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Index Funds and ESG Hypocrisy

Eric C. Chaffee[†]

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I. The Intersection of Index Funds and ESG Investing

In recent years, two incompatible trends have risen to the forefront of investing. The first is the dominance of index funds[1] in allowing

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1. This Essay will use the term "index fund" to designate both actual index funds and exchange traded funds ("ETFs"). Both of these investment vehicles track an index with the main difference being that ETFs are traded like stock on stock exchanges. *See* Lucian Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 Colum. L. Rev. 2029, 2044 (2019) ("The term 'index fund' encompasses both mutual funds and exchange traded funds (ETFs), or any other investment vehicle that mechanically tracks an index."); Jill Fisch, Assaf Hamdani & Steven Davidoff Solomon, *The New Titans of Wall Street: A Theoretical Framework for Passive Investors*, 168 U. Pa. L. Rev. 17, 19 n.4 (2019) ("An ETF is a fund which tracks an index but is publicly traded on the market rather than purchased directly from (or sold to) the fund sponsor."); Giovanni Strampelli, *Are Passive Index Funds Active Owners? Corporate Governance Consequences of Passive Investing*, 55 San

passive investors to gain consistent returns and mitigate risks through the diversified portfolios of these funds, which are designed to track the components of financial markets.[2] The second is the environmental, social, and governance (ESG) movement in which investors seek out socially conscious companies and try to facilitate change in companies to achieve ESG-related goals.[3]

Each of these movements is important, which helps to explain their popularity. In regard to index funds, three entities—BlackRock, Vanguard, and State Street—have become dominant players in marketing and selling index funds.[4] As a consequence, the power of

Diego L. Rev. 803, 809 (2018) ("Passive index funds include index mutual funds and exchange traded funds (ETFs). Although index mutual funds and ETFs are technically different—index funds are traded only once a day after markets have closed and ETFs can be bought and sold continuously during the entire trading day—they share the fundamental characteristic of seeking to replicate stock indices and to minimize cost ratios.").

2. *See* Quinn Curtis, *Costs, Conflicts, and College Savings: Evaluating Section 529 Savings Plans*, 37 Yale J. on Regul. 116, 140 (2020) ("Index funds, investments that seek to track broad market factors at low cost, have grown rapidly over the last decade. Investors who choose index funds forgo the possibility of outperforming the market in exchange for the certainty of low costs."); Sean J. Griffith & Dorothy S. Lund, *A Mission Statement for Mutual Funds in Shareholder Litigation*, 87 U. Chi. L. Rev. 1149, 1205 (2020) ("Index funds regularly rebalance their portfolios to bring their holdings in line with the index they track, and buy and sell shares to manage flows of capital into and out of the fund."); Jay B. Kesten, *Shareholder Political Primacy*, 10 Va. L. & Bus. Rev. 161, 197 (2016) ("Index funds invest in a portfolio of securities intended to track a particular market index, such as the S&P 500 or Russell 3000.").

3. *See* Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 Stan. L. Rev. 381, 388 (2020) ("ESG investing resists precise definition, but roughly speaking, it is an umbrella term that refers to an investment strategy that emphasizes a firm's governance structure or the environmental or social impacts of the firm's products or practices. . . . Other labels for the practice include ethical investing, economically targeted investing, sustainable or responsible investing, and impact investing.").

4. *See* Nathan Atkinson, *If Not the Index Funds, Then Who?*, 17 Berkeley Bus. L.J. 44, 45 (2020) ("In recent years, large asset managers have reached incredible sizes, managing trillions of dollars of assets on behalf of tens of millions of clients. The largest three, BlackRock, Vanguard, and State Street, taken together (the 'Big Three'), vote about 20% of shares in most large companies, with the majority of these shares held in passive index funds."); Bebchuk & Hirst, *supra* note 1, at 2033 ("Index funds—investment funds that mechanically track the performance of an index—hold an increasingly large proportion of the equity of U.S. public companies. The sector is dominated by three index fund managers—BlackRock, Inc. (BlackRock), State Street Global Advisors, a division of State Street Corporation (SSGA), and the Vanguard Group (Vanguard), often referred to as the 'Big Three.'"); Brando Maria Cremona & Maria Lucia Passador,

these entities is increasing rapidly and dramatically. In 2000, when combined, these three entities were the largest shareholder in 25% of S&P 500 companies, and by 2015, that number had jumped to 88%.[5] At the time of the writing of this piece, these entities currently own 5% to 7% of most public companies.[6] These numbers are only likely to increase. In regard to ESG, the ESG movement has taken root with investors, especially millennials.[7] Surveys suggests that 70% to 80% of institutional investors take ESG information into account in making investment decisions.[8]

The tendrils of the ESG movement have reached index funds as well. BlackRock, State Street, and Vanguard have each promised to use their voting power created by their management of these funds to push forward an ESG agenda.[9] For example, in a 2020 letter to CEOs,

Shareholder Activism Today: Did Barbarians Storm the Gate?, 20 U.C. Davis Bus. L.J. 207, 233 (2020) ("Index funds currently play an increasingly important role in the asset management industry: indeed, index funds managed by the so-called 'Big Three' (Blackrock, Vanguard and State Street) have now become the largest investors within the modern capital markets.").

5. *See* Brian R. Cheffins, *Corporate Governance and Countervailing Power*, 74 Bus. Law. 1, 42–43 (2019) ("The proportion of S&P 500 companies where BlackRock, Vanguard, and State Street combined would constitute the largest shareholder increased from 25 percent in 2000 to 88 percent in 2015.").

6. *See* Edward B. Rock & Daniel L. Rubinfeld, *Common Ownership and Coordinated Effects*, 83 Antitrust L.J. 201, 224–25 (2020) ("BlackRock, Vanguard, and State Street each currently own 5–7 percent of most public companies . . . .").

7. *See* Dana Brakman Reiser & Anne Tucker, *Buyer Beware: Variation and Opacity in ESG and ESG Index Funds*, 41 Cardozo L. Rev. 1921, 1978 (2020) ("Interest in sustainable and ESG investing appears concentrated in women and millennials."); Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 Vand. L. Rev. 1401, 1451–52 (2020) ("[R]etail investors, particularly millennials, are increasingly choosing to place their money with companies committed to ESG. . . . According to estimates, the total amount of assets invested in line with ESG principles had reached, by 2018, about $22 trillion, or a quarter of all assets under management in the world.").

8. *See* Virginia Harper Ho, *Disclosure Overload? Lessons for Risk Disclosure & ESG Reporting Reform from the Regulation S-K Concept Release*, 65 Vill. L. Rev. 67, 82 n.80 (2020) ("[S]urveys find, on average, that 70% to 80% of institutional investors consider ESG information as important or essential to investment analysis.").

9. *See* Alexander T. Kraik, *Environmental, Social, and Governance Issues: An Altered Shareholder Activist Paradigm*, 44 Vt. L. Rev. 493, 526 (2020) ("BlackRock, Vanguard, State Street, and other asset managers have elevated ESG and use it as an important benchmark for their investment decisions and governance priorities.").

Laurence D. Fink—Founder, Chairman, and Chief Executive Officer of BlackRock—stated that ESG has been and will continue to be a priority in BlackRock's voting practices. He wrote:

> Where we feel companies and boards are not producing effective sustainability disclosures or implementing frameworks for managing these issues, we will hold board members accountable. Given the groundwork we have already laid engaging on disclosure, and the growing investment risks surrounding sustainability, we will be increasingly disposed to vote against management and board directors when companies are not making sufficient progress on sustainability-related disclosures and the business practices and plans underlying them.[10]

In a 2020 letter to clients, he made clear that these practices would be intensifying regarding index funds:

> Investment stewardship is an essential component of our fiduciary responsibility. This is particularly important for our index holdings on behalf of clients, in which we are essentially permanent shareholders. We have a responsibility to engage with companies to understand if they are adequately disclosing and managing sustainability-related risks, and to hold them to account through proxy voting if they are not. We have been engaging with companies for some time on these issues, as reflected in our engagement priorities. As in other areas of our investment functions, our investment stewardship team is intensifying its focus and engagement with companies on sustainability-related risks.[11]

State Street has unapologetically chartered a similar course regarding ESG and index fund voting. State Street's *Stewardship Report 2018-19* informs:

> A significant challenge for asset managers with index strategies invested in thousands of listed companies globally is to provide active oversight of their holdings. As noted, our stewardship program identifies a series of strategic priorities designed to enhance the quality and define the scope of our stewardship activities for the year. Identifying these priorities enables us to

10. Larry Fink, *Larry Fink's 2020 Letter to CEOs: A Fundamental Reshaping of Finance*, BlackRock, https://www.blackrock.com/corporate/investor-relations/2020-larry-fink-ceo-letter [https://perma.cc/S8FV-69AA] (last visited May 21, 2021).

11. Larry Fink, *BlackRock's 2020 Letter to Clients: Sustainability as BlackRock's New Standard for Investing*, BlackRock, https://www.blackrock.com/corporate/investor-relations/2020-blackrock-client-letter [https://perma.cc/9LKA-TG9H] (last visited May 21, 2021).

> plan and actively focus our engagement efforts on thematic ESG and sector-specific issues that are important to our clients. We develop our priorities based on several factors, including client feedback received in the past year, emerging ESG trends, developing macroeconomic conditions, and the regulatory environment.[12]

Finally, Vanguard has also decided to pursue ESG-related objectives through its index funds. A document from April 2019 by Glenn Booraem, Vanguard Investment Stewardship Officer, details Vaguard's approach:

> We consistently engage with portfolio companies about climate risk, especially companies in carbon-intensive industries. We believe that climate risk can potentially have a long-term impact on companies in many sectors. But our discussions on these issues are anchored to a broader conversation about governance, in particular how a company's strategy and the related risks are governed by its board. Our index funds, by design, generally hold all the companies in their benchmark; these include winners and losers, leaders and laggards. This ownership across the spectrum gives us the opportunity to influence investor outcomes by directly engaging about material environmental and social risks with directors and executives at the companies in which our funds invest.[13]

Each of these statements from BlackRock, State Street, and Vanguard can be boiled down into a contradictory phrase that sounds like it belongs in George Orwell's novel, *1984*: "Diversity is conformity."[14] To unpack this idea a bit more, BlackRock, State Street, and Vanguard are selling index fund shares with the promise of diversification of the portfolios that underlie those funds to stabilize returns while mitigating risk, yet at the same time, they are fueling conformity through their voting power related to those funds.

This Essay takes the position that the importation of ESG voting into index funds by the dominate players in the index fund industry is unacceptable because it creates an unresolvable conflict of interests, is misleading to those purchasing shares in mutual funds, and is

12. State Street Global Advisors, Stewardship Report 2018–19, at 25 (2019), https://www.ssga.com/library-content/products/esg/annual-asset-stewardship-report-2018-19.pdf [https://perma.cc/D3PH-R34X].

13. Glenn Booraem, *What We Do. How We Do It. Why It Matters.*, Vanguard 13 (Apr. 2019), https://about.vanguard.com/investment-stewardship/perspectives-and-commentary/what_how_why.pdf [https://perma.cc/J5CV-7894].

14. *See generally* George Orwell, 1984 (1949) ("War is Peace;" "Freedom is Slavery;" "Ignorance is Strength.").

undemocratic. This Essay argues that these issues could be resolved by the SEC promulgating rules creating a fund name taxonomy to make it clear to investors the nature of the funds in which they are investing.[15]

This Essay contributes to the existing literature in three main ways. First, this Essay contains an extensive analysis of the problems of pursuing ESG objectives through index funds, which include that it creates an unresolvable conflict of interest, is misleading, and is undemocratic.[16] Second, this Essay proposes a fund name taxonomy for investment funds to resolve the problems with pursuing ESG objectives through index funds, which includes the requirement that the title "index fund" be reserved only for passively managed funds that are designed to track the components of financial markets.[17] Such an approach would fit the underlying purposes of federal securities regulation to mandate disclosure and allow investors to make informed decisions regarding their investments.[18] Third, the analysis and proposal in this Essay is especially important because at the time of this Essay, the United States Securities and Exchange Commission (SEC) is considering whether additional rulemaking is needed relating to section 35(d) of the Investment Company Act of 1940,[19] which mandates honesty in the naming of investment funds.[20]

The remainder of this Essay is structured as follows. Part II explores the problems of pursuing ESG through index funds. Part III examines various solutions to these problems. Finally, the last part contains brief concluding remarks.

II. The Problems with Pursuing ESG Through Index Funds

Superficially, the intersection of index funds and ESG seems like a wonderful idea. For a large number of investors, the lure of relatively predictable returns with minimal risk, while pursuing ESG goals, is almost irresistible. Under the surface, however, the problems with

15. *See infra* Part III (proposing the creation of a fund name taxonomy for investment funds).

16. *See infra* Part II (exploring the problems with pursuing ESG through index funds).

17. *See infra* Part III (discussing how a fund name taxonomy for investment funds might be structured).

18. *See infra* Part III.A (discussing the benefits of creating a fund name taxonomy for investment funds).

19. 15 U.S.C. § 80a–34 (2018).

20. *See infra* Part III.A (explaining that at the time of the writing of this Essay, the SEC had recently issued a Request for Comments on Fund Names, 85 Fed. Reg. 13,221 (Mar. 6, 2020)).

pursuing ESG through index funds are numerous, including that such an approach creates an unresolvable conflict of interests, misleads investors as to what fund managers are actually pursuing, and produces undemocratic results. Each of these problems will be examined in turn.

A. Unresolvable Conflict of Interest

Attempting to achieve ESG goals by using index funds as the vehicle creates an unresolvable conflict of interests because of the essential nature of these investment devices. Index funds are cons–tructed, advertised, and sold based upon Modern Portfolio Theory.[21] In 1952, Harry Markowitz introduced this theory in his article *Portfolio Selection* in *The Journal of Finance*.[22] In 1990, he won a Nobel Prize in Economic Sciences based upon his work on this topic.[23] Modern Portfolio Theory posits that through diversification, investors can create the greatest likelihood of consistent returns while minimizing

21. *See* Alyssa A. DiRusso & Kathleen M. Sablone, *Statutory Techniques for Balancing the Financial Interests of Trust Beneficiaries*, 39 U. S.F. L. Rev. 261, 268 (2005) (footnotes omitted) ("The . . . concept behind modern portfolio theory is that capital markets are basically efficient. Importantly, this assertion leads to the conclusion that an individual investor selecting a portfolio should not be able to achieve a greater return than the market in general. . . . [M]odern portfolio theory not only permits passive investments (such as index funds), but it actually questions the use of more costly active management, which may be unable to achieve greater returns."); Charles R. Korsmo, *Delaware's Retreat from Judicial Scrutiny of Mergers*, 10 U.C. Irvine L. Rev. 55, 99 (2019) ("[I]ndex funds are certainly 'sophisticated' investors in the sense that they understand the central lesson of modern portfolio theory—that picking stocks is usually a fool's errand . . . ."); Jerry W. Markham, *Privatizing Social Security*, 38 San Diego L. Rev. 747, 798 (2001) ("Modern portfolio theory encourages passive investment in which a portfolio is diversified to track some stock market index that broadly reflects over-all market movements.").

22. *See generally* Harry Markowitz, *Portfolio Selection*, 7 J. Fin. 77 (1952) (introducing Modern Portfolio Theory).

23. *See* Susan N. Gary, *Best Interests in the Long Term: Fiduciary Duties and ESG Integration*, 90 U. Colo. L. Rev. 731, 748 (2019) ("Harry Markowitz, an economist who won the 1990 Nobel Prize in Economic Sciences, published his explanation of [Modern Portfolio Theory] in 1952, and it influenced investing strategies and changes to the prudent investor standard in the years that followed."); Philip J. Ruce, *The Trustee and the Prudent Investor: The Emerging Acceptance of Alternative Investments as the New Fiduciary Standard*, 53 S. Tex. L. Rev. 653, 667 (2012) ("[Modern Portfolio Theory] found its beginnings in the 1952 article *Portfolio Selection* by Harry Markowitz, the insights of which won Markowitz the Nobel Prize in Economics."); Stewart E. Sterk, *Rethinking Trust Law Reform: How Prudent Is Modern Prudent Investor Doctrine?*, 95 Cornell L. Rev. 851, 858 (2010) ("Modern portfolio theory owes its genesis to a 1952 article by Harry Markowitz, *Portfolio Selection*—an article whose insights ultimately won Markowitz the Nobel Prize in Economics.").

risk.[24] A complete laying out of this theory is beyond the word limits of this Essay. With that said, Modern Portfolio Theory can be boiled down to a single word—diversification.[25] When index funds are advertised and sold to investors, fund managers are selling individuals the ability to diversify their portfolios through a single investment device.[26] The

24. *See* Michael Cappucci, *The Proxy War Against Proxy Advisors*, 16 N.Y.U. J.L. & Bus. 579, 583 (2020) ("Modern portfolio theory . . . provided mathematical support for the idea that holding a well-diversified portfolio of many assets is less risky than, and therefore preferable to, holding a port–folio of fewer stocks."); Paul N. Cox, *Reflections on Ex Ante Compensation and Diversification of Risk as Fairness Justifications for Limiting Fiduciary Obligations of Corporate Officers, Directors, and Controlling Shareholders*, 60 Temp. L.Q. 47, 53 (1987) ("Modern portfolio theory and capital asset pricing theory suggest that investment in an efficiently diversified portfolio, such as an index fund, will virtually eliminate unsystematic risk."); Charles Korsmo & Minor Myers, *The Flawed Corporate Finance of* Dell *and* DFC Global, 68 Emory L.J. 221, 226 (2018) ("A basic tenet of modern portfolio theory is that, for diversified investors, only market or systematic risks affect asset values, while firm-specific risks are largely irrelevant to pricing.").

25. *See* Tom C.W. Lin, *The New Market Manipulation*, 66 Emory L.J. 1253, 1312–13 (2017) ("Modern portfolio theory suggests that market-wide diversification along with low transaction fees would permit investors to reduce their risk exposure and maximize the benefits of compounding returns over the long term."); Stewart E. Sterk, *Trust Decanting: A Critical Perspective*, 38 Cardozo L. Rev. 1993, 1999 (2017) ("The central insight of modern portfolio theory [is] that a prudent investor should not avoid risk altogether, but should instead minimize risk through diversifi–cation . . . ."); Eva E. Subotnik, *Artistic Control After Death*, 92 Wash. L. Rev. 253, 299 (2017) ("[M]odern portfolio theory basically instructs that a prudent investor should diversify investments.").

26. *See* José Azar, *The Common Ownership Trilemma*, 87 U. Chi. L. Rev. 263, 265 (2020) ("The enormous success of index funds and other instruments to achieve better and cheaper diversification is the practical counterpart to the triumph of the ideas of Modern Portfolio Theory, which showed that rational shareholders would want (under some assumptions, of course) to hold the market portfolio."); Charles R. Korsmo, *The Audience for Corporate Disclosure*, 102 Iowa L. Rev. 1581, 1604 (2017) ("Part of the reason for this explosion of diversified index and mutual funds is that the central lesson of Modern Portfolio Theory—which has come to dominate the academic understanding of securities markets over the past half century—is that holding a well-diversified portfolio will be optimal for most ordinary investors, offering them the best possible combination of low risk and high return."); Gabriel Rauterberg & Andrew Verstein, *Index Theory: The Law, Promise and Failure of Financial Indices*, 30 Yale J. on Reg. 1, 7–8 (2013) ("[I]ndex-guided investment lets retail investors take advantage of two of the most important financial insights of the late twentieth century: the Efficient Markets Hypothesis, which posits that market prices reflect all available financial information, and Modern Portfolio Theory, which posits that diversified portfolios can achieve similar

financial market that the index fund tracks will have certain criteria to be a part of it.[27] For example, an index fund that tracks the S&P 500 would have only large companies in its portfolio,[28] but the goal remains diversification.[29] Importantly, diversification is a means, not an end. The end of Modern Portfolio Theory is profit.[30]

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returns at less risk than undiversified portfolios—or superior returns with equal risk.").

27. *See* Lucian Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B.U. L. Rev. 721, 727 (2019) ("Among those equity investment funds, index funds invest in portfolios that attempt to track the performance of a particular benchmark stock market index, such as the S&P 500 or the Russell 3000."); Cremona & Passador, *supra* note 4, at 233 ("[T]he main peculiarity of index funds is their goal not to beat the market, but rather to match or track the performance of various indexes."); Alan R. Palmiter & Ahmed E. Taha, *Mutual Fund Performance Advertising: Inherently and Materially Misleading?*, 46 Ga. L. Rev. 289, 297 (2012) ("Passively managed funds typically are index funds, managed to track the returns of a specified market index, such as the S&P 500 Index.").

28. *See* Richard A. Booth, *Index Funds and Securities Fraud Litigation*, 64 S.C. L. Rev. 265, 285 n.109 (2012) ("The S&P 500 measures the performance of a particular segment of the market, namely, large capitalization stocks."); Alexander I. Platt, *Index Fund Enforcement*, 53 U.C. Davis L. Rev. 1453, 1464 (2020) ("[T]he S&P 500 is a well-known index maintained by Standard & Poor's and is comprised of 500 large U.S. companies."); Rauterberg & Verstein, *supra* note 26, at 18–19 ("[T]he S&P 500 is an indicator and bellwether of blue-chip America, meant to track the most significant large-capitalization firms in the leading U.S. industries.").

29. *See* Marcel Kahan & Edward B. Rock, *Index Funds and Corporate Governance: Let Shareholders be Shareholders*, 100 B.U. L. Rev. 1771, 1774 (2020) ("Long the darling of finance scholars, index funds offer investors the benefit of a diversified portfolio at low cost. Because index funds—which do not need to employ analysts—charge lower fees than actively managed funds and because the conventional wisdom that it is difficult to outperform the market has proven correct, index funds often have better returns than active funds."); Kesten, *supra* note 2, at 191 ("[F]or most retail investors, the safest course of action is not to try to pick the right thirty stocks, but rather to invest in low-cost, more thoroughly diversified products, such as index funds that track broader markets."); Emily Winston, *Managerial Fixation and the Limitations of Shareholder Oversight*, 71 Hastings L.J. 699, 722 (2020) ("[M]any institutional investors, such as mutual funds and index funds, exist specifically to provide diversification and therefore are invested in a very large number of companies.").

30. *See* Madison Condon, *Externalities and the Common Owner*, 95 Wash. L. Rev. 1, 13 n.53 (2020) ("Modern portfolio theory holds that investors can maximize their return, given a desired amount of risk, by diversifying their portfolios."); Victor Fleischer, *Two and Twenty: Taxing Partnership Profits in Private Equity Funds*, 83 N.Y.U. L. Rev. 1, 21 (2008) ("In its simplest form, modern portfolio theory cautions investors to maintain a diversified mix of stocks, bonds, and cash in order to balance the volatility of their portfolios with the desire to maximize returns."); David J. Herzig, *The*

In regard to ESG investing, the goal is dramatically different. The ESG movement is a form of principle-based investing, which employs various ESG factors in investment practices.[31] As a result, ESG investors seek to invest in companies with management who already align with their views on ESG-related issues.[32] In addition, they seek to move the management of companies into alignment with their views regarding ESG-related matters.[33] Although variations in opinions and

Income Equality Case for Eliminating the Estate Tax, 90 S. CAL. L. REV. 1143, 1176–77 (2017) ("Modern Portfolio Theory is a theory of finance, developed by Harry Markowitz in the 1950s, that attempts to maximize a portfolio return.").

31. *See* Tom C.W. Lin, *Incorporating Social Activism*, 98 B.U. L. REV. 1535, 1580–81 (2018) ("[O]ne of the growing areas in investment management in recent years has been impact or social investing. Impact or social investing refers to investments that seek positive financial returns while aiming to make a positive social impact, particularly on environmental, social, and governance ('ESG') factors."); Omari Scott Simmons, *Chancery's Greatest Decision: Historical Insights on Civil Rights and the Future of Shareholder Activism*, 76 WASH. & LEE L. REV. 1259, 1289 (2019) ("In socially responsible or impact investing, environmental, social, and governance (ESG) factors guide decisionmaking.").

32. *See* Beth Haddock, Tucker Pribor & Kate Starr, *Why Corporate Attorneys and Other Gatekeepers Should Consider ESG and Sustainability Principles*, 30 FORDHAM ENV'T L. REV. 1, 4 (2018) ("ESG investments entail specialized investment strategies and typically require additional investment instructions that may relate to higher standards for corporate accountability for investable assets with regard to, for example, use of resources, labor practices, supply chain management, conflicts of interest, internal controls, and board diversity."); Joseph Manning, *Myopic Madness: Breaking the Stranglehold of Shareholder Short-Termism to Address Climate Change and Build a Sustainable Economy*, 10 ARIZ. J. ENV'T L. & POL'Y 425, 426–27 (2020) ("Today, an increasing number of investors screen investments for environmental, social, and governance . . . factors, while both mainstream and boutique investment firms offer sustainable investment product lines to consumers.").

33. *See* Lisa Benjamin, *Institutional Investors in the UK and "Carbon-Major" Companies: Private Environmental Governance Post-Paris*, 9 GEO. WASH. J. ENERGY & ENV'T L. 5, 11 (2018) ("Institutional investors can adopt a variety of sustainable investment strategies that include active approaches, such as including ESG factors in the investment process, shareholder activism through the use of shareholder resolutions, and engagement with management."); David Hess, *Combating Corruption Through Corporate Transparency: Using Enforcement Discretion to Improve Disclosure*, 21 MINN. J. INT'L. L. 42, 71 (2012) ("In addition to using ESG factors in investment decision making, . . . shareholders often engage directly with corporations to push for improvements."); Reiser & Tucker, *supra* note 7, at 1932 ("In addition to using various strategies to incorporate ESG factors into investment selection, ESG funds also practice engagement. They utilize their power as shareholders—to vote for directors, on fundamental transactions and shareholder proposals, make shareholder proposals, and

goals do exist among those interested and engaging in ESG investing, the ESG movement is in general an effort to create a uniform commitment within companies to ESG-related issues.[34] In some instan–ces, investors who are committed to ESG investing are even willing to forgo profit based upon their commitments to various ESG-related principles.[35]

In regard to the intersection of ESG and index funds, the conflict of interest is almost beyond peradventure. In the vast majority of cases, index funds are advertised, marketed, and sold based upon the notion that they provide an opportunity for creating portfolio diversification through a single financial product.[36] When a fund manager markets and pushes forward ESG objectives in regard to an index fund, they are working to create standardization and uniformity within the index fund's portfolio.[37] Diversity and uniformity are antonyms. To claim that

more informal efforts to influence management—to drive ESG changes in investee companies.").

34. *See supra* note 3 and accompanying text (describing the ESG movement).

35. *See* Gadinis & Miazad, *supra* note 7, at 1409–10 ("[T]here are many ESG initiatives that do not readily fit within the confines of profit maximization, such as large-scale workplace efforts to eliminate the gender pay gap."); Bernard S. Sharfman, *The Risks and Rewards of Shareholder Voting*, 73 SMU L. REV. 849, 872 (2020) ("[A]n institutional investor with a strong preference for . . . some component of environmental, social, and corporate governance may prioritize that preference over the default objective of shareholder wealth maximization."); Marcia Narine Weldon & Rachel Epstein, *Beyond Bitcoin: Leveraging Blockchain to Benefit Business and Society*, 20 TRANSACTIONS: TENN. J. BUS. L. 837, 888 (2019) ("Although shareholders, particularly institutional shareholders, clearly value wealth maximization, more are also pressing companies to provide data on environmental, social, and governance factors (ESG).").

36. *See supra* note 26 and accompanying text (explaining that index funds are advertised and sold based on their claimed ability to provide for portfolio diversification).

37. *See* Booraem, *supra* note 13, at 13 ("Our fund shareholders have entrusted their assets to Vanguard to create and protect sustainable, long-term value as they save for their important financial goals. Ensuring that the 13,000 global companies in which our funds invest on their behalf have a similar long-term mindset is central to our stewardship program."); Fink, *supra* note 10 ("[BlackRock] believe[s] that when a company is not effectively addressing a material issue, its directors should be held accountable. . . . Where we feel companies and boards are not producing effective sustain–ability disclosures or implementing frameworks for managing these issues, we will hold board members accountable. Given the groundwork we have already laid engaging on disclosure, and the growing investment risks surrounding sustainability, we will be increasingly disposed to vote against management and board directors when companies are not making sufficient progress on sustainability-related disclosures and the business practices and plans underlying them."); Cyrus Taraporevala, *CEO's Letter on our 2020 Proxy Voting Agenda*, STATE STREET GLOBAL ADVISORS (Jan. 28, 2020),

one is seeking both is contradictory and impossible. Individuals and entities owing fiduciary duties relating to index funds are arguably placed in a position where they are in breach of fiduciary duties regardless of whether they pursue retaining diversification or ESG standardization because they have promised both.

To overcome this concern, the common move is to claim that the interest in ESG is limited to improving the profitability of the index funds. For example, on July 24, 2018, Cyrus Taraporevala, president and chief executive officer of State Street Global Advisors, published a letter in *The Financial Times* and stated the following:

> Efforts by large index fund managers to engage with public companies have recently come under attack from some business leaders. They complain that we are misusing our rights as share–holders to enforce arbitrary political or social “values” because we raise environmental, social and governance concerns with the boards of the companies in which we invest.
>
> This completely misrepresents the mission of State Street Global Advisors and other large index fund managers. We seek long-term value for millions of ordinary investors in a world that has become increasingly obsessed with short-term results. That goal, not some political agenda, is why we have developed a rigorous, research-based shareholder engagement programme. We raise all kinds of issues with boards that might materially impact their company’s ability to generate sustainable returns over the long haul. [38]

The problem is that this only deepens the conflict of interests. Rather than just a dilemma being created between obtaining passive diversification and pursing ESG objectives, a trilemma is created among obtaining passive diversification, pursuing ESG objectives, and actively seeking profitability. In fact, trilemma is probably not even the correct description because ESG is an amorphous term that potentially entails a wide-range range of objectives.[39]

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https://www.ssga.com/us/en/institutional/ic/insights/informing-better-decisions-with-esg [https://perma.cc/4DEW-KKZG] (“As one of the world’s largest investment managers, each year State Street Global Advisors engages in dialogue with companies about a variety of issues critical to long-term performance—from business strategy to independent board leadership to sustainability. . . . [W]e will continue our active engagement with boards on sustainability, but also use our proxy vote to press companies that are falling behind and failing to engage.”).

38. Cyrus Taraporevala, *Index Funds Must Be Activists to Serve Investors*, Fin. Times (July 24, 2018), https://www.ft.com/content/4e4c119a-8c25-11e8-affd-da9960227309 [https://perma.cc/DRW2-QQUW].

39. *See* Gadinis & Miazad, *supra* note 7, at 1414 (“Despite trillions of dollars poured into ESG investments, a decade of corporate soul searching, and a bevy of standard setters, one would be hard-pressed to come up with a

B. Materially Misleading

Advertising and selling index funds that are claimed to be managed to obtain passive diversification, pursue ESG objectives, and actively seek profitability teeters dangerously close to a material misrepre–sentation regarding these investment vehicles. The conflicts of interests discussed in the previous Part demonstrate that all three of these goals cannot be pursued and achieved at the same time.

To begin, importantly and unequivocally, this Essay does not assert that any person or entity has engaged in unlawful activity for at least two reasons. First, most, if not all, of the potential violations of the law that could be brought have a variety of elements. Even if a material misrepresentation exists, which it may not, these other elements must be satisfied. For example, section 10(b) of the Securities Exchange Act of 1934[40] and Rule 10b-5 promulgated thereupon[41] are catch-all provisions under the federal securities law,[42] and these provisions apply to the purchase and sale of index funds.[43] A private right of action under these provisions has numerous elements, including requirements of economic loss and loss causation.[44] Some have claimed that pursuit of

consistent definition for this phenomenon."); Reiser & Tucker, *supra* note 7, at 1940 ("Unfortunately, even the most motivated of investors will struggle to unpack what ESG means for a particular fund in a meaningful way."); Bernard S. Sharfman, *Now Is the Time to Designate Proxy Advisors as Fiduciaries under ERISA*, 25 Stan. J.L. Bus. & Fin. 1, 16 (2020) ("ESG has its roots in the practice of avoiding investment in firms that make antisocial products. This practice can be traced back to the 18th century. However, this simple ethical approach to investing has morphed into what is now known as ESG, a concept that is so undefined as to be virtually all encompassing.").

40. *See* 15 U.S.C. § 78j(b) (2018).

41. *See* 17 C.F.R. § 240.10b-5 (2020).

42. Based upon the legislative history, the Supreme Court of the United States has regularly held that section 10(b) is designed to be a catch-all provision for addressing securities fraud. *See, e.g.*, Herman & MacLean v. Huddleston, 459 U.S. 375, 382 (1983) ("Section 10(b) is a 'catchall' antifraud provision . . . ."); Chiarella v. United States, 445 U.S. 222, 226 (1980) ("Section 10(b) was designed as a catch-all clause to prevent fraudulent practices."); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 203 (1976) ("This brief explanation of § 10(b) by a spokesman for its drafters is significant. The section was described rightly as a 'catchall' clause to enable the Commission 'to deal with new manipulative (or cunning) devices.'" (quoting *Hearings on H.R. 7852 and H.R. 8720 Before the H. Comm. on Interstate and Foreign Com.*, 73d Cong., 115 (1934))).

43. *See* 15 U.S.C. § 77b(a)(1) (2018) (providing the definition of a security under the Securities Act of 1933); *id.* § 78c(a)(10) (providing the definition of a security under the Securities and Exchange Act of 1934).

44. *See* Stoneridge Inv. Partners, LLC v. Scientific–Atlanta, Inc., 552 U.S. 148, 157 (2008) ("In a typical § 10(b) private action a plaintiff must prove (1) a

ESG objectives through index funds and other mutual funds actually improve their profitability.[45] Assuming this is true, an action under section 10(b) and Rule 10b-5 would not prevail because the elements of economic loss and loss causation elements would not be satisfied. Second, for purposes of federal securities law, what is a misrepresentation, especially when it is contrasted with mere puffery, is an amorphous and ambiguous concept,[46] and the definitional difficulties exist regarding what is material as well.[47] As a consequence, this Essay

material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.").

45. *See* Susan N. Gary, *Values and Value: University Endowments, Fiduciary Duties, and ESG Investing*, 42 J. Coll. & U.L. 247, 250 (2016) ("In recent years, some investors have begun to focus on the significance of ESG factors in improving returns while reducing risk."); Claire A. Hill, *Marshalling Reputation to Minimize Problematic Business Conduct*, 99 B.U. L. Rev. 1193, 1205 (2019) ("[P]art of the rhetoric in mainstream pushes for ESG is . . . that sustainability yields long-term profits."); Michael J. Vargas, *In Defense of E. Merrick Dodd: Corporate Social Responsibility in Modern Corporate Law and Investment Strategy*, 73 Bus. Law. 337, 363 (2018) ("[I]nvestors have recognized the gains that can be realized from socially conscious investing, leading to an increase in the number and value of investment funds applying environmental, social, and governance ('ESG') metrics.").

46. *See* Andrew Horwitz, *Taking the Cop out of Copping a Plea: Eradicating Police Prosecution of Criminal Cases*, 40 Ariz. L. Rev. 1305, 1324 (1998) ("The fine line between misrepresentation and 'puffery' is often quite difficult even for an attorney to identify."); Peter Reilly, *Was Machiavelli Right? Lying in Negotiation and the Art of Defensive Self-Help*, 24 Ohio St. J. on Disp. Resol. 481, 514–15 (2009) ("It can be difficult to draw a distinction between permissible puffing and impermissible factual misrepresentation constituting fraud."); Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 Clinical L. Rev. 73, 123–24 (1995) ("The line between a lie or deliberate misrepresentation and bluffing, posturing, puffing or gamesmanship . . . is not always clear.").

47. *See* George S. Georgiev, *Too Big to Disclose: Firm Size and Materiality Blindspots in Securities Regulation*, 64 UCLA L. Rev. 602, 620 (2017) ("At their core, many of the materiality determinations that firms are called upon to make involve the application of vague regulatory and judicial guidance as part of an intensely fact-specific inquiry that often involves predictions about effects in future time periods."); Amanda M. Rose, *The "Reasonable Investor" of Federal Securities Law: Insights from Tort Law's "Reasonable Person" & Suggested Reforms*, 43 J. Corp. L. 77, 78–79 (2017) ("Materiality's vagueness stems from its definition: material information is information that a 'reasonable investor' would consider important. The 'reasonable investor' is at best a shadowy figure, described only generically in judicial opinions and—in doctrine if not in practice—someone for the fact-finder to identify case-by-case."); Vijay Sekhon, *Enforcement of Material Non-Disclosure Under the Federal Securities Laws*, 16 Stan. J.L.

merely asserts that advertising and selling index funds that are claimed to be managed to obtain passive diversification, pursue ESG objectives, and actively seek profitability teeters dangerously close to a material misrepresentation. It does not conclude that material misrepresen–tations are actually occurring.

Yet asserting that index funds can be managed to obtain passive diversification, pursue ESG objectives, and actively seek profitability likely entails some sort of misrepresentation. The line between a misrepresentation and mere puffery for purposes of federal securities law is a blurry one.[48] The logical dissonance regarding claiming that index funds can be managed to obtain passive diversification, pursue ESG objectives, and actively seek profitability, however, is manifest because not all three aims can be pursued simultaneously. This is true because index funds cannot deliver diversity and uniformity at the same time. The issue of active management of funds touted and purchased for their passivity is problematic as well.[49] Perhaps, index fund marketers, sellers, and managers have been noisy enough about their obviously conflicting goals to overcome concerns about misrepre–sentations, but this likely turns on the question of the materiality of the assertions being made by those advertising, selling, and managing index funds.

The representations by those advertising, marketing, and managing index funds may constitute material misrepresentations under federal securities law. In *TSC Industries, Inc. v. Northway, Inc.*, the Supreme

Bus. & Fin. 273, 277 (2011) ("The concept of materiality under the federal securities laws has been criticized by scholars and practitioners as being vague. They claim that the concept does not allow public companies to identify with reasonable certainty the boundaries between lawful and unlawful conduct . . . .").

48. *See supra* note 46 and accompanying text (discussing the difficulties in distinguishing between misrepresentations and mere puffery).

49. *See* Cappucci, *supra* note 24, at 583–84 ("[M]any investors have sought to avoid the hassle and expense of holding thousands of different stocks by investing through passive index funds. Managing a passive portfolio designed to match the performance of an index takes considerably less creativity and talent—two highly compensated skills—than managing an active portfolio."); Fisch et al., *supra* note 1, at 19 ("Drawn by the lower costs of these products as well as a literature reporting that even savvy money managers cannot consistently beat the market, an increasing number of retail investors invest through indexed mutual funds and exchange-traded funds (ETFs) (collectively, *index funds* or *passive funds*)—funds that do not make information-based trading decisions."); Robert C. Illig, *What Hedge Funds Can Teach Corporate America: A Roadmap for Achieving Insti–tutional Investor Oversight*, 57 Am. U. L. Rev. 225, 331–32 (2007) ("Rather than seek to achieve profit growth through stock picking acumen, [investors in index funds] embrace the lessons of the efficient capital markets hypothesis and reject any efforts to actively follow their investments.").

Court established the standard for materiality under the federal securities law.[50] Writing for a unanimous Court in a matter brought under section 14(a) of the Securities Exchange Act of 1934 and Rule 14a-9 promulgated thereupon, Justice Thurgood Marshall wrote, "[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."[51] He continued, "[p]ut another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[52] In *Basic Inc. v. Levinson*, the Supreme Court adopted this same standard of materiality for actions under section 10(b) and Rule 10b-5 involving reasonable investors and the purchase or sale of securities.[53]

If a misrepresentation is occurring by those individuals and entities asserting that index funds can be managed to obtain passive diversification, pursue ESG objectives, and actively seek profitability, such a misrepresentation could also potentially be material. A lot turns on who is a reasonable investor for purposes of the application of federal securities law to index funds. The question of who constitutes a reasonable investor for purposes of federal securities law has been the subject of fierce debate.[54] While a "one size fits all" approach that provides a single definition for all circumstances might be possible,[55]

50. 426 U.S. 438, 449 (1976).

51. *Id.*

52. *Id.*

53. 485 U.S. 224, 231–32 (1988).

54. *See* Tom C.W. Lin, *The New Investor*, 60 UCLA L. Rev. 678, 694–95 (2013) ("The reasonable investor, thus far, has remained anonymous, elusive, and the subject of much inquiry. Legal scholars and commentators have speculated on the reasonable investor's gender, temperament, and sophistication, among other characteristics."); Rose, *supra* note 47, at 118 ("For decades the reasonable investor test has been a flashpoint for debate in securities law circles.").

55. *See* Tom C.W. Lin, *Reasonable Investor(s)*, 95 B.U. L. Rev. 461, 462 (2015) ("Investors exist everywhere, in every form. . . . Yet for all their diversity, financial regulation frequently treats them monolithically as 'the reasonable investor.'"); Geoffrey Rapp, *Rewiring the DNA of Securities Fraud Litigation:* Amgen*'s Missed Opportunity*, 44 Loy. U. Chi. L.J. 1475, 1481 (2013) ("The SEC's vision of the reasonable investor centers on the typical 'retail' investor. The reasonable investor is neither a sophisticated money manager nor an electronically savvy day trader. Rather, the reasonable investor is an ordinary person who invests money in securities subject to the SEC's regulatory authority."); Aisha I. Saad & Diane Strauss, *The New "Reasonable Investor" and Changing Frontiers of Materiality: Increasing Investor Reliance on ESG Disclosures and Implications for Securities Litigation*, 17 Berkeley Bus. L.J. 391, 393–94 (2020) ("The reasonable investor archetype, which arose from early 20th century case

questions of materiality are highly factually dependent, which makes it far more likely that the decision of who is a reasonable investor may vary based on the facts of the particular situation, especially in regard to the type of investment product that is being sold and to whom it is being marketed.[56] Index funds are suitable for and marketed to individuals with limited investment knowledge who are interested in passive investments with relatively reliable returns and relatively limited risk, i.e., unsophisticated investors are often reasonable investors in index funds.[57] Thus, while a knowledgeable and alert investor might quickly recognize the impossibility of those advertising, selling, and managing index funds relentlessly seeking to obtain passive diversification, pursue ESG objectives, and actively seek profitability at the same time, many reasonable investors in index funds likely would not. The existing "total mix" of information available might be sufficient to put reasonable investors in index funds on notice of potential concerns, but it is a close call. Certainly, BlackRock, State Street, and Vanguard have been very open about their pursuit of ESG objectives through the diversified portfolios of index funds to obtain greater profits for their shareholders.[58] Nonetheless, based on the

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law, conceives of the investor as an economically rational actor who relies solely on financial disclosures in making decisions about the purchase and sale of securities.").

56. *See* Arthur B. Laby, *Differentiating Gatekeepers*, 1 Brook. J. Corp. Fin. & Com. L. 119, 150 (2006) ("The [materiality] standard is ambiguous. It depends on what a reasonable investor would decide, which is often dependent on how a particular judge or regulator views the facts."); Yvonne Ching Ling Lee*, The Elusive Concept of "Materiality" Under U.S. Federal Securities Laws*, 40 Willamette L. Rev. 661, 664 (2004) ("[T]he concept of materiality pivots upon what the reasonable investor would decide; though a useful and flexible legal device, it is often a 'wild card,' determined by the regulators and/or judges based on the specific facts in light of policy."); Laura Palk, *Ignorance Is Bliss: Should Lack of Personal Benefit Knowledge Immunize Insider Trading?*, 13 Berkeley Bus. L.J. 101, 144 n.280 (2016) ("Materiality is a fact-specific analysis and depends on the weight a reasonable investor attributes to the information.").

57. *See* Stephen J. Choi, *Promoting Issuer Choice in Securities Regulation*, 41 Va. J. Int'l L. 815, 838 (2001) ("Through an index fund, unsophisticated investors . . . achieve equity-based returns and diversification of unsys–tematic risks while avoiding the need to investigate any one particular company."); Stephen Choi, *Regulating Investors Not Issuers: A Market-Based Proposal*, 88 Calif. L. Rev. 279, 301 (2000) ("Due to the passive nature of index funds, informational asymmetries that may disadvantage unsophisticated investors in the securities markets are at a minimum. . . . To the extent unsophisticated investors desire to diversify their overall investments to include securities, the availability of index funds meets this preference.").

58. *See* BlackRock, BlackRock ESG Integration Statement 2 (rev. 2020), https://www.blackrock.com/corporate/literature/publication/blk-esg-investment-statement-web.pdf [https://perma.cc/G8ED-JR6D] ("As

inherent conflict of interest, concerns linger as to how confusing this might be to reasonable investors within these index funds.

C. Undemocratic

The ESG movement entails numerous important issues that are increasingly of interest to investors and society at large.[59] In many instances, however, federal and state governments have failed to act sufficiently to address these issues.[60] As a consequence, one reason to praise BlackRock, Vanguard, and State Street for addressing ESG issues in the management of index funds is that these three entities can act as de facto regulators in instances in which federal and state governments have failed or refused to act.[61] Such behavior is proble–

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long-term investors, accounting for environmental, social, and governance (ESG) risks and opportunities helps us provide sustainable value to our clients."); State St. Glob. Advisors, Aim Higher: Helping Investors Move from Ambition to Action with ESG Investment Approaches 4 (2018), https://www.statestreet.com/content/dam/statestreet/documents/Articles/aim-higher-helping-investors-move-from-ambition-to-action-with-ESG-investment-approaches.pdf [https://perma.cc/KR2M-52JQ] ("In the pursuit of better investment outcomes, we have an opportunity to add value by helping clients aim for improved performance and better ESG outcomes."); *ESG Investing: Discover Funds that Reflect What Matters Most to You*, Vanguard, https://investor.vanguard.com/investing/esg/ [https://perma.cc/FZ55-2RVK] (last visited April 1, 2021) ("Over the long term, we believe our ESG products are enduring investment options for anyone interested in aligning their values with their fund selections.").

59. *See supra* notes 7–8 and accompanying text (discussing the importance of the ESG movement).

60. *See* Tamara C. Belinfanti, *Shareholder Cultivation and New Governance*, 38 Del. J. Corp. L. 789, 857 (2014) ("The SEC has slowly been accreting sustainability and other ESG issues into its reporting framework since the 1970s, but it has not done so in a systematic way."); Brent J. Horton, *Rising to Their Full Potential: How a Uniform Disclosure Regime Will Empower Benefit Corporations*, 9 Harv. Bus. L. Rev. 101, 132 (2019) ("[T]he SEC has traditionally been reluctant to require social disclosure (sometimes referred to as environmental, social, and governance concerns, or 'ESG')."); Ruth Jebe, *The Convergence of Financial and ESG Materiality: Taking Sustainability Mainstream*, 56 Am. Bus. L.J. 645, 650 (2019) ("While the SEC has demonstrated little interest in the disclosure of ESG information, the investing community increasingly wants this information.").

61. *See* Caleb N. Griffin, *Environmental & Social Voting at Index Funds*, 44 Del. J. Corp. L. 167, 209 (2020) ("[BlackRock, State Street, and Vanguard] have the power to determine the fate of a substantial proportion of shareholder proposals on E&S. Even where their vote alone is not sufficient to determine the outcome, their vote can still impact whether a company will act in response to a particular proposal and whether that proposal can be resubmitted in the near future. Ultimately, the Big Three have become the arbiters of some of the most controversial E&S ballot items.").

matic, however, because allowing these entities to play such a role is undemocratic in a variety of different ways, including that these entities are unelected, are focused solely on the financial interests of investors, are subject to inadequate check and balances, and have limited to no regulatory experience.

First, allowing investment fund managers to function as de facto regulators is undemocratic because these fund managers are not elected. Although investment in index funds is common, which is the reason for the current power wielded by BlackRock, Vanguard, and State Street, it is far from universal.[62] Democracy is rule by the people, often through elected representatives, i.e., representative democracy.[63] No vote has ever been conducted to give BlackRock, Vanguard, and State Street the power to regulate ESG matters. At best, allowing them to regulate is plutocracy, or government by the wealthy, which is an affront to democratic principles.[64]

62. *See* Bebchuk & Hirst, *supra* note 27, at 723 ("Based [on] our analysis of recent trends, we conclude that the Big Three will likely continue to grow into a 'Giant Three,' and that the Giant Three will likely come to dominate voting in public companies."); Caleb N. Griffin, *Margins: Estimating the Influence of the Big Three on Shareholder Proposals*, 73 SMU L. Rev. 409, 410 (2020) ("Just three index fund providers—Vanguard, BlackRock, and State Street (collectively, the Big Three)—control the vast majority of indexed capital. . . . Given their voting influence, the concentration of power in the hands of the Big Three has become a source of concern for academics and policymakers."); Bernard S. Sharfman, *How the SEC Can Help Mitigate the "Proactive" Agency Costs of Agency Capitalism*, 8 Am. U. Bus. L. Rev. 1, 2 (2019) ("[T]he largest mutual fund advisers, such as BlackRock, Vanguard, and State Street Global Advisors ('the Big Three'), now . . . control an extraordinary amount of shareholder voting power at many of our largest public companies.").

63. *See* L. Amber Brugnoli, *Withholding Democracy: The Timeliness of Self-Governance in a Post-Conflict Occupation*, 15 Loy. U. Chi. Int'l L. Rev. 131, 134 (2018) ("Every modern definition of representative democracy includes participatory and contested elections perceived as the legitimate procedure for the translation of rule by the people into workable executive and legislative power."); David Prendergast, *The Judicial Role in Protecting Democracy from Populism*, 20 German L.J. 245, 247 (2019) ("A basic etymological description of democracy is the people ruling themselves, or rule by the people."); Yasmin Dawood, *The Antidomination Model and the Judicial Oversight of Democracy*, 96 Geo. L.J. 1411, 1433 (2008) ("The term 'democracy' has its roots in the Greek words *demos* (people) and *kratos* (rule); at a minimum, democracy means rule by the people.").

64. *See* Jeffrey Glekel, *Money in the Public Realm*, 94 Yale L.J. 957, 958 (1985) (book review) ("The basic distinction between democracy and plutocracy is that democracy, although consistent with the unequal accumulation of wealth in the private realm, does not permit such wealth to control decisions made in the public realm, the realm of government."); Areto A. Imoukhuede, *Education Rights and the New Due Process*, 47 Ind. L. Rev. 467, 487 (2014) ("Democracy, given its central concern with majority consent, provides the greatest respect for individual liberty for the

Second, allowing index fund managers to function as regulators is also an affront to democracy because the approach of these entities appears to focus on a very narrow goal: profit. As explained above, despite suggestions by index fund managers that they are pursuing investor diversification and ESG objectives, fund managers argue that their primary goal is to seek profits for those holding shares in their index funds.[65] As also explained above, this is confusing and misleading to investors because it suggests that index fund managers are pursuing a wide range of interests, while they seem to be suggesting that they are really seeking a narrow one, profit.[66] Consequently, once again, rather than being democracy, this is really plutocracy because the focus is on pursuing wealth for the wealthy.[67]

Third, allowing index fund managers to function as de facto regulators is also undemocratic because they are subject to inadequate checks and balances. John Acton famously wrote: "Power tends to corrupt and absolute power corrupts absolutely. Great men are almost always bad men . . . ."[68] To combat this unfortunate reality, well-structed democratic systems contain checks and balances to ensure that the will of the people is honored.[69] One of these checks and balances is

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greatest number of individuals. Plutocracy, which literally means 'rule by the wealthy,' does not similarly value the concerns of all the people, but only those of the wealthy."); Eric W. Orts & Amy J. Sepinwall, *Collective Goods and the Court: A Theory of Constitutional Commodification*, 97 Wash. U. L. Rev. 637, 685–86 (2020) ("Democratic government is a collective good in the sense that mutual participation of all citizens on at least a relatively equal basis defines it. To the extent that our government is or becomes bought and paid for by its wealthiest citizens, it becomes a plutocracy rather than a collective project of self-government.").

65. *See supra* note 38 and accompanying text (explaining that index fund managers' interest in ESG is limited to improving the profitability of the index funds).

66. *See supra* Part II.A (exploring the conflicting interests that index fund managers are pursuing when they attempt to achieve ESG objectives through index funds).

67. *See supra* notes 62–64 and accompanying text (explaining that pursuing ESG goals through index funds is undemocratic, especially when index fund manager focus primarily on wealth maximization for investors in their funds).

68. Letter from Lord Acton to Bishop Mandell Creighton (Apr. 5, 1887), *reprinted in* 1 Louise Creighton, Life and Letters of Mandell Creighton 372 (1904).

69. *See* Catherine E. Kanatas, Lisa G. London & Maxwell C. Smith, *Legitimate from the Inside Out: A Review of How Agencies Act When Judges Are Not Watching*, 17 Rutgers J.L. & Pub. Pol'y 243, 249 (2020) ("The success of democracy in the United States depends on the health of the components that make up its structure. Our democracy sits atop a three-legged stool: the judicial, executive and legislative branches. In order for our democracy to remain steady, however, those branches must operate under a system of

typically the ability to vote the person out of office, but they often include others, such as checks and balances among the various branches of government. When index fund managers function as regulators, little to no checks and balances exist to control their behavior and make sure that the voice of the people is heard and implemented. One response is that if investors are unhappy with the managers of the funds in which they invest, then they can sell their shares.[70] This is a common practice and common refrain in instances in which investors are unhappy with the management of the companies in which they invest directly. In regard to index funds, however, because the market is dominated by three players that appear to be behaving similarly regarding ESG, investors have little choice if they want to invest in this popular investment vehicle. Consequently, if index fund managers are acting as de facto regulators, their unchecked power is a concern.

Fourth, allowing index fund managers to act as regulators is also an affront to democracy because within a democracy individuals and entities already exist with the expertise, experience, and legitimacy to function as regulators: *actual regulators*. Index fund managers typically have relatively small stewardship teams.[71] These teams lack legitimacy

checks and balances, with each leg steadying the other two."); Tom R. Tyler, *Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority*, 56 DePaul L. Rev. 661, 666 n.24 (2007) ("[C]hecks and balances among the branches of government are critical to democracy.").

70. *See* Afra Afsharipour, *Reevaluating Shareholder Voting Rights in M&A Transactions*, 70 Okla. L. Rev. 127, 142 (2017) ("Shareholder rights are not limited to voting rights. Shareholders unhappy with corporate decisions may also sell their shares—in other words, exercise their 'wall street vote' . . . ."); Daniel J.H. Greenwood, *Corporate Governance and Bankruptcy*, 13 Brook. J. Corp. Fin. & Com. L. 99, 103 (2018) ("[M]ost of the time, shareholders can be counted on to follow the 'Wall Street Rule'—if you are unhappy with incumbent managers, then sell your stock to someone who likes them better . . . ."); D. Theodore Rave, *Politicians as Fiduciaries*, 126 Harv. L. Rev. 671, 707 (2013) ("In the corporate context, if shareholders are unhappy with the behavior of management, they can simply sell their shares and exit the agency relationship.").

71. *See* Gaia Balp & Giovanni Strampelli, *Institutional Investor Collective Engagements: Non-Activist Cooperation vs Activist Wolf Packs*, 14 Ohio St. Bus. L.J. 135, 156 (2020) ("Although they are expanding, stewardship teams are still too small even at the leading fund managers. For example, at Blackrock—the world's largest asset manager—the stewardship team is made up of around 40 people, who are tasked with monitoring corporate governance issues at around 17,000 companies and voting in around 17,000 shareholder meetings each year."); Caleb N. Griffin, *We Three Kings: Disintermediating Voting at the Index Fund Giants*, 79 Md. L. Rev. 954, 965 (2020) ("The investment stewardship teams making voting decisions are generally quite small in size: Vanguard has about twenty employees who share responsibility for researching and voting on 168,786 ballot items, or roughly 8400 per employee. Similarly, BlackRock employs thirty-six people

because they are not elected. In addition, they focus on a single underlying goal, increasing returns, and they lack general expertise in regulating markets, which is in no way their objective.[72] Although Commissioners and other officials in administrative agencies—such as the SEC—are not elected, their leaders are nominated by the President and approved by the Senate.[73] The agencies themselves are also created by acts of Congress.[74] As a consequence, their legitimacy is much less in question than allowing index fund managers to act as regulators. In addition, for better or worse, administrative agencies, such as the SEC, are staffed by technocrats who are experts in creating and enforcing regulation with a general interest in the welfare of the public at large.[75]

III. Creating a Fund Name Taxonomy for Investment Funds

In Act II, Scene I of *Romeo and Juliet* by William Shakespeare, Juliet Capulet utters the famous words, "What's in a name? That which we call a rose [b]y any other name would smell as sweet."[76] While she is correct that a name does not alter the substance of what is being described, someone would still be confused and likely unhappy if that individual ordered roses and tulips arrived, despite the fact that both flowers have their virtues. The proper and consistent use of words allows individuals to plan and to more easily navigate the world. To

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to analyze and vote on 158,942 proposals, or nearly 4500 issues per employee. Finally, State Street has twelve people on staff to investigate and vote on over 154,458 proposals, an average of about 12,900 issues per employee.").

72. *See supra* note 38 and accompanying text (explaining that index fund managers have stated that their avowed purpose in pursuing ESG objectives is to improve returns for investors in their funds).

73. *See* 15 U.S.C. § 78d(a) (2018) ("There is hereby established a Securities and Exchange Commission . . . to be composed of five commissioners to be appointed by the President by and with the advice and consent of the Senate.").

74. *See id.* (providing for the creation of the SEC).

75. *See* Raymond F. Gorman, Martin F. Grace & Gautam Vora, *Public Utility Underwriting Costs and Regulatory Climate: An Examination of PUC and SEC Multiple Jurisdictions*, 10 Yale J. on Reg. 17, 44 n.103 (1993) ("The SEC's technical expertise in capital market regulation makes it a more competent watchdog than Congress, which lacks the means to directly manage the securities markets."); Frederick H.C. Mazando, *The Taxonomy of Global Securities: Is the U.S. Definition of a Security Too Broad?*, 33 Nw. J. Int'l L. & Bus. 121, 195 (2012) ("As the securities market regulator, the SEC has intimate knowledge of and unparalleled expertise in the financial markets . . . .").

76. *See* William Shakespeare, Romeo and Juliet act 2, sc. 2, l. 46–47.

put it a bit differently, whether something is referred to as Capulet, Montague, rose, or tulip does not matter as long as the word is clearly defined, consistently used, and not misleading.

In regard to the issue addressed in this paper—the incompatibility of index funds and the advancement of ESG objectives—the solution lies with making sure that investors are on notice as to the nature of the funds in which they are investing and how those funds will be managed. This Essay proposes that the term "index fund" should be reserved for passively managed funds that are designed to track the components of financial markets. To facilitate this type of fund to exist, regulators will need to either create pass-through voting to place voting into the hands of the investors investing in the fund or remove index funds from quorum requirements under state law.[77] The term "ESG investment fund" should be reserved for funds that are undertaking investment decisions based on ESG factors, and the term "ESG managed fund" should be reserved for funds whose management are actively seeking to achieve ESG objectives by influencing issuers through proxy voting and other means. A fund that invests based on ESG factors and actively seeks to achieve ESG objectives would be known as an "ESG managed investment fund." Finally, an ESG fund that is designed to track a financial market would be known as an "ESG market fund." Additional descriptors like "investment," "managed," or both could be added to "ESG market fund" to better explain the nature of a particular fund.

A. The Case for the Proposed Fund Taxonomy

The proposed fund taxonomy is superior to the current system because it accords with the policies underlying federal securities law, allows for investors to make informed investment decisions, and accords with existing regulation. In regard to the policies underlying federal securities regulation, the proposed fund taxonomy supports them because securities law in the United States is disclosure-based

77. A number of commentators have already suggested that pass-through voting offers a viable solution to the dominance and the power associated with it of BlackRock, State Street, and Vanguard in the index fund industry. *See, e.g.*, Bebchuk & Hirst, *supra* note 1, at 2118 ("As an alternative to taking voting power from index funds, several authors have suggested taking voting power from the managers of index funds. These authors advocate 'pass-through' requirements that would enable the beneficial investors of index funds to determine how the votes associated with the funds' shares will be cast."); Griffin, *supra* note 62, at 440 ("[P]roxy voting rights [could] 'pass through' the index fund intermediary to the actual investor. Pass-through voting would help to mitigate the problem of concentrated index fund power by transferring this power from index funds to their investors").

regulation, rather than merit-based regulation.[78] In describing federal securities law in the United States, Justice Arthur Goldberg famously wrote in the majority opinion for *SEC v. Capital Gains Research Bureau, Inc.*,[79] "[a] fundamental purpose [of federal securities law] was to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry."[80] To put it differently, federal securities law is designed to provide investors with robust, precise, and accurate information on which to make their investment decisions.[81] Increasing the clarity and consistency of investment fund naming can only help to achieve this goal.

Relatedly, the proposed taxonomy is also useful because it allows investors to make informed investment decisions. A segment of the investors investing in index funds is going to have a sophisticated understanding that fund managers cannot pursue diversification, ESG objectives, and seeking profit at the same time.[82] While those investors

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78. *See* Zachary J. Gubler, *Reconsidering the Institutional Design of Federal Securities Regulation*, 56 Wm. & Mary L. Rev. 409, 417 n.29 (2014) ("The original draft of the federal securities laws incorporated a form of such 'merit review,' but this proposal was ultimately replaced with a purely disclosure-based regime."); Mike Koehler, *Foreign Corrupt Practices Act Ripples*, 3 Am. U. Bus. L. Rev. 391, 437 (2014) ("The securities laws are based on the general premise that issuers must make full and complete disclosure of all material facts relevant to its business."); Michael C. Macchiarola, *Get Shorty: Toward Resurrecting the SEC's Ill-Fated Pursuit of PIPE Arbitrageurs*, 4 Va. L. & Bus. Rev. 1, 4 (2009) ("In ushering in this new federal securities law, Congress embraced a disclosure-based system of regulation aimed at minimizing the financial risks that an investor faces when investing on the basis of imperfect or insufficient information.").

79. 375 U.S. 180 (1963).

80. *Id.* at 186.

81. *See* Thomas Lee Hazen, *Crowdfunding or Fraudfunding? Social Networks and the Securities Laws—Why the Specially Tailored Exemption Must be Conditioned on Meaningful Disclosure*, 90 N.C. L. Rev. 1735, 1741 (2012) ("The federal securities laws do not focus on the merits of investments but rather are based on disclosure to allow sufficiently informed investors to fend for themselves."); Troy A. Paredes, *Blinded by the Light: Information Overload and its Consequences for Securities Regulation*, 81 Wash. U. L.Q. 417, 422 (2003) ("Our federal securities laws are designed to protect investors and the integrity of capital markets by mandating disclosure that enables informed investor decision making . . . ."); Urska Velikonja, *Waiving Disqualification: When Do Securities Violators Receive a Reprieve?*, 103 Calif. L. Rev. 1081, 1101 (2015) ("[F]ederal securities laws are often described as a disclosure-based regime, where the regulator's primary goal is not to evaluate the fairness of an offering but to ensure accurate and complete disclosure to let investors make fully informed purchasing decisions.").

82. *See supra* Part II.A (examining the unresolvable conflict created by attempting to achieve portfolio diversification and to pursue ESG objectives

are investing in inconsistency and incoherence, they are doing so willingly and with a full understanding of the situation. The problem is that index funds are marketed to, and the smart choice for, unsophisticated investors who do not have the knowledge, time, or resources to actively manage a portfolio of investments.[83] As a consequence, these investors are reasonable investors in index funds. Federal securities laws are about the truthful disclosure of material information to reasonable investors for purposes of making investment decisions. Materiality is defined as the information that a reasonable investor would consider in making an investment decision.[84] Index funds are popular because they allow for passive diversification with relatively low risk and consistent returns.[85] ESG investing is popular in part because it allows investors to support socially important causes through their investment activities.[86] The fund taxonomy proposed above will provide material Information to reasonable investors and help all investors better understand the nature of the funds in which they are investing in a relatively quick and simple way.

Finally, the fund taxonomy also accords with existing regulation. In addition to various other general anti-fraud provisions of federal securities law, section 35(d) of the Investment Company Act of 1940, which became effective in 2001, provides:

> It shall be unlawful for any registered investment company to adopt as a part of the name or title of such company, or of any securities of which it is the issuer, any word or words that the Commission finds are materially deceptive or misleading. The Commission is authorized, by rule, regulation, or order, to define such names or titles as are materially deceptive or misleading.[87]

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through proxy voting and other means to influence the management of portfolio companies).

83. *See supra* note 57 and accompanying text (asserting that unsophisticated investors are reasonable investors in index funds because of the nature of these investment vehicles).

84. *See supra* notes 50–53 and accompanying text (providing the definition of materiality under federal securities law).

85. *See supra* notes 21–30 and accompanying text (explaining that index funds are structured based on Modern Portfolio Theory, which posits that through diversification, investors can create the greatest likelihood of consistent returns while minimizing risk).

86. *See supra* notes 7–8 and accompanying text (discussing the growing popularity of ESG investing).

87. 15 U.S.C. § 80a-34(d) (2018).

The SEC has promulgated Rule 35d–1 under this provision to define materially deceptive and misleading fund names.[88] Whether current naming practices might violate existing laws and regulations is open for debate. To provide greater clarity in naming practices, however, Rule 35d–1 could be amended or a new rule could be promulgated to adopt the taxonomy above. The SEC has generally been interested in the topic of the naming of index funds. In March 2020, the SEC issued a request for comments on fund names.[89] Specifically, the request posed various questions relating to the application of existing regulation to ESG and how regulation ought to evolve.[90] This suggests that the SEC already recognizes the need for action on fund naming and ESG.[91] The fund taxonomy provided above provides a good response to that need.

B. Possible Concerns

The possible concerns with the fund name taxonomy proposed above are few. The successes of the securities markets in the United States are a testimony to its high-quality system of securities regulation, which is founded upon disclosure.[92] The taxonomy proposed above is

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88. 17 C.F.R. § 270.35d–1 (2020).

89. Request for Comments on Fund Names, 85 Fed. Reg. 13,221 (Mar. 6, 2020).

90. *Id.* at 13,223–24.

91. Gary Gensler, Chair of the SEC, has spoken publicly about the need for transparency in the naming of funds focused on ESG, but rather than proposing an improved taxonomy for naming funds, he has suggested greater disclosure regarding how and why fund managers use the labels that they use. *See* Gary Gensler, Chair, SEC, Remarks before the European Parliament Committee on Economic and Monetary Affairs (Sept. 1. 2021), https://www.sec.gov/news/speech/gensler-remarks-european-parliament-090121 ("Many funds these days brand themselves as 'green,' 'sustainable,' 'low-carbon,' and so on. I've directed staff to review current practices and consider recommendations about whether fund managers should disclose the criteria and underlying data they use to market themselves as such. I also have asked staff to pursue similar disclosure requirements with respect to human capital and board diversity."); Gary Gensler, Chair, SEC, Prepared Remarks Before the Asset Management Advisory Committee, https://www.sec.gov/news/public-statement/gensler-amac-2021-07-07 [https://perma.cc/4GH6-FHD8]("Many funds use terms like 'green' or 'sustainable.' . . . As there's not a standardized meaning of these sustainability-related terms, I've asked staff to consider recommendations about whether fund managers should disclose the criteria and underlying data they use.").

92. *See* Nathaniel G. Dutt, *Current United States Credit Default Swap Regulatory Initiatives: A New World Standard or Just a Ploy?*, 16 ILSA J. Int'l & Compar. L. 169, 186 (2009) ("[T]he United States is the leader of the financial markets and the world looks to the United States for guidance as to regulatory initiatives."); George W. Madison & Stewart P. Greene, *TIAA-CREF Response to* A Blueprint for Cross-Border Access

founded upon that policy of disclosure as a means of allowing investors to make an informed choice regarding their investments. With that said, two major criticisms exist.

First, the proposed fund name taxonomy is relatively basic. This criticism is legitimate. Obviously, because of the space limitations of this symposium issue, only a basic sketch can be offered of the type of nomenclature that ought to be used in regard to investment funds. With that said, this sketch offers the fundamentals of how a line ought to be drawn between index funds and ESG activity. The taxonomy proposed would need to be more fully studied and developed. With that said, the fundamentals are enough for purpose of this Essay.

Second, the proposed fund name taxonomy may inhibit useful change. Although the dominance of BlackRock, State Street, and Vanguard in the index fund industry creates reason for concern because of the power that they now wield,[93] each of these entities has demonstrated a commitment to ESG matters.[94] Potentially, they may be able to serve as de facto regulators in a space in which federal and state governments have failed to act.[95] This could lead to desirable reforms and force corporations to fulfill their obligations to society.[96] Regardless, this still generates the problems that allowing index fund managers to engage in ESG creates an unresolvable conflict,[97] is

to U.S. Investors: A New International Framework, 48 Harv. Int'l L.J. 99, 100 (2007) ("The SEC performs its task admirably—and sets the standard against which all other regulators around the globe are judged. The U.S. market is desirable and one of the most efficient at raising capital. The SEC, with its track record and high standards for protecting investors, has historically been a leader in setting benchmarks for market regulation.").

93. *See supra* notes 5–8 and accompanying text (discussing the power that BlackRock, State Street, and Vanguard now have as a result of their dominance in marketing and selling index funds).

94. *See supra* notes 10–13 and accompanying text (reporting that BlackRock, State Street, and Vanguard have publicly stated their commitment to pursuing ESG objectives through their index fund portfolio holdings).

95. *See supra* note 61 and accompanying text (explaining that some have argued that index fund managers can act as de facto regulators in circumstances in which federal and state governments have failed to take action on ESG issues).

96. *See generally* Eric C. Chaffee, *The Origins of Corporate Social Responsibility*, 85 U. Cin. L. Rev. 353 (2017) (discussing the various circumstances in which the essential nature of the corporate form obligates corporations to engage in socially responsible behavior).

97. *See supra* Part II.A (explaining that pursuing ESG objectives through index funds creates an unresolvable conflict of interests).

materially misleading,[98] and is undemocratic.[99] Although useful reforms should be made regarding ESG matters, such as a sensible system of ESG disclosure, these reforms should come from the government, rather than index fund managers, who are admittedly only seeking to increase investment returns.[100] Additionally, creating an expediency exception for ESG and index funds while attempting to create fair and transparent markets seems troubling to say the least. As a consequence, the proposed fund name taxonomy ought to prevail.

Conclusion

The rise of index funds and ESG investing are two of the most important developments in investing in recent years. The intersection of the two, however, has generated a variety of different issues and is unacceptable because it creates an unresolvable conflict of interests, is misleading to those purchasing shares in mutual funds, and is undemocratic.[101] Investors need to be able to quickly and easily understand the nature of the funds in which they are investing. As a consequence, the best solution is to adopt the fund name taxonomy proposed with this Essay.[102] Such a taxonomy is superior to the current system because it accords with the policies underlying federal securities law, allows for investors to make informed investment decisions, and accords with existing regulation.[103] Reasonable investors in index funds reflect a much wider segment of the public than reasonable investors in other circumstances. They deserve to have a clear idea of what they are purchasing and its attributes.

98. *See supra* Part II.B (explaining that pursuing ESG objectives through index funds is materially misleading).

99. *See supra* Part II.C (explaining that pursuing ESG objectives through index funds is undemocratic).

100. *See* Taraporevala, *supra* note 38 (reporting that when index fund managers pursue ESG objectives through the funds they manage they are doing so only to pursue profit).

101. *See supra* Part II (discussing the problems relating to pursing ESG objectives through index funds via proxy voting and other efforts to influence management of portfolio companies).

102. *See supra* Part III (providing a proposal for the creation of a fund name taxonomy for investment funds).

103. *See supra* Part III.A (discussing the case for adopting the fund name taxonomy proposed in this Essay).