

Engines of External Governance

(forthcoming Geo. L.J.)

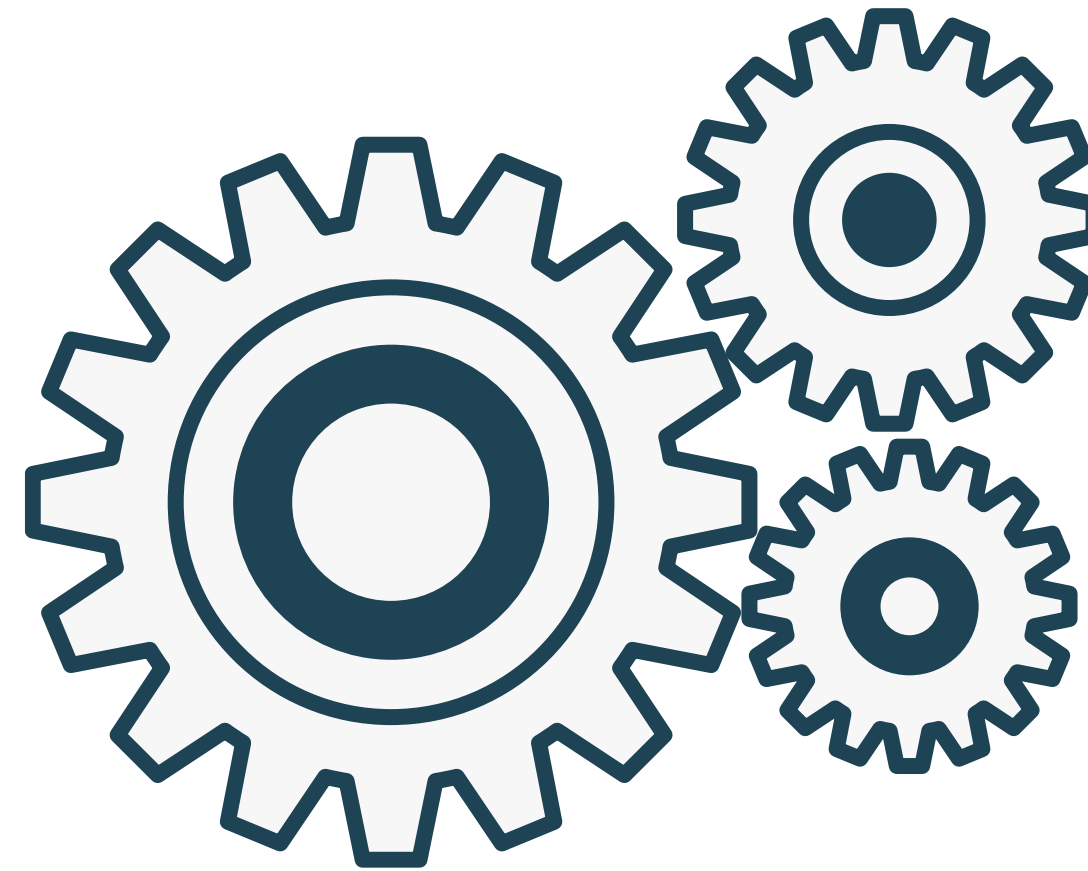
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Which actors shape corporate governance?

- Shareholders
- Directors & officers
- Employees

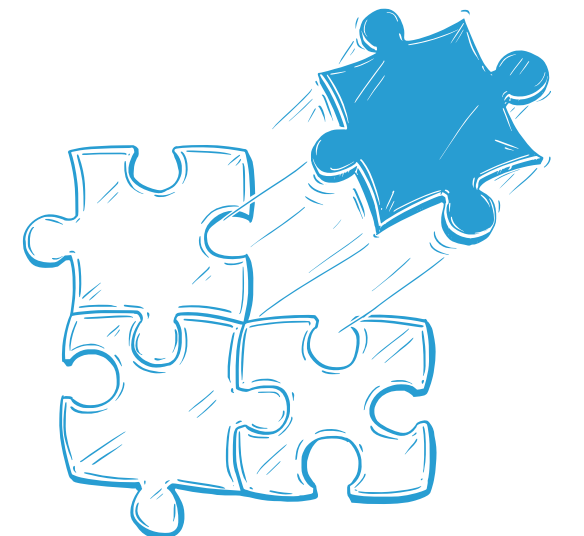
Additional actors

- Stock exchanges
- Stock indices
- Proxy advisors
- Rating agencies
- Academics
- Corporate “gadflies”
- Etc.



This paper adds another actor . . .

- Traditional accounts of corporate governance focus on internal actors and largely neglect external governance: the ways in which actors outside the firm seek to embed broader objectives into corporate decision-making.
- **Nonprofits** are among the most important engines of external governance. They have shaped, and will continue to shape, many of the significant corporate governance developments of the past, present, and future.



Broad intersection
between nonprofits and corporate governance

Foundations established by corporations



Business corporations controlled by nonprofits



Our focus: influence of nonprofits on the corporate governance of for-profit firms

- Benefit corporations
- U.S. and EU conflict minerals rules
- California, UK and EU supply chain regulations
- Rise of ESG investing
- Proliferation of social and environmental shareholder proposals
- Climate disclosure and climate litigation
- Anti-ESG and anti-DEI backlash through legislation and litigation

Influence of traditional actors

- **Managers**
 - Business Roundtable
 - Chamber of Commerce
- **Shareholders**
 - ICGN
 - CII
- **Workers**
 - AFL-CIO, other unions

And those that have received far less attention!



Three primary contributions

- We identify the range and features of nonprofits that shape for-profit corporate governance.
- We examine the main elements of their playbook and analyze how these strategies have driven key corporate governance shifts.
- We explore the broader implications of this phenomenon.

Why is activity that aims at impacting for-profit corporations taking place through nonprofit vehicles?

- Individuals vs. Organizations
 - Legal personality & attributes that are enabled by this separateness (e.g., asset partitioning)
 - In this context, we deduce these characteristics are likely also important: continuity, scale, legitimacy, anonymity
- For-profits vs. Nonprofits
 - Theory about nonprofits: unaddressed collective interests, asymmetric information, as well as cost and tax advantages (Weisbrod (1977); Hansmann (1980))

But why are nonprofits turning to corporate governance rather than lobbying for traditional regulations or providing the necessary services on their own?

- Growing skepticism about the feasibility of government solutions
- “Governance gaps” produced by globalization
- Power and resources of corporations and the potential to direct them alternatively through public and private channels
- Increase in shareholder power

Mapping actors and key features

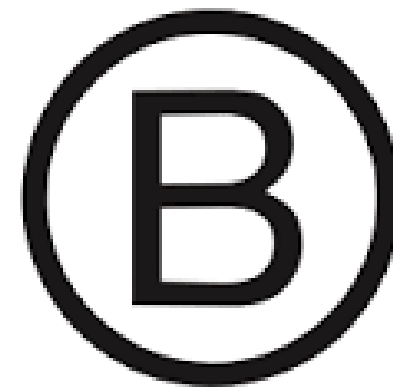


1839



OXFAM

1942



Lab

2006



**AMERICA
FIRST
LEGAL**

2021

Approximately half established in the 21st century

Mapping actors and key features

Timing of creation

Purpose & degree of specialization

Geographical reach

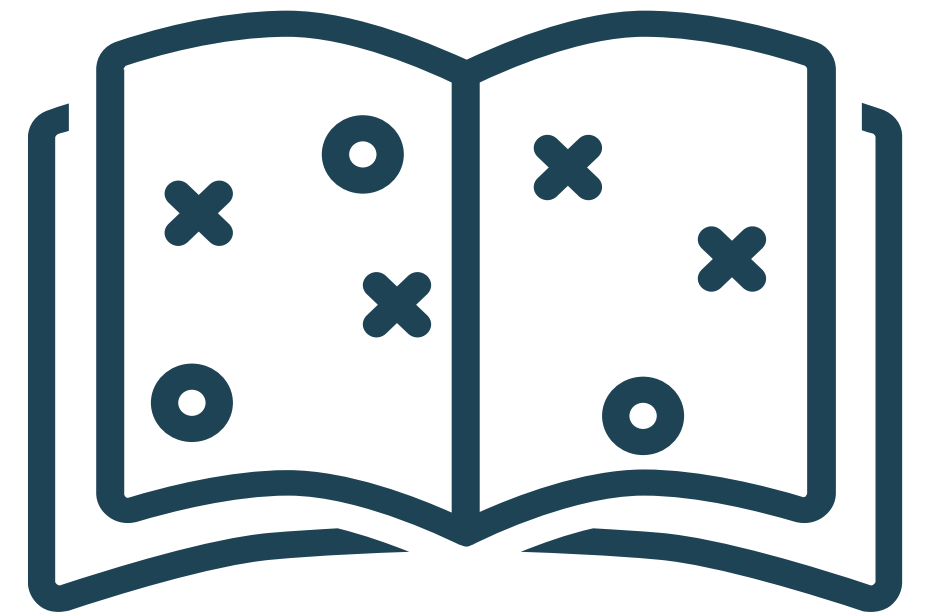
Appendix A

Key nonprofit players in corporate governance

Nonprofit	Incorporation
<i>Alliance for Fair Board Recruitment</i>	2021 (Texas)
<i>America First Legal</i>	2021 (Delaware)
<i>American Legislative Exchange Council</i>	1975 ²⁴³ (Virginia)
<i>Amnesty International</i>	1961 (United Kingdom)
<i>Anti-Slavery International</i>	1839 (United Kingdom)
<i>Alliance to Stop Slavery and End Trafficking</i>	2007 (California)
<i>As You Sow</i>	1992 (California)
<i>B Lab</i>	2006 (Pennsylvania)
<i>CCFD-Terre Solidaire</i>	1961 (France)
<i>Ceres</i>	1989 (Massachusetts)
<i>ClientEarth</i>	1993 (United Kingdom)
<i>Coalition to Abolish Slavery and Trafficking</i>	1999 (California)
<i>Conectas Human Rights</i>	2001 (Brazil)
<i>Consumer Federation of California</i>	1960 (California)
<i>Consumers' Research</i>	1937 ²⁴⁴ (Virginia)
<i>Corporate Justice Coalition</i>	2010 ²⁴⁵ (United Kingdom)
<i>Centre for Social Justice</i>	2004 (United Kingdom)
<i>Collectif Éthique sur l'étiquette</i>	2007 ²⁴⁶ (France)
<i>Follow This</i>	2002 (The Netherlands)
<i>Forum Citoyen pour la Responsabilité Sociale des Entreprises</i>	2012 ²⁴⁷ (France)
<i>Friends of the Earth</i>	1971 (United Kingdom)
<i>Global Business Coalition Against Human Trafficking</i>	2012 (New York)
<i>Global Enabling Sustainability Initiative</i>	2008 ²⁴⁸ (Belgium)
<i>Global Witness</i>	1993 (United Kingdom)
<i>Greenpeace</i>	1989 (Canada)
<i>Heartland Institute</i>	1984 (Illinois)
<i>Heritage Foundation</i>	1973 (District of Columbia)
<i>Institute for Human Rights and Business</i>	2009 (United Kingdom)
<i>Interfaith Center on Corporate Responsibility</i>	1982 (New York)
<i>Ligue des droits de l'homme</i>	1905 ²⁴⁹ (France)
<i>Medical Committee for Human Rights</i>	1965 (New York)
<i>National Center for Public Policy Research</i>	1982 (Delaware)
<i>New Civil Liberties Alliance</i>	2016 (District of Columbia)
<i>New Venture Fund (Enough Project)</i>	2006 (District of Columbia)
<i>Oxfam</i>	1942 (United Kingdom)
<i>Project on Corporate Responsibility</i>	1972 (District of Columbia)
<i>ReCommon</i>	2012 (Italy)

The strategic playbook for nonprofit influence

- Legislation
- Litigation
- Shareholder proposals
- Advocacy, soft law, & shaming



Legislation

- Supply chain legislation: Dodd-Frank Conflict Minerals, California Transparency in Supply Chains Act, UK Modern Slavery Act, France's Duty of Vigilance Law
- Benefit corporation statutes: over 30 U.S. states, Italy, Colombia
- Anti-ESG legislation: model legislation by Heritage Foundation and ALEC; testimony during legislative process

Litigation

- Climate litigation
 - e.g., ClientEarth v. Shell & Milieudefensie et al. v. Shell; Exxon v. Arjuna Capital & Follow This
- Anti-ESG litigation
 - e.g., NCPPR v. Schultz (Target & Starbucks); Craig v. Target Corporation, America First Legal securities class action against Target; Alliance for Fair Board Recruitment and the NCPPR v. Nasdaq & California board diversity rules

Shareholder proposals

- Nonprofits are often generating opposing forces within public companies as part of larger strategies for influence
 - e.g., As You Sow; NCPPR
- Nonprofits are laboratories for corporate governance ideas
 - e.g., Shareholder Rights Project; The Shareholder Commons

Soft law & shaming

- Advising, consulting, collaborating
 - Environmental Defense Fund partnered with businesses like Walmart to reduce greenhouse gas emissions across supply chains
 - U.N. Guiding Principles on Business and Human Rights with Ira Millstein, Weil Gotshal countering Marty Lipton, WLRK
- Standard setting, codes of conduct, indexes
 - Ceres Principles, SASB, GRI
 - B-Lab
 - Center for Public Accountability's CPA-Zicklin Index
- White papers & public campaigns
 - Oxfam's Inequality Inc.
 - Marble Freedom Trust, Consumers' Research

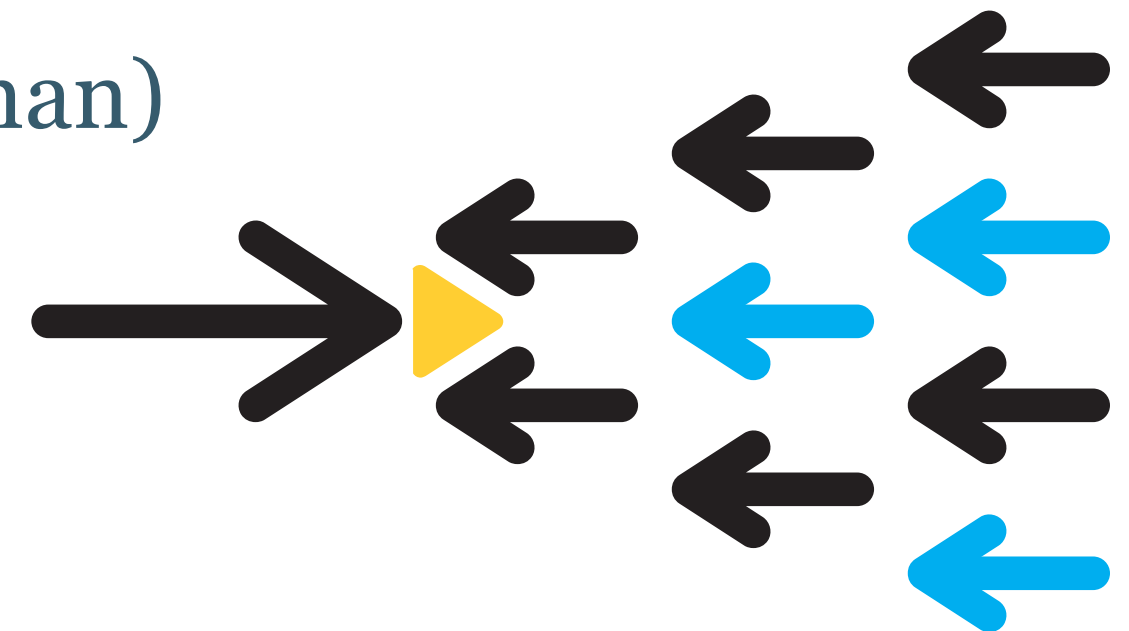
The early wave of nonprofit advocacy

1960s/70s: Corporate Social Responsibility

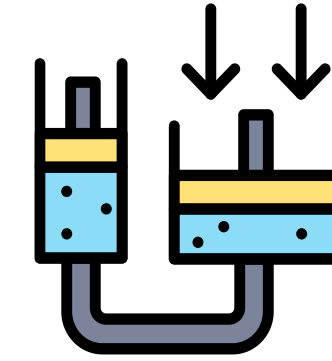
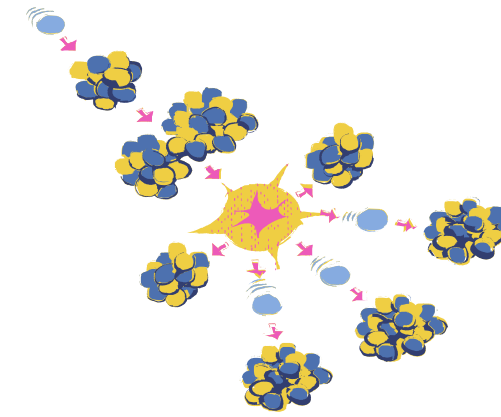
- Medical Committee and Human Rights v. Dow Chemical
- Project on Corporate Social Responsibility and Campaign GM
- Sullivan Principles

But: ensuing backlash

- Theories of the firm (Jensen & Meckling; Friedman)
- Powell Memo



Resulting dynamics



- Unpredictable chain reactions
 - Activism can trigger backlash that not only swings back on gains; it can lead to new status quo or forms of polarization.
 - Snowballing wins & gradually hardening demands & legal challenges.
- Hydraulic effect
 - Hard to fight nonprofits' pressure in corporate governance:
 - Diverse strategies, incl. partnering with traditional actors (possibility of co-optation; astroturfing).
 - Substitution & combinations of strategies.
 - Significant operations at the transnational level.

Implications for comparative CG

- Traditional debate: “convergence” to shareholder-oriented model vs. “persistence” of existing structures?
- “The End of History for Corporate Law” (Hansmann & Kraakman): rise of shareholder-centered ideology “among the academic, business, and governmental elites in leading jurisdictions.”
- Nonprofits were excluded from the picture but have helped shape history in a different direction.

Normative implications

- Impossible to make categorical assessments of impact as uniformly positive or negative given the wide variety of nonprofits & issues.
- Must consider different concerns & contexts, incl. types of nonprofits, constructive & problematic dimensions.
 - Helpful progress vs. counterproductive & costly forces that increase polarization?
 - Nonprofits present distinct agency problems and legitimacy issues.
 - Mapping onto deeply contested theoretical divides in corporate purpose.

Conclusion

- Nonprofits as important actors shaping corporate governance
- Work to broaden the set of interests and objectives at stake in corporate governance
- Diverse playbook of strategies
- Transnational mobilization and dynamics (unpredictable chain reactions & hydraulic effect)
- Less predictable trajectory for the field
- Opens conversation about normative implications – both constructive and problematic aspects

Thank you!

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