Members' Debrief

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By George Dallas

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About the ECGI Members' Debrief

Greetings,

I'm George Dallas and I am a longstanding governance professional and one of the original practitioner members of ECGI since its launch in 2002. ECGI has been useful throughout my professional career in credit ratings at Standard & Poor's, asset management at F&C Investments and as a policy director of the global investor body, the International Corporate Governance Network. Though not an academic, I have authored dozens of professional publications, including two books, and have taught an MSc class in corporate governance at Bayes Business School.

I now divide my professional time between supporting ECGI with its content strategy and working in executive education in governance and stewardship, including at the Cambridge Institute for Sustainability Leadership and as a member of the Advisory Council of the Corporate Governance Institute of the Frankfurt School of Management and Finance. This competes for attention with my membership in a London early music chamber choir and playing the five-string banjo in a local bluegrass band.

ECGI is a cherished part of this mix. Throughout my professional journey, academic research in governance has always been an important resource and source of guidance for me— to keep track with current thinking, to support my conceptual understanding of governance issues and to have a better sense of what we do and do not know about governance empirically. As a practitioner I have found ECGI to serve as a high quality, convenient and efficient filter to focus on the leading governance research that is coming out.

The ECGI Members' Debrief

In February 2024, we introduced a resource exclusively for ECGI members called The ECGI Members' Debrief, this monthly newsletter was created to provide a timely, digestible overview of the latest developments in corporate governance and ECGI content. Each edition brings to your attention the past month's working papers from the ECGI Research Members, an update on key market and regulatory developments, along with a focus on two recent working papers that catch my eye— and which I approach critically as a practitioner discussant.

While the monthly newsletter is a benefit of ECGI membership, we now offer this bi-annual compilation to all of the members of our community. It includes a review of selected research papers that featured in the newsletters, leaving out the monthly round-up of news and events, which are more time-specific. For non-members who enjoy the content of this report, we encourage you to consider ECGI membership (very affordable, great value!) so that you can receive the full report every month, along with the update on key market and regulatory developments.

We hope you enjoy the discussions!

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Best wishes,
George Dallas
Head of Content
Editor of The ECGI Members' Debrief

Human Capital

Paper: **CHRO Compensation and Strategic Human Capital Management**
Authors: **David Larcker** (Stanford Graduate School of Business and ECGI), **Charles McClure** (University of Chicago), **Shawn X. Shi** (University of Washington), **Edward Watts** (Yale School of Management and ECGI)
Finance Working Paper N° 1121/2025 | December 2025

I personally think of companies just as much as a nexus of capitals (financial, intellectual, social, natural, etc) as a nexus of contracts. In this vein, I was pleased to read the finance paper CHRO Compensation and Strategic Human Capital Management by David F. Larcker, Charles McClure, Shawn X. Shi and Edward M. Watts, given its focus on human capital and its management in companies. As the authors point out from the beginning, human capital is a key determinant of productivity in companies, particularly in the so-called ‘knowledge industries’. But, as with other forms of non-financial capital, the effectiveness of human capital management can be tricky to measure in a meaningful way.

The broad arc of the paper’s narrative is positive about the importance of human capital and how effective human capital management can improve company operational outcomes and financial performance. But it is important to understand how this conclusion was reached, particularly about a management process that is less directly observable than measurable financial data. To address this, the authors develop a new company-specific metric: the ratio of Chief Human Resources Officer (CHRO) pay vis-à-vis the CEO’s pay. They employ proprietary survey data on CHRO pay to serve as an indicator of or a proxy for the priority that firms assign to human capital management.

The CHRO pay ratio is an innovative way to develop data points to get a handle on an often-opaque aspect of management. With the paper focusing on the US, the authors note that the prevalence of CHROs — as members of the ‘C-Suite’—has increased dramatically in recent years, yet only 15% of public firms report CHRO compensation in their proxy statements—and even fewer are Named Executive Officers (NEOs), whose pay is required disclosure under SEC requirements. The authors get around these public data limitations by using external data vendors to plug the gaps. In addition to the CHRO pay ratio, the authors also create proxies for overall human capital management by using measures related to employee turnover, workforce composition and employee capital.

From this stew of data and proxy variables the authors conclude that there is a strong association of CHRO pay ratios with improvements in different dimensions of human capital management. Interestingly, this positive outcome is focused on those CHROs receiving the highest relative pay levels; it is not the same for less well paid CHROs. This could reflect the possibility that quality of

CHROs matters, as reflected in his or her pay level. But it could also reflect the broader priority that company management and the board places on human capital management and on the degree of authority granted to the CHRO.

It was interesting, if not initially counterintuitive, to observe that the CHRO ratio was positively linked to higher employee turnover. While one could interpret this as a bad thing, implying poor employee morale, the authors suggest the opposite. They note that workplace sentiment metrics are higher in companies with high CHRO ratios. Staff turnover in this sense is regarded as positive to the extent that poor performance employees are managed out of the company and replaced with higher quality employees in what the authors label 'talent curation' and others might simply call 'hiring and firing.'

The authors are cautious in their analysis, noting that much of it is 'inherently descriptive'. The paper is built from a long logic chain linking differing proxies to various human capital outcomes: e.g., using patent data relating to new hires as a proxy for overall workforce innovation or using new hires recruited from competitors as a proxy for employee quality. There is even a link to positive financial outcomes, linking positive short-term market returns to CHRO appointments involving a high CHRO ratio.

At one level what the authors suggest is not profound, and could possibly be paraphrased as 'you get what you pay for' in human capital management. But that would belie the paper's thoughtful approach and inventiveness. The authors certainly do not suggest that a high CHRO ratio is causally linked to better human capital or financial outcomes. But they are guiding us in that direction.

While there is a clear, if not clever, logic to the use of the CHRO ratios and other specific proxies for human capital management, we can't forget that in building the overall narrative there is a lot of inference going on that leads to the authors' more general conclusions. This reflects the challenge of developing a rigorous framework and data foundation to study human capital management. But it is good to see this attention to human capital, and I hope that governance research will continue to extend beyond financial capital dimensions and embrace the multicapital environment that is a reality for most companies. All in, a relatively short but interesting read on a governance topic that warrants greater attention.

Read the paper: https://www.ecgi.global/publications/working-papers/when-speaking-freely-pays-anti-slapp-laws-and-firms-cost-of-equity

Governance of Externalities

Paper: **Convergence, diversity, and divergence: the two axes of corporate law and governance**
Author: **Jeffrey N. Gordon** (Columbia University, University of Oxford and ECGI)
Law Working Paper N° 891/2025 | January 2026

Both practitioners and academics can struggle with how to most coherently conceptualise corporate governance, particularly with regard to how to consider social, environmental and other sustainability factors in company governance. Law scholar Jeffrey Gordon tackles this big topic in the short and readable paper Convergence, diversity, and divergence: the two axes of corporate law and governance.

The starting point is the issue of global convergence of corporate governance frameworks, which Gordon and fellow scholar Mark Roe had written about in the early 2000s as a way for companies to seek comparative advantage in both global product and capital markets. But times have changed and as we fast forward to 2025, Gordon now chooses to split the issue of convergence along two separate axes. The first axis, which he calls 'internal governance' focuses on the more traditional territory of shareholder value maximisation, where the central concern is controlling managerial and controlling shareholder agency costs. Here he refers to the G20/OECD Principles of Governance, as well as national corporate governance and stewardship codes as examples of global convergence mechanisms.

At the same time the author notes that there remains a wide diversity of governance practices in differing governance codes globally, and that vested interests can constrain the rate and extent of convergence — or result in 'faux convergence'– in which certain governance practices have been 'repurposed for quite different purposes than making the world safer for global stock market investors.' This may be particularly true in jurisdictions such as emerging markets, where the influence of American/European governance standards may not mesh well with local legal and cultural traditions and other path dependencies.

The second axis defined by Gordon is what he calls 'externalities governance', which 'assesses the extent to which corporate law and governance induce the firm to internalize a broad set of social concerns, well beyond efficient production and firm-specific challenges and well beyond parties with plausible contractual claims.' The main thrust of the paper is to flesh out this concept of the externalities governance axis, whose importance has 'exploded' in recent years.

As a term of art, 'externalities governance' doesn't exactly trip off the tongue, so we'll see if it catches on. But the term has a technical appeal in a way that the vague, and increasingly divisive, acronym 'ESG' does not. Even if it is a bit clunky, the focus on externalities—negative impacts—is an important awareness to build in companies and boards. At least to me, it is not about expecting companies to 'do good'. It speaks more to the need for companies to seek to 'do no harm'. And it also employs the logic of double materiality, a concept that is currently championed in the European Union's sustainability-focused approach to corporate governance.

Regarding Europe, the author outlines the comprehensive legislative developments in the EU over the past 10-12 years, culminating in multiple sustainability related directives including most recently the Corporate Sustainability Due Diligence Directive (CSDDD). Combined with the growing consolidation of global sustainability reporting standards through the creation of the International Sustainability Standards Board, the EU has laid out the groundwork for establishing a sustainability focused approach to corporate governance, with the ambition of leading global convergence on this model. This has often been called the 'Brussels Effect'.

In the film Field of Dreams, the mystical mantra was 'if you build it, they will come.' And they did. Back in the world of reality, however, sometimes they don't. As Gordon notes, it is not clear that other global economies, the US in particular, will follow the lead of Brussels to adapt to what the author labels as externalities governance. Indeed, in the Trump era the concept is likely to be summarily dismissed or distorted by many in the US as something socialistic or 'unamerican'. But the author goes beyond simple populist politics and identifies deeper path dependencies that place the US on a different track than Europe. This includes the fact that the US is a fossil fuel-rich nation and Europe is not. Also, individual equity ownership is significantly more prevalent in the US, which may also help explain why the social impact of companies may have greater priority for European citizens than does shareholder value.

Gordon concludes his paper leaving us at loggerheads, with the Brussels and ('retrograde') Washington effects fighting in opposite corners for hearts and minds. This dialectic tension has existed before and will probably always continue to do so, at least if human nature has anything to do with it.

This is an interesting and thoughtful paper that seeks to flesh out a new dimension or axis of corporate governance as a way to incorporate more robustly externalities and sustainability considerations. But as the author notes, building traction on externalities governance, even if it may be a good idea, is likely to remain volatile given its dependence on a 'time-varying socio-political consensus'.

Read the paper: https://www.ecgi.global/publications/working-papers/does-share-repurchase-legalization-really-harm-corporate-investments

Bank governance

Paper: **Bank Governance: Lessons Still Not Learned**

Authors: **Marco Becht** (Université libre de Bruxelles, CEPR and ECGI), **Patrick Bolton** (Imperial College London, CEPR, NBER and ECGI), **Ailsa Roell** (Imperial College London, CEPR and ECGI)

Law Working Paper N° 893/2026 | January 2026

I start with two quotations from this paper:

1. ‘Banks are not ordinary corporations.’
2. ‘The optimal probability of failure of a systemically important bank is zero.’

Banks are indeed different and complex beasts. Whether or not an investor has a direct exposure to individual banks, all investors, if not all citizens, are exposed to the stability—or instability—of the banking system. But bank governance and regulation can be arcane to many, and in recent years other systemic risks such as climate change have possibly upstaged financial system stability in terms of urgency or attention. But we forget financial stability at our peril, and I was therefore pleased to read the paper Bank Governance: Lessons Still Not Learned by finance scholars Marco Becht, Patrick Bolton and Ailsa Roell. I was even more pleased to see the authors’ focus on bank creditors and the potential role that a stronger creditor focus might play in bank governance.

The paper reviews the bank reforms put in place since the 2008 Financial Crisis that sought to introduce governance practices aimed at addressing root causes of the crisis. But ongoing recent failures such as Credit Suisse and Silicon Valley Bank show that banking sector risk lives on, notwithstanding prior reform efforts in many jurisdictions worldwide. In assessing the regulatory response to the Financial Crisis, the authors draw the conclusion that regulators missed the mark in their reform efforts. They argue that governance related reforms placed undue emphasis on the agency cost of equity and had the effect of strengthening shareholder control to the potential disadvantage of a bank’s depositors, creditors and ultimately society at large. The authors label this as ‘risk shifting’.

Expressing this economically, with reference to the Jensen/Meckling focus on agency costs, the authors’ ‘central thesis is that the primary governance issue in banks is the agency cost of debt—the conflict of interest between creditors and shareholders—rather than the agency cost arising from conflicts between shareholders and management.’ In the case of banks, which can be leveraged at 10 to 1, or higher, the economic impact of bank failure on creditors dwarfs that of shareholders, not to mention the ultimate backstop of the state/taxpayer, at least for systemically important banks. Given the limited liability of banks as corporate structures, the authors identify the risks of banks ‘gambling for resurrection’ and leaving creditors and society to pick up the pieces when things go bad.

So notwithstanding traditional ownership rights that come with equity shares, I think that the authors make a good point when they suggest that the tail may be wagging the dog when it comes to bank governance. They characterise post Financial Crisis reforms on bank governance as propagating a shareholder-biased solution, notably through incentive structures, say on pay votes and other mechanisms such as shareholder engagement. The authors contend that these measures had the effect of amplifying, not reducing, bank risk.

As a solution the authors propose redesigning governance structures to put creditor interests into greater balance. They call this ‘prophylactic governance’ (a term of art I’m not sure will catch on…), involving mechanisms such as remuneration incentives, capital structure reform and board composition. I’m a bit dubious about their two-tier equity idea, as I cannot imagine many, if any, institutional investors wishing to become an ‘inside’ holder. But I think they make a good point in suggesting that bank pay incentives should have a greater bias towards creditor protection over risk taking. Back in 2011 when I was in asset management, I remember arguing with my fund manager colleagues that return on equity is a bad metric to guide bank incentives and that bonuses should be either contingent upon or tied to a bank’s credit quality. Sadly, these efforts did not seem to influence market practice, at least not yet. But I’m gratified to see the authors drawing similar conclusions all these years later.

The most intriguing proposal behind this ‘prophylactic governance’ model relates to their premise that ‘governance powers should be allocated to those who bear the costs of bank failure—creditors, deposit insurers, and ultimately taxpayers, rather than concentrated in the hands of shareholders who benefit from risk-shifting.’ And as a practical solution to this premise, the authors specifically identify deposit insurers as creditor representatives to nominate or appoint directors. This is a very interesting idea that calls for attention but also raises immediate questions of practicability or the possibility of creating a quasi-regulatory monster with its own unintended consequences. Proposing effective practical solutions can still be a challenge even with a well-diagnosed problem, and some of the specifics proposed by the authors are certainly serious but also warrant constructive scrutiny.

In reading the paper I was reflecting on how the issue of corporate purpose in banks could possibly be more linked into the discussion. Preventing bank failure should certainly be an outcome, but is that a purpose? How should banks articulate their purpose in view of this rebalancing between shareholder value and creditor protection? The answer might be found in the systemic concerns that motivated this paper. Whether they like it or not, banks have features that should, at least in principle, have similarities with benefit corporations. Transforming banks into benefit corporations is not a practical suggestion (and the authors do not suggest this). But a rearticulation of a bank’s purpose, reflecting some form of double bottom line commitment to social/systemic responsibility as well as financial goals, could possibly provide a more substantive foundation for the refocusing of bank governance proposed by the authors.

As a former credit rater myself I am very sympathetic to the call for banks to be governed more from a creditor than shareholder perspective. Overall, I think the authors do us a service by redirecting our attention to bank governance and its systemic implications, and they present serious suggestions in terms of how to address this. This is an interesting and readable account that takes us through the recent scholarship on post-crisis financial regulation, providing both a useful regulatory timeline and detailed analysis of Credit Suisse as a case study.

Read the paper: https://www.ecgi.global/publications/working-papers/bank-governance-lessons-still-not-learned

Diversity, Equity and Inclusion

Paper: **The Miscalculation of Corporate DEI Risk**
Author: **Lisa M. Fairfax** (University of Pennsylvania and ECGI), **Veronica Root Martinez** (Duke University and ECGI)
Law Working Paper N° 896/2026 | January 2026

Not all that long ago corporate diversity, equity and inclusion (DEI) programmes were gathering momentum and visibility in the US, riding the stakeholder capitalism wave together with fellow acronym ESG. But waves ultimately crash, and DEI and ESG are now on the back foot in the US, particularly given the new administration that came into office in 2025. In their paper The Miscalculation of Corporate DEI Risk, authors Lisa M. Fairfax and Veronica Root Martinez explore the political risks to US companies that come with maintaining DEI programmes. They also examine the operational, reputational and financial risks for companies that choose to retrench upon their prior DEI commitments. A possible case of damned if you do, damned if you don't.

The warm glow of stakeholder capitalism in the US— as reflected in the famous Business Roundtable letter of 2019, and possibly culminating in Nasdaq's board diversity disclosure rule— seems to have gone cold. By 2023, as the 'ESG backlash' was beginning to kick in, Elon Musk proclaimed that 'DEI must DIE'. The Trump administration brought with it strong government pressures for companies to dilute or abandon so-called 'woke activities', including DEI, which was targeted in the Project 2025 manifesto. Indeed, on the first day of his second term in office Trump signed an executive order against DEI, calling it discriminatory and wasteful.

The authors note that DEI programmes are not inherently illegal, but they describe the legal landscape as 'murky'. Reflecting an Orwellian logic, the purpose of DEI has been twisted by its detractors as being discriminatory, by virtue of giving opportunity to historically disadvantaged minorities. If nothing else, this creates uncertainty for companies. Direct in the crosshairs are companies whose business model relies on US government contracts. But the risk of legal sanction remains for all US companies.

So how should boards respond? The authors describe a spectrum of corporate response, ranging from full DEI retrenchment to staying the course. As they explain, each course of action has its own incumbent risks. For companies that never bought into DEI in the first place, retrenchment is an easy option. But other companies that see clear value (or enterprise risk) in DEI are being put in a tight spot. The temptation for many is most likely to lay low and stay beneath the radar.

But for large companies this is not always possible.

The authors provide the example of the retailer Target, which rapidly dismantled its DEI commitments (they label this ‘capitulation’) only to experience other, arguably longer-term risks of ‘reputational backlash, consumer boycotts, workforce disruption and significant market-value loss’. This is contrasted with fellow US retailer Costco that stuck to its DEI guns, emphasising that its focus is to ensure its DEI activities fully comply with the law relating to illegal discrimination.

To navigate between this rock and a hard place, the authors approach this problem through the lens of fiduciary duty, identifying the pressures of short-term ‘political salience’ pitted against the board’s fiduciary duty to consider material DEI factors in risk oversight and board reporting. Notwithstanding the current political zeitgeist, the authors observe that boards do not have the luxury of simply ignoring DEI in their oversight. They outline in some detail the business risks that make DEI relevant to a company’s operational and financial performance— including how this affects stakeholders such as the workforce, consumers and investors. Moreover, as we see from the Target case, backing away from DEI commitments, even to avoid near term political sanction, is also an enterprise risk.

Framed this way, the authors suggest that the way to approach DEI is as a material risk factor that warrants board oversight as a dimension of enterprise risk management —not as a social or corporate responsibility initiative. They conclude by encouraging boards to engage in a ‘fulsome’ DEI risk assessments to clinically address relevant risks relating to legal, regulatory, reputational, consumer, workforce and other operational factors. Boards cannot simply choose to be myopic by dismissing DEI risks. But by focusing on the enterprise risk, the authors effectively conclude that DEI must be shown to add value in a shareholder primacy culture such as the US.

I am sympathetic with the authors’ arguments, and share the belief that DEI is a critical dimension of human capital management that warrants effective board oversight in most, if not all, companies. It is not something boards can opt out of, even if current political pressures might encourage them to do so. There is also a clear ethical argument for DEI, but the authors are sensibly more tasked with making the more secular business case— rather than running into normative, and inevitably polarised, arguments about whether DEI is intrinsically ‘good or bad’.

For two live examples of how DEI risk is playing out in practice in the US, see the Market and Policy Developments section below.

Read the paper: https://www.ecgi.global/publications/working-papers/the-miscalculation-of-corporate-dei-risk

Investor democracy

Paper: **Investor Democracy**

Authors: **Rob Bauer** (Maastricht University, ECCE and ECGI), **Emmeline Cooper** (Cranfield University), **Bram van der Kroft** (Massachusetts Institute of Technology), **Paul Smeets** (University of Amsterdam)

Finance Working Paper N° 1125/2026| February 2026

Investor democracy sounds appealing in theory, but it is not easy to make it work well in practice, especially for pension funds with large numbers of diverse shareholders. In particular, it is a challenge for pension fund managers to understand beneficiaries' preferences when it comes to tradeoffs between financial returns to shareholders and the social impact of investee companies. In their paper, Investor Democracy, Rob Bauer, Emmeline Cooper, Bram van der Kroft and Paul Smeets tackle this subject and use a live case study of how a Dutch pension fund has applied techniques of deliberative democracy to address what they call the 'democratic deficit'. Might this be a way forward?

Specifically, the authors partnered with Pensioenfonds Detailhandel (PD), a large Dutch occupational public pension fund, whose beneficiaries are current and former employees in the Dutch retail sector. And it is relevant to the paper that the level of financial literacy of PD's beneficiaries is not high, reflecting the challenge of gauging meaningful beneficiary sentiment on investment preferences and tradeoffs. But in what turns out to be a social experiment effectively using 'live ammunition' (e.g., PS's own investment policies), the authors employ a multi-stage technique including what they call a 'deliberative mini-public with a binding maxi-public vote'. With roots dating back to ancient Greece and more recent applications in Ireland (abortion policy) and in climate negotiations at Glasgow's COP26 the authors apply political theory to shareholder democracy.

For purposes of this paper, a mini-public is an exercise in providing expert training to a random subset of PD's beneficiary members. This involved a three-day seminar on the Dutch pension system, investment management and sustainable investment, delivered by 'independent deliberative democracy specialists' (more on that later). Among other things this training taught that there are potential tradeoffs between investor returns and social impact—and that funds with an emphasis on sustainability factors run the risk of underperforming relative to funds without a sustainability focus.

The effectiveness of this mini-public was reflected by the participants' own self-assessments in terms of their knowledge of investment-related issues. As part of this learning process the authors observe how a better understanding of sustainable investment shifted participants' preferences from a 'deontological' (e.g., moral) perspective to a 'consequentialist' perspective which focuses more on practical societal outcomes. In a philosophical context this pits Kantian idealism against the utilitarianism of Bentham and JS Mill. But more basically, it demonstrates how a bit of knowledge can change thinking—in this case how to consider sustainability in the context of investment. Without going into detail on the authors' conclusions, a noteworthy finding was that informed beneficiaries expressed a preference for expanding sustainable investing; moreover, impact investing was identified as the most attractive way to go about this. The authors present this in the form of a utility function to formalize the relationship between sustainable investment decisions, return expectations, impact beliefs, and sustainable investment preferences.

The next stage to the process is the 'maxi-public'—a process of leveraging the learning of the mini-public participants to inform the entirety of PD's beneficiary base. This form of peer education and input did seem to prove effective, and, to make it interesting, PD allowed for a binding vote of all beneficiaries to address whether PD should increase its overall portfolio allocation to impact investing—with all participants taking note of the potential tradeoffs between investment returns and social impact. To make a long story short, the authors report that overall, the share of participants supporting sustainable investing increased from 23.8% to 62.8% in this process and that the result of the binding vote on impact investing was for PD to increase (modestly) its capital allocation to impact investments.

The authors ultimately propose the 'mini-maxi-public' approach as a new tool to help crack investor rational apathy and elicit preferences that legitimise and democratise a pension fund's investment policies. The PD case is presented as a positive example of how techniques of deliberative democracy can be applied in pension fund management to better reflect beneficiary preferences on complex questions such as the balance between investment returns and social impact.

This is a very interesting, and possibly compelling, case for deliberative democracy. Yet it is not clear to me how replicable/scalable this approach might be as a standard practice by pension funds, at least at the level of detail and rigor (and cost) as presented in the authors' paper. Is there a Mini-Maxi-Public Lite? While this focus on deliberative democracy is intriguing, perhaps most fundamentally this paper seems to underscore the social value and importance of building greater financial literacy amongst pension fund beneficiaries. The mini-maxi-mini approach does warrant consideration, but would seem to be but one of several possible ways to go about this.

A final point relating to nationality and culture—and the role of the 'independent deliberative democracy specialists' who would engage the fund's beneficiaries in a mini-public exercise on the costs and benefits of differing investment practices, including sustainable investing. I somehow suspect that a Dutch based 'specialist' might present sustainability rather differently than, say, a similar 'specialist' advising pension funds in Texas. So I am not sure how this Dutch example would play out in other jurisdictions. It could be a case of be careful what you wish for.

I have not given full justice in this short review to the careful detail that lies behind the paper's analysis and conclusions. With appendices the paper is an intimidating 122 pages, but the core text is a very readable 35 pages.

Read the paper: https://www.ecgi.global/publications/working-papers/investor-democracy

Shareholder rights

Paper: **Corporate Disenfranchisement**
Author: **Sergio Alberto Gramitto Ricci** (Hofstra University), **Christina M. Sautter** (Southern Methodist University)
Law Working Paper N° 902/2026 | February 2026

I start with two quotes from the paper:

- 'You are led to believe that you matter. This is the hallmark deception of American corporate governance.'
- 'Believing that formal rights deliver actual power is a species of false hope. The alternative to false hope is not despair. It is clear sight.'

Continuing on the theme of investor democracy—or the lack thereof—authors Sergio Alberto Gramitto Ricci, and Christina M. Sautter employ in their paper Corporate Disenfranchisement a literary metaphor to examine the current wave of shareholder marginalisation in the US against a broader historical arc of elites always seeming to find a way to game the system.

The literary reference is to The Leopard, a novel based on an aristocratic family in Sicily during the late 19th century, struggling to maintain its influence during the Risorgimento—the revolution and subsequent unification of Italian states under Garibaldi—which marked a period of decline for Italy's aristocracy. The novel is noted for the quote spoken by its aristocratic protagonist: 'If we want things to stay as they are, things will have to change'. In practical terms this meant that to maintain power and privilege the aristocrats needed to at least superficially embrace the political change. The authors use this as a jumping off point to the world of corporate governance to develop their thesis that corporations (focusing on the US) also present a superficial public embrace of shareholder rights, even while taking steps to disenfranchise the shareholder voice in practice.

The authors frame this as a debate/power struggle between director primacy and shareholder primacy, with directors (elites) winning in part because the game is rigged in their favour. Focusing on the new US political regime in 2025, the authors consider how shareholders have found themselves to be on the back foot of this power struggle. They face pressure on multiple fronts, including from the Delaware courts, the SEC, the corporate lobby and from some state legislatures, Texas possibly most notably.

Nominally, to provide a more level playing field, shareholders are armed with the basic Hohfeldian rights (named after a 20th Century US legal theorist) of shareholder voting at AGMs, the ability to sue the company and the ability to put forward proposals at company meetings. But to mix another literary metaphor into this discussion, the authors portray these Hohfeldian rights as little more than a flimsy Potemkin Village. In practice, the rights can be marginalised even if they might look good on the surface. The authors label this the 'rights-powers gap' and speak to how societal elites can perpetuate 'the systematic divergence between formal entitlements and the practical capacities required to exercise them.'

While there could be a number of possible examples to choose from, the authors highlight in particular the practice of shareholder proposals in the US—one of the core Hohfeldian rights enabling shareholders to express their voice at shareholder meetings by proposing items for the ballot. SEC Rule 14a-8 outlines the process through which company shareholders can submit proposals. Corporates tend to dislike shareholder proposals inasmuch as they challenge company management and autonomy and possibly create negative public visibility. In turn, the authors report how pro-business lobbies such as the Business Roundtable and US Chamber of Commerce have been pressuring the SEC to water down the shareholder proposal process, particularly with regard to resolutions relating to environmental and social matters.

Traditionally, the SEC would adjudicate between legitimate and illegitimate shareholder proposals through no-action letters that let the company off the hook from heeding those resolutions deemed as illegitimate. However, in late 2025, the SEC stepped back from this altogether, effectively giving companies a free hand to quash proposals they do not like. Moreover, also in late 2025, Trump signed an executive order to review, and presumably weaken, the existing shareholder proposal process, so as to exclude 'radical politically-motivated agendas'. The authors refer to US Democratic Representative Jamie Raskin calling this 'the corporate governance equivalent of voter suppression'. They also characterise this as 'killing the miner's canary' insofar as shareholder proposals can sometimes serve as helpful wake-up calls to help corporate management and boards identify underlying problems.

The paper places today's dynamics in a much broader historical context, starting in ancient Greece, the so-called cradle of democracy. All free, male Athenian citizens (which excluded most of Athenian society in the first place…) were able to speak at the ekklesia—the city-state general assembly. Yet those without the gift of rhetoric—which comes from formal training that aristocratic families could afford, but not the common citizen—were unable to exert meaningful influence notwithstanding the trappings of democracy. (We can probably say the same thing about privileged Oxbridge or Ivy League educated students today.) The history lesson continues with an interesting jaunt through the East India Company in the 1760s, Antebellum America 1776-1860, the American Corporation 1860s-1920, up through modern times—a period in which the separation of ownership and control had the effect of entrenching management and providing weak accountability mechanisms.

Ultimately, the authors leave us with their articulation of the 'Leopold Paradigm' to shed light on these underlying power dynamics, with the 'elites' tending to find ways to exploit the gaps between formal shareholder rights and powers to adapt and entrench. This is an age-old story that has taken form in many ways throughout history, with human nature at its core. The paper is an interesting and well-written account that puts the status quo into historical context. But sadly, we are not given much guidance as to what to do about it. So, for investors this is a somewhat depressing paper. It may be a case of sadder, but wiser.

One final reservation to a fine paper: having been a practitioner in asset management, I would like to push back on how the authors characterise institutional investors as ‘elites’ in this discussion, especially vis-à-vis retail shareholders. I don’t think that is an accurate or useful distinction in this paper and belies my own professional experience. It is certainly the case that retail shareholders lack the expertise and infrastructure enjoyed by larger institutional investors. But to call them ‘elites’ in this discussion is to suggest that institutional investors are somehow profiting from these diminishing shareholder rights in a way that small shareholders are not. That would be unfair, and if anything I would suggest that institutional investors and retail shareholders are in the same boat here and should have broadly aligned interests to promote more substantive shareholder rights in practice.

Read the paper: https://www.ecgi.global/publications/working-papers/corporate-disenfranchisement

Sustainable investing

Paper: **Systematic Stewardship on the Waterbed**
Authors: **Tobias H. Tröger** (Goethe University, CAS LawFin, LIF SAFE, and ECGI)
Law Working Paper N° 914/2026| March 2026

I’m shamelessly attracted by a fun title and in my university days in California in the 1970s, some of the cool guys had waterbeds in their dorm rooms. This did not include me. But I did have a cool guy friend with a waterbed and have hazy recollections of sloshing around on it while playing backgammon and listening to the New Riders of the Purple Sage. I think I could be forgiven for not anticipating at the time how the waterbed could become a compelling metaphor to frame the real-world impact—or lack thereof—of investors seeking to address systemic issues, such as climate change, through systematic stewardship.

Law scholar Tobias Tröger embraces this metaphor in his law series paper Systematic Stewardship on the Waterbed and leaves us with a sober, and sceptical, reflection on the practical abilities, if not limitations, of free markets, corporate governance mechanisms and investor stewardship on combating climate change. The author’s jumping off point is traditional asset pricing theory and the notion that there is a market-based incentive for companies to undergo a transition to reflect the ‘green preferences’ of investors and hopefully benefit from lower funding costs. This private ordering arrangement suits the agenda of politicians who may be reluctant to impose unpopular regulation, such as carbon prices or emissions caps, upon their polity. Yet does this free market approach work? Here, the author is sceptical, and he cites a range of similar conclusions from other scholars.

Even if investor systematic stewardship efforts are successful in some individual firm-level engagements, the author brings in the waterbed metaphor to show how the net effect across a sector can be neutral, if not negative. The simple idea behind the waterbed effect is that when you press on one part of the bed, the water will move somewhere else (barring a leak!)—but not go away.

At this point we watch the professor of law showcase his quantitative chops in adapting concepts from environmental economics to present a mathematical microeconomic formulation of the waterbed effect on the corporate governance dynamics of systematic stewardship. Taking an industry-wide approach, he divides firms in a given industry into two different groups. The first group is the 'engaged' or targeted universe of issuers who may be taking on carbon commitments and related abatement costs reflecting investor pressures. The other group consists of 'non-engaged' firms that are not subject to emissions reduction commitments (and the related costs) of engaged firms; this could include private companies, SOEs or firms that otherwise manage to fly below the radar of investor monitoring.

The result is an asymmetry of governance pressures felt by targeted versus untargeted companies. Thus, the equilibrium outcome of the model is one in which targeted firms emit less, untargeted firms emit more—leaving total emissions unchanged, or even higher. In extremis, this appears to be an exercise in kicking the can down the road (or supply chain) without addressing the core problem.

Here is where the author warns against overreliance of stewardship and market mechanisms to make serious inroads on climate change—at least without complementary and supportive regulatory interventions that cut across an entire sector, and not just the smaller subsector of 'engaged' companies. We are left with the 'structural insight that partial governance cannot replicate the aggregate efficiency properties of uniform regulation.'

This is a short, insightful, fun—and possibly depressing—read, at least for advocates of systematic stewardship. And the author does indulge in one cynical dig about the investor 'ESG gravy train' and its potential to generate 'naïve enthusiasm for placebo treatments.' That may be a bit unfair, though I think his basic arguments about the limitations of systematic stewardship have merit. The author is careful to avoid saying that shareholder stewardship including governance features—such as say-on-climate votes or ESG-linked remuneration incentives—is without value. But he is suggesting there are limits to what may be achieved by stewardship alone in combatting climate change, without overarching regulation.

The waterbed is an engaging and entertaining metaphor. But we must remember that, notwithstanding the siren song of the equations, the author's model might shed insight on some of the dynamics at play—but not all. This model is not reality itself, and no doubt other forces are going on too. But I think this is a good prod for investors to think through, and build awareness of, the net ecosystem impacts of their stewardship efforts in climate change. Sometimes better sadder but wiser.

Stewardship is still a young discipline, and far from a perfect science; but it is a worthy aspiration and we dismiss it at our peril. At the same time, investors may need to raise their game and be more innovative in terms of how they can truly move the dial in their systematic stewardship efforts. Micro engagement at the company level may continue to be useful and produce positive individual outcomes. But the bigger and more scalable win may be in the public policy arena where investors can hopefully contribute to the dialogue for regulatory interventions in climate that apply equally across the engaged and non-engaged universe of companies.

This leads ultimately to a political agenda in a very complex, divided and febrile geopolitical environment. The author rightly notes that the stakes are high and that we don't have the luxury of time to rely on market forces alone to combat climate change. Yet it is unclear how, when or where the political will might emerge globally to address the problems through regulation that market forces alone seem unable to resolve. We may not have the luxury of time to wait for that either. If market forces are all we've got in this world which is seemingly devoid of political will, systematic stewardship is still a card worth playing.

Read the paper: https://www.ecgi.global/publications/working-papers/real-entity-theory-without-metaphysics-how-organizations-shape

Investor stewardship

Paper: **Universal Owner and Impact of its Engagement Program: An Analysis of Engagement Records of Japan's GPIF**
Author: **Masahiro Shibata** (UTokyo Economic Consulting Inc.), **Kazunori Suzuki** (Waseda University and ECGI)
Finance Working Paper N° 1130/2026 | March 2026

As noted in my review above, stewardship is still a relatively young practice—quite literally a teenager, as its formal codification started only in 2010. Stewardship codes now exist in many markets, and stewardship is becoming a profession of its own, commonly featuring in asset management mandates and conducted by investor stewardship teams. Yet there remains a thirst in the institutional investment community for a stronger evidence trail about what stewardship can achieve in practice and how this is best brought about.

So it is very good to see Masahiro Shibata and Kazunori Suzuki's contribution to the stewardship literature in their finance paper Universal Owner and Impact of its Engagement Program: An Analysis of Engagement Records of Japan's GPIF. GPIF is Japan's Government Pension Investment Fund and is one of the world's largest pension funds, with assets under management of ¥ 258 trillion (US$ 1.6 trillion). The authors note that since 2017, GPIF has required asset managers to document engagement activities, leading to the creation of one of the most extensive datasets on stewardship in Japan.

The paper focuses on the authors' access to this proprietary data set, which includes 26,792 engagements covering 48,077 themes in total, by 21 funds of GPIF's external asset managers entrusted with domestic Japanese equity investments from fiscal 2017 to fiscal 2022. This amounts to GPIF holding a stake of around 6.4% of the entire Tokyo Stock Exchange. Particularly in Japan, but also globally, given the scope and magnitude of its investment reach, GPIF regards itself as a 'universal owner' with a highly diversified portfolio across the global capital markets, and a 'super long-term' investor with a 100-year horizon. As a universal owner with a long-term, effectively infinite, time horizon GPIF believes it has a particular responsibility to incorporate sustainability considerations into the investment process through engagement and to 'suppress negative externalities' at individual companies in the interest of sustainable capital markets and societies.

The authors focus their study on two basic questions: 1) What factors influence asset management engagement targets? and 2) does this engagement work in terms of measurable improvements? To the first question, they apply a Probit analysis with a trinomial independent variable (e.g., no company engagements, one engagement, multiple engagements) along a wide range of engagement themes, from business strategy to governance and to sustainability issues, including climate change and diversity. They also use propensity score matching and a staggered difference-in-differences (PSM-DiD) analysis to assess the causal effect of engagement on selected KPIs.

During this 2017-2022 period stewardship was on a rising trajectory in Japan. The number of company engagements almost doubled to 6,274 engagements taking place in 2022. In terms of companies selected for engagement, these companies tended to be larger in size, with less controlling owner control and with proactive disclosure (including integrated reports). Given my own stewardship experience when I was in asset management, this amounts to a statistical confirmation of common sense. Of the wide range of engagement themes considered, the top themes across all companies were management/business strategy, the board and climate change. I find it interesting that climate change clearly stuck out as the one main sustainability related engagement theme, whereas other important sustainability themes such as biodiversity, human rights and health & safety received far less attention.

To assess the effectiveness of this engagement, the authors construct a set of 94 target KPIs reflecting individual engagement themes. The authors report that 56 of these KPIs improved significantly post-engagement, with most of the improvements taking place in smaller cap companies. The encouraging results from the PSM-DiD analysis suggest that engagement on GPIF portfolio companies in Japan yielded positive outcomes. The authors specifically highlight positive changes in financial valuation (higher Tobin's Q and Total Shareholder Return), governance factors such as more independent directors and fewer cross-shareholdings—as well as reduced Scope 2 emissions.

These results are not profound; and they need not be. They are interesting and encouraging, and speak positively to the impacts of GPIF's engagement programme and stewardship more broadly. It is great to see more empirical research on stewardship, and the paper brings the additional benefit in focusing on stewardship taking root in Japan, which has a distinct economic and market tradition, and is not one of the ‘usual suspects’ in Western Europe or North America for this sort of analysis. It does suggest that stewardship can have legs in an Asian jurisdiction with its own cultural and market dynamics.

I know the authors took care to employ the PSM-DiD analysis to allow for causal inference, which they do report in their results. Certainly, in a Japanese context GPIF is the 300-pound gorilla in the room, and this will have clout. But based on my own asset management experience I am uncomfortable seeing too much causal attribution being applied to one investment institution, especially when there is a lot of other stuff going on. This is not only with other Japanese and overseas investors or investment bodies, who may be engaging GPIF portfolio companies along similar themes as GPIF, but also the general tide of governance reforms over this period in the Tokyo Stock Exchange, the Japanese Corporate Governance Code and the Japan Stewardship Code.

I would expect there to be a broader set of causal forces at work, with GPIF as an important contributor to the wave, certainly a leader, but not a solitary driver. This is not to diminish the paper, nor GPIF and its achievements. I think this is a very useful contribution to the literature and a welcome empirical study that might set the stage for future stewardship research. The authors specifically identify the nature and effectiveness of engagements between single and multiple asset managers as a topic for future study. Yes that, and no doubt much more.

Read the paper: https://www.ecgi.global/publications/working-papers/universal-owner-and-impact-of-its-engagement-program-an-analysis-of

Legal form

Paper: **Legal Form and Corporate Outcomes: Evidence from the Societas Europaea**
Authors: **François Belot** (Université Paris-Dauphine), **Edith Ginglinger** (Université Paris Dauphine, PSL and ECGI), **Timothée Waxin** (Léonard de Vinci Pôle Universitaire)
Finance Working Paper N° 1137/2026| May 2026

Inevitably betraying my own Anglo-American bias, I have always liked Societas Europaea (SE) as a corporate form, as it has struck me as simpler and less cumbersome than governance structures in Germany and other continental European countries. But I have not been following this issue closely and had thought that companies adopting an SE structure were something of a rarity, and to some extent they still are. But I was interested to learn more about its uptake and rationale in the EU in the paper Legal Form and Corporate Outcomes: Evidence from the Societas Europaea authored by the French finance scholars François Belot, Edith Ginglinger and Timothée Waxin. One interesting factoid from this is that the SE structure is more well-established than I had thought, at least in the large corporate sector, representing over 25% of the Eurostoxx index in terms of capitalisation. But that’s just for starters.

At its core this paper is about the role of a company's legal form, and what might motivate a company to change its form. The SE structure is a supranational hybrid construct that sits above EU member state national legal systems and offers potential flexibilities through, for example, a unified board structure, as opposed to a two-tiered supervisory board/management board model. But the paper is not a doctrinal analysis taking an advocacy perspective as to which is the superior form. Rather, its focus is on what type of companies take up the SE structure, why they do so — and what the shareholder impacts might, or might not, be for those companies that shift to it.

In this vein, the authors undertook a study of all EU listed firms (176) that changed their legal form to an SE form, starting slightly prior to its introduction in 2004 through to 2024. The authors employ data from various commercial services and add their own manually collected data relating to ownership structure. In terms of basic descriptive statistics, we learn that Germany accounts for almost 2/3 of this sample, followed by France with around 20%. So at least to date France and Germany are really where the action is at in the SE world.

The study sought to better understand the motivations for companies shifting to an SE structure, with the main driver articulated by companies as the desire to present the firm with a broad European identity, both within Europe and globally. In this context using the SE form seems most fundamentally a strategic or branding tactic. The desire for greater governance flexibility was the second main driver articulated by companies, and the authors cite in particular the attraction for German firms to adopt a unitary board instead of the two-tiered structure mandated in German law. They also observe that firms adopting the SE legal form are younger and spend more on R&D than their peers. Other factors are at play as well, including flexibility in relocating company headquarters and greater freedom to engage in cross-border acquisitions. The authors note that adopters are also likely to be family-controlled firms, particularly when they own a substantial share of capital or voting rights, observing that this could facilitate business succession.

To test for causal impacts of the SE structure, the authors employ a difference-in-differences analysis using a propensity score matching procedure to pair SE form companies with similar companies retaining their traditional corporate governance regimes. From this analysis they find that SE status has the effect of stimulating relatively more acquisitions, particularly acquisitions in non-EU countries. It also seems to trigger a shift in shareholder composition, in particular an increasing presence of foreign investors. The authors speculate that the SE structure has an appeal to overseas institutional investors — something I think is probably right, at least in the Anglo-American world.

However, the financial impacts of the SE structure belie this apparent attraction to foreign investors. Returns to shareholders in aggregate declined in the three years following SE adoption, and the market reaction to SE adaptation was also negative. Here again the authors suggest, rightly I think, that this market reaction may reflect market uncertainties about how the company might change upon adopting an SE form. In particular the authors note the concern that this shift could give greater latitude to the CEO, to the potential expense of both stakeholders and shareholders.

For me, possibly the most interesting finding is that the change to the SE governance legal form does not seem to be driven in the first instance to improve corporate governance or financial performance — or if it is, the immediate financial impacts are not positive. Rather, it reflects a broader strategic intent, as companies position their identity on a European or global stage.

Even though we have over twenty years of data on SE companies, going back to 2003, I still would like to see how the financial performance evolves going forward, and how SE companies compare to their national based peers, particularly as measured in terms of share price and returns on capital. And while the immediate market effects of SE conversion seem negative, it will be interesting to watch whether or not the potential benefits of the SE structure produce stronger financial and market performance over a longer time frame.

Read the paper: https://www.ecgi.global/publications/working-papers/legal-form-and-corporate-outcomes-evidence-from-the-societas-europaea

Sustainable finance

Paper: **Sustainable Finance and Corporate Law: Lessons from the US**
Author: **Jill Fisch** (University of Pennsylvania and ECGI), **Amelia Miazad** (University of California, Davis)
Law Working Paper N° 917/2026 | April 2026

In these times, the US seems to be a continuous source of bad news for those investors and companies who see sustainability as core to their business model and ethos. The so-called 'ESG backlash' that began to gather steam five or so years ago has been turbo-charged by the Trump Administration, and amongst its varied impacts has been a spate of anti-ESG legislation in a range of jurisdictions, as well as other challenges to traditional shareholder rights and protections — all while the traditional checks and balances between the administrative, legislative and judicial branches are under constant pressure from a heavy-handed executive branch.

So, for many who might see the US currently swallowed up in a black cloud, law scholars Jill Fisch and Amelia Miazad offer us a faint shaft of light in their paper Sustainable Finance and Corporate Law: Lessons from the US. The source of their 'cautious optimism' lies in the second 'S' of the US: the states themselves. Or could that stand for Superman? They cite the 'unique advantage of the US federalist system, which offers the potential for tailored state level regulation as an alternative to a uniform national law.' The authors effectively argue that states can serve as another line of defence against federal government initiatives that seek to block or inhibit sustainable financing preferences.

The paper focuses on what the authors call 'two major US sustainability initiatives', both relating to disclosure of climate-sector risks as a test case for sustainable investment. One is at the federal level through the jurisdiction of the US Securities and Exchange Commission (SEC) and the other is at the state level, with California flagged as the most prominent state antagonist to the negative federal pushback against sustainability regulations. The issue at hand is the SEC climate disclosure rule, initially put forward in March 2022 during the Biden administration in response to pressure from environmental lobbies, as well as investors, to require standardised climate disclosure in company reporting. Notwithstanding growing Republican pushback, the final disclosure rule was implemented by the SEC in 2022.

But that isn't the end of the story, as Republican pushback continued along the lines that the disclosure rule is fundamentally driven by left wing social and political values, not financial materiality. Once the Trump administration was in place, the SEC formally opted to stop enforcing or defending the rule, and the authors describe the climate disclosure rule as currently in 'legal limbo'. The politisation of the SEC, and its apparent fealty to the US administration, have effectively blocked the way to standardised climate disclosure in the US — making the US an outlier amongst its peers, especially compared to the more robust sustainability reporting regime in the EU. (See the market and regulatory update below about how the SEC has recently begun the process to formally rescind the climate disclosure rule.)

That isn't the end of the story either. Enter the state of California, which in 2023 enacted three climate change-related laws, thereby mandating climate change disclosure (including Scope 1, 2, and 3 emissions) for corporations doing business in California with over $1 billion in revenue. Unsurprisingly, this initiative was supported by investor groups — but also by prominent corporates such as Salesforce, Apple and IKEA.

Yes, California is only one of 50 states and its laws have limited scope as compared with federal jurisdiction. But as the world's fifth largest economy California's not exactly chopped liver either. Indeed, the authors articulate a 'California Effect', as a US parallel to the EU's 'Brussels Effect' that has influenced similar climate-disclosure initiatives in likeminded states such as New York, New Jersey, Colorado and Illinois helping to build convergence at the state level through what the authors call 'horizontal diffusion'.

While these developments are encouraging for companies and investors wishing to pursue a sustainability agenda, the authors are by no means Pollyanna in their outlook: 'As we write, the political climate in the US does not bode well for mandatory sustainability disclosure by the SEC'. Moreover, California's climate disclosure initiative is facing ongoing litigation and the authors anticipate a continuation of 'polarised legislation' in the US with conflicting laws relating to sustainability matters. As such, the authors do not position federalism as a flawless system or a perfect substitute. But they do show that it does provide an avenue for states to take their own initiatives to address sustainability issues within their own legislative frameworks in the event that the federal government shows resistance to this agenda. And the California Effect may come to influence other states to do the same.

Read the paper: https://www.ecgi.global/publications/working-papers/sustainable-finance-and-corporate-law-lessons-from-the-us

Fiduciary Duty

Paper: **Competing Visions of the Corporation and Fiduciary Obligation: Some Comparative Law Perspectives**

Authors: **Jennifer G. Hill** (Monash University and ECGI), **Steve Kourabas** (Monash University)

Law Working Paper N° 934/2026 | May 2026

Fiduciary duty is a core concept of corporate governance in terms of shaping directors' responsibilities to companies and institutional investor responsibilities to investor beneficiaries. Despite the fact that we bandy about the term regularly, both in academic and professional circles, it can be easy to forget that fiduciary duty can mean different things to different people.

In their paper Competing Visions of the Corporation and Fiduciary Obligation: Some Comparative Law Perspectives, authors Jennifer Hill and Steve Kourabas take us through a comparative analysis of how fiduciary duty, and the purpose of the firm more broadly, has been interpreted, focusing on three jurisdictions sharing Anglo American governance roots, developed market economies and common law traditions — the US, UK and Australia. Notwithstanding many shared perspectives on corporate law and governance, we learn that the prevailing orthodoxy of fiduciary duty in the US has rival interpretations in the UK and Australia, and need not be taken simply as a 'given'.

While the authors briefly outline a range of conceptual legal frameworks relating to fiduciary duty and corporate governance, they take specific aim at the agency theory of the firm as 'advanced under the law and economics school'. The authors claim agency theory 'emerged triumphant' as a default/orthodox paradigm for governance in the US, alongside compatible concepts like shareholder primacy and the corporate objective of profit maximisation. Even more specifically, they challenge the legacy of Jensen and Meckling (J&M) and their epic paper from 1976: Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure. The J&M paper famously framed companies as legal fictions that serve as a 'nexus for a set of contract relationships', with the law serving mainly to enforce private contracts in what is called private ordering. This contractarian approach led to the interpretation of the firm as an 'instrument of shareholder wealth maximisation isolated from broader societal concerns' with J&M stating that a company 'can be no more responsible than a lump of coal.' The authors describe how agency theory and contractarianism were recognised by the Delaware courts as a 'foundational principle of corporate law' and that the recent (controversial) enactment of SB-21 'further entrenched a contractarian trajectory, as well as diminishing fiduciary duties and minority shareholder protection.'

But the authors invoke, or revisit, the late 20th Century scholarship of Duke University law professor Deborah DeMott as a counterweight to the prevailing J&M model of governance. They cite in particular a 1988 paper in which DeMott rejects 'the growing tendency to subsume fiduciary duties within the logic of contract.' A key insight (at least to a non-legal scholar like myself) is that contract law came from common law courts, while 'fiduciary obligation originated in equity'. In this usage 'equity' is employed as a dimension of law to ensure fairness and justice, particularly when the strict application of common law or statutory law might produce a harsh, rigid, or unjust result. Effectively, it provides 'a sense of moral direction, which is absent under agency theory'.

Moreover, J&M is not the only game in town. The authors then turn to a comparative analysis of the role of the company and fiduciary duty in a short history of UK and Australian law. In a global context the US, UK, and Australia are all advanced market economies, often seen as having more similarities than differences. But building from the DeMott challenge to agency theory the authors underscore clear differences with the UK and Australia, which offer a 'sharp contrast with US-style contractarianism.' They cite the 2022 Sequana case in the UK which identifies the company as a 'separate legal entity rather than as an abstract aggregation of contracts.' And, in turn, a company has moral and ethical responsibilities. In the case of Australia, the authors describe a public enforcement model for directors' duties, with the Australian courts noting that company directors have public obligations that require consideration of social interests and not just the interests of shareholders and creditors. In short, the UK and Australia offer a broader interpretation of the role of the firm and fiduciary duty that transcends contractarianism and recognises the social nature and impact of companies.

This is a short and clearly focused paper, and very approachable for practitioners who are neither lawyers nor scholars. A new learning for me is how the legal concept of equity represents not only the historical roots of fiduciary duty but also a contrasting way of approaching fiduciary duty that is not limited to strict contractarian interpretations of agency theory. If nothing else, even for those contractarians out there, the authors show that agency theory need not be regarded as the 'default' system of governance. There are other, broader, ways of interpreting fiduciary duty with a clearer grounding in ethics and the social role of the firm. I am personally working with practitioner colleagues on a project on multicapitalism that seeks to frame companies as a nexus of capitals rather than contracts and I find value in the authors' paper in helping to show why we need not simply accept agency theory as the given standard — even in its home ground in the US. Moreover, it doesn't take too much imagination to conclude that companies can be more responsible than a lump of coal.

Read the paper: https://www.ecgi.global/publications/working-papers/competing-visions-of-the-corporation-and-fiduciary-obligation-some

Investor Stewardship

Paper: **Why Shareholder-Driven Corporate Social Responsibility Failed**
Author: **Mark J. Roe** (Harvard University and ECGI)
Law Working Paper N° 931/2026 | May 2026

Last month we reviewed a paper by Jill Fisch and Amelia Miazad which outlined how political forces in the US have diluted minority shareholder rights and protections, particularly with regard to investor engagement on sustainability-related issues. Our sadder-but-wiser series on investor stewardship in the US continues, and now leads us to Mark Roe's law paper Why Shareholder-Driven Corporate Social Responsibility Failed.

While proclamations of stewardship's failure may be a bit extreme, or at least premature, Roe examines what he calls 'shareholder-driven corporate social responsibility' in the US. It is a rise-and-fall type of analysis, taken not through a strict legal or financial lens, but rather through the possibly more overarching lens of political economy. And from this Roe expresses scepticism about the ability of investors to make a meaningful impact on social and environmental issues if they are swimming against the tide of prevailing political forces and interest groups or the general polity. But thanks in part to an Overton window (to be explained...), it's not all necessarily gloom and doom.

Roe's focus is on investor stewardship on macro sustainability-linked issues rather than traditional micro engagement relating to board structure, capital allocation or executive pay. He mainly uses the term 'CSR' to represent sustainability issues, but sometimes uses it interchangeably with ESG. (I will therefore just refer to 'CSR'.) The author observes that for large well-diversified investors in particular it is rational to take a universal owner portfolio view, taking into consideration systemic risks such as climate change or social inequality to the extent they can affect the health and resilience of markets and economies as a whole. This systemic perspective gives a political dimension to investor stewardship. In this context the rise of shareholder-driven CSR has been premised on the basis that the private sector can play an important role in addressing social and environmental challenges that government has not adequately addressed. But can it fix the 'broken government' that the author refers to?

'Broken government' is often used as a cheap rhetorical trope, but in this case the author takes care to define three different dimensions of brokenness — each with important implications for CSR-minded investors.

- Type 1: dysfunctional government/institutional collapse or ineffectiveness
- Type 2: interest group power/undemocratic outputs
- Type 3: misguided democracy/a 'blind majority' of the public as a whole

Against this background Roe chronicles the blossoming of CSR in the US during the 2010s, with the mega investor BlackRock and CEO Larry Fink tagged as a poster boy for the trajectory of shareholder CSR and stakeholder capitalism. In the author's terminology, BlackRock and other investors may have initially been seeking to address the Type 1 of broken government. But the blossom began to wilt in the 2020s, and the author recounts how political pressure, both at federal and at state levels (Texas having a lead role), ultimately forced BlackRock to retreat from its prior prosocial positioning on environmental and social issues.

But, taking Roe's political economy perspective, the story doesn't end here. Further obstacles exist: Type 2 (for example, strong oil industry political influence) or Type 3 (for example, if the general, possibly ill-informed, populace is not willing to make personal sacrifices to prevent climate change). In sum, Roe argues that shareholder-driven CSR activists are ill-positioned to take on public initiatives that challenge vested political interests or general public sentiment: investors 'thought they could escape the polity. They cannot.' This is why Roe argues that shareholder CSR in the US has failed — at least to date.

If the story ended here, it would be a pretty glum conclusion. But Roe does offer some constructive suggestions to investors. He effectively suggests that investors should act smarter, which can include coalition forming and engaging more directly in the political process. While this was not mentioned in the paper, this could potentially involve investors more actively engaging professional lobbyists to support their voice with policymakers more effectively. Roe also made encouraging comments about the importance of 'small victories' in a journey to make 'once-radical proposals become mainstream.' To this end he employs the concept of the 'Overton window', a political construct describing the range of ideas, policies and opinions that the general public finds acceptable at a given point in time. The main point is that the Overton window is dynamic and can change over time, and the author suggests that CSR-focused investors can serve as a 'social movement' and seek to chip away to influence public opinion — to ultimately embed the sustainability agenda in an evolving Overton window.

This political economy perspective provides important insight and a possible reality check for CSR focused investors in terms of what they can achieve — or at least how they can best achieve it. In the still young history of codified investor stewardship, it is fair to say that we are still learning — and testing — the limits, scope and content of stewardship at both micro (companies) and macro (systemic) levels. Stewardship is an ambitious, if not aspirational, undertaking. But part of the author's message is that investors need to better appreciate that financial markets are subsystems within a broader political economy. This is particularly true in areas relating to sustainable investment that may run against the grain of vested political interests or general public sentiment. The paper makes these challenges clear and the author concludes that 'direct political action — however difficult that is — is the endgame, and the only realistic channel to victory.'

Read the paper: https://www.ecgi.global/publications/working-papers/why-shareholder-driven-corporate-social-responsibility-failed

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