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Ignorance Is Strength: Climate Change, Corporate Governance, Politics, and the English Language

Abstract: This article discusses the Orwellian nature of the current debate about the role of climate change in corporate governance, by juxtaposing the arguments of climate-denying commentators about corporate governance against the objective facts. Settled law allows corporations and institutional investors to take into account risk factors like climate change and may require them to consider those risks when they are directly material, as climate change is for many industries. If anything, the corporate response to climate change has been too tepid, and the pace of climate change and its corresponding harm is outrunning efforts to constrain it.

No simple answer exists to addressing the dangers this Orwellian manipulation creates. But identifying that behavior and holding political elites responsible for a basic acceptance of fact and for consistently applying their stated principles is a necessary start.

Keywords: Climate change, climate denial, corporate governance, ESG, fiduciary duties, material risks, stakeholders

I. Introduction

In a series of influential masterpieces near the end of his life, George Orwell dilated on the negative role that obscurantist language and the denial of objective fact could have on the ability of societies to protect democracy and human freedom (Orwell, *Animal Farm* [1945] 2020; "Politics" [1946] 1981; *1984* [1949] 2023).[1] He portrayed a potential world where political elites had lost any genuine belief in a cause larger than themselves, and where "[p]ower is not a means; it is an end" (Orwell, *Animal Farm*

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[1] This citation-heavy, fact-laden article was substantially completed by mid-2024, and does not attempt to capture the many relevant factual events that have transpired since then. Those events, if anything, make the arguments in the article stronger and more relevant. The convention of this journal is to use the author's name and the date of publication. Because of the importance of Orwell's works to the article, I cite to the name of the three classic pieces most cited in addition to the year of the publication. For the essay, "Politics and the English Language," I shorten the reference to simply "Politics."

[1945] 2020, 263). In pursuing power, these elites sought to control the masses whose support they depended on by manipulating language and the very concept of truth so that their followers would come to happily embrace any portrayal of reality as a matter of identification with their chosen party, even while recognizing that the portrayal was objectively untrue.

For the elites, truth did not matter; what mattered was that the message served their interests in securing and preserving their power, and that their party acolytes accepted their message as part of their core identity. Indeed, the way to accomplish this was to disconnect language and political messages from any concept of objective fact and to encourage compliant, unthinking, and emotionally manipulable reactions by the party rank and file, using the rallying point of a common enemy to unify happy, rote acceptance of the party line.[2]

In many ways, there could be no less ideological issue than human-caused climate change. No person on earth has any rational or emotional reason to want carbon- and methane-based products to cause warming or other harm. Any sane socialist, liberal, conservative, independent, reactionary, or anarchist would be happy if we could use these products to keep us warm or cool, depending on the season, to help us move by car, rail, or plane, or for myriad other valuable purposes without any harm.

But wishes are not realities, and human-caused climate change is real and not reasonably deniable. Not only that, human-caused climate change[3] is an objectively undeniable economic, not just environmental and societal, problem and risks an enormous decline in economic output and tremendous downside harm to many industries. And, if anything, the response of the corporate and institutional investor sector to the risks of climate change has been too slow and too tepid, and the pace of climate change and its corresponding harm is outrunning efforts to constrain it.

One might think that the compelling implications of these objective realities would cause a concerted public-private effort, devoid of ideology or partisanship, to address the fact of human-caused climate change on something like a war footing.[4] That might be thought particularly so within the ranks of business elites and investors, where rationality in the face of facts is expected of fiduciaries.

Instead, however, the so-called "culture wars" have fully penetrated the debate over climate change and corporate governance, and in a distinctly "Orwellian" way—keeping in mind that Orwell was not himself Orwellian. Rather, the debate is Orwellian in the sense that it involves the manipulative use of language, the denial of objective fact, and the process of doublethink that Orwell warned were all inimical to freedom.

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[2] In *1984*, Orwell referred to the party elites as the "Inner Party" (Orwell, *1984* [1949] 2023, 141).

[3] I recognize that "anthropogenic climate change" might be more scientific, but it also seems distinctly not as clear as Orwell would prefer.

[4] This has happened before, when in the 1980s the international community mounted an aggressive global campaign to address the rapid depletion of ozone in the stratosphere. The resulting treaty, the Montreal Protocol on Substances That Deplete the Ozone Layer, is the most successful international environmental treaty ever signed, and the first treaty in UN history to receive universal ratification. As a result, the production of ozone-depleting substances has decreased by around 99 percent (UN Environment Programme 2021). According to a recent study, climate model scenarios suggest that the seasonal Arctic ozone hole will return to 1980 values around 2045, the Antarctic ozone hole will return to 1980 values around 2066, and the global average distribution of ozone will return to 1980 levels around 2040 (World Meteorological Organization 2022, 31, 33–34).

It is ultimately impossible to have sensible policies in a free society if "two plus two make four" (Orwell, *1984* [1949] 2023, 81) is not accepted as true. Citizens cannot function as such if they do not acknowledge factual realities and force themselves to justify their policy views in terms of those realities.

There are many legitimate, indeed huge, questions to be answered about the best ways to redress human-caused climate change before it dramatically harms our economy and disrupts the global order. Answering them in a timely way would be difficult enough if the debate were based on a good-faith acceptance of basic truth. But when a substantial portion of our fellow citizens are subject to Orwellian manipulation intended to cause them to deny objective facts as a matter of personal political identity, the dangers to humanity and to our nation's ability to function as a republican democracy based on individual freedom are ominous.

No simple answer exists to addressing the dangers this Orwellian behavior creates. But identifying that behavior for what it is and holding political elites responsible for a basic acceptance of facts and for consistently applying their stated principles is a necessary place to start.

II. Road Map

To demonstrate the Orwellian nature of the opposition to corporate and institutional investor consideration of climate change, this article proceeds as follows. Part III describes the basic argument of those who say that corporations and institutional investors should not give weight to so-called "ESG (environmental, social, and governance) factors," and in particular climate change, in their governance and should focus solely on seeking profit for their investors. Part IV then shows that the public officials addressing climate change largely sidestep or obfuscate the factual question of whether human-caused climate change is occurring and presents a danger to our economy, the stability of our and other societies, and to the planet itself.

Pivoting off that discussion, Part V deals with certain confounding realities, including that:

A. It is settled law that corporations and institutional investors may take into account ESG factors that are rationally related to the profitability of their businesses and investments, and if those factors are obviously relevant as a matter of business and investment risk, consideration of those factors may be required as a matter of fiduciary duty.

B. Major institutional investors focus on producing profits for their stockholders and address ESG risk—and climate—within that investor-focused framework.

C. An overwhelming scientific and business consensus exists that human-caused climate change is occurring and threatens enormous economic, social, political, and environmental harm.

Part VI highlights other realities that reflect Orwellian inconsistencies between the stated principles of anti-ESG leaders and their conduct:

A. The politicians who argue that corporations should focus solely on profit for their stockholders and have no legitimacy to use corporate resources to address social or political issues are among the largest recipients of corporate political donations.

B. The same politicians who argue that industry collaboration to address climate change violates the antitrust laws are allied closely with longstanding industry groups that have been at the forefront of climate denial and obfuscation.

From those realities, in Part VI, the article distills the Orwellian essence of the opposition to business and institutional investor consideration of climate change. It does so by reference to Orwell's classic works, observing the extent to which the arguments contradict objective reality and involve the simultaneous embrace and rejection of certain principles in a manner consistent with Orwell's concept of doublethink. The article concludes somberly in Part VII because the extent to which these techniques of linguistic manipulation have been successful is dismaying, and in a society where many antimajoritarian institutions exist that diminish our capacity to address major challenges with alacrity and scale, the basic failure of a substantial portion of the population to accept that "two plus two make four" heightens the risk that we will fail to act to redress climate change before it is too late.

III. The Pushback Against ESG in Corporate Governance and the Consideration of Climate Risk in Particular

The current corporate governance debate involves a right-wing backlash against the consideration of ESG factors by corporations and institutional investors (DeSantis et al. 2023; McGowan 2023; Elbein 2023). In some ways, the backlash does not involve new themes, but instead echoes right-wing thinkers like Milton Friedman from prior eras (Friedman 1970). The current baseline argument made by those on the right opposing ESG is that public corporations and institutional investors should focus on making profits for their stockholders and avoid political and social issues. Pivoting off a misuse of the term "woke" by a *New York Times* columnist,[5] these right-wing voices condemn what they call "woke capitalism," which they view as involving the illegitimate use of corporate resources by corporate leaders with left-wing beliefs to address issues like diversity, equality, voting rights, guns, and climate change (Garcia 2023; Rubio 2021a; Cruz 2023; Mangan 2022; Hooks 2022). To address this concern, they call for business leaders and institutional investors to eschew any consideration that is not directly related to advancing the economic interests of their stockholders, and to avoid "the furtherance of any social, political, or ideological interests" (Government and Corporate Activism Act, Fla. ch. 2023-28, § 17.57 (2023); Rubio 2022; Abbott 2023a). To this extent, this camp takes the traditional position associated with Milton Friedman and other conservative thinkers, who argued that the only shared interest of stockholders was in a sound return and that business leaders had no legitimacy to use their fiduciary power over corporate funds to advance social or political ends.[6]

[5] One of *The New York Times*'s conservative columnists, Ross Douthat, took the term "woke," long affiliated with the labor and civil rights movements, and linked it to certain corporate leaders speaking out on social issues. His coined term "woke capitalism" has become the rallying cry for arguments by right-wing voices against the ability of corporations and institutional investors to consider ESG factors in their governance and stewardship policies (Douthat 2018).

[6] "The corporation is an instrument of the stockholders who own it. If the corporation makes a contribution, it prevents the individual stockholder from himself deciding how he should dispose of his funds" (Friedman [1962] 2002, 135). On gathering leading conservative corporate law thinkers taking this position, see Strine and Walter (2015, 346–59).

But this camp goes beyond the Friedmanite position to seek to prohibit consideration of certain issues, even if the issue is being considered solely from the perspective of what is the best way for the corporation or investment fund to make the most sensible financial decision for its investors. That is, at the same time as they argue that corporations should focus solely on profit, these same voices advocate preventing corporations that consider managing certain ESG risks crucial to their ability to make profits from doing so. These risks include those presented by climate change.

For example, legislation was adopted in Texas banning state investments in businesses that cut ties with the oil and gas industry (Texas Comptroller of Public Accounts 2022; Bloomberg 2021). In August 2022, Comptroller Glenn Hegar invoked this law and accused ten financial companies and nearly 350 investment funds of taking steps to "boycott energy companies," which could force certain Texas government funds to sell shares and divest from such companies (Texas Comptroller of Public Accounts 2022). The list of companies included major investment firms like BlackRock, BNP Paribas, and UBS (Moran and Hagan 2023; Kerber and Schroeder 2022). In February 2023, Comptroller Hegar sent letters to five Texas government-employee pension funds "strongly" encouraging them to sever all relationships with companies on his divestment list (Kerber and Schroeder 2022). Underscoring how this encouragement has succeeded is the recent decision of the Texas Permanent School Fund to pull $8.5 billion from BlackRock's management (Binnie 2024). And movement members in other states have criticized as "woke" banks that have decided not to make certain loans because of ESG considerations, such as adverse environmental or social impact (McGowan 2023; Elbein 2023).

Similarly, legislation in Texas was proposed to prohibit insurance companies from considering ESG risks when setting rates. S.B. 833, 88th Leg. Reg. Sess. (Tex. 2023). Although the eventual legislation was dampened down at industry request to permit the consideration of an ESG risk bearing directly on insurance risk, the obvious intent of the original bill was to preclude insurers from taking climate risk into account when setting premiums (Goth 2023a; Ahmed 2023).

This attempt to stifle the consideration of climate change by businesses for which it is a business issue is not confined to Texas. By way of further example, Florida's Chief Financial Officer was also explicit about his desire that insurers not take into account climate risk:

> Meanwhile, as certain insurance companies have joined the cult of ESG, Florida is experiencing a hardening insurance market. If insurance companies are charging a premium for ESG, then we need to know about it. We know that asset managers are telling insurers to focus more on climate change, or they'll lose money, or be sued. Or both. (State of Florida Department of Financial Services 2023)

Likewise, as much or more intense pressure has been put on institutional investors to stop considering ESG factors in their investment and stewardship activities. Some elected officials have pulled investments from institutional investors they considered to be "woke" (Marques and Smith 2023; McGowan 2023), and many others have threatened to do so. Legislation has also been recently adopted in several states limiting the extent to which ESG factors can be considered by institutional investors (Goth 2023a; 2023b; Ahmed 2023), and similar legislation has been proposed at the federal level.[7] The animating concern for this legislation is encapsulated in Senator Cruz's recent criticism of

[7] For example, Texas Senator Cruz introduced a bill to ban investment fund managers of funds held in federal employee retirement accounts from using those holdings to vote in corporate shareholder meetings to "force leftist Environmental, Social, Governance (ESG) and Diversity, Equity, and Inclusion (DEI) policies onto private sector businesses" (Cruz 2023;

BlackRock CEO Larry Fink: "What Larry Fink is doing is taking your shares and my shares and [those of] millions of little old ladies who've invested in funds, and he's aggregating that vast amount of capital and he's decided to vote not to maximize their returns, because apparently his fiduciary duty to customers is not a top priority. He's voting instead on his politics" (Mangan 2022). The senator goes on to say that Fink had "decided that he's more welcomed at the 'New York Country Club' when he walks in and has stood against oil and gas even if it reduces the returns of the accounts he's managing, and even if it's destroying jobs, helping America's enemies and hurting America" (ibid.).

Climate change has drawn specific attention, and threats have been made that antitrust suits might be brought against corporations, institutional investors, and insurers for joining various groups affiliated with the Glasgow Financial Alliance for Net Zero (GFANZ), an umbrella for eight independent net-zero financial alliances formed by leading financial institutions. GFANZ has more than 675 member firms and was founded in 2021 by the United Nations Special Envoy on Climate Action and Finance and the COP26 presidency (Glasgow Financial Alliance for Net Zero 2023). The groups under the Net Zero banner include the Net Zero Financial Service Providers Alliance, the Net Zero Asset Managers Initiative, the Net-Zero Banking Alliance, and the Net-Zero Insurance Alliance, all of which are committed to moving toward an economy that does not add more carbon to the atmosphere (Net Zero Financial Service Providers Alliance 2023). By way of prominent example, a group of twenty-two state attorneys general sent letters to prominent institutional investors suggesting that their involvement in the Net Zero Asset Managers Initiative potentially violated the Sherman Act, 15 U.S.C. § 1, and various state laws (Republican Attorneys General 2023). Similar communications were made to insurance companies that had joined the Net-Zero Insurance Alliance (Rives and Barrett 2023).

US senators have used the same tactics. In September 2022, Senator Rubio cosigned a letter to fifty-one law firms that counsel investors and other clients in the ESG space. That letter warned firms:

> The ESG movement attempts to weaponize corporations to reshape society in ways that Americans would never endorse at the ballot box. Of particular concern is the 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. Over the coming months and years, Congress will increasingly use its oversight powers to scrutinize the institutionalized antitrust violations being committed in the name of ESG, and refer those violations to the FTC and the Department of Justice. To 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. (Rubio 2022)

Similar attacks have been made on the institutional investor-led Climate Action 100+ effort.[8]

Stop TSP ESG Act, S. 1891, 118th Cong. (2023)). In September 2021, Senator Rubio introduced a bill titled the Mind Your Own Business Act, which he touted as addressing "woke" actions by business leaders "to advance left-wing policies" using their control of public companies by allowing for shareholder suits in which the company would have to prove that its consideration of an ESG issue was in the stockholders' best financial interests (Rubio 2021b; Mind Your Own Business Act, S. 2829, 117th Cong. (2021)).

[8] Climate Action 100+ is a group of more than seven hundred investors managing $68 trillion in assets focusing on 171 companies (Climate Action 100+ 2023a; US House Committee on the Judiciary 2022).

During the same time period, however, many of these same officials have called on insurers to respond to the growing number of high-impact natural disasters in their states by helping homeowners rebuild.[9] Likewise, these officials have sought to have other states' taxpayers, in the form of the federal government, subsidize their states' recovery from these events.[10] Consistent with wanting federal taxpayer assistance, these officials have also sought funding for huge infrastructure projects designed to address sea rise and other threats caused by climate change in their states.[11]

IV. Climate Denial, Obfuscation and Evasion, and the Anti-ESG Movement

In *1984* and *Animal Farm*, Orwell imagined political leaders who were motivated not by any genuine belief in facts or an ideology, but solely by their own desire for power. In both novels, the leaders understand that what they are telling their masses—in the case of *1984*, Party members, and in the case of *Animal Farm*, the working animals—is at odds with objective reality and that they are demanding of the masses beliefs and conduct that the leaders do not expect of themselves. The leaders use political rhetoric to manipulate the emotions of the masses and to rally them by creating a sense of shared tribal identity. What is most important is not factual reality but embracing whatever view of reality that the Party advocates at any time and thus marking yourself as part of the tribe.[12]

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[9] Governor DeSantis established "insurance villages" in the wake of Hurricane Ian, under the leadership of Florida's CFO, Jimmy Patronis, to assist with insurance claims. Both DeSantis and Patronis were eager to help Florida citizens get paid by insurance companies quickly. DeSantis suggested "make sure if you're looking at claims on your property, you document that. Take photos, make sure you have it. We want you to be able to be made whole as quickly as possible" (Stracqualursi 2022). Patronis similarly advised that the "first phone call" for claimants to make "needs to be your agent, your carrier, or to my office" (ibid.). The financial impact of climate change on homeowners in at-risk states like Florida is creating political and economic dissonance. By way of example, a group of left-wing organizations put out a study criticizing Florida's governor for not doing enough to make property insurance more affordable, and for being influenced by the industry by virtue of his acceptance of large contributions from it (American Federation of Teachers et al. 2023). The report states that "Home insurance is particularly critical in Florida, where communities vulnerable to climate change face increasingly frequent and severe hurricanes and other weather events" (ibid. at 4). But the report bemoans the rising insurance rates that are naturally to be expected when risk rises, and encourages government action to force insurers to cover homeowners at lower cost. Ultimately, of course, something has to give, and the cost of having to repair and rebuild properties that are at risk for regular damage by climate change–fueled weather events has to be borne in some way. This report illustrates that addressing hard realities like this and charting a sound path forward is not easy even if the basic facts of climate change's impact are accepted.

[10] For instance, Governor DeSantis—who, while serving in Congress, prominently opposed disaster relief for New York and New Jersey in the wake of Hurricane Sandy—wrote a letter in September 2022 asking President Biden to issue a Major Disaster Declaration and provide federal assistance to Florida communities in the wake of Hurricane Ian (Felgenheimer 2022). Similarly, in the aftermath of a severe winter storm in February 2023, Texas Governor Abbott sent a request to President Biden for an emergency disaster declaration in order to allow nearly two dozen counties to receive federal assistance (Abbott 2023b). Both Republican senators from Texas urged the president to accept (Cornyn and Cruz 2023).

[11] Senator Rubio played a key role in whipping votes for the Central Everglades Planning Project, which seeks to improve water flow in the Everglades through the removal of canals and levees while providing flood defense in the abutting agricultural and urban areas. The projected cost: $6.9 billion (Rubio 2019; Rubio 2021c). Governor DeSantis has sponsored similar large-scale government-led efforts in the Everglades (DeSantis 2023). In Texas, climate-denying politicians have requested $30 billion in federal funding for a restoration project to extend and raise the Galveston sea wall (Linden 2021).

[12] The way that political leaders can use language to forge tribal identities to demarcate their supporters from others has been eloquently described by Fintan O'Toole:

> But perhaps the greatest advantage of tribalization is that it solves the problem of identity. The phrase "identity politics" is a misnomer. Tribal politics does not in fact deal in collected identities, which are always complex. They reduce the difficult "us" to the easy "not them." They set up some rough (and often arbitrary) markers of difference and then corral real collective experiences and histories within the narrow limits they define. They

The current rhetoric of those political leaders who criticize business leaders for factoring climate risk into their corporate governance illustrates many of these same themes. For starters, these political leaders themselves manifest no objective belief that their disparagement of the connection between human conduct and climate warming is grounded in science. Indeed, many leaders of the political party most associated with climate denial, the Republican Party, have at times acknowledged that human behavior was fueling climate change that was an economic and existential threat to humanity. By way of example, President George H. W. Bush made strong statements about the need to address human-caused climate change (Bush 1992), and his administration considered robust action, only to back down because of internal opposition by key administration officials connected with the oil and gas industry, and because of Bush's desire to consolidate party support (Rich 2018). His son, President George W. Bush, obfuscated the reality of human-caused climate change,[13] and pursued deregulation that was inconsistent with addressing it, only to become somewhat more acknowledging of its reality after securing a second term (NPR 2007; Goldenberg 2009). Senators McCain and Romney, who were Republican standard bearers, had a similar record of admitting reality but then sloughing it off (Romney 2010; 2011; Harris 2012). Senator McCain's backpedaling was poignant, because he had led bipartisan legislative efforts to address climate change, only to abandon them when seeking reelection in the face of a primary opponent coming from his right in 2010 (Lavelle 2018).

By way of a more current example, even President Trump at one time prominently embraced fact. In a 2009 full-page ad that appeared in *The New York Times* the day before a UN Climate Change Conference, Trump, along with a consortium of business leaders, and his children Eric and Ivanka, argued that urgent action was needed to mitigate climate risk:

> As business leaders we are optimistic that President Obama is attending Copenhagen with emissions targets. Additionally, we urge you, our government, to strengthen and pass United States legislation, and lead the world by example. We support your effort to ensure meaningful and effective measures to control climate change, an immediate challenge facing the United States and the world today. Please don't postpone the earth. If we fail to act now, it is scientifically irrefutable that there will be catastrophic and irreversible consequences for humanity and our planet. (*New York Times* 2017)

But, as his 2016 campaign and subsequent presidency proceeded, President Trump took a sharply different tack. Rather than grapple directly with the evidence regarding climate change, Trump cast aspersions, suggesting that it was a "hoax" (*Daily Mail* 2010).[14] In a *60 Minutes* interview, President Trump stated, "I'm not denying climate change. But it could very well go back. You know, we're talkin' about over a millions . . . of years. They say that we had hurricanes that were far worse than what we just had with [Hurricane] Michael" (Stahl 2018). This rhetoric insinuates that worries about climate change are the product of a conspiracy and are irrational, and slights, if not denies, the reality

> draw crude self-caricatures and then use them as passport photographs. The true colors of a community's life may be a dazzling mosaic, but tribalism makes them monochrome: an orange sash, a green flag, a red MAGA hat. The more complicated a real collective identity is, the greater the attraction of these shrunken simplicities. (O'Toole 2023)

13 George W. Bush claimed, "But science, there's a lot—there's differing opinions. And before we react, I think it's best to have the full accounting, full understanding of what's taking place" (Commission on Presidential Debates 2000).

14 At his golf courses, however, planning permissions show that Trump recognized the reality and threat of climate change and sought to mitigate its effect on his own property (Schreckinger 2016).

that it is human-generated carbon and methane emissions from the past century that are causing the accelerating warming, and the magnitude of the coming harm (Trump 2020).[15]

This approach now predominates among opponents of ESG arguing that consideration of climate by businesses and institutional investors is a wrongful deviation from fiduciary duty. For example, governors and senators from Florida and Texas have vocally opposed action to reduce carbon usage and to transition our economy to forms of energy that do not injure the climate and have trivialized the risks of climate change.[16] But they largely refuse to engage in any fact-based discussion of whether human conduct is fueling climate change or whether the pace of climate change is accelerating and dangerous (Alyssa Johnson 2023).[17] Some of them say that if there are risks arising because of climate change, they should be dealt with, but they will not speculate on what's causing it (Bowden 2023). At least one has said, without explaining why or giving any reason to think he believes what he is saying, that CO_2 "is good for plant life" (Mervis 2015).[18] All, even if some more implicitly than others, suggest that any member of their political tribe should consider skepticism about human-caused climate change and opposition to measures to mitigate climate change to be badges of tribal identity, marking one as distinctly different from members of the "woke" left (Shipp 2022; Brodesky 2014; Schwartz 2019). As Governor DeSantis puts it: "I've always rejected the politicisation of the weather" (Bowden 2023). Senator Ted Cruz opts for an even more fact-denying line: "No, this [climate change] is liberal politicians who want government power over the economy, the energy sector and every aspect of our lives" (NPR 2015). In 2021, UN Secretary António Guterres remarked that "Texas will have to diversify its economy and Texas will have to be less dependent on oil and gas [due to climate change]" (Schechter 2021). Abbott's response: "Texas to United Nations: Pound Sand."[19]

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[15] In response to a reporter asking, "Do you still think climate change is hoax?" President Trump replied:

> No, not at all. I think what is—I think aspects of it are. I think that some people are—they put it at a level that is, you know, unrealistic, to a point you can't live your lives. We want to have the cleanest water on Earth. We want to have the cleanest air on Earth. Our numbers, as you saw—we had record numbers come out very recently. Our numbers are very, very good—our environmental numbers. Our water numbers, our—our numbers on air are tremendous. We have to do something about other continents. We have to do something about other countries. When we're clean and beautiful and everything is good, but you have another continent where the fumes are rising at levels that you can't believe—I mean, I think Greta ought to focus on those places. But we are doing better right now than we've ever done, in terms of cleanliness, in terms of numbers. We have a beautiful ocean called the Pacific Ocean, where thousands and thousands of tons of garbage flows toward us, and that's put there by other countries. So I think Greta has to start working on those other countries. (Trump 2020)

[16] By way of example, each of the following reported contemporaneous statements by Senator Rubio disclaims or slights any human connection to climate change and downplays its risks (Kliegman 2014; Leary 2013; League of Conservation Voters 2016). Similar statements were made by Governor DeSantis (Nehamas and Mazzei 2023; Bowden 2023). Senator Cruz has long been a climate denier and skeptic (Mervis 2015). And Governor Abbott is a proud defender of the fossil fuel industry and climate change skeptic (Abbott 2023c).

[17] See also a debate exchange with Governor DeSantis: "MACCALLUM: So, we want to start on this with a show of hands. Do you believe . . . human behavior is causing climate change? Raise your hand if you do. DESANTIS: Look, we're not schoolchildren. Let's have the debate. I mean, I'm happy to take it to start. . . . BAIER: So do you want to raise your hand[?]. . . . DESANTIS: I don't think that's the way to do it. So, let me just say . . . this—first of all, one of the reasons our country has declined is because of the way the corporate media treats Republicans versus Democrats. Biden was on the beach while those people were suffering. He was asked about it and he said no comment. Are you kidding me? As somebody that's handled disasters in Florida, you've got to be activated. You've got to be there. You've got to be present. You've got to be helping people who are doing this" (CQ 2023).

[18] Quoting Ted Cruz's opening statement at a Senate committee hearing he chaired entitled "Data or Dogma? Promoting Open Inquiry in the Debate over the Magnitude of Human Impact on Climate Change."

[19] @GregAbbott_TX, *Twitter*, October 24, 2021, 9:39 p.m., https://twitter.com/GregAbbott_TX/status/1452449776411238402.

In this manner, their conduct mirrors much of their rhetoric about COVID-19 vaccines. Although these political leaders all seem to have gotten themselves and their families vaccinated—indeed, one of former President Trump's last acts as president was to make sure he and his family got vaccinated while he had access as president to an early-stage vaccine (Haberman 2021)—Governors DeSantis and Abbott have also been among those implicitly creating uncertainty about the efficacy of vaccines, in terms of both personal protection and, as important, reducing the likelihood of spreading the COVID-19 virus to others (Contorno 2022; Sarkissian 2023; Reynolds 2022; Reimann 2022; Klas 2022; Rowen 2021; Allen 2021).

As to the issue of both climate and vaccines, rhetoric and language are not used to an end that the speaker embraces as good in a high-minded, other-regarding way. Rather, rhetoric and language are used in the Orwellian sense of being a means to the singular end of securing power for the speaker. Both issues also illustrate the ability to use matters of tribal identity in the face of objective facts. The vaccine issue underscores this disconnect between fact and tribal beliefs, given the strong evidence, consistent with past experience with other vaccines, that the COVID-19 vaccine reduced the number of COVID-19-related deaths and illnesses profoundly among the vaccinated, that higher vaccination rates resulted in less transmission, and that communities with lower vaccination rates experienced far worse outcomes (Johnson et al. 2023).

V. How Reality Collides with Corporate Governance Climate Denial

Having set forth the basic position of the anti-ESG movement regarding the appropriate ends of the governance of corporations and investment funds, and the rhetoric it has employed about climate, the stage is set to address certain confounding realities. Let's begin with the black-letter law.

A. Black-Letter Federal and State Law Makes Clear That Companies and Investors Not Only Can, but Must, Consider Material Risks That Might Harm Their Entities and Investors

The law indisputably affords discretion to the fiduciaries of investment funds and corporations to take into account issues that they believe bear on the sustained profitability of their investments. In fact, as a normative standard, and even sometimes as a liability standard, fiduciaries have a duty to address issues of that kind if they present a material risk of harm to their entities and investors.

Starting with productive business organizations like corporations, the business judgment rule affords the managers wide discretion to determine the company's path toward long-term profitability and to take into account risks of any kind that might endanger the company and its stockholders. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985). Although under Delaware law, fiduciaries' consideration of the interests of stakeholders like workers or communities, or of social issues like environmental responsibility, must be rationally related to corresponding benefits to stockholders, the Delaware courts have long recognized that boards often reasonably consider the corporation's reputation as a solid citizen, its minimization of regulatory and legal problems, and a focus on making money by quality and innovation, rather than on shortcuts that involve externalizing costs, as valuable to stockholders and not to be second-guessed (Rock 2020; Condon 2020; Strine 2021). This is so even when the corporation must address controversial issues. *Simeone v. Walt Disney Co.*, 302 A.3d 956 (Del. Ch. 2023). Delaware's long leash for directors to take into account what must be acknowledged as

"ESG factors" is actually shorter than that in most US states. The contention that for-profit corporations must focus on the best interests of stockholders and cannot consider the interests of other stakeholders also runs squarely into another reality about American corporate governance: A majority of American states, including many red and not just blue ones, have statutes that expressly empower boards of directors to govern in a multi-stakeholder way.[20] These statutes also commonly consider the communities in which companies operate as stakeholders, and entitle corporate boards to consider the environmental impact of their operations. Prominent examples include the corporate laws from two of the states whose public officials have been the loudest in arguing that corporate leaders cannot legitimately give weight to issues like the effect of the company in contributing to climate change. Thus, the Texas Business Organizations Code not only allows for corporate charters to include social purposes, but also states expressly that even if the corporate charter does not include a social purpose, a director or officer may "consider[], approv[e], or tak[e] an action that promotes or has the effect of promoting a social, charitable, or *environmental* purpose." Tex. Bus. Orgs. Code Ann. § 21.401(e) (2023) (emphasis added). Likewise, the Florida Business Corporation Act empowers directors to:

> [C]onsider such factors as the director deems relevant, including the long-term prospects and interests of the corporation and its shareholders, and the social, economic, legal, or *other effects* of any action on the employees, suppliers, customers of the corporation or its subsidiaries, *the communities and society* in which the corporation or its subsidiaries operate, and the economy of the state and the nation.

Fla. Stat. § 607.0830(6) (2023) (emphasis added). And a majority of states have now authorized a form of for-profit corporation, the public benefit corporation, that explicitly requires corporations to consider the best interests of stakeholders and the environment at all stages of the corporation's life cycle, including in determining whether and to whom to sell the corporation.[21]

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[20] Currently, thirty-two states have constituency statutes: Ariz. Rev. Stat. § 10-830 (2022); Conn. Gen. Stat. § 33-756 (2022); Fla. Stat. § 607.0830 (2023); Ga. Code Ann. § 14-2-202 (2023); Haw. Rev. Stat. § 414-221 (2023); Idaho Code § 30-1602 (2023); 805 Ill. Comp. Stat. 5/8.85 (2023); Ind. Code § 23-1-35-1 (2023); Iowa Code § 490.1108A (2022); Ky. Rev. Stat. Ann. § 271B.12-210 (2023); Me. Rev. Stat. Ann. tit. 13-C § 831.6 (2022); Md. Code Ann., Corps. & Ass'ns § 2-104 (LexisNexis 2023); Mass. Gen. Laws Ann. ch. 156D, § 8.30 (2023); Minn. Stat. Ann. § 320A.251 (2022); Miss. Code Ann. § 79-4-8.30 (LexisNexis 2023); Mo. Rev. Stat. § 351.347 (LexisNexis 2023); Neb. Rev. Stat. § 21-2,102 (2023); Nev. Rev. Stat. § 78.138 (2022); N.J. Stat. Ann. § 14A:6-1 (2023); N.M. Stat. Ann. § 53-11-35 (2023); N.Y. Bus. Corp. § 717 (LexisNexis 2023); N.D. Cent. Code § 10-19.1-50 (LexisNexis 2023); Ohio Rev. Code Ann. § 1701.59 (LexisNexis 2023); Or. Rev. Stat. § 60.357 (2023); 15 Pa. Cons. Stat. § 1715 (2023); 7 R.I. Gen. Laws. § 7-5.2-8 (LexisNexis 2023); S.D. Codified Laws § 47-33-4 (LexisNexis 2023); Tex. Bus. Orgs. Code Ann. § 21.401 (2023); Vt. Stat. Ann. tit. 11A, § 8.30 (2022); Va. Code Ann. § 13.1-728.9 (LexisNexis 2023); Wis. Stat. § 180.0827 (2023); Wyo. Stat. Ann. § 17-16-830 (2021).

[21] At present, forty-one states and the District of Columbia have statutes authorizing public benefit corporations: Ala. Code § 10a-2a-17.01 (2023); Ariz. Rev. Stat. § 10-2401 (2022); Ark. Code Ann. § 4-36-101 (2020); Cal. Corp. Code § 14600 (2022); Colo. Rev. Stat. § 7-101-501 (2023); Conn. Gen. Stat. § 33-1350 (2022); Del. Code Ann. tit. 8, § 361 (2023); D.C. Code § 29-1301.01 (2023); Fla. Stat. § 607.601 (2023); Ga. Code Ann. § 14-2-1801 (2023); Haw. Rev. Stat. § 420D-1 (2023); Idaho Code § 30-2001 (2023); 805 Ill. Comp. Stat. 40/1 (2023); Ind. Code § 23-1.3-1-1 (2023); Iowa Code § 490.1701 (2022); Kan. Stat. Ann. § 17-72a01 (2022); Ky. Rev. Stat. Ann. § 271B.8-300 (2023); La. Stat. Ann. § 12:1801 (2022); Mass. Gen. Laws Ann. Ch. 156E, § 1 (2023); Md. Code Ann., Corps. & Ass'ns § 5-6C-01 (2023); Me. Rev. Stat. Ann. tit. 13-C § 1801 (2022); Minn. Stat. Ann. § 304A.001 (2022); Mont. Code Ann. § 35-1-1401 (2021); Neb. Rev. Stat. § 21-401 (2023); Nev. Rev. Stat. § 78B.020 (2022); N.H. Rev. Stat. Ann. § 293-C:1 (LexisNexis 2023); N.J. Stat. Ann. § 14A:18-1 (2023); N.M. Stat. Ann. § 53-12-7 (LexisNexis 2023); N.Y. Bus. Corp. § 1701 (LexisNexis 2023); Ohio Rev. Code Ann. § 1701.96 (LexisNexis 2023); Okla. Stat. tit. 18 § 1201 (2022); Or. Rev. Stat. § 60.750 (2023); 15 Pa. Cons. Stat. § 3301 (2023); 7 R.I. Gen. Laws § 7-5.3-1 (2021); S.C. Code Ann. § 33-38-110 (2023); Tenn. Code Ann. § 48-28-101 (2021); Tex. Bus. Orgs. Code Ann. § 21.951 (2023); Utah Code Ann. § 16-10b-101 (LexisNexis 2023); Vt. Stat. Ann. tit. 11A, § 2101 (2022); Va. Code Ann. § 13.1-782 (LexisNexis 2023); W. Va. Code § 31F-1-101 (2022); Wis. Stat. § 204.101 (2023). Several states also

Even in the stricter realm that addresses the responsibility of fiduciaries of pension and other investment funds, it is accepted that ESG issues can reasonably affect the sustainable profitability of an investment and that, when that is the case, fiduciaries not only can, but have a duty to, consider those risks if they bear on whether it is prudent to entrust their beneficiaries' capital, just like other material risks of investing.[22] It is true, however, that in this realm the law is more like that of Delaware corporate law than that of the constituency states. Under ERISA, by way of example, a fiduciary must discharge her duties "solely in the interests of the participants and beneficiaries" for the "exclusive purpose" of "providing benefits" to the beneficiaries of the plan and "defraying reasonable expenses." 29 U.S.C. § 1104(a)(1)(A). There has, no doubt, been controversy around the margins about the extent to which fiduciaries can factor ESG issues into their investment strategy. During the first Trump administration, the Department of Labor (DOL) proposed stricter constraints on fund fiduciaries to limit their ability to prefer an investment because it might have certain "collateral benefits"—benefits thought to be of indirect value to beneficiaries because the investment was more valuable in some way to workers or society generally, such as by being more environmentally responsible—requiring that the investment can only be preferred if its rate and risk profile is as sound as other comparable investments without those benefits. 29 C.F.R. § 2550.404a-1(c)(2) (2022). The Biden DOL, like the Obama DOL, has taken a somewhat more forgiving stance and allows an ERISA fund to prefer an investment based on collateral benefits so long as it prudently concludes that it will equally serve the financial interests of the plan participants over the appropriate time horizon (US Department of Labor 2018). But that stance remains conservative in the sense that it requires ERISA fiduciaries to put the best interests of fund participants in a safe and sound return first, and even skeptics of giving ERISA fiduciaries wider discretion largely concede that so-called "risk-return ESG investing" is consistent with the prudent investor rule because ESG factors like climate change can present risks of future financial loss, shifts in markets, reputational harm, managerial deficiencies, and other material problems that could harm portfolio value over the time period during which funds have promised pensions to their beneficiaries (Schanzenbach and Sitkoff 2020, 403–05).[23] In this respect,

have Social Purpose Corporation statutes, including Florida; see, for example, Cal. Corp. Code § 2500 (2022); Fla. Stat. § 607.501 (2023); Wash. Rev. Code § 23B.25.050 (2023).

[22] Demonstrating the rationale for the view that investing in companies that may be deemed less likely to suffer costly reputational and legal problems because they engage in quality ESG practices is a recent study by a leading advisory firm, Kroll, which identified a substantial equity premium in terms of cumulative returns for the period from 2013 to 2021 for portfolios comprised of firms with high ESG ratings on a leading metric (Kroll 2023). Although there was notable variation among industries, the overall effect was substantial globally and, in particular, in the United States (ibid. at 4, 44, 51). To similar effect, a joint study by the NYU Stern School of Business's Center for Sustainable Business and Rockefeller Asset Management reviewed more than one thousand studies of the relationship between good ESG practices and financial performance, and found that they generally supported the conclusion that good practices improve financial performance, provide downside protection, and increase value over time (Whelan et al. 2021). As to climate change in particular, the authors conclude that "managing for a low-carbon future improves financial performance" (ibid. at 9). A recent analysis of index returns from the Institute for Energy Economics and Financial Analysis underscores the purely investor-based case for institutional investors to factor in climate change when seeking to generate the highest risk-adjusted return for their long-term investors. This study shows that fossil fuel companies are underperforming their indices and creating a drag on their returns. In various hypothetical "ex-Fossil Fuel" models, the S&P 500, MSCI ACWI, and Russell 3000 indices return over half a percent higher annually compared to the current indices over the past decade (Chung and Cohn 2024, 7–11). That said, I do not wish to overstate this point and recognize that different investors have different time horizons and goals, and that this bears on the extent to which they either will or must take into account the investment risk presented by climate change. The incisive article by Professors Greenfield and Partnoy in this symposium issue makes this point well (Greenfield and Partnoy 2025).

[23] Discussing "risk-return ESG investing," doing a balanced review of the empirical evidence, and concluding that there is a rational case for this method of investing, but not a compelled one. Also see 29 C.F.R. § 2509 (2008), 29 C.F.R. § 2509 (2015) and US Department of Labor (2018), all generally acknowledging that ESG-like risk factors may be taken into

consideration of ESG factors is again, arguably, mandated by the prudent investor rule in some situations because prudent investors have to take into account material risks of any kind that might harm their beneficiaries (ibid. at 403–05).[24] To this extent, ESG investing is materially distinct from situations, for example, where an ERISA fiduciary fund makes a suspect investment in exchange for a guarantee of employment for members of a union associated with the fund. The famous *Blankenship v. Boyle* case involving a union whose leader was convicted of a murder-for-hire scheme and embezzling funds addresses that sort of situation. 329 F. Supp. 1089 (D.D.C. 1971), *aff'd*, 447 F.2d 1280 (D.C. Cir. 1971). But even in this more delicate space, federal courts have accorded fiduciaries the good-faith discretion to take into account the reality that fund beneficiaries live in the real world and that non-self-dealing, prudent investments that involve collateral benefits, such as helping to ensure the solvency of the city employing the beneficiaries,[25] or using only union contractors to develop the plan's own physical property,[26] were consistent with the duty of loyalty.

Underscoring the settled nature of these principles is a recent decision by a right-wing federal district court judge Matthew Kacsmaryk, who previously issued controversial rulings enjoining Biden administration regulations on issues like reproductive rights and the Remain in Mexico policy.[27] But facing a challenge to the Biden administration DOL regulations addressing the ability of Labor Department regulations to take into account ESG factors when relevant to their investors' best interests, Judge Kacsmaryk hewed to the traditional approach and held that the regulations were valid (Monyak 2023). In so ruling, he stated:

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account in seeking the best risk-adjusted return for a fund's beneficiaries. Professors Schanzenbach and Sitkoff also make the point that if one concedes that risk-return ESG investing can be a reasoned investment approach, so can one built around the notion that companies that have poor ESG records might be undervalued and that gains for investors might result from investing in them (Schanzenbach and Sitkoff 2020, 443–45). As a statement of black-letter law, their viewpoint seems inarguable. One point the distinguished authors do not dilate upon, but suggest will be the subject of later work, is the relationship between investing and stewardship (ibid. at 405n116). Many prominent institutional investors largely build portfolios that are indexed and that thus do not involve screening in or out companies on the basis of ESG performance. But these investors are required to engage in certain stewardship activities, including voting on matters they view as important, as a matter of their fiduciary duty and do not sell the investments until they leave the requisite index. It thus seems settled that they can take the view that in engaging in stewardship as to these companies, it is important to focus on quality ESG practices that limit regulatory and reputational risk and encourage companies in their broad portfolios to make money net of externalities, because that is the best way for their investors to gain the most return. Put simply, just because an index fund is tied to an index does not mean that the stewardship activities of the fund should not be channeled in the way that helps the index as a whole grow in the most sustainable manner, because that is precisely what will produce the best risk-adjusted return for the fund's investors.

[24] This is not to say, however, that fiduciaries must embrace the view that ESG-focused investing will maximize the risk-adjusted returns of their investors. As noted, Professors Schanzenbach and Sitkoff find that the evidence in favor of risk-return ESG investing is far too mixed to make it a matter of fiduciary duty and point out that strategies like indexing that are clearly reasonable do not use ESG screens. To that point, the new DOL regulation does not mandate that ESG be considered in all investment decisions. "The Rule also explains that fiduciaries remain free 'to determine that an ESG-focused investment is not in fact prudent,' 87 Fed. Reg. at 73831, and stresses that a 'fiduciary's determination with respect to an investment . . . must be based on factors that the fiduciary reasonably determines are relevant to a risk and return analysis,' *Id.* § 2550.404a-1(b)(4))." Utah v. Walsh, No. 2:23-016-Z, 2023 WL 6205926, at *4 (N.D. Tex. Sept. 21, 2023). That said, I take it as uncontroversial that if, for example, a pension or mutual fund engaged in an active trading strategy was making an investment in a particular company and an ESG issue was material to assessing the risk and reward potential of that investment, the duty of prudence would require the investing fiduciary to consider that issue.

[25] *Withers v. Teachers' Retirement System of the City of New York*, 447 F. Supp. 1248 (S.D.N.Y. 1978).

[26] *Donovan v. Walton*, 609 F. Supp. 1221, 1245 (S.D. Fla. 1985), *aff'd sub nom.* Brock v. Walton, 794 F.2d 586 (11th Cir. 1986).

[27] For reproductive rights, see Alliance for Hippocratic Medicine v. F.D.A., No. 2:22-cv-223-Z, 2023 WL 2825871 (N.D. Tex. Apr. 7, 2023). For Remain in Mexico, see Texas v. Biden, 646 F. Supp. 3d 753 (N.D. Tex. 2022).

> For nearly three decades, DOL has posited that ERISA's obligations do not forbid consideration of collateral or non-financial benefits in the selection of competing investments that serve the plan's economic interests equally. 87 Fed. Reg. at 73824. This so-called "tiebreaker" standard is only permitted where the selected investment (1) has "an expected rate of return at least commensurate to rates of return of available alternative investments" with similar risks, and (2) otherwise comports with factors like "diversification" and "the investment policy of the plan." *Id.* Likewise, DOL has recognized that "environmental, social, and governance issues" ("ESG") may present purely financial considerations if they "are not merely collateral considerations or tie-breakers" but instead are "proper components of the fiduciary's primary analysis of the economic merits." 80 Fed. Reg. at 65136 (Oct. 26, 2015).

Utah v. Walsh, No. 2:23-cv-00016, 2023 WL 6205926, at *1 (N.D. Tex. Sept. 21, 2023). Stressing the consistency of the new rule with settled law, the judge noted that "[t]he 2022 Rule changes little in substance from the 2020 Rule and other rulemakings." *Walsh*, 2023 WL 6205926, at *4.[28] He found no basis to set aside the new rule, which simply recognized that a fiduciary could consider ESG factors when that was reasonable to seeking the best outcome for its investors:

> To summarize, an ESG factor could be worth consideration even under prior rules if it "is expected to have a material effect on the risk and/or return of an investment." 85 Fed. Reg. at 72884. Similarly, the 2022 Rule states that risk and return factors may include ESG factors under some circumstances, but those factors must still reflect "a reasonable assessment of its impact on risk-return." 29 C.F.R. § 2550.404a-1(b)(4). In other words, the 2022 Rule "provides that where a fiduciary reasonably determines that an investment strategy will maximize risk-adjusted returns, a fiduciary may pursue the strategy, whether pro-ESG, anti-ESG, or entirely unrelated to ESG." ECF No. 88 at 13–14.

Walsh, 2023 WL 6205926, at *5.[29] This recognition that ESG factors may bear on investment risk also coheres with another body of relevant law. Section 1(a)(1) of 404(c) of ERISA grants the fiduciaries of 401(k) plans substantial discretion to give their investors a range of reasonable investment choices, within a framework that limits the fiduciary's responsibility for participant losses when participants are afforded a range of reasonable investment options.[30] 29 C.F.R. § 2550.404c-1(a)(1) (2010). The safe harbor is available when participants have "at least three investment alternatives" that are "diversified," "have materially different risk and return profile characteristics," will "enable the participant . . . to achieve a portfolio with [appropriate] aggregate risk and return characteristics," and "when combined . . . tend[] to minimize through diversification the overall risk." 29 C.F.R. §

[28] Also see a description of the differences between the Biden administration DOL rule and the prior Trump administration rule as "cosmetic" (Schanzenbach and Sitkoff 2023).

[29] That Judge Kacsmaryk was a Trump appointee with indisputable right-wing views was insufficient reason for a group of anti-ESG attorneys general to refrain from appealing his ruling (Wille 2024). That appeal's basis was then broadened by the Supreme Court's overruling of Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) in Loper Bright Enterprises v. Raimondo, 603 U.S. __ (2024). The decision below was vacated to allow Judge Kacsmaryk to consider the case again without *Chevron*'s overlay. Utah v. Su, 109 F.4th 313 (2024). For present purposes, what remains most important is that one of the most conservative right-wing jurists found the Biden Administration's ERISA rule to be largely consistent with prior ones of Republican administrations and compatible with the statutory text.

[30] Courts have found that institutional fund managers such as Fidelity that are contracted to provide a company with investment options do not assume any fiduciary duties, so long as the employer has ultimate authority over which funds are on the investment menu: "Merely 'playing a role' or furnishing professional advice is not enough to transform a company into a fiduciary." Hecker v. Deere & Co., 556 F.3d 575, 584 (7th Cir. 2009) (citation omitted).

2550.404c-1(b)(3)(B) (2010). The plan must also provide participants with adequate information and guidance on various investment risks. 29 C.F.R. § 2550.404c-1(b)(2) (2010).

Although "limiting or designating investment options . . . is a fiduciary function," *Difelice v. U.S. Airways, Inc.*, 497 F.3d 410, 418 n.3 (4th Cir. 2007),[31] courts have generally hesitated to find fiduciaries liable for providing their participants with a diverse range of investment options that involve different risk-reward calculuses.[32] To this point, 401(k) plans have often given investors a chance to invest in actively traded mutual funds, despite the vast evidence that most such funds underperform the market as a whole, and thus underperform index funds, and are premised on assumptions about trading that are inconsistent with the efficient capital markets hypothesis.[33] Likewise, 401(k) plans often allow investors choice of funds invested in fixed-income securities, certain types of sectors (utilities, energy, etc., or even in commodities such as gold) that could be said to offer a less than optimal risk-reward return if taken in isolation, and not used as part of a diversified portfolio. Courts have not second-guessed the inclusion of such funds. *Wildman v. American Century Services, LLC*, 362 F. Supp. 3d 685, 705 (W.D. Mo. 2019).[34] For example, courts have held that it is permissible to include sector-specific funds, such as gold funds, even though they might perform worse than a general index fund, because "gold funds are generally held in an investment portfolio to hedge against fluctuation in the stock market." *Ramos v. Banner Health*, 461 F. Supp. 3d 1067, 1093 (D. Colo. 2020), *aff'd*, 1 F.4th 769 (10th Cir. 2021). In evaluating the performance of sector-specific funds, merely showing that the sector fund performed worse than the S&P 500 or has higher fees than a passive fund is insufficient to show imprudence, because the very reason to invest in sector funds is that "gold and gold funds tend to be countercyclical to the stock market, and benchmarking a gold fund against the stock market would result in large differentials that are not truly representative of the prudence of offering the gold fund as a Plan investment option." *Ramos*, 461 F. Supp. 3d at 1093. Of course, fiduciaries should still be careful to monitor the performance of all their included funds, because claims for failure to monitor can survive motions to dismiss. *Tracey v. Massachusetts Institute of Technology*, 404 F. Supp. 3d 356, 362 (D. Mass. 2019).[35] But it is reasonable to assume that investing in a fund that screens stocks for ESG risks might have a long-term value—that is, to take the reasonable view that companies that can make money without posing risks to society and externalizing costs might be more sustainably profitable—mutual funds that advertise themselves as applying ESG and other social responsibility screens have long formed an uncontroversial part of the many choices offered in 401(k) plans, and courts have

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31 Also see In re Enron Corp. Secs., Derivative & ERISA Litig., 284 F. Supp. 2d 511, 578 ("Losses that do not 'result from' the participant's exercise of control are still charged against the plan fiduciary, which retains the duty to prudently select investment options under the plan and to oversee their performance on a continuing basis.").

32 Illustrating this reality is a decision of the US Court of Appeals for the Fourth Circuit holding that an employer may even offer plan participants an option to invest in a single-stock investment fund so long as that option was prudently included within the diverse menu of investment options required to temper liability responsibility under Section 404(c). Tatum v. RJR Pension Inv. Comm., 761 F.3d 346, 356 (4th Cir. 2014); *Hecker*, 556 F.3d at 584–90.

33 Two important studies provide evidence that active trading strategies are unlikely to outperform the market as a whole (Crane and Crotty 2016; Anyfantaki et al. 2022).

34 "But merely because sector funds carry with them an inherent risk does not mean that offering them in the lineup was imprudent." *Wildman*, 362 F. Supp. 3d at 705 (citing Tibble v. Edison Int'l, No. CV 07-5359SVW(AGRX), 2010 WL 2757153 (C.D. Cal. July 8, 2010), *vacated and remanded on other grounds*, 843 F.3d 1187 (9th Cir. 2016)).

35 "The debate over whether certain kinds of funds should have been included in the Plan is a material factual dispute that will be preserved for trial" in a claim against MIT for retaining regional and sector funds without sufficient performance history in its investment plan. *Tracey*, 404 F. Supp. 3d at 362. Also see Spano v. Boeing Co., 125 F. Supp. 3d 848, 870 (S.D. Ill. 2014), holding that plaintiffs had created an issue of fact as to whether some technology funds were prudently offered, where plaintiffs alleged that Boeing offered these funds in part to foster a banking relationship.

noted that this is consistent with the breadth of reasonable investing strategies that can be offered in 401(k) plans. As the Sixth Circuit recently put it:

> A plan fiduciary might prudently seek value in actively managed funds—whether aggressively bullish or highly defensive—that might charge higher expense ratios due to the requisite skills of their management teams. Or a plan fiduciary might make available an actively managed—and thus more expensive—fund that considered non-financial ESG (Environmental, Social, Governance) objectives.

Forman v. TriHealth, Inc., 40 F.4th 443, 449 (6th Cir. 2022). To summarize, this recitation of settled law does not make anything but this measured claim: Corporate fiduciaries and investment fiduciaries have long been entitled to take into account ESG factors they consider relevant to delivering a profitable, sustainable return to their investors. In fact, their duties of loyalty and care require them to address those risks and not to blindly proceed without addressing them.

From here, it makes sense to address another reality, which is that the nation's largest institutional investors have approached their consideration of ESG factors like climate in a manner that reflects their acceptance of these long-recognized duties.

B. *The Major Institutional Investors Focus on Producing Profits for Their Stockholders and Address ESG Risk—and Climate—Within That Investor-Focused Framework*

Consistent with their legal responsibilities and interest in attracting investors, none of the biggest institutional investors has ever taken the view that their consideration of ESG issues, and climate in particular, was ever disconnected from their desire to seek the best risk-adjusted returns for their investors. To the contrary, each of the "Big 4" has long linked their consideration of ESG and climate to their pursuit of sustainable returns, and has taken the view that companies with superior ESG performance are more likely to produce sustainable returns and be profitable in the long term (Aggarwal, Litov, and Rajgopal 2023).[36] Although some have no doubt been more vocal than others about their belief that good ESG practices are connected to value—Larry Fink of BlackRock being a prominent example[37]—their policy statements have always linked their consideration of ESG to their pursuit of profit for their investors. As Fink put it more recently, "[w]e focus on sustainability not because we're environmentalists, but because we are capitalists and fiduciaries to our clients" (Fink 2022). In fact, because of their cautious approach, members of the Big 4 have been regularly criticized from the left for not matching their rhetoric about ESG with practical action factoring ESG into their

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[36] "[A] company's ability to manage environmental, social, and governance matters demonstrates the leadership and good governance that is so essential to sustainable growth, which is why we are increasingly integrating these issues into our investment process" (Fink 2018). Additional statements of this kind were issued by BlackRock (BlackRock 2020; Fink 2016; 2020), as well as by State Street Global Advisors (Kumar 2019; State Street Global Advisors 2016), by Fidelity (Fidelity Investments 2022a; 2023a) and by Vanguard (Vanguard 2020).

[37] In his 2018 letter to CEOs, Larry Fink famously suggested that companies should consider how they can "make[] a positive contribution to society" beyond financial performance (Fink 2018). But even in that arguably splashy letter, Fink tied his call for positive corporate contributions to corporations' ability to produce sustainable profits: "Without a sense of purpose, no company, either public or private, can achieve its full potential. It will ultimately lose the license to operate from key stakeholders. It will succumb to short-term pressures to distribute earnings, and, in the process, sacrifice investments in employee development, innovation, and capital expenditures that are necessary for long-term growth" (ibid.).

investing and stewardship activities. By way of prominent example, after Blackrock's former Sustainable Investing Chief Investment Officer, Tariq Fancy, left the company he issued a series of broadsides criticizing his former employer's lack of meaningful action and suggesting that BlackRock's rhetoric about ESG was just branding (Fancy 2021a).[38] Other big investors have received similar criticism for not factoring ESG in a materially effective way into their investing and stewardship activities (Rose, Buckley, and Brown 2021).[39] By way of further example, recent reports by ShareAction ranked leading asset managers on their proxy voting support for environmental and social issues. In 2022, the four leading American institutional investors, plus T. Rowe Price, another leading mainstream investor, ranked sixty-first to sixty-fifth out of the sample in terms of their "environmental score" (Gray et al. 2023, 10–11). In 2023, these big investors fared no better in the eyes of ShareAction, and were criticized for voting on climate-related resolutions in a manner inconsistent with their putative commitments to moving toward a net-zero economy and their membership in organizations like Climate100+ (Sood et al. 2024, 8–9, 35–41). As in 2022, the Big 4 asset managers, and American asset managers generally, ranked near the bottom of the studied investors in terms of their support for environmental proposals (ibid. at 8, 11–18).

In addition, none of the biggest investors has made divestment from carbon-producing companies a priority. Although they have some specific mutual fund options available for investors who view a portfolio without such companies as attractive (Fidelity Investments 2023b; 2023c), these investors run major index funds that by definition include the largest oil and gas public companies. Their stewardship policies are expressly articulated as being directed to increasing the sustainable profitability of the companies in which they invest for the benefit of their long-term investors.[40]

Of course, given the relative decline of defined benefit pension funds, an increasing percentage of retirement investments are selected by individual investors from a menu provided by their employer in its 401(k) program. The Big 4 and other investors have long included in their diverse choices mutual funds that explicitly consider ESG factors in selecting portfolio investments. In these circumstances, there is disclosure of the criteria that is used and the potential effect it has on returns. By way of example, TIAA offers a series of "Social Choice" investments, which track the market with special consideration of certain ESG criteria.[41] Prospectuses of similar TIAA funds have included a specific note on risk categorized as "Social Criteria Risk" or, since December 2015, as "ESG Criteria Risk": "The risk that because the Fund's social criteria exclude securities of certain issuers for nonfinancial reasons, the Fund may forgo some market opportunities available to funds that don't use these criteria" (TIAA-CREF Funds 2015; 2023). Likewise, Vanguard's FTSE Social Index Fund prospectus highlights an "ESG Investing Risk," which warns of the chance that an index screened for ESG criteria will underperform the market generally, and may also underperform other ESG funds, given that

[38] "In truth, sustainable investing boils down to little more than marketing hype, PR spin and disingenuous promises from the investment community. . . . I believe we are doing irreversible harm by stalling and greenwashing" (Fancy 2021b). These publications resulted, in part, in calls for Larry Fink to step down as BlackRock's CEO and more widespread criticism of BlackRock's ESG strategy (Helmore 2022; Burns 2022).

[39] Another author noted that a climate change investor advocacy group called Fidelity a "carbon hypocrite" for voting against certain climate-related stockholder proposals (Brooksbank 2017).

[40] See communications from BlackRock (Fink 2016; 2018; 2020; BlackRock 2020), from State Street Global Advisors (Kumar 2019; State Street Global Advisors 2016), from Fidelity (Fidelity Investments 2022a; 2023a), and from Vanguard (Vanguard 2020).

[41] An annuity described as a "balanced, all-in-one investment built to benefit you while making a positive impact" (TIAA 2022).

"there are significant differences in interpretations of what it means for a company to meet ESG criteria" (Vanguard Group 2021).

Other prominent socially responsible mutual funds make disclosures in a similar manner (BlackRock Funds IV 2023; Calvert 2023, 3). Fidelity's Sustainability Index Fund does not even have an ESG risk or socially responsible investment risk disclosed in its prospectus; rather, it simply articulates the basis on which the fund makes its investment choices and the connection between its view of the risks and opportunities of climate change to securing a sustainable profit for its investors (Fidelity Investments 2022b). Although these disclosures, like those of other funds taking different approaches to investing that do not involve a focus on ESG, articulate that there are risks to the approach being taken, they typically do not involve decisions by the funds to accept lower returns as a consequence of applying ethical or value-based screens. Rather, the funds largely characterize their investing approaches as ones that use ESG criteria in reasoned investment strategies.

That is, not only have the Big 4 not engaged in any broad divestment strategy, and rather have been major investors through their index and actively traded mutual funds in the fossil fuel industry, they also have funds that enable their investors to concentrate their portfolio in that industry space. Each of the Big 4 has funds that invest specifically in the fossil fuel industry (BlackRock 2023).[42] This illustrates a reality one might expect of this rather money-focused sector, which is that the money management industry remains focused on attracting investors by seeking to convince them that their funds will produce the best returns at the least cost.

Consistent with the focus on stockholder returns, the major investors have policies that disfavor poison pills, classified boards, and any obstacles to action by a majority vote or by written consent, that might impede a takeover bid or activism campaign.[43] The opposition of these major investors to obstacles to takeover defenses has resulted in a sharp decline in their incidence.[44] From this reality about how major institutional investors have considered climate and other ESG risks, let's pivot to other realities: the fact of human-caused climate change and its reasonable connection to corporate and investment fund governance.

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[42] "Includes stocks of companies involved in the exploration and production of energy products such as oil, natural gas, and coal" (Vanguard Group 2023a). "Normally invests in . . . securities of companies principally engaged in the energy field, including the conventional areas of oil, gas, electricity, and coal, and newer sources of energy such as nuclear, geothermal, oil shale, and solar power" (Fidelity Investments 2023d). "Seeks to provide precise exposure to companies in the oil, gas and consumable fuel, energy equipment and services industries" (State Street Global Advisors 2023a).

[43] Their policies disfavor poison pills unless subject to stockholder approval (BlackRock 2024, 9–10, 13–14; Fidelity Investments 2024, 8–9; Vanguard Group 2023b, 16–17; State Street Global Advisors 2023b, 12). Policies further disfavor classified boards (BlackRock 2024, 6, 10, 21; Fidelity Investments 2024, 3; Vanguard Group 2023b, 16; State Street Global Advisors 2023b, 4, 8), disfavor supermajority provisions designed to impede takeover bids or stockholder action (BlackRock 2024, 21, 24; Fidelity Investments 2024, 8, 10; Vanguard Group 2023b, 17; State Street Global Advisors 2023b, 13), and disfavor limitations on action by written consent (BlackRock 2024, 23–24; Fidelity Investments 2024, 9–10; Vanguard Group 2023b, 17; State Street Global Advisors 2023b, 12).

[44] Only four S&P 500 companies had a shareholder rights plan (inclusive of a net operating loss protective plan) in place at the end of 2023, compared to 299 S&P 500 companies having a plan at the end of 2000 (FactSet Research Systems 2024a). At the end of 2023, 91.51 percent of the S&P 500 companies and 47.5 percent of the Russell 3000 companies had adopted the majority voting standard, increases from 73.5 percent of the S&P 500 companies and 26.5 percent of the Russell 3000 companies at the end of 2010 (FactSet Research Systems 2024b). Less than 12 percent of S&P 500 companies had staggered boards at the end of 2023, compared to 29 percent and 61 percent of the S&P 500 companies having staggered boards at the end of 2010 and 2002, respectively; only 25 percent of S&P 1500 companies had staggered boards at the end of 2023, compared to 42 percent and 57 percent of S&P 1500 companies at the end of 2010 and 2005, respectively (FactSet Research Systems 2024c).

C. *Human Behavior, Climate Change, and Its Possible Economic Effects: A Fact-Based Look*

The evidence that the earth's climate is at levels of warmth unknown for thousands of years, that it continues to warm rapidly, and that its warmth is creating a rise of sea level, glacier melting, reef death, wildfires, and storms is overwhelming and beyond rational denial (Wetzel 2023; Ly 2023), as is the reality that much of this warming has occurred in recent decades and is intensifying.[45] Likewise, the causal effect between human emissions of carbon and methane and this warming is not a subject of rational scientific controversy (Hausfather 2018; Kluger 2016; Heede 2013, 234).

The scientific consensus for these realities is firmly established (Myers et al. 2021; US Global Change Research Program 2017, 1). This consensus includes international organizations like the United Nations, whose members have diverse ideological views and governmental systems (Houghton et al. 2001; Australian Academy of Sciences et al. 2001; Lee et al. 2023).

The business community also accepts these realities.[46] By way of prominent example, the insurance industry—an industry not known for being touchy-feely in terms of having an emotional approach to the world—is keenly focused on the potential impact of climate change because of two key risks (American Academy of Actuaries 2023; US Department of the Treasury 2023, 7–8, 30–31; Johansson et al. 2022). The first is the risk that insurers face from the increased property and human damages that come with climate change–fueled increases in weather and fire disasters. This is so-called "physical risk" (American Academy of Actuaries 2023, 3–11).[47] The second is that insurers have large portfolios of long-term investments as part of their business model and thus face the risks that all long-term investors have in terms of "transition risk," in other words, the negative impact that climate change may have on the value of certain industries and asset classes (US Department of the Treasury 2023, 58–59).

A review of the public filings and communications by the world's ten largest insurers reveals that each insurer accepts that human-caused climate change poses serious risks to them as insurers, and risks and opportunities for them as investors (Reiff 2023). In particular, the insurers accept that human-caused climate change has markedly increased the frequency and severity of weather events, causing both property damage and loss of lives (AIG 2023, 6, 12, 15, 21–22, 124–26; 2022, 3, 11, 21–22, 25–39; Allianz 2023a; 2023b; 2023c, 59–64, 112; AXA 2022, 19; Allstate 2023, 3, 13, 35, 56–59; Berkshire Hathaway 2023, 5–7, 15–18, 44, K-51, K-73; Chubb Limited 2023a, 5–7, 15–18, 29; 2023b; MetLife 2023, 26, 42–43; Ping An 2023, 19, 74–78; Prudential 2023, 34, 45). These insurers accept reality (AIG 2022, 26). And they link it directly to business and economic risk and harms.[48] One insurer was also

[45] "Recent changes are rapid, intensifying, and unprecedented over centuries to thousands of years" (Masson-Delmotte et al., v).

[46] For example, JPMorgan Chase uses climate change scenarios to estimate future potential losses on its real estate portfolio and to develop ways to mitigate these risks (JPMorgan Chase & Company 2022). The Climate Financial Risk Forum surveyed risk management firms and found that 80 percent performed climate scenario analyses to attempt to assess the negative financial impact of climate change (Climate Financial Risk Forum 2022).

[47] Also see US Department of the Treasury (2023, 38–41, 56, 60) (showing large increases in climate-related disaster losses in the last decade and growth in uninsured losses, rapidly increasing premiums and coverage gaps, and an increasing need for subsidized programs of insurance to cover residents of areas most threatened by climate change).

[48] "Amongst a broad landscape of ESG factors, we consider climate change to be the most critical in terms of its potential to materially affect the global economy and our business, especially in the long run. Risks arising from climate change can

candid about climate-denying political leaders who want to force insurers to cover policyholders in high storm areas most at risk because of climate change, stating:

> Climate change is driving insurers to send price signals about the consequences [of climate change-caused risks], and that may ultimately contribute to individual behavior in terms of where people choose to live and where businesses choose to locate. There is a cost with living in extreme CAT-prone areas. Governments cannot for long force insurers to subsidize this behavior or do so themselves, and think they can avoid the price. (Chubb Limited 2023a, 7)

Most responsible estimates of climate change's economic effect suggest that it will be profoundly negative and involve substantial reductions in gross domestic product.[49] And many of these estimates exclude obviously material risks like the possibility for tipping points (such as glacier melting), sea-level rise, and the economic consequences of forced migration and potential geopolitical conflicts (Trust et al. 2023, 14; Hansen et al. 2023, 26). The secondary health impacts of climate change, such as climate suitability for infectious disease transmission, food security risks, changes in labor capacity, and heat-related mortality, likewise pose material independent risks to economic growth (Romanello et al. 2023, 9–15). For these reasons, a recent study argues that the pace of likely warming is so substantial and so negative in economic effect within the life expectancy of many dependent on retirement schemes that there is a "compelling logic for net zero becoming part of fiduciary duty, as if we do not mitigate climate change, it will be exceptionally challenging to provide financial returns" (Trust et al. 2023, 26). Although precisely measuring the pace and impact of human-caused climate change remains difficult, scientists' consensus forecasts have been reasonably accurate and more likely to underestimate the coming growth in temperature and its resulting harm (LePage 2023, 10).

Rather than overstate the risks of climate change, however, most businesses and insurers are not being as gimlet-eyed as the evidence warrants about the pace at which the earth is warming and the negative effects this will have (Trust et al. 2023, 15–16; US Department of the Treasury 2023, 30–31). Instead of recognizing that the likelihood of achieving the goal, for example, of the Paris Agreement of limiting

already be seen today and their relevance will increase over the mid- and long-term" (Allianz 2023c, 112). AXA connects climate change to markedly greater risk of cyclones of all kinds, floods of all kinds, severe convective storms, heavy precipitation, and wildfires (AXA 2022, 71). "Climate change is one of the most critical challenges threatening customers, businesses, and communities. Today, a natural catastrophe that exceeds $1 billion occurs every 18 days, a 400% increase from 1980" (Allstate 2023, 13). "Climate change is a reality and its effects can be seen by an increased frequency and severity of natural catastrophes. Climate change is contributing to higher surface sea temperatures, rising sea levels and increasing trend in extreme weather events, including floods, droughts, winter storms, heat waves, wildfires and hurricane intensity. Chubb's business involves providing clients with insurance and reinsurance from the impact of natural catastrophes, including weather events that are more frequent or severe. We recognize that climate change affects everyone—customers, employees, shareholders, business partners, and the communities we serve" (Chubb Limited 2023b). As major insurers recalibrate their approach to climate risk, consumers and taxpayers have begun to bear the brunt of the harm: Coastal regions around the globe are becoming uninsurable. This reality is manifesting itself in diverse markets where insurance programs set up to cover risks that the private sector will no longer insure have experienced huge demand. Florida's taxpayer-backed insurer of last resort, Citizens, has been forced to cover nearly triple the homes it must provide insurance for in the past three years. From 2018 to 2022, California's Fair Plan doubled in size in response to increased wildfire risk. The UK's Flood Re program, which transfers flood risk from private homeowner's insurance to the UK government in exchange for a fixed fee, added more than 110,000 policies since 2018 and by 2023 was covering 260,000 homes (Smith, Mooney, and Williams 2024).

[49] Indeed, a recent study indicates that climate change has already had a substantial negative impact on average Gross State Product in the United States across industry sectors, resulting in a loss of 0.0273 percentage points per year. This cumulatively amounts to a real GSP loss per capita of 4 percent between 1976 and 2016, roughly equivalent to the loss in real GDP from COVID-19 or the Great Recession (Mohaddes et al. 2023, 7–9).

warming to 1.5 degrees Celsius above preindustrial levels has diminished considerably, a recent study suggests that a supermajority of firms were using scenarios of climate impact that assumed that the Paris targets were met (Trust et al. 2023, 16).[50] This is unsurprising given the difficulty of modeling unprecedentedly rapid and powerful change, and the reality that business leaders remain subject to pressures to place far more weight on short-term rather than long-term factors (Taylor 2023; Collie 2023). The private sector's failure to address climate change more urgently comports with the lagging pace of government efforts to meet the goals of the Paris Agreement (Harvey 2023).[51] In keeping with the evidence that the overall societal and business effort to redress climate change is, if anything, incommensurate with the risk, the International Monetary Fund has found that the continuation of enormous explicit and implicit subsidies of fossil fuels encourages their continued use at high levels, endangers the ability to keep warming below 2 degrees Celsius, and will cause 1.6 million premature deaths (Black et al. 2023).

VI. Do as I Say, Not as I Do

The anti-ESG right has argued that corporations should focus solely on profit and should not use their entrusted capital to advance political or social causes. The anti-ESG right has also argued that collaboration on the part of corporations and institutional investors to address climate change risks violates antitrust laws and should be stopped, and that those participating should be subject to investigation.

The extent to which these are principled positions can be usefully evaluated in the context of the advocates' own adherence to them.

A. The Consumption of Corporate Political Spending by Opponents of ESG's Consideration in Corporate Governance

Despite arguing that corporations should not use their resources for political ends, the leading voices attacking consideration of ESG factors by business leaders[52] are among the most well-fed pigs at the corporate political spending trough. And they have not limited their pursuit and receipt of corporate contributions to closely held companies, but have devoured contributions from public companies with diverse stockholder bases.

For example, the governors of Florida and Texas have received large amounts of corporate funds both directly from corporations and from the Republican Governors' Association, which is a huge recipient of contributions from public corporations.[53] The same is true for the US senators from these

[50] Nick Taylor finds that scenarios used to estimate climate risk are "optimistic" in an "overly strong" way because the likelihood of meeting the Paris goals has diminished (Taylor 2023, 69).

[51] James Dinneen notes that high-income nations had pledged in 2009 to provide $100 billion a year by 2020 to help low-income nations transition to a low carbon economy and protect them from climate change's adverse effects and that they failed to do so on time and may have only barely met the target in the last year (Dinneen 2023, 8).

[52] See discussion above in Part III.

[53] Between 2010 and 2018, 46.6 percent of the total money raised by the Republican Governors Association (RGA), Republican Attorneys General Association (RAGA), and the Republican State Leadership Committee (RSLC) came directly from public companies (Freed et al. 2020). The RGA continues to be a recipient of huge contributions from public corporations. By way of example, between January and August of 2024, public corporations funneled $3.36 million to the RGA's coffers (Republican Governors Association 2023). And a summary provided to me by the Center for Political Accountability from Internal Revenue Service data shows that 179 public corporations gave more than $100,000 each to

states.[54] Ditto for state attorneys general, who have vocally attacked corporations and businesses for considering ESG issues. The Republican Attorneys General Association has received millions of dollars in contributions from public corporations,[55] and it has been a major contributor to the campaigns of attorneys general who have threatened corporations and institutional investors with possible investigation for participating in ESG initiatives such as the Glasgow Financial Alliance for Net Zero and Climate Action 100+ (Stone 2023; Lamar Johnson 2023; Rives and Barrett 2023; Brnovich 2022). Although the corporate sector has been criticized by climate-denying politicians for factoring climate change and other ESG issues into their governance, that has not stopped these same politicians and the political committees that support them from demanding political donations from the coffers of the very corporations they have criticized.[56]

These contributions have come from public companies in industry spaces like banking, insurance, and asset management that have been targeted by the attack on ESG and woke capitalism (Boguslaw 2023; Lund and Strine 2022; Koch 2023; Center for Political Accountability 2022, 29–31). But, as one would expect, these contributions also come heavily from leading energy companies.[57]

Notably, even though Democrats have typically slightly outnumbered Republicans for many years and there has been an ever-increasing portion of the population that identifies as independent rather than as either Democrat or Republican (Jeffrey M. Jones 2023), corporate political spending skews strongly in the Republican direction (Freed et al. 2020, 5–7, 32–35).[58]

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the RGA during the last two cycles, with total contributions of $77,656,467 (Center for Political Accountability 2024). Data from OpenSecrets also shows public corporations among the largest donors to the RGA (OpenSecrets 2024a). The RGA was the largest single donor to both the Abbott (OpenSecrets 2024b) and DeSantis (OpenSecrets 2024c) campaigns in 2022, donating $4 million and $14.3 million, respectively.

[54] From 2017 to 2022, Senator Rubio and his leadership PAC received millions in dollars of contributions from public companies, including the GEO Group, Comcast, Raytheon, PNC, Berkshire Hathaway, Lockheed Martin, Honeywell, UBS AG, General Dynamics, AT&T, UPS, Northrop Grumman, Verizon, Delta Air Lines, Walmart, Wells Fargo, Goldman Sachs, FedEx, Blue Cross/Blue Shield, General Motors, Home Depot, Altria, United Health, and Walt Disney (OpenSecrets 2024d). From 2017 to 2022, Senator Cruz received sizable contributions directly from AT&T, Berkshire Hathaway, Boeing, Union Pacific, Honeywell, Comcast, Valero, Delta Air Lines, Lockheed Martin, FedEx Corp, Northrop Grumman, American Airlines, Accenture, Chevron, Dell, Verizon, Exxon Mobil, Southwest Airlines, Raytheon, United Airlines, and the UnitedHealth Group (OpenSecrets 2024e).

[55] For example, during the last two cycles, seventy-one public corporations gave the RAGA more than $100,000 each, with a cumulative total contribution from just them of $17,752,260 (Center for Political Accountability 2024).

[56] A comprehensive report by the CPA documents the substantial flow of funds from the treasuries of public corporations supposedly committed to addressing the risk of climate change into the coffers of politicians and political committees opposed to addressing climate change (Center for Political Accountability 2022). The CPA has also documented the contributions from corporations committed to addressing climate change to politicians and political committees opposed to addressing climate change (Freed et al. 2020, 5, 8, 27).

[57] The oil and gas industry pours roughly $100 million annually into campaign contributions for Republicans and Republican-aligned groups, even in off-cycle elections (OpenSecrets 2024f). Additional commentary on such campaign donations is available (Negin 2023; Burns 2023).

[58] Demonstrating that public corporations are the largest contributors to partisan 527 committees and that corporations donate much more heavily to Republican than Democratic committees, with Democrats receiving about half as much. Consistent with the heavy tilt of corporate political spending in one direction, another recent report by the Center for Political Accountability demonstrates that public corporations gave the Republican State Leadership Committee—an organization intended to turn state legislatures to Republican control—over $188 million from 2010 to 2023, that twenty-two public corporations each gave at least $1 million, and that many of these corporations had taken stances on issues contrary to the stands of the candidates the RSLC supported (Hanna et al. 2023). A contributing factor to this stark partisan tilt in American public company spending might be that American CEOs have historically been far more likely to identify as Republican than as Democrats, that they have personally contributed much more to Republicans than to Democrats,

Although the investor class is wealthier on average and thus might trend more Republican than average Americans, there is no rational basis to assume that American stockholders share anything close to a consensus on political beliefs; in fact, the stockholder bases of most public companies have strong contingents of Democrats and independents.[59] Moreover, because most Americans invest indirectly through mutual funds, there is also no rational reason to assume that any invest in public companies as a way of expressing shared political values.[60]

B. Opponents of ESG Have Long Affiliated Themselves with Industry-Funded Organizations That Foment Climate Denial and That Promote the Interests of the Carbon- and Methane-Producing Energy Industry

As has just been shown, leaders of the anti-ESG movement have been huge recipients of political contributions from the fossil fuel industry.[61] For generations, the oil and gas industry has funded, led, and collaborated in groups like the American Petroleum Institute (API) to promote its interests. The API's leadership has historically been drawn from the major American oil and gas companies (McGreal 2021).[62] As has been well documented, these companies' internal research long ago confirmed the connection between carbon and methane emissions and climate change and predicted enormous warming and harm if those emissions were not reduced (Supran, Rahmstorf, and Oreskes 2023; Milman 2023).[63] After internally considering transitioning its business plans in the direction of cleaner forms of energy and reducing climate-harming emissions, the industry pivoted to promoting misinformation suggesting that there was no genuine connection between the industry's products and climate change, downplaying the potential harm of global warming, and otherwise attempting to reduce any public or regulatory pressure to diminish society's usage of carbon-based energy.[64]

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and, interestingly, that there is a statistically significant and negative association between a Republican CEO and the company's willingness to disclose its corporate political spending (Cohen et al. 2019, 15–17, 22, 35–39).

[59] Although many Americans own some stock, mostly in the form of mutual funds, the distribution in stock ownership still skews heavily toward the affluent (Gebeloff 2021; Board of Governors of the Federal Reserve System 2023). In the last century or so, Republicans were likely to be wealthier on average than Democrats, and that remains the case, although there has been a growth in the numbers of college-educated Democrats and of working-class Republicans in the last decade (Zacher 2023). But the reality remains that the investor class is diverse in outlook, that it comprises people of all parties, and that, within parties, members have extremely divergent perspectives on many political issues.

[60] In prior work, I gathered empirical evidence and perspectives from scholars of diverse political perspectives demonstrating the reasons why this is the case (Strine 2020, 1022–27, 1037–38; Macey and Strine 2019, 506; Strine and Walter 2015, 364–65, 374–75).

[61] See notes 52–57 and accompanying text above.

[62] Notable current and former board members of the API include Rex Tillerson, former CEO and Chairman of Exxon Mobil, and Tofiq Al Gabsani, the head of an Aramco subsidiary. The API's current chairman is Mike Wirth, CEO and Chairman of Chevron. Wirth replaced Greg Garland, Phillips 66 Chairman and CEO, who remains on the API's Executive Committee (American Petroleum Institute 2022).

[63] In lengthy complaints filed in recent court actions, government plaintiffs have compiled the record of industry knowledge of the connection between fossil usage and climate change, and the harmful potential of climate change. The complaint filed by the state of California cites to internal research by leading oil and gas companies to this effect. It cites internal research of ExxonMobil, Shell, American Petroleum Institute, and a Climate and Energy Task Force, including scientists from Exxon, Mobil, Amoco, Phillips, Texaco, Shell, and Standard Oil of Ohio, and from Chevron's predecessor corporations. Complaint at 35–51, People ex rel. Rob Bonta v. Exxon Mobil Corp., Case No. CGC23609134 (Cal. Super. Ct. S.F. Cnty. Sept. 15, 2023).

[64] The California complaint cites to direct evidence putting API at the center of the industry's efforts to cast doubt on the connection between fossil fuels and harmful warming, including by creating advocacy organizations and funding scientists to cast doubt on realities that the industry's own research had long accepted. Complaint at 51–71, *Exxon Mobil Corp.* A coalition of local governments in Puerto Rico also has comprehensively cited industry internal documents to support its

The API was a fulcrum for this misinformation campaign and funneled money from huge energy corporations into a variety of front organizations, think tanks, and lobbyists, which claimed tax-exempt status under various 501(c) sections of the Internal Revenue Code (Owen and Bignell 2010; McGreal 2021). Although the huge energy companies have now conceded the connection between their products and climate change—and all now claim to be transforming to meet the objective of net-zero carbon emissions—they continue to fund the API and these other organizations.[65]

In recent years, elements of the business community took similar action on the other side of the climate issue. As previously discussed, the Glasgow Financial Alliance for Net Zero is a global coalition of eight independent net-zero financial alliances with more than 675 member firms, formed in 2021 by the UN Special Envoy on Climate Action and Finance and the COP26 presidency (Net Zero Financial Service Providers Alliance 2023). This so-called "Net Zero Alliance" at various times had members from many of America's largest financial institutions in the banking sector.[66] The Net Zero Alliance members also at one time included Vanguard, BlackRock, and State Street (Net Zero Asset Managers Initiative 2023).[67] Meanwhile, another group, Climate Action 100+, was formed specifically by institutional investors. It is now composed of more than seven hundred investors managing $68 trillion in assets and has three clear goals: implementing a strong governance framework addressing accountability and oversight of climate change risk, reducing emissions in line with the Paris Agreement goal, and enhancing corporate disclosure and implementation of climate transition plans (Climate Action 100+ 2023b).

Leaders of the anti-ESG movement have long been major recipients of political contributions from the leading companies funding the API and other collaborative-industry organizations that have engaged in climate denial and have impeded public policies designed to reduce carbon emissions.[68] The API has existed since 1919. During its entire history, it has been a collaboration of the major energy companies, which are otherwise direct competitors.[69] Absent is evidence of any similar communication, protest, or other action by any of the leading voices against ESG claiming that the

allegation of concerted industry action to conceal the realities of human-caused climate change (Mindock 2022). Amended Complaint, *Municipalities of Puerto Rico v. Exxon Mobil Corp.*, 3:22-cv-01550 (D.P.R. Nov. 22, 2023). In addition to California and Puerto Rico, it is also notable that the state that is the domicile of a large percentage of American public corporations has itself initiated a similar suit against the major fossil fuel companies and the API for climate change–related damage to Delaware's environment, and that several of the state's claims survived a motion to dismiss. State ex rel. Jennings v. BP, No. N20C-09-097, 2024 WL 98888 (Del. Sup. Ct. Jan. 9, 2024). These suits, which are increasing internationally as well as domestically, not only cite to evidence of industry collaboration to suppress climate risk, but represent an economic risk to fossil fuel companies and their investors (Matthews and Eaton 2023). Research has found that more than 2,486 climate lawsuits have been filed in fifty-two nations, that many were against corporations, and that more than one hundred suits had been filed every year since 2015 (Wetzer et al. 2024, 152–53).

[65] The API membership roll includes Chevron, Exxon, Shell USA, Marathon, Phillips 66, and Halliburton (American Petroleum Institute 2023).

[66] For example, US members included Wells Fargo & Company, Bank of America, Citi, JPMorgan Chase, Morgan Stanley, and Goldman Sachs (Net-Zero Banking Alliance 2023).

[67] Other notable signatories include(d): Brookfield Asset Management, Stafford Capital Partners, and J.P. Morgan Asset Management (Ellmen 2022).

[68] See notes 53–57 and accompanying text above.

[69] There is, of course, a long tradition dating back to the early twentieth century of competitors forming industry associations that advocate policy positions favored by the industry in the main and that engage in public relations efforts designed to improve the industry's public image. Other similar trade groups include the US Farm Bureau, the National Association of Manufacturers, the National Association of Realtors, and the US Chamber of Commerce.

collaborative efforts of these direct competitors to suppress the truth about climate change and to tilt public opinion against taking remedial action were legally improper in any way.[70]

But, in the past several years, these same anti-ESG leaders have used the power of their regulatory positions to intimidate corporations and institutional investors that were members of the Net Zero Alliance and Climate Action 100+. They have argued that corporations and institutional investors that participate in these organizations alongside their competitors are flouting conduct violative of federal and state antitrust laws. Members of Congress have issued stringently worded letters to industry participants to this effect (US House Committee on the Judiciary 2022; 2023a; 2023b; 2023c; 2023d), as have state attorneys general.[71] Similar communications were not made to the supporters of the API or its affiliates. Nor were they made to the numerous well-established industry collaboratives formed by industry competitors that continue to advocate for public policy positions on issues of common concern.[72]

VII. The "Success" of the Orwellian Approach to the Climate Debate

The Orwellian rhetoric about corporate governance and climate may be disconnected from objective reality. Its leading orators may also betray their alleged commitment to requiring corporations and institutional investors to stick to making money for their investors and to refrain from using their resources for political actions, because they, like the well-fed pigs of *Animal Farm*, sup at their trough.

But their Orwellian rhetoric has been successful on two levels. The first is more immediate and involves slowing down and potentially reversing momentum by the business and institutional investor community in taking action to reduce carbon usage and to try to meet the objectives of the Paris Agreement.

The climate-denying anti-ESG movement intimidated corporate leaders and institutional investors into backtracking on their climate commitments. Since the waves of antiwoke capitalist rhetoric have surged, several prominent corporations and institutional investors have pulled out of Net Zero Alliance initiatives, as exemplified by Vanguard's withdrawal from the Net Zero Asset Managers (NZAM) and the mass exodus of members from the Net-Zero Insurance Alliance (NZIA) (Andrew Jones 2023; Pucker 2023; Wilkes, Hübner, and Sims 2023). Underscoring the successful efforts of climate-denying political leaders pressuring corporations and investors to back away from climate commitments, on February 15, 2024, BlackRock, State Street, and JPMorgan Chase all withdrew from Climate Action 100+ (Jessop and Kerber 2024). Similarly, there has been a noticeable change in the way that business leaders and institutional investors talk about ESG issues in general, including climate

[70] A leading climate-denial organization has applauded the efforts to condemn collaborative efforts by investors and corporations to address climate change as "woke" breaches of fiduciary duty (Burnett 2022).

[71] In a letter accusing BlackRock of violating its fiduciary duties to investors and flouting the antitrust laws by engaging in collaborative efforts with other investors and businesses to address climate change, a group of state attorneys general actually argued that the failure of governments and the business sector to make the commitments necessary to meet the targets of the Paris Agreement and to move toward net zero was a reason why climate change could not be considered a rational concern for a fiduciary investing for long-term investors (Brnovich et al. 2022). In this respect, the letter seems to take the view that because certain businesses such as oil and gas companies would remain profitable longer even if they did not transition to clean energy sources of revenue, a diversified investor like BlackRock that invests in the entire economy and thus has a portfolio that will suffer great harm if climate change is not arrested, cannot take that larger reality into account.

[72] Likewise, groups ranging from the United States Chamber of Commerce, the National Association of Realtors, and the National Association of Manufacturers have not been threatened by Republicans with antitrust provisions.

change—with some, like BlackRock's Larry Fink, now refusing to use the term "ESG" at all, and many others seeming to pull back on past statements robustly committing to progress on issues like DEI (Werschkul 2023; Binnie 2023; Reuters 2023; Gasparino 2023).[73] Corporate leaders are keeping their heads down (see Monster 2023; Alfonseca and Zahn 2023), and institutional investor support for stockholder initiatives asking companies to address environmental issues, including climate, and social issues such as DEI, has waned (Christ 2023; Ayas 2023). As to the Big 4 and American institutional investors in particular, 2023 saw a marked decline in support for environmental and social shareholder resolutions compared to 2021 (Sood et al. 2024, 8–9). This decline in support had tangible effects on outcomes, because eight times as many resolutions would have passed had the Big 4 voted for them (ibid. at 19–27).[74]

Given concerns that the business and investment communities were already behind in terms of taking the bold actions required in order to meet the targets of the Paris Agreement, this retrenchment is worrying at the least, and may be rationally thought to be seriously dangerous to our nation's economic future and to the world's political stability and quality of life. But for those using antiwoke climate rhetoric, that is not the point—and this highlights the second level of success that has been achieved, which is in making climate denial a part of the identity of a substantial segment of the most vocal elements of the Republican electorate.

This second success is arguably more durably pernicious than the short-term success of the intimidation tactics, because it involves the inculcation of false views about climate change in a substantial portion of the American population. The beliefs of the party regulars on climate—or their tribal identity—become even more of a danger in the context of the US political system. Because of the American system's many countermajoritarian features (for example, an unrepresentative Senate made even more unrepresentative by the filibuster; gerrymandering; the inability to amend the Constitution easily; a powerful life-tenured judiciary), a party committed blindly to resisting reality and progress can easily obstruct and impede the rapidity of action that most scientists believe is necessary to avoid substantial economic, human, and environmental damage from human-caused warming.

For the political leaders engaging in the rhetoric of climate denial in the context of their larger attacks on ESG, there is no apparent policy end—no vision of the good—that they genuinely embrace and intend to accomplish with this rhetoric. Instead, it cements a bond of distinctive identity between themselves—the Inner Party leaders—and the party rank and file; the point is whether that rhetoric helps those who use it to secure power. And the poll data suggests that it does. In an increasingly polarized electoral system in which fewer elected officials run in competitive districts, climate change ignorance and attacks on woke capitalism are affects and symbols of tribal identity on the part of the party faithful. Polls show a striking difference between Republicans and other Americans in terms of their acceptance that human activity—in the form of carbon and methane emissions—is what is driving climate change. Republicans disbelieve reality at rates far outstretching independents and Democrats (Kennedy, Tyson, and Funk 2022; Oreskes and Conway 2022).

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[73] Fink's retreat is reflected in the language of his annual letters: In 2021, he mentioned the terms "stakeholder," "climate," "purpose," or "ESG" nearly fifty times; in 2022, that number was above thirty; in 2024, Fink had used those terms just five times and began using "energy pragmatism" as a replacement for ESG (Hoffman 2024).

[74] In fact, an entire section of this report is devoted to the subject: "Support for shareholder resolutions has hit a new low, with the 'big four' and US asset managers particularly culpable" (Sood et al. 2024, 19). Other reporting has focused on the ShareAction study and voting on ESG proposals by major institutional investors, noting that the study showed that the Big 4 supported 39 percent of environmental proposals in 2021 and only 14 percent in 2023 (Bryan 2024).

In this respect, climate denial—the rejection of empirical fact—marries with other tribal beliefs at odds with factual reality. Polls show, by way of example, that Republicans are far less likely to believe that vaccines help prevent COVID-19 than are independents and Democrats (Kirzinger et al. 2021; KFF 2021). And polls of course showed that a stubbornly high percentage of Republicans continued to believe late into President Obama's second term that he was not born in the United States, despite the ample evidence, including a birth notice in a Hawaiian newspaper nine days after his birth in 1961 and the release of his birth certificate, that he obviously was (Niesse 2011; Rogers 2020).[75] Sadly, the increasing gap between reality and the views of certain Americans continues to grow, as evidenced by the large percentage of self-identified Republicans who believe that the Federal Bureau of Investigation orchestrated the violent invasion of the Capitol on January 6, 2021 (Jackman et al. 2024).[76] If this conspiratorial mindset was less concerning for the ability of our republic to function effectively and with civility, one might chuckle at the shockingly large percentage of self-identified Republicans who believed that Taylor Swift and Travis Kelce's relationship was a phony contrivance that is part of a covert government effort to help Joe Biden win the presidential election (Monmouth University 2024). But, in a republic with countermajoritarian brakes as part of the governmental design, having a substantial portion of the electorate divorce themselves from objective reality is too damaging to laugh off.

VIII. Conclusion: The Disturbingly Orwellian Quality of the Climate-Denying Attack on ESG

With these building blocks having been laid, the Orwellian basis for the attacks on corporate and investor consideration of climate change can be properly understood in fuller form, by reference to Orwell's own writings.

For starters, the situation is Orwellian in the sense that, as has been discussed, there is no basis to believe that the political leaders casting doubt on the human connection to climate change, vaccine efficacy, or President Obama's birth origins themselves believe in the doubts that they sow.[77] In fact, there is a great deal of evidence, in the form of their own avid desire to get vaccinated, and their own refusal to engage on the specific factual issues involved when challenged, that they do not.[78] The fact that many opponents of ESG, like so many of the Republican Party's presidential candidates, including Donald Trump, previously acknowledged that human-caused climate change was a substantial economic and human danger also illustrates another Orwellian quality, which is that the Inner Party leaders obfuscate their past positions and that their acolytes are asked to and seem to put these past statements into the "memory hole,"[79] where they disappear and do not cause them cognitive dissonance. Indeed, by noon on the day President Trump was inaugurated for the first time, all

[75] President Obama's long-form birth certificate was made publicly available by the White House in April 2011 (Pfeiffer 2011).

[76] This *Washington Post* poll indicates that 34 percent of responding Republicans and 44 percent of responding 2020 Trump voters had this view.

[77] See Part IV above.

[78] "It was also more suited to the dignity of the Leader (for of late he had taken to speaking of Napoleon under the title of 'Leader') to live in a house than in a mere sty" (Orwell, *Animal Farm* [1945] 2020, 66). Orwell's *1984* discusses that the Inner Party members had access to all kinds of goods and lifestyle amenities and freedoms that the party regulars were denied (Orwell, *1984* [1949] 2023, 141).

[79] In *1984*, when the Party rewrites history, the "memory hole" is where deleted facts/events were sent to be erased (Orwell, *1984* [1949] 2023, 39). Also, in *Animal Farm*: "That evening Squealer explained privately to the other animals that Napoleon had never in reality been opposed to the windmill" (Orwell, *Animal Farm* [1945] 2020, 57).

references to climate change were removed from the White House website and his EPA soon followed suit, removing the agency's page discussing climate science (Schlanger 2023).

But as with the Party leaders in *1984*, or the pigs in *Animal Farm*, the point of their rhetoric is not to advance an idea of the good that is grounded in truths that the leaders themselves accept as a basis for their own behavior. It is to secure the power base of the party leaders by shaping and manipulating the tribal identities of the party faithful. In the case of climate, the woke left-wing CEOs[80] who are seeking to misuse corporate resources for extreme social ends are the context-specific Goldsteins who symbolize the larger incursion on traditional American beliefs that these political leaders argue is occurring. To this point, consider this statement by the CEO of an anti-ESG organization, the State Financial Officers Foundation (funded in large measure by dark money groups, such as DonorsTrust and Donors Capital Fund (Armiak 2023), which have contributed to many climate-denial organizations), who said this (in terms redolent of how Goldstein and Snowball are referred to in *1984* and *Animal Farm*):

> BlackRock is the Death Star. The progressive ESG movement is the Evil Empire. President Biden could arguably be Darth Vader, and the emperor is Larry Fink. (Kreifels and Williams 2022)

In the face of an overwhelming scientific and business consensus that climate change is real, temperature readings that show a disturbing and continuing pattern of record highs, and resulting increases in high-impact storms, heat waves, glacier melting, and reef deaths, the climate-denying and obscuring rhetoric proceeds. "The Party told you to reject the evidence of your eyes and ears. It was their most final, essential command" (Orwell, *1984* [1949] 2023, 81). Facts about climate (and vaccines, and the nationality of President Obama) are not important to the party leaders. The utility of those issues to these political leaders is to inculcate a sense of identity and fealty in the masses whom they sought to secure as their power base:

> In a way, the world-view of the Party imposed itself most successfully on those incapable of understanding it. They could be made to accept the most flagrant violations of reality, because they never fully grasped the enormity of what was demanded of them, and were not sufficiently interested in public events to notice what was happening. By lack of understanding they remained sane. They simply swallowed everything, and what they swallowed did them no harm, because it left no residue behind, just as a grain of corn will pass undigested through the body of a bird. (Orwell, *1984* [1949] 2023, 156)

The counterintuitive emotionalization of issues of science like climate change and vaccines is, of course, intentional.[81] Suggesting that these issues result from conspiracies of the left to enslave right-thinking free Americans, and to impose upon them restrictions and changes in their way of life to promote a woke agenda, transforms them from issues of scientific, objective factual consideration into ones of quasi-religious tribal identity. Instead of the evil Goldstein who was the bogeyman threatening to undermine the people of Oceania or Snowball who was the alleged traitor to the best interests of

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[80] It is, of course, with some chagrin that any person of the left approaches the idea that there are left-wing American CEOs, given the nearly universal antipathy that CEOs have for labor unions and worker voice.

[81] Consider also Orwell in "Politics and the English Language": "The great enemy of clear language is insincerity. When there is a gap between one's real and one's declared aims, one turns as it were instinctively to long words and exhausted idioms, like a cuttlefish spurting out ink" (Orwell, "Politics" [1946] 1981, 167).

the animals in *Animal Farm*, the woke left is pinned as the insidious influence seeking to push climate mitigation and vaccine policies. Fervor, not dispassion, is brought to these most scientific of issues, bringing to mind the anti-Goldstein rallies in *1984*: "It was almost impossible to listen to him without being first convinced and then maddened. At every few moments the fury of the crowd boiled over and the voice of the speaker was drowned by a wild beastlike roaring that rose uncontrollably from thousands of throats" (Orwell, *1984* [1949] 2023, 181). In this manner, the use of emotionally manipulative rhetoric disconnected from objective fact is also similar to the ploys used by the ruling pigs in *Animal Farm*. "If Comrade Napoleon says it, it must be right" (Orwell, *Animal Farm* [1945] 2020, 82).

The factually and scientifically ungrounded rhetoric employed by climate deniers also was anticipated by Orwell. Much of *Animal Farm* and *1984* are preoccupied by the dangers posed when powerful political leaders skillfully manipulate the masses by eradicating any objective facts and thus eliminating any ability of the masses to hold them accountable. Indeed, the elimination of science and objective fact was a goal of the Party in seeking to secure its continuing power:

> In Oceania at the present day, Science, in the old sense, has almost ceased to exist. In Newspeak there is no word for "Science." The empirical method of thought, on which all scientific achievements of the past were founded, is opposed to the most fundamental principles of Ingsoc.
>
> [T]here was no vocabulary expressing the function of Science as a habit of mind, or a method of thought . . . . There was, indeed, no word for "Science," any meaning that it could possibly bear being already sufficiently covered by the word Ingsoc. (Orwell, *1984* [1949] 2023, 193, 310)[82]

The Orwellian success of these political leaders in obscuring reality can be seen in the poll data that has been cited demonstrating the striking disconnect that their political base, as reflected by self-identified Republicans and conservatives, has about climate change, vaccines, and President Obama's birth nation.

The intense identification of many of these acolytes of climate-denying political leaders with former President Trump exemplifies these Orwellian qualities. In *1984*, Big Brother is less a person than a rallying identity for what the masses should embrace, being juxtaposed with the enemy they should fear, "Goldstein." The former president's rallies have the quality of the Two Minutes Hate (Orwell, *1984* [1949] 2023, 12–16),[83] albeit over much longer time frames, in which he seeks to galvanize his

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[82] *Animal Farm*, of course, involved a similar story about the manipulation and deviation from empirical fact by leaders seeking power for themselves and compliance from their constituents. As the pigs take on more and more power, food, human beds, and other benefits for themselves, and starve, oppress, and work the other animals, they convince the other animals that things have always been as the pigs say and that things are always getting better. The animals could not remember if things were better: "There was nothing with which they could compare their present lives: they had nothing to go upon except Squealer's list of figures, which invariably demonstrated that everything was getting better and better" (Orwell, *Animal Farm* [1945] 2020, 130). Most famously, the original list of commandments the animals embraced for *Animal Farm* was continuously manipulated and altered with the original "All Animals Are Equal" becoming "Some Animals Are More Equal Than Others" (ibid. at 25, 134).

[83] Orwell describes the Two Minutes Hate, which always centers on Goldstein and the supposed Brotherhood group that was his organization conspiring to undermine the Party and state. Also, in *Animal Farm*, Napoleon blames everything on Snowball and suggests Snowball is everywhere: "It seemed to them [the Animals] as though Snowball were some kind of

supporters by disparaging a wide range of threats to his supporters, from a Black president who might not even have been American (President Obama) (*ABC News* 2016), to "sleepy Joe Biden" (Kapur 2023), to undocumented immigrants from "shithole countries" (Vitali, Hunt, and Thorp 2018), to Antifa (whatever that is),[84] to the woke left, to Pocahontas (Senator Warren) (Phelps 2018). "Even the humblest Party member is expected to be competent, industrious, and even intelligent within narrow limits, but it is also necessary that he should be a credulous and ignorant fanatic whose prevailing moods are fear, hatred, adulation, and orgiastic triumph. In other words, it is necessary that he should have the mentality appropriate to a state of war" (Orwell, *1984* [1949] 2023, 192). Rather than fret that their worldview is at odds with objective fact, the acolytes embrace one of the key tenets of the Party in *1984*: "IGNORANCE IS STRENGTH" (ibid. at 16, 26).[85]

Trump's role in the new political "antiwoke" right also has certain Big Brother–like qualities: "His function is to act as a focusing point for love, fear, and reverence, emotions which are more easily felt toward an individual than toward an organization" (Orwell, *1984* [1949] 2023, 208). Several of the climate-denial political leaders have a palpably uncomfortable relationship with this reality, as displayed when some of them sought to secure power for themselves in place of Trump in the 2024 Republican presidential primary, or had run against him in the past and have since responded to his superior poll ratings among the party base with a combination of attempts at distancing and shows of obsequious adoration (Gans 2023).[86] Even when seeking to advance themselves, they are careful to hew to the Inner Party's line on issues of tribal identity and to largely embrace the Bigger Brother (Trump)'s rhetoric on those issues, while stressing their superior chances at winning. The exponential increase in right-wing politicians' use of the already tired, overbroad, and misleading term "woke capitalism" illustrates this kind of tribal incantation and the use of language to sharpen identification with the party while simultaneously dulling real thought.[87] Embedding the false message that climate change is

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invisible influence, pervading the air about them and menacing them with all kinds of dangers" (Orwell, *Animal Farm* [1945] 2020, 78–79).

84 As a person of the left, I have never encountered anyone who is affiliated with or knows anyone affiliated with whatever Antifa is, if it actually exists as an organization of any genuine capacity.

85 Other concepts in *1984* describe the Inner Party's methods for obtaining compliant acceptance of the factually implausible from their members. Party members were trained in childhood in crime stop, black is white, and doublethink and are thus "unwilling and unable to think too deeply on any subject whatever" (Orwell, *1984* [1949] 2023, 211). "*Crimestop* means the faculty of stopping short, as though by instinct, at the threshold of any dangerous thought" (ibid. at 212). "*Crimestop*, in short, means protective stupidity" (212). "[B]lack is white" is the ability to say that black is white when the Party demands it, and not just "to know that black is white, and to forget that one has ever believed the contrary" (212).

86 The Republican presidential debates in 2023 illustrated this tendency. So does the behavior of Senators Cruz and Rubio, who were the subject of personal attacks by Trump, but who became dogged advocates for him (He 2016; DeBonis 2020; King 2017). And the governor of Florida's ambivalent relationship with President Trump has been widely reported (Gomez Licon 2023), as have Trump's awkward relationships with other rivals, such as his last remaining 2024 primary opponent, former Governor Haley (Racker 2023). The withdrawing candidates' conduct toward Trump has underscored the fear of Republican leaders of crossing Trump; many of his 2024 primary rivals, including Governor DeSantis, coupled their retreats from the race with strong endorsements of him. The governor's withdrawal announcement "descended into an exercise of sycophancy" toward Trump, and with that, save former Governor Christie, "all the male pretenders ha[d] rapidly fallen into line" (Krause-Jackson 2024).

87 "When one watches some tired hack on the platform mechanically repeating the familiar phrases . . . one often has a curious feeling that one is not watching a live human being but some kind of dummy. . . . And this is not altogether fanciful. A speaker who uses that kind of phraseology has gone some distance toward turning himself into a machine" (Orwell, "Politics" [1946] 1981, 167). "Words of this kind are often used in a consciously dishonest way. That is, the person who uses them has his own private definition, but allows his hearer to think he means something quite different. Statements like *Marshal Pétain was a true patriot, The Soviet press is the freest in the world, The Catholic Church is opposed to persecution*, are almost always made with intent to deceive. Other words used in variable meanings, in most cases more or less dishonestly, are: *class, totalitarian, science, progressive, reactionary, bourgeois, equality*" (ibid. at 162). "What was required, above all for political

not real, and not a proper business consideration for corporate and investment fund leaders, within a larger, supposedly legally grounded argument that their fiduciary duties require focusing solely on profit, underscores how sloppy language and thinking corrodes public discourse in a democratic society where what citizens understand as reality matters to policy outcomes.[88]

Because of the contradictions in their stated principles, the leaders of the antiwoke capitalism movement and their acolytes also display another Orwellian characteristic: the ability to proceed while knowing that what was being said was untrue but acting as if it were true, to engage in "doublethink":

> To know and not to know, to be conscious of complete truthfulness while telling carefully constructed lies, to hold simultaneously two opinions which cancelled out, knowing them to be contradictory and believing in both of them, to use logic against logic, to repudiate morality while laying claim to it, to believe that democracy was impossible and that the Party was the guardian of democracy, to forget whatever it was necessary to forget, then to draw it back into memory again at the moment when it was needed, and then promptly to forget it again, and above all, to apply the same process to the process itself—that was the ultimate subtlety; consciously to induce unconsciousness, and then, once again, to become unconscious of the act of hypnosis you had just performed. Even to understand the word "doublethink" involved the use of doublethink. (Orwell, *1984* [1949] 2023, 35)[89]

By way of nonexhaustive example, the antiwoke capitalism movement can be fairly said to embrace these examples of doublethink:

- Companies that wish to stifle information about climate change and action to address it may join together in industry groups to discuss and promote their views; companies that believe climate change is an urgent business and human problem violate the antitrust laws if they take identical action.

- Like other companies, insurance companies should focus only on profit, but they must provide insurance without pricing the risks of climate change to the constituents of climate-denying politicians.

- Companies should shut up about political issues and concentrate on profit, but they should continue to give treasury funds that could be used for dividends or capital investment to politicians and partisan political committees.

purposes, were short clipped words of unmistakable meaning which could be uttered rapidly and which roused the minimum of echoes in the speaker's mind" (Orwell, *1984* [1949] 2023, 308).

88 "Political language—and with variations this is true of all political parties, from Conservative to Anarchists—is designed to make lies sound truthful and murder respectable, and to give an appearance of solidity to pure wind" (Orwell, "Politics" [1946] 1981, 171).

89 "*Doublethink* means the power of holding two contradictory beliefs in one's mind simultaneously, and accepting both of them. . . . *Doublethink* lies at the very heart of Ingsoc, since the essential act of the Party is to use conscious deception while retaining the firmness of purpose that goes with complete honesty. . . . Even in using the word *doublethink* it is necessary to exercise *doublethink*. For by using the word one admits that one is tampering with reality; by a fresh act of *doublethink* one erases this knowledge; and so on indefinitely, with the lie always one leap ahead of the truth" (Orwell, *1984* [1949] 2023, 214).

- Companies that have pro-Christian, progun, or anticlimate views have values; companies that have contrary positions are illegitimately using other people's moneys to promote a "woke" agenda.

- Members of the Inner Party get vaccines and take climate mitigation efforts to protect themselves, their families, and their own property; however, the party faithful should distrust vaccines and climate change as part of a larger conspiracy to restrict their freedom.

There are no easy answers to addressing the enormous challenge that Orwellian tactics pose for our society's ability to address many urgent problems, and climate change in particular. Urgent, coordinated action is needed to prevent enormous economic, human, and environmental harm. Even human beings who agree with that reality can have important differences that must be hashed out to ensure that effective and timely efforts are made, especially given the vast differences in wealth, power, and other attributes of the societies and human beings who will be affected by the reforms and change necessary to arrest warming before it is too late.[90]

But when a large percentage of the population of a republican democracy has been inculcated to deny the basic reality of human-caused climate change and its dangers, our society's ability to act with the speed and scale necessary to help humanity meet the challenge is fundamentally undermined. The countermajoritarian mechanisms that act as an intended break on tyranny instead become a tool to impede progress at the instance of political leaders misusing using a genuine emergency as one of their manipulative tools to secure their own power.

One way to redress this threat to our society and the genuine freedom that it is intended to provide its citizens is to draw on Orwell's *1984* protagonist Winston Smith himself and to recognize that the potential power of his resistance is greater in a society that is not totalitarian. In the United States, as opposed to Oceania, the leaders of the anti-ESG movement are using Orwellian tools of manipulation to secure their power among a minority (however important) of the population within what is basically their primary electorate. Insisting that "two plus two make four" is nonetheless essential to protecting our freedom.[91]

Asking and insisting on principled answers—over and over again if necessary—to questions like these is urgent:

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[90] In this regard, most conservative economists say that the best way to address the negative impact of carbon and methane on the climate is to tax them to price the externality and let the market then react to reduce their use (Banzhaf 2020). But, when Orwellian rhetoric is addressed to the party acolytes to obscure basic facts, it becomes as a practical matter impossible to get self-proclaimed conservative elected officials to do that (Meyer 2022). This reality motivated conservative proposals like cap and trade as a second-best alternative to a carbon tax, which are then attacked as left-wing inventions when moderate Democrats like President Obama embrace them (Arnold 2014). The same thing happened in the health care space where the adoption in the Affordable Care Act of a longstanding Heritage Foundation idea—the idea that everyone uses the health care system and there should be a minimum user fee on everyone—led to its vilification because that conservative-originated idea was accepted by President Obama (Jacobson 2010; Haislmaier 2006). My strong sense is that many Republican primary voters who were told that these tools were instruments of the far left had no idea that that was—as a matter of objective fact—not true.

[91] "Freedom is the freedom to say that two plus two make four. If that is granted, all else follows" (Orwell, *1984* [1949] 2023, 81).

- Just a few years ago, you admitted that human beings caused climate change. Why are you denying that now?

- What is your scientific basis for denying that the emission of huge amounts of carbon and methane in the past fifty years is not causing the demonstrable increase in temperatures, storms, glacier meltage, and reef deaths?

- If corporations breach their fiduciary duties by taking stands on political or social issues, how come you have accepted millions of dollars in contributions from them? Will you agree to stop accepting those contributions?

- You insist that it is illegitimate for corporate leaders to consider the effect of their corporations' conduct on the environment and its contribution to climate change. Do you know that your own state's corporate law expressly authorizes them to do just that?

- If the Net Zero Alliance is illegal under the antitrust laws, why are you not investigating the American Petroleum Institute?

- If corporations must focus on profits, doesn't an insurance company have to price climate risk in writing policies covering property that is at risk for damage because of climate change?

- If institutional investors must be prudent in investing, don't they have to take into account objective reality, such as the threat climate change poses to certain industries?

- Do you accept the evidence that your own state has suffered greatly from increased storms and heat waves over the last two decades resulting from climate change? In fact, haven't you sought federal assistance to pay your state to help deal with the resulting harm? Why should federal taxpayers subsidize your state if you continue to deny the reality of climate change and refuse to do your part?[92]

In other words, although there surely are other measures that can be taken to better guarantee that our society can address important policy issues and resolve differences about them on a factually sound basis, the relentless insistence that those who obscure objective reality be confronted with the fact that they are doing it is a necessary place to start. When someone denies fact, mainstream institutions should call that out and refuse to legitimize their misinformation tactics. Lies should be labeled as lies. Manipulative, fraudulent half-truths should be labeled as just that. Changes in factual position unexplained by reason should be called out as self-interested hypocrisy. And when someone denies objective reality on one subject, their views as to all subjects should be regarded with justifiable suspicion.

[92] There are of course also rational nonclimate questions of this kind, such as: If a corporation can have religious values and even close on Sundays when other competitors are open, why can't a corporation have the view that it will better serve its customers and stockholders if it has good DEI practices that ensure that the full range of America's diversity is represented among its workforce?

As to climate change in particular, this is essential and justified. No one has a rational motive to conspire to invent a false notion that human carbon and methane usage is warming our climate in a manner that seriously threatens our economy, the livability of many communities, and the quality of our lives. Conceiving of such an idea brings no hedonic or moral advance. There is nothing intrinsically wrong with carbon or methane, and no rational person of the left wants to reduce their use as a moral end in itself. All of us who are rational would be pleased if products that keep us warm in winter, keep us cool in summer, and enable our mobility could continue to be used safely and without harming our futures.

It is precisely those who deny the objective reality that carbon and methane usage has already caused substantial, harmful climate change and will cause enormous future warming and harm if not arrested who are conspiring against the basic idea of empirical truth. A free society cannot function if political leaders and citizens do not accept that two plus two make four and work out their legitimate differences over how to address that reality. Otherwise, those who seek to have their own facts will ultimately undermine our society's ability to collectively pull together to sensibly and timely address the large-scale problems that must be confronted if the basic framework for a safe, healthy, stable, and economically prosperous society is to be secured. And without that kind of framework, the fact deniers will deprive everyone else of this nation's animating promise to be one where people of good faith but different beliefs can thrive, and where future generations of Americans have the promise of even better lives.

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