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Corporations and the 99%: Team Production Revisited

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Abstract

This Article explores the legal manifestation of the interaction between the general public and the public corporation. Revisiting team production analysis, this Article redefines the corporate team and argues that while several constituencies indeed form part of the corporate team, others are exogenous to the corporate enterprise. Employees, suppliers and financiers contribute together to the common corporate enterprise, enjoying a long-term relational contract with the corporation, while retail consumers contract with the corporation at arm's length, and other people living alongside the corporation do not contract with it at all. Under this organizational model, the general public may participate in the team forming the corporate enterprise by providing public financing. Indeed, corporate law was developed to protect public investors.

However, evidence shows that most of the listed equity is no longer held by the general public directly; the new shareholders are institutional investors. This Article analyzes the impact of institutionalization on the interaction of corporations with the general public, outlining spheres of potential divergence between institutional and retail investors and raising the timely concern for the agency costs embedded in the relationship between the general public and institutional investors. First, not all institutional investors are investing on behalf of the public. Shareholder empowerment platforms are frequently mobilized by intermediaries representing only the wealthiest 1%. Second, when shareholders are mostly institutional investors, the likelihood of distributional conflicts between various stakeholder groups is higher because the institutional thought and decision-making patterns do not match those of the general public. The objectives of institutional investors are significantly narrower than, and potentially divergent from, those of the general public. Third, the technology used for trading by institutional investors, algorithmic trading, potentially imposes externalities on retail investors, and ultimately widens the gap between corporations and the general public. It may often be the case that the institutional interests align with those of the general public, but the law does not necessitate it.

This Article further discusses converse trends towards convergence, including socially responsible investments and impact investments, corporate social responsibility, sustainability reporting, and customer voice. This Article ultimately suggests policy implications. When shareholders' interests are not necessarily aligned with those of the general public, we have reason to revisit the axiom of shareholder value as the underlying purpose of corporations, the boundaries of fiduciary duty, and the limited platform and audience for sustainability reporting.

KEYWORDS: Shareholder, Stakeholder, Institutional Investors, Institutionalization, Corporation, Corporate Law, Agency

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Shlomit Azgad-Tromer[*]

This Article explores the legal manifestation of the interaction between the general public and the public corporation. Revisiting team production analysis, this Article redefines the corporate team and argues that while several constituencies indeed form part of the corporate team, others are exogenous to the corporate enterprise. Employees, suppliers and financiers contribute together to the common corporate enterprise, enjoying a long-term relational contract with the corporation, while retail consumers contract with the corporation at arm's length, and other people living alongside the corporation do not contract with it at all. Under this organizational model, the general public may participate in the team forming the corporate enterprise by providing public financing. Indeed, corporate law was developed to protect public investors.

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TABLE OF CONTENTS

INTRODUCTION

"We are the 99%" is the political slogan of the Occupy Wall Street movement.[1] The slogan refers to the wealth and income inequality

1. Erik Kain, *Outside of Wonkland, 'We are the 99%' Is a Pretty Good Slogan,* FORBES (Oct. 12, 2011, 12:11 PM), http://www.forbes.com/sites/erikkain/2011/10/12/o

prevalent in American society. Equally as important, the slogan symbolizes a divergence of corporate America from the public. Corporations are arguably the most significant legal institution in today's society; they accommodate most of society's commercial needs, provide employment opportunities, and have an immeasurable impact on public policy. Considering the dominance and power held by corporations, their potential divergence from the general public is not to be taken lightly. Nevertheless, the stakeholder theory of corporate law portrays the corporation as a sphere of cooperation and coordination between all stakeholder constituencies including the general public.[2] This Article explores the relationship of the general public with the public corporation and its legal manifestation in corporate law.

This Article is organized as follows. Using the contractual model of the corporation, Part I introduces the stakeholder theory and team production analysis.[3] This section argues that the corporation does not provide equal participation or representation to all stakeholder constituencies.[4] Rather, the corporation's financiers, suppliers, and employees form the corporate team and create the corporate value. In contrast, the corporation's contractual relationship with the general public is at arm's length, and for corporations with no retail consumers, there are often no contractual foundations at all.[5] Under this organizational model, the general public assumes a role within the corporate team only to the extent that it provides public financing.[6]

While in the past, the general public provided financing to public corporations and held securities in person, retail investors have now disappeared from direct ownership of listed corporations.[7] Part II analyzes the impact of institutionalization, outlining the differences between retail and institutional investors with regard to shareholder activism, investment objectives, and trading mechanisms.[8] First,

utside-of-wonkland-we-are-the-99-is-a-pretty-good-slogan/ [http://perma.cc/4FZW-J9SG].

2. Jonathan R. Macey & Geoffrey P. Miller, *Corporate Stakeholders: A Contractual Perspective*, 43 U. TORONTO L.J. 401, 416-19 (1993).

3. *See infra* Part I.

4. *See infra* Part I.

5. Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 250, 256 (1999).

6. *See infra* Part I.

7. *See infra* Part II.

8. *See infra* Part II.

shareholder activism is often mobilized by hedge funds, representing the wealthiest 1%, with little participation by retail investors.[9] Second, the investment objectives of institutional investors are significantly narrower than, and potentially divergent from, those of the general public, as not all institutional investors are investing on the public's behalf.[10] Banks and insurance companies, for example, contract with the general public under loan and insurance contracts. Their duties toward the general public are confined to their obligations to their consumer constituency, while they invest for the benefit of their own accounts. Therefore, institutionalization may significantly disadvantage retail investors, as much of the impact and voice given by the empowerment platforms are utilized by institutional investors and intermediaries who are not legally bound by the general public's interests.[11] Third, the institutional trading methodologies of algorithmic trading ("algo-trading") are technologically inaccessible to individuals, potentially imposing negative externalities on retail investors.[12] Overall, institutionalization has demonstrated that shareholder empowerment does not empower all shareholders equally.

Despite the divergence of corporations from the general public, Part III describes increasing trends towards convergence.[13] This section surveys patterns of convergence between corporations and the general public, including investment paradigms that consider social progress in portfolio management, the corporate social responsibility movement and its corresponding effect on sustainability reporting, and the public corporation's growing interest in the voice of the general public through social media and websites providing accumulated customer reviews such as Yelp.com.[14]

Finally, the article concludes with policy implications and a proposal to reunite the 99% with the 1%.[15] Understanding that the primary purpose of public policy should be to enhance aggregate social welfare, corporate law must face the challenge of aligning the interests

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9. *See infra* Part II.A.
10. *See infra* Part II.B.
11. *See infra* Part II.A.
12. *See infra* Part II.C.
13. *See infra* Part III.
14. *See infra* Part III.
15. *See infra* Part IV.

of today's institutional shareholders with those of the general public.[16] Because the general public no longer directly owns stock, the mandatory disclosure of nonfinancial performance and sustainability reporting should not be restricted to public corporations.[17] Rather, these disclosure requirements should apply to corporations funded privately that serve public roles or provide public services.

I. STAKEHOLDER THEORY AND TEAM PRODUCTION ANALYSIS

Corporations are often theorized as bundles of contracts between various agents facilitating cooperation and coordination between participants in the corporate enterprise.[18] The corporation is portrayed as a nexus of contracts, an organizational means of reducing contracting costs and inducing trust between the various contracting parties and corporate constituencies.[19] Because corporate law is restricted to the corporate constituencies, the public participates in the legal institution of the corporation only insofar as it encompasses one of the constituencies such as the consumer.

Under the stakeholder approach to corporate law, the corporation is an organizational platform for a set of relationships between groups that have a stake in a common enterprise. The purpose of the corporation is to create as much value as possible for all stakeholders, usually defined as groups without whose support the organization would cease to exist, including shareholders, employees, customers, suppliers, lenders, and society as a whole.[20] Alternatively, a corporation's stakeholders can be defined as those whose stake in the corporate enterprise contributes to

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16. *See infra* Part IV.A.

17. *See infra* Part IV.C.

18. *See* HENRY HANSMANN & REINIER KRAAKMAN, *What is Corporate Law¸ in* THE ANATOMY OF CORPORATE: A COMPARATIVE AND FUNCTIONAL APPROACH LAW 1, 6 (2d ed. 2009); Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

19. *See* HANSMANN & KRAAKMAN, *supra* note 18; *see also* William W. Bratton, *The Economic Structure of the Post-Contractual Corporation*, 87 NW. U. L. REV. 180, 191 (1992).

20. *See* R. F. Stewart, J. K. Allen & J. M. Cavender, Stanford Research Institute, Long Range Planning Serv., Indus. Econ. Div., *The Strategic Plan*, Research Report 168 (1963); R. EDWARD FREEMAN, JEFFREY S. HARRISON, ANDREW C. WICKS, BIDHAN L. PARMAR & SIMONE DE COLLE, STAKEHOLDER THEORY: THE STATE OF THE ART (2010); *see also* Giles Slinger, Essays on Stakeholding, (unpublished Ph.D. dissertation, University of Cambridge) (arguing that "stakeholders" refers to all those who have a "stake" in the corporate enterprise and contribute to the success of the corporation).

the success of its business. [21] Stakeholder theory thus assesses the corporation as a platform for business endeavors designed to enable cooperation between various contributors and enhance its value for a wider community that includes not only the shareholders but also the customers, suppliers, employees, financiers (including shareholders, bondholders and banks), communities, and managers. The role of management is to shape and manage these relationships and perform the distributional allocation of resources and corporate activities among the various stakeholder constituencies.[22] The following diagram demonstrates the juggling of corporate management among different stakeholder constituencies.

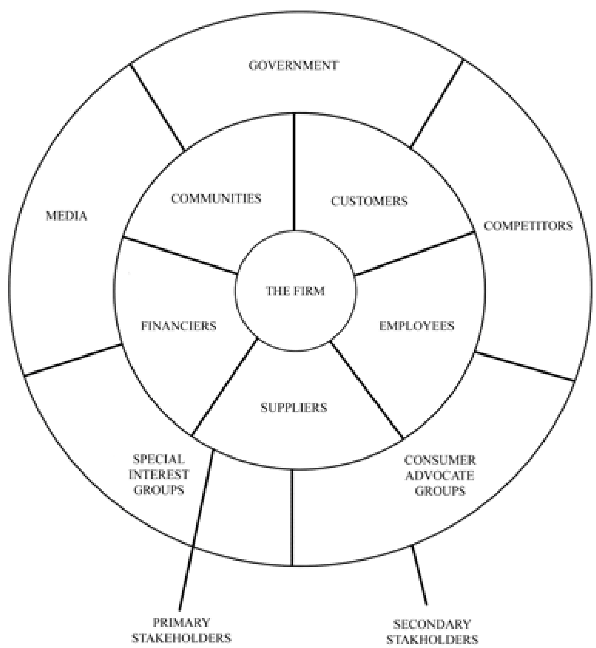

Illustration 1: Corporate Stakeholders[23]

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21. *See supra* note 20 and accompanying text.

22. *See* R. EDWARD FREEMAN, JEFFREY S. HARRISON & ANDREW C. WICKS, MANAGING FOR STAKEHOLDERS: SURVIVAL, REPUTATION AND SUCCESS 7 (2007).

23. *See id.*

Perhaps because of the wide array of agents taking part in the creation of value and its distribution through the corporate platform, some scholars find the justification of stakeholder accountability to be within the firm's commitment to business ethics and social responsibility. Wesley Cragg, for example, argues that the corporation's status as a social institution imposes private and public liability, accounting for stakeholder interests while pursuing shareholder profits.[24] In recognizing the diversity of stakeholders, the stakeholder theory advocates a holistic approach to management, integrating considerations that are considered ancillary by the conventional analysis of agency theory and shareholder primacy including social, political, ethical, and environmental considerations.[25] Some scholars argue that the wider circle of stakeholders should also extend to wider stakeholder representation in management.[26] Corporate management continuously engages in the distributional allocation of resources, and stakeholder theory provides a doctrinal foundation for greater social accountability. However, the notion of the ethical corporation under agency theory seems to be paradoxical; at some point there is a conflict between two choices: ethics without business or business without ethics.[27]

Margaret Blair and Lynn Stout portray the corporation as a "nexus of firm-specific investments," an organizational platform for team production, where several parties may pursue a joint enterprise within which each party contributes "unique and essential resources to the corporate enterprise . . . ."[28] Under their team production model of the firm, it is the "horizontal interaction" that enables team members to collaborate and produce corporate value beyond the "sum of their

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24. *See* Wesley Cragg, *Business Ethics and Stakeholder Theory*, 12 BUS. ETHICS Q. 113 (2002).

25. *See, e.g.*, R. Edward Freeman & S. Ramakrishna Velamuri, *A New Approach to CSR: Company Stakeholder Responsibility*, *in* CORPORATE SOCIAL RESPONSIBILITY: RECONCILING ASPIRATION WITH APPLICATION 9 (Andrew Kakabadse & Mette Morsing eds., 2006).

26. *See, e.g.*, Charles W. L. Hill & Thomas M. Jones, *Stakeholder-Agency Theory,* 29 J. MGMT. STUD. 131, 134 (1992).

27. J. R. Boatright, *Fiduciary Duties and the Shareholder-Management Relation: Or, What's so Special About Shareholders?,* 4 BUS. ETHICS Q. 393 (1994); Kenneth E. Goodpaster, *Business Ethics and Stakeholder Analysis*, 1 BUS. ETHICS Q. 53, 53 (1991); Kenneth Goodpaster & T. Holloran, *In Defense of a Paradox*, 4 BUS. ETHICS Q. 423 (1994).

28. Blair & Stout, *supra* note 5, at 275.

individual inputs."[29] Rather than "a bundle of assets under common ownership," Blair and Stout suggest that the corporation is a mediating hierarchy of horizontal cooperation.[30] As they describe it, "[p]erhaps one individual brings critical technical skills to the table, while another has a talent for management, and a third provides marketing insights."[31]

A team is a group of people with complementary skills who are committed to a common purpose, each with a distinct role in sharing culture, tasks and leadership.[32] Indeed, some stakeholder constituencies conform to this model: shareholders often need employees and suppliers to engage in production while shareholders, employees, and suppliers all need the financiers to lend the enterprise a credit line. But stakeholder theory and team production analysis fail to reflect the distinct nature of the various relationships the corporation encompasses. In every corporation, several stakeholder constituencies are negotiating and cooperating towards a common goal, forming the insider corporate "team," while other stakeholder constituencies are negotiating with the corporation at arm's length, excluded from the core of the corporate platform.[33] The horizontal cooperation enterprise is exclusively reserved for those parties contributing directly to the common corporate endeavor: those who are part of the team.

In particular, the general public is not part of the team engaging in the corporate enterprise. The general public rarely has a seat at the corporate table. The public is absent from the corporate premises and lacks institutional representation in the corporation's organizational form.[34] With such a low percentage of retail investors, and a negligible

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29. *Id.* at 270.

30. *Id.* at 271-76.

31. *Id.* at 275.

32. JON R. KATZENBACH & DOUGLAS K. SMITH, THE WISDOM OF TEAMS: CREATING THE HIGH-PERFORMANCE ORGANIZATION (1993).

33. For an analysis of the effect of different social relationships on commercial contracts, see Ian R. Macneil, *Relational Contract Theory: Challenges and Queries*, 94 NW. U. L. REV. 877 (2000); Ian R. Macneil, *Contracts: Adjustment of Long-term Economic Relations Under Classical, Neoclassical and Relational Contract Law*, 72 NW. U. L. REV. 854 (1977-1978); IAN R. MACNEIL, THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS (1981).

34. For a dramatic portrait of the seclusion of corporations from the general public, see JOEL BAKAN, THE CORPORATION: THE PATHOLOGIC PURSUIT OF PROFIT AND POWER (2003). For a doctrinal analysis of the limited scope of corporate law, see Shlomit

percentage of retail investors actively trading, the public remains living alongside the corporation, occasionally wearing the consumer hat but mostly serving as a human background for the social and environmental externalities of the corporate enterprise. Stakeholder theory and team production analysis broaden the group of constituencies to which the corporation's management is accountable, but they sustain the alienation of the general public from the corporate scene. The following is a diagram demonstrating the juggling of corporate management among different stakeholder constituencies, taking into account the nature of the contractual relationship between the corporation and the different stakeholder constituencies.

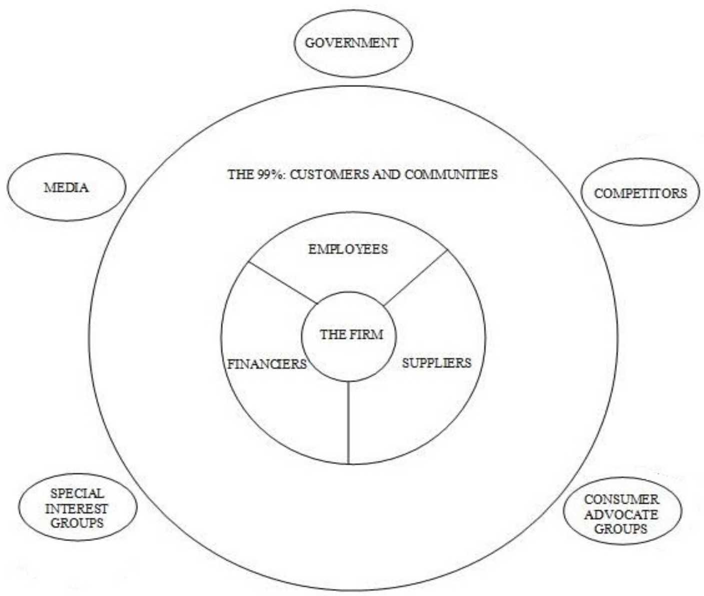

Illustration 2: Internal and External Stakeholders[35]

II. INSTITUTIONALIZATION AND ITS IMPLICATIONS

Once upon a time, most investors in the capital markets were individuals, but this is no longer the case.[36] Investments in public

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Azgad-Tromer, *The Case of Consumer-Oriented Corporate Governance, Accountability, and Disclosure,* 17 U. PA. J. BUS. L. 227, 228-48, 285-90 (2015).

35. This illustration is an original design in order to provide a visual representation of the interaction between internal and external stakeholders.

corporations are now dominated by financial corporations, also labeled as "institutional investors."[37] In 1945, individual households directly owned 93% of outstanding corporate equities; by 2014, individuals held only 36%.[38] Additionally, investments by individuals tend to be more passive: from April 2005 to August 2006, trades by individuals represented, on average, less than 3% of the NYSE trading volume for NYSE listed firms.[39] Instead, institutional activism drives both trading volume and proxy voting.[40] The public corporation is no longer public.

Retail investments were the fuel for dispersed ownership, affecting the design of United States corporate governance. It was not until the latter part of the nineteenth century that most businesses were incorporated; in fact corporations played a negligible role in the nonfinancial sector of the American economy before that time.[41] In 1859, the nonfinancial corporations' share of national wealth is estimated to have been only about 7%.[42] Initially, the economy was dominated by self-funded, small, family businesses. People trusted their own endeavors. For example, the farmer invested in her farm and the shoemaker invested in his street stand. Incorporation gained popularity in the 1840s and 1850s when funding for the railroads required public financing through security issuances. Later, from 1880 until World War

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36. Donald C. Langevoort, *The SEC, Retail Investors, and the Institutionalization of the Securities Markets*, 95 VA. L. REV. 1025, 1026 (2009).

37. *Id.*

38. BD. OF GOVERNORS OF THE FED. RESERVE SYS., FEDERAL RESERVE STATISTICAL RELEASE: Z.1 FINANCIAL ACCOUNTS OF THE UNITED STATES: HISTORICAL ANNUAL TABLES 1945-1954, at 121 tbl. L.223 Corporate Equities (1) (2015), http://www.federalreserve.gov/releases/z1/Current/annuals/a1945-1954.pdf [http://perma.cc/6DN8-PHY9] [hereinafter FEDERAL RESERVE STATISTICAL RELEASE, 1945-1954]; BD. OF GOVERNORS OF THE FED. RESERVE SYS., FEDERAL RESERVE STATISTICAL RELEASE: Z.1 FINANCIAL ACCOUNTS OF THE UNITED STATES: FIRST QUARTER 2015, at 119 tbl. L.213 Corporate Equities (1) (2015), http://www.federalreserve.gov/releases/z1/20150611/z1.pdf [http://perma.cc/YK8V-GK6H] (the data cited refers to the fourth quarter).

39. *See* Alicia J. Davis, *Do Individual Investors Affect Share Price Accuracy? Some Preliminary Evidence* 36-38 (Univ. of Mich. L. Sch. Empirical Legal Studies Ctr., Working Paper No. 07-018, 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=998093 [http://perma.cc/RN9C-3XDK].

40. *See generally id.*

41. INSTITUTIONAL INVESTORS AND CORPORATE STOCK – A BACKGROUND STUDY 35 (Raymond W. Goldsmith ed., 1973).

42. *Id.*

I, incorporating again resurfaced, as the rapidly expanding manufacturing, mining, electric power, and communication sectors sought public funding through the corporate issue of stock, bonds and other debt.[43]

Individual investors funded the rise of corporations in America.[44] However, since individual investors have been leaving the securities markets, institutional investors have become the dominant owners of securities in America. Below is an illustrative graph of the share of households and institutions, respectively, in total equities outstanding, in the period between 1964 and 2012.

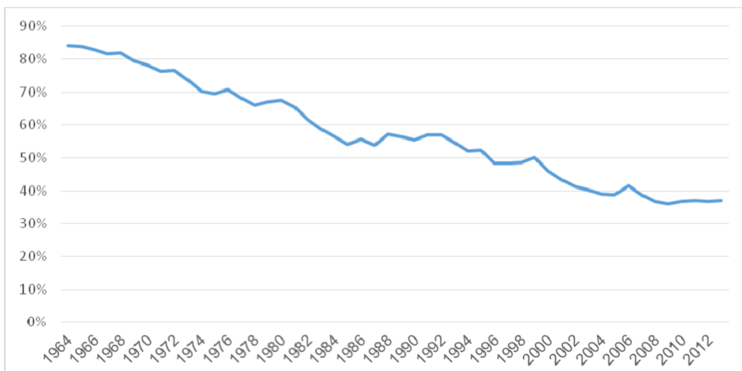

Illustration 3: U.S. Households Percent Share of Total Holdings of Equities[45]

Institutional investors are financial corporations; some of whom invest on behalf of their clients directly and some of whom do not. Pension funds and mutual funds, for example, invest on behalf of their clients. Consumers trust these financial institutions to manage their savings, and these institutions are obliged to act as fiduciaries for their clients and beneficiaries.[46] Saving on the institutional platform is encouraged by tax incentives, through which governments enhance the

43. Davis, *supra* note 39, at 39-40.

44. Federal Reserve data from the 1940's show that more than 90% of outstanding equity was held by individual household investors. *See* FEDERAL RESERVE STATISTICAL RELEASE, 1945-1954, *supra* note 38.

45. SIFMA, 2015 SIFMA FACT BOOK 61 tbl. U.S. Holdings of Equities.

46. *See generally*, Hanoch Dagan & Sharon Hannes, *Managing Our Money: The Law of Financial Fiduciaries as a Private Law Institution*, in THE PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW (Andrew S. Gold & Paul B. Miller eds., Oxford Univ. Press 2014).

institutionalization of capital markets and empower institutional investors.[47]

Other institutional investors, such as commercial banks and insurance companies, invest sums they collect from their consumers, either as a loan or as a premium.[48] These institutional investors do not invest on behalf of their clients, instead the return or loss from their investments is credited to their own account. Eventually, the beneficiaries are the shareholders of the institution. Typically, institutional investors are more heavily regulated than other corporations, with financial regulators often imposing specific leverage and minimum capital requirements, due to the vulnerability of financial markets and the need to secure financial stability.[49] An exception to the highly regulated regime of financial institutions is hedge funds, which often adopt speculative and high-risk strategies, and frequently engage in active investments, sometimes effecting major changes in the strategy, management, or structure of public firms.[50]

The difference between retail investors and institutional investors makes a significant impact on the nature of our capital markets. The remainder of this section surveys the impact of institutionalization on shareholder activism, investment objectives, and trading methodologies.

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47. Such tax incentives are common in most western societies. JOHN C. BOGLE, THE CLASH OF THE CULTURES: INVESTMENT VS. SPECULATION 29-31 (2012); *see also* Immacolata Marino, Filippo Maria Pericoli & Luigi Ventura, *Tax Incentives and Household Investment in Complementary Pension Insurance: Some Recent Evidence from the Italian Experience* 14 RISK MGMT. & INS. REV. 247, 247-63 (2011).

48. The formal definition for a bank is a firm taking deposits and making loans – on a contractual basis. The relationship of the depositor with the bank is based on a consumer contract. Likewise, consumers of insurance policies are purchasing the insurer's contingent liability upon the insurance event. Insurance companies and banks thus invest their own funds collected from their consumer. On the other hand, mutual funds are pooled investment vehicles, investing on their clients' behalf. *See, e.g.,* Howell E. Jackson, *Regulation in a Multisectored Financial Services Industry: An Exploratory Essay*, 77 WASH. U. L. REV., 319, 327-331 (1999).

49. HOWELL E. JACKSON & EDWARD L. SYMONS, JR., THE REGULATION OF FINANCIAL INSTITUTIONS (1999); Anat R. Admati, *The Compelling Case for Stronger and More Effective Leverage Regulation in Banking*, 43 J. LEGAL STUD. 35, 41 (2014).

50. *See* Marcel Kahan & Edward B. Rock, *Hedge Funds in Corporate Governance and Corporate Control*, 155 U. PA. L. REV. 1021 (2007).

A. SHAREHOLDER ACTIVISM

Individuals are dispersed investors with little incentive to act individually on the corporate scene due to both the size of their expected returns and collective action problems. Because individuals have small and diversified portfolios, they are typically "rationally apathetic" towards their securities holdings.[51] Institutional investors, however, have larger stakes and are thus more likely to engage actively in the corporate scene. Indeed, institutionalization is famed for "shareholder activism," which has disciplinary effects on the companies that institutional investors hold, and often leads to changes in governance.[52]

Institutional investors have a strong impact on the corporations they hold. These investors create this impact either by simply selling their large number of shares and voting with their feet, or by voting against corporate decisions, which can lead to amendments in governance or to hostile takeovers.[53] Institutional investors also form coalitions and industry organizations, such as the Council of Institutional Investors, providing a platform for cooperation in legal, governance, and strategy issues.[54] The *Financial Times* declared 2013 the year of "the triumph of activism," and *Barron's* called it the year that "activist investing had entered a golden age."[55]

To be sure, not all institutional investors are active. Many institutional investors are "sleeping giants," and are notably passive due to a variety of barriers, including free-riding, conflicts of interest, and a

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51. LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 89 (2012).

52. *See* Anat R. Admati, Paul Pfleiderer & Josef Zechner, *Large Shareholder Activism, Risk Sharing, and Financial Market Equilibriu*m, 102 J. POL. ECON. 1097, 1097-1130 (1994).

53. *See* Anat R. Admati & Paul Pfleiderer, *The "Wall Street Walk" and Shareholder Activism: Exit as a Form of Voice*, 22 REV. FIN. STUD. 2245, 2246-49 (2009).

54. *See, e.g.*, *About Us: Corporate Governance Advisory Council*, *Council of Institutional Investors*, CII (2013), http://www.cii.org/cgadvisorycouncil [http://perma.cc/2R7F-AHRB].

55. Brian R. Cheffins, *The Team Production Model as a Paradigm* 37 (Eur. Corp. Governance Institute, Working Paper No. 262/2014, 2014) (citing Stephan Foley, *The Brave New World of Investor Activism,* FIN. TIMES (U.S.) Dec. 24, 2013, at 15 and Avi Salzman, *How to Profit From Today's Shareholder Activism*, BARRON'S, Nov. 30 2013, at 25).

common fee structure.[56] In practice, third-party intermediaries play a major role in mobilizing activism and defining its agenda.[57] Activists function as arbitrageurs, creating value by amplifying the institutional investor voice.[58] However, not all activists are bound by duties to the general public or have their interests aligned with it. Of the various activist agents, hedge funds are particularly prominent: between 2009 and 2014 they launched campaigns at more than one-fifth of companies in the S&P 500.[59] According to FactSet research, 60% of proxy fights prompted by a hedge fund activist that went to an actual vote in 2013 resulted in at least a partial activist victory.[60] The peril of hedge fund activism has prompted a change in the governance of public corporations even before they have been targeted.[61] Managers of public companies start to "look at (their) company through the lens of an activist."[62] Public companies are now offering board representation to activists who have not even launched proxy contests for board seats.[63] Proxy contests and shareholder activism led by hedge funds have fostered a "really enhanced investor outreach" in public companies.[64] However, hedge funds are not investing on behalf of the general public. Usually, investment in hedge funds is exclusively restricted to investors with a net worth of $1 million or more.[65]

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56. *See* Sharon Hannes, Super Hedge Fund 2-9 (Aug. 22, 2014) (unpublished manuscript), http://ssrn.com/abstract=2485129 [http://perma.cc/UN9J-8L23].

57. Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights,* 113 COLUM. L. REV. 863, 863 (2013).

58. *See id.* at 901.

59. *See The Barbarians Return to the Gate,* FIN. TIMES, Apr. 25, 2014, at 10.

60. *See* Cheffins, *supra* note 55, at 37 (citing FactSet Insight, *Activists Increasing Success Gaining Board Seats at U.S. Companies*, FACTSET (Mar. 11. 2014), http://www.factset.com/insight/2014/3/sharkspotlight_3.11.14#.VharzvlVhBd [http://perma.cc/N3B8-5Y8W]).

61. *See* Lucian Arye Bebchuk, *The Case for Increasing Shareholder Powe*r, 118 HARV. L. REV. 833, 910 (2005).

62. Cheffins, *supra* note 55, at 38 (citing Dan McCrum & David Gelles, *Finance: Stirrers and Shakers*, FIN. TIMES, Aug. 22, 2012, at 7).

63. Cheffins, *supra* note 55, at 38.

64. *Id.* (citing David Gelles, *Boardrooms Rethink Tactics to Defang Activist Investors*, N.Y. TIMES: DEALBOOK, Nov. 12, 2013, at F10).

65. *See Getting Started: How to Buy Hedge Funds,* MARKETWATCH, http://www.marketwatch.com/getting-started/hedge-funds [http://perma.cc/44BA-Y2VF].

Under agency theory, it is beneficial to empower the principals thereby reducing the agency costs of discretion by the appointed management. Thus, empowering shareholders with more discretion is strongly advocated by scholars working within the agency theory paradigm.[66] However, shareholder empowerment does not empower all shareholders equally. As previously mentioned, retail investors hardly trade and are mostly apathetic towards actively using disciplinary corporate governance through proxies.[67] Those institutional investors that are investing on behalf of the general public are more inclined to make centralized voting decisions based on how all of their funds will vote, generally exercising less activism.[68] As Chief Justice of the Delaware Supreme Court Leo E. Strine Jr. writes, "[T]he segment of the investment community that is best positioned to vote with an eye toward sustainable value creation is the least active in exercising voice and judgment in American corporate governance . . . ."[69] Additionally, conflicts of interest may arise between retail investors and hedge funds, which are prominent agents of shareholder activism, because "hedge funds frequently engage in hedges and other sophisticated trading and arbitrage strategies."[70] The alignment of interests between those active shareholders and the general public remains to be questioned.[71]

Activism may often enhance aggregate social welfare even in the absence of fiduciary duties imposed on the activist agent vis-à-vis the

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66. *See* Bebchuk, *supra* note 61, at 910.

67. *See* Davis, *supra* note 39, at 36-38. It has been reported that only a small portion of retail investors vote. *See Briefing Paper: Roundtable on Proxy Voting Mechanics*, SEC (May 23, 2007), http://www.sec.gov/spotlight/proxyprocess/proxy votingbrief.htm [http://perma.cc/9KE2-875F].

68. *See* Leo E. Strine Jr., *Can We Do Better by Ordinary Investors? A Pragmatic Reaction to the Dueling Ideological Mythologists of Corporate Law,* 114 COLUM. L. REV. 449, 478 (2015) ("Index fund investors do not benefit by bubbles that burst. Index fund investors also have a more durable interest in the prospects of the corporations in the index than investors in actively traded funds.").

69. *Id.* at 477-78.

70. Kahan & Rock, *supra* note 50, at 1071.

71. *See* Martin Lipton, *Further Recognition of The Adverse Effects of Activist Hedge Funds,* HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (Apr. 11, 2015) (citing Yvan Allaire, Institute for Governance of Private and Public Organizations, *Hedge Fund Activism: Preliminary Results and Some New Empirical Evidence* (2015), http://www.wlrk.com/docs/Allaire_HedgeFundActivism-new-empirical-evidence-English-final.pdf [http://perma.cc/9WN5-8592]), http://corpgov.law.harvard.edu/2015/04/11/further-recognition-of-the-adverse-effects-of-activist-hedge-funds/ [http://perma.cc/H84Y-MN56].

general public. For example, empirical research suggests that in the five years following activist interventions by hedge funds, target companies demonstrated improved operating performance, contradicting claims of a detrimental effect on the long-term interests of corporations and their shareholders due to divergent investment objectives and horizons.[72] Moreover, some asset managers are actively involved in corporations held on their clients' behalf. Recently, for example, BlackRock Inc. and the Vanguard Group, respectively the largest and third largest United States asset managers, with more than $7 trillion in combined assets under management, have made public statements emphasizing that they are focused on corporate governance and board engagement.[73] Additionally, much of the voice generated on behalf of the general public is mobilized by active intermediaries such as Harvard's Shareholders Rights Project. From 2012 to 2013, the group was responsible for over 50% of all successful precatory proposals by public pension funds and over 20% of all successful precatory proposals.[74] Therefore, while it may often be the case that an activist's interests align with those of the general public, the law does not necessitate this outcome.

B. INVESTMENT OBJECTIVES

A second point of divergence between retail and institutional investors is their investment objectives. Institutional investors are bound to enhance financial value; indeed, that is the legal purpose of their institutionalization.[75] Some institutional investors do act on their clients' behalf, such as a mutual fund or a pension fund. But these institutional investors are similarly gauged by their consumers on the basis of their

72. *See generally* Lucian A. Bebchuk, Alon Brav & Wei Jiang, *The Long-Term Effects of Hedge Fund Activism*, 115 COLUM. L. REV. 1085 (2015).

73. SULLIVAN & CROMWELL LLP, THE EVOLVING LANDSCAPE OF SHAREHOLDER ACTIVISM: KEY DEVELOPMENTS AND POTENTIAL ACTIONS (2015), http://www.sullcrom.com/siteFiles/Publications/SC_Publication_The_Evolving_Landscape_of_Shareholder_Activism.pdf [http://perma.cc/FYZ4-L4YT].

74. *Shareholder Rights Project News Alert*, SHAREHOLDER RIGHTS PROJECT (Oct. 29, 2013), http://srp.law.harvard.edu/newsletters/10-29-2013_SRP_newsletter.shtml [http://perma.cc/X2ZY-FUJB].

75. *See* David G. Yosifon, *The Law of Corporate Purpose,* 10 BERKELEY BUS. L.J. 181 (2013).

ability to make investments that yield better economic returns. Several institutional investors, such as pension funds and insurance companies, have grown such enormous and highly diversified portfolios that their interests in long-term macroeconomic prosperity are significant, as their returns are likely to reflect the financial performance of the market and the global economy as a whole.[76] These large and long-term institutional investors are sometimes titled "universal owners."[77] As of 2014, $17 trillion was being managed by open-end mutual funds, closed-end funds, exchange-traded funds and unit investment trusts, on behalf of 98 million United States investors.[78] However, only a minority of these institutional investors are socially responsible funds that cater to investors who have social objectives other than profit-making, such as fair labor practices, environmental sustainability, and the promotion of moral values.[79] The majority of institutional investors continue to ignore environmental, social, and governance criteria in their investment allocations.[80]

Unlike corporations, individuals always have additional stakeholder capacities on the corporate scene. For example, a retail investor may be living in the neighborhood of the corporation's factory and suffering pollution. Retail investors may also be the corporation's customers.

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76. *See, e.g.*, SEARCHING FOR A UNIVERSAL ETHIC (John Berkman & William C. Mattison III eds., 2014); *see also* UNEP FINANCE INITIATIVE, UNIVERSAL OWNERSHIP: WHY ENVIRONMENTAL EXTERNALITIES MATTER TO INSTITUTIONAL INVESTORS (2011), http://www.unepfi.org/fileadmin/documents/universal_ownership_full.pdf [http://perma.cc/NU5U-Y857].

77. *See, e.g.*, STOUT, *supra* note 51, at 86-94; Jeremy C. Stein, *Efficient Capital Markets, Inefficient Firms: A Model of Myopic Corporate Behavior*, 104 Q.J. ECON. 655 (1989). While Stout simultaneously accuses hedge funds of "short-termism" due to their rather short holding periods, a recent empirical study finds no evidence that the initial positive stock price spike accompanying activist interventions fails to appreciate their long-term costs and therefore tends to be followed by negative abnormal returns in the long term. To the contrary, the data found is consistent with the initial spike, reflecting correctly the intervention's long-term consequences. *See* Bebchuk, *supra* note 61.

78. *See* INV. CO. INST., 2015 INVESTMENT COMPANY INSTITUTE FACT BOOK, http://www.icifactbook.org/fb_ch1.html [http://perma.cc/23HU-BC6K].

79. *See* Christopher C. Geczy, Robert F. Stambaugh & David Levin, Investing in Socially Responsible Mutual Funds (Oct. 2005) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=416380 [http://perma.cc/HXT6-ZY8K].

80. *See* Joakim Sandberg, *Socially Responsible Investment and Fiduciary Duty: Putting the Freshfields Report into Perspective*, 101 J. BUS. ETHICS 143, 144 (2011).

Individuals, as Stout says, "are not just investors. They are also consumers who buy products, citizens who pay taxes, and organisms who breathe air and drink water . . . ."[81] Additionally, "real human beings care about much more than just whether . . . stock rises. They also want to protect the value of their other investments, keep their jobs, lower their tax bills, and preserve their health."[82]

The discrepancy between individual and institutional shareholders is somewhat offset by the individual representation of institutional investors on boards of directors. The board is comprised of individual members, appointed by institutional shareholders. As Stout shows, these individual members of the board are committed to the corporation's purpose even in the absence of substantial incentives.[83] Few scholars consider the breadth of director discretion under the business judgment rule that is wide enough to encompass any lawful business consideration in addition to shareholder wealth, including decisions made in favor of the consumers, the employees, the environment, and the society as a whole[84] However, these appointed human members of the board are agents with a mission to represent their principal, a profit-seeking institutional investor. Only shareholders elect directors and may sue to enforce directors' fiduciary duties.[85] As Chief Justice Leo Strine Jr., writes, "[w]hen only one constituency has the power to displace the board, it is likely that the interests of that constituency will be given primacy."[86] Their motivation and decision making process is likely to conform to the principal's expectations.[87] When the principal's voice is mobilized by an activist intermediary, that intermediary's interests are likely to serve as a lighthouse for the corporation, whether these interests are aligned with those of the general public or not.

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81. STOUT, *supra* note 51, at 87.

82. *Id.*

83. *See* Lynn A. Stout, *On the Proper Motives of Corporate Directors (or, Why You Don't Want to Invite Homo Economicus to Join Your Board)*, 28 DEL. J. CORP. L. 1, 3 (2003).

84. *See* STOUT, *supra* note 51, at 33-45, 74-85; Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 738 (2005).

85. *See* DEL. CODE ANN. tit. 8, §§ 211(b), 327.

86. *See* Strine, *supra* note 68, at 455.

87. *See* Joseph Fuller & Michael C. Jensen, *Just Say No to Wall Street: Putting a Stop to the Earnings Game*, 14 J. APPLIED CORP. FIN. 41 (2002).

Because the objectives of corporations are narrower than those of individuals, prudent corporate governance should regulate the relationship between institutional investors and their beneficiaries more closely to ensure accountability for the public's interests. The Group of Twenty ("G20") and the Organization for Economic Cooperation and Development ("OECD") recognized the risk of divergent interests between institutional investors and the public, and in 2013, they issued principles encouraging policies that give pension funds incentives to align their investment strategies with their beneficiaries' specific interests. The G20 and OECD specifically noted the beneficiaries' strong interest in the long-term growth of not only the pension fund portfolio but also the wealth of the nation in which they live, taking into account the wider individual interests of retirees.[88] Still, however, the question regarding the extent to which board members conform to shareholders' expectations lies at the heart of corporate law scholarship, and corresponds to the power struggle between boards and shareholders over control of the corporation.[89]

C. INVESTMENT ALLOCATION AND INFORMATION MANAGEMENT

Institutional investors are more likely than individuals to pursue their investment purpose in a comprehensive and deliberate manner.[90] Institutional investors are also more likely than individuals to act as rational agents, and to collect and analyze the full information provided

88. *See* OECD, G20/OECD HIGH-LEVEL PRINCIPLES OF LONG-TERM INVESTMENT FINANCING BY INSTITUTIONAL INVESTORS 5, 9-10 (2013), http://www.oecd.org/finance/private-pensions/G20-OECD-Principles-LTI-Financing.pdf [http://perma.cc/V4PH-ZABV] (stating that long term investments should take into account the "socio-economic and environmental impact assessments" and that "[a]n appropriate financial inclusion and consumer protection framework combined with financial regulation should promote long-term investment by institutional investors serving the retail market and to protect stakeholders, policyholders and beneficiaries of institutional investors in relation to such long term investment.").

89. *See* Mark J. Roe, *Corporate Short-Termism – In the Boardroom and in the Courtroom*, 68 BUS. LAW. 977, 981-82 (2013); Bebchuk, *supra* note 61, at 833-914; *see also* STOUT, *supra* note 51.

90. The corporate decision making purpose is naturally less inclined to emotional and cognitive flaws. For an analysis of board decision making process, see Stephen M. Bainbridge, *Why a Board? Group Decisionmaking in Corporate Governance,* 55 VAND. L. REV. 1 (2002).

in order to support the investment allocation decision.[91] Institutional investors are indeed a legal construct of the textbook *homo economicus* model: unlike individuals, they serve as an organizational platform for carrying out the economic vision of rational actors to its full potential.[92]

While corporate law and securities regulation continue to protect the bounded rationality of retail investors, institutional investors professionally collect all of the required information for a thorough analysis and investment allocation even in the absence of mandatory disclosure platforms. As Professor Donald Langevoort explains:

> [T]hroughout the SEC's history and culture, the rhetorical stress has been on the plight of average investors, ones who lack investing experience and sophistication so as to need the protection of the securities laws . . . The subsequent history of rules, interpretations and enforcement by the SEC is filled with references to both the need to promote retail-level investor confidence . . . and the desire to level the playing field between the meek and the privileged.[93]

Langevoort conducts a thought experiment asking whether, in the absence of retail investors, securities markets could emerge and be governed by antifraud policy only, as opposed to the intense mandatory disclosure regime offered by securities regulation today.[94] Five years later, Elizabeth de Fontenay gave this thought experiment an empirical answer in the affirmative, showing that leveraged loan markets are

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91. *See* Davis, *supra* note 39, at 3. Davis shows that rather than serving as noise trading that distorts stock prices, individual trading actually increases share price accuracy. She distinguishes between individual investors and company insiders who may avail themselves of non-public information before trading. *See id.* at 2, 15.

92. *See* RICHARD H. THALER & SENDHIL MULLAINATHAN, *Behavioral Economics,* in THE CONCISE ENCYCLOPEDIA OF ECONOMICS (2d ed.), http://www.econlib.org/library/Enc/BehavioralEconomics.html# [http://perma.cc/7C6Y-P3WY]. Indeed, the potential of corporations to act rationally and maximize information prior to investment allocation was recently empirically demonstrated. *See* Elisabeth de Fontenay, *Do the Securities Laws Matter? The Rise of the Leveraged Loan Market*, 39 J. CORP. L. 725 (2014).

93. Donald C. Langevoort, *The SEC, Retail Investors, and the Institutionalization of the Securities Markets*, 95 VA. L. REV. 1025, 1025-26 (2009).

94. *Id.*

functioning as well as bond markets without any disclosure requirements imposed on the borrowing corporation.[95]

The implication of this empirical study is that institutional investors do well in collecting requisite information and negotiating their investments even in the absence of mandatory securities disclosures.[96] Howell Jackson and Eric Pan have shown that the institutional investors in Securities Act Rule 144A transactions request and receive disclosures similar to those available in registered offerings.[97] Institutional investors can either do without it or use it when it is available. The American Institute of Certified Public Accountants' Special Committee on Financial Reporting has noted that investors generally find the business reporting system in the United States to be working well and providing "users with essential information that heavily influences their decisions."[98] Retail investors, on the other hand, are less likely to delve through the bounty of information available at online SEC databases such as EDGAR.[99] Recent empirical studies suggest disclosure is an inefficient policy for altering individual behavior due to the reluctance to analyze the overload of information.[100] Individual investors can be overwhelmed with such copious, complex information, and the sheer volume of disclosures available on EDGAR alone surpasses human capacity.

D. TRADING METHODOLOGIES

Institutional investors are not only better at collecting and analyzing information but also are better at utilizing more efficient

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95. de Fontenay, *supra* note 92 (comparing the corporate bonds and loans markets and showing these markets are rapidly converging despite a lack of regulatory intervention in the latter).

96. *Id.*

97. Howell E. Jackson & Eric J. Pan, *Regulatory Competition in International Securities Markets: Evidence from Europe—Part II*, 3 VA. L. & BUS. REV. 207, 255-57 (2008).

98. SPECIAL COMMITTEE ON FINANCIAL REPORTING, AICPA, IMPROVING BUSINESS REPORTING – A CUSTOMER FOCUS ch. 1 (1994), http://www.aicpa.org/InterestAreas/FRC/AccountingFinancialReporting/DownloadableDocuments/Jenkins%20Committee%20Report.pdf [http://perma.cc/5JSQ-7GEP].

99. *See Filings & Forms*, SEC (Feb. 21, 2012), http://www.sec.gov/edgar.shtml#.VOhwaC42R9A [http://perma.cc/52XP-8RCP].

100. *See, e.g.*, OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (2014).

trading methodologies. In recent years, institutional investors have frequently used automated platforms for trading by coding a trading algorithm according to predetermined variables. Algo-trading technology is used by institutional investors to improve performance on both risk management and expected return.[101] Algo-trading is precise and informative, and has been shown to narrow spreads, reduce adverse selection, and reduce trade-related price discovery, all of which generally improves the liquidity of markets and makes quotes more informative.[102] Retail investors, on the other hand, are heavily influenced by past performance and tend to make trading decisions on their own, underperforming benchmarks and selling winning investments while holding on to losing ones.[103]

Most algo-trading institutional investors engage in high-speed trading, where a program automatically trades faster than humans can respond to data.[104] Algo-trading thus generates negative externalities on retail investors: when others become faster, adverse selection costs for slow investors increase.[105] This result reflects informational asymmetries between large, fast institutional traders and small, slow retail traders.[106]

E. SOCIETAL IMPACT

The divergence between retail and institutional investors is particularly significant in light of the everyday impact that corporations and their management decisions have on individuals. Corporations serve a prominent role in society. The public is both heavily influenced and dependent on the continuous supply of products and services provided

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101. *See* Tom C.W. Lin, *The New Financial Industry*, 65 ALA. L. REV. 567, 576 (2014).

102. Terrence Hendershott, Charles M Jones & Albert J. Menkveld, *Does Algorithmic Trading Improve Liquidity?* 66 J. FIN. 1, 30-31 (2011).

103. Brad M. Barber & Terrance Odean, *The Behavior of Individual Investors*, *in* 2B HANDBOOK OF THE ECONOMICS OF FINANCE 1533 (George M. Constantinides, et al. eds., 2011).

104. *See* Shobhit Seth, *Basics of Algorithmic Trading: Concepts and Examples,* INVESTOPEDIA, http://www.investopedia.com/articles/active-trading/101014/basics-algorithmic-trading-concepts-and-examples.asp [http://perma.cc/2SYE-ZXUZ].

105. Thierry Foucault, Sophie Moinas & Bruno Biais, *Equilibrium High Frequency Trading* 2 (Sept. 2011) (unpublished manuscript), http://ssrn.com/abstract=1834344 [http://perma.cc/FX3F-3SM8].

106. *Id.*

by corporations. Banks are essential for monetary services and credit. Other corporations supply the public with energy, electricity, and gas, run major hospitals, provide public transportation, broadband services, and basic foods, and much more.

Corporations often meet our cultural expectations of life. Everyday, managements within corporations make financial and functional decisions that impact the environment as well as product quality, employee rights, and the financial results of the corporations. Profits may often be realized by imposing externalities on other stakeholder constituencies of the corporation or on the general public. Cutting back on safety expenditures, decreasing employee wages, or reducing adherence to environmental standards can all improve stock performance, but this added value for shareholders can also be harmful for other constituencies of the corporation.[107] For institutional investors, however, this is rarely of interest.[108]

III. TOWARDS CONVERGENCE

Despite the substantially divergent grounds of corporations and the general public, there has been an increasing trend towards convergence. Part III briefly surveys the major streams of convergence: socially responsible and impact investments, corporate social responsibility, sustainability reporting, and customer voice platforms.

A. SOCIALLY RESPONSIBLE INVESTMENTS AND IMPACT INVESTMENTS

As of 2014, one out of every six dollars invested by institutional investors who are professional fund managers is reported to take into account sustainable, responsible and impact investing (SRI) considerations.[109] There is no method for tracing how these considerations actually affected the investment allocation performed by money managers between increasing the rate of return and social

107. *See* STOUT, *supra* note 51, at 88.

108. *See infra* Part III.A (discussing socially responsible investments and impact investments as disclaimers where only one out of six dollars invested by institutional investors takes social considerations into account in investment allocation).

109. The total dollar amount of SRI assets at the beginning of 2014 was $6.57 trillion. *See* U.S. SIF FOUND., REPORT ON US SUSTAINABLE, RESPONSIBLE AND IMPACT INVESTING TRENDS 12 (2014), http://www.ussif.org/Files/Publications/SIF_Trends_14.F.ES.pdf [http://perma.cc/T6WR-5XHV].

responsibility. Although only a minority of fund managers have been willing to embrace the larger social mission thus far, even if it is only through legally unenforceable statements of their intentions, the number continues to grow.[110] A 2008 study found that socially responsible funds are visible in the proxy process, yet they generally do not receive majority support.[111] By 2012, however, environmental, social, and governance issues "constituted the majority of all shareholder proposals."[112]

Concerned that capitalism is not capable of undertaking the problems facing the economy, investors have been accumulating funds to invest in impact investments that not only provide a return on investment, but also target specific social needs and maximize social goals in general.[113] A subset of socially responsible investments, impact investments seek to allocate funds to particular social goals and projects while also finding the economic rationale.[114] While traditional, socially responsible investments securitize the investment allocation based on profit considerations and alter it when externalities exceed the profit to investors, impact investments seek to create both social and economic value.[115]

B. CORPORATE SOCIAL RESPONSIBILITY[116]

Corporate social responsibility ("CSR") refers to the trend among for-profit corporations of voluntarily adopting extracurricular activities

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110. *Id.* at 5.

111. Luc Renneboog, Jenke ter Horst & Chendi Zhang, *The Price of Ethics and Stakeholder Governance: The Performance of Socially Responsible Mutual Funds*, 14 J. CORP. FIN. 302 (2008).

112. George Serafeim, *The Role of the Corporation in Society: An Alternative View and Opportunities for Future Research* 18 (Harv. Bus. Sch., Working Paper No. 14-110, 2014), http://www.hbs.edu/faculty/Publication%20Files/14-110_e7a7f1b3-be0d-4992-93cc-7a4834daebf1.pdf [http://perma.cc/YVS4-4N88].

113. Olaf Weber, *Social Finance and Impact Investing* 3-4 (Oct. 11, 2012) (unpublished working paper), http://ssrn.com/abstract=2160403 [http://perma.cc/SCF6-DGJ8].

114. *Id.* at 10.

115. *Id.*

116. This section draws largely on my prior scholarly work regarding corporate social responsibility published and edited by the *University of Pennsylvania Journal of Business Law*. *See* Azgad-Tromer, *supra* note 34.

for the benefit of the "other," including other non-profit organizations and philanthropies, weak stakeholder groups (such as consumers), or civil society and the needs of the general public as a whole. Ideas about CSR emerged in Europe in the interwar period, between 1918 and 1939, when a few large stock corporations began to dominate the economies of the West.[117] While shareholders of large corporations in the eighteenth and early nineteenth centuries were often personally involved in managing or monitoring the corporation, by the beginning of the twentieth century they were typically absent from management or production, assuming a passive role, becoming widely dispersed, and taking little interest in the daily management of the business.[118] Ownership and control were separated, and corporations were left to the leadership of their hired professional managers.[119] Accordingly, shareholders were seen as less central to the corporate ethos, becoming "anonymous pensioners," possessing claims to "get something for nothing" as "absentee owners."[120]

CSR originally posed a fundamental challenge to the paradigm of shareholder primacy, regarded as "a radical reconceptualization of the corporation of the nature of the corporation . . . underlain by the belief that is was perfectly legitimate to subordinate the interests of shareholders to those of other groups, or of society as a whole."[121] Contemporary writers on CSR have adopted a softer approach in which the social liabilities of corporations are seen as an ameliorative commitment to shareholders and their property rights.[122] As such, ideas of CSR are seen as a legitimizing tool for corporate externalities, tempering inequalities in wealth and income that the core property emphasis on shareholders' rights and privileges would stress, through self-regulation, voluntarism and "soft-law."[123]

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117. *See* PADDY IRELAND & REGINEE G. PILLAY, *Corporate Social Responsibility in a Neoliberal Age*, *in* CORPORATE SOCIAL RESPONSIBILITY AND REGULATORY GOVERNANCE, TOWARDS INCLUSIVE DEVELOPMENT? 77, 79-80 (Peter Utting & Jose Carlos Marques eds., 2010).

118. *Id.*

119. For an empirical study backing this historical analysis, see ADOLF BERLE & MEANS GARDINER, THE MODERN CORPORATION AND PRIVATE PROPERTY (rev. ed. 1967).

120. *See* IRELAND & PILLAY, *supra* note 117; *see also* THORSTEIN VEBLEN, ABSENTEE OWNERSHIP AND BUSINESS ENTERPRISE IN RECENT TIMES (1923).

121. IRELAND & PILLAY, *supra* note 117, at 84.

122. *See id.* at 88-91.

123. *See id*.

The backdrop to the emergence of CSR concepts was the rise of managerial agents as prominent organs of the corporation whose owners are passive and widely dispersed. In a series of public correspondences between Adolf Berle and American corporate lawyer E. Merrick Dodd from the early 1930s, Berle argued that the fiduciary duties of managers should be enhanced to prevent the preference of controlling groups of shareholders over minority groups.[124] Dodd suggested that once the corporation is an independent entity separate from its owners, rather than an aggregate of stockholders, "there was no reason why it should not operate through its managerial agents, as a 'good citizen . . . with a sense of social responsibility.'"[125] Dodd advocated a view of the corporation not as a purely private enterprise, but as a wider organization with social responsibilities and obligations.[126] By the 1950s, shareholder primacy was seen as "slightly old-fashioned,"[127] and managers were perceived as being in charge of balancing the interests of different groups connected with the "soulful," socially responsible corporation.[128] In the 1960s, Berle explicitly rejected shareholder primacy by describing corporate managers as "administrators of a community system."[129] Shareholder primacy returned to dominance with the rise of neoliberal ideology in the financial markets of the 1980s and 1990s.[130] Fiercely believing in the forces of the market as efficient and

124. A. A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1367 (1932).

125. PADDY IRELAND, *Defending the Rentier: Corporate Theory and the Re-Privatisation of the Public Company, in* THE POLITICAL ECONOMY OF THE COMPANY 150 (John Parkinson, Gavin Kelly & Andrew Gamble eds., 2000) (quoting E. Merrick Dodd, *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1147 (1932)).

126. *See* Dodd, *supra* note 125, at 1161.

127. L. C. B. Gower, *Shareholder Democracy: A Broader Outlook for Corporations*, 68 HARV. L. REV. 922, 927 (1955) (reviewing FRANK D. EMERSON & FRANKLIN C. LATCHAM, SHAREHOLDER DEMOCRACY (1954)).

128. Carl Kaysen, *The Social Significance of the Modern Corporation*, 47 AM. ECON. REV. 311, 314 (1957).

129. *See* BRYAN HORRIGAN, CORPORATE SOCIAL RESPONSIBILITY IN THE 21ST CENTURY: DEBATES, MODELS AND PRACTICES ACROSS GOVERNMENT, LAW AND BUSINESS 89 (2010) (citing Adolf A. Berle, *The Corporation in a Democratic Society*, *in* MANAGEMENT AND CORPORATIONS 1985 63, 68 (M. Anshen and G. Bach eds., 1975)).

130. *See* IRELAND & PILLAY, *supra* note 117, at 78.

as the primary facilitator of wealth, neoliberals employed every means to deregulate and eliminate governmental intervention in the forces of the free market.[131] Shareholders in this period were less dispersed and came to be represented by only a few institutional investors as claims for shareholder activism and shareholder value became stronger.[132]

CSR is often justified from the shareholder value perspective in that improving environmental and social performance will serve the best long-term interests of investors, thereby enhancing the overall shareholder value.[133] Under the "doing well by doing good" theory, promoting the needs of other stakeholders can improve financial performance.[134] For example, employee training and product development leads to better product quality.[135]

In *Individual and Corporate Responsibility*, Ronald Bénabou and Jean Tirole discuss three alternative visions of CSR.[136] Vision 1 is the "win-win" approach, under which the incentive for CSR stems naturally and inherently from the promotion of shareholders' interests in profits.[137] When firms fail to accommodate CSR, they in fact reduce shareholder value by focusing on the short term.[138] Bénabou and Tirole give the example of a firm that may reduce costs by reneging on a contract with its labor or suppliers so as to reduce costs, which would damage the long-term goodwill of the different constituencies, making it more difficult to either attract motivated employees or induce suppliers to make long-term investments.[139]

CSR under this first vision is in fact a means of maximizing profits and enhancing shareholder value in the long run. The academic support for CSR often comes from the value it brings to shareholders such as

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131. *See id*. at 85.

132. *See* DOUG HENWOOD, WALL STREET: HOW IT WORKS AND FOR WHOM (1997).

133. Michael E. Porter & Mark R. Kramer, *Creating Shared Value*, HARV. BUS. REV. Jan.–Feb. 2011, at 62, 64-65.

134. Serafeim, *supra* note 112, at 2 (citing Joshua D. Margolis, Hillary Anger Elfenbein & James P. Walsh, Does It Pay To Be Good? A Meta-Analysis and Redirection of Research on the Relationship between Corporate Social and Financial Performance (Nov. 1, 2013) (unpublished manuscript), http://www.hks.harvard.edu/m-rcbg/papers/seminars/margolis_november_07.pdf [http://perma.cc/LN5C-V2NW]).

135. *Id.* at 2.

136. Ronald Bénabou & Jean Tirole, *Individual and Corporate Social Responsibility*, 77 ECONOMICA 1, 9-12 (2010).

137. *Id.* at 9-10.

138. *Id.* at 10.

139. *Id.*

greater access to finance or a heightened corporate reputation.[140] CSR was found to have a small, yet significant, positive impact on profitability.[141] Recently, sustainable organizations, defined as organizations that voluntarily integrated social and environmental issues into their business model strategy, were found to outperform their lower sustainability peers over an eighteen-year horizon, both in stock markets and in operational performance.[142]

Of course, there is no consensus on this win-win approach. Because the corporation is a distributional platform, stakeholder constituencies do not always have aligned interests. Companies engaging in environmental and social issues might underperform and "be eliminated by competitors who choose not to be so civic minded, or will survive only by consuming their economic rents in this manner."[143] Paying more to employees and engaging in environmental mitigation can often enhance agency costs, implying negative financial implications for the corporation.[144] "The social responsibility of business is to increase its profits," according to Milton Friedman,[145] but today's investors seem to care about the broader CSR and ethics issues, often considering it a potential concern that can translate into financial consequences.[146]

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140. Beiting Cheng, Ioannis Ioannou & George Serafeim, *Corporate Social Responsibility and Access to Finance*, 35 STRATEGIC MGMT. J. 1, 6 (2013); Charles J. Fombrun, Naomi A. Gardberg & Michael L. Barnett, *Opportunity Platforms and Safety Nets: Corporate Citizenship and Reputational Risk*, 105 BUS. & SOC'Y REV. 85, 85-86 (2000).

141. Margolis, Elfenbein & Walsh, *supra* note 134.

142. Robert G. Eccles, Ioannis Ioannou & George Serafeim, *The Impact of Corporate Sustainability on Organizational Processes and Performance*, 60 MGMT. SCI. 2835, 2836 (2014).

143. Michael Jensen, *Value Maximization, Stakeholder Theory and the Corporate Objective Function,* 22 J. APPLIED CORP. FIN., Winter 2010, at 32, 39.

144. William O. Brown, Eric Helland & Janet Kiholm Smith, *Corporate Philanthropic Practices,* 12 J. CORP. FIN. 855, 856 (2006).

145. Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES, Sept. 13, 1970, at 122.

146. LYNN S. PAINE, VALUE SHIFT: WHY COMPANIES MUST MERGE SOCIAL AND FINANCIAL IMPERATIVES TO ACHIEVE SUPERIOR PERFORMANCE 15-16 (2003) (citing research by the Society of Consumer Affairs).

A recent empirical study explored the impact of CSR ratings on sell-side analysts' assessments of firms' future financial performance.[147] It found that in the early 1990s, analysts issued more pessimistic recommendations for firms with high CSR ratings, but in more recent years, analysts progressively assess these firms less pessimistically, and eventually, optimistically.[148] Everyone wants to fly the cheapest airline as consumers, earn better wages as employees, and receive higher returns as investors, but the corporation has a bounded supply of resources and often becomes a platform for distributional justice.

Vision 2 is labeled "delegated philanthropy" by Bénabou and Tirole.[149] Under this view, the firm is a channel for the expression of different constituencies, and the corporation's management caters to demand by supplying the stakeholders' need to engage in charity while maximizing profit.[150] As Bénabou and Tirole point out, it is necessary to explain why the corporation is the adequate social vehicle for this philanthropy.[151] In theory, Starbucks's consumers could send charitable donations directly to the workers in the coffee plantations.[152] The explanation Bénabou and Tirole suggest is transaction cost savings.[153] Since the corporation is already involved in a transaction with the workers, it is much cheaper for it to forward them the donation.[154]

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147. *See* Ioannis Ioannou & George Serafeim, *The Impact of Corporate Social Responsibility on Investment Recommendations: Analysts' Perceptions and Shifting Institutional Logics*, 36 STRATEGIC MGMT. J. 1053 (2015).

148. *Id.* at 1054.

149. Bénabou & Tirole, *supra* note 136, at 10.

150. *Id*. at 11

151. *Id.* at 10.

152. *Id.*

153. *Id*.

154. *Id*. Obviously, there is some circularity in this answer. There is no doubt that the corporation can deal with the workers more efficiently and for less transaction costs, but the real question is why do we use the corporate vehicle as a social means for charity to begin with. Why do we find the corporate relationship we have with other stakeholder constituencies to raise a justification for charity to begin with? In theory, if consumer citizens are bothered by work conditions in Africa, they can collect and send money to the group in need even if not directly in a relationship with them (one can assume workers for Dunkin Donuts coffee enjoy no better terms of employment, and from a human rights standpoint, there is no justification for why we should support only the workers working directly on our personal cup of latte). The apparent answer is that we find a need to support those in relationship to our actual lives, even if indirectly and through the channel of a for-profit organization.

Bénabou and Tirole label Vision 3 "insider-initiated corporate philanthropy." This vision reflects management's personal need or willingness to contribute money to a good cause and using "others' money" for that purpose.[155]

As it currently stands, CSR is a voluntary practice. In a communication from the European Union, CSR is defined as "a concept whereby companies integrate social and environmental concerns in their business operations and in their interactions with their stakeholders on a voluntary basis."[156] Voluntary commitments are, alas, limited in their strength and ability to create incentives for legal compliance. It is often argued that corporate commitment to ideas of CSR is largely empty.[157] For example, the Christian Aid Report, *Behind the Mask: The Real Face of Corporate Social Responsibility*, lists a string of transgressions by corporations that "espouse voluntary approaches" to CSR commitments.[158] This list includes Shell, which officially strives to be a good neighbor but "fails to quickly clean up oil spills that ruin villages;" British American Tobacco, which stresses its commitment to high standards of health and safety but is reported to have "chronic ill-health related to tobacco cultivation;" and Coca-Cola, which states it uses "natural resources responsibly" but is claimed to have a "wholly owned subsidiary in India [that] is accused of depleting village wells in an area where water is notoriously scarce."[159]

Perhaps due to the lack of external standardization, CSR is often considered a public relations endeavor, where the real value given to

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155. *Id*. at 11. This vision is easily objectionable on corporate governance grounds. *See* Friedman, *supra* note 145; *see also* Citizens United v. Fed. Election Comm., 558 U.S. 310, 474 (2008) (discussing the issue of political donations conducted by corporations, giving rise to questions of agency costs and management's personal political agendas promoted at the shareholders' expense); Lucian A. Bebchuk & Robert J. Jackson, Jr., C*orporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 87-89 (2010).

156. *See* Ireland & Pillay, *supra* note 117, at 90 (citing *Communication from the Commission Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development*, COM (2002) 347 final (July 2, 2002)).

157. *See* Ireland & Pillay, *supra* note 117, at 94 ("CSR is often treated by corporations as little more than a public relations or window dressing exercise . . .").

158. *See* CHRISTIAN AID, BEHIND THE MASK: THE REAL FACE OF CORPORATE SOCIAL RESPONSIBILITY 15 (2007), http://baierle.files.wordpress.com/2007/11/behind-mask.pdf [http://perma.cc/RS6U-P2TL].

159. *See id.* at 2.

society is not comparable to the negative externalities imposed on the public. Destruction of nature and of social morality may be justified with meager donations, with no real estimation of the cost-benefit analysis from the general public's perspective. Like the Once-Ler in *The Lorax* who rationalizes his corporation's destruction of the environment by singing, "How ba-a-a-ad can I be? A portion of proceeds goes to charity,"[160] CSR provides corporations with a narrative of societal consciousness that allows them to rationalize harmful corporate behavior. For example, a corporation failing to return debt to creditors may hurt millions of retirees while enjoying the status of a CSR promoter due to a meager donation to the preschool of the CEO's daughter. CSR allows tax deductions for the – often minor – expense and provides great public relations value. "All the customers are buying," sings the Once-ler, "and the PR people are lying."[161]

Mandatory CSR is not common in the western world but was recently adopted in China and India. In China, Article 5 of the Company Law requires companies to "undertake social responsibility" in the course of business.[162] In 2013, India adopted a corporate law that requires large companies to invest in sustainable initiatives and engage in CSR activities with two percent of their average net profits.[163]

C. SUSTAINABILITY REPORTING

Sustainability reporting is a method of nonfinancial information management. It requires the reporting of information about environmental, social, and corporate governance performance. A company must provide this information to investors through a systematic platform "at par with financial reporting in terms of rigor, credibility and comparability."[164] Sustainability reporting is thus the

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160. *See* THE LORAX (Universal Pictures 2012).

161. *Id.*

162. Ioannis Ioannou & George Serafeim, *The Consequences of Mandatory Corporate Sustainability Reporting: Evidence from Four Countries* 9 (Harv. Bus. Sch., Working Paper No. 11-100, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1799589 [http://perma.cc/L4P7-YJZE].

163. Section 135 of the new Act requires that the Board of Directors ensure that at least 2% of the company's average net profits during the three preceding years be spent on Corporate Social Responsibility policy. For the full version of the law, see The Companies Act, No. 18 of 2013, India Code (2013).

164. Ioannou & Serafeim, *supra* note 162, at 6.

transparency platform for assessing the nonfinancial performance of corporations.

The history of sustainability reporting is rather short and runs back to the 1989 Exxon Valdez disaster, after which the Coalition for Environmentally Responsible Economies ("CERES") introduced environmental reporting guidelines on behalf of the Social Investment Forum ("SIF").[165] The Global Reporting Initiative ("GRI") was launched in 1997 by CERES and the United Nations Environmental Program ("UNEP"), proposing an alternative "triple bottom line" accounting for economic, social, and environmental corporate performance.[166] It is becoming highly customary for public corporations to disclose sustainability information. By 2013, more than 6,000 companies were issuing sustainability reports,[167] with 499 of the 500 S&P 500 companies having either made a sustainability disclosure or linked financial performance with a sustainability initiative.[168] Sustainability indices and funds emerged at stock exchanges,[169] and a new C-level executive position was established in many companies to oversee sustainability-related issues.[170]

Lately, an increasing number of nations are mandating corporate disclosure of environmental, social and governance information.[171] As of 2015, mandatory non-financial disclosure regulations are prevalent in Denmark, South Africa, China, Malaysia, Brazil, Hong Kong, and India.[172] As of 2013, United Kingdom regulations require that large, publically traded corporations file "strategic reports," which must

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165. *Id.*

166. *Id.*

167. *Id.* at 2.

168. *See* Integrated Financial and Sustainability Reporting in the United States (IRRC Institute, 2013), http://irrcinstitute.org/pdf/FINAL_Integrated_Financial_Sustain_Reporting_April_2013.pdf [http://perma.cc/K7WQ-B7HN].

169. Such indices and funds include the Dow Jones Sustainability Indices, the FTSE4GOOD Index Series, Ethibel funds, Domini Social Investments (including the Domini 400 Social Index), the Vanguard Calvert Social Index Fund, and the Corporate Governance Quotient (CGQ). *See* Ioannou & Serafeim, *supra* note 147, at 1058.

170. *See id*. ("AT&T, Blackstone, BT, Dow Chemical, Nestle, SAP, Siemens, Unilever, among many others").

171. *See* Ioannou & Serafeim, *supra* note 162, at 2 (depending on the country, mandated corporate disclosure has been accomplished either through laws or through stock exchange listing requirements).

172. *Id.*

include information about corporate performance indicators, which effectively measure the company's business position and its performance, as well as information about environmental matters, the company's employees, social community, and human rights issues.[173] A recently published study suggests that mandatory sustainability disclosures are associated with increases in firm valuations.[174] Like any disclosure regime, sustainability reporting is likely to affect the ex-ante incentives of the management of reporting corporations in areas of performance that are subject to disclosure.[175]

Mandatory disclosures of nonfinancial information only apply to publicly traded corporations, due to their public funding rather than their public function or importance. Listed corporations are typically larger, and the public funding may well correlate with the public role of corporations. However, applying sustainability only to listed corporations surely misses some privately funded corporations with significant public roles. Applying the enhanced disclosure regime to a narrow group of corporations that are of interest to investors overlooks those corporations that are significant to the wider and more diverse general public.

Sustainability is the business of society as a whole, not only of investors. A study by the Sustainability Accounting Standards Board found that "50 percent of disclosures related to environmental and social issues [were] immaterial [to] the future long-term financial performance of the company."[176] The target audience of sustainability reporting is the general public, but in practice, sustainability reporting is typically integrated or adjusted to the financial reporting and directed at the investor base.[177] Nonfinancial information on corporate performance is available on EDGAR, which is used mainly by institutional investors.[178] The significant amount of nonfinancial information falls mostly on the institutional investors' deaf ears. As shown earlier, institutional investors are mostly reluctant to engage with the nonfinancial aspects of

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173. The Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013, 2013, S.I. 1970 (U.K.).

174. *See* Ioannou & Serafeim, *supra* note 162, at 21.

175. *See* Frank H. Easterbrook & Daniel R. Fichel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669, 714 (1984).

176. Serafeim, *supra* note 112, at 3.

177. Ioannou & Serafeim, *supra* note 162, at 4-5.

178. *See Filings & Forms*, SEC (Feb. 21, 2012), http://www.sec.gov/edgar.shtml [http://perma.cc/52XP-8RCP].

investments.[179] The general public is hardly aware of information available at EDGAR. A small percentage of the trading public is made up of individuals, and of these few, even fewer read the corporate filings.

D. CUSTOMER VOICE

When consumers speak, corporations should listen, especially since consumers share information with one another. Word-of-mouth consumer advice is one of the most effective marketing strategies. We are all more inclined to purchase what our peers and social acquaintances enjoy and recommend. The effectiveness of the consumer voice can be attributed to both a cognitive bias that causes us to over-evaluate the easily accessibility and the reliability of a peer review from a disinterested party who typically has no clear conflict of interest with us, unlike corporate retailers.

With the abundance of Internet platforms, consumers are able to share information with one another cheaply and quickly. In addition, they are able to distribute their advice to a far larger group than that in their immediate physical proximity. Internet platforms enable consumers to share their reviews about the products and services they have used, and to pass that knowledge to future consumers who are faced with a consumption choice.[180] Typically, both the participation in information sharing and the consumption thereof are available to all, free of charge, online.

The Internet digitally revives Habermas's lost public sphere, which refers to a mezzanine sphere between the state and society where people

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179. *See supra* Part I.A.

180. A sincere question that arises in that regard is why a person would be motivated to participate in such a review process, which on the surface does not and would not appear to be profitable. Considering the meager cost and limited time commitment of creating a review, it is easy to see why consumers would be willing to share their opinions and thereby help future consumers. One such consumer motivation would be to help and thank the for a good product or service. On the contrary, another motivation could be to complain about bad products or services. The potential to voice one's opinion as a consumer empowers the consumer dramatically, and as every single consumer is becoming able to mass distribute her opinions online, sellers view each of their consumers' satisfaction as a major means of marketing. To learn more about decentralized cooperation and motivation, see YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM (2005).

come together and engage in noncompulsory conversation.[181] The traditional communication environment dictated an asymmetry of information between sellers and consumers. This asymmetry was enabled by the scarcity of access to media as well as the structure of the markets, with dispersed consumers who were unable to act collectively and share information with one another. Conversely, the Internet provides a framework for costless collective consumer discussions and sharing of information.

Unlike twentieth-century communication spheres, which were modeled on a few influencers talking to the public (few-to-many), the Internet is a stage open to all where anyone may talk at will (many-to-many). In addition, listeners are able to search electronically through the mass of information and find that which is most relevant to them. Customers speak directly, not only to their sellers in the customer service lane, but also to their peer consumers, on a variety of social media websites and in the framework of diverse consumer communities that develop online. These communities are digital meeting places where consumers who share similar needs can share their experiences with one another.[182] Structurally, the Internet provides a communal framework for consumption, where each consumer can share her experience with all others, and future consumers of a product can learn from the experience of the product's previous consumers by a simple web search, even when

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181. In a most influential work, Jürgen Habermas argues that the democratic public sphere developed during the seventeenth and eighteenth centuries and declined throughout the twentieth century. *See* JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY (Thomas Burger trans. assisted by Frederick Lawrence, 1989) (1962). Unlike Habermas's public sphere, users of the Internet do not meet in person. Some argue, based on this shortfall, that the Internet does not meet Habermas's definition. *See, e.g.*, Mark Poster, *Cyber Democracy: The Internet and the Public Sphere*, *in* READING DIGITAL CULTURE (David Trend ed., 2001). However, the flourishing abundance of digitized social networks (i.e., Facebook) shows that physical presence is no longer a requirement for communal and social engagements. A public sphere for public discussions by individuals may well be virtual.

182. Consider, for example, communities of young mothers sharing information on baby care products. Some of these Internet consumer communities are sponsored and hosted by the sellers themselves. For example, see the StrongMoms Community hosted by Similac, which was hosted on Similac's webpage but has recently been migrated to Similac's Facebook page. *See* SIMILAC, http://similac.com/community/boards/discussion_boards/f [http://perma.cc/C6RT-CSXE]; Similac US, FACEBOOK, http://www.facebook.com/Similac [http://perma.cc/A6ZR-YHUP].

such other consumers are total strangers living in different cultures and continents.

Under the traditional consumption model, the asymmetry between sellers and consumers has led to the characterization of the consumer as an antihero, an insignificant part of the crowd who lacks any unique skills regarding the object of consumption and rarely takes a significant role in facilitating the consumption transaction.[183] But today, the argument for asymmetry of information has weakened. The Internet is the ultimate framework for the expression of the wisdom of the crowds, and it has the potential to move toward a utopian model for consumer organizations and for consumer influence on commercial life.[184] The consumer is regaining dominance: she knows more about each of her purchased products, and voices her opinions about them, posting her consumption experience in a public arena exposed for all Internet users to see.[185] The consumer thereby strengthens the incentives of corporations to gratify consumers and listen to their voice by increasing the stakes of reputational damage. In fact, in 2006, TIME chose the consumer, i.e., the reader, as the "Person of the Year."[186]

Sellers can easily censor unfavorable and unwelcome reviews on their own company websites, and are strongly incentivized to do so;

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183. Azgad-Tromer, *supra* note 34, at 250-253.

184. *See, e.g.*, JAMES SUROWIECKI, THE WISDOM OF CROWDS: WHY THE MANY ARE SMARTER THAN THE FEW AND HOW COLLECTIVE WISDOM SHAPES BUSINESS, ECONOMIES, SOCIETIES AND NATIONS (2004). (A good illustration of this model in current Internet consumption can be found in sites such as epinions.com, where consumers get access to the accumulated collective treasury of consumer knowledge regarding a variety of products. Each consumer can join the community and add reviews at will. While these websites represent independent consumer organizations, some sellers offer a collection of consumer reviews in their merchandising sites as well. For example, Sears sets a platform for consumer reviews on all offered products, and summarizes the results for future consumers by posting the average grade given by previous consumers (on a five-star scale). *See* SEARS, http://www.sears.com [http://perma.cc/X93F-Q8UW]. Interestingly, the accumulated wisdom of previous consumers is summarized by the seller voluntarily even when the grade given to the offered product is below average.

185. Information uploaded on the Internet is irreversible in the sense that no option to delete it exists. Once data has been uploaded to the Internet, no agent is able to deny future users from accessing that data.

186. *See* Lev Grossman, *You — Yes, You — Are TIME's Person of the Year*, TIME (Dec. 25, 2013), http://www.time.com/time/magazine/article/0,9171,1569514,00.html [http://perma.cc/W6SH-Q4SL].

however, they are exposed to a variety of platforms, forums, and social media, which document consumer complaints and expose unfavorable information to a wide public of prospective customers. One web platform for consumers' commercial speech that merits a closer look is Yelp.[187] A contraction of yellow pages, Yelp provides product information about businesses in various categories, including dining, entertainment, retail, travel, and professional services throughout the United States. In a typical search, performed from any web browser, including those on mobile devices, consumers define what they are seeking (e.g., an auto body shop), and the location in which the search is to be performed (neighborhood, city, or zip code). In response, Yelp provides a list of businesses, each accompanied with a five-point average consumer rating, reviews from other consumers, and general contact information, including the business address, hours and parking options.

Yelp is a dynamic source of product information, boosted by a vibrant community of users, some of whom have a reputation for being reliable, prolific, and/or tasteful in their consumption habits. Users have their own pages listing their previous reviews, thereby enabling other users to follow their consumption habits and opinions, contributing to the creation an online community of consumers. With over 83 million cumulative reviews of local businesses, Yelp creates an abundance of consumer knowledge.[188] However, this consumer utopia is not to be overrated. Yelp solicits business owners to join a "Sponsorship Program" that allows businesses to bring a favorite review to the top of the page.[189] According to its 10-K filings for 2013, Yelp generates revenue primarily from the sale of advertising on its website and mobile app to small businesses.[190]

Because customer opinion significantly impacts sales, some corporations have adopted a more intense listening regime by taking customer complaints into serious and immediate consideration. Corporations have demonstrated an effort to create customer satisfaction

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187. YELP, http://www.yelp.com [http:// perma.cc/G294-5XV2].

188. *See* Yelp 2Q15 Data Sheet, YELP, http://www.yelp-ir.com/phoenix.zhtml?c=250809&p=irol-irhome [http://perma.cc/8PGV-V9CQ].

189. *See* Sarah Duxbury, *Restaurants Learn to Yelp: Eateries Give Mixed Reviews: It's a Service or a Shakedown*, S.F. BUS. TIMES, (Jun. 29, 2008, 9:00 PM), http://sanfrancisco.bizjournals.com/sanfrancisco/stories/2008/06/30/story1.html [http://perma.cc/9LBN-DX8G].

190. *See* Yelp Inc., Annual Report (Form 10-K) (Mar. 3, 2013).

and avoid the ill effects of web-based negative customer speech, and have also attempted to listen to their customers directly, bypassing both Yelp and social media platforms. Accordingly, supporting mobile applications were recently developed to allow direct communication between the retail consumers and the corporations.[191] Some of these applications have features that allow corporations to track conversations taking place on social networks, news websites, blogs and forums, allowing customer support agents to know whether they need to engage with customers immediately in order to resolve issues or complaints.[192]

IV. POLICY IMPLICATIONS

A. THE PURPOSE OF CORPORATE LAW: INVESTOR PROTECTION AND SOCIAL WELFARE

Corporate governance rules were designed to enhance public funding by providing adequate protection to investors. There are two rival systems of corporate governance. The first is a concentrated ownership system that is characterized by controlling block shareholders, high private benefits of control, and weak securities markets with low disclosure and market transparency standards.[193] The second is a dispersed ownership system that is characterized by strong securities markets, rigorous disclosure standards, and high market transparency.[194] In the dispersed ownership system, the market for corporate control constitutes the ultimate disciplinary mechanism.[195] Share ownership in the United States remains dispersed in most large public companies, and it is rare to find a single shareholder owning more than 5% of a big public firm, despite the rise of institutional investors.[196] Legal scholars debate the merits of each of these systems

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191. *See* OWNERLISTENS, http://www.ownerlistens.com [http://perma.cc/YPG9-EDAC].
192. *See* ENGAGOR, http://www.engagor.com [http://perma.cc/M7GP-8DGL].
193. *See* Rafael La Porta, Florencio Lopez-de-Silanos & Andrei Shleifer, *Corporate Ownership around the World*, 54 J. FIN. 471, 471-74 (1999).
194. *See id.*
195. *See id.*
196. Stout, *supra* note 83, at 3.

and whether this dichotomy can persist in an increasingly competitive global capital market.[197]

In particular, corporate law scholars debate the origins of dispersed ownership. Professors Rafael La Porta, Florencio Lopez-de-Silanos, and Andrei Shleifer place legal variables at center stage, arguing that the legal foundations for investor protection are the fuel behind public investments in corporations.[198] They find that countries with weaker investor protections, measured by both the character of the legal rules and the quality of law enforcement, have smaller and narrower capital markets.[199] These findings apply to both equity and debt markets. Research suggests that French civil law countries have both the weakest investor protections and the least developed capital markets, especially as compared to common law countries.[200] Harvard law professors Lucian Bebchuk and Mark Roe offer an alternative theory:

> [T]he corporate structures that an economy has at any point in time depend in part on those it had at earlier times. . . . First, the corporate structures of an economy depend on the structures with which the economy started. Initial ownership structures have such an effect because they affect the identity of the structure that would be efficient for any given company and because they can give some parties both incentives and power to impede changes in them. Second, corporate rules, which affect ownership structures, will themselves depend on the corporate structures with which the economy started. Initial ownership structures can affect both the identity of the rules that would be efficient and the interest group politics that can determine which rules would actually be chosen.[201]

Alternatively, Columbia law professor John Coffee turns to a political explanation, suggesting that the principal variable in the development of dispersed ownership in the United States and the United Kingdom was the separation of the markets from politics in the late nineteenth century, placing control in the discipline of the markets rather than in the hands of controlling shareholders.[202]

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197. John C. Coffee, Jr., *The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control*, 111 YALE L.J. 1, 3-4 (2001).

198. La Porta, Lopez-de-Silanos & Shleifer, *supra* note 193, at 476-80.

199. *Id.*

200. *See id.*

201. Lucian Arye Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127, 127 (1999).

202. Coffee, *supra* note 197, at 8-9.

Regardless of the origins of dispersed ownership, it is dispersed ownership that shaped corporate law. Modern corporate law was designed to expand the family business and provide the legal foundations for mass investment in other people's businesses, fueling the growing economy.[203] Whether as a means of enhancing public investments, or as a means of reducing contractual costs for business cooperation by providing a cheaper organizational platform for the requisite nexus of contracts, corporate law provides the foundations for investor protection in incorporated business endeavors.

The basic legal characteristics of the business corporation–legal personality, limited liability, transferable shares, delegated management under a board structure, and investor ownership–all conform to the investor protection motivation of corporate law.[204] By permitting the corporation to function as a single contracting party, a "separate patrimony" distinct from the individuals who own it and their assets, corporate law reduces the cost of lending to the corporation and protects creditors.[205] Asset partitioning reduces the cost of capital by isolating separate lines of credit and allowing better evaluation and monitoring of the shielded entity by potential creditors.[206] Limited liability, which "has become a nearly universal feature of the corporate form," protects equity investors by shielding shareholders' assets from the corporate asset pull in case of corporate failure.[207] Transferable shares provide investors an exit from their investments, allowing liquidation and diversity of the investment portfolio, and lowering the risk in commitment to investment. The separation of ownership and control, and the delegation of management to a board of directors, provide further investor protection by forming a "mediating hierarchy" committed to professional management for running the common business of the corporation and its shared pull of assets.[208] In public corporations with a majority of independent board members, investor protection is further

203. Henry Hansmann & Reinier Kraakman, *The End Of History For Corporate Law*, 89 GEO. L. J. 439 (2000).

204. HANSMANN & KRAAKMAN, *supra* note 19, at 1.

205. *Id* at 7.

206. *Id.* at 10.

207. *Id.* at 9.

208. Blair & Stout, *supra* note 5, at 250-56.

enhanced by providing a commitment to impartial leadership.[209] Finally, investors are protected by default rules providing them control of the firm through exclusive voting rights, and they retain the right to receive the firm's residual net earnings in proportion to the amount of capital contributed to the firm.[210]

The underlying motivation to protect retail investors is also apparent in the tendency to enact financial legislation in times of crisis.[211] For example, "[t]he Future Trading Act of 1921, the first federal statute regulating commodity futures markets, was enacted in the wake of the most severe recession in the United States up to that time."[212] The federal securities laws enacted in the 1930s were a response to the 1929 stock market crash and the Great Depression.[213] Yale law professor Roberta Romano suggests that similar circumstances attended the initiation of the Sarbanes-Oxley governance mandates as well.[214] Historical research suggests that financial legislation during the eighteenth and nineteenth centuries in the United Kingdom and the United States was adopted "only after stock market declines, which, by 1837, coincided with economic contractions."[215] Crises have spurred political action to craft emergency financial legislation aimed at saving the public.

Considering the goal of corporate law, this underlying motivation to protect retail investors is of particular interest. The general normative objective of all fields of law is presumably to increase the aggregate welfare of society−the whole social pie−thereby serving the best interests of the entire human population.[216] In corporate law, most scholars work under the assumption that the corporation's purpose is to serve the best interest of shareholders and, more specifically, to enhance

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209. Ran Duchin, John G. Matsusaka, and Oguzhan Ozbas, *When Are Outside Directors Effective?*, 96 J. FIN. ECON. 195 (2010); Lauren Cohen, Andrea Frazzini, and Christopher Malloy, *Hiring Cheerleaders: Board Appointments of 'Independent' Directors',* 58 MGMT. SCI. 1039 (2012).

210. HANSMANN & KRAAKMAN, *supra* note 18, at 14.

211. Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance,* 114 YALE L.J. 1521, 1591-99 (2005).

212. *Id.* at 1591.

213. Romano, *supra* note 211, at 1592.

214. *Id.*

215. *Id.* at 1593 (citing STUART BANNER, ANGLO-AMERICAN SECURITIES REGULATION: CULTURAL AND POLITICAL ROOTS, 1690-1860, at 257 (1998)).

216. *See* HANSMANN & KRAAKMAN, *supra* note 18, at 28 (aggregate welfare refers to Kaldor-Hicks efficiency).

shareholder value by increasing the market price of shares.[217] This precedence of shareholders' interests is not established on a normative distributional preference. If shareholders were to enrich themselves at the expense of making other stakeholders worse off, there would be little academic support for the gain.[218] Yet, the platform for investor protection provided by corporate law and securities regulation now serves the institutional investors.

Using shareholder value as a heuristic for social value is based on the residual nature of shareholder interests and the identical character of shareholders as representatives of the public. If a particular agent is getting only the last piece of the pie, that agent has strong incentives to make sure the pie is as large as possible to begin with.[219] "[A]s the firm's residual claimants and risk bearers [shareholders] have a direct pecuniary interest in making sure that corporate transactions are beneficial, not just to the shareholders, but to all parties who deal with the firm."[220] Shareholder value draws primary attention because it seems to serve as a heuristic for the aggregate social pie. As Bebchuk writes:

> My support . . . is not motivated by political ideas but rather by the goal of making a market institution–the modern publicly traded company–function better. . . . I support a viable shareholder power to replace directors only because I view it as a valuable instrument for enhancing shareholder value by making boards more accountable and more attentive to shareholder interests.[221]

Additionally, in the words of Judge Frank Easterbrook and University of Chicago law professor Daniel Fischel:

> [M]aximizing profits for equity investors assists the other "constituencies" automatically. . . . A successful firm provides jobs for workers and goods and services for consumers. . . . Wealthy firms provide better working conditions and clean up their outfalls;

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217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.* at 28.
221. Lucian A. Bebchuk, *The Myth of the Shareholder Franchise,* 93 VA. L. REV. 675, 678-79 (2007).

> high profits produce social wealth that strengthens the demand for cleanliness.[222]

But this logic does not take into account the identity of shareholders. When shareholders are retail investors, and therefore members of the general public, they always have additional capacities, for example, as consumers, or even as persons living in the corporation's neighborhood that is potentially affected by its business. When shareholders are institutional investors, they usually have a single purpose in mind: increasing profits for their own or their client's accounts. Individual shareholders reduce the likelihood of conflicts of interest between various stakeholder groups.

Consider, for example, two road-paving companies. In Company A, shareholders are mostly individuals. In Company B, shareholders are mostly institutional investors. Shareholders of Company A drive to work and live in the areas that Company A paves. If the corporation pollutes, the shareholders and their children breathe the polluted air. If the corporation paves a noisy road, shareholders' work suffers the risk of distraction. If the corporation fails to assess the transportation volume accurately, shareholders sit in traffic. In addition to considering their own interests in their other capacities with the corporation, individual shareholders frequently make decisions that take into account payoffs to others, act altruistically, and are "extremely sensitive to the signals . . . about the expectations, needs, attitudes, identities and likely behavior of the people around us."[223] Shareholders in Company B are institutional investors. Generally, institutional investors are solely interested in the rates of return and only a minority take additional considerations into account. Using individual shareholders' interests as a heuristic for aggregate social welfare makes sense when looking at the potential for distributional conflicts between various stakeholder groups. But when the shareholders are mostly institutional investors, as in the case of Company B, the likelihood of distributional conflicts between various stakeholder groups is higher because the spectrum of objectives taken into account by institutional investors does not match individuals' thought processes and decision-making patterns. Therefore, it does not make sense to use institutional investors' interests as a heuristic for the aggregate social welfare.

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222. *See* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 38 (1991).

223. Stout, *supra* note 83, at 14.

An alternative justification for shareholder primacy involves contracting costs.[224] Creditors, employees, and customers have fixed claims on the corporation and thus could obtain suitable protection and better information enabling them to remain indifferent to the policy adopted by the management.[225] Shareholders' residual claims, in contrast, have an open-ended association and thus should be entitled to leveraged protection, as they are most likely to be affected by corporate policy.[226] But this argument also applies to the 99%, who live alongside the corporation and are directly impacted by its externalities. If the open-ended association is the argument for primacy, then the general public should be the primary corporate constituency.

B. BOUNDED FIDUCIARY DUTY

The reluctance of institutional investors to engage in nonfinancial investment considerations is legally rooted in their bounded fiduciary duties.[227] Institutional investors trading on behalf of their clients and advising their clients' securities selection are bound by fiduciary duties, under either the federal securities laws or the common law of agency, or both.[228] Fiduciary duties are aimed at mitigating the agency costs caused by the divergent interests and risk tolerance of the client and the institutional investors representing her.[229]

The core fiduciary duties are loyalty and care. The duty of loyalty regulates potential conflicts of interest and proscribes misappropriation, while the duty of care establishes a professional benchmark for "reasonableness" and "prudence."[230] Yet, despite the broad spectrum of human objectives, the United States Department of Labor clarified in a

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224. Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimating Schemas of Modern Policy and Corporate Law,* 103 MICH. L. REV. 1, 46-57 (2004).

225. *Id.*

226. Macey & Miller, *supra* note 2, at 416-19.

227. Andreas G. F. Hoepner, Michael Rezec & Sebastian Siegl, *Does Pension Funds' Fiduciary Duty Prohibit the Integration of Environmental Responsibility Criteria in Investment Processes? A Realistic Prudent Investment Test* 2 (Sept. 19, 2011) (unpublished working paper), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1930189 [http://perma.cc/RGT4-2FCJ].

228. Robert H. Sitkoff, *The Fiduciary Obligations of Financial Advisers Under the Law of Agency,* 27 J. Fin. Plan. 42, 48 (2014).

229. *Id.* at 43.

230. *Id.* at 44.

2008 Labor Bulletin that ERISA prohibits investment decisions based on nonfinancial factors.[231] Institutional investors are bound to enhance financial value; indeed, that is the legal purpose of their institutionalization.[232] Bridging the gaps between ethics and business is a challenge, as the objectives and methods of both often face conflicts in investment allocation. Perhaps due to fear of political intervention, or the potentially substantial cost of aligning social and financial goals into one socially responsible investment policy, the policy guiding the pension savings under ERISA purposefully blinds itself to the underlying human interests of its clients.[233]

Back in the 1980s, ethical investments used "negative screening," banning investments in enterprises based on religious or political divergence. For example, in *Board of Trustees v. City of Baltimore*, the Maryland Court of Appeals upheld Baltimore City Ordinance No. 765 banning pension funds' investments in companies doing business in South Africa.[234] The risk of subverting investors' interests into politics has raised an academic debate, with most scholars accepting the view in the Freshfields Bruckhaus Deringer 2005 report.[235] The report concluded that pension funds are legally required to consider environmental, social, and governance considerations if there is a clear consensus amongst beneficiaries in favor of this criterion or the criterion is believed to be financially beneficial.[236] However, this is a high bar to overcome; therefore, the bottom line is that environmental, social, and governance considerations remain secondary to the financial interest.

In the years following the most recent financial crisis, responsible investment strategies became more widely adopted. In 2009, a report by

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231. *See* 29 C.F.R. § 2509.08-2 (2008).

232. *See* David G. Yosifon, *The Law of Corporate Purpose,* 10 BERKELEY BUS. L.J. 181, 181 (2013).

233. Timothy Adler & Mark Kritzman, *The Cost of Socially Responsible Investing,* 35 J. PORTFOLIO MGMT. 52 (2008).

234. Bd. of Trs. v. Mayor of Balt., 562 A.2d 720, 746 (Md. 1989).

235. Charles E. Rounds, Jr., *Why Social Investing Threatens Public Pension Funds, Charitable Trusts, and the Social Security Trust Fund*, *in* PENSION FUNDS POLITICS: THE DANGERS OF SOCIALLY RESPONSIBLE INVESTING 56 (Jon Entine ed., 2005); FRESHFIELDS BRUCKHAUS DERINGER, A LEGAL FRAMEWORK FOR THE INTEGRATION OF ENVIRONMENTAL, SOCIAL AND GOVERNANCE PRINCIPLES IN INVESTMENT DECISIONS (2005), http://www.unepfi.org/fileadmin/documents/freshfields_legal_resp_200511 23.pdf [http://perma.cc/U69W-2ZPK]; s*ee* Hoepner, Rezec & Siegl, *supra* note 227, (surveying the academic support for the Freshfields report).

236. FRESHFIELDS BRUCKHAUS DERINGER, *supra* note 235, at 13.

the asset management group of the United Nations Environmental Program Finance Initiative stated, "Fiduciaries must recognise that integrating [environmental, social and governance] issues into investment and ownership processes is part of responsible investment, and is necessary to managing risk and evaluating opportunities for long-term investment."[237] This report framed the environmental, social, and governance investment considerations as a proactive obligation of institutional investors that is inherent to their professional duties.[238] According to the report, failure to comply with this obligation may be considered negligence.[239] In 2014, Institutional Shareholder Services issued policy guidelines for voting on SRI environmental, social and governance issues.[240] Later that year, a collection of academic essays broadly interpreting fiduciary duties was published as the *Cambridge Handbook of Institutional Investment and Fiduciary Duty*, dismissing the belief that fiduciary duties are essentially an obligation to maximize short-term returns, and instead focusing on long-term societal value.[241]

Yet, it is important to remember that many institutional investors are not bound by any fiduciary duty to the general public in their investment decisions.[242] Banks and insurance companies invest for their own accounts, and although they are contractually tied to the consumer public, they are not investing on its behalf. Hedge funds are fiduciaries of the 1% rather than 99%. Fiduciary duties do not cover investments where the general public is not the principal. The remodeling of fiduciary duties should be extended to bind institutional investments even when the general public is under other stakeholder constituencies.

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237. ASSET MGMT. WORKING GRP. UNEP FINANCE INITIATIVE, FIDUCIARY RESPONSIBILITY 11 (2009), http://www.unepfi.org/fileadmin/documents/fiduciaryII.pdf [http://perma.cc/SD5C-BELD].

238. *See id.* at 44.

239. *See id.*

240. *See* INSTITUTIONAL SHAREHOLDER SERVICES INC., 2014 SRI U.S. PROXY VOTING GUIDELINES (2014), http://www.issgovernance.com/file/2014_Policies/2014ISSSRIUSAGuidelines.pdf [http://perma.cc/4EVX-ULQK].

241. THE CAMBRIDGE HANDBOOK OF INSTITUTIONAL INVESTMENT AND FIDUCIARY DUTY 1-2 (James P. Hawley et al. eds., 2014).

242. *See supra* Part II.A.

C. Platform and Audience for Sustainability Reporting

The target audience for sustainability reporting is the general public. Sustainability reporting aims to bring to the public condensed and systemic information regarding the non-financial performance of corporations. Yet, sustainability data is still limited to the financial reporting available on EDGAR, where institutional investors are generally the only parties accessing and reading such disclosures. Even when sustainability reporting becomes mandatory, it typically applies only to listed corporations.[243] Despite being a disclosure platform based on stakeholder theory, sustainability reporting is typically adopted only in public corporations. Corporations may have a major role in society and provide essential services and products to the public, but when funded privately, are exempt from any accountability to public transparency regarding their performance.

Because the target audience for sustainability reporting is wider than the investor constituency, sustainability reporting should be voiced through additional platforms to reach the general public. Mandatory regulations imposing sustainability reporting obligations should apply to corporations holding public roles or providing public services, even when funded privately.

Conclusion

Stakeholder theory and team production analysis theorize corporate law as team production law, providing an organizational platform for various stakeholder constituencies.[244] Yet, in the scholarship of stakeholder theory, no attention is devoted to the nature of the corporation's relationships with the various stakeholder constituencies. Unlike financiers, employees, and suppliers, the 99% contract with the corporation at arm's length, as its end consumers, or do not contract with it at all, simply coexisting alongside the corporation.

Under this organizational model, the general public may participate in the corporate enterprise only by providing public financing. However, this Article outlined the impact of institutionalization on the interaction between the general public and the public corporation because the

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243. *See supra* Part III.C.

244. Blair & Stout, *supra* note 5, at 249-50.

general public no longer holds listed equity directly. Not all institutional investors are investing on behalf of the public, and shareholder empowerment platforms are frequently mobilized by intermediaries representing only the wealthiest 1%. The objectives and methods used by institutional investors are potentially divergent from those of the general public, and potentially impose negative externalities on retail investors. The prominence of institutional investors, and the differences between institutional investors and retail investors, increase the likelihood of potential conflicts of interest between the shareholders and other stakeholder constituencies of the corporation.

This Article described increasing trends towards the convergence of public corporations with the general public. Impact investments, social responsible investments, CSR, sustainability reporting, and customer voice all represent commitments to enhancing corporate accountability towards the 99%.

This Article analyzed these trends and raised policy implications. Corporate law must face the challenge of aligning shareholders' interests with those of the general public. In a world of institutional investments, enhancing shareholder value is not always a good heuristic for aggregate social welfare. In addition, as the general public is no longer serving in the shareholding constituency while the target audience of sustainability reporting is the general public, sustainability reporting should not be restricted to public corporations; rather, sustainability reporting should apply to corporations serving significant public roles even when funded privately.

The contribution of this Article is in raising the timely concern for the agency costs embedded in the relationship between the general public and institutional investors. When shareholders' interests are not necessarily aligned with those of the general public's, we have reason to revisit the axiom of shareholder value as the underlying purpose of corporations, and accordingly reconsider the design of corporate law.