

THE LIMITS OF PORTFOLIO PRIMACY

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ABSTRACT

Climate change is one of the defining challenges of our time, but governments around the world are failing to deliver adequate responses. Given government inertia, many observers have suggested that large institutional investors can be expected to use their shareholder power to push companies toward decarbonization. In particular, according to a theory that is gaining increasing support among academics and practitioners (“portfolio primacy theory”), index funds have strong financial incentives to become “climate stewards” because their portfolios mirror the entire economy and therefore internalize, at least in part, the social costs of climate change (“climate externalities”).

But to what extent can society rely on portfolio primacy to mitigate the threat of climate change? This Article provides a conceptual and empirical assessment of the potential impact of portfolio primacy on climate risk mitigation, by examining the scope of action, economic incentives, and fiduciary conflicts of index fund managers. The analysis reveals three major limits that are likely to undermine the practical impact of portfolio primacy on climate risk mitigation.

First, the potential scope of climate stewardship is narrow, as most companies around world, including most carbon emitters, are private,

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controlled by state governments or private shareholders, or influenced by significant blockholders. In particular, my analysis of the ownership structure of oil, gas, and coal companies in the FTSE Global All Cap Index—one of the broadest equity indices tracked by index funds and fairly representative of the global stock market—reveals that most publicly-traded carbon emitters are partially or totally shielded from index fund stewardship.

Second, index fund managers internalize climate externalities to a very limited degree and therefore have very weak incentives to engage in aggressive climate stewardship. In particular, index funds are interested in maximizing the welfare of large producers, but not necessarily the welfare of small firms and consumers; index funds are disproportionately invested in richer economies, which are relatively less vulnerable to climate change; and they discount the distant future at a much higher rate than what most experts believe is the social discount rate for climate mitigation.

Third, index fund managers advise dozens of funds with different portfolios and conflicting interests with respect to climate mitigation. I show through a numerical simulation that, under plausible assumptions, many of the “Big Three” index funds with the largest holdings in Exxon will oppose a climate mitigation measure that penalizes oil companies even if it benefits the stock market as a whole.

Taken together, these limits show that portfolio primacy is not an adequate substitute for climate regulation and might even make things worse by creating a false sense of security that could reduce the political capital for government intervention. The Article suggests that climate regulation should remain the primary goal for those concerned about climate risk and provides a basic framework to assess capital market policies aiming at strengthening the role of private actors in climate risk mitigation.

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INTRODUCTION

Climate change is one of the defining challenges of our time. Without mitigation, the increasing concentration of greenhouse gases in the atmosphere will cause severe and irreversible damage to our societies and might possibly have catastrophic consequences for human life.¹

Yet governments around the world are failing to deliver adequate responses to this challenge. In the United States, no major federal environmental reform has been enacted since the 1990s,² and the growing partisan divide on environmental issues makes ambitious climate legislation difficult to pass.³ As recently as June 2022, the Supreme Court deprived the Environmental Protection Agency (EPA) of a powerful regulatory tool to reduce industrial carbon emissions,⁴ and many leading climate scientists believe that this ruling will result in an even weaker and slower response to climate change.⁵

In this context, legal scholars and economists have been studying whether private actors can step up to the challenge and fill the regulatory gap.⁶ In particular, a theory that is gaining increasing support among academics and practitioners suggests that large asset managers, and in particular index fund managers, can and will use their legal and economic power as shareholders of large corporations to push these corporations to reduce their carbon footprint. This view is based on the theory that the goal of index funds is not to maximize the value of individual companies (shareholder primacy), but rather to maximize the value of their entire investment portfolio (portfolio primacy). Under this view, index fund portfolios mirror the whole economy and therefore have strong financial incentives to reduce systemic, economy-wide risks such as climate change.⁷

¹ See *infra* notes 27-32, and accompanying text.

² Michael P. Vandenbergh, *Private Environmental Governance*, 99 CORNELL L. REV. 129, 131 (2013).

³ See Jonathan M. Gilligan & Michael P. Vandenbergh, *A Framework for Assessing the Impact of Private Climate Governance*, 60 ENERGY RES. & SOC. SCI. 1, 2 (2020).

⁴ *West Virginia, et al. v. Environmental Protection Agency*, 597 U.S. __ (2022).

⁵ See *generally* Brief for Climate Scientists Michael Oppenheimer et al. as Amici Curiae in *id.*

⁶ See sources cited *supra* notes 2-3, and *infra* note 15.

⁷ For an early economic model showing how diversified investors internalize externalities and want to maximize portfolio value, see Robert G. Hansen & John R. Lott, *Externalities and Corporate Objectives in a World with Diversified Shareholder/Consumers*, 31 J. FIN. QUANTITATIVE ANALYSIS 43 (1996). For recent academic articles arguing that index funds and other large, diversified owners can be expected to reduce companies' climate externalities, see *generally* Madison Condon, *Externalities and the Common Owner*, 95

Economists and legal scholars have pointed out that portfolio-level economic incentives make climate risk mitigation financially profitable for index funds and other diversified investors. The underlying idea is quite simple. Diversified portfolios include both companies that create climate externalities and companies that suffer those externalities. Therefore, whenever climate externalities result in a net loss for the market, “a portfolio-wide owner should be motivated to curtail those externalities at the source.”⁸ A different version of this theory argues that climate risk is a systematic risk affecting the entire market, and therefore diversified asset managers such as index funds will try to reduce climate risk in order to “lower systematic risk and thus to improve risk-adjusted returns for portfolio investors.”⁹ Either way, we should expect index funds to care about climate risk and to pressure companies to reduce their carbon footprint.

Portfolio primacy has been obtaining increasing support among public institutions, market players, and environmental activists. For example, a 2011 report by the United Nations Principle of Responsible Investment argued that large asset managers are “universal owners,” with “highly-diversified and long-term portfolios that are representative of global capital markets,” and therefore are exposed to “costs from environmental damage caused by companies.”¹⁰ Therefore, the report concluded, “[i]t is in the financial interest of Universal Owners to address environmental impacts of business activities to reduce this exposure.”¹¹

In November 2017, the head of the Japanese Government Pension Fund stated that the main driver of return for the fund was market-wide performance, rather than company-level performances, and therefore the fund would hire social and environmental experts to try to improve market return by producing a positive impact on society and the economy.¹² And in December 2021, The Shareholder Commons, a non-

WASH. L. REV. 1 (2020); Jeffrey N. Gordon, *Systematic Stewardship*, J. Corp. L. (forthcoming 2022); John C. Coffee, Jr., *The Future of Disclosure: ESG, Common Ownership, and Systematic Risk*, ECGI Law Working Paper No. 541/2020 (2021), available at <https://ssrn.com/abstract=3678197>; Luca Enriques & Alessandro Romano, *Rewiring Corporate World in an Interconnected World*, 64 ARIZ. L. REV. (forthcoming 2022), <https://ssrn.com/abstract=3814822>.

⁸ Condon, *supra* note 7, at 6.

⁹ Gordon, *supra* note 7, at 3.

¹⁰ UNITED NATIONS PRINCIPLES FOR RESPONSIBLE INVESTMENT, UNIVERSAL OWNERSHIP: WHY ENVIRONMENTAL EXTERNALITIES MATTER TO INSTITUTIONAL INVESTORS 3 (2011), available at <https://perma.cc/F2BL-RCYF>

¹¹ *Id.* at 9.

¹² See JON LUKOMNIK & JAMES P. HAWLEY, MOVING BEYOND MODERN PORTFOLIO THEORY 86 (2021).

profit organization engaged in shareholder advocacy on social and environmental issues, submitted a shareholder proposal at BlackRock, the world's largest asset managers, advocating a shift from traditional investment stewardship to portfolio primacy.¹³ In doing so, the Shareholder Commons' explicit goal was to "find a way to deploy private capital in a manner that prioritizes vital environmental and social system over individual company profits."¹⁴

The idea behind portfolio primacy is elegant and compelling. It puts a spotlight on a very important fact: broadly diversified investors with significant shareholder power do have stronger incentives and better tools than small undiversified shareholders to push companies to reduce their carbon footprint. Portfolio primacy is also politically appealing for many, as it promises to be a powerful market-based tool to by-pass the political gridlock and government paralysis on climate policy. If government does little to tackle climate risk, private actors must step in,¹⁵ and index funds might very well good candidates for this role.

This Article accepts the conceptual premises of the portfolio primacy theory but seeks to assess its practical impact. To what extent can we rely on portfolio primacy to mitigate climate risk? Can we expect index fund stewardship to become a meaningful tool for climate mitigation?

To provide a conceptual and empirical assessment of portfolio primacy, this Article examines the scope of action, economic incentives, and fiduciary conflicts of index fund managers with respect to climate

¹³ Blackrock, Inc., S.E.C. No-Action Letter, 2022 WL 225966, at *2 (Apr. 4, 2022). For a detailed analysis of this proposal and its implications for corporate governance and fiduciary law, see Roberto Tallarita, *Fiduciary Deadlock*, 171 U. PA. L. REV. ONLINE (forthcoming 2022).

¹⁴ The Shareholder Commons, *About*, [THE SHAREHOLDER COMMONS.COM, https://theshareholdercommons.com/about/](https://theshareholdercommons.com/about/).

¹⁵ In a series of works, Mike Vandenberg and co-authors have built an articulated and compelling defense of the role of private governance for climate risk mitigation. See Michael P. Vandenberg, *The New Wal-Mart Effect: The Role of Private Contracting in Global Governance*, 54 UCLA L. REV. 913 (2007); MICHAEL P VANDENBERGH & JONATHAN M GILLIGAN, *BEYOND POLITICS: THE PRIVATE GOVERNANCE RESPONSE TO CLIMATE CHANGE* (2017); Ash Gillis et al., *Convincing Conservatives: Private Sector Action Can Bolster Support for Climate Change Mitigation in the United States*, 73 ENERGY RES. & SOC. SCI. 1 (2021).

A recent work highlighting the quasi-regulatory role of asset managers is Dorothy Lund, *Asset Managers as Regulators*, 171 U. PA. L. REV. (forthcoming 2022), <https://ssrn.com/abstract=3975847>. Professor Lund argues that "in light of their size and "universal ownership"—the fact that they hold stakes in every company in the public market—the Big Three have been able to assume regulatory functions that typically reside in the hands of large government agencies like the EPA or SEC." *Id.* (manuscript at 3). Like the supporters of portfolio primacy, Professor Lund believes that index funds can and do play a role in climate risk mitigation; however, she does not attribute this role to portfolio primacy, but to the "demand for rules from a broad swath of actual and potential clients." *Id.*

risk mitigation. Although portfolio primacy potentially applies to all large investors with broadly diversified portfolios, index funds are the most obvious candidates to put the theory into practice and undertake the role of “climate stewards.” Index fund managers—and especially the “Big Three” BlackRock, State Street and Vanguard—have been gaining an extraordinary shareholder power,¹⁶ and they are programmatically focused on mirroring market indices rather than picking the best individual stocks.¹⁷ In the popular shorthand, they “own the market,”¹⁸ and therefore they are interested in how the market does as a whole, rather than in the value of individual companies. If we concluded that the Big Three offer little hope for effective climate stewardship, the whole promise of portfolio primacy would appear unreliable.

The analysis presented here identifies and discusses three crucial limits of portfolio primacy. The first limit is that the potential scope of climate stewardship is narrow, as most companies around the world, including most carbon emitters, are private, state-owned, or influenced by major blockholders, and therefore are totally or partially shielded from the influence of index funds.¹⁹ Publicly traded companies, the target of index fund stewardship, represent only a subset of the global economy. In the United States, for example, the contribution of public companies to the gross domestic product (GDP) is only slightly more than 20%, and in major emerging economies (and major carbon emitters) such as China and India, public companies play an even smaller role.²⁰

Furthermore, even within the subset of public companies, most companies have a controlling shareholder or an influential blockholder who can frustrate stewardship initiatives. Based on ownership data for the 253 oil, gas, and coal companies included in the FTSE Global All Cap Index, one of the broadest indices tracked by index funds, I estimate that companies in which insiders have less than 5% of the shares represent less than one third of the aggregate market value of the index. Furthermore, outside of the United States, Canada, and the United Kingdom, 94% of the value of the index is represented by companies with insiders owning at least 20% of the shares.

Finally, if climate stewardship became a significant and effective strategy, companies with carbon intensive assets could stay or go private

¹⁶ See *infra* notes 53-54, and accompanying text.

¹⁷ See *infra* notes 46-51, and accompanying text.

¹⁸ See, e.g., Julie Connelly, *The Ease of Index Funds: No Ins and Outs to Know*, N.Y. TIMES, Oct. 23, 2007 (“The argument for indexing is that you cut your risk of being in the wrong stock at the wrong time because you own the market.”).

¹⁹ See *infra* Part II.

²⁰ See sources cited *infra* notes 65-70, and accompanying text.

or could sell their most problematic assets to private buyers, thus insulating them from index fund influence. Whatever incentives and power index funds have to influence climate strategy, it is unlikely that they will start policing and blocking M&A deals. Thus, the narrow scope of action of climate stewardship would likely get even narrower.

The second limit of portfolio primacy is that index fund managers internalize climate externalities to a very limited degree and therefore have very weak incentives to engage in aggressive climate stewardship.²¹ To begin with, index fund portfolios internalize only the effects of climate change on large corporations, not on small and micro firms or individuals. Climate effects that harm people without harming mega-capitalization companies' stock value are not internalized by index funds, and therefore do not prompt them to act. In fact, under portfolio primacy, index funds would support climate strategies that would protect large corporations while creating negative effects for consumers and society.

Furthermore, index funds are disproportionately invested in richer economies, which are relatively less vulnerable to climate change. Based on an analysis of the geographic exposure of revenues of the portfolio companies of the thirty largest BlackRock ETFs, which manage \$1.4 trillion of assets worldwide, I estimate the exposure of these funds to country-level climate risk compared to the "fair share" of exposure to climate risk of a geographically unbiased portfolio. My analysis shows that the thirty largest BlackRock ETFs' exposure to the United States is twice as large as their "fair share" should be, whereas their exposure to India is less than half of their "fair share," their exposure to the Middle East is less than a third of their "fair share," and their exposure to Africa is about a fourth of their fair share. Such a geographic bias means that these funds have weak incentives to address global climate risk and they would likely oppose many potential climate mitigation measures that would be socially desirable on a global scale.

Finally, index funds likely discount the distant future at a much higher rate than what most experts believe is the correct social discount rate for climate damage. The consensus among experts is that society should discount future climate damage at a rate between 1% and 3%. By contrast, the stock market discount rate is 7% or higher. Although we have little evidence on how the market discounts climate mitigation investments, it is plausible that such rate is much closer to the 7% average stock market rate than to the social discount rate. As a result, index funds massively underestimate the social value of climate risk mitigation and have very weak incentives to invest in it. For example, if index funds discounted the future at a 2% rate, an index fund owning

²¹ See *infra* Part III.

1% of the global economy would be willing to spend more than \$809 million in 2023 in order to generate \$1 trillion market-wide climate benefits in 2150. By contrast, at a 7% discount rate, the same index fund would be willing to spend no more than \$2 million, only 0.2% of the socially appropriate investment.

The third limit of portfolio primacy is that index fund managers advise hundreds of funds with different investment objectives and therefore face insoluble fiduciary conflicts that discourage aggressive climate stewardship. Based on the portfolio composition of the Big Three index funds with the twenty largest equity holdings in Exxon Mobil (Exxon), I estimate that, under plausible assumptions, many of these funds would lose money if asset managers supported a climate mitigation measure that penalizes oil companies but benefits the stock market as a whole. Therefore, even if a climate mitigation measure results in a net gain for the stock market, some index funds within the same family might have incentives to oppose it, and the asset managers of the entire family would face significant fiduciary conflicts in implementing a portfolio primacy strategy.

Taken together, these limits show that our expectations of portfolio primacy's impact on climate risk should be modest. The potential role of index funds for climate risk mitigation is limited and we should be wary of relying on index funds' climate stewardship as an effective tool for climate mitigation. In fact, excessive reliance on index fund stewardship might create a false sense of security and reduce the political capital for painful but necessary government intervention. Capital market policies can work as transmission mechanism to internalize regulatory risk and social pressure on an individual-company level, but climate regulation should remain the primary goal for those concerned about the threat of climate change.

The Article is organized as follows. Part I discusses why climate change is a market failure, and it summarizes the main arguments in support of portfolio primacy as a market-based mechanism to correct this failure. Part II examines the potential scope of action of climate stewardship, and it shows that it is presently quite narrow and will tend to become even narrower. Part III examines the extent to which index funds actually internalize global climate externalities, and it shows that index funds internalize only producer welfare, not total welfare, are overexposed to richer economies, and discount climate mitigation at a high rate; therefore, index funds massively underestimate the social value of climate mitigation. Part IV examines the internal conflicts within fund families with respect to climate mitigation, and it shows that many funds have incentives to oppose climate mitigation measures that are profitable for the stock market as a whole. Part V discusses the policy implications of the analysis and offers a basic framework to assess

capital market policies on climate risk.

* * *

Before proceeding, some clarifications are in order. First, the literature distinguishes two broad categories of climate-related risks: physical climate risk and transition risk.²² Physical climate risk includes risks arising from rising temperatures, extreme weather events, and other changes in climate, whereas transition risk includes risks connected with the transition to a low-carbon economy, due to regulation or changes in technology and social preferences. This Article uses the terms climate risk and climate damage to refer to physical climate risk and damage. Transition risk does not derive from climate change *per se* but from the social and political response to climate change.

It is possible that investors (including index funds) want companies to adopt climate mitigation measures in anticipation of environmental regulation or a change in consumer preferences.²³ Such a decision, however, is driven by a traditional company-level shareholder value-maximizing approach, not by a portfolio-primacy approach. In this scenario, it is the regulatory and social pressure that changes the investors' incentives, not the portfolio-wide internalization of externalities. In order to examine the ability of portfolio primacy—as opposed to regulatory and social pressure—to drive climate mitigation, we must examine the willingness of index funds to address physical climate risk, not transition risk.

Second, a recent academic literature and institutional and corporate manifestos have forcefully argued in favor of the view that corporate leaders can and should be expected to take into account the interests of all corporate stakeholders, including the environment and society at

²² See, e.g., BANK FOR INTERNATIONAL SETTLEMENTS, CLIMATE-RELATED RISK DRIVERS AND THEIR TRANSMISSION CHANNELS 5 (2021).

Sometimes, experts separately identify a third category of climate risk: liability risk, which arises from the company's management of other kinds of climate risk. See, e.g., Mark Carney, Governor of the Bank of Eng., Speech at Lloyd's of London: Breaking the Tragedy of the Horizon: Climate Change and Financial Stability (Sept. 29, 2015), <http://www.bankofengland.co.uk/publications/Documents/speeches/2015/speech844.pdf>. For our purposes, however, liability risk is a derivative risk, which is connected either to physical risk or to transition risk.

²³ For a discussion of how companies are exposed to transition risks, see, e.g., Ali A. Zaidi, *Mandates for Action: Corporate Governance Meets Climate Change*, 72 STAN. L. REV. ONLINE 122 (2019-2020); Cynthia A. Williams, *Fiduciary Duties and Corporate Climate Responsibility*, 74 VAND. L. REV. 1875, 1884-1885 (2021); For a discussion of how private environmental governance initiatives (shareholder proposals, activism, company commitments, etc.) create "transition risk," see Michael P. Vandenberg, *Disclosure of Private Climate Transition Risks*, 63 WM. & MARY L. REV. 1695 (2022).

large, rather than only the interests of shareholders.²⁴ An optimistic version of this view suggests that corporate leaders, perhaps through some ad-hoc improvements to corporate governance arrangements (such as climate-oriented compensation metrics, or enhanced insulation from shareholder pressure), can be expected to take meaningful steps toward decarbonization. In a series of articles co-authored with Lucian Bebchuk and Kobi Kastiel, I critically examine this view and its theoretical and empirical shortcomings.²⁵ Here, I study the role of major institutional shareholders, not of management, in pushing corporations to address climate risk. The two issues overlap in some general aspects but are very different.

Third, some commenters, discussing earlier drafts of this Article, have argued that, due to Congressional gridlock and bad political incentives, a carbon tax or other aggressive regulatory measures against climate change are unlikely to materialize in the near future. Therefore, these critics argue, index fund climate stewardship is at least a step in the right direction, in the absence of better alternatives.

Matt Levine, for example, discussing an earlier draft of this Article on Bloomberg, observed that, while it is perhaps true, as I argue, that regulation would be a better response to climate change than index fund stewardship, “if policy makers *don’t* want to fight climate change then BlackRock will probably do something.”²⁶ As discussed above, I agree with these commentators that legislative and regulatory action on climate has been lagging dramatically and might well continue to lag in the future. I also believe that, in assessing how to tackle the climate crisis best and more quickly, we need to consider the respective roles of private and public actors, not only of public actors.

However, in order to have a meaningful conversation on this crucial problem, we must be clear-eyed on the limits of index fund stewardship.

²⁴ For an overview of the literature and of the most prominent defenses of this view, see Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 103-108 (2020).

²⁵ Bebchuk & Tallarita, *Illusory Promise*, *supra* note 24; Lucian A. Bebchuk, Kobi Kastiel & Roberto Tallarita, *For Whom Corporate Leaders Bargain*, 94 S. CAL. L. REV. 1467 (2021); Lucian A. Bebchuk & Roberto Tallarita, *Will Corporations Deliver Value to All Stakeholders?*, 75 VAND. L. REV. (forthcoming 2022); Lucian A. Bebchuk, Kobi Kastiel & Roberto Tallarita, *Stakeholder Capitalism in the Time of COVID* 40 YALE J. REG. (forthcoming 2022); Lucian A. Bebchuk & Roberto Tallarita, *The Perils and Questionable Promise of ESG-Based Compensation*, 48 J. CORP. L. (forthcoming 2022); and Lucian A. Bebchuk, Kobi Kastiel & Roberto Tallarita, *Does Enlightened Shareholder Value Add Value*, 77 BUS. LAW. 1 (2022).

²⁶ Matt Levine, *Money Stuff: Investment Banking is Cheap If You’re Rich*, BLOOMBERG.COM, Sept. 20, 2021, <https://www.bloomberg.com/news/newsletters/2021-09-20/money-stuff-investment-banking-is-cheap-if-you-re-rich>.

The shortcomings of politics are not a good reason to make excessive reliance on private actors. The goal of this Article is to help set more accurate expectations on what index funds can and will do with respect to climate risk mitigation, so that we, as a society, can make more effective choices in our fight against climate change.

I. INDEX FUNDS AS CLIMATE STEWARDS

A. Climate Change as a Market Failure

1. Climate Change as a Collective Action Problem

The scientific consensus is that human activity is the dominant cause for global warming and other observed changes in the climate system.²⁷ Fossil fuel combustion and certain industrial processes, as well as forestry and other land use, have led to unprecedented levels of carbon dioxide (CO₂) and other greenhouse gases in the earth's atmosphere.²⁸ The resulting effects include rising average temperatures, impacts on temperature extremes, changes in precipitation patterns, sea level rise, alterations in hydrogeological systems, wildfires, and more frequent extreme weather events.²⁹

Without mitigation, the continued emission of greenhouse gases might cause "severe, pervasive and irreversible impacts for people and ecosystems."³⁰ In many plausible scenarios, climate change is a "major threat to humans and to the natural world,"³¹ and in some highly uncertain but possible scenarios, it may have catastrophic consequences for human life.³²

From an economic standpoint, the problem of climate change is a classic market failure.³³ Individuals and firms engage in activities resulting in carbon emissions because they benefit from them.³⁴ For

²⁷ Intergovernmental Panel on Climate Change, *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* 47-49 (R.K. Pachauri and L.A. Meyer eds. 2014).

²⁸ *Id.* at 45-46.

²⁹ *Id.* at 49-54.

³⁰ *Id.* at 56.

³¹ William Nordhaus, *Climate Change: The Ultimate Challenge for Economics*, 109 AM. ECON. REV. 1991, 1996 (2019).

³² Martin L. Weitzman, *On Modeling and Interpreting the Economics of Catastrophic Climate Change*, 91 REV. OF ECON. & STAT. 1 (2009).

³³ For a general discussion of the economics of climate change, see generally NATHANIEL O. KEOHANE & SHEILA M. OLMSTEAD, *MARKETS AND THE ENVIRONMENT* (2nd ed. 2016).

³⁴ In this Article, I will use "carbon emissions" and "greenhouse gas emissions" interchangeably. Sometimes, for brevity, I will just use "emissions" to refer to carbon emissions.

example, many people drive a car to work, and companies burn fossil fuels to generate the energy needed for their industrial processes. However, while these individuals and firms benefit from these activities, they do not bear all the costs associated with the emissions of greenhouse gases resulting from these activities. In fact, since climate change affects firms and individuals globally, most costs of carbon emissions are effectively imposed on someone else. Climate change is a quintessential economic externality.³⁵

As a result, individual actors lack the economic incentives to reduce carbon emissions. Despite the consensus that the current level of carbon emission is excessive, and that society as a whole would benefit from its reduction, individual actors would not benefit from the reduction of their own emissions. For example, companies that switch to renewable sources of energy would pay the costs associated with this switch, while most of the benefits would be reaped by someone else. Therefore, each company has an incentive to maintain its current level of emissions while benefitting from the mitigation measures implemented, and paid for, by others. The equilibrium resulting from this free riding problem is one in which the level of carbon emissions produced by economic activity is higher than what would be socially desirable.

2. Policy Remedies for Climate Change

A traditional policy remedy to an externality problem of this kind is the imposition of a tax equal to the social cost of the relevant activity.³⁶ With a “carbon tax,” the individual firm would pay the entire social cost associated with the production of carbon emissions rather than imposing most of this cost on others. Therefore, the firm would internalize its own climate externalities and would have an economic incentive to set the

³⁵ In economic theory, externalities can be positive or negative. Carbon emissions impose negative externalities. For simplicity, since the externalities discussed here are negative externalities, I will use the phrase “climate externalities” to refer to climate change-related negative externalities.

³⁶ These kinds of taxes are commonly named Pigouvian taxes, after the economist who first theorized them. ARTHUR C. PIGOU, *THE ECONOMICS OF WELFARE* 168-171 (1920). Pigou was of course unaware of the impact of greenhouse gases on climate, but one of his examples, of great concern for his contemporaries, was about industrial emissions. Pigou reported that in London, according to a recent study at the time, “there [was] only 12 per cent as much sunlight as astronomically possible” due to the smoke produced by factory chimneys. Pigou observed that although “factory chimney [could] be made practically smokeless” through existing technologies, firms underinvested in the prevention of smoke because much of the cost of those emissions was borne not by the emitting firm but by the community (“in injury to buildings and vegetables, expenses for washing clothes and cleaning rooms, expenses for the provision of extra artificial light, and in many other ways”). *Id.* at 160-161.

level of carbon emissions at a socially desirable level.³⁷ Other examples of possible climate policies are abatement subsidies (subsidies for the reduction of carbon emissions), cap-and-trade policies (which establish a total allowable quantity of emissions and allow firms to buy and sell emission permits), information-based policies (such as mandatory disclosure, ecolabeling, and certification programs), and traditional prescriptive regulation (such as mandatory technology standards and ceilings on emissions).³⁸

Climate externalities may also lead to the emergence of social and cultural norms (including changes in consumer and investor preferences) that would put pressure on companies and financial intermediaries to accelerate the transition to a low-carbon economy.³⁹ For example, some consumers might prefer products sold by companies with better environmental standards, and investors might be willing to accept a somewhat lower financial payoff in order to reduce their company's carbon emissions.⁴⁰ Recently, large companies have seen a rise in support of shareholder activism on social and environmental issues, including climate disclosure and decarbonization.⁴¹ Furthermore, according to some authors, younger investors and consumers are more likely to demand social and environmental responsibility from investment managers and corporations.⁴² Changing social norms may also affect investment managers directly: for example, investment managers might follow, to some extent, their own prosocial and expressive preferences (rather than those of the beneficial owners) or might cave in to peer pressure on environmental issues.⁴³

³⁷ See generally A. Lans Bovenberg & Lawrence H. Goulder, *Environmental Taxation and Regulation*, in 3 HANDBOOK OF PUBLIC ECONOMICS 1471 (Alan J. Auerbach & Martin Feldstein eds., 2002).

³⁸ For a discussion of various types of environmental policy instruments, see Keohane & Olmstead, *supra* note 33, at 139-147.

³⁹ For a discussion of the emergence of social norms as a response to negative externalities, see JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY 250-251 (1990).

⁴⁰ On the altruistic preferences of shareholders, see Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J.L. FIN. & ACCT. 247 (2017).

⁴¹ For a discussion of this phenomenon, see generally Roberto Tallarita, *Stockholder Politics*, 73 HASTINGS L. J. (forthcoming 2022).

⁴² Michal Barzuza, Quinn Curtis, & David H. Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 143 (2020).

⁴³ For a discussion of "image motivation," which is "the desire to be liked and well regarded by others," as a driver in prosocial behavior, see, for example, Dan Ariely, Anat Bracha, & Stephan Meier, *Doing Good or Doing Well? Image Motivation and Monetary Incentives in Behaving Prosocially*, 99 AM. ECON. REV. 544 (2009). For a discussion of social pressure as a driver of charitable giving (people would rather not donate but "dislike saying no ... due to social pressure"), see Stefano DellaVigna, John A. List, &

All these mechanisms—taxes, regulation, and social and cultural pressures—affect corporate decisions at the level of the individual company. They either modify the incentives or constrain the choices of the individual company. For example, a carbon tax might raise the price of fossil fuels to a point where the construction of a new petrochemical plant, which would have been profitable without the tax, becomes unprofitable and is abandoned. A government subsidy might turn an unprofitable investment in renewable energies into a profitable one. Consumers with environmentally friendly preferences might be willing to pay for the additional cost necessary to reduce carbon emissions and make such a measure profitable. And so forth. In all these cases, regulatory or social pressure changes the incentives or the available choices of the individual company in a direction that is socially more desirable.

By contrast, a theory that is gaining increasing support, and that is the subject of this Article, holds that climate externalities could be addressed at the level of investment portfolios rather than at the level of the individual company. According to this theory, large, broadly diversified investors, such as the most influential index fund managers, internalize climate externalities because they invest both in companies producing carbon emissions and in companies bearing the costs of those emissions. Therefore, by maximizing the value of their entire portfolio (portfolio primacy) rather than the value of the individual company (shareholder primacy), index fund managers have strong economic incentives to undertake the role of “climate stewards” and steer companies toward decarbonization.⁴⁴

This theory is particularly appealing because it offers a tool to fight climate change that relies not on regulation (which has become increasingly difficult to adopt)⁴⁵ or optimistic social and cultural changes, but on the sheer power of financial incentives. If the theory held true, portfolio primacy would alleviate the effects of an epochal market failure through a purely market-based mechanism.

This Article scrutinizes this view and exposes its many limits. Before proceeding, however, the next Section will present the case for portfolio primacy and index funds’ climate stewardship.

Ulrike Malmendier, *Testing for Altruism and Social Pressure in Charitable Giving*, 127 Q. J. ECON. 1 (2012).

⁴⁴ See sources cited *supra* note 7.

⁴⁵ See *supra* notes 2-15, and accompanying text.

B. The Case for Portfolio Primacy

Index funds are broadly diversified investment vehicles that seek to replicate the performance of an index, which is a basket of different securities.⁴⁶ Unlike active investment funds, they do not try to pick the stocks that will perform best; instead, they mechanically track the composition of an index, typically created by a third party. For example, Vanguard 500 seeks to track the performance of the S&P 500 index, which includes large-capitalization companies in leading industries.⁴⁷ BlackRock's iShares Russell Mid-Cap Index Fund tracks the Russell Midcap Index, which includes the 800 smallest issuers in the Russell 1000 index.⁴⁸ And so on.

Behind such a passive investment strategy lie two fundamental insights. The first is the main insight of modern portfolio theory, according to which the investor's purpose should be to maximize risk-adjusted return.⁴⁹ By investing in a diversified portfolio, investors minimize (and potentially eliminate) the risk connected to company-specific decisions and events (so-called idiosyncratic risk) and therefore improve risk-adjusted return. The second insight is that, in the long run, the compound effect of fees charged by investment managers has a sizeable impact on returns. As compellingly illustrated by William Sharpe, "a person saving for retirement who chooses low-cost investments could have a standard of living throughout retirement more than 20% higher than that of comparable investors in high-cost investments."⁵⁰ Indexation allows managers to drastically reduce fees for investors.

This strategy has proven remarkably successful. According to some estimates, in 2020 mutual funds and exchange-traded funds (ETFs)⁵¹

⁴⁶ John C. Bogle, *The Index Mutual Fund: 40 Years of Growth, Change, and Challenge*, 72, FIN. ANALYST J. 9 (2016).

⁴⁷ Vanguard 500 Index Fund Admiral Shares, Vanguard.com, <https://investor.vanguard.com/mutual-funds/profile/VFIAX>.

⁴⁸ iShares Russell Mid-Cap Index Fund, iShares.com, <https://www.ishares.com/us/products/280761/blackrock-mid-cap-index-fund-class-a>.

⁴⁹ See Harry Markowitz, *Portfolio Selection*, 7 J. FIN. 77 (1952); Harry Markowitz, *Nobel Prize Lecture, Foundations of Portfolio Theory*, Dec. 7, 1990, <https://bit.ly/2RWnU4o>.

⁵⁰ William F. Sharpe, *The Arithmetic of Investment Expenses*, 69 FIN. ANALYST J. 34, 34 (2013).

⁵¹ The term "index funds" refers to a wide category of funds whose investment strategy is based on indexing (i.e., the mechanical tracking of a benchmark index provided by a third party). Generally, index funds have two structures: mutual funds and exchange-traded funds (ETFs). Index mutual funds are open-ended funds—i.e., funds that issue securities that are redeemable on a daily basis. ETFs combine characteristics of mutual funds (they issue securities that are redeemable on a daily basis, but only in large blocks) and of closed-end funds (their securities are traded on a secondary market).

following an indexation strategy (in short, index funds) owned about 14% of the whole U.S. stock market, up from 7% in 2010.⁵² The Big Three—BlackRock, Vanguard, and State Street—are together the largest shareholder in 40% of listed companies in the United States and in 88% of S&P 500 companies.⁵³ By 2039, they are projected to vote 41% of the shares in S&P 500 companies.⁵⁴

Many experts worry that such massive ownership concentration will soon lead to a scenario in which a very small number of individuals control the majority of the United States' largest companies, thus creating a politically unsustainable concentration of power,⁵⁵ potential antitrust problems,⁵⁶ increasing volatility,⁵⁷ and weaker indirect investor protection.⁵⁸ Portfolio primacy theorists, however, believe that large index fund managers can and will use their growing influence to reduce corporate climate externalities.

Broadly diversified investors, such as the Big Three and other index fund managers, are interested in the performance of their entire portfolio rather than the performance of an individual company. What is bad for a single company might be good for the portfolio as a whole, and vice versa. Index fund managers are incentivized to maximize the value of the entire portfolio, even if doing so means sacrificing the value of some individual companies.

An example of this portfolio primacy framework would be, according to the theory at hand, the internalization of within-portfolio climate externalities. For example, oil companies are responsible for a significant

In this Article, I will use the term “index funds” to refer to both kinds of investment vehicles.

⁵² Investment Company Institute, 2021 INVESTMENT COMPANY FACT BOOK 50 (2021), <https://perma.cc/FZ4E-GQQ7>.

⁵³ Bob Eccles, *Concentration in the Asset Management Industry: Implications for Corporate Engagement*, FORBES, Apr. 17, 2019, <https://bit.ly/3viwp8v>.

⁵⁴ Lucian Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B.U. L. REV. 721, 724 (2019).

⁵⁵ See, e.g., John C. Coates IV, *The Future of Corporate Governance Part I: The Problem of Twelve*, HARV. PUB. L. WORKING PAPER NO. 19-07 (Mar. 2019), <https://ssrn.com/abstract=3247337>.

⁵⁶ See, e.g., José Azar, Martin Schmalz & Isabel Tecu, *Anticompetitive Effects of Common Ownership*, 73 J. FIN. 1513 (2018); Einer Elhauge, *Horizontal Shareholding*, 129 HARV. L. REV. 1267 (2016).

⁵⁷ See Itzhak Ben-David, Francesco Franzoni, Rabih Moussawi, & John Sedunov, *The Granular Nature of Large Institutional Investors*, 67 MGMT. SCI. 6629 (2021).

⁵⁸ Holger Spamann, *Indirect Investor Protection: The Investment Ecosystem and Its Legal Underpinnings*, 13 J. L. ANALYSIS 672 (2021).

fraction of carbon emissions,⁵⁹ while companies in the hospitality industry are believed to be especially vulnerable to the effects of climate change. Therefore, a portfolio that includes both oil and hospitality stocks internalizes the externalities imposed by one industry on the others. If these climate externalities result in a net portfolio loss (in the example, if the losses suffered by the hospitality industry are larger than the corresponding gains for oil companies), the holder of the portfolio will benefit from a reduction or elimination of such externalities, even if it would damage one subset of companies (in the example, oil companies). As a prominent scholar recently put it, “[o]wning the market, the “universal” shareholder will protect the market.”⁶⁰

To illustrate, consider the following example, taken from a recent article by Madison Condon, which makes a compelling case for the portfolio internalization of climate externalities.⁶¹ Suppose that BlackRock must decide whether to force Exxon and Chevron to cut 40% of their carbon emissions. According to Condon’s estimates, based on the widely used Dynamic Integrated Climate Economy model, this emissions cut would reduce climate damage by \$385 billion over a 100-year period. If we assume that BlackRock benefits from such climate damage reduction in proportion to its share of the global economy, the emissions cut has for BlackRock a present value of \$9.7 billion. Therefore, if the 40% reduction of emissions cost Exxon and Chevron a 20% drop in their stock value—a plausible estimate, according to Condon’s calculations—BlackRock would still make a profit of \$3.4 billion (\$9.7 billion of reduction of climate change losses less \$6.3 billion of losses from Exxon and Chevron stock decline).

This rough estimate shows that, in theory, BlackRock might want to persuade some portfolio companies to make value-decreasing decisions at the company level that are value-increasing for BlackRock at the portfolio level. In this way, portfolio primacy would solve the collective action problem of climate change. Although individual companies, in a shareholder primacy framework, face a free riding problem and have no individual incentive to reduce climate externalities, large index funds, in a portfolio primacy framework, internalize the relevant externalities and have the incentives (and voting power) to pressure companies toward a reduction of climate externalities.

Portfolio primacy theory reveals an important fact: broadly diversified investors are likely to be more incentivized than undiversified investors to address climate risk. However, in order to have a productive policy

⁵⁹ See, e.g., CARBON MAJORS REPORT 5-6 (2017) <https://climateaccountability.org/pdf/CarbonMajorsRpt2017%20Jul17.pdf>.

⁶⁰ See, e.g., Coffee, *supra* note 44, at ii.

⁶¹ Condon, *supra* note 44, at 45-47.

conversation on the respective roles of public and private actors on climate risk mitigation, we must try to assess the potential impact of portfolio primacy.

The expectation that index funds' climate stewardship can play a significant role in mitigating climate risk is necessarily based on three assumptions. One is that index fund stewardship can push carbon emitters to reduce their externalities to an extent that corresponds to a meaningful progress on the reduction of global climate damage. If index funds could not have a meaningful effect on the decisions of global carbon emitters, the whole theory would be of very limited import. Another crucial assumption is that index fund portfolios internalize climate externalities to a meaningful degree and therefore have strong financial incentives to engage in climate stewardship. A further assumption is that the legal and economic structure of index funds allow asset managers to engage in portfolio-driven stewardship, which would sacrifice the profits of individual companies for portfolio-wide gains.⁶² The following Parts scrutinize each of the above assumptions and discuss their promise and their limits. On a close examination, all these assumptions prove unreliable.

⁶² In this Article, I will not discuss another important dimension of climate stewardship, namely the potential agency problems of index fund managers, which might have incentives not to engage in climate stewardship even if climate stewardship were in the interest of index fund investors. The agency problems of asset managers are a contentious issue and the focus of an extensive literature. For the argument that index fund managers lack the incentives to engage in stewardship, see Lucian A. Bebchuk, Alma Cohen, & Scott Hirst, *The Agency Problems of Institutional Investors*, 31 J. ECON. PERSP. 89 (2017); Lucian Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence and Policy*, 119 COLUM. L. REV. 2029 (2019); Bebchuk & Hirst, *Specter*, *supra* note 54. See also Sean J. Griffith, *Opt-in Stewardship: Toward an Optimal Delegation of Mutual Fund Voting Authority*, 98 TEX. L. REV. 983 (2020); Dorothy S. Lund, *The Case against Passive Shareholder Voting*, 43 J. CORP. L. 493 (2018). For the opposite view, see Einer Elhauge, *The Causal Mechanisms of Horizontal Shareholding*, 82 OHIO ST. L. J. 1 (2021); Barbara Novick, *"The Goldilocks Dilemma": A Response to Lucian Bebchuk and Scott Hirst*, 120 COLUM. L. REV. FORUM 80 (2020); Marcel Kahan & Edward B. Rock, *Index Funds and Corporate Governance: Let Shareholders Be Shareholders*, 100 B.U. L. REV. 1771 (2020); Jill Fisch, Assaf Hamdani, & Steven Davidoff Solomon, *The New Titans of Wall Street: A Theoretical Framework for Passive Investors*, 168 U. PENN. L. REV. 17 (2019). This Article does not take a position on this debate and will conservatively assume that index fund managers generally act in the interests of their clients, subject to regulatory constraints. Such assumption biases the results of my analyses in favor of portfolio primacy; therefore, those who believe that index fund managers suffer from severe agency problems should be even more pessimistic about the promise of portfolio primacy than this Article suggests.

II. THE LIMITED SCOPE OF CLIMATE STEWARDSHIP

This Part examines the potential scope of action of index funds' climate stewardship. Even if index fund managers did engage in aggressive climate stewardship, their influence on global climate risk would be very limited, as most firms around the world, including most carbon emitters, are or can become privately owned, are owned by state governments, or have a controlling shareholder or influential blockholder.

Section A shows that public companies represent a limited subset of the economy, both in the United States and, more importantly, in emerging economies. Section B shows that even public companies are often controlled by state governments or major shareholders or are otherwise influenced by insiders with a significant fraction of shares. Based on ownership data of the 253 coal, oil, and gas companies included in the FTSE Global All Cap Index, one of the broadest world stock indices used by index funds, I show that companies in which insiders have less than 5% of the shares represent less than one third of the aggregate market value of the index. Section C argues that in a world in which index funds engage in aggressive and systematic climate stewardship, companies with carbon intensive assets are more likely to stay private, sell their most problematic assets to private owners, or become controlled companies, in order to be insulated from climate stewardship.

A. The Role of Public Companies in the Economy

Index funds are primarily invested in public equities. While the Big Three and other index fund managers also manage funds that invest in private companies, the size of their private investments is very small compared to their investments in public equities.⁶³ Yet, public companies represent only a subset of the entire economy. A climate mitigation tool that target only a subset of the economy, leaving the vast majority of economic activities undisturbed, is a tool of very limited efficacy.

This is particularly true in emerging economies, some of which play a significant role in global carbon emissions. According to the EPA, the top carbon dioxide (CO₂) emitters are China, the United States, the European Union, India, and Russia.⁶⁴ But with the exception of the United States, these other countries have much less developed stock markets,

⁶³ See, e.g., Sungjaung Kwon, Michelle Lowry, & Yiming Qian, *Mutual Fund Investments in Private Firms*, 136 J. FIN. ECON. 407 (2020).

⁶⁴ U.S. Environmental Protection Agency, Global Greenhouse Gas Emissions Data, <https://www.epa.gov/ghgemissions/global-greenhouse-gas-emissions-data>.

compared to the size of their economy. Using the most common indicator for the size of the stock market (the ratio of stock market capitalization to GDP), Table 1 reports data on the stock market size of these top CO₂ emitters.

Table 1. Stock Market Size of Top CO₂ Emitting Countries

<i>Country</i>	<i>Listed Domestic Companies Capitalization (as a % of GDP)</i>
<i>Top 5 World CO₂ Emitters</i>	
<i>China</i>	45.5%
<i>United States</i>	147.7%
<i>European Union</i>	51.5%
<i>India</i>	84.5%
<i>Russia</i>	34.8%
<i>Top 5 EU CO₂ Emitters</i>	
<i>Germany</i>	44.1%
<i>United Kingdom*</i>	115.7%
<i>France</i>	84.8%
<i>Italy</i>	27.2%
<i>Poland</i>	27.3%

* The United Kingdom was still a member of the European Union as of the reference date of these data.

The table reports the total market capitalization of listed domestic companies as a percentage of the country's gross domestic product in constant US dollars. Data are collected from the World Bank database at <https://data.worldbank.org> and refer to 2018. The list of top 5 world CO₂ emitters is from the U.S. Environmental Protection Agency (<https://www.epa.gov/ghgemissions/global-greenhouse-gas-emissions-data>). The list of top 5 European Union's top CO₂ emitters is from the European Parliament (<https://www.europarl.europa.eu/news/en/headlines/society/20180301STO98928/green-house-gas-emissions-by-country-and-sector-infographic>).

The Table shows that in China and Russia public companies represent a much smaller subset of the economy, compared to the United States and the United Kingdom. Indeed, the literature on international diversification of equity portfolios recognizes that equity indices of emerging economies do not provide an adequate exposure to these countries' economy.⁶⁵ Furthermore, the divergence between size of the

⁶⁵ See Joon Woo Bae, Redouane Elkamhi, & Mikhail Simutin, *The Best of Both Worlds: Accessing Emerging Economies via Developed Markets*, 74 J. FIN. 2579, 2579-2580 (2019).

economy and size of the equity market seems to be widening over time.⁶⁶

China, in particular, provides the starkest contrast between the role of the country in global climate risk and the role of its stock market within the country's economy. China is the single greatest emitter of CO₂ in the atmosphere and therefore any effective climate stewardship strategy cannot ignore Chinese companies. However, the role of the stock market in the Chinese economy remains "peripheral."⁶⁷

Even in the United States, public companies have been playing an increasingly smaller role in the economy. In the last two decades there has been a sharp decline in public equity.⁶⁸ In 1997, U.S. publicly traded companies were 7,576; in 2018, their number had plummeted to 3,613.⁶⁹

In a recent study, Frederik Schlingemann and René Stulz show that public companies have become increasingly less relevant for the overall U.S. economy. They estimate that in the early 1970s more than 41% non-farm workers in the private sector were employed by public companies in the United States, but in 2019 it was only 29%.⁷⁰ Over the same period, public companies' contribution to the U.S. gross domestic product has fallen, and at the end of the period top market capitalization companies accounted for a much smaller fraction of the overall economy than at the beginning of the period.⁷¹ As of 2019, the overall contribution of public companies to the U.S. GDP is only slightly more than 20%.

Public companies are not only a small subset of the economy as a whole, but also account for a small subset of major emitters. According to the Carbon Majors Report, of all the carbon emissions produced by the 100 major fossil fuel producers in the world, only 30% are public companies.⁷²

B. The Ownership Structure of Public Companies

Even within the subset of public companies, most firms, including most carbon emitters, are controlled by state governments or private shareholders, or otherwise have an influential blockholder who can

⁶⁶ Geert Bekaert & Campbell R. Harvey, *Emerging Equity Markets in a Globalizing World*, Working Paper (April 2017) (manuscript at 5), available at <https://ssrn.com/abstract=2344817>.

⁶⁷ Dan Luo, *What Role Does the Stock Market Play in the Chinese Economy*, THE CONVERSATION, Aug. 26, 2015, <https://theconversation.com/explainer-what-role-does-the-stock-market-play-in-the-chinese-economy-46691>.

⁶⁸ See, generally, René M. Stulz, *Public versus Private Equity*, 36 OXFORD REV. OF ECON. POL'Y 275 (2020).

⁶⁹ *Id.* at 275.

⁷⁰ Frederik P. Schlingemann & René M. Stulz, *Have Exchange-Listed Firms Become Less Important for the Economy?*, 143 J. FIN. ECON. 927 (2022).

⁷¹ *Id.*

⁷² CARBON MAJORS REPORT, *supra* note 59, at 10

frustrate stewardship initiatives by institutional investors. In China, for example, of the 109 corporations listed on the Fortune Global 500, 85% are owned by the government.⁷³ According to a 2014 study by the World Bank, “almost all Chinese companies listed on the Shanghai stock exchange are majority owned by the government.”⁷⁴ It is unrealistic to think that index fund managers can influence the climate policies of the governments of China or other major countries. In fact, institutional investors are less likely to engage with state-owned enterprises.⁷⁵

In general, most companies around the world have controlling or influential shareholders. According to a recent study of the 10,000 largest publicly listed companies in the world, in 29% of the companies the largest shareholder owns more than 50% of the stock; and in 21% of the companies, the largest shareholder owns between 30% and 49% of the stock.⁷⁶ Furthermore, in 49% of the companies, the three largest shareholders jointly own more than 50% of the stock.⁷⁷

To examine this aspect, I collected from the FactSet Ownership database detailed ownership data on the portfolio companies of Vanguard Total World Stock Index Fund, a global stock index fund that tracks the FTSE Global All Cap Index. This index includes 9,446 large, medium, and small capitalization companies in 48 different countries, including developed and emerging economies.⁷⁸ Its composition is a reasonable approximation of the universe of public companies in which index funds invest.

Table 2 reports data on the ownership structures of the companies engaged in the coal, oil, and gas industries. As the Table shows, more than 60% of the index capitalization is represented by companies with an insider with more than 20% of the company shares, and more than two thirds of the index capitalization is represented by companies with an insider with more than 5% of the company shares. If we exclude companies incorporated in the United States, Canada, or the United Kingdom, companies with insiders owning more than 20% of the

⁷³ Amir Guluzade, *The Role of China's State-Owned Companies Explained*, WORLD ECON. F., May 7, 2019, <https://www.weforum.org/agenda/2019/05/why-chinas-state-owned-companies-still-have-a-key-role-to-play/>.

⁷⁴ WORLD BANK, CORPORATE GOVERNANCE OF STATE-OWNED ENTERPRISES: A TOOLKIT 151 (2014).

⁷⁵ Ernest W. K. Lim, *Concentrated Ownership, State-Owned Enterprises and Corporate Governance*, 41 OXFORD J. L. STUD. 663, 685-688 (2021).

⁷⁶ Adriana De La Cruz, Alejandra Medina, & Yun Tang, *Owners of the World's Listed Companies*, OECD CAPITAL MARKET SERIES (2019) at 17.

⁷⁷ *Id.*

⁷⁸ FTSE Russell, FTSE Global All Cap Index: Factsheet, May 31, 2022.

company shares represent 94% of the index.⁷⁹

Table 2. Blockholders in Coal, Oil, and Gas Companies in the FTSE Global All Cap Index

Countries	Market Value (\$ million)	No Blockhol ders	Blockhol ders 5-20%	Blockhol ders >20%
Middle East	\$2,552,605	0%	0%	100%
United States	\$1,970,430	88%	10%	2%
China	\$493,823	0%	0%	100%
Canada	\$485,519	72%	10%	18%
European Union	\$363,270	7%	43%	49%
United Kingdom	\$348,866	96%	1%	3%
India	\$318,915	0%	0%	100%
Centr. & S. America	\$281,290	0%	1%	99%
Russia	\$242,364	7%	0%	93%
Other countries	\$456,484	5%	10%	85%
Total	\$7,513,565	33%	6%	61%

The table reports total market capitalization of companies included in the FTSE Global All Cap Index by country of incorporation as well as the percentage of market capitalization of companies in which no insiders own more than 5% of the company shares (No Blockholders column), insiders own between 5% and 20% of the company shares (Blockholders 5%-20% column), and insiders own more than 20% of the company shares (Blockholders >20% column). The analysis is based on ownership data of the portfolio companies if Vanguard Total World Stock ETF, which tracks the FTSE Global All Cap Index, as reported in the FactSet Ownership database as of June 1, 2022.

Just like private companies, controlled companies and companies with a significant blockholder are unlikely to sacrifice company-level profits in exchange for portfolio-level gains. Insiders owning a significant fraction of the company shares are typically less diversified than institutional investors. In fact, they often have a large fraction of their wealth invested in that particular company.⁸⁰ To be sure, investor

⁷⁹ Even in the United States, where dispersed ownership has traditionally been the norm, controlled companies and companies with influential blockholders are increasingly more frequent. On this phenomenon, see generally Lucian A. Bebchuk & Assaf Hamdani, *Independent Directors and Controlling Shareholders*, 165 U. PA. L. REV. 1271, 1279 (2017); Albert H. Choi, *Concentrated Ownership and Long-Term Shareholder Value*, 8 HARV. BUS. L. REV. 53, 54-56 (2018); Ronald J. Gilson & Alan Schwartz, *Corporate Control and Credible Commitment*, 43 INT'L REV. L. & ECON. 119, 119-20 (2015).

⁸⁰ See generally, Dhammika Dharmapala & Vikramaditya S. Khanna, *Controlling Externalities: Ownership Structure and Cross-Firm Externalities*, EUR. CORPORATE GOV. INST. LAW WORKING PAPER No. 603/2021 (Aug. 2021) at 38, <https://ssrn.com/abstract=3904316>. See also Alperen Afşin Gözlügül, *Controlling Shareholders: Missing Link in the Sustainability Debate?*, Oxford Bus. L. Blog, July 16,

stewardship and engagement in the presence of blockholders is possible, and there is evidence that institutional investors and even hedge funds do engage with companies with concentrated ownership.⁸¹ However, the efficacy of this kind of engagement is highly dubious.⁸² Even BlackRock has recently acknowledged that its ability to monitor and influence controlled companies in Asia face significant hurdles.⁸³ Since effective climate stewardship requires persuading major fossil fuel producers to transition toward decarbonization even if such transition is costly to these individual companies, the picture reported in Table 2 shows that the task is likely to prove impractical.

C. Brown Spinning

Even in the United States and other Anglo-American jurisdictions, in which most public companies have dispersed ownership, climate stewardship might prove self-defeating in the long run. If index funds did engage in aggressive climate stewardship, companies with carbon intensive assets that would have otherwise gone or stayed public have economic incentives to stay private, return private, or sell their most carbon intensive assets to private buyers (so called “brown spinning”).⁸⁴ In this scenario, public companies would account for an increasingly

2021, <https://www.law.ox.ac.uk/business-law-blog/blog/2021/07/controllingshareholders-missing-link-sustainability-debate>.

⁸¹ See Kobi Kastiel, *Against All Odds: Hedge Fund Activism in Controlled Companies*, 2016 COLUM. BUS. L. REV. 60 (2016) (finding that “although the increase in ownership concentration reduces the likelihood of activism, controlled companies are not fully insulated from activist interventions, and the total number of companies subject to activism is not negligible”); Giovanni Strampelli, *Institutional Investor Stewardship in Italian Corporate Governance* in GLOBAL SHAREHOLDER STEWARDSHIP 130-149 (Dionysia Katelouzou & Dan W. Puchniak, eds. 2022) at 131-133 (reporting evidence that despite dispersed ownership companies are a small minority in Italy, institutional investors do engage in voting and informal engagement);

⁸² For a discussion of the limits of investor stewardship in countries with concentrated ownership structures, see, e.g., Dan W. Puchniak, *The False Hope of Stewardship in the Context of Controlling Shareholders: Making Sense Out of the Global Transplant of a Legal Misfit*, Am. J. Comp. L. (forthcoming 2022), http://ssrn.com/abstract_id=3858339.

⁸³ BLACKROCK, INVESTMENT STEWARDSHIP ANNUAL REPORT (September 2020), at 30, <https://www.blackrock.com/corporate/literature/publication/blk-annual-stewardship-report-2020.pdf>

⁸⁴ For a discussion of brown spinning and how it can frustrate “net zero pledges” and other decarbonization goals, see generally Alperen A. Gözlügöl & Wolf-Georg Ringe, *Private Companies: The Missing Link on the Path to Net Zero*, EUR. CORP. GOVERNANCE INST. WORKING PAPER No. 635/2022 (2022), <https://ssrn.com/abstract=4065115>.

smaller fraction of climate risk and climate stewardship would become increasingly less effective.

Under certain circumstances, the prospect of brown spinning may also discourage climate stewardship *ex ante*. To illustrate this effect, let us consider an index fund portfolio of 1,000 stocks, some of which are net producers of climate externalities (dirt companies) and the others are net beneficiaries of climate mitigation (beneficiaries). If index funds push for decarbonization, the dirt companies will suffer a loss while the beneficiaries will make a gain. Overall, the portfolio would benefit. Suppose that the dirt companies are worth \$1 billion in the business-as-usual (BaU) scenario and \$800 million in the decarbonization scenario, whereas the beneficiaries are worth \$4 billion in the BaU scenario and \$4.5 billion in the decarbonization scenario. Suppose further that taking the dirt companies private would decrease their value by \$100 million because of the lack of access to the capital markets but would allow the dirt companies to continue to operate their business as usual, without the decarbonization pressure from index funds. To complete the picture, suppose that climate stewardship costs index funds \$10 million and the transaction costs of selling and buying the dirt companies are \$10 million for the sellers and \$10 million for the buyers.

Which is the most likely outcome if the parties are free to follow their market incentives? Index funds can decide whether or not to push for decarbonization, and dirt companies and private funds can decide whether or not to enter into a deal to take the dirt companies private. If private funds do not buy the dirt companies, index funds will impose the decarbonization, because in the decarbonization scenario the aggregate value of dirt companies and beneficiaries is higher than in the BaU scenario. By contrast, if private funds buy the dirt companies, the dirt companies will continue to operate as usual, as in the BaU scenario their stand-alone value would be higher than in the decarbonization scenario. Part of the surplus value created by the privatization can be appropriated by the private funds. Traditional economic analysis suggests that a market transaction that creates surplus for buyer and seller will take place. Therefore, the most likely outcome is the one in which the dirt companies are taken private and continue to emit greenhouse gases instead of decarbonizing.

To be sure, index funds with particular strong incentives to reduce overall climate risk might pressure the dirt companies into avoiding brown spinning or might vote against brown-spinning mergers. However, the intensity of climate stewardship required to monitor and block M&A deals is much more than that needed for pushing companies toward less carbon emissions. Institutional investors are usually much less likely to oppose a merger or reorganization than social or environmental proposals. For example, based on the data made public by BlackRock on its 2021 stewardship activities across all its portfolio companies around

the world, BlackRock votes against management 39.8% of the times on social and environmental proposals (including management and shareholder proposals), but only 16.1% of the times on merger and reorganization proposals.⁸⁵ In the Americas, where the influence of the Big Three is comparatively superior, BlackRock voted against management 58.2% of the times on social and environmental proposals, but only 4.5% on mergers and reorganizations.⁸⁶

Brown spinning is not a mere theoretical hypothesis but an actual market strategy, which companies with carbon intensive assets have started to put into practice. News reports have noted that in 2020 and 2021, private equity firms have bought \$60 billion worth of coal, oil, and gas assets from public companies, through 500 transactions.⁸⁷ Some of these deals have attracted significant attention. For example, in 2017, ConocoPhillips reported a 22% decrease in its carbon emissions, but the effect was mainly due to the sale of some of its oil and gas assets to private-equity backed Hilcorp Energy, rather than to an actual reduction of carbon emissions.⁸⁸ If index funds increased their climate stewardship, we should expect these transactions to become even more frequent and economically significant, with the effect of condemning climate stewardship to self-defeat.

* * *

This Part has shown that despite the significant shareholder power amassed by the Big Three and other large index fund managers, most firms around the world, including most carbon emitters, are effectively shielded from their climate stewardship or can easily frustrate the effects of climate stewardship through brown spinning. Therefore, even if index fund managers did engage in aggressive climate stewardship, the global impact of this strategy would prove very limited.

III. LIMITED INTERNALIZATION OF CLIMATE EXTERNALITIES

This Part examines the extent to which index fund portfolios effectively internalize climate externalities and therefore are incentivized

⁸⁵ Analysis based on the data reported in BLACKROCK, INVESTMENT STEWARDSHIP ANNUAL REPORT JANUARY 1-DECEMBER 31, 2021 (2022), at 125-126, <https://www.blackrock.com/corporate/literature/publication/annual-stewardship-report-2021.pdf>.

⁸⁶ *Id.*

⁸⁷ *Who Buys The Dirty Energy Assets Public Companies No Longer Want?*, THE ECONOMIST, Feb. 12, 2022, <https://www.economist.com/finance-and-economics/who-buys-the-dirty-energy-assets-public-companies-no-longer-want/21807594>.

⁸⁸ See Gözlügöl & Ringe, *supra* note 84, at 15.

to reduce them. Section A shows that the incentives of index fund are aligned with the welfare of large corporations, but not necessarily with the welfare of small companies, micro firms, or individuals. Section B shows that index fund portfolios are significantly overexposed to richer economies, which are relatively less vulnerable to climate risk, and therefore internalize only a fraction of global climate externalities. Section C shows that index funds give very low weight to the distant future and therefore massively underestimate the benefits of climate risk mitigation.

A. Asymmetric Mitigation

When we talk about climate risk and the negative effects of climate change on society, we implicitly refer to what economists call “total welfare,” meaning the totality of effects of climate change on the entire society. But index fund interests are aligned with the interests of their portfolio companies and not necessarily with the interests of society as a whole. Therefore, they will favor mitigation measures that are most profitable for large corporations (which make up a disproportionate part of their portfolios) over measures that will improve the welfare of small firms and consumers.

Large corporations can adapt to climate change more easily and more effectively than small firms and individuals.⁸⁹ For example, a multinational company can move the production of some of its products from countries more severely hit by rising temperatures to colder countries, whereas local family businesses, small farmers, and employees cannot. Large companies are also more likely to afford investing in mitigation technologies or adapting strategies that protect their business but do not necessarily alleviate the consequences of climate change for the general population. For example, a company can relocate its offices farther from the ocean, but this relocation would not lower the risk of flooding for local residents. A company can invest in expensive technology and engineering solutions to lower the temperature in its workplace (e.g., with new cooling capacity, changes in insulation or cool buildings designs), but smaller firms, families, and other individuals would not benefit from this investment.⁹⁰ In other words, climate risk mitigation can take different forms, but large corporations (and, consequently, index funds) will systematically prefer those that are privately efficient for them over those that are socially efficient.

⁸⁹ See, e.g., CENTER FOR CLIMATE AND ENERGY SOLUTIONS, WEATHERING THE STORM: BUILDING BUSINESS RESILIENCE TO CLIMATE CHANGE 22 (July 2013).

⁹⁰ Some of private adaptation measures proposed as examples in the text are taken from Robert Mendelsohn, *Efficient Adaptation to Climate Change*, 45 CLIMATIC CHANGE 583, 584 (2000).

Furthermore, many companies see climate change as a business opportunity. In a recent survey on the risks, opportunities, and adaptation strategies of many large companies, for example, pharmaceutical company Eli Lilly observed that climate change might result in an increase in the spread of infectious disease, which would increase the demand for some of its drugs.⁹¹ A hypothetical decision of pharmaceutical companies to increase the price of drugs for climate-related diseases would benefit index funds investing in those companies, but would hurt consumers already hit by the direct effect of climate change.

To illuminate this problem, we can use the distinction, frequently used in antitrust law and economics, between producer welfare and consumer welfare.⁹² A typical example in antitrust law regards the welfare effects of a merger between two companies. A merger can reduce operating costs for the participant companies, due to synergies, but can also result in higher prices and lower output, due to reduced competition. From a welfare perspective, lower costs and higher prices increase producer welfare but reduce consumer welfare; the effect of the merger on total welfare depends on whether the increase in producer welfare is greater than the reduction of consumer welfare.

Index fund portfolios benefit from increases in producer welfare but not necessarily from increases in consumer welfare. In fact, many observers worry that index funds' growing influence may lead to anti-competitive behavior that is profitable for aggregate producer welfare but detrimental to consumer welfare.⁹³

A similar problem, however, arises in the context of climate stewardship. The strategies that companies choose to mitigate climate risk are motivated by their private interests and therefore will tend to increase the "producer welfare." However, the relationship between the company's welfare and consumer and social welfare can take different forms. It is possible that the best strategy for the company is also the best strategy for consumer welfare and for total welfare. However, it is also possible that the best strategy for the company is the best strategy for total welfare but not for consumer welfare, or it is suboptimal both for consumer welfare and for total welfare. We can call the first type "symmetric mitigation," and the second and third types "asymmetric mitigation." The company, and the index funds that own its stock, have no incentives to favor symmetric mitigation over asymmetric mitigation.

⁹¹ Eli Lilly & Co., Response to the "Climate Change 2018" CDP Survey, available on <https://www.cdp.net>.

⁹² See, e.g., Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 118 (2018).

⁹³ See *supra* note 56, and accompanying text.

They only care that the chosen strategy is optimal for the company.

One crucial problem with relying on a climate mitigation tool, such as portfolio-driven climate stewardship, that is aligned exclusively with producer welfare is that it will prioritize mitigation strategies that protect companies but not necessarily other market and social actors from climate risk. In theory, if there is a mitigation strategy that protect portfolio companies but damages consumers, index funds will have incentives to support such a strategy.

Another crucial problem, however, is that index fund portfolios are disproportionately composed of very large companies, which are believed to be more resilient to climate risk due to economies of scale and easier access to capital. Therefore, even within the set of “producers,” index funds will favor the subset of very large corporations and will ignore the interests of small and micro firms not represented in equity indices.

Some of the most significant effects of climate change will be felt by small farmers, agricultural laborers in small farms, and other micro-firms representing important parts for the economy of those country, but that are not represented in equity indices. For example, “subsistence” or “smallholder” farmers are responsible for “90% of the production of rice, wheat, other food crops, cocoa, and cotton in Nigeria,”⁹⁴ and for “70 percent of arable and permanent cropland in several West and Southern African and Pacific countries.”⁹⁵ The economic activity of these farms is very vulnerable to extreme weather events and other climate change effects.⁹⁶ Stock market investors, including index funds, are not exposed to these risks and therefore have no incentives to mitigate them.

B. Geographic Bias

1. Geography and Climate Risk

Index funds typically have a specific geographic focus. For example, Vanguard 500 includes almost exclusively companies incorporated in the United States,⁹⁷ whereas BlackRock’s iShares ISCF ETF invests mostly in companies incorporated in Europe and Asia.⁹⁸ Since climate change is expected to create more damage in some countries than in others, where index funds invest affects how much they are willing to invest to mitigate

⁹⁴ John F. Morton, *The Impact of Climate Change on Smallholder and Subsistence Agriculture*, 104 PROCEEDINGS OF THE NAT’L ACAD. SCI. 19680, 19680 (2007).

⁹⁵ *Id.* at 19681.

⁹⁶ *Id.* at 19684.

⁹⁷ As of April 30, 2022, 96% of Vanguard 500 Index Fund portfolio companies were U.S. companies. Data collected from the FactSet Ownership database.

⁹⁸ As of April 30, 2022, 41% of iShares ISCF ETF’s portfolio companies were European companies, 28% were Asian companies, and 20% were North American companies.

climate risk.⁹⁹

For example, a recent study by Jose Luis Cruz Alvarez and Esteban Rossi-Hansberg estimated that, in a baseline scenario with no climate policies, by 2200, world productivity would decline by 19% on average, but the effect would vary significantly across regions. In some parts of the world (such as Alaska, Northern Canada, and Northern Russia) productivity would double relative to a scenario without global warming, while in other regions (such as Brazil, Africa, the Middle East, India, and Australia) productivity would decline by up to 60%.¹⁰⁰

Furthermore, there is “near universal agreement that poorer countries are more vulnerable to climate change.”¹⁰¹ The Notre Dame Global Adaptation Initiative has developed an index measuring each country’s vulnerability and resilience to climate change (the ND-GAIN Index), which shows enormous differences across countries.¹⁰² According to these estimates, Norway, New Zealand, and Finland have the three highest scores and are therefore expected to suffer the least from climate change. In general, the United States, Western European countries, and many other high-income countries are among the top 50 countries in the index, while the bottom 50 positions are occupied predominantly by low-income countries, with Chad, Somalia, and the Central African Republic as the most vulnerable. Therefore, a fund investing exclusively in U.S. companies will have a very different exposure to climate risk compared to a fund significantly exposed to companies located in emerging or

⁹⁹ See, e.g., William D. Nordhaus, *Revisiting the Social Cost of Carbon*, 114 PROC. NAT’L ACAD. SCI. OF THE U.S. 1518, 1521-1522 (2017) (estimating that the country-level social cost of carbon for the United States, India, and Africa are 15%, 9%, and 3%, respectively, of the global cost of carbon); Katharine Ricke, Laurent Drouet, Ken Caldeira, & Massimo Tavoni, *Country-level Social Cost of Carbon*, 8 NATURE CLIMATE CHANGE 895 (2018) (estimating that the country-level social cost of carbon for the United States, India, and Africa are 11%, 20%, and 10%, respectively, of the global cost of carbon); Tol, *supra* note 101 (estimating that the country-level social cost of carbon for the United States, India, and Africa are 0.6%, 23.9%, and 30.4%, respectively, of the global cost of carbon). These estimates refer to the base case for each study. As of the end of 2019, the gross domestic product of the United States, India, and Africa was 24.4%, 3.3%, and 2.3%, respectively, of the world gross domestic product, in current U.S. dollars, at purchase power parity. WORLD BANK, OPEN DATA DATABASE, available at <https://data.worldbank.org/>.

¹⁰⁰ Jose Luis Cruz Alvarez & Esteban Rossi-Hansberg, *The Economic Geography of Global Warming* 27, NBER Working Paper 28466 (Feb. 2021), <http://www.nber.org/papers/w28466>.

¹⁰¹ Richard S. J. Tol, *A Social Cost of Carbon for (Almost) Every Country*, 83 ENERGY ECON. 555, 564 (2019).

¹⁰² The ND-GAIN database, covering 181 countries over the period 1995–2018, is available at <https://gain.nd.edu/>.

developing economies.¹⁰³

2. Countries of Incorporation

To examine this aspect, I analyzed the geographic distribution of portfolio companies of the 30 largest ETFs managed by BlackRock (the “Top 30 BlackRock ETFs”), the world’s largest asset manager and one of the most vocal on social and environmental issues. These funds track many different indices, including large-cap, mid-cap, and small-cap indices, and U.S., developed markets, and emerging markets indices. Taken together, the Top 30 BlackRock ETFs have \$1.4 trillion of assets under management, a majority of the \$2.4 trillion managed by all

¹⁰³ The distributional effects of climate change are the focus of a vast literature in both philosophy and economics. In an influential work, Henry Shue identified four distinct questions of international distributive justice raised by climate change: (1) how to allocate mitigation costs; (2) how to allocate the costs of coping with unavoidable consequences; (2) what is the background allocation of wealth that would allow fair bargaining among nations; and (4) how to allocate carbon emissions. See Henry Shue, *Subsistence Emissions and Luxury Emissions*, 15 LAW & POLY 39 (1993). For other perspectives on climate change and distributive justice, see ERIC A. POSNER & DAVID WEISBACH, CLIMATE CHANGE JUSTICE 73-98 (2008); Mathias Frisch, *Climate Change Justice*, 40 PHIL. & PUB. AFF. 225 (2012); PETER SINGER, ONE WORLD; THE ETHICS OF GLOBALIZATION 26-49 (2002).

An important aspect to consider is that the estimate of climate change costs for richer and poorer countries depends, among other things, on the marginal willingness to pay for climate risk mitigation. Generally speaking, money is more valuable to poorer people than to richer people; therefore, richer people are willing to pay more for a mitigation investment with an identical effect on individual welfare. If we assess the costs and benefits of climate mitigation in the form of willingness to pay, the relative share of climate change costs of poorer and richer countries depends on our estimate of how people’s willingness to pay change with income. For an insightful discussion of this problem in cost-benefit analysis, see Daniel Hemel, *Regulation and Redistribution with Lives in the Balance*, 89 U. CHI. L. REV. 649 (2022). At the same time, however, the same increase in temperature are likely to have impacts of different magnitudes on richer and poorer countries. How income elasticity of willingness to pay and of impact should be estimated is a difficult question, which few climate economists have tried to address so far. See Tol, *supra* note 101, at 564.

Another important problem is the extent to which income inequality within the same country affects the calculation of the social cost of carbon. See Ulrike Kornek, David Klenert, Ottmar Edenhofer, & Marc Fleurbaey, *The Social Cost of Carbon and Inequality: When Local Redistribution Shapes Global Carbon Prices Individual with Different Levels of Wealth and Income within the Same Country*, 107 J. ENVTL. ECON. & MGMT. 102450 (2021). A further complication concerns the social welfare function used to estimate the costs of climate change. See Matthew Adler, David Anthoff, Valentina Bosetti, Greg Garner, Klaus Keller, & Nicolas Treich, *Priority for the Worse-Off and the Social Cost of Carbon*, 7 Nature Climate Change 443 (2017). For the purposes of this Article, I will ignore these various complications.

BlackRock ETFs.¹⁰⁴

Table 3 reports, for each fund in the sample, the percentage of assets invested in portfolio companies incorporated in the United States, Canada, United Kingdom, Europe, China, India, Middle East, Africa, and other countries. As the Table shows, most funds invest almost exclusively in North American and European companies, and in the aggregate more than 85% of the assets are invested in North America and Europe.

Investments in India, Latin America, Africa and Middle East are disproportionately small, compared to the size of these economies. These regions account for 15% of the global GDP and 52% of the world population, but for less than 3% of the assets of the Top 30 BlackRock ETFs' portfolio companies.

¹⁰⁴ As of the end of 2021, BlackRock had \$5.3 trillion assets under management in equity funds, of which \$2.4 trillion were held by ETFs. BlackRock, Inc., 2021 Annual Report (Form 10-K) 42 (Feb. 25, 2022).

Table 3. Geographic Exposure of the Top 30 BlackRock ETFs
(Country of Incorporation of Portfolio Companies)

<i>Fund</i>	<i>N. Am & Europe</i>	<i>China</i>	<i>India</i>	<i>Africa & Middle East</i>	<i>Latin Amer.</i>	<i>Rest of the World</i>
<i>Core S&P 500</i>	100%	<1%	<1%	<1%	<1%	<1%
<i>Core MSCI EAFE</i>	64%	<1%	<1%	1%	<1%	35%
<i>Core MSCI Emerg. Markets</i>	5%	25%	13%	7%	5%	48%
<i>Core S&P Small Cap</i>	100%	<1%	<1%	<1%	<1%	<1%
<i>Core S&P Mid-Cap</i>	100%	<1%	<1%	<1%	<1%	<1%
<i>Russell 1000 Growth</i>	100%	<1%	<1%	<1%	<1%	<1%
<i>Core S&P 500 UCITS</i>	100%	<1%	<1%	<1%	<1%	<1%
<i>Russell 1000 Value</i>	100%	<1%	<1%	<1%	<1%	<1%
<i>Russell 2000</i>	100%	<1%	<1%	<1%	<1%	<1%
<i>MSCI EAFE</i>	64%	<1%	<1%	1%	<1%	36%
<i>Core MSCI World UCITS</i>	90%	<1%	<1%	<1%	<1%	10%
<i>Core S&P Tot. U.S. Stock</i>	100%	<1%	<1%	<1%	<1%	<1%
<i>S&P 500 Growth</i>	100%	<1%	<1%	<1%	<1%	<1%
<i>Core MSCI Total Int. Stock</i>	48%	8%	4%	4%	1%	36%
<i>Russell Midcap</i>	100%	<1%	<1%	<1%	<1%	<1%
<i>Russell 1000</i>	100%	<1%	<1%	<1%	<1%	<1%
<i>MSCI Emerging Markets</i>	5%	27%	11%	10%	4%	48%
<i>MSCI USA Min Vol. Factor</i>	100%	<1%	<1%	<1%	<1%	<1%
<i>S&P 500 Value</i>	100%	<1%	<1%	<1%	<1%	<1%
<i>Select Dividend</i>	100%	<1%	<1%	<1%	<1%	<1%
<i>Core Dividend Growth</i>	100%	<1%	<1%	<1%	<1%	<1%
<i>ESG Aware MSCI USA</i>	100%	<1%	<1%	<1%	<1%	<1%
<i>MSCI USA Quality Factor</i>	100%	<1%	<1%	<1%	<1%	<1%
<i>MSCI ACWI</i>	78%	3%	1%	1%	1%	15%
<i>Core MSCI EM IMI UCITS</i>	7%	25%	13%	10%	4%	43%
<i>MSCI EAFE Value</i>	63%	<1%	<1%	1%	<1%	36%
<i>Russell Mid-Cap Value</i>	100%	<1%	<1%	<1%	<1%	<1%
<i>Core FTSE 100 UCITS GBP</i>	100%	<1%	<1%	<1%	<1%	<1%
<i>Core S&P 500 UCITS USD</i>	100%	<1%	<1%	<1%	<1%	<1%
<i>Core High Dividend</i>	100%	<1%	<1%	<1%	<1%	<1%
Total	85%	3%	1%	1%	<1%	10%
World GDP	51%	17%	3%	7%	5%	16%
World Population	14%	18%	18%	26%	8%	15%

The table reports the geographical exposure of the 30 largest BlackRock ETFs by assets under management, based on the country of incorporation of their portfolio companies (weighted by market capitalization). The analysis is based on ownership data as reported in the FactSet Ownership database as of June 10, 2022.

3. Revenues

The country of incorporation of a company does not necessarily reflect the geographic exposure of the company's business. Many large companies in which index funds invest are multinational enterprises with assets and sales all over the world. Therefore, a company incorporated in the United States or Europe might well have a significant exposure to the climate risk of developing or emerging economies.

To examine this aspect, I collected from FactSet GeoRev detailed data on the geographic distribution of revenues for the portfolio companies of the Top 30 BlackRock ETFs and then I attributed to each fund the pro-rata share of local revenues, based on the ownership interest of the fund in the relevant company.

Table 4 reports the results of this analysis. The exposure of the Top 30 BlackRock ETFs to North America and Europe is still disproportionately high. For most funds, the vast majority of revenues are from North America and Europe; in the aggregate, only 8% of the revenues are from India, Latin America, Africa or the Middle East, which account for 15% of the global GDP and 52% of the world population.

Table 4. Geographic Exposure of the Top 30 BlackRock ETFs
(Revenues of Portfolio Companies)

<i>Fund</i>	<i>N. Am & Europe</i>	<i>China</i>	<i>India</i>	<i>Africa & Middle East</i>	<i>Latin Amer.</i>	<i>Rest of the World</i>
<i>Core S&P 500</i>	83%	4%	1%	3%	3%	6%
<i>Core MSCI EAFE</i>	52%	7%	2%	3%	4%	32%
<i>Core MSCI Emerg. Markets</i>	16%	46%	4%	5%	8%	21%
<i>Core S&P Small Cap</i>	87%	2%	1%	2%	3%	6%
<i>Core S&P Mid-Cap</i>	85%	3%	1%	2%	4%	5%
<i>Russell 1000 Growth</i>	78%	7%	1%	3%	3%	8%
<i>Core S&P 500 UCITS</i>	83%	4%	1%	3%	3%	6%
<i>Russell 1000 Value</i>	85%	3%	1%	2%	3%	5%
<i>Russell 2000</i>	88%	2%	1%	2%	3%	5%
<i>MSCI EAFE</i>	55%	7%	2%	3%	4%	29%
<i>Core MSCI World UCITS</i>	71%	6%	1%	3%	3%	16%
<i>Core S&P Tot. U.S. Stock</i>	84%	4%	1%	2%	3%	6%
<i>S&P 500 Growth</i>	77%	7%	1%	4%	3%	9%
<i>Core MSCI Total Int. Stock</i>	41%	20%	2%	4%	5%	27%
<i>Russell Midcap</i>	87%	3%	1%	2%	3%	5%
<i>Russell 1000</i>	83%	4%	1%	2%	3%	6%
<i>MSCI Emerging Markets</i>	16%	49%	3%	4%	8%	20%
<i>MSCI USA Min Vol. Factor</i>	89%	3%	1%	2%	2%	4%
<i>S&P 500 Value</i>	86%	3%	1%	2%	3%	5%
<i>Select Dividend</i>	89%	2%	1%	2%	2%	5%
<i>Core Dividend Growth</i>	81%	5%	1%	3%	3%	7%
<i>ESG Aware MSCI USA</i>	82%	5%	1%	3%	3%	7%
<i>MSCI USA Quality Factor</i>	84%	5%	1%	2%	2%	6%
<i>MSCI ACWI</i>	59%	15%	2%	3%	4%	17%
<i>Core MSCI EM IMI UCITS</i>	17%	45%	4%	5%	7%	21%
<i>MSCI EAFE Value</i>	56%	7%	2%	3%	4%	28%
<i>Russell Mid-Cap Value</i>	87%	3%	1%	2%	3%	5%
<i>Core FTSE 100 UCITS GBP</i>	68%	7%	2%	4%	4%	14%
<i>Core S&P 500 UCITS USD</i>	83%	4%	1%	3%	3%	6%
<i>Core High Dividend</i>	80%	5%	1%	3%	3%	8%
Total	66%	12%	1%	3%	4%	14%
World GDP	51%	17%	3%	7%	5%	16%
World Population	14%	18%	18%	26%	8%	15%

The table reports the geographical exposure of the 30 largest BlackRock ETFs by assets under management, based on the local revenues of their portfolio companies. The analysis is based on ownership data collected from the FactSet Ownership database and on revenues data collected from FactSet GeoRev, both as of June 10, 2022.

Even if we assume, for simplicity, that companies (and index funds as their investors) internalize local social costs of climate change in proportion to their local revenues, then the Top 30 BlackRock ETFs will

internalize less than half of their “fair share” of climate externalities. Figure 1 provides a rough estimate of this effect based on the revenues data I collected, data on gross domestic product (GDP) collected from the World Bank, and data on country-level social cost of carbon estimated by Richard Tol.¹⁰⁵

We know, however, that climate damage will materialize not only in the form of lower consumption, but also in the form of deaths, poor health, and lower nonpecuniary wellbeing, in particular in developing economies.¹⁰⁶ As a recent study shows, “poor countries are projected to disproportionately experience [climate change effects] through deaths, while wealthy countries experience effects largely through costly adaptation investments.”¹⁰⁷ The authors of the study estimate that under a high-emissions scenario the increase in global mortality rate at the end of the century will have a magnitude similar to “the current global mortality burden of all cancers or all infectious diseases.”¹⁰⁸ Therefore, index funds’ actual internalized share of climate externalities is likely to be even smaller than what the data on revenue distribution suggest.

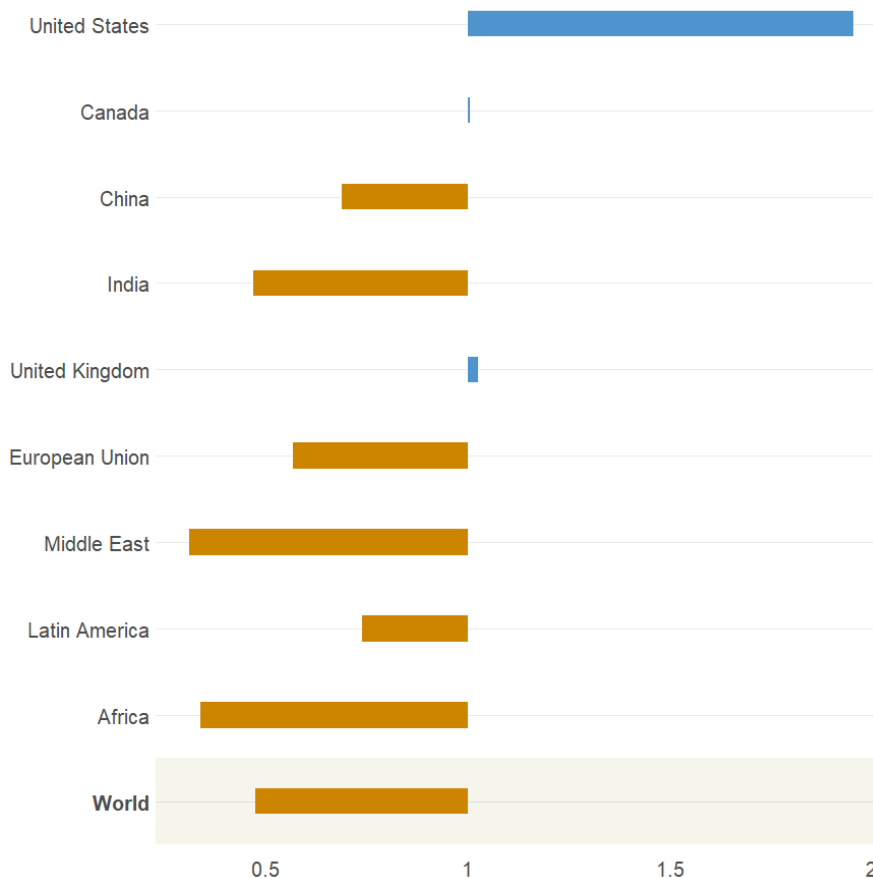
¹⁰⁵ Tol, *supra* note 101. Country-level estimates used in this simulation are taken from the study’s dataset, generously made available by the author. All estimates are based on the study’s base scenario.

¹⁰⁶ See Tamma Carleton et al., *Valuing the Global Mortality Consequences of Climate Change Accounting for Adaptation Costs and Benefits*, Q. J. ECON. (forthcoming 2022) (on file with author).

¹⁰⁷ *Id.* (manuscript at 4-5).

¹⁰⁸ *Id.* (manuscript at 63).

Figure 1. Geographic Bias of Top 30 BlackRock ETFs



Fraction of country-level social cost of carbon internalized by the Top 30 BlackRock ETFs, assuming that an index fund internalizes the social cost of carbon of a given country in proportion to the local revenues of its portfolio companies relative to the size of the local economy (GDP). Data on country-level revenues were collected from FactSet GeoRev as of June 10, 2022. Data on country GDP were collected from the World Bank database and refer to 2019. Estimates of country-level social cost of carbon are taken from Richard Tol (2019).

C. Discounting the Future

A fundamental problem in estimating the social value of climate mitigation is the determination of the appropriate discount rate. Discounting is a required step in the evaluation of any future payoffs.¹⁰⁹ Companies discount expected future payoffs in order to decide whether a

¹⁰⁹ For a general overview of discounting in corporate finance, see JONATHAN BERK & PETER DEMARZO, CORPORATE FINANCE 63-69 (3rd ed. 2014).

given investment is worthwhile. Investors discount companies' future cash flows to estimate today's value of the company's stock.¹¹⁰ Likewise, federal agencies use discounting to evaluate whether the present cost of a policy is justified in light of the expected future payoffs.¹¹¹ In all these cases, choosing the correct discount rate is crucial for determining whether a given investment is sound or wasteful.

In climate economics, the "social discount rate" is the rate at which society as a whole is willing to substitute present payoffs with future payoffs across generations.¹¹² The determination of the social discount rate is particularly important for climate policy because the effects of climate change as well as of mitigation measures will occur well into the distant future. Therefore, slightly different rates could lead to very different conclusions.¹¹³

Suppose that cutting 1% of carbon emissions costs us, as a society, \$100 billion in 2023 and reduces climate damage by \$1 trillion in 2150. Is the emissions cut socially desirable? The answer depends on the rate at which we discount the future climate benefits. At a discount rate of 1%, the emissions cut is a net social gain; at a discount rate of 2%, the emissions cut is a net social loss.¹¹⁴

Despite the importance of the question, there is a persistent disagreement among climate experts on the correct social discount rate.¹¹⁵ One reason for such different estimates is that there is significant

¹¹⁰ This valuation methodology (commonly known as discounted cash flow, or DCF, analysis) is often used also by Delaware courts to determine the fair value of company shares, at least since *Weinberger. Weinberger v. UOP, Inc.*, 457 A.2d 701, 713 (Del. 1983). For a description of the method and discussion of the relevant case law, see 1 R. FRANKLIN BALOTTI ET AL., *THE DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS* § 9.45[B][1] (Supp. 2021).

¹¹¹ See generally Office of Management and Budget, *Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs*, Circular A-94 (1992), 57 Fed Reg 53519, 53523 (1992).

¹¹² For an overview of the topic, see Cass R. Sunstein & David A. Weisbach, *Climate Change and Discounting the Future: A Guide for the Perplexed*, 27 YALE L. & POL'Y REV. 433 (2009).

¹¹³ The question has generated a vast literature. For a general overview, see Stefano Giglio, Matteo Maggiori, Johannes Stroebel, & Andreas Weber, *Discounting Climate Change Investments*, in COMBATING CLIMATE CHANGE: A CEPR COLLECTION 75-81 (Beatrice Weder di Mauro, ed. 2021); NATIONAL ACADEMIES OF SCIENCES, ENGINEERING, AND MEDICINE, *VALUING CLIMATE DAMAGES: UPDATING ESTIMATION OF THE SOCIAL COST OF CARBON DIOXIDE* (2017); Christian Gollier, *PRICING THE PLANET'S FUTURE: THE ECONOMICS OF DISCOUNTING IN AN UNCERTAIN WORLD* (2012).

¹¹⁴ The present value of the emissions cut in 2023 is \$283 billion at a 1% discount rate, and \$81 billion at a 2% discount rate.

¹¹⁵ See, e.g., National Academies, *supra* note 113, at 165 (reporting different social discount rates used in prominent academic studies and institutional reports in the 1990s and 2000s, with estimates ranging from 1.5% to 16%).

uncertainty around the parameters used for the calculation of the social discount rate. For example, it is difficult to predict the growth rate of consumption over the very long run, which plays an important role in determining the willingness of a society to forego present benefits (the cost of mitigation) in order to obtain future benefits (reduced effects from climate change).¹¹⁶

Another important reason for the disagreement on the social discount rate is a purely normative question regarding the socially desirable distribution of resources across generations. One approach to the calculation of the social discount rate relies solely on the opportunity cost of capital, just like for the discounting of private investments. According to this approach, the market provides a reliable indication of the actual social preferences for the relative weights of present and future payoffs.¹¹⁷ An alternative approach instead finds pure market measures morally inadmissible because they value the utility of future generations less than the utility of the current generation, thus violating the principle of intergenerational neutrality.¹¹⁸ Others have tried to reconcile the two views by defending market discounting for the choice of the most efficient strategy and addressing intergenerational redistribution separately.¹¹⁹

Recent U.S. administrations have adopted very different estimates of the social discount rate to evaluate climate policies. During the Obama administration, the Interagency Working Group on the Social Cost of Greenhouse Gases (IWG) recommended three values of social discount rates: 2.5%, 3%, and 5%, with 3% being the “central value.”¹²⁰ A few years later, however, during the Trump administration, the IWG was dismantled, and the Environmental Protection Agency adopted

¹¹⁶ The intuition behind the relevance of the growth rate is that the same amount of money is worth more to someone when they are poorer and less when they are richer. Therefore, estimating how richer future generations are is important to determine how valuable a certain benefit for them will be.

¹¹⁷ For a classic presentation of this view, see, for example, William D. Nordhaus, *A Review of the Stern Review on the Economics of Climate Change*, 45 J. ECON. LITERATURE 686 (2007).

¹¹⁸ For a classic presentation of this view, see, for example, NICHOLAS STERN, *THE ECONOMICS OF CLIMATE CHANGE: THE STERN REVIEW* (2007). For a discussion of the social discount rate by moral philosophers, see JOHN BROOME, *COUNTING THE COST OF GLOBAL WARMING* (1992); Tyler Cowen & Derek Parfit, *Against the Social Discount Rate*, in *JUSTICE BETWEEN AGE GROUPS AND GENERATIONS* 144 (Peter Laslett & James S. Fishkin eds., 1992).

¹¹⁹ See, e.g., Sunstein & Weisbach, *supra* note 112.

¹²⁰ U.S. INTERAGENCY WORKING GROUP ON SOCIAL COST OF GREENHOUSE GASES, *TECHNICAL SUPPORT DOCUMENT: SOCIAL COST OF CARBON, METHANE, AND NITROUS OXIDE* (Aug. 2016), https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/scc_tsd_final_clean_8_26_16.pdf.

significantly higher estimates of the social discount rate: 3% and 7%.¹²¹ In 2021, President Biden reinstated the IWG, which reintroduced the previous rates of 2.5%, 3%, and 5%.¹²²

As of today, although there is no consensus on a precise estimate of the social discount rate, most experts seem to agree that the correct social discount rate is between 1% and 3%, with 2% being the modal response.¹²³ By contrast, the stock market discounts future cash flows at a rate of 7% or higher.¹²⁴ Since index funds internalize the benefits of future climate mitigation through changes in stock prices, if these benefits are discounted on average at the stock market discount rate, index funds will assign to them a much lower value than their social value. In particular, since climate change occurs on a very long-time horizon, such an underestimation would result in massive underinvestment in climate mitigation.

To illustrate, suppose that an index fund that “owns 1% of the economy”¹²⁵ must decide whether to support an aggressive climate risk mitigation measure that would reduce global climate damage by \$1 trillion in 2150. For simplicity, let us assume a stylized two-period economy, in which the cost of the mitigation measure is entirely borne in 2023 and the climate benefits are entirely produced in 2150.

Figure 2 shows how much the index fund would be willing to pay in 2023 in order to produce \$1 trillion climate benefit in 2150, based on different discount rates. The graph identifies four different estimates based on different discount rates. At the 1.1% discount rate proposed by

¹²¹ U.S. GOVERNMENT ACCOUNTABILITY OFFICE, SOCIAL COST OF CARBON 16-19 (June 2020).

¹²² U.S. INTERAGENCY WORKING GROUP ON SOCIAL COST OF GREENHOUSE GASES, TECHNICAL SUPPORT DOCUMENT: SOCIAL COST OF CARBON, METHANE, AND NITROUS OXIDE (Feb. 2021), https://www.whitehouse.gov/wp-content/uploads/2021/02/TechnicalSupportDocument_SocialCostofCarbonMethaneNitrousOxide.pdf.

¹²³ Moritz A. Drupp, Mark C. Freeman, Ben Groom, & Frikk Nesje, *Discounting Disentangled*, 10 AM. ECON. J.: ECON. POL’Y 109, 118 (2018). The authors report that “92 percent of experts report that they would be comfortable with an SDR somewhere in the interval of 1 to 3 percent, and over three-quarters find an SDR of 2 percent acceptable.” *Id.* at 111.

¹²⁴ See, e.g., Peter A. Diamond, What Stock Market Return to Expect for the Future?, Center for Retirement Research at Boston College (September 1999), <https://crr.bc.edu/briefs/what-stock-market-returns-to-expect-for-the-future/> (reporting that the “Social Security Administration’s Office of the Actuary... has generally used a 7.0 percent real return for stocks (based on a long-term historical average”).

¹²⁵ I will assume that the index fund bears 1% of the cost and receives 1% of the benefits of the mitigation measure. This assumption is made *in arguendo* because, as explained in Sections A and B, index funds are in fact significantly underexposed to the benefits of climate mitigation.

the Stern Review in 2007, the fund would be willing to pay up to \$2.5 billion for climate mitigation.¹²⁶ At the “consensus” social discount rate between 2% and 3%,¹²⁷ it would be willing to pay a sum between \$234 million and \$809 million. At the 7% stock market rate, our hypothetical index fund would not be willing to pay more than \$2 million for the proposed mitigation measure—a very small sum.

To be sure, it is difficult to measure how the stock market discounts climate mitigation cash flows, and it is possible that it does so at a very low rate, in line with the consensus social discount rate. However, it is more likely that the market discounts climate mitigation at a rate that is closer to the average market return for equity, given that private investors typically have a much shorter time horizon than society as a whole, they do not internalize all the hedging effects of climate mitigation investments, and the opportunity cost of their capital is the equity market return.¹²⁸ Private investors also have heterogeneous beliefs with respect to climate changes,¹²⁹ and according to a recent survey most investment managers believe that the stock market underestimate climate risk.¹³⁰ On this plausible assumption, in our hypothesis, index funds’ willingness to pay for climate mitigation is two or even three orders of magnitude smaller than the mitigation’s social value.

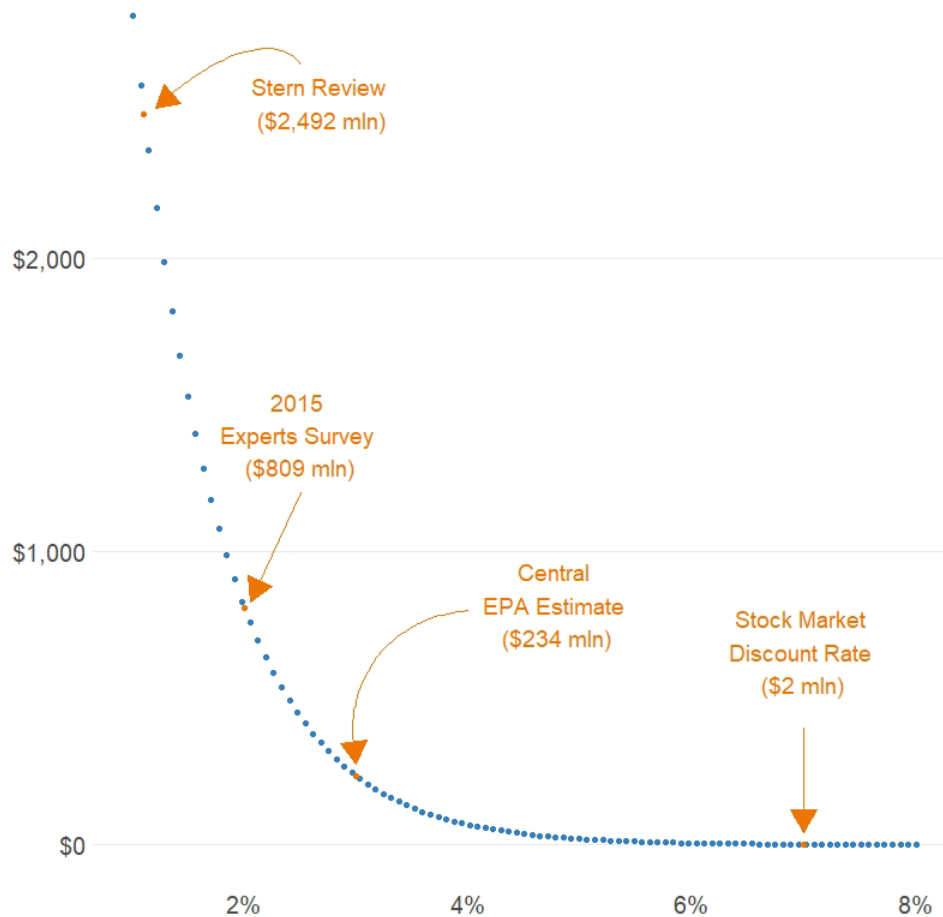
¹²⁶ Stern, *supra* note 118.

¹²⁷ Drupp et al., *supra* note 123.

¹²⁸ For a discussion of real estate market discount rates for climate mitigation investments, see Stefano Giglio, Matteo Maggiori, Krishna Rao, Johannes Stroebe, & Andreas Weber, *Climate Change and Long-Run Discount Rates: Evidence from Real Estate*, 34 REV. FIN. STUD. 3527 (2021). See also Asaf Bernstein, Matthew T. Gustafson, & Ryan Lewis, *Disaster on The Horizon: The Price Effect of Sea Level Rise*, 134 J. FIN. ECON. 253 (2019) (finding that houses exposed to the risk of sea level rise sell for a discount compared to equivalent unexposed houses, after controlling for distance from the beach).

¹²⁹ Two recent studies found that the price effect of physical climate risk on the housing market depends on whether local residents believe in climate change. Markus Baldauf, Lorenzo Garlappi, & Constantine Yannelis, *Does Climate Change Affect Real Estate Prices? Only If You Believe in It*, 33 REV. FIN. STUD. 1256 (2020); Laura A. Bakkensen & Lint Barrage, *Going Underwater? Flood Risk Belief Heterogeneity and Coastal Home Price Dynamics*, 8 REV. FIN. STUD. 3666 (2022).

¹³⁰ Philipp Krueger, Zacharias Sautner, & Laura T. Starks, *The Importance of Climate Risks for Institutional Investors*, 33 REV. FIN. STUD. 1067 (2020).

Figure 2. *Willingness to Pay for Climate Mitigation*

Maximum amount of money that an index fund would be willing to pay in 2023 in order to produce a \$1 trillion gain in 2150, based on different discount rates. The calculation assumes that the index fund “owns 1% of the economy” and therefore captures 1% of all the positive externalities of the mitigation measure. The horizontal axis represents discount rates. The vertical axis reports figures in millions of dollars.

Many experts condemned the decision of the Trump administration to adopt a social discount rate of 7%, because they worried that it would have blocked many urgent and desirable climate policies.¹³¹ Those

¹³¹ See, e.g., Brad Plumer, *Trump Put a Low Cost on Carbon Emissions. Here’s Why It Matters*, N.Y. TIMES, Aug. 23, 2018, <https://www.nytimes.com/2018/08/23/climate/social-cost-carbon.html>; Institute for Policy Integrity, *How the Trump Administration Is Obscuring the Costs of Climate Change*

worries should also apply to index funds, which are likely to discount the distant future at a similar rate.

* * *

This Part has examined the limits of index funds' internalization of climate externalities. Despite their common characterization as "universal owners," index funds invest only in subsets of the global economy. First, they are exclusively exposed to "producer welfare" and not necessarily to total welfare; therefore, they will favor climate mitigation strategies that are profitable to producers (and, in particular, very large producers) but not necessarily those that are best for small firms or consumers. Second, their portfolios are significantly overexposed to richer economies, which are less vulnerable to climate risk; therefore, they capture only a fraction of the global social cost of carbon. Third, they likely discount the distant future at a much higher discount rate than the social discount rate; therefore, even if they internalized the entire social cost of carbon, their willingness to pay for climate mitigation would still be much lower than what is socially desirable. Taken together, these limits reveal that index funds internalize climate externalities only to a very limited extent and therefore have very weak incentives to engage in aggressive climate stewardship.

IV. PORTFOLIO CONFLICTS

This Part examines the internal conflicts of portfolio primacy. Index fund managers manage dozens of different funds with different portfolios and different incentives with respect to climate risk mitigation. Under plausible assumptions, a mitigation measure that would be profitable for the stock market as a whole can still result in a loss for many index funds within the same family. These internal conflicts create significant legal and economic obstacles for aggressive climate stewardship.

Section A discusses how the specific composition of each index fund portfolio may affect the fund's incentives with respect to climate risk mitigation. Section B presents a simulation of the net portfolio effect of a climate mitigation measure for each of the Big Three's index funds with the twenty largest holdings in Exxon, a major carbon emitter. Section C

(Mar. 2018), https://policyintegrity.org/files/publications/Obscuring_Costs_of_Climate_Change_Issue_Brief.pdf; Karl Hausker, *The Flawed Analysis behind Trump Administration's Proposed Repeal of the Clean Power Plan*, WORLD RESOURCES INSTITUTE, Oct. 16, 2017, <https://www.wri.org/insights/flawed-analysis-behind-trump-administrations-proposed-repeal-clean-power-plan>.

discusses the legal and economic issues raised by portfolio conflicts.

A. Portfolio Composition and Climate Incentives

Index funds are not created equal. A recent study by Adriana Robertson found that U.S. index funds track hundreds of different indices, many of which specialize in specific industries, companies of a certain size, or stocks with specific characteristics.¹³² Furthermore, many indices select stocks based on a specific “investment style”¹³³ or weigh companies based on criteria¹³⁴ that give disproportionate representations to certain industries.¹³⁵ When we consider the economic incentives of an index fund to mitigate climate externalities, these differences matter.

A portfolio that faithfully mirrors the entire stock market potentially has, as the portfolio primacy theory posits, a proportionate exposure to emitters and to externalities. By contrast, a portfolio that is overexposed to certain subsets of the market and underexposed to other subsets of the market might be biased with respect to climate risk. In this case, the incentives of the funds to address climate risk might be weaker than what society needs or even conflicting with the interests of society.

Many index funds, for example, specialize in specific industries or

¹³² Adriana Z. Robertson, *Passive in Name Only: Delegated Management and “Index” Investing*, 36 YALE J. REG. 795, 815 (2019).

¹³³ The most popular investment styles are growth investment and value investment. Growth funds focus on stocks that have higher market value relative to earnings or book value and are believed to have above-average growth potential. By contrast, value funds focus on stocks that have lower market value in relation to those measures and are believed to be undervalued by the market. See, e.g., Henrik Cronqvist, Stephan Siegel, & Frank Yu, *Value versus Growth Investing: Why Do Different Investors Have Different Styles?*, 117 J. FIN. ECON. 333, 334 (2015). Other widely used investment styles focus on high dividend yields, earnings, or volatility. Robertson, *supra* note 132, at 820-821.

¹³⁴ The most common weighting methodology is based on the market capitalization of the company. FTSE Russell, *How Are Indexes Weighted?*, <https://perma.cc/7JNF-2GJX>. With this method, the index fund will own a roughly similar percentage of stock in each portfolio company and will have a roughly proportional exposure to the costs and benefits of carbon emissions. There are, however, many funds using alternative weighting criteria, including equal weighting, weighting on the basis of revenues, cash flow or other fundamentals, weighting based on volatility, and so on. See Vanguard, *A Review of Alternative Approaches to Equity Indexing* (Nov. 2011), <https://perma.cc/7TDG-JXPW>. These alternative criteria may give the funds more exposure to carbon emitters and less exposure to companies with higher climate vulnerability, or vice versa.

¹³⁵ For example, iShares Russell 1000 Value ETF, which focuses on “value stocks,” invests 25% of the portfolio in financial companies, 12% in health technology companies, and 5% in energy companies. By contrast, iShares Russell 1000 Growth ETF, which focuses on “growth stocks,” invests 35% in technology services companies, 19% in electronic technology companies, 13% in retail companies, and only 0.25% in energy companies.

sectors. For example, among the 15 most popular indices (i.e., those tracked by the largest number of index funds) are the Dow Jones U.S. Real Estate Index (which includes real estate investment trusts and other companies investing in real estate), the Dow Jones Basic Materials Index (which includes chemical companies, metal and mining companies, construction materials companies, and other companies in the materials sector), the Dow Jones U.S. Financial Index (which includes U.S. companies in the financial sector), the Dow Jones U.S. Oil & Gas Index (which includes U.S. companies that produce and distribute oil and gas), and the NASDAQ Biotechnology Index (which includes NASDAQ-listed companies in the biotech and pharmaceutical industries).

It is widely believed that rising temperatures will have heterogeneous effects across economic sectors.¹³⁶ For example, there is agreement among experts that climate change will materially affect recreation and tourism, insurance companies, the health sector, and the agricultural sector. By contrast, absent any mitigation policies, technology shock, or change in social preferences, oil and gas companies will continue to profit from carbon emissions. Thus, an index fund focusing on major carbon emitters (such as the energy sector) will have very different incentives to address climate risk than an index fund focusing on industries vulnerable to carbon externalities.

Suppose, for example, that iShares U.S. Energy ETF, managed by BlackRock, is considering whether to urge its portfolio companies to reduce their carbon emissions in order to decrease long-term global damage from climate change. iShares U.S. Energy ETF is a fund invested mostly in energy companies. According to the portfolio primacy theory, the fund would be willing to cut emissions if doing so increases the value of its overall portfolio, even if it decreases the value of the companies that most depend on carbon emissions. But in this case, the whole portfolio consists almost exclusively of oil and gas companies, which profit from fossil fuels.¹³⁷ It is unlikely that the fund would gain from cutting emissions of oil and gas emissions in order to reduce global climate losses.

Another possible portfolio bias concerns the size of portfolio

¹³⁶ See, e.g., Bruno Conte, Klaus Desmet, Dávid Krisztián Nagy, & Esteban Rossi-Hansberg, *Local Sectoral Specialization in a Warming World*, 21 J. Econ. Geog. 493 (2021) for a model estimating different effects of global warming for the agricultural and non-agricultural sectors. See also Intergovernmental Panel on Climate Change, FIFTH ASSESSMENT REPORT 662-693 (2014) (assessing the estimated impact of climate change on various economic sectors).

¹³⁷ According to the FactSet Company/Security Database, as of July 2021, iShares U.S. Energy ETF invested 97.3% of its portfolio in oil companies (integrated oil, oil and gas production, oil refining and marketing, oil and gas pipelines, and oilfield services and equipment) and 99.6% of its portfolio in U.S. companies.

companies. Many funds have a broad portfolio in terms of market capitalization of the individual companies—that is, they include large, medium, and small companies. Many others, however, focus on companies of a certain size. For example, Vanguard 500 focuses on large-capitalization companies. The vast majority of the fund (78.5%) is invested in companies with a market capitalization exceeding \$50 billion, and less than 1% of the fund is invested in companies worth less than \$2 billion.¹³⁸ By contrast, none of the portfolio companies of State Street’s SPDR Portfolio Mid Cap ETF has a market capitalization larger than \$20 billion, and most are worth less than \$5 billion.¹³⁹

Adaptation to climate change is relatively more difficult for smaller companies, which have more limited capital for investment in expensive climate resilience projects with long-term, uncertain payoffs.¹⁴⁰ Therefore, a portfolio with a disproportionate fraction of large companies may be underexposed to the total risk of climate change and thus have reduced incentives to address climate externalities.

A further portfolio characteristic that affects climate incentives is geography, as discussed in Part III.B. Portfolios focusing on developed economies have different incentives than portfolios focusing on developing and emerging economies.

Large asset managers, such as the Big Three, advise dozens of different index funds, with different portfolio compositions. Despite the superficial characterization of all index funds as “universal owners,” some of these funds may have incentives to support a given climate mitigation measure, whereas some other funds, advised by the same asset manager, may have incentives to oppose it.

These internal conflicts represent a formidable obstacle to climate stewardship. As explained in Section C, investment managers have a fiduciary duty to act in the interests of the investors in the fund and cannot trade-off benefits for investors in some funds with benefits for investors in other funds.

B. Simulation of Carbon Mitigation Measure

To empirically test whether and how the different composition of portfolios may result in different incentives with respect to climate mitigation, I examined the investment of the Big Three in Exxon, one of

¹³⁸ Data collected from the FactSet Ownership database as of July 28, 2021.

¹³⁹ Data collected from the FactSet Ownership database as of July 28, 2021.

¹⁴⁰ See, e.g., CENTER FOR CLIMATE AND ENERGY SOLUTIONS, WEATHERING THE STORM: BUILDING BUSINESS RESILIENCE TO CLIMATE CHANGE 22 (July 2013).

the world's biggest carbon emitters.¹⁴¹ Major emitters such as Exxon make significant profits from fossil fuels and, absent regulatory or social pressure, they do not have individual incentives to reduce climate externalities. If, following the portfolio primacy theory, the Big Three were to become climate stewards, we would expect them to persuade companies like Exxon to cut their emissions, even if doing so is economically irrational at the company level. As of the end of June 2022, index funds advised by BlackRock, State Street or Vanguard owned, in the aggregate, 16.6% of Exxon stock,¹⁴² and their influence is realistically bound to grow.¹⁴³ Therefore, they could exert significant influence on Exxon's climate policy.

However, the Big Three do not directly hold Exxon stock; they advise a large number of funds, including index funds, that hold the stock for the benefit of the fund investors. In particular, there are 298 mutual funds and ETFs advised by the Big Three that own Exxon stock. For my analysis here, I will focus on the Big Three equity index funds with the twenty largest stakes in Exxon ("Top Big Three Funds"). In the aggregate, these funds own 13.6% of Exxon, equal to 82% of the entire Big Three holdings.

To examine the potential conflicts within the same fund families, I consider a hypothetical emissions cut that would reduce the value of oil companies by \$1,000 billion but would increase the value of non-oil companies by \$1,200 billion, thus netting a global stock market gain of \$200 billion, in present value terms. This is the typical scenario in which portfolio primacy predicts that index funds would have strong financial incentives to support the mitigation measure.

To simulate such a scenario, I assume that the entire costs and benefits of the proposed mitigation measure would be captured by the companies in which the Top Big Three Funds invest. In other words, I assume that the portfolios of the Top Big Three Funds, taken together, internalize all the effects of the proposed mitigation measure. These funds invest in 11,512 different companies, of which 307 meet the definition criteria of oil company.¹⁴⁴ I also assume that oil companies

¹⁴¹ CARBON MAJORS REPORT, *supra* note 59 (listing Exxon among "the highest emitting companies since 1988 that are investor-owned").

¹⁴² Data collected from the FactSet Ownership database on June 24, 2022.

¹⁴³ See Bebchuk & Hirst, *Specter*, *supra* note 54.

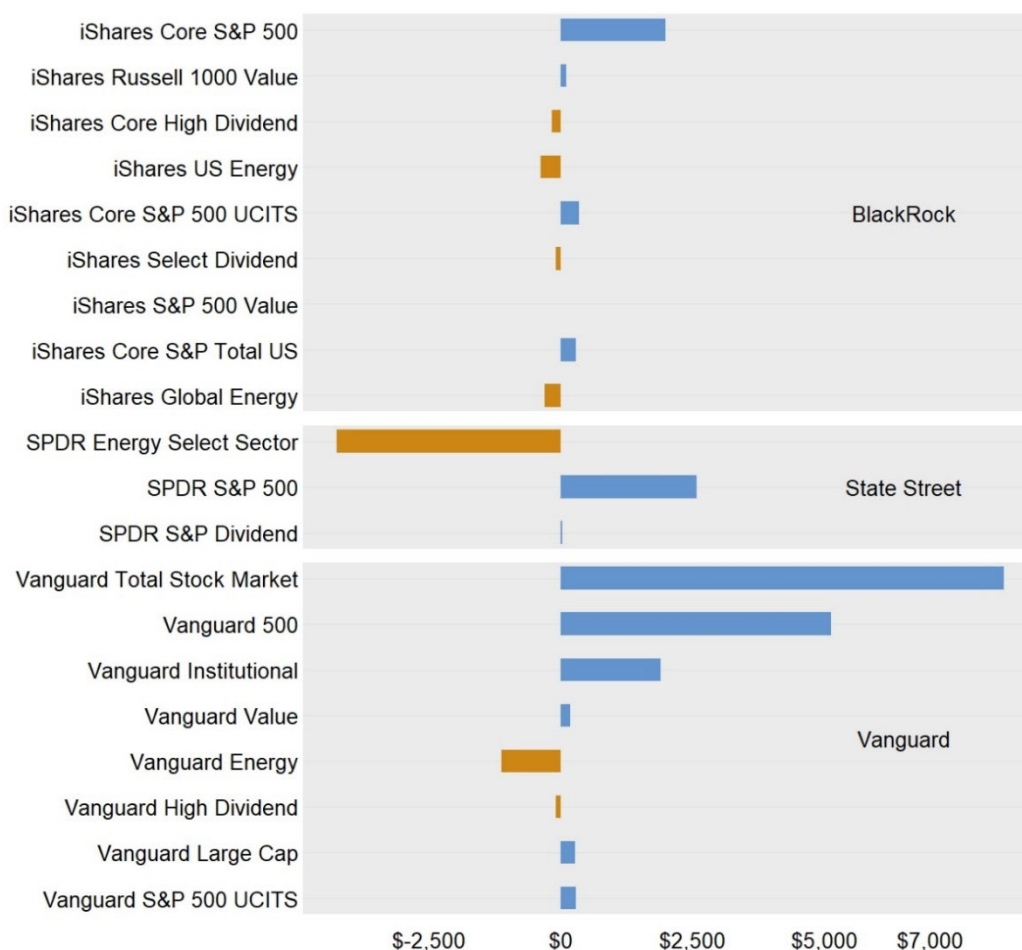
¹⁴⁴ In this Article, by oil companies I refer to companies in the following industries: integrated oil, oil and gas production, oil refining and marketing, oil and gas pipelines, oilfield services and equipment, and contract drilling. For simplicity, I use the classifications utilized in the FactSet Ownership database. As of July 25, 2021, companies in these industries accounted for 3.02% of the Vanguard Total World Stock Index Fund (a market-cap weighted index fund invested in 8,963 companies around the world) and for 2.4% of the Vanguard Total Stock Market Index Fund (a market-cap

bear the cost of the mitigation measure in proportion to their market capitalization (specifically, the measure reduces the market value of each oil company of about 16.8%), and, likewise, all other companies reap the benefits of climate mitigation in proportion to their market capitalization.

Figure 3 reports the result of the simulation. As the figure shows, broad-based index funds, such as Vanguard Total Stock Market, Vanguard 500, and SPDR S&P 500 make substantial gains, whereas other energy funds and funds focused on “high dividend” stock take a hit. For example, State Street’s Energy Select Sector SPDR Fund loses \$4,245 million, Vanguard Energy loses \$1,118 million, and BlackRock’s iShares US Energy loses \$373 million. Interestingly, while for Vanguard and BlackRock the aggregate net effect of the proposed mitigation measure is positive, for State Street the measure would result in a net loss despite the huge positive effect for “the whole market.”

weighted index fund invested in approximately 100% of the stocks traded on the New York Stock Exchange and Nasdaq.

Figure 3. Net Portfolio Effect of an Emissions Cut (Linear Function)

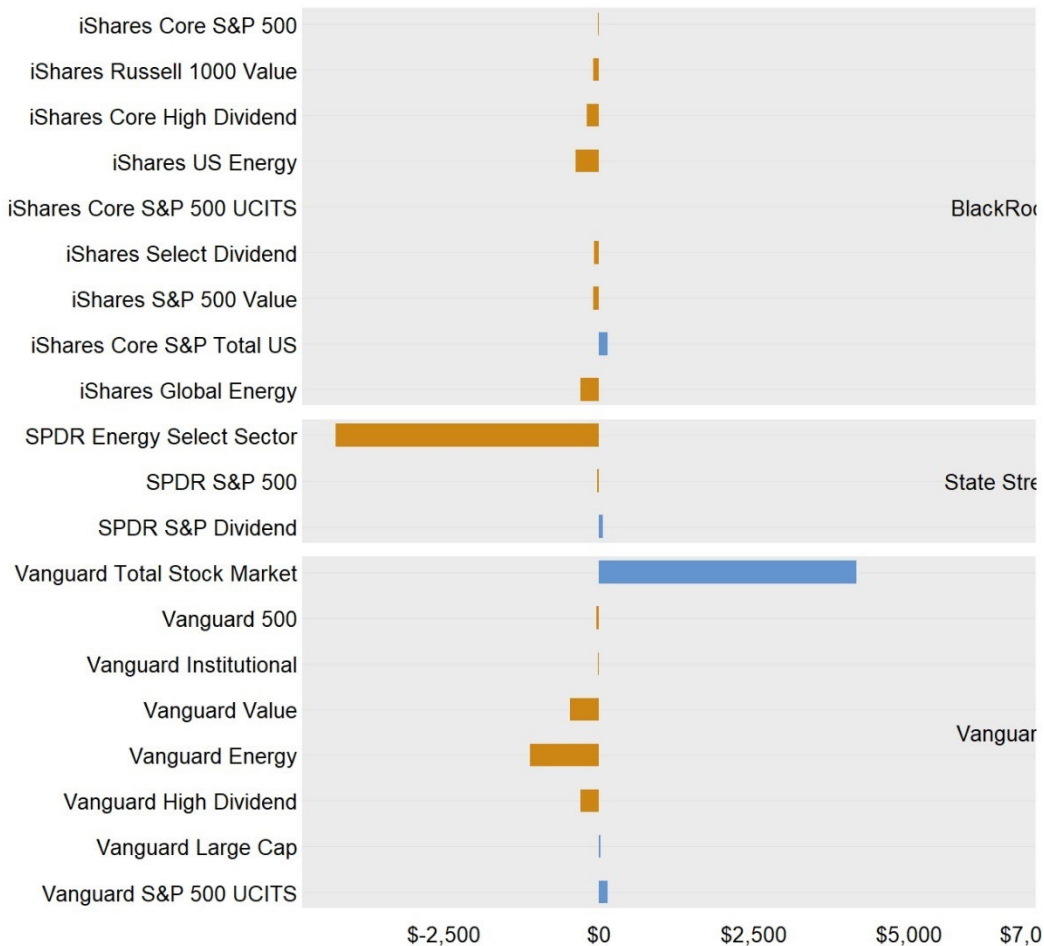


This figure reports the result of a simulation of the net portfolio gains or losses from a hypothetical emissions cut that reduces the value of oil companies by \$1,000,000 million and increases the value of all other companies by 1,200,000 million. The simulation assumes that the effects of the emissions cut are entirely captured by the 11,512 companies in which the above funds invest. All costs and benefits are proportional to market capitalization. Data on the portfolio composition of the various funds were collected from FactSet as of November 30, 2021. Values on the horizontal axis are in millions of dollars.

The results of the simulation are highly sensitive to the specific assumptions. If, for example, we assume that the benefits of climate mitigation do not increase linearly with market capitalization but larger companies benefit from climate mitigation proportionally less than smaller companies, the gain for broad-based index funds is significantly reduced. To illustrate, Figure 4 reports the results of the same simulation but on the assumption that the benefits of climate mitigation are proportional to the square root of market capitalization. The

assumption is not implausible: indeed, as discussed in Part III.A, larger companies are believed to be more resilient to climate risk and therefore smaller companies are likely to benefit proportionally more from climate mitigation.

Figure 4. Net Portfolio Effect of an Emissions Cut (Concave Function)



This figure reports the result of a simulation of the net portfolio gains or losses from a hypothetical emissions cut that reduces the value of oil companies by \$1,000,000 million and increases the value of all other companies by 1,200,000 million. The simulation assumes that the effects of the emissions cut are entirely captured by the 11,512 companies in which the above funds invest. Costs for oil companies are proportional to market capitalization; benefits for non-oil companies are proportional to the square root of market capitalization. Data on the portfolio composition of the various funds were collected from FactSet as of November 30, 2021. Values on the horizontal axis are in millions of dollars.

Since most Top Big Three Funds focus on mega-capitalization companies, they end up losing from the emissions cut. If the real-world distributions of costs and benefits of climate mitigation is closer to the simulation in Figure 4 rather than to the simulation in Figure 3, most funds will have strong incentives to oppose the proposed emissions cut. But even if the real-world distribution is closer to the simulation in Figure 3, conflicts within the same family of funds pose difficult legal and economic problems for fund managers.

C. Fiduciary Conflicts

The simulations proposed in Section B are only illustrations of possible real-world scenarios. In the real world, estimating the costs and benefits of specific carbon mitigation measures for each public company is extremely difficult. However, given the different portfolio compositions of the various funds, it is reasonable to believe that many measures that result in an aggregate net gain for the whole stock market will create a loss for many individual funds. In particular, within the same family of funds managed by the same asset manager, some funds will benefit from the measure, while some others will lose.

Under the existing law, a mutual fund must be managed “on behalf of its investors.”¹⁴⁵ In particular, the law makes it clear that mutual funds must operate in the interest of all classes of investors and that such a duty is violated when the fund acts in the interests of directors, officers, investment advisers, special classes of investors, other mutual funds, or entities engaged in other lines of business.¹⁴⁶

The duty of loyalty not only prohibits fraud and misappropriation but also condemns conflicts of interests between directors and officers of the fund, or investment advisers, and the investors in the fund.¹⁴⁷ Therefore, the portfolio conflicts examined in this Part translate to conflicts of duties under fiduciary law.¹⁴⁸

As shown in Section B, carbon mitigation measures might benefit some index funds and damage other funds advised by the same

¹⁴⁵ Investment Company Governance, Exchange Act Release No. IC-26520, 2004 WL 1672374 (July 27, 2004).

¹⁴⁶ Investment Company Act § 1(b)(2), 15 U.S.C. 80a-1(b)(2).

¹⁴⁷ See generally Arthur B. Laby, *The Fiduciary Structure of Investment Management Regulation*, in RESEARCH HANDBOOK ON THE REGULATION OF MUTUAL FUNDS 79-110 (William A. Birdthistle & John Morley eds. 2018).

¹⁴⁸ For discussions of fiduciary conflicts within family of funds, see, e.g., Ann M. Lipton, *Family Loyalty: Mutual Fund Voting and Fiduciary Obligation*, 19 TENN. J. BUS. L. 175, 176 (2017); Utpal Bhattacharya et al., *Conflicting Family Values in Mutual Fund Families*, 68 J. FIN. 173 (2013); José-Miguel Gaspar et al., *Favoritism in Mutual Fund Families? Evidence on Strategic Cross-Fund Subsidization*, 61 J. FIN. 73 (2006).

investment adviser. What should the investment adviser do in this case? From a legal standpoint, the answer seems straightforward. Directors and officers (or trustees)¹⁴⁹ of each fund, as well as their investment advisers,¹⁵⁰ must resolve any conflicts in the interests of the investors of that particular fund.¹⁵¹ Hence, in our hypothesis, the investment adviser should vote and engage companies in opposite and conflicting ways on behalf of different funds.¹⁵² In practice, however, index fund managers do not make this kind of decision at the level of the individual fund. They typically have centralized governance offices that make decisions on voting and other engagement issues at the level of the entire institution.¹⁵³

Advocates of portfolio primacy find that the centralization of engagement decisions, although potentially problematic from a fiduciary standpoint, ultimately favors institution-level stewardship.¹⁵⁴ Indeed, according to this view, by making centralized decisions for the funds they manage, large asset managers will choose to maximize value across portfolios rather than at the level of a particular fund, also because this strategy has a low chance of being legally challenged.¹⁵⁵

However, this view seems to underestimate investment managers' incentives to maximize value for investors in order to attract capital (and fees). Although such incentives are not powerful enough to prevent all kinds of malfeasance,¹⁵⁶ they might be able to dissuade management

¹⁴⁹ Most funds are organized as Delaware or Massachusetts trusts, or as Maryland corporations (with a board-centric governance). Deborah A. DeMott, *Fiduciary Contours: Perspectives on Mutual Funds and Private Funds*, in RESEARCH HANDBOOK ON THE REGULATION OF MUTUAL FUNDS, *supra* note 147, at 61.

¹⁵⁰ Investment advisers owe fiduciary duties to the fund they advise under the Investment Advisers Act of 1940. SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 191–92 (1963) (“The Investment Advisers Act of 1940 ... reflects a congressional recognition of the delicate fiduciary nature of an investment advisory relationship, as well as a congressional intent to eliminate, or at least to expose, all conflicts of interest which might incline as investment adviser—consciously or unconsciously—to render advice which was not disinterested”) (citations omitted).

¹⁵¹ See generally Lipton, *Family Loyalty*, *supra* note 148.

¹⁵² For a discussion of the conflicts of interests in mutual fund voting, see also Sean J. Griffith & Dorothy S. Lund, *Conflicted Mutual Fund Voting in Corporate Law*, 99 B.U. L. REV. 1151 (2019).

¹⁵³ Bebchuk & Hirst, *Index Funds*, *supra* note 62, at 2076–2084.

¹⁵⁴ See, e.g., Condon, *supra* note 44, at 57–59.

¹⁵⁵ *Id.* at 59 (reporting that the Securities and Exchange Commission has brought only one enforcement action punishing conflicted proxy voting practices, in 2009, and that investment managers can provide a “plausible business-purpose cover” for their strategy, thus avoiding legal consequences).

¹⁵⁶ In fact, the role of investment management law and of the Securities and Exchange Commission is justified on the grounds that market incentives are not enough to police investment managers' behavior.

companies from systematically and visibly harming the value of portfolio companies. If the Big Three overtly pressured energy companies to engage in value-decreasing strategies for the benefit of other companies, it is very likely that investors in their energy-focused funds would flee (and perhaps even take legal action). In fact, mutual funds shareholders' strong exit rights—stronger than in regular corporations—and the desire of investment managers to attract new investors force fund directors, officers, and investment advisers to pay careful attention to conflict-of-interest issues.¹⁵⁷

* * *

This Part has shown that even if index fund portfolios had strong incentives to mitigate climate externalities, climate stewardship would create serious internal conflicts among funds advised by the same index fund manager. These conflicts translate to conflicts of duties under fiduciary law and disincentivize asset managers to engage in aggressive climate stewardship.

V. A FRAMEWORK FOR POLICY ANALYSIS

This Article has tried to show that the promise of portfolio primacy for climate mitigation is severely constrained by three crucial limits, and therefore our expectations on the potential impact of index fund stewardship on climate change should be modest. Such recognition has significant implications for current policy decisions.

As discussed in Part I, regulators can use different tools to address climate externalities, including Pigouvian taxes, cap-and-trade systems, abatement subsidies, information-based policies, and traditional command-and-control regulation (such as standard setting or emissions ceilings). Each of these tools presents advantages and disadvantages and raises complex legal and economic questions.¹⁵⁸ However, growing expectations that portfolio primacy would force companies to internalize emissions' externalities and therefore to reduce climate risk might

¹⁵⁷ See John Morley, *The Separation of Funds and Managers: A Theory of Investment Fund Structure and Regulation*, 123 YALE L. J. 1228, 1263 (“[Investment] [m]anagers must therefore constantly consider how conflict resolutions will affect their ability to attract new investors”). Another potential tension is the one between portfolio primacy and the fiduciary duties of corporate directors, which prohibit directors to damage the company they manage for the benefit of some large, diversified investors. See Marcel Kahan & Edward Rock, *Systematic Stewardship with Tradeoffs* (working paper) (Jan. 30, 2022), <https://ssrn.com/abstract=3974697>.

¹⁵⁸ See sources cited *supra* notes 38-40.

undermine support for much-needed regulatory interventions.¹⁵⁹

For example, public opinion might accept an exceedingly optimistic version of portfolio primacy and become persuaded that the stock market on its own will be able to reduce climate externalities to a significant degree. This phenomenon might in turn reduce political support for more stringent regulation. Decarbonization will likely be costly for most people, with varying impacts on their habits,¹⁶⁰ and democratic support for effective decarbonization policies is reduced by positive intergenerational externalities (that is, the fact that most of the benefits of decarbonization will be enjoyed by future generations). Therefore, portfolio primacy's flawed promise of an internalization mechanism might become a political argument to justify weaker support for painful but effective measures.

If portfolio primacy does not have a meaningful effect on climate stewardship, then what can explain the public statements and concrete engagement actions of the Big Three and other large asset managers in favor of climate risk disclosure and emissions reductions?¹⁶¹ One reason might be the concern of investment managers for regulatory and transition risks. If market participants anticipate a transition toward a low-carbon economy due to regulatory intervention, technological changes, or changes in social preferences, they have good economic reason to pressure companies into preparing for such a transition.¹⁶²

Another reason might be the concern of fund investors for climate issues, which creates a demand for environmentally conscious mutual funds and thus an incentive for investment managers to signal their commitment to climate mitigation.¹⁶³ A further driver might be the effect of moral and social norms on investment managers, either because they hold genuine beliefs that favor environmentally friendly behaviors or because they are forced to act in that way as a result of image concerns

¹⁵⁹ In previous work, I have discussed a similar problem with respect to the question whether "stakeholderism" (that is, reliance on corporate leaders to pursue the interests of corporate stakeholders and society at large) can distract from pushing for regulatory solutions. See Bebchuk & Tallarita, *Illusory Promise*, *supra* note 24, at 168-175.

¹⁶⁰ See, e.g., Michael P. Vandenbergh & Paul C. Stern, *The Role of Individual Household Behavior in Decarbonization*, 47 ENVTL. L. REP. NEWS & ANALYSIS 10941 (2017).

¹⁶¹ For some anecdotal evidence, see, for example, Condon, *supra* note 44, at 18-25. See also generally José Azar, Miguel Duro, Igor Kadach, & Gaizka Ormazabal, *The Big Three and Corporate Carbon Emissions around the World*, 142 J. FIN. ECON. 674 (2021).

¹⁶² On the importance of anticipating regulatory interventions for private actors' decisions, see Jonathan S. Masur & Jonathan Remy Nash, *Promoting Regulatory Prediction*, 97 IND. L.J. 203 (2022); on the reasons why companies might want engage in "forward compliance" and adjust to anticipated future regulation, see John Armour, *The Case for Forward Compliance*, BRIT. ACAD. REV. (Autumn 2008) at 19.

¹⁶³ See Barzuza et al., *supra* note 42.

and social pressure.¹⁶⁴ Other reasons, of course, might be less noble: some asset managers, for example, might simply use the promise of climate stewardship as a marketing tool or as a way to curry personal favor with elected officials or policymakers.

Regulatory, technological, and moral or social drivers ultimately rely on government intervention and social or cultural changes rather than on direct financial incentives such as portfolio-level profits. In fact, financial incentives are, at best, the mere transmission mechanism through which regulatory interventions and social and moral norms affect investment and corporate decisions. In other words, financial incentives are more likely to operate as the proximate cause, but not the ultimate cause, of climate stewardship.

The above analysis suggests that climate regulation, in the form of taxes, subsidies, cap and trade systems, and prescriptive regulation should remain the primary goal for those concerned about the effects of climate change. The analysis also offers a basic framework to assess potential capital market policies that may increase the impact of investors on climate risk mitigation, as a supplement for climate regulation. Policies that focus on the portfolio dimension of climate stewardship are severely constrained by the limits discussed in this Article, but policies that focus on the transmission of regulatory risk, facilitate social and cultural pressures on corporate decision makers, and support the prosocial preferences of individual investors are likely to prove more effective.

Some of the steps recently taken by the Securities and Exchange Commission (SEC) on social and environmental issues can and should be evaluated also through the above framework. For example, the proposed rule on the disclosure of climate change risk and transition risk might improve price efficiency and force companies to incorporate individual climate risk,¹⁶⁵ and the proposed rule on the transparency of “ESG” funds¹⁶⁶ might help investors make informed choice with respect

¹⁶⁴ See *supra* note 43, and accompanying text. Interestingly, a study by Alexander Dyck, Karl V. Lins, Lukas Roth, and Hannes F. Wagner on the effect of institutional investors’ engagement in certain corporate environmental metrics finds that social and cultural norms are a decisive driver of this phenomenon. In particular, European institutional investors—based in countries with stronger social and cultural norms with respect to environmental protection and climate mitigation—affect companies’ environmental scores, while U.S. investors do not. Alexander Dyck, Karl V. Lins, Lukas Roth, & Hannes F. Wagner, *Do Institutional Investors Drive Corporate Social Responsibility? International Evidence*, 131 J. FIN. ECON. 693, 695, 705-710 (2019).

¹⁶⁵ Securities Exchange Commission, The Enhancement and Standardization of Climate-Related Disclosures for Investors, Release No. 33-11061, May 9, 2022, <https://www.sec.gov/rules/proposed/2022/33-11061.pdf>.

¹⁶⁶ Securities Exchange Commission, Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance

to socially responsible investments. Furthermore, the recent SEC's staff guidance on shareholder proposals, which takes a more permissive approach on socially relevant proposals, might facilitate pressures from environmental activists and environmentally conscious investors.¹⁶⁷ The discussion of these proposals and policy changes is beyond the scope of this Article, but the proposed analysis might help illuminate some of their potential benefits.

CONCLUSION

Climate change is one of the most pressing issues for our society. It is the product of a collective action problem: individuals and firms do not have incentives to produce a socially desirable level of carbon emissions. Portfolio primacy theory claims that large asset managers, particularly index fund managers, can mitigate this collective action problem by internalizing climate risk within their investment portfolios. This Article has provided an assessment of portfolio primacy's potential impact. The analysis has shown that our expectations about the role of index fund stewardship in mitigating climate risk should be modest. Climate policy should focus on regulatory tools—carbon taxes, cap-and-trade systems, and prescriptive regulation—and social pressure rather than on direct market-based tools such as portfolio primacy. Capital markets innovations can be used as a transmission mechanism for regulatory risk, social pressure, or the prosocial preferences of investors. However, climate regulation should remain the primary goal for all those concerned about the effects of climate change.

Investment Practices, Release No. 33-11068, May 25, 2022, <https://www.sec.gov/rules/proposed/2022/33-11068.pdf>.

¹⁶⁷ SEC Staff Legal Bulletin No. 14L, Shareholder Proposals, <https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals> (SEC Div. Corp. Fin. Nov. 3, 2021).