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Mutual Fund Stewardship and the Empty Voting Problem

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Abstract

When Roberta Karmel wrote the articles that are the subject of this symposium, she was skeptical of both the potential value of shareholder voting and the emerging involvement of institutional investors in corporate governance. In the ensuing years, both the increased role and engagement of institutional investors and the heightened importance of shareholder voting offer new reasons to take Professor Karmel's concerns seriously. Institutional investors have taken on a broader range of issues ranging from diversity and political spending to climate change and human capital management, and their ability to influence corporate policy on these issues has become more significant.

The broadened scope of institutional engagement and influence raises new questions about the legitimacy of institutional investor engagement. Specifically, the mutual funds and other institutional investors are not principals but agents. The exercise of institutional voting power is by fund managers or governance teams, people who have "little or no economic interest in the shares that they vote," This "empty voting" has the potential to undermine the legitimacy of the shareholder franchise. It is of particular concern when the assets committed to a broad-based index fund are voted to support initiatives that have the potential to sacrifice economic value in favor of social or societal objectives about which the shareholders invested in that index fund may not agree.

Because of the risk that empty voting will not reflect the preferences of the true economic owners, this Article argues for change. The Article identifies potential market-based solutions to increase the alignment between institutional engagement and the preferences of fund investors including greater and more transparent fund segmentation, pass-through voting, or an explicit mechanism for fund investors to communicate their preferences to asset managers. At the same time, because asset managers have private incentives to retain their current power, the Article also considers potential regulatory reforms.

I. Introduction

Roberta Karmel's scholarship demonstrates a skepticism of both shareholder voting and institutional investors. She has warned that some shareholders can misuse the tools of shareholder democracy at the expense of their fellow shareholders and the corporation.[1] She has

* Saul A. Fox Distinguished Professor of Business Law, University of Pennsylvania Law School. I am grateful to Elizabeth Pollman and to the participants in this symposium for helpful comments. It is an honor and pleasure to contribute this article to a symposium honoring Roberta Karmel. Professor Karmel has been an inspiration, a mentor and a friend since I began teaching.

[1] Roberta Karmel, *Voting Power Without Responsibility or Risk–How Should Proxy Reform Address the Decoupling of Economic and Voting Rights?*, 55 VILL. L. REV. 93 (2010).

also worried that institutional investors may not act in the long-term interest of the corporations in which they are invested,[2] and toward that end she has considered whether they should be constrained by fiduciary duties.[3]

These concerns were important at the time Professor Karmel published these articles, ten to fifteen years ago, but the evolving role of large mutual fund sponsors in corporate governance offers new reasons to take them seriously. Today, institutional investors own 70-80% of the stock in large publicly-traded companies in the United States.[4] Of these investors, the "Big Three" mutual fund complexes alone – BlackRock, Vanguard and State Street[5] – own over 20%, making their combined voting power influential and, in many cases, pivotal.[6] Top managers at the large mutual fund complexes wield increasing influence over business operations.[7] Indeed, the policies of the Big Three appear to have eclipsed the controversial influence of proxy advisor ISS.[8]

Institutional engagement had traditionally been defended in terms of increasing officer and director accountability to shareholders with the objective of promoting firm economic value.[9] As Professor Karmel recognized, institutional investors' identification of so-called good governance practices led to wholesale governance reforms including the widespread elimination

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[2] Roberta Karmel, *Realizing the Dream of William O. Douglas–The Securities and Exchange Commission Takes Charge of Corporate Governance*, 30 DEL. J. CORP. LAW. 79, 140 (2005) ("Many of the evils of the dot-coin bubble were caused by institutional investors and their portfolio managers, who first insisted that corporate officers have equity interests in their companies instead of relying upon cash compensation and who then pressured issuers to achieve higher earnings every quarter.").

[3] Roberta Karmel, *Should A Duty to the Corporation Be Imposed on Institutional Shareholders?,* 60 BUS. LAW. 1 (2004).

[4] Assaf Hamdani & Sharon Hannes, *The Future of Shareholder Activism*, 99 B.U. L. REV. 971, 973 (2019) ("institutional investors today collectively own 70-80% of the entire U.S. capital market").

[5] *See* Jan Fichtner, Eelke M. Heemskerk & Javier Garcia-Bernardo, *Hidden Power of the Big Three? Passive Index Funds, Re-Concentration of Corporate Ownership, and New Financial Risk*, 19 BUS. & POL. 298, 304 (2017) (terming BlackRock, Vanguard and State Street the "Big Three" due to their domination of the asset management industry).

[6] Lucian Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B.U. L. REV. 721, 724 (2019) ("Following two decades of growth, the Big Three now collectively hold an average stake of more than 20% of S&P 500 companies.").

[7] Lucian Bebchuk & Scott Hirst, *The Power of the Big Three and Why it Matters*, (Harv. L. Sch. & B.U. Sch. L., Working Paper, dated 2/21/2021), http://www.law.harvard.edu/faculty/bebchuk/The_Power_of_the_Big_Three_and_Why_It_Matters.pdf ("the Big Three have considerable power and influence on corporate decisions and outcomes"); Niccolo Calvi, *Toward Shareholder Vote on Equity Issuances*, 10 AM. U. BUS. L. REV. 1, 19 (2021) ("Recent studies describe the business model of the institutional investors and point out how the size of the stake they usually hold results in an interest in not missing the opportunity to cast their determinative vote in an informed way in order to beneficially impact the firm's performance.").

[8] Audra Boone, Stuart L. Gillan, & Mitch Towner, *The Role of Proxy Advisors and Large Passive Funds in Shareholder Voting: Lions or Lambs?*, *in* 2ND ANNUAL FINANCIAL INSTITUTIONS, REGULATION AND CORPORATE GOVERNANCE CONFERENCE, at 4 (February 20, 2020), https://ssrn.com/abstract=2831550 ("our results suggest that the Big 3 have become more influential in voting outcomes, and ISS less so, in the post-crisis period")

[9] Giovanni Strampelli, *Knocking at the Boardroom Door: A Transatlantic Overview of Director-Institutional Investor Engagement in Law and Practice*, 12 VA. L. & BUS. REV. 187, 190 (2018) ("institutional shareholders are expected to hold managers more accountable for company valuation and urge them to favor a long-term approach when making business decisions").

of staggered boards of directors in established companies, dramatic reforms to the structure of executive compensation, the adoption of proxy access and majority voting, and greater shareholder power to call special meetings.[10] Commentators have criticized some of these efforts in retrospect as based on mixed empirical evidence and having, in some cases, unintended and potentially detrimental effects on firm value.[11]

In recent years, however, the focus on institutional investor stewardship has changed. Institutional investors have taken on a broader range of issues ranging from diversity and political spending to climate change and human capital management. In most cases, investors defend their engagement on these issues as enhancing firm-specific economic value.[12] They have increasingly faced calls to do more, however, and to promote the needs of their broader portfolio, the interests of non-shareholder stakeholders, and the interests of society as a whole.[13]

This broadened scope of institutional engagement and influence raises new questions about the legitimacy of institutional investor engagement. Specifically, the mutual funds and other institutions engaged in this stewardship are not principals but agents. The economic interest underlying their voting power is held by millions of mutual fund beneficiaries who do not play any role in deciding how the mutual funds they own will vote their shares and who may or may not support their initiatives.[14] The exercise of voting power by fund managers or governance teams, people who have "little or no economic interest in the shares that they vote," is how Professor Karmel described empty voting in her 2010 Villanova Law Review article.[15] As Professor Karmel explained, "[e]mpty voting seriously undermines the shareholder franchise."[16]

Concededly, the empty voting problem about which Professor Karmel wrote, a problem typified by hedge funds whose economic interests were directly opposed to the voting power they exercised, is quite different from the case of a mutual fund voting the shares of its portfolio

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[10] *See* Karmel, *supra* note 1, at 106–108 (recounting these developments).
[11] *See, e.g.,* Sanjai Bhagat, Brian Bolton & Roberta Romano, *The Promise and Perils of Corporate Governance Indices*, 108 COLUM. L. REV. 1803, 1814 (2008) ("Despite widespread belief in the importance of governance mechanisms for resolving agency problems, the empirical literature investigating the effect of individual corporate governance mechanisms on corporate performance has not been able to identify systematically positive effects and is, at best, inconclusive.").
[12] *See, e.g.,* Sean J. Griffith, *Opt-In Stewardship: Toward an Optimal Delegation of Mutual Fund Voting Authority*, 98 TEX. L. REV. 983, 1030 (2020) (reporting that the large asset managers claim that their engagement on ESG issues focuses on wealth maximization).
[13] *See, e.g.,* Jeffrey N. Gordon, *Systematic Stewardship*, (COLUM. L. SCH., Working Paper, dated February 14, 2021) https://ssrn.com/abstract=3782814 (arguing institutional investors should engage on the basis of portfolio-wide impacts); Madison Condon, *Externalities and the Common Owner*, 95 WASH. L. REV. 1, 81 (2020) (arguing that institutional investors should "function as 'surrogate regulators,' sacrificing individual firm profits for the benefit of the broader portfolio").
[14] *See, e.g.*, Stephen Choi, Jill Fisch & Marcel Kahan, *Who Calls the Shots? How Mutual Funds Vote on Director Elections*, 3 HARV. BUS. L. REV. 35, 37–38 (2013) ("mutual funds are merely intermediaries—holders of pooled investments—and the funds' investors, those with an economic interest in the underlying securities, lack voting authority"); Griffith, *supra* note 12, at 992 ("most mutual fund investors receive the economic returns of portfolio company shares but no right to vote their proportional interest in them").
[15] Karmel, *supra* note 1, at 93.
[16] *Id*. at 94.

companies.[17] The mutual fund is a legitimate record holder of the shares. In a substantial majority of cases, its interests are aligned both with the interests of its customers—the holders of mutual fund shares—and the interests of other shareholders in the portfolio companies. In addition, the managers of mutual funds are constrained by the fiduciary duties they owe to their beneficiaries, duties that they take very seriously. But Professor Karmel's article provides an interesting lens through which to examine current institutional investor engagement efforts, and the analogy highlights some of the issues about which we might be concerned.

Specifically, the analogy to empty voting highlights the fact that, as agents, the preferences of those who vote mutual fund shares may, in some cases, differ from the interests of mutual fund shareholders. The potential for such differences increases when the scope of voting issues expands from director elections and issues involving corporate structure and governance to politically divisive issues such as diversity, wealth inequality, and climate change. Although investors may share a common interest in the survival of the planet or moving toward a more just world, there is no particular reason to think that people who commit their assets to a broad-based diversified index fund, often through an employer-sponsored 401(k) plan, share the political or social views of fund managers. Nor is there reason to believe that they intend, through the delegation to those managers of investment authority, to give fund managers the authority to pursue social welfare objectives, objectives that traditionally have been pursued through the political process.[18]

The challenge increases for initiatives that potentially involve sacrificing shareholder economic value in the name of non-shareholder interests, such as recent shareholder proposals seeking to have traditional corporations convert to public benefit corporations.[19] Unlike the empty voting by hedge funds that Professor Karmel wrote about, the empty voting resulting from intermediation creates the risk that the voting decisions of a small number of institutional fund managers will dictate the outcome of a substantial number of shareholder votes, dominating the interests of other investor groups who, unlike the fund managers, have real skin in the game.

Because of the increasing risk that this empty voting will not reflect the preferences of the true economic owners, and because of the potential for the private interests of fund managers and sponsors to drive fund voting decisions, this Article argues for change. Change can come from within, and this Article identifies potential market-based solutions to increase the alignment between institutional engagement and the preferences of fund investors. These solutions include

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[17] I am not the first to describe mutual funds as engaging in empty voting. *See* Bernard S. Sharfman, *Mutual Fund Advisors' "Empty Voting" Raises New Governance Issues*, THE CLS BLUE SKY BLOG (July 3, 2017), https://clsbluesky.law.columbia.edu/2017/07/03/mutual-fund-advisors-empty-voting-raises-new-governance-issues/ (describing and criticizing "the 'empty voting' of mutual fund advisors").

[18] The line, of course, is not self-evident. A variety of issues with political and social dimensions directly impact a corporation's economic value, a point that many commentators make in supporting increased disclosure of ESG issues in financial reporting. *See, e.g.,* Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 GEO. L.J. 923, 933 (2019) (citing literature identifying a relationship between sustainability and operating performance).

[19] *See, e.g.*, Memorandum from Jennifer H. Noonan to the Chief Counsel at the U.S. Securities and Exchange Commission, Exhibit A (Nov. 20, 2020) (on file with the SEC), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2020/mcritchietractor123120-14a8-incoming.pdf (requesting the Board of Tractor Supply Company to take the necessary steps to cause the company to become a Public Benefit Corporation).

greater and more transparent fund segmentation, pass-through voting, or an explicit mechanism for fund investors to communicate their preferences to asset managers. As the Article warns, however, market-based solutions require the cooperation of asset managers, who have private incentives to retain their current power. Accordingly, the Article also considers potential regulatory reforms.

This Article begins by reviewing how institutional investor engagement has evolved in scale, scope, and influence. It then explains the analogy between the structure of institutional engagement and Professor Karmel's concern about empty voting. Finally, the Article considers regulatory and market-based approaches that might increase the alignment between the exercise of institutional voting rights and the economic interests that underly those rights. Ultimately, this alignment is necessary to retain the legitimacy of the shareholder franchise.

II. The Evolution of Mutual Fund Engagement

Both the degree to which institutional investors dominate the ownership of publicly-traded securities and the concentration of that ownership have increased over time. Institutional ownership of publicly-traded U.S. equity increased from around 6% in 1950 to more than 50% by 2001.[20] Subsequently, that percentage has grown to approximately 80%.[21] Significantly, the largest institutional investors have grown larger and, as a result, a small number of investors, in some cases as few as three, own a substantial block in the largest publicly-traded companies.[22] These blocks give the largest institutional investors considerable power over the activities of their portfolio companies.

Although historically institutional investors were relatively passive, they have become increasingly engaged. This engagement responds to both regulatory and academic demands that institutional investors engage more extensively with their portfolio companies.[23] In 2003, the Securities and Exchange Commission ("SEC") adopted rules requiring mutual fund companies to vote and to disclose their voting positions.[24] After a relatively slow start in which mutual funds relied heavily on proxy advisor recommendations,[25] they began to act more independently – to

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[20] Matteo Tonello & Stephan Rabimov, *The 2010 Institutional Investment Report: Trends in Asset Allocation and Portfolio Composition 22* (Megan Manni ed., 2010), http://ssrn.com/abstract=1707512.

[21] *80% of equity market cap held by institutions*, PENSIONS & INVESTMENTS, Apr. 25, 2017, https://www.pionline.com/article/20170425/INTERACTIVE/170429926/80-of-equity-market-cap-held-by-institutions.

[22] Bebchuk & Hirst, *supra* note 6.

[23] Alan R. Palmiter, *Mutual Fund Voting of Portfolio Shares: Why Not Disclose?,* 23 CARDOZO L. REV. 1419, 1439–1440 (2002) (noting that many observers "doubt whether the mutual fund industry is taking seriously its voting function").

[24] 17 C.F.R. § 275.204-2(c)(2) (2003). The rule followed a release by the Department of Labor stating that pension funds were required by their fiduciary duties to vote the shares of their portfolio companies. Interpretive Bulletins Relating to the Employee Retirement Income Security Act of 1974, 29 C.F.R. § 2509.94-2 (2002) (fiduciary act of managing employee benefit plan assets consisting of equity securities includes voting of those securities).

[25] James Cotter, Alan Palmiter, & Randall Thomas, *ISS Recommendations and Mutual Fund Voting on Proxy Proposals*, 55 VILL. L. REV. 1, 2 (2010) (finding that during from 2003-2008 "mutual funds tend to vote in line with ISS recommendations across the board").

analyze, to vote, and to engage.[26] The Big Three now have dedicated governance teams to analyze proxy voting decisions and to engage directly with their portfolio companies.[27]

Institutional investors initially focused their engagement on governance. Led by several large pension funds that not only exercised voting power but began to sponsor governance shareholder proposals,[28] institutional investors voted their stock in favor of shareholder proposals to reform corporate governance such as proposals seeking independent boards, the elimination of poison pills and staggered boards of directors, and the adoption of performance-based compensation.[29] These efforts were effective. The Harvard Shareholder Rights Project partnered with institutional investors to bring shareholder proposals asking issuers to eliminate their staggered boards and reported that, over a three-year period, 121 companies agreed to move to annual elections.[30] With the congressional adoption of an advisory vote on executive compensation—say on pay—as part of the Dodd-Frank Act, institutions became engaged in broader reforms to the size and structure of executive pay.[31] Institutional investors were pivotal in persuading issuers to adopt reforms such as majority voting[32] and proxy access.[33] Although non-hedge fund institutions focused largely on governance proposals that could be applied across the range of their portfolio companies, they also played an increasingly important role in evaluating firm-specific activism and lending their voting support to activist campaigns that they viewed as appropriate.[34]

In contrast, large institutional investors initially limited their engagement with respect to Environmental, Social, and Governance ("ESG") issues.[35] That orientation has shifted, and

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[26] *See* Jill Fisch, Assaf Hamdani & Steven Davidoff Solomon, *The New Titans of Wall Street: A Theoretical Framework for Passive Investors*, 168 U. PA. L. REV. 17 (2019).
[27] *Id*. at 49.
[28] Diane Del Guercio & Jennifer Hawkins, *The Motivation and Impact of Pension Fund Activism*, 52 J. FIN. ECON. 293, 297 (1999) (noting that CalPERS, CalSTRS, NYC, SWIB, and CREF sponsored 18% of all corporate governance proposals submitted in 1987–1993).
[29] *See, e.g.,* Lucian A. Bebchuk, Alma Cohen & Charles C.Y. Wang, *Staggered Boards and the Wealth of Shareholders: Evidence from a Natural Experiment 3* (Harv. Law Sch. John M. Olin Ctr. for Law, Econ., and Bus., Discussion Paper No. 697, 2010), http://ssrn.com/abstract=1706806 (describing increasing institutional investor efforts to eliminate staggered boards); Soren Lindstrom, *Shareholder Activism Against Poison Pills: An Effective Antidote?,* 9 WALL ST. LAWYER 17, 17 (2015) ("Today shareholders increasingly are exercising their right to vote for proposals to eliminate shareholder rights plans . . . .").
[30] *121 Companies Agreed to Move towards Annual Election,* HARVARD SHAREHOLDER RIGHTS PROJECTS, http://www.srp.law.harvard.edu/companies-entering-into-agreements.shtml (last visited Aug. 20, 2021).
[31] *See* Jill Fisch, Darius Palia & Steven Davidoff Solomon, *Is Say on Pay All About Pay? The Impact of Firm Performance*, 8 HARV. BUS. L. REV. 101, 101 (2018). (empirically analyzing say on pay votes).
[32] Stephen J. Choi, Jill E. Fisch, Marcel Kahan & Edward Rock, *Does Majority Voting Improve Board Accountability?*, 83 U. CHI. L. REV. 1119, 1127 (2016) (describing issuer shift from plurality to majority voting);
[33] *See, e.g.,* Holly Gregory, *The Latest on Proxy Access*, HARV. L. SCH. F. ON CORP. GOV., (Feb. 1, 2019), https://corpgov.law.harvard.edu/2019/02/01/the-latest-on-proxy-access/ (noting the "the widespread adoption of proxy access by large U.S. public companies" in response to "[p]ressure from large institutional investors, including public and private pension funds").
[34] *See* 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, 865–67 (2013).
[35] *See, e.g.*, Cynthia A. Williams & John M. Conley, *An Emerging Third Way? the Erosion of the Anglo-American Shareholder Value Construct*, 38 CORNELL INT'L L.J. 493, 546 (2005) ("U.S. mutual funds show little evidence of serious consideration of social and environmental issues."); *see also* Press Release, IRRC, Most Mutual Funds

institutions have become increasingly engaged in ESG issues.[36] The Investor Responsibility Research Center ("IRRC") reported in 2011 that approximately 50% of institutional investors reported engaging on environmental and social issues.[37] Votes by BlackRock and Vanguard at Occidental and ExxonMobil in 2017 were critical to the first climate-change shareholder proposals receiving majority support.[38] Larry Fink's 2021 letter to shareholders boasted of BlackRock's increasing dedication to ESG issues.[39] In BlackRock's quarterly stewardship report for Q1 2021, it reported that it supported 75% of environmental and social shareholder proposals.[40] In May 2021, environmental activist Engine No. 1 was successful in winning board representation at Exxon for directors who ran on a platform of addressing climate change, due in part to the support of large institutional investors such as BlackRock.[41]

There are several reasons for this shift. Commentators have noted the attraction of ESG as an investment trend, and asset managers may seek ESG engagement as a form of branding[42] or to attract investments, particularly from socially-conscious millennial investors.[43] Portraying themselves as socially responsible may assist asset managers in forestalling regulation and may temper initiatives to reduce their power.[44] U.S. asset managers may be influenced by efforts in

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Opposed All Social Proposals (Sept. 15, 2004), http://www.irrc.com/company/Mutual Funds 0904.html (reporting that a "majority of the nation's 100 largest mutual funds opposed all social issue shareholder resolutions that came to votes in the first half of 2004. . .").

[36] Robert G. Eccles & Svetlana Klimenko, *The Investor Revolution*, HARV. BUS. REV. (May-June 2019) https://hbr.org/2019/05/the-investor-revolution ("Over the past five years or so, investors have become increasingly interested in ESG issues."); David Hess, *Public Pensions and the Promise of Shareholder Activism for the Next Frontier of Corporate Governance: Sustainable Economic Development*, 2 VA. L. & BUS. REV. 221, 223 (2007) ("[F]or many investors, governance issues are transforming into 'environmental, social, and governance' ('ESG') issues.").

[37] Jon Lukomnik & Marc Goldstein, *The State of Engagement Between U.S. Corporations and Shareholders,* HARV. L. SCH. F. ON CORP. GOV. (Mar. 15, 2011), https://corpgov.law.harvard.edu/2011/03/15/the-state-of-engagement-between-u-s-corporations-and-shareholders/.

[38] Cydney S. Posner, *Are Shareholder Proposals on Climate Change Becoming a Thing?*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 21, 2017), https://corpgov.law.harvard.edu/2017/06/21/are-shareholder-proposals-on-climate-change-becoming-a-thing/.

[39] Larry Fink, *Larry Fink's Chairman's Letter,* BLACKROCK, 2021, https://www.blackrock.com/corporate/investor-relations/larry-fink-chairmans-letter (stating that "we are increasingly using our voice and our insights to advocate on behalf of clients for more sustainable and inclusive economies").

[40] BlackRock Investment Stewardship, Q1 2021 Global Quarterly Stewardship Report at 3 (May 2021), https://www.blackrock.com/corporate/literature/publication/blk-qrtly-stewardship-report-q1-2021.pdf.

[41] Kevin Crowley & Scott Deveau, *Exxon CEO is Dealt Stinging Setback at Hands of New Activist*, BLOOMBERG GREEN (May 26, 2021, 1:18 PM), https://bloomberg.com/news/articles/2021-05-26/tiny-exxon-investor-notches-climate-win-with-two-board-seats.

[42] State Street, for example, has developed a brand associated with an emphasis on diversity through its "Fearless Girl" campaign. *See Fearless Girl Campaign Positive Change Continues*, STATE ST. GLOB. ADVISORS (Mar. 19, 2021), https://www.ssga.com/us/en/individual/mf/insights/asr-fearless-girl-campaign.

[43] Michal Barzuza, Quinn Curtis & David H. Webber, Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance, 93 S. CAL. L. REV. 1243, 1251, 1294 (2020) ("In response to competition for money to manage, the largest pools of assets in our economy have turned their power as shareholders to advancing investors' social agenda.").

[44] *See* Jeff Schwartz, *'Public' Mutual Funds*, CAMBRIDGE HANDBOOK ON INV. PROT. (forthcoming 2021), https://ssrn.com/abstract=3821388.

the EU and UK to require institutional investors to engage in responsible stewardship.[45] And socially or politically responsible investing behavior may be consistent with the personal preferences of fund managers, who view their actions as in the best interests of society.

Significantly, the potential voting power exercised by institutional investors enables them to influence corporate policy without the need to utilize a formal shareholder vote.[46] Increasingly issuers facing the prospect of large institutional support for shareholder proposals often do not even put those proposals to a vote, but voluntarily agree to the proponent's demands in exchange for withdrawal of the proposal. This settlement mechanism has the effect of influencing operational change without the transparency of a proxy statement and voting outcome.[47] And increasingly, these agreed-upon changes encompass ESG issues. For example, the board of Yum brands voluntarily agreed, in response to a shareholder proposal, to provide a report on the effects of antibiotic use in its supply chain.[48]

The objectives of institutional shareholder engagement and influence continue to expand. The issue of racial justice is one example, and a substantial number of companies have announced donations, policy changes and other reform initiatives.[49] Racial justice is also a topic of increasing concern for institutional investors.[50] Shareholders are introducing and supporting proposals seeking increased diversity reporting, and racial equity audits.[51] Several shareholder groups are pushing institutional investors to do more to hold companies accountable – criticizing investors for supporting management's nominees at companies with insufficient board

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[45] *See generally* Dionysia Katelouzou & Mathias Siems, *The Global Diffusion of Stewardship Codes*, *in* GLOBAL SHAREHOLDER STEWARDSHIP: COMPLEXITIES, CHALLENGES AND POSSIBILITIES (Dionysia Katelouzou & Dan W. Puchniak eds., forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3616798 (detailing the use of stewardship codes across a wide range of jurisdictions).

[46] *See* Sarah C. Haan, *Shareholder Proposal Settlements and the Private Ordering of Public Elections*, 126 YALE L.J. 262, 273, 312 (2016).

[47] At least one such settlement has generated legal challenge. In January 2021, a pension fund filed suit alleging that Twitter's agreement to add three new board members in response to a threatened proxy contest by hedge fund Elliot Management violated the Twitter board's fiduciary duties. Sujeet Indap, *Mystique of Elliott Management at issue in challenge from Twitter shareholder*, FIN. TIMES, Sept. 20, 2021, https://www.ft.com/content/5f3dd95f-8a7c-4f39-991a-87b2bc05691c.

[48] *The Shareholder Commons Announces Withdrawal of Shareholder Proposal after Yum! Brands Commits to Disclose Systemic Costs of Antibiotic Use*, PRNEWSWIRE (Mar. 3, 2021, 12:56 ET), https://www.prnewswire.com/news-releases/the-shareholder-commons-announces-withdrawal-of-shareholder-proposal-after-yum-brands-commits-to-disclose-systemic-costs-of-antibiotic-use-301239878.html

[49] *See, e.g.,* Gillian Friedman, *Here's What Companies are Promising to do to Fight Racism*, N.Y. TIMES (Aug. 23, 2020), https://www.nytimes.com/article/companies-racism-george-floyd-protests.html (describing some of the pledges, donations and changes made by companies to address racial justice since the killing of George Floyd).

[50] Julie Wokaty, *Investors Commit to Address Systemic Racism Through Corporate Engagements and Policy Advocacy*, INTERFAITH CTR. ON CORP. RESP.: JULIE WOKATY'S BLOG (June 18, 2020), https://www.iccr.org/investors-commit-address-systemic-racism-through-their-portfolios-corporate-engagements-and-policy (describing the Racial Justice Investing Coalition as "a group of investors who have used their collective leverage as fiduciaries and shareholders to advance racial justice issues since December of 2017").

[51] *See, e.g.*, Lorraine Woellert, Catherine Boudreau & Kellie Mejdrich, *Shareholders Target 'White Man's World' with Record Demands for Diversity Data*, POLITICO (Apr. 6, 2021, 12:01 PM), https://www.politico.com/news/2021/04/06/shareholders-diversity-data-479159 (reporting shareholder proposals seeking data on diversity in corporate boards and workforces); Heidi Walsh & Michael Passoff, PROXY PREVIEW 2021, 43–47 (providing detailed analysis of shareholder initiatives on racial justice and diversity during 2021 proxy season).

diversity.[52] Similarly, institutions have been called upon to exert pressure against companies located in states that sought to restrict voting rights after the 2020 presidential election.[53]

The extent to which ESG, social and political issues should be addressed through corporate policies and the further degree to which those policies should be informed by shareholder engagement is a complex question beyond the scope of this Article. The foregoing discussion simply highlights the expansive range of topics that are now the subject of such engagement. That expansive range of topics, however, complicates the practice of institutional investor voting because, as noted above, an institution's voting policies are not determined by its customers or beneficiaries—those with skin in the game—but are instead determined by advisors who are managing other people's money. This Article argues that, as the scope of shareholder voting extends beyond purely economic issues to encompass a broader range of societal interests and concerns, the potential concerns over this empty voting, to which the Article now turns, increase.

III. Mutual Funds and Empty Voting

A. The Empty Voting Debate

In 2004, Perry Capital, a hedge fund, acquired a substantial block of shares of Mylan Pharmaceuticals for the purpose of voting that stock against a proposed merger with King Pharmaceutical, a company in which Perry owned 7 million shares.[54] It turned out that Perry had fully hedged its interest in Mylan, enabling it to vote its Mylan shares in favor of a merger in which Mylan was overpaying for King, without suffering the economic effects of that overpayment.[55] Several commentators seized upon the Mylan/King merger and other similar examples to describe a phenomenon they termed "empty voting."[56] Empty voting is voting shares in which the person exercising voting power lacks an economic interest in the shares being voted.[57]

Empty voting is a specific example of a broader phenomenon that has been termed morphable voting, in which investors use a range of structures to decouple the voting rights of stock from the related economic interest in that stock.[58] In Black and Hu's article, they demonstrated several different scenarios under which a shareholder could obtain voting rights

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[52] Leslie P. Norton, *Activists Pressure Corporate Boards to Address Racial Justice, Voting Laws*, BARRON'S (Apr. 20, 2021, 3:46 PM), https://www.barrons.com/articles/activists-pressure-corporate-boards-to-address-racial-justice-voting-laws-51618947999.
[53] *Id*.
[54] Henry T. C. Hu & Bernard Black, *The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership*, 79 S. CAL. L. REV. 811, 816 (2006).
[55] *Id*.
[56] *See, e.g.,* Shaun Martin & Frank Partnoy, *Encumbered Shares*, 2005 U. ILL. L. REV. 775; Hu & Black, *supra* note 54, at 816–817; Patricia Beck, Note, *What we talk about when we talk about Voting: Efficiency and the Error in Empty voting*, 21 FORDHAM J. CORP. & FIN. L. 211 (2016).
[57] *Cf.* Hu & Black, *supra* note 54, at 825 (defining "empty voters" as "any persons whose voting rights substantially exceed their net economic ownership.").
[58] *See id.* at 826. (using the term morphable voting).

without the economic risks of share ownership.[59] They criticized this process as problematic because the legitimacy of the shareholder voting process is premised on the expectation that shareholders will vote in accordance with their economic interests and therefore in accordance with what they believe to be the best interests of the company.[60]

Sean Martin and Frank Partnoy similarly observed that the separation of voting rights from underlying the economic interest is widespread because it occurs through stock lending and shorting transactions that are commonplace in the market.[61] Martin and Partnoy argued that the increasing prevalence of encumbered shares—"shares held by stockholders who lack the otherwise homogeneous incentives generated by 'pure' share ownership"[62]—limited the potential efficiency associated with a one share/one vote rule.[63] Jordan Barry, John William Hatfield, and Scott Duke Kominers further demonstrated through formal models that investor use of derivatives to engage in empty voting could "render financial markets unpredictable, unstable, and inefficient."[64]

Professor Karmel's 2009 article considered the potential connection of empty voting to another issue on the SEC's regulatory agenda – proxy access.[65] In 2009, the SEC proposed a proxy access rule to permit shareholders to nominate director candidates who would be included in an issuer's proxy statement.[66] For Professor Karmel, who was skeptical about increasing the power of institutional investors,[67] empty voting heightened the problem by increasing the power of some shareholders whose interests were not necessarily aligned with those of other shareholders and the corporation. In particular, Professor Karmel worried that proxy access could allow activist investors, such as hedge funds, to challenge incumbent boards in order to further their interests not as shareholders but as traders.[68]

Concerns about empty voting led commentators to advocate reform – arguing that either state legislatures, the SEC, or corporations themselves through private ordering should limit the

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[59] Hu & Black, *supra* note 54.
[60] *Id.* at 820.
[61] Martin & Partnoy, *supra* note 56.
[62] *Id*. at 780.
[63] *Id*. at 813.
[64] Jordan M. Barry, John William Hatfield, & Scott Duke Kominers, *On Derivatives Markets and Social Welfare: A Theory of Empty Voting and Hidden Ownership*, 99 VA. L. REV. 1103, 1110 (2013) (observing that opaque derivatives markets have this impact).
[65] Karmel, *supra* note 1.
[66] Facilitating Shareholder Director Nominations, 74 Fed. Reg. 29,024 (June 18, 2009) (to be codified at 17 C.F.R. pts. 200, 232, 240, 249, and 274). The SEC promulgated the proposal after Congress authorized the SEC to adopt a proxy access rule as part of the Dodd-Frank Act of 2008. The SEC subsequently adopted a proxy access rule, Rule 14a-11, but the DC Circuit subsequently invalidated the rule. *See* Jill E. Fisch, *The Destructive Ambiguity of Federal Proxy Access*, 61 EMORY L.J. 435, 447–448 (2012) (describing the history of the SEC's proxy access rule).
[67] *See, e.g.,* Karmel, *supra* note 1, at 123 (observing that proxy contests are "not generally in a corporation's best long-term interests.").
[68] *Id*. ("Because the shareholder franchise is an important accountability mechanism, it should be protected from exploitation by large shareholders whose interests and loyalties are not necessarily aligned with other shareholders (especially retail shareholders), or the corporation, just as the shareholder franchise is protected from exploitation by incumbent managers and directors.").

capacity of decoupled shareholders to vote.[69] On July 14, 2010, the SEC issued a concept release requesting comments on a variety of issues in connection with the proxy voting system,[70] including empty voting, but the release did not result in new regulations. Situations involving empty voting continue to arise, particularly in connection with share lending programs in which an investor that borrows shares has the right to vote those shares unless they are recalled by the lending institution.[71] The potential inefficiency that can arise when shareholders do not exercise voting rights that are proportional to their economic interest extends to other situations such as dual class voting structures.[72]

B. Empty Voting Revisited

The traditional concern over empty voting stemmed from a conflict between the economic interests of activist hedge funds and other shareholders of the portfolio company whose shares they were voting.[73] Voting by institutional investors who hold stock as intermediaries is different. In particular, the amount of stock owned by mutual funds is transparent, unlike the ownership stakes of hedge funds, which need not be disclosed unless the hedge fund owns over 5% of a portfolio company's voting securities.[74] In addition, mutual funds must publicly disclose how they vote their stock; hedge funds need not do so.[75]

Yet the analogy to empty voting by hedge funds is similar. Mutual fund managers (and fund governance teams) do not own the stock they are voting. More significantly, although the mutual fund is technically the owner of the shares, it is the fund's shareholders that hold the fund's economic value. Although fund shareholders are the ones whose economic interests are affected by voting outcomes, they have no role in deciding how those votes are cast. Indeed, in many cases, fund shareholders may be unaware of the fund's voting records or policies.[76] Although mutual funds are required to disclose this information, it may be difficult and costly for investors to find it.[77]

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[69] *See, e.g.,* Beck, *supra* note 56, at 224 (arguing for SEC action or amendments to corporate bylaws).
[70] Concept Release on the U.S. Proxy System, Exchange Act Release No. 62,495, Investment Company Act Release No. 29,340, 75 Fed. Reg. 42,982 (July 22, 2010).
[71] Kate Burgess, *Market reverberates with accusations of 'empty voting'*, FIN. TIMES, (July 15, 2018), https://www.ft.com/content/0e28929e-85dd-11e8-a29d-73e3d454535d.
[72] *See* Lucian A. Bebchuk & Kobi Kastiel, *The Perils of Small-Minority Controllers*, 107 GEO. L. J. 1453, 1459 (2019) (identifying inefficiency when corporate controllers can exercise substantially greater voting power than their economic interest).
[73] *See* Hu & Black *supra* note 54, at 816–817.
[74] *See* Barry, Hartfield & Kominers, *supra* note 64, at 1115 (modeling the problematic impact of empty voting that is not transparent).
[75] *See* Disclosure of Proxy Voting Policies and Proxy Voting Records by Registered Management Investment Companies, Release No. IC-25922 (Jan. 31, 2003) (adopting the requirement that mutual funds disclose their votes on form N-PX).
[76] *See* Acting Chair Allison Herren Lee, *Every Vote Counts: The Importance of Fund Voting and Disclosure* (Mar. 17, 2021) (https://www.sec.gov/news/speech/lee-every-vote-counts) ("It's hard to see how retail investors can formulate an accurate and reliable picture of how a fund votes on ESG issues when they are forced to parse voluminous forms that often use bespoke shorthand for shareholder proposals.").
[77] *See, e.g., id*. (observing that funds' disclosures on form N-PX "are unwieldy, difficult to understand, and difficult to compare across fund complexes").

Commentators have focused limited attention on empty voting by mutual fund advisors, presumably because, until relatively recently, there were few reasons to suspect that such voting deviated substantially from the interests of fund beneficiaries. To be sure, commentators argued that funds were overly deferential to management, and some suggested that this deference was due to advisor-level conflicts of interest such as a desire to obtain outside business.[78] There was little evidence however, that mutual fund shareholders wanted their funds to be more active.[79] In any event, other investors, including public pension funds, hedge funds and retail investors, increasingly challenged management through the proxy voting process. Over time, mutual funds have increasingly supported those initiatives.[80]

As institutional investors began to engage more actively and to vote their shares more critically of management, they focused on issues that appeared to be related to the issuer's economic value. Hedge fund challenges, for example, involved proposed structural or operational challenges that were billed as increasing or unlocking firm value.[81] Institutions challenged executive compensation, defending their votes as an effort to reduce managerial agency costs.[82] In this context, any potential agency problem between the mutual fund advisor and its beneficiaries did not appear significant – engagement that promoted firm economic value automatically redounded to the benefit of the fund's beneficiaries.

It is worth noting that, as mutual funds have increased their engagement, they have focused largely on governance reforms such as proxy access, annual election of directors and majority voting, say on pay – all reforms that increase shareholder empowerment. As Bernie Sharfman has noted, the shareholders that were empowered by these reforms, which issuers broadly adopted in response to institutional pressure, were not retail investors, but these same institutions.[83] Institutions could then wield their power over board composition and executive pay to pressure corporate managers to adopt the policies favored by those institutions. Fund managers could use their voting power to discipline Fortune 500 CEOs who did not take their calls and pay attention to their letters. The result was to give large asset management firms a

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[78] *See, e.g.,* Paul G. Mahoney & Julia D. Mahoney, *The New Separation of Ownership and Control: Institutional Investors and ESG*, 2021 COLUM. BUS L. REV. (forthcoming Aug. 2021) (manuscript at 14) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3809914) ("critics observe that fund managers may choose to vote with corporate management so as not to damage other business relationships with the company"); Sean J. Griffith & Dorothy S. Lund, *Conflicted Mutual Fund Voting in Corporate Law*, 99 B.U.L. REV. 1151, 1157 (2019) (terming this type of conflict "Corporate Client Conflict").

[79] Indeed, it is not clear that retail fund investors even have opinions on how their shares should be voted. That retail shareholders might be rationally apathetic or prefer to delegate these decisions to expert fund managers is one rationale for preferring some system by which investors can communicate their voting preferences, if they have any, rather than providing them with the opportunity to vote their shares directly. *See infra* Part IV.

[80] Lisa M. Fairfax, *From Apathy to Activism: The Emergence, Impact, and Future of Shareholder Activism as the New Corporate Governance Norm*, 99 B.U. L. REV. 1301, 1305 (2019) (describing the shift from apathy to activism as "a radical departure from the traditional corporate governance norm").

[81] *See* Gilson & Gordon, *supra* note 34.

[82] *See, e.g.,* Jay C. Hartzell & Laura T. Starks, *Institutional Investors and Executive Compensation*, 58 J. FIN. 2351, 2352 (2003).

[83] *See* Sharfman, *supra* note 17 (distinguishing between shareholder empowerment objective, which is beneficial to asset managers, and wealth maximization for fund shareholders).

voice in setting corporate policy.[84] It also created the potential for misuse, such as the concern that institutions would encourage their portfolio companies to engage in anticompetitive behavior.[85] Jeff Schwartz has identified an alternative selfish motivation, arguing that mutual funds engage in stewardship in "an attempt to mollify the public and regulators" and to forestall efforts to limit their power or ownership concentration.[86]

The increased focus of institutional investor stewardship on ESG initiatives is different both because the connection of these initiatives to firm-specific economic value is unclear and because ESG issues raise a greater potential for asset managers to act for nonfinancial reasons, such as pursuing a favored social or political objective. Concededly, most institutional investors argue that their goal in pursuing board diversity or carbon neutrality is to increase the financial value of their funds.[87] ESG covers a broad range of issues, however, and, to date, the evidence linking those issues to economic value is mixed.[88] Although a number of studies report that firms rated highly on ESG outperform their peers,[89] there are a variety of empirical limitations to establishing a causal relationship with ESG and economic performance. Indeed, for a variety of reasons, the impact of an ESG initiative on a single firm's economic value may be largely

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[84] *See* Caleb N. Griffin, *Estimating the Influence of the Big Three on Shareholder Proposals*, 73 SMU L. REV. 409, 415–16 (2020) (explaining that the stewardship teams of the Big Three can wield this influence by setting priorities, engaging with management and proxy voting).

[85] The literature regarding such potential anticompetitive behavior was sparked by two empirical papers: José Azar, Martin C. Schmalz & Isabel Tecu, *Anticompetitive Effects of Common Ownership*, 73 J. FIN. 1513, 1518 (2018) (analyzing the airline industry) and José Azar, Sahil Raina & Martin C. Schmalz, *Ultimate Ownership and Bank Competition* (May 4, 2019) (unpublished manuscript), https://ssrn.com/abstract=2710252 (analyzing the banking industry). The subsequent academic debate over whether the claims are true and, if so, actionable violations of antitrust law, is extensive. *See, e.g.,* C. Scott Hemphill & Marcel Kahan, *The Strategies of Anticompetitive Common Ownership*, 129 YALE L. J. 1392, 1410–1414 (2020) (discussing some of the academic literature).

[86] Schwartz, *supra* note 44.

[87] *See, e.g.*, Letter from Cyrus Taraporevala, President & CEO, State St. Glob. Advisors, to Bd. Member, State St. Glob. Advisors (Jan. 28, 2020) (on file with https://www.ssga.com/us/en/institutional/ic/insights/informing-betterdecisions-with-esg) ("We believe that addressing material ESG issues is good business practice and essential to a company's long-term financial performance – a matter of value, not values.") (emphasis omitted).

[88] *See, e.g.*, Jesse M. Fried, *Will Nasdaq's Diversity Rules Harm Investors?* (Harv. Univ. and ECGI, Working Paper No. 579, 2021) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3812642 (arguing that "studies actually provide little support for the claim that gender or ethnic diversity in the boardroom increases shareholder value"); David Blitz & Laurens Swinkels, *Does Excluding Sin Stocks Cost Performance?* (June 25, 2021) https://ssrn.com/abstract=3839065) (reporting evidence that excluding sin stocks can lead to underperformance); *but see* Richard W. Painter, Painter, *Board Diversity: A Response to Professor Fried* (April 11, 2021), https://ssrn.com/abstract=3824245) (challenging Fried's analysis).

[89] *See, e.g.,* Michael Katz, *Increasing Body of Evidence Bolsters Case for ESG Investing*, CHIEF INV. OFFICER (Sept. 8, 2020), https://www.ai-cio.com/news/increasing-body-evidence-bolsters-case-esg-investing/ (reporting on study finding that "the companies that improved on material ESG issues 'significantly outperformed' their competitors"); Tensie Whelan, Ulrich Atz, Tracy Van Holt & Casey Clark, *ESG and Financial Performance: Uncovering the Relationship by Aggregating Evidence from 1,000 Plus Studies Published between 2015 – 2020*, ROCKEFELLER CAPITAL MANAGEMENT (Feb. 10, 2021), https://www.stern.nyu.edu/sites/default/files/assets/documents/NYU-RAM_ESG-Paper_2021%20Rev_0.pdf (reporting results from a meta-study of over 1000 research papers and finding a positive relationship between ESG and financial performance in 58% of the studies).

unknowable in that it depends on the subsequent behavior of the firm's competitors, customers, and regulators.[90]

Moreover, as Paul and Julia Mahoney observe, it is difficult, for a variety of reasons, to credit institutional investors' claims that they are simply seeking to enhance firm economic value.[91] Indeed, commentators defend institutional stewardship in support of broader objectives. Some commentators argue that mutual funds should engage in a manner that promotes the overall value of their portfolio even at the expense of the economic value of a specific firm, citing the portfolio effects of such engagement[92] or the potential externalities of individual firm behavior.[93] Others defend mutual fund stewardship explicitly addressed to stakeholder or societal interests, arguing that such efforts are necessary to address the failures of the political process to do so.[94]

This broader focus raises a variety of challenges for mutual fund managers. One is competency. It is unclear that asset managers have the skill set to solve complex social problems.[95] Promoting societal objectives involves judgment – by what year should Ford seek to become carbon neutral and, is carbon neutrality enough or should it attempt to become carbon negative?[96] As SEC Commissioner Hester Peirce has explained, something that is good from the perspective of one ESG consideration might be bad from another.[97] An initiative to promote

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[90] *See, e.g.,* Dorothy Lund, *Corporate Finance for Social Good*, 121 COLUM. L. REV. 1617, 1638 (2021) (describing potential secondary effects from a firm's CSR activities).
[91] Among other things, Mahoney and Mahoney observe that an admission that institutions were sacrificing value for values would constitute a breach of fiduciary duty. *See* Mahoney & Mahoney, *supra* note 78 (manuscript at 3). *See also* Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. REV. 381, 385–86 (2020) (arguing that fiduciaries can only consider ESG factors if: "(1) the trustee reasonably concludes that the ESG investment program will benefit the beneficiary directly by improving the risk-adjusted return; and (2) the trustee's exclusive motive for adopting the ESG investment program is to obtain this direct benefit").
[92] *See, e.g.,* Gordon, *supra* note 13.
[93] *See* THE SHAREHOLDER COMMONS INVITES SHAREHOLDERS TO SUBMIT PROPOSALS THAT MOVE BEYOND THE BUSINESS CASE, (2021) at 1, https://theshareholdercommons.com/wp-content/uploads/2020/10/TSC-2021-Shareholder-Proposals-Strategy.pdf (explaining the purpose of its shareholder proposal project as focusing on the external costs of corporate actions); *see also id*. at 7 (stating that "when companies ignore external costs, they increase profits but harm the economy").
[94] *See* Lund, *supra* note 90, at 1632–33 (arguing that a private sector response is necessary because "optimal externality regulation is unlikely").
[95] *See, e.g.,* Davis Soderberg, *Woke CEOs are undermining the democratic process*, WASH. TIMES (July 27, 2021), https://www.washingtontimes.com/news/2021/jul/27/woke-ceos-are-undermining-the-democratic-process/ (criticizing Larry Fink's intention to force issuers to become carbon neutral by 2050 for failure to consider its costs and technical uncertainty); Anna Irrera, Jessica DiNapoli & Imani Moise, *Take a stance or tiptoe away? Corporate America's battle with social activism*, REUTERS (Oct. 27, 2020), https://www.reuters.com/article/usa-companies-activism-analysis/take-a-stance-or-tiptoe-away-corporate-americas-battle-with-social-activism-idUSKBN27C1O3 (identifying the challenges that these expectations impose on corporate issuers).
[96] *See, e.g.,* Brad Smith, *Microsoft will be carbon negative by 2030,* OFFICIAL MICROSOFT BLOG (Jan. 16, 2020), https://blogs.microsoft.com/blog/2020/01/16/microsoft-will-be-carbon-negative-by-2030/ (announcing that, by 2050, Microsoft will remove all the carbon from the environment that it has emitted since it was founded in 1975).
[97] Hester Peirce, *Chocolate-Covered Cicadas Remarks Before the Brookings Institute* (July 20, 2021), https://www.sec.gov/news/speech/peirce-chocolate-covered-cicadas-072021?utm_medium=email&utm_source=govdelivery ("people do not share uniform views of what good ESG practices are for issuers or good ESG portfolios are for asset managers").

cleaner energy may sacrifice well-paying jobs.[98] Similarly, a given technology may have both good and bad effects along the same dimension.[99]

Increasingly, investor initiatives are seeking to have issuers reexamine profitable and legal business practices – gun sales, products that promote childhood obesity, and lending to carbon-intensive businesses. In some cases, investors are demanding not merely that issuers reform their internal operations but that they engage in broader political and social debates.[100] Although institutional investors describe these efforts as an essential component of an issuer's risk management and warn that companies face regulatory, political, and economic risk for ignoring ESG issues,[101] companies may also face negative backlash and economic consequences for their ESG initiatives.[102]

A second challenge is accountability. Overcoming political failures through ESG initiatives undermines the regulatory decisions that have been made in accordance with the democratic process.[103] Simply put, people have different views on what constitutes good ESG – both which societal goals a corporation should consider and the weight to be given to those goals. As the recent presidential election demonstrated, the country is deeply divided on issues that include climate change, diversity, and voter rights,[104] and shareholder engagement risks placing mutual funds in the role of unelected and unaccountable political actors.[105]

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[98] *See, e.g.,* Noam Scheiber, *Building Solar Farms May Not Build the Middle Class*, N.Y. TIMES (July 16, 2021), https://www.nytimes.com/2021/07/16/business/economy/green-energy-jobs-economy.html?searchResultPosition=1

[99] Peirce, *supra* note 97 ("a technology, for example, can have both positive and negative climate effects"). *See also* Benoit Faucon, *Clean Energy Faces the Same Problem as Fossil Fuels: Community Protests*, WALL ST. J. (July 12, 2021), https://www.wsj.com/articles/clean-energy-fossil-fuels-protests-11626094401 (citing environmentalist objections to renewable energy projects such as wind farms).

[100] *See, e.g.,* Tammy Joyner, *Investors wade into Georgia voting rights fray*, ATLANTIC CIVIC CIRCLE (Mar. 23, 2021), https://atlantaciviccircle.org/2021/03/23/heavyweight-investors-weigh-into-georgia-voting-rights-fray/ (describing efforts by nineteen investors to persuade business interests to take a stand against legislation to restrict voting rights in Georgia).

[101] *See, e.g.,* Dylan Tokar, *Will Political Polarization Stop Companies From Supporting Social Causes*?, WALL ST. J. (Nov. 20, 2020), https://www.wsj.com/articles/will-political-polarization-stop-companies-from-supporting-social-causes-11605868200 (identifying the reputational risk companies face by failing to engage on social issues).

[102] For example, Unilever is facing backlash and potential regulatory consequences for the decision by its subsidiary Ben & Jerry's to stop selling its product in Israeli-occupied territories. *See* Dov Lieber & Nick Kostov, *Ben & Jerry's Decision to Stop Sales in West Bank Puts Unilever in Tough Spot*, WALL ST. J. (July 20, 2021), https://www.wsj.com/articles/ben-jerrys-decision-to-stop-sales-in-west-bank-puts-unilever-in-tough-spot-11626799596?mod=itp_wsj&mod=djemITP_h. *See also* Eugene Kontorovich, *Ben & Jerry's Israel Boycott Could Cost Unilever*, WALL ST. J. (July 21, 2021), https://www.wsj.com/articles/ben-jerrys-boycott-unilever-israel-palestine-11626895917?mod=itp_wsj&mod=djemITP_h (describing potential legal consequences to Unilever)

[103] *See, e.g.,* Soderberg, *supra* note 95 (arguing that investor-driven ESG initiatives inappropriately bypass democratic lawmaking processes like passing legislation).

[104] *See, e.g.,* Susan Milligan, *A Place in the Political Sun*, U.S. NEWS & WORLD REP. (Sept. 6, 2019), https://www.usnews.com/news/the-report/articles/2019-09-06/climate-change-is-a-big-2020-campaign-issue-but-only-for-democrats. ("While polls show that more Americans believe climate change is a looming disaster, there is a deep ideological and political party divide, with an overwhelming majority of Democrats seeing a dangerous ecological and financial crisis but only a fraction of Republicans agreeing with them.")

[105] *See* Esther Whieldon, *Political divide over mandatory ESG disclosures on display at US House hearing*, S&P GLOBAL MARKET INTELLIGENCE (Feb. 26, 2021), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/political-divide-over-mandatory-esg-disclosures-on-display-at-us-house-hearing-

That asset managers lack public accountability for their social and political initiatives is problematic itself, but the critical feature is that they are supporting these initiatives with other people's money. As Caleb Griffin has observed, money managers make no effort to discern the preferences of their beneficiaries, and their voting patterns are "very unlikely" to match their beneficiaries' preferences.[106] Moreover, Paul Miller explains that pension and mutual fund managers are arguably forcing their customers to be associated with political or social positions that they may not support, particularly when those customers have invested through an employer-sponsored pension or 401(k) plan.[107] It is not the goal of this Article to take a normative position on ESG issues in general or any particular ESG initiative. When a small number of institutional investors have the power to decide the outcome of a substantial proportion of shareholder votes, however, that power should not be exercised through empty voting that need not reflect the preferences of those with skin in the game. [108]

IV. Aligning Engagement and Economic Interest

The potential for empty voting by institutional investors raises serious questions about the legitimacy of corporate voting outcomes, particularly voting outcomes on issues that involve a potential conflict between value and values or a possible conflict among competing ideological principles. The increasing frequency with which these issues are presented in shareholder proposals and their potential expansion to voting on director elections and bylaw amendments, as well as the meaningful impact that substantial voting support on these issues can have on operational decision making, highlights the importance of ensuring that voting outcomes reflect the preferences of those with skin in the game rather than the perspective of unaccountable intermediaries. This Part offers several preliminary approaches to addressing the empty voting problem.

A. Market-Based Responses

One potential response to empty voting by institutional investors is private market mechanisms that would increase the alignment between fund engagement and the interests of fund investors. Two general categories of market-based responses are possible. The first is more transparent market segmentation that would enable fund investors to vote with their feet by

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62899325. (citing testimony from congressional panelist claiming that the ESG movement allows "rich investors and corporations to dictate what should be done on issues of morality and public policy.").

[106] Caleb Griffin, *Environmental & Social Voting at Index Funds*, 44 DEL. J. CORP. L. 167, 211–212 (2021). For further consideration of the extent to which institutional intermediaries vote in ways that differ from the preferences of retail investors see Alon Brav, Matthew D. Cain & Jonathon Zytnick, *Retail Shareholder Participation in the Proxy Process: Monitoring, Engagement, and Voting* (May 25, 2021) (European Corp. Governance Inst., Working Paper No. 637, 2019), at 5, https://ssrn.com/abstract=3387659. (documenting "substantial differences in voting between retail and institutional shareholders); *see also* Jill. E. Fisch, *Standing Voting Instruction: Empowering the Excluded Retail Investor*, 102 MINN. L. REV. 11, 15 (2017) ("there are reasons to believe that retail investor voting preferences differ systemically from those of institutional investors").

[107] *See* Paul S. Miller, *A Right For Retirement: Unconscionable Contracts, The Right (Not) to Associate, and Citizens United*, 71 AM. UNIV. L. REV. (forthcoming 2021), https://ssrn.com/abstract=3709509.

[108] Griffin, *supra* note 106, at 209 ("the Big Three have the power to decide the fate of a substantial proportion of shareholder E&S proposals").

selecting funds that engage in accordance with their preferences. The second is reducing the level of intermediation by affording fund investors greater input into fund voting decisions.

Market segmentation enables investors to select into a fund that meets their preferences as to both the desired level of engagement and the objectives of that engagement. A recent article by Jonathan Zytnick offers data supportive of this approach, finding that, although today most mutual funds do not vote in accordance with investor preferences, the preferences of individual investors in ESG funds are aligned with the funds' voting policies.[109]

Market segmentation requires three elements. First, funds must transparently disclose their engagement policies—meeting with management, proxy voting, sponsoring shareholder proposals—and the scope of issues on which they intend to engage, such as better corporate governance, the environment, or diversity – ideally in a way that is easy to access and understand.[110] Second, funds must disclose sufficient information to enable investors to determine whether funds are behaving consistently with those policies.[111] Third, and perhaps most importantly, investors must have meaningful choice. For market segmentation to work, investors must have the option of selecting funds with whose policies they agree.[112]

Significantly, this Article argues that ESG funds should vote differently from, for example, broad-based index funds.[113] Similarly, a fund that purports to focus on environmental concerns should not vote in sync with a fund that prioritizes diversity. Although it may not be problematic for a specialty sponsor, such as Calvert, to commit all of its funds to environmental responsibility, the shares of products that are billed as operating passively to provide a market rate of return, such as index funds, should not be voted to support initiatives that could reduce the fund's returns. Importantly, fund voting behavior should not be analyzed at the sponsor level, an analysis that mistakenly treats the sponsor as the principal.[114] Significantly, in addition to providing investor choice, specialization is a way of holding fund sponsors accountable, because investors can move their money into funds that behave in accordance with their values.[115]

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[109] Jonathan Zytnick, *Do Mutual Funds Represent Individual Investors?*, N.Y.U. L. & Econ. Research Paper No. 21-04 (Apr. 24, 2021), https://ssrn.com/abstract=3803690.

[110] *See* Griffith, *supra* note 12, at 1041 (suggesting the potential creation of stewardship funds that could market themselves as engaging more actively with management); *but see* Zytnick, *supra* note 109 (warning that the costs of acquiring granular information about different ESG funds may exceed the benefits).

[111] Market intermediaries such as Morningstar could rank funds and report on both their disclosures and their compliance with those disclosures.

[112] Indeed, the very act of selecting a fund in accordance with its fully-disclosed engagement policies can be understood as legitimizing the fund's subsequent engagement.

[113] *See also* Quinn Curtis, Jill Fisch & Adriana Robertson, *Do ESG Mutual Funds Deliver on Their Promises?* MICH. L. REV. (forthcoming 2021) (providing empirical evidence that funds that identify as ESG funds vote differently from other funds).

[114] *See* Fisch, Hamdani & Solomon, *supra* note 26 at 22, 32 (distinguishing between activities of the sponsor and those of the individual mutual fund).

[115] There is evidence that at least some investors do not share the ideological preferences of Larry Fink. New funds are seeking to attract investors with different social and political preferences. *See, e.g.,* Ryan Vlastelica, *This fund invests only in companies that contribute to Trump and Republicans. Its ticker: MAGA*, MARKETWATCH (Sept. 1, 2017, 7:52 AM), https://www.marketwatch.com/story/think-trump-and-the-republicans-can-make-you-money-this-

The second option involves enabling fund beneficiaries to provide input into fund voting decisions. This can be accomplished directly through pass-through voting or indirectly through a system in which a portfolio manager retains voting authority but obtains input from the funds' investors about their voting preferences.[116]

Over the years, various commentators have advocated for pass-through voting by mutual fund investors.[117] Technological innovations currently offer the promise of making pass-through voting easier and less expensive.[118] Nonetheless, pass-through voting raises challenges.[119] In particular, given the relatively low levels of voting by direct retail investors, there are reasons to question the extent to which mutual fund investors, who are likely to be less sophisticated and engaged in individual portfolio companies, will exercise voting rights.[120] At the extreme, the failure of such investors to vote might lead issuers to experience difficulties in meeting quorum requirements unless mutual funds adopted policies for voting the fraction of shares that would otherwise not be voted. In addition, as Caleb Griffin notes, pass-through voting does not offer investors a mechanism for consolidating their voting power.[121] Social media platforms such as reddit might enable retail investors to overcome this problem but have not yet done so.[122]

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new-etf-bets-on-maga-2017-08-31 (describing MAGA ETF which holds companies that are seen as supportive of the Republican Party).

[116] There are indications that the large asset managers are taking steps to permit pass-through voting by their institutional customers, although their efforts have not yet extended to mutual fund shareholders. BlackRock, for example, announced that it would start allowing certain of its institutional clients to cast their own votes rather than having their shares voting by BlackRock's investment stewardship team. See Simon Jessop & Ross Kerber, *BlackRock to give clients more say on holding firms to account*, REUTERS, Oct. 7, 2021, https://www.reuters.com/article/blackrock-agm-letter/blackrock-to-give-clients-more-say-on-holding-firms-to-account-idUSL8N2R32Y7.

[117] *See, e.g.,* Dorothy S. Lund, *The Case Against Passive Shareholder Voting*, 43 J. CORP. L. 493, 530 (2018) (considering pass-through voting, but acknowledging that it would be burdensome for both funds and their investors); Jennifer S. Taub, *Able but not Willing: The Failure of Mutual Fund Advisors to Advocate for Shareholders' Rights*, 34 IOWA J. CORP. L. 843, 889 (2009) (advocating "optional pass-through voting, where Advisers would have to take proxy assignments from retail fund shareholders who wish to vote from time to time on contentious matters at portfolio companies.").

[118] *See* Griffith, *supra* note 12, at 992 (explaining that the "separation of economic returns and voting rights inherent in mutual fund investing likely reflects the underdeveloped infrastructure of shareholder voting".); Sergio Alberto Gramitto Ricci & Christina M. Sautter, Corporate Governance Gaming: The Power of Retail Investors, 22 NEV. L. J. (forthcoming 2021), https://ssrn.com/abstract=3815088 (manuscript at 33) (observing that "blockchain, distributed ledgers, or even virtual reality" can provide retail investors with access to voting at "very affordable costs").

[119] I have previously expressed concern about the desirability of pass-through voting. *See* Jill E. Fisch, *The Uncertain Stewardship Potential of Index Funds*, *in* GLOBAL SHAREHOLDER STEWARDSHIP: COMPLEXITIES, CHALLENGES AND POSSIBILITIES (Dionysia Katelouzou & Dan W. Puchniak eds., Cambridge Univ. Press forthcoming 2021).

[120] *See, e.g.,* Griffith, *supra* note 12, at 995 (noting low levels of voting by retail investors); *see also* Broadridge & PricewaterhouseCoopers, 2015 Proxy Season Preview 3 (1st ed. 2015), http://media.broadridge.com/documents/Broadridge-PwC-ProxyPulse-1st-Edition-2015.pdf (reporting that retail investors vote only 29% of their shares, while institutional investors vote 90%).

[121] Caleb Griffin, *We Three Kings: Disintermediating Voting at the Index Fund Giants*, 79 MD. L. REV. 954, 983 (2020).

[122] *See* Ricci & Sautter, *supra* note 118 (manuscript at 33) (explaining that "online communication venues . . . decrease the costs of collective action").

The other option is to offer fund investors the opportunity to communicate their preferences to fund managers. Rather than voting their proportional interest in the portfolio companies directly, investors would advise fund managers as to their views, giving fund managers a basis for determining investors preferences that could be factored into the fund's voting decision, but that need not be controlling. The advantage of a preference system is that it would enable the fund manager to consider the number of investors who had weighed in, the degree of disparity among their views, and the extent to which the manager had superior information with respect to a given issue. In addition, communication would enable fund managers to use their expertise to formulate voting policies, an outcome that unsophisticated or rationally apathetic fund investors might prefer. The disadvantage of allowing fund managers to retain voting power is that managers would retain the discretion to vote and, as noted above, they might not be motivated to weigh investor preferences appropriately. It would be difficult both to enable managers to retain a degree of discretion and, at the same time, hold them accountable for failing to adhere to the views articulated by fund investors, especially if many investors do not participate in the process.

In considering these possibilities, a critic might reasonably question why, if market-based approaches are feasible, existing institutional intermediaries are not already offering them. The answer to that is twofold. First, it is likely that potential market developments to facilitate pass-through voting or preference registration are in transition. The market is still evaluating the potential impact of new technologies like blockchain on proxy voting. Companies like Say are developing platforms to enable retail investors to communicate their views to issuers, and analogous approaches could be used for mutual fund investors.[123] Finally, although the potential of social media to facilitate collective action and retail investor communication is substantial, it is largely untapped, and social media engagement currently raises other concerns about investor vulnerability and the potential for manipulation.[124]

Second, the extent to which asset managers are motivated voluntarily to adopt market-based reforms that would reduce empty voting is unclear. It is likely that executives at some of the largest institutional investors personally value the attention and clout that they obtain by wielding the voting power of the assets they manage. The leaders of the large public pension funds obtained considerable attention and influence by engaging with their portfolio companies, sponsoring shareholder proposals, and exercising their voting power.[125] More recently, several mutual fund leaders, most prominently Larry Fink at BlackRock, have received widespread attention for focusing their fund engagement on high-profile societal and political issues. This

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[123] *See* SAY, https://www.saytechnologies.com/investor (last visited Sep. 5, 2021).
[124] Ricci & Sautter, *supra* note 118 (manuscript at 35) (describing "engaging with corporate governance" as "the next logical step for retail investors").
[125] *See generally* Stephen Choi & Jill E. Fisch, *On Beyond CalPERS: Survey Evidence on the Developing Role of Public Pension Funds in Corporate Governance,* 61 VAND. L. REV. 315 (2008) (reporting survey evidence on engagement by public pension funds in corporate governance).

attention likely contributed to the role that Fink and BlackRock played in consulting with top U.S. government officials about the market's response to the pandemic.[126]

The power enjoyed by asset managers that is provided by the heft associated with the substantial holdings of the funds they manage may present an obstacle to market-based reform. It is unsurprising that mutual fund managers have not rushed to provide their beneficiaries with pass-through voting, as such voting would both deprive the managers of influence and prevent the funds from speaking with a single voice. Today many mutual fund managers are receiving public praise for their efforts to encourage their portfolio companies to engage in more socially responsible behavior, and whether or not their beneficiaries support those positions, vesting the power to make decisions in the hands of beneficiaries tempers the ability of the fund managers and sponsors to take credit.

B. Regulatory Responses

To the extent market responses are inadequate, the alternative is regulatory reform. Regulators could address the potential for empty voting by limiting the extent to which intermediaries can exercise voting power, by limiting the scope of issues on which intermediaries can vote, or by requiring intermediaries to provide mechanisms by which the economic owners of stock can influence the voting behavior of their agents.

A few scholars have suggested that, in appropriate cases, intermediaries should be prohibited from voting their shares. Perhaps best known is the proposal by Professor Dorothy Lund that "would restrict passive funds from voting their shares."[127] Professor Lund's proposal is not premised on the potential that asset managers' voting preferences will differ from those of their customers, but rather that asset managers, particularly those who manage passive funds, will rationally be uninformed and are therefore poorly positioned to influence corporate decisions.[128] Caleb Griffin offers a more modest proposal – that the votes of institutional investors be capped.[129] Such an approach would limit institutional power but, as Griffin observes, shift that power to other investors, raising the difficult question of whether such investors would be better positioned to exercise it.[130] Professor Sean Griffith argues that regulation should impose a default rule prohibiting mutual funds from voting against management on issues where they do not possess an informational advantage.[131] Professor Griffith explicitly argues that mutual funds should defer to management on environmental and

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[126] *See, e.g.,* Jeanna Smialek, *Top U.S. Officials Consulted With BlackRock as Markets Melted Down*, N.Y. TIMES (June 24, 2021), https://www.nytimes.com/2021/06/24/business/economy/fed-blackrock-pandemic-crisis.html (reporting, in response to the market meltdown "how intertwined BlackRock has become with the federal government").
[127] Lund, *supra* note 117, at 528.
[128] *Id*. at 529 ("the law would make all parties better off by restricting passive funds from casting uninformed votes").
[129] Griffin, *supra* note 121, at 983.
[130] *Id.*
[131] Griffith, *supra* note 12.

social issues because "[m]anagement has superior information in determining the effect of ES proposals on shareholder wealth."[132]

A more moderate reform would involve scaling down the existing regulations that force or pressure institutional investors to vote the shares of their portfolio companies.[133] As noted above, the SEC implemented rules requiring mutual funds both to vote their shares and to disclose their votes and voting policies.[134] Similarly, the Department of Labor determined that proxy voting was part of a pension fund's fiduciary duty.[135] Yet the obligation to vote on issues in which the relationship between value and values is unclear, or on which a fund's beneficiaries may have different or even directly conflicting views, is far from clear.[136] Arguably voting on ESG shareholder proposals should be optional for institutional investors, and a fund should be permitted, consistent with its fiduciary duties, to abstain from voting on the basis that it lacks sufficient information about the potential impact – economic or otherwise of the proposal or it cannot formulate a voting policy that accurately reflects the interests of its beneficiaries.[137] The Department of Labor's 2020 rule on fiduciary obligations under the Employee Retirement Income Security Act of 1974 ("ERISA") with respect to proxy voting could be understood as a partial implementation of this approach through its requirement that fiduciaries engage in proxy voting solely in the economic interest of the plan and its explicit recognition that plans need not vote every proxy.[138] Another option would require institutional investors to engage in mirror voting in which they voted their shares in the same proportion as direct retail investors. This approach would be premised on the expectation that retail investor voting preferences are a reasonable approximation of the views of retail investors in pension or mutual funds.

Alternatively, the extent to which intermediaries can vote on the type of ESG issues that present a potential conflict of interest could be reduced by modifying the scope of the SEC's shareholder proposal rule. Most shareholder votes on ESG issues occur through the shareholder proposal process which is, as one commentator observes, a "regulatory creation."[139] The shareholder proposal rule was adopted in 1942.[140] At the time, it was not inevitable that the rule would allow shareholder-initiated proposals on a broad range of social policy issues. For

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[132] *Id.* at 1030.
[133] *Id.* at 1045 (explaining that "[l]aw and regulation push mutual funds to vote").
[134] *See supra* note 24 and accompanying text.
[135] *See supra* note 24.
[136] Griffith, *supra* note 12, at 1045. ("A fund fiduciary does not advance its investors' interests by voting when they would prefer that it not.").
[137] Such an approach raises the possibility that institutions would employ this rationale frequently to avoid the effort of exercising an informed vote, thereby undermining the increased management accountability that has resulted from the SEC and Department of Labor initiatives to encourage voting.
[138] Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, 85 Fed. Reg. 81658 (Dec. 16, 2020). The impact of this rule is unclear as the Biden administration subsequently announced its intention not to enforce the rule. *See* Lee Barney, *DOL Says It Won't Enforce Final Rules on ESG and Proxy Voting*, Compliance, PLAN ADVISOR (Mar. 10, 2021), https://www.planadviser.com/dol-says-wont-enforce-final-rules-esg-proxy-voting/.
[139] Griffith, *supra* note 12, at 1027 (observing that "ES issues typically arise not as contests, but as 'shareholder proposals'").
[140] Jill E. Fisch, *The Transamerica Case*, in THE ICONIC CASES IN CORPORATE LAW 46, 49 (Jonathan R. Macey ed., 2008) (recounting the history of the shareholder proposal rule).

example, in 1945, the SEC Division of Corporate Finance concluded that general political, social, and economic matters were not "proper subjects for action by security holders."[141]

The SEC's position evolved over time, in part in response to potential legislation that would have overruled SEC restrictions on social policy proposals.[142] In 1972, the SEC amended Rule 14a-8 to provide that social policy proposals could be excluded only if they were not "significantly related to the business of the issuer or [] not within its control."[143] Although Rule 14a-8 allows corporations to exclude proposals that relate to a company's ordinary business operations, courts and the SEC have interpreted the exclusion narrowly to allow social policy proposals that "transcend[] the day-to-day business matters and raises policy issues so significant that [they] would be appropriate for a shareholder vote…"[144]

Notably, however, these developments predate the recent high level of engagement on social policy matters by institutional intermediaries with substantial voting power.[145] As the SEC recently observed in adopting amendments to Rule 14a-8, changes in share ownership, technology, and the markets may warrant reconsideration of the type of shareholder proposals that should be permitted under the rule.[146]

Regulatory intervention is a serious response to empty voting. Evaluating the extent to which it is warranted, and the costs associated with such intervention is beyond the scope of this Article. The prospect of regulation, however, may be a powerful tool in encouraging institutional receptiveness to market-based mechanisms that reduce the extent to which institutional intermediaries can use other people's money to influence corporate decisions.

Conclusion

As shareholders exercise greater power over corporate decisions through their voting and engagement, and as they deploy that power over a broader range of issues, it has become increasingly important to understand who those shareholders are and the motivations for their behavior. Professor Karmel recognized, over a decade ago, that the role of institutional investors presents distinctive concerns because institutions may not fairly represent the views of their fellow shareholders. Intermediation raises an additional complexity in that those who act on

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[141] Baldwin B. Bane, Exchange Act Release No. 34-3638 (Jan. 3, 1945).
[142] Fisch, *supra* note 140, at 57.
[143] Solicitations of Proxies, Exchange Act Release No. 34-9784, 37 Fed. Reg. 23, 178–79 (Oct. 31, 1972). *See* Jill E. Fisch, *From Legitimacy to Logic: Reconstructing Proxy Regulation*, 46 VAND. L. REV. 1129, 1154–55 (1993) (explaining the SEC revisions to the rule).
[144] Trinity Wall St. v. Wal-Mart Stores, Inc., 792 F.3d 323, 345 (3d Cir. 2015), quoting SEC Staff Legal Bulletin No. 14E, 2009 SEC No-Act. LEXIS 825, 2009 WL 4363205, at *2 (Oct. 27, 2009).
[145] *See* Fisch, *supra* note 140, at 57 (describing expanded approach to permissibility of social policy proposals in the 1970s).
[146] *See* Press Release, SEC Adopts Amendments to Modernize Shareholder Proposal Rule (Sept. 23, 2020), https://www.sec.gov/news/press-release/2020-220 (quoting SEC Chair Jay Clayton as explaining "there have been many significant changes in communication methods and technology, as well as the methods investors, particularly retail investors, use to access our markets in the 20 years and 75 years since the initial and resubmission thresholds were last revised.").

behalf of institutions may not fairly represent the views of those whose economic interests they are charged with serving.

The evolving focus of corporate decisionmaking to encompass non-economic considerations adds an additional dimension to the analysis, making it both harder to treat shareholder interests as homogeneous and more difficult to apply guardrails to constrain institutional intermediaries appropriately. In a time of increasing political and social polarization, the case for such guardrails is compelling.

This Article identifies several regulatory and market options that can reduce the potential agency costs associated with empty voting by mutual funds and other institutions. While market solutions may forestall the need for regulatory intervention, they depend critically on the willingness of asset managers to forego some of the influence provided by the substantial assets they manage. Whether they will choose to do so is, at present, uncertain.