The Citizen Shareholder: Modernizing the Agency Paradigm to Reflect How and Why a Majority of Americans Invest in the Market

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I. INTRODUCTION TO THE AGENCY PARADIGM

Corporate law can seem obsessed with the internal operations of a corporation,[1] often ignoring external realities. The underlying assumption is that if corporations are operating correctly internally, then they generate external benefits for markets, consumers, communities, and other stakeholders.[2] Focusing on the internal operations can insulate corporate law theories, like the agency paradigm, from the changing economic realities of how and why individuals invest.

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1. *See, e.g.*, Kelli A. Alces, *Beyond the Board of Directors*, 46 WAKE FOREST L. REV. 783, 805–806 (2011) ("The problems with the existing board structure are significant, however, and matter very much to the extent they impede the ability of corporate investors to constrain the agency costs inherent in the corporate form. The goal of reducing those agency costs has been the preoccupation of corporate law and scholarship for at least the last eighty years.").

2. *See, e.g.*, Stephen M. Bainbridge, *Director Primacy* (UCLA School of Law, Law & Econ. Research Paper Series 1-12, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1615838 (explaining director primacy theory as one view of how corporations are internally organized and the benefits of such a model). As Lucian Bebchuk explains,

> Some supporters of greater shareholder power might regard increases in "shareholder voice" and "corporate democracy" as intrinsically desirable. I should therefore stress at the outset that I do not view increasing shareholder power as an end in and of itself. Rather, effective corporate governance, which enhances shareholder and firm value, is the objective underlying my analysis.

Lucian Ayre Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 843 (2005). For a definition of stakeholders, see *infra* note 251.

The agency paradigm is premised on two actors: managers and shareholders.[3] It aims to prevent managers from acting in their own interests rather than in the interests of shareholders.[4] It seeks to reduce conflicts of interest by striking the appropriate balance between the authority of managers and the interests of shareholders.[5] The larger the pool of shareholders, however, the more attenuated the shareholders' link to managers becomes because the voice or vote of each shareholder is diluted relative to the size of the whole pool.[6] For example, one shareholder's vote out of ten total votes has more potential influence than one shareholder's vote out of 10,000 or 10 million votes. Berle and Means captured this problem with their famous phrase: "the separation of ownership from control."[7]

From the agency paradigm was born the corporate law litmus test of whether corporate actions serve the interests of shareholders.[8] The

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3. *See, e.g.*, D. Gordon Smith et al., *Private Ordering with Shareholder Bylaws*, 80 FORDHAM L. REV. 125, 135–36 (2011) (discussing the role of shareholders and corporate managers in the agency paradigm and recent proposals to achieve the appropriate power balance).

4. *See, e.g.*, WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 2096.30 (2011) (discussing the separation of ownership and control as a foundational theory in corporate law).

5. This tension between the owners and who is in control of a corporation is at the heart of corporate law debates and is a starting point from which many theories diverge. Lynn A. Stout, *Takeovers in the Ivory Tower: How Academics Are Learning Martin Lipton May Be Right*, 60 BUS. LAW. 1435, 1445 ("The principal–agent model has so dominated academic discussions of corporate law . . . ."); *see also* Jennifer S. Taub, *Able But Not Willing: The Failure of Mutual Fund Advisers to Advocate for Shareholders' Rights*, 34 J. CORP. L. 843, 846 (2009) ("[M]uch of corporate governance work focuses on that power balance between management and owners, and seeks to find ways to enhance shareholders' rights. Or, the work looks to the failure of the board of directors to look out for shareholders.").

6. Clifford Holderness, *The Myth of Diffuse Ownership in the United States*, 22 REV. FIN. STUD. 1377, 1380 (2009) (discussing how increasingly dispersed ownership weakens shareholder rights and exacerbates problems such as shareholder passivity).

7. ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 4 (1932); *see also* FLETCHER, *supra* note 4, § 2096.30 (discussing the separation of ownership and control as a foundational theory in corporate law).

8. Scholars disagree, however, about how to best achieve this end. Theories run the gamut from trying to empower shareholders' voices in corporate governance to limiting restrictions on management's right to control the corporation.

Measures that focus on enhancing and enforcing the rights of shareholders fall into the shareholder primacy camp:

> Shareholder primacy theory includes two bedrock principles: (1) maximizing long-term shareholder value is the only legitimate objective of the corporation, and (2) designing ways to assist shareholders in exerting control through their powers, including the power to vote at annual meetings, will minimize the agency costs that result from the separation of ownership from control in publicly traded and diffusely held corporations. It is a direct outgrowth of agency theory.

J. W. Verret, *Treasury, Inc.: How the Bailout Reshapes Corporate Theory and Practice*, 27 YALE J. ON REG. 283, 318 (2010). *See generally* Bebchuk, *supra* note 2, at 850; Jonathan M. Karpoff et al., agency paradigm, however, relies on a traditional image of a shareholder—a shareholder that is a direct (although likely very small) owner in an individual company.[9] In other words, the agency paradigm conceptualizes "shareholder" to mean an individual investor who buys stock in a publicly traded company, like IBM, one of the case study companies discussed in this Article.[10]

Corporate Governance and Shareholder Initiatives: Empirical Evidence, 42 J. FIN. ECON. 365, 366 (1996) ("A central tenet of shareholder activism holds that shareholder proposals ameliorate the shareholder–manager agency conflict and pressure managers to adopt value-increasing policies.").

Under a director primacy theory, the board of directors is in the best position to monitor the company because of its interest in protecting and preserving their jobs and therefore the company as a whole. In light of director incentives to efficiently monitor the company and maximize profits, under a director primacy theory, directors should have greater control over the corporation with little shareholder interference in the form of votes, disclosures, etc. *See, e.g.*, Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735, 1752 (2006); Verret, *supra*, at 321–22. For a description of a nexus-of-contracts theory organization view of the firm, which serves, in part, the director primacy theory, see Stephen M. Bainbridge, *Unocal at 20: Director Primacy in Corporate Takeovers*, 31 DEL. J. CORP. L. 769, 775–84 (2006) (describing the corporation as "a legal fiction representing the nexus of a set of contracts among the multiple factors of production provided by the organization's various constituencies," which minimizes the role of shareholder ownership).

These two ends of the spectrum can be generally summed up as the shareholder primacy and director primacy camps, with an understanding that there are many alternative and competitive theories that fall in between (and on other axes within the same debate). *Id.* (describing shareholder primacy and director primacy theories along with contractarian theory, agency law theory, progressive corporate law, and a team production theory of corporate law); *see also* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 250–53 (1999); Virginia Harper Ho, *"Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder–Stakeholder Divide*, 36 J. CORP. L. 59 (2010).

9. *See, e.g.*, Stout, *supra* note 5, at 1444–45 ("According to the principal–agent model, corporations are the 'property' of shareholders, who are the 'principals' who hire directors and officers to act as 'agents' on their behalf. An important implication of the principal–agent model is that shareholders are, or ought to be, the sole residual claimants in corporations, entitled to each and every penny of profit left over after the firm's contractual obligations have been met.").

The small, direct owner in a corporation is often referred to as a "retail investor." *See generally* Barbara Black, *Arbitration of Investors' Claims Against Issuers: An Idea Whose Time Has Come?*, 75 LAW & CONTEMP. PROBS. 107, 125 (2012) (discussing the difficulty of small "retail" investors in arbitrating claims); Alicia Davis Evans, *A Requiem for the Retail Investor?*, 95 VA. L. REV. 1105 (2009) (discussing the role of the retail investor); Jeffrey Ross, *A Brief Overview of the U.S. DOL's Proposed Re-Definition of Investment Advice*, *in* RECENT CHANGES IN EMPLOYEE BENEFITS AND EXECUTIVE COMPENSATION (Melissa Silvanic ed., 2012), 2012 WL 698041, at *6 (discussing the impact of the proposed changes on "retail investors").

10. In this Article, I discuss three case study companies: Wal-Mart, IBM, and WellPoint. Using publicly available information, I ranked the corporations by revenue and created a combined ranking of global economies (country by GDP and corporation by gross revenue). *See infra* Table 7: Top Economies of the World in 2010; Table 8: Top 100 Companies by Revenue in 2010. To highlight the argument advanced in this Article and the issues raised in Part III, I gathered additional data regarding the top (Wal-Mart), middle (IBM), and lowest (WellPoint) U.S.-based and publicly traded companies included in the top 100 list. *See infra* Part III. In addition, I aggregated data for the top eleven

Currently, indirect owners like mutual fund investors are not directly included in the agency paradigm's conceptualization of shareholders. For example, a Wal-Mart employee invests in a BlackRock mutual fund as a part of a 401(k).[11] The BlackRock mutual fund is invested in IBM and is therefore the shareholder in the company (and the agency paradigm), not the employee–investor—even though she bears the ultimate risk of ownership. Mutual fund ownership thus augments the distance between the "owners" and the management, and complicates the application of the agency paradigm to questions of modern investment.[12] Consequently, the agency paradigm should be modernized to incorporate the unique identity and interests of these investors, a class of investors termed herein as the citizen shareholders.

A. Forces of Change

With 90 million U.S. citizens invested in mutual funds,[13] the traditional concept of the individual, direct shareholder is divorced from economic realities for the majority of investors.[14] Investment trends, and the conditions that will likely perpetuate them, are changing who is investing, in what, and why.[15] The most dominant of these trends is retirement

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mutual funds and describe in further detail their role in defined contribution plans and the arguments relating to the interconnectedness of investments. *See infra* Table 4: Top Mutual Fund Funds with 200,000 Shares or More in Case Study Companies (2010); Table 9 Top Corporate, Mutual Fund, and Government Institutional Investors in Case Study Companies. Data tables not included in the main body of the Article are provided in an Appendix at the end.

11. To illustrate the distinction between direct and mutual fund shareholders, as well as other terms relied on in this Article, consider the following example. Wal-Mart offers its securities (shares or stock) for sale on a publicly traded exchange (e.g., NYSE or NASDAQ). An individual, direct shareholder owns shares in Wal-Mart. A mutual fund investor, by contrast, owns shares in a mutual fund, say for example BlackRock. The mutual fund is the entity that owns stock in Wal-Mart, what I refer to as the "underlying" company throughout this Article.

12. *See, e.g.*, PIERRE-YVES GOMEZ & HARRY KORINE, ENTREPRENEURS AND DEMOCRACY, A POLITICAL THEORY OF CORPORATE GOVERNANCE 143–44 (2008) ("Owners of shares, represented by intermediary financial institutions and corporations, operate at a great distance from each other, incomparable with the situation that prevailed for most of the twentieth century.").

13. INV. CO. INST., 2011 INVESTMENT COMPANY FACTBOOK 80 (51st ed. 2011) www.ici.org/pdf/2011_factbook.pdf [hereinafter ICI 2011 FACTBOOK]. Mutual fund ownership is over 40% of the population of this country, compare with the 6% of the country's population invested in mutual funds in 1980. *Id.* at 79.

14. For those who subscribe to a shareholder-centric vision of corporate governance, focusing just on direct shareholders ignores how much capitalism's environment has changed . . . . While working people through their savings today hold the majority of stock in the most powerful enterprises in the world, they are not even mere legal owners anymore.

Taub, *supra* note 5, at 847.

15. The data indicate that primarily middle-class citizens are investing in the stock markets, primarily through mutual funds:

investment through employer-sponsored defined contribution plans like the 401(k).[16] This trend has created a class of investors who have limited choice about entering the market and whose retirement savings bear the risk of the markets without the traditional rights associated with such ownership. These three facts—mutual funds, employer-sponsored plans, and retirement saving—fundamentally alter the landscape of individual investments. Part II discusses in detail investment trends and their affect on the agency paradigm; a summary of those main arguments is provided below.

First, for a growing group of investors, participation in the stock market can no longer be thought of as a voluntary endeavor for those with discretionary or extra funds.[17] Rather, it has become a default form of retirement savings, a personally important task that is crucial to individual and social financial stability.[18] While investors do have choice

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> The majority of U.S. households owning mutual funds had moderate incomes. One-quarter of mutual fund-owning households had household incomes of less than $50,000; 20 percent had household incomes between $50,000 and $74,999; 19 percent had incomes between $75,000 and $99,999; and the remaining 36 percent had incomes of $100,000 or more. The median household income of mutual fund-owning households was $80,000.

ICI 2011 FACTBOOK, *supra* note 13, at 82.

16. Taub, *supra* note 5, at 847, 851 (describing institutional investors as representing state and union pension funds along with mutual funds, but noting the investment in mutual funds through employer-sponsored retirement "channels" was the predominant form of investment). The Investment Company Institute defines a defined contribution plan as "[a]n employer-sponsored retirement plan, such as a 401(k) plan or a 403(b) plan, in which contributions are made to individual participant accounts. Depending on the type of DC plan, contributions may be made by the employee, the employer, or both." ICI 2011 FACTBOOK, *supra* note 13, at 216. For the purposes of this Article, 401(k) plans will be the focus of the collected data and therefore the subject of greatest discussion herein. The assertions made in this Article, however, include all defined contribution plans.

17. The experience of most readers probably parallels those of the "majority of investors" described herein. An employee is automatically enrolled in a 401(k) plan upon hiring, selects a few funds from fifteen to twenty-five participating funds (see, for example, *infra* Part III) in which to invest and keeps his or her investments in the employer's plan, while perhaps making allocation adjustments to reflect changing retirement goals or the performance of a particular fund. Such an investor had little choice in making the initial investment and little choice regarding the funds into which he or she will invest (as compared with the option to invest directly in any publicly traded company, which is the assumption in the traditional agency paradigm).

For a discussion of automatic enrollment in 401(k) plans, see Colleen E. Medill, *Stock Market Volatility and 401(k) Plans*, 34 U. MICH. J.L. REFORM 469, 481 (2001); *see also* Paul Schott Stevens, President & CEO, Inv. Co. Inst., Speech at the Ayco Summer InnerCircle Benefits and Compensation Conference: How the 401(k) System Is Succeeding (July 28, 2011) [hereinafter Stevens, ICI Speech], *available at* http://www.ici.org/pressroom/speeches/11_pss_ayco_401k.

18. "Mutual funds play a key role in achieving both the long- and short-term savings goals of U.S. households. In 2010, 74 percent of mutual fund-owning households indicated that their primary

with regard to investment options within a plan and can even opt out of participating in defined contribution plans altogether, empirical and anecdotal evidence suggests that a majority of investors are reluctant and feel ill-equipped to use those options.[19] Such an investor has little choice in making the initial investment and little choice regarding the funds into which she will invest, particularly when compared to the option to invest directly in any publicly traded company, which is the assumption in the traditional agency paradigm. Investing through employer-sponsored defined contribution plans alters the investor's choice to enter the market, as well as the investor's choice to exit the market, which will be limited by the available investment alternatives within the employer's plan.[20] Exit rights,[21] like voting, are important arrows in investors' quiver as the rights to withdraw money and leave facilitate investors' influence of corporate managers through the threat of falling share prices.[22]

Second, the number of investors in this class is at a tipping point, outpacing the growth in any other category of investment and likely to

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financial goal for their fund investments was saving for retirement." ICI 2011 FACTBOOK, *supra* note 13, at 84.

19. "[W]hile the employee makes the selection at the fund level, the employer (i.e., corporate management) makes the fund family selection. Corporate management who, acting as plan sponsor, influences which fund families will be among the investment choices." Taub, *supra* note 5, at 876.

> Study after study shows that Americans possess little financial acumen, both generally and when it comes to investing. Moreover, with respect to 401(k) investors, there is particular reason for concern. In a recent survey, about 50% rated themselves as "not very experienced" or "not at all experienced" in investing. Perhaps this is because 401(k) participants do not relish the opportunity to invest. The same survey labeled 62% of 401(k) participants as "accidental investors," because they "typically invest only [in their 401(k)s], they don't enjoy investing, and they don't pay much attention to what they invest in.

Jeff Schwartz, *Rethinking 401(k)s*, 49 HARV. J. ON LEGIS. 53, 55 (2012) (citing ALLIANCE BERNSTEIN, INSIDE THE MINDS OF PLAN PARTICIPANTS 5 (2009)); *see also* Cass R. Sunstein, *Empirically Informed Regulation*, 78 U. CHI. L. REV. 1349, 1393 (2011) (noting that after automatic enrollment, 401(k) participation increased even though opting out of it was easy).

20. *See, e.g.*, John Morley & Quinn Curtis, *Taking Exit Rights Seriously: Why Governance and Fee Litigation Don't Work in Mutual Funds*, 120 YALE L.J. 84, 88 (2010) ("Mutual funds differ from ordinary companies in all three categories of shareholder rights, but they are most unusual in terms of exit.").

21. For example, the issue of compelled speech for dissenting shareholders was rejected as a concern under the majority holding of *Citizens United v. FEC*, 130 S. Ct. 876 (2010), because an unsatisfied shareholder could remedy the problem by selling her shares and reinvesting elsewhere. "If and when shareholders learn that a corporation has been spending general treasury money on objectionable electioneering, they can divest." *Id.* at 978 (Stevens, J., dissenting) (arguing against the majority's rationale that the secondary market for securities protects shareholders from the threat of compelled political speech through corporate political independent expenditures).

22. *See, e.g.*, Christine Hurt, *Moral Hazard and the Initial Public Offering*, 26 CARDOZO L. REV. 711, 755 (2005) (describing how shareholder exit after the lock-up period with stock offered in an initial public offering can cause a drop in stock price).

soon include most working Americans.[23] Yet, this group has no direct role in the agency paradigm.[24] Consider again, for example, the Wal-Mart employee with 401(k) investments in BlackRock mutual funds. BlackRock, not the employee–investor, votes in IBM director elections and exercises other shareholder rights. While the mutual fund investor is represented by the BlackRock fund managers, there are legitimate criticisms of managers' ability to represent the interests of individual mutual fund investors.[25]

Third, what the average American investor "owns" through their securities holdings[26] is very different from what a controlling-interest or blockholding shareholder[27] in an individual company owns.[28] For exam-

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23. *See infra* Part II.B. "The U.S. mutual fund market—with $11.8 trillion in assets under management at year-end 2010—remained the largest in the world, accounting for 48 percent of the $24.7 trillion in mutual fund assets worldwide." ICI 2011 FACTBOOK, *supra* note 13, at 22.

24. For a discussion of mutual fund investments and the voting and disclosure rules to which they are subject, see Mary Joan Hoene et al., Practising Law Inst. CLE, Background: Mutual Funds and Exchange-Traded Funds 2011 (June 9, 2011).

25. The efficacy of mutual fund managers to represent mutual fund investors' interests is a subject of continued study and debate. *See, e.g.*, Taub, *supra* note 5, at 844–45; *see also* William A. Birdthistle, *Compensating Power: An Analysis of Rents and Rewards in the Mutual Fund Industry*, 80 TUL. L. REV. 1401, 1409 (2006) ("This Article argues that the industry's faults can be found in the idiosyncratic structure of mutual funds, a structure that exacerbates the ability of managers to wield substantial power and to use that power to extract rents both overtly and surreptitiously from shareholders."). For a more detailed discussion of the criticisms regarding mutual fund management representation of investors' interests, see *infra* notes 119–25.

26. *See, e.g.*, GOMEZ & KORINE, *supra* note 12, at 144 ("This [separation of ownership from control] is a second important element in the transformation of the nature of the ownership of the public corporation: for many funds, attachment to a particular corporation as an owner is no longer the primary motivation for holding shares. Today's shareholder can be an *investor* who diversifies his/her portfolio sufficiently to minimize risk and cares little about the *raison d'être* or fate of any individual corporation; he/she is primarily interested not even in a corporation's profits, but in a rise in its share price to improve the performance of the investment portfolio.").

27. A blockholder is an individual shareholder, trust, or the composite shares held by a single family that has a large ownership interest in a public company. *See generally* Holderness, *supra* note 6. "[M]inority control, may be said to exist when an individual or small group hold a sufficient stock interest to be in a position to dominate a corporation *through their stock interest.* Such a group is often said to have 'working control' of the company." BERLE & MEANS, *supra* note 7, at 80.

As the size of the corporation increases along with the dispersion of stock ownership, there is a decrease in the size of the controlling interest sufficient to influence the company. *Id.*; *see also* Sanjai Bhagat et al., *Relational Investing and Firm Performance*, 27 J. FIN. RES. 1, 9 (2004) (defining blockholding shareholders and documenting their stake in U.S. companies from 1987 to 1990); Holderness, *supra* note 6 (discussing the presence of blockholding shareholders in U.S. public companies and concluding that ownership in the U.S. is less dispersed than assumed).

28. Another fault line separating shareholders is the extent to which their portfolios are diversified. James Hawley and Andrew Williams have advanced the argument that the institutionalization of U.S. shareholdings created a new category of shareholders, "universal owners," who are characterized by their holdings across a wide spectrum of the stock

ple, the Wal-Mart employee's retirement account that is invested in BlackRock mutual funds benefits from sustained market stability and performance, rather than firm-specific returns like IBM's daily stock price. Even though studies indicate that investors may not *care* about market performance as a whole, they benefit from it.[29]

The changing investment landscape alters key assumptions of the agency paradigm and supports supplementing the shareholder definition with the citizen shareholder identity.

Part III introduces a separate but related argument for why the shareholder identity should be expanded to include the "citizen shareholder" and acknowledges growing corporate spaces as another force contributing to the new economic reality of investments. By corporate spaces, I mean both the size of corporations and the public functions they perform in modern society. As to the first, both the growth of corporate revenues—influenced in part by the influx of capital from the growing number of investors[30]—and the concentration of wealth in corporations[31] demonstrate increasing size. Additionally, there is a level of interconnectedness of investments. For example, BlackRock, a Wal-Mart 401(k) plan participant, is invested in Wal-Mart, IBM, and WellPoint. And those companies and their mutual-fund participants are also invested in the case study companies.[32] The trend of concentration of wealth is also mirrored by mutual funds so that the largest mutual funds control an increas-

> market. Because their investment portfolios are so diversified, universal owners are thought of as "owning the economy." . . . Universal owners can be contrasted with undiversified shareholders, such as inside shareholders and founding-family shareholders, who have their wealth disproportionately invested in a given company.

Iman Anabtawi, *Some Skepticism about Increasing Shareholder Power*, 53 UCLA L. REV. 561, 583–84 (2006) (citing JAMES P. HAWLEY & ANDREW T. WILLIAMS, THE RISE OF FIDUCIARY CAPITALISM 21 (2000)).

29. *See, e.g.*, Anabtawi, *supra* note 28; Stout, *supra* note 5.

30. *See* Alan R. Palmiter, *Mutual Fund Voting of Portfolio Shares: Why Not Disclose?*, 23 CARDOZO L. REV. 1419, 1427–28 (2002) (describing the "influx of individual investors into the capital markets"); *see also* Floyd Norris, *As Corporate Profits Rise, Workers' Income Declines*, N.Y. TIMES, Aug. 5, 2011, at B3, *available at* http://www.nytimes.com/2011/08/06/business/workers-wages-chasing-corporate-profits-off-the-charts.html (discussing the record profits of corporations as rising to 14% of the national GDP).

31. For example, looking at 2010 data, the top 5% of companies whose primary listing is on an American stock exchange accounted for "70% ($10.6 trillion) of the market value and 90% ($765 billion) of the total profit . . . ." *They Are the 5%,* ECONOMIST, Nov. 1, 2011, http://www.economist.com/blogs/dailychart/2011/11/corporate-wealth.

32. *See infra* Table 9: Top Corporate, Mutual Fund, and Government Institutional Investors in Case Study Companies; *see also* Figure 2: Interconnectedness between Mutual Funds, Corporate 401(k) Plans, and Corporate Sponsor of the Plan.

ingly large market share of managed assets.[33] The level of investment interconnectedness between the top public companies and mutual funds, which provide the securities invested in by a majority of Americans, further supports supplementing the traditional image of the individual, direct shareholder with the citizen shareholder, whose interests lie with market performance.

The scope of corporations also references the public functions performed by corporations. Examples of public functions include providing health care insurance, providing vehicles for individual retirement savings, and participating in political speech.[34] Private entities providing increasingly public functions affect the interests of investors and non-investors alike, further demonstrating the need for a shareholder image that accurately captures the relationship between economic, social, and political interests implicated by market performance and stability. The phrase citizen shareholder is intended to capture, in part, the juxtaposition of private entities performing public functions and the increasing link between corporate performance and social stability. As economic interests become inextricably intertwined with the social and political, the agency paradigm requires language that reflects the bifurcated interests of investors as shareholders and citizens alike.[35]

B. The Citizen Shareholder

Expanding the shareholder identity in the agency paradigm to include citizen shareholders[36] better captures the entire scope of interests implicated by modern investment practices, and is discussed in detail in Part IV. In previous articles, I introduced the phrase citizen shareholder

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> 33. In this past decade, however, the percentage of industry assets at larger fund complexes has increased. The share of assets managed by the largest 25 firms increased to 74 percent in 2010 from 68 percent in 2000. In addition, the share of assets managed by the largest 10 firms in 2010 was 53 percent, up from the 44 percent share managed by the largest 10 firms in 2000.

ICI 2011 FACTBOOK, *supra* note 13, at 23.

34. *See, e.g.*, William W. Bratton & Michael L. Wachter, *Tracking Berle's Footsteps: The Trail of The Modern Corporation's Last Chapter*, 33 SEATTLE U. L. REV. 849, 852 (2010).

> 35. Many [scholars] have concluded that the principal–agent model fails in important ways to capture the economic and legal realities of public corporations. Many also have begun to suspect that, quite apart from doubts about the market's efficiency, the idea that directors best serve shareholders by ruthlessly maximizing share price rests on a narrow, unrealistic, and impoverished view of what is truly in "shareholders' interests."

Stout, *supra* note 5, at 1445.

36. Anabtawi, *supra* note 28, at 577 (describing the different "flavors" of shareholders and their myriad of interests in investments).

to describe the connection between economic and political interests when corporations engage in political speech. I use it in this Article for similar as well as newly expanded reasons. Citizen shareholder is meant to capture the growing group of investors who enter the market through employer-sponsored defined contribution plans by investing in mutual funds, whose choices are structurally constrained, and who bear the risks of the market without the benefit of ownership rights extended to traditional shareholders. Identifying this group as "citizen" shareholders speaks to the commonality of these investors in how and why they enter the market. It also speaks to the interconnection between market performance and individual financial security, as well as to the fusing of economic interests with social and political interests.[37] Finally, it speaks to the ubiquity of both corporations in society and individual investment in them. By giving name to this class of investors, it is my intention to focus corporate law debates on these investors' interests, as well as acknowledge the personally and socially vital role that their investments serve.

Citizen shareholder is a metaphor—a language device—used to both conceptualize and convey the facts that a majority of Americans are corporate shareholders, that the 90 million Americans who are indirect investors benefit from market performance as a whole, and that corporate spaces are growing so that the links between the economic and the social, the public and the private, and the corporation and the individual are ever increasing. Corporate law analysis under the traditional agency paradigm is outdated because of the current, limited definition of shareholder. It must be expanded if the paradigm is to remain relevant to modern investment practices. Unless the agency paradigm is expanded to include the citizen shareholder identity, a growing majority of modern investors

37. In this Article, I discuss the interrelationship between corporate action and the affect on social and political interests. This assertion is observational and is not to suggest that individual investors are aware of or presently care about the consequences of this interrelationship. For example, the current debate about corporate political spending highlights how economic and social/political interests are intertwined. The debate cannot be cast as solely a corporate, economic, or political one. Rather, the debate involves all of these interests. *See, e.g.*, Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides*?, 124 HARV. L. REV. 83 (2010) (discussing the distinction between ordinary business decisions and corporate political speech/spending decisions and examining legislative options in light of the Supreme Court opinion in *Citizens United*); *see also* William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and the Modern Corporation*, 34 J. CORP. L. 99, 102–03 (2008) (discussing the origins and evolutions of Berle's view of the role of corporations in light of changes in the economy, politics, and policies); Cheryl L. Wade, *For-Profit Corporations that Perform Public Functions: Politics, Profit, and Poverty*, 51 RUTGERS L. REV. 323 (2000) (identifying ways in which the public/private dichotomy falls away, for example, when private corporations "contract with governments to manage prisons and public schools, or distribute welfare benefits").

are left without a meaningful voice in an increasingly important sphere of society.

II. A DYING PARADIGM AND THE EMERGENCE OF THE CITIZEN SHAREHOLDER

A. Declining Dominance: The Shelf-Life of the Traditional Shareholder Identity

Traditional corporate law literature, beginning with Berle and Means, discusses the problem of the modern corporation as the distance between managers and stockholders, or the separation of ownership from control.[38] With one phrase, Berle and Means captured the agency problems of diverse and dispersed ownership with a powerful image. The separation of ownership and control, the issue at the heart of most corporate law debates and developments in reporting and regulation,[39] speaks to the inherent agency problem[40] that arises when those who govern the company are not the owners. Therefore, laws and governance standards seek to identify ways to properly align the interests of the managers (those in control) with those of the shareholders (the owners).[41]

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38. BERLE & MEANS, *supra* note 7, at 4 (describing the public corporation as "a corporation in which a large measure of separation of ownership and control has taken place through the multiplication of owners"); *see also id.* at 90–118 (identifying the forms of control within a corporation and discussing the evolution of control being held by the owners to one dominated by management control).

39. "Corporations address passive owners' vulnerability to mismanagement through such devises as monitoring of management by independent directors, shareholder voting backed by federal proxy and disclosure rules, fiduciary duties, and takeovers. These devices not only cannot make managers perfectly loyal to owners' interests, but also could generate their own costs." LARRY E. RIBSTEIN, THE RISE OF THE UNCORPORATION 193 (2009); *see also id.* at 195–207 (discussing different features of corporate governance and its shortcomings).

40. In publicly traded companies with dispersed ownership, the interests of management do not fully overlap with those of shareholders, and management thus cannot be automatically counted on to take actions that would serve shareholder interests. As a result, agency costs that reduce shareholder value might arise. Without adequate constraints and incentives, management might divert resources through excessive pay, self-dealing, or other means; reject beneficial acquisition offers to maintain its independence and private benefits of control; over-invest and engage in empire-building; and so forth. Adequate governance arrangements, however, can provide constraints and incentives that reduce deviations from shareholder-value maximization.

Bebchuk, *supra* note 2, at 850; *see also* RIBSTEIN, *supra* note 39, at 193 ("The modern corporation, however, is far from ideal. A key problem lies in how the corporate form deals with the agency costs of delegating control to powerful managers.").

41. BERLE & MEANS, *supra* note 7, at 6 ("The separation of ownership from control produces a condition where the interests of owner and of ultimate manager may, and often do, diverge, and where many of the checks which formerly operated to limit the use of power disappear."). Where the

Corporate law allocates voting rights on certain issues to shareholders, as well as rights to receive information and inspect books and records.[42] Together, these rights are referred to as "corporate democracy," reflecting the representative position that management holds with shareholders. Corporate democracy and the remedy of selling shares when dissatisfied with corporate performance or policy are the primary rights assigned to shareholders. The balancing point reflected by these rights and the specific mechanisms developed under each were constructed with the traditional image of a direct shareholder in mind, pitting shareholder interests against management authority.[43]

Berle and Means discussed the relationship between the size of corporations and the diverse and dispersed ownership of public companies as eroding the foundational assumptions protecting shareholder rights, and raised the red flag of accountability that continues to perplex scholars and lawmakers alike.[44] The agency paradigm, which continues to serve as a foundation of corporate law, was already weakened in 1932 when realities of investment were beginning to outgrow the concept of the traditional shareholder.[45]

An identifiable shareholder with discrete and discernible interests in a specific company is no longer the model that fits the majority of American investors.[46] While there are blockholders[47] in public corporations

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interests of shareholders significantly diverge from those of the directors and officers of a corporation, "corporate law rules impose special requirements designed to address this conflict." Bebchuk & Jackson, *supra* note 37, at 90. Executive compensation regulations "say on pay" is an example of how corporate rules seek to align management and shareholder interests. *Id.*

42. *See, e.g.*, DEL. CODE ANN. tit. 8, §§ 211 (shareholder voting rights), 220 (shareholder access and inspection rights) (2011).

43. *See, e.g.*, Stephen Choi, Jill Fisch & Marcel Kahan, *The Power of Proxy Advisors: Myth or Reality*, 59 EMORY L.J. 869, 870–77 (discussing shareholder voting rights developments intended to empower the shareholder to serve as a meaningful check on the authority of corporate managers); *see also* Jill E. Fisch, *Securities Intermediaries and the Separation of Ownership from Control*, 33 SEATTLE U. L. REV. 877, 885 (2010) ("The scope of shareholder voting power has also increased.").

44. BERLE & MEANS, *supra* note 7, at 80. "The fundamental problem with diffuse ownership is that a joint owner will not have the same incentives as either a manager or a monitor as a sole owner will have. The more fractured the ownership becomes, the greater this free-rider problem becomes." Holderness, *supra* note 6, at 1379.

45. *See, e.g.*, Fisch, *supra* note 43, at 879–80 (describing the rising presence of institutional investors and tracking their development, beginning in the 1920s).

46. *See* Stout, *supra* note 5, at 1445–47 (rejecting the traditional "principal–agent model [that] assumes that shareholders in public corporations are a single, homogenous mass with a uniform interest in raising share price," and arguing for a view of investors as highly diversified and whose interests may include factors outside of economic returns); *see also* Anabtawi, *supra* note 28, at 578–93 (arguing that there are five main distinctions among shareholders that make it impossible for the law to characterize shareholders as having discernible and harmonized interests); William B. Chandler III, *On the Instructiveness of Insiders, Independents, and Institutional Investors*, 67 U. CIN. L. REV. 1083, 1092 (1999) (describing investors as having different "flavors").

and a small number of investors own a large percentage of securities,[48] this is not the reality for the over 90 million Americans invested in the stock market through mutual funds.[49]

The identity of the individual shareholder is ill-equipped to represent the interests or to protect the rights of modern investors.[50] To reach their conclusions, Berle and Means compiled data on corporate ownership and control, and drew larger conclusions about the then-current function and conceptualization of corporations.[51] Infusing the agency paradigm with external economic realities— where a majority of Americans are invested in securities and where corporations play expanding roles in modern society—requires adopting a shareholder identity, like that of the citizen shareholder, capable of reflecting these new realities.

B. Recognizing a New Reality: The Evolution of American Investment

Given the number of American households[52] invested in the stock market, the economic rights[53] of citizens are intimately tied to how cor-

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47. Holderness, *supra* note 6, at 1377 ("This article offers evidence on the ownership concentration at a representative sample of U.S. public firms. Ninety-six percent of these firms have blockholders; these blockholders in aggregate own an average 39% of the common stock."); *see also* Bhagat et al., *supra* note 27, at 9 (identifying the number of outside investors holding 10% or more of the company's securities during the study period of 1987–1990).

48. For example, the top 10% of U.S. households (measured by income) owned 50.8% of the stocks held by households, and the next 10% (of ranked households) owned 29.3% of equity assets. FED. RESERVE SYS., SURVEY OF CONSUMER FINANCES (2009), *available at* http://federalreserve.gov/econresdata/scf/scf_2009p.htm; *see also Share of Stock Holdings Held by Top 10% Has Barely Budged in Last Two Decades*, ECON. POLICY INST., (2011), http://stateofworkingamerica.org/charts/distribution-of-stock-market-wealth-by-wealth-class-1962-2007/ (measuring investment asset concentration among U.S. households from 1962 to 2007). 2007 data collected by the Federal Reserve that separates out ownership of stocks from mutual funds suggest that there is significant concentration of wealth among consumer mutual fund investors as well. The top 1% of mutual fund owners held 46.7% of mutual fund assets, and the 90–99 percentile controlled another 40% of mutual fund assets. Families in the top 50–90 wealth percentile owned 11.6% of mutual fund assets. ARTHUR B. KENNICKELL, PONDS AND STREAMS: WEALTH AND INCOME IN THE U.S., 1989 TO 2007, FED. RESERVE BD., FIN. AND ECON. DISCUSSION SERIES, DIVS. OF RESEARCH & STATISTICS & MONETARY AFFAIRS, PAPER 2009-13, 63 fig.A3a: Amounts and shares of net worth and components; by net worth percentile group; 2007 SCF, *available at* http://www.federalreserve.gov/pubs/feds/2009/200913/200913pap.pdf.

49. ICI 2011 FACTBOOK, *supra* note 13, at 80.

50. For a brief discussion of the limitations of mutual fund managers as a sufficient representation of mutual fund investors', or citizen shareholders', interests, see *supra* note 25.

51. *See, e.g.*, BERLE & MEANS, *supra* note 7, at 121 (describing the challenges to internal governance of a corporation where there are "owners without appreciable control and the control without appreciable ownership . . . ").

52. The empirical research regarding investments is often focused at the household, rather than the individual, level. Investment assets are often subject to joint ownership interests for assets ac-

porations operate and the standards by which they are governed. Estimates range from just under 50%[54] to over 54% of American households are invested in the stock market.[55] Not only has the number of Americans invested in the stock market changed the nature of stock investment but the circumstances under which most Americans invest have also contributed to the change.[56] For example, stock ownership is increasingly indirect, typically in mutual funds through an employer-sponsored plan or investment company, rather than purchasing shares of stock held directly in one company.[57] Additionally, the reasons for investing have evolved from a voluntary, discretionary asset allocation for wealthier households

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quired during a marriage and are often intended for the support of the entire household rather than the individual holder. The focus on the household rather than the individual is consistent with financial and economic research. *See, e.g.*, Jane Wheelock & Elizabeth Oughton, *The Household as a Focus for Research*, 29 J. ECON. ISSUES 143 (1996) (discussing the merits of household level research on issues related to consumption and labor supply).

53. See *infra* Part III for a discussion of other investor interests, such as social and political interests, implicated by corporate action.

54. In 1989, when equity ownership in America was first calculated, 32% of American households owned stocks or bonds. INV. CO. INST. & SEC. INDUS. & FIN. MKTS. ASS'N, EQUITY AND BOND OWNERSHIP IN AMERICA, 2008 9 (2008), *available at* www.ici.org/pdf/rpt_08_equity_owners.pdf [hereinafter ICI & SIFMA]. As of the first quarter of 2008, 45% of households in America (approximately 54.5 million citizens) own stocks or bonds, falling from a peak of 53% in 2001. *Id.*

> There are four primary means by which individuals may own stock. Thirty-four million directly own shares in publicly traded companies. Twenty-seven million own shares in equity mutual funds outside of retirement saving plans and pension accounts; some of these individuals also own stock directly. Nearly 34 million own equity through self-directed retirement plans such as Individual Retirement Accounts, Keogh plans or 401(k) plans, and 48 million own equity through defined contribution pension plans. There is substantial overlap among these four methods of share ownership. When this overlap is accounted for, a total of 84 million shareowners hold stock through at least one of these channels, and three million hold stock through all four channels.

J. WILLIAM HICKS, INTERNATIONAL DIMENSIONS OF U.S. SECURITIES LAW § 2.30 (2011). Forty-three percent hold bond-based mutual funds and 45% hold hybrid mutual funds. Press Release, Securities Industry and Financial Markets Association, Nearly Half of U.S. Households Owns Equities, Bonds (Dec. 15, 2008), *available at* http://www.sifma.org/news/news.aspx?id=9624.

55. Dennis Jacobe, *In U.S., 54% Have Stock Market Investments, Lowest Since 1999,* GALLUP (Apr. 20, 2011), http://www.gallup.com/poll/147206/Stock-Market-Investments-Lowest-1999.aspx (based on the responses of over 1000 adults to a telephone poll, stock ownership among American households, either directly or indirectly, is 54%, the lowest percentage number since Gallup began tracking equity ownership in 1999); *see also* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012, tbl.1211, http://www.census.gov/compendia/statab/cats/banking_finance_insurance/stocks_and_bonds_equity_ownership.html (last visited Dec. 21, 2011) (calculating the percentage of American households invested in the stock market, either directly or indirectly, at 53.3% in 2007).

56. *See* ICI 2011 FACTBOOK, *supra* note 13, at 23 (documenting and discussing investment trends in 2010).

57. *Id.* at 83; Evans, *supra* note 9 (describing the decline in direct ownership and trend toward investment through and with institutional investors like mutual funds).

to a nearly compulsory endeavor for employees through employer-provided 401(k) plans as the predominant form of retirement saving.[58]

Mutual funds, rather than direct stock ownership, are the fastest growing class of investments among individual investors.[59] Recent data suggest that American households are selling their direct stock and investing primarily in mutual funds.[60] The trend of investment in mutual funds as a part of retirement savings among individual investors is not new, but the numbers paint a more precise picture than summation alone in demonstrating the true scope of this trend. "In 2010, an estimated 90 million individual investors owned mutual funds and held 87 percent of total mutual fund assets at year-end."[61] Total U.S. household investment in the stock market is 54%,[62] out of which 51.6 million households, or 44% of all U.S. households, own mutual funds.[63]

To better understand this investment trend and forecast, one must examine how investors are entering the market. Among these mutual fund owners, a vast majority use mutual fund investments for retirement

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58. "Ownership inside tax-deferred accounts accounted for most of the increase in the 1989 to 2001 period and has since remained steady, which implies that most of the decline since 2001 occurred outside tax-deferred accounts. Tax-deferred accounts include employer-sponsored retirement plans and Individual Retirement Accounts (IRAs)." ICI & SIFMA, *supra* note 54, at 15; *see also* Mark Klock, *What Will It Take to Label Participation in a Deceptive Scheme to Defraud Buyers of Securities a Violation of Section 10(b)? The Disastrous Result and Reasoning of Stoneridge,* 58 U. KAN. L. REV. 309, 352 (2010) ("At one time, a relatively small segment of the public invested in publicly-traded securities. Now a significant proportion of the U.S. population owns publicly-traded stocks, either directly or indirectly. A major trend in the investment world has been the remarkable growth of stock ownership through defined-contribution retirement plans. Additionally, there has been even more remarkable growth in mutual funds."); Medill, *supra* note 17, at 481 (discussing automatic enrollment as the new trend in 401(k) plan administration).

59. ICI 2011 FACTBOOK, *supra* note 13, at 8–9, 80 ("As households have increased their reliance on funds, their demand for directly held stocks has been decreasing for most of the decade . . . .").

60.
> Households are the largest group of investors in funds, and registered investment companies managed 19 percent of households' financial assets at year-end 2008 . . . . As households have increased their reliance on funds, their demand for directly held stocks and bonds has grown more slowly. For example, over the period 2004 to 2008, households purchased, on net, a total of $2.4 trillion in mutual funds (including through variable annuities), ETFs, and closed-end funds, while they sold $2.5 trillion of directly held stock. Much of this shift by households toward funds has been through net purchases of mutual funds.

INV. CO. INST., 2009 INVESTMENT COMPANY INSTITUTE FACTBOOK 8 (49th ed. 2009), *available at* http://www.icifactbook.org/2009/pdf/2009_factbook.pdf.

61. ICI 2011 FACTBOOK, *supra* note 13, at 80.

62. *See supra* note 55.

63. ICI 2011 FACTBOOK, *supra* note 13, at 80.

savings.[64] These investment trends will persist in light of the fact that 72% of first-time mutual fund purchases after 2005 were made inside employer-sponsored plans,[65] which is a 20% increase since 1990.[66] Additionally, initial money invested in a mutual fund through employer-sponsored retirement plans tends to stay invested in a mutual fund, even if the funds do not remain in the original employer-sponsored account.[67] For example, after termination, the Wal-Mart employee can maintain her shares in the original BlackRock funds, or she may "rollover"[68] the investments into her new employer's plan or open a self-directed Individual Retirement Account (IRA).[69] Throughout these transitions, whether to a private or to another employer-sponsored account, the investment typically remains within a mutual fund.

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64. *Id.* at 85–86. "The most significant distribution channel for equity mutual funds is the retirement channel. Thanks to special tax treatment tremendous incentives have been created to encourage workers to invest their wages into mutual funds held by retirement plans." Taub, *supra* note 5, at 851.

65. As 401(k) and other employer-sponsored DC retirement plans have become increasingly popular in the workplace, the fraction of households that make their first foray into mutual fund investing inside their employer-sponsored retirement plans has increased. Among those households that made their first mutual fund purchase in 2005 or later, 72 percent did so inside an employer-sponsored retirement plan . . . .

ICI 2011 FACTBOOK, *supra* note 13, at 85.

66. "Among those households that made their first purchase before 1990, 52 percent did so inside an employer-sponsored retirement plan." *Id.*

67. "[Sixty-three] percent of mutual fund-owning households without funds in workplace accounts held funds in their IRAs and in many cases, these IRAs held assets rolled over from 401(k)s or other employer-sponsored retirement plans (defined benefit or DC plans)." *Id*. at 86.

68. These DC Plans permit investors to transfer their DC Plan assets (but not DB Plan assets) into Individual Retirement Accounts ("IRAs"). In addition to maintaining the tax relief and creditor shielding available in DC Plans, [retail customers] find IRAs attractive, because IRAs provide greater investment options, often at less cost, than DC Plans. A recent study indicated that as a result of *rollovers* from DC Plans into IRAs (often due to job changes or losses), investors had more assets in IRAs, which are not subject to ERISA fiduciary standards, than they held in 401(k)s, which are subject to ERISA fiduciary standards.

David Groshoff, *Responding to Dodd–Frank Section 913's Punt: An Essay Calling for Bifurcated Fiduciary Standards Among Retail Financial Advice Providers*, 38 W. ST. U. L. REV. 151, 159 (2011) (emphasis added).

69. ICI 2011 FACTBOOK, *supra* note 13, at 86.

Table 1: American Investment by the Numbers

54% of American Households	Invest in the stock market
44% of American Households	Invest in mutual funds
68% of American Households invested in mutual funds	Own mutual funds in employer-sponsored plans
72% of American Households	First purchased securities through an employer-sponsored fund if entering the market in 2005 or later

C. Recognizing a New Reality: The Emergence of the Citizen Shareholder as the Dominant Shareholder Identity

Rising investments in mutual funds—a trend predicted long ago[70]—and the declining dominance of individual investment in direct companies, coupled with the decline of private[71] pensions,[72] fundamentally alter the shareholder identity and investment assumptions. The proliferation of mutual fund ownership as facilitated by employer-sponsored defined contribution retirement plans is likely to continue, especially in light of developments such as automatic enrollment in employer-sponsored contribution plans. Automatic enrollment makes 401(k) plan participation the default option for employees, which both encourages greater employ-

70. *See, e.g.*, MATTHEW P. FINK, THE RISE OF MUTUAL FUNDS: AN INSIDER'S VIEW 14–18 (2d ed. 2011).

71. Note that government-sponsored pension plans, particularly at the state and local level, remain a meaningful mechanism for public-sector employees to save for retirement. *See supra* discussion Part II.B. The issues raised in this Article, in part, apply to public employees participating in pensions because the pensions are invested in the market similar to mutual funds.

72. *Id.* at 283; *cf.* Stevens, ICI Speech, *supra* note 17. The term pension has broad meaning and can include any form of employer-sponsored retirement program, including both defined benefit and defined contribution plans. In this Article, I distinguish between defined contribution plans, which include employee-directed accounts such as IRAs, 401(k)s, and 457s. The term pension is used above to focus only on defined benefit plans. *See, e.g.*, Jeff Schwartz, *supra* note 19, at 55 ("The traditional private pension is the defined benefit plan. In these plans, employers promise to provide their employees with a portion of their preretirement income in retirement. Such plans, however, are on the decline and now cover only a small portion of the population."); DIANA FURCHTGOTT-ROTH, HUDSON INST., UNION VS. PRIVATE PENSION PLANS: HOW SECURE ARE UNION MEMBERS' RETIREMENT 6 (2008), *available at* http://www.hudson.org/files/publications/UnionVsPrivatePensionPlans.pdf.

ee participation in retirement savings and likens such private investment to a form of employment tax.[73] Given the current number of mutual fund investors and the emergence of automatic enrollment, the number of citizen shareholders has achieved a critical mass that will continue to expand. The emerging dominance of the citizen shareholder requires measuring corporate success in terms that protect these investors' interests.

One change resulting from the growth of mutual fund investment is that mutual fund ownership is different in nature from direct stock ownership.[74] A mutual fund investor is not an owner in the underlying company and thus is excluded from exercising shareholder rights or having her interests represented in the agency paradigm.[75] Mutual fund managers, not the investors, exercise direct shareholder rights such as voting, and the limitations of this representation is discussed below in section D. An investor entering through employer-sponsored defined contribution plans like a 401(k) "takes the economic risk, but . . . she is not the legal owner of the mutual fund or the underlying portfolio companies. In this way . . . she is distanced even more from the location of control over the capital . . . she has at risk."[76]

73. I hope to explore these ideas and the comparisons in future works. My initial thoughts are that tax incentives to invest, general investor information asymmetries, and automatic enrollment, as well as other structural constraints, make participating in an employer-sponsored contribution plan closer to the nature of an employment tax or a condition of employment. The consequences of encouraging participation are good: individual retirement savings. Savings benefit the individual investor as well as society by lessening the need for familial or governmental assistance after retirement. I do not question the positive result of the program. But to the extent that individual investors are pushed into private markets to serve, at least in part, a public function, the system into which the individual invests should be subject to rigorous safeguards and scrutiny.

74. The voting rights are different, the reporting rights are different, and the exit remedies are also significantly altered. Morley & Curtis, *supra* note 20, at 88–89 ("Mutual funds differ from ordinary companies in all three categories of shareholder rights, but they are most unusual in terms of exit.").

> Corporations have an additional and significantly different set of problems: they are legally required to represent not a group of people but a legally defined set of interests—the interests of a fictional creature called a shareholder that has no associations, economic incentives or political views other than a desire to profit from its connection with this particular corporation.

Daniel J. H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 1033 (1998).

75. "Mutual funds are financial intermediaries through which investors pool their money for collective investment, usually in marketable securities." Anabtawi, *supra* note 28, at 580; *see also* ROBERT C. POZEN, THE MUTUAL FUND BUSINESS 4 (1998).

76. Taub, *supra* note 5, at 851.

> [Investors] "purchase" shares through their defined contribution (DC) plan that is sponsored by their employer. This is often referred to as the retirement channel. In the retirement channel, though, the retirement plan is the legal owner of fund shares. The employee is considered a "plan participant" and merely directs the plan to make investments of his or her pre-tax wages in accordance with his or her instructions.

Investing in mutual funds not only alters the nature of what is "owned" but also alters the level of risk exposure[77] because of diversification.[78] For example, when an investor buys one share of a mutual fund, she holds an indirect interest in all of the stocks, bonds, or other securities invested in by the mutual fund in accordance with the mutual fund's investment objectives.[79] Because one share represents an ownership interest in many securities, investors achieve a certain level of investment diversification[80] with just one investment decision. Diversification, in theory, reduces a specific firm's ability to affect the bottom line of the investor's retirement savings.[81]

Because a mutual fund owner is invested in "the market" or a representative sample of the whole,[82] she may care more about overall growth and stability of the market rather than the performance of a specific firm.[83] Additionally, she may incorporate a broader view of risk analysis that takes into account stakeholder interests[84] in addition to traditional economic interests.[85]

Id.

77. A single shareholder, or multiple shareholders with homogeneous preferences, would in theory be able to specify a single objective for running the firm. Shareholders with private interests, however, might prefer the firm to pursue those interests at the expense of the interests they have in common with other shareholders . . . . Thus, when shareholders have divergent private interests, it is no longer accurate to think of shareholder action as a collective good . . . . Put another way, how a shareholder would like the firm to be managed becomes a function of who the shareholder is and what its private interests are.

Anabtawi, *supra* note 28, at 575.

78. Anabtawi, *supra* note 28, at 564; Lisa M. Fairfax, *Making the Corporation Safe for Shareholder Democracy*, 69 OHIO ST. L.J. 53, 84 (2008); Stout, *supra* note 5, at 1448–49.

79. Taub, *supra* note 5, at 848–49.

80. "A universal shareholder is, in effect, a highly diversified investor. She invests . . . in the equities of many different firms in many different industries." Stout, *supra* note 5, at 1448; *see also* Taub, *supra* note 5, at 852.

81. *See, e.g.*, *Diversifying Your Portfolio*, INVESTORGUIDE.COM, http://www.investorguide.com/igu-article-543-asset-allocation-diversifying-your-portfolio.html (describing the benefits of individual portfolio diversification) (last visited Mar. 19, 2012).

82. This occurs through investment vehicles like index funds. The *ICI 2011 Factbook* defines index funds as "[a] fund designed to track the performance of a market index. The fund's portfolio of securities is either a replicate or a representative sample of the designated market index." ICI 2011 FACTBOOK, *supra* note 13, at 218.

83. Richard A. Booth, *Stockholders, Stakeholders, and Bagholders (Or How Investor Diversification Affects Fiduciary Duty)*, 53 BUS. LAW. 429, 429 (1998) (asserting that diversified shareholders do not care about firm-specific risk or longevity).

84. "[A]ttention to traditional 'stakeholder' interests such as the effect of corporate operations on the environment, employees, or local communities, is seen as a means of generating long-term shareholder weather and improving portfolio- and firm-level risk assessment." Ho, *supra* note 8, at 62 (defining the role of stakeholders in the enlightened shareholder value approach advanced in the article); *see also* Taub, *supra* note 5, at 860 ("Included within a list of such stakeholders might be

Differences in ownership between direct and indirect stockholders, as well as the diversification of indirect stockholders, may affect an investor's preference for corporate externalities[86] as well as other factors that influence portfolio analysis.[87] Externalities are costs generated but not borne by the corporation. While mutual fund investors should[88] prefer market performance as a whole over firm-specific returns as a result of diversification, they should also be concerned about corporate practices that generate externalities that affect other industries or the securities market as a whole.[89]

Because questions of risk and return are not company-specific for mutual fund investors,[90] some academics have described these share-

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employees, suppliers, customers, the local community, the environment, future generations, and perhaps anyone impacted significantly by externalities resulting from corporate operations.").

> 85. In other words, like many economic theories, the principal–agent model assumes investors only care about making money. Most people, and certainly most investors, do want to acquire money. Extensive empirical evidence demonstrates, however (as does casual observation) that money is not the only thing people care about. People often act as if they care about other things as well, including their friends and loved ones; their community; the environment; social justice, and the welfare of humanity.

Stout, *supra* note 5, at 1449.

86. *See, e.g.*, Robert G. Hansen & John R. Lott, Jr., *Externalities and Corporate Objectives in a World with Diversified Shareholder/Consumers*, 31 J. FIN. & QUANTITATIVE ANALYSIS 42 (1996) (arguing that diversified shareholders do not want corporations to produce externalities in pursuit of profit maximization, but instead want companies to pursue policies that are portfolio maximizing thus minimizing externalities); *see also* Fairfax, *supra* note 78, at 84.

87. In the literature, this distinction is often referred to as the division between the diversified and the undiversified shareholder. *See, e.g.*, Anabtawi, *supra* note 28, at 584–85.

> 88. It simply doesn't make economic sense for [universal owners] to put much time or effort into finding out what's going on at any of the particular companies in which they hold shares. Instead, they focus their attention on information that is simple, easy, and cheap to obtain: stock price. As a result they usually don't know when a company is externalizing costs onto their other interests . . . . They assume a rising share price must translate into a personal benefit, ignorant of the damage being done to other parts of their universal portfolio.

LYNN A. STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATION, AND THE PUBLIC 89–90 (2012).

> 89. The extent of a shareholder's diversification also matters with respect to how that shareholder regards externalities, or spillover effects, that firms generate. One consequence of "owning the economy" is that, unlike less well-diversified investors, universal owners can be expected to feel the impact of actions by one company in their portfolio on their other portfolio companies. In other words, through its extensive holdings, the universal shareholder internalizes many of the externalities generated by the companies in which it invests. Universal owners are thus likely to favor activities of firms in which they own shares that minimize negative externalities (and maximize positive ones) to the extent that those activities impose costs on (or can be captured by) other firms in which they own an interest.

Anabtawi, *supra* note 28, at 585.

90. This fact applies to all types of diversified investors, including mutual fund owners. *See, e.g.*, ICI 2011 FACTBOOK, *supra* note 13, at 216 (Diversification is "[t]he practice of investing

holders as "universal investors."[91] The phrase universal investor describes what an investor owns and her interest in the performance of the market as a whole, as compared to an interest in a specific company.[92] The theory of universal investors also describes the reduction in firm-specific risks achieved through portfolio diversification, as well as an increased vulnerability to systemic risks or failures within the market.[93] The economic realities of modern investment diminish the relevance of the traditional shareholder identity. Understanding that market performance, rather than company-specific performance, has the greatest impact on the portfolio of a growing majority of investors underscores the need to recast the agency paradigm with the universal interest of the citizen shareholder.[94]

Incorporating a "general" identity of the shareholder in the agency paradigm lessens the need to find a way around shareholder heterogeneity,[95] which is discussed in the corporate law literature. If (a) stock investment is a common practice, and for a majority of those investors, they (b) invest in securities that advance a universal investor approach, then focusing on investor-specific interests is incomplete. The current economic reality of how a majority of individuals invest suggests that while there are vast individual differences in investment performance

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broadly across a number of different securities, industries, or asset classes to reduce risk. Diversification is a key benefit of investing in mutual funds and other investment companies that have diversified portfolios.").

91. HAWLEY & WILLIAMS, *supra* note, at 28; *see also* Fairfax, *supra* note 78, at 83–85.

92. HAWLEY & WILLIAMS, *supra* note, at 28; *see also* Anabtawi, *supra* note 28, at 584–85; *cf.* Fairfax, *supra* note 78, at 84 n.170 ("[U]ndiversified shareholders tend to have large stakes in a given company. This increases the likelihood that they are long-term investors. Hence, it is likely that such shareholders care deeply about their own firm's employees, customers, and creditors because their investment is linked with the well-being of these other stakeholder groups. In this regard, it is probably more accurate to state that diversified shareholders are concerned about a broader range of stakeholders.").

93. The opposite is true for individuals invested directly in one company or who have a large holding in a particular company so that their portfolio is disproportionately tied to the returns of one company. In that instance, the externalization of risk is preferred to the internalization.

94. Anabtawi, *supra* note 28, at 584–85.

95. This section does not suggest that the different investor interests do not matter; instead, what this section suggests is that for this class of investors—mutual fund investors who enter the market through employer-sponsored retirement accounts—their economic interests can be generalized into a preference for market performance given the circumstances under which and purposes for which they invest. For a discussion of the appropriate role of shareholder interest diversity in corporate governance, see generally STOUT, *supra* note 88 (providing examples of shareholder heterogeneity, including long-term versus short-term investors, direct investors versus mutual fund investors, individual versus institutional investors, as well as interests in social and political consequences of corporate action).

and policy, those economic differences matter little to citizen shareholders when there is an undeniable common interest in the overall performance of the market.[96] Even if market performance as a whole is not a recognized interest for each individual investor, it is a valid measure or substitute for mutual fund investors as a class within the agency paradigm. Replacing the focus on individual, direct shareholders with the image of the citizen shareholder captures the vast mass of investors who enter the market through employer-sponsored plans for individual retirement savings. Adopting a generalized shareholder standard, like that of the citizen shareholder, diminishes the import of individual economic differences as between investors and modernizes the agency paradigm by holding corporate managers accountable to the interests of mutual fund investors and, consequently, market stability and performance as a whole.

A shift in thinking away from company-specific performance and from investor-specific identities would discourage policies that generate externalities such as excessive risk taking and unsustainable environmental, employee, and social policies.[97] Recent examples of such risk taking and externalities are evident in the failures of companies like Lehman Brothers, the damage to financial institutions involved in the creation and sale of collateralized debt instruments, and the resulting weakened housing market.[98] Supplementing the agency paradigm with the citizen shareholder, and thus a focus on market performance, encourages market-stabilizing practices. Specifically, it reduces incentives for a company to engage in practices that generate spillover effects or externalities that have consequences outside of a specific firm and affect the market as a whole.[99]

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96. Corporate law should have different standards that account for different shareholder interests. I do not suggest otherwise; rather, I suggest that for mutual fund investors, the standard is market performance as a whole rather than firm-specific performance. There is also an implicit bias toward long-term investment strategies when weighing the interests of this class of investors.

97. *See, e.g.*, Hansen & Lott, *supra* note 86, at 44–46.

98. *See, e.g.*, Adam J. Levitin, *The Crisis Without a Face: Emerging Narratives in the Financial Crisis*, 63 U. MIAMI L. REV. 999, 1009–10; *see also* Ho, *supra* note 8, at 89 ("The global economic crisis has also moved public opinion and public policy further in the direction of enlightened shareholder value by calling attention to the dangers of short-term investment strategies and encouraging a reassessment of the balance between risk taking and risk management.").

99. Universal investors have to worry about a problem that undiversified shareholders don't need to worry about—the possibility that, in the ruthless pursuit of a higher share price, the board of directors of one company may adopt business strategies that have negative "spillover" effects on the universal investor's other assets. Such negative spillover effects are not only possible, but common, in today's business world.

Stout, *supra* note 5, at 1448.

The evolving nature of corporate investment—the widespread participation, the rise in indirect ownership, the limited choices offered in the context of employer-sponsored plans—creates a new reality that must be acknowledged and incorporated into the governance standards of corporate law. Supplementing the image of the single shareholder and its corresponding idiosyncratic set of needs and interests[100] with that of the citizen shareholder infuses the agency paradigm with the tools to incorporate indirect owners' interests—economic, social, political—previously excluded from consideration and determine how they affect overall market performance.

D. Dilution of Citizen Shareholder Rights Under the Traditional Agency Paradigm

The evolving nature of corporate stock ownership by individuals highlights the need to align corporate managers' actions with investors' interests. Corporate governance rules affect more citizens as stock ownership by American households has climbed above 50% and continues to increase.[101] Thus, the shareholder status is an important feature of the citizen status. Occupying the majority status, stock ownership thus justifies the dedication of significant resources[102] to ensure the health and integrity of the system; there is great incentive to get it right and more at stake if we do not. Consequently, the theoretical models relied on by corporate law should evolve along with the circumstances under which the greatest number of citizens invest.

> 100. A single shareholder, or multiple shareholders with homogeneous preferences, would in theory be able to specify a single objective for running the firm. Shareholders with private interests, however, might prefer the firm to pursue those interests at the expense of the interests they have in common with other shareholders . . . . Thus, when shareholders have divergent private interests, it is no longer accurate to think of shareholder action as a collective good . . . . Put another way, how a shareholder would like the firm to be managed becomes a function of who the shareholder is and what its private interests are.

Anabtawi, *supra* note 28, at 575.

101. *See generally* ICI 2011 FACTBOOK, *supra* note 13; Stevens, ICI Speech, *supra* note 17.

102. By resources I mean thought, scholarly debate, public scrutiny, and possibly resulting changes in legislation and subsequent enforcement through the legal system. What those specific changes would be will be the subject of future works. My intent with this Article is to articulate the tensions between the theory and the reality of modern investments, identify where the two are incongruent, and begin thinking about how to better infuse the theory with the economic reality of investments for a majority of investors.

Traditional shareholder rights intended to alleviate the agency problem—usually focused on voting, disclosure, and exit rights[103]—are distorted in the context of indirect ownership facilitated through employer-sponsored funds. This distortion occurs because the mutual fund is an intermediary[104] that is inserted into the traditional paradigm to create three actors: shareholders in the mutual fund, the mutual fund as the direct shareholder in the corporation,[105] and management of the corporation. Inserting an intermediary increases the distance between the ultimate owners (the mutual fund investors) and those in control (corporate management)[106] and leaves indirect investors without a direct voice in corporate governance or represented interests in the traditional agency paradigm.[107] That increased distance also weakens the accountability mechanisms provided to shareholders under traditional corporate law so that symptoms of modern corporate investment, such as rational shareholder passivity and diluted shareholder voice,[108] are magnified with indirect ownership.[109]

Indirect ownership distorts traditional shareholder rights—voice through vote, choice in investment, information rights, and exit remedies. In regards to choice, when an individual invests in securities through an employer-sponsored plan, the decision to invest is strongly encouraged by tax incentives and, with features like automatic enrollment, is not a

103. "Since the publication of a widely read book by Albert Hirschman in 1970, social scientists have come to agree that all organizations give to their members and owners some combination of the same three basic kinds of rights: exit, voice, and liability." Morley & Curtis, *supra* note 20, at 87.

104. "Mutual funds are financial intermediaries through which investors pool their money for collective investment, usually in marketable securities." Anabtawi, *supra* note 28, at 580; *see also* POZEN, *supra* note 75, at 3.

105. A mutual fund that invests in stock is considered the shareholder in the underlying corporation; the mutual fund exercises corporate governance rights. *See, e.g.*, Taub, *supra* note 5, at 848.

106. Bratton & Wachter, *supra* note 37, at 143 ("[Investment intermediaries] exacerbated the separation of ownership and control, extending the distance between managers and the individuals who were the ultimate beneficial owners.").

107. For a discussion on the limitations of mutual fund advisors to represent the interests of those invested in the funds, see generally, Taub, *supra* note 5, at 852–55, 867–70, 892–93.

108. *See, e.g.*, Benjamin J. Richardson, *Fiduciary Relationships for Socially Responsible Investing: A Multinational Perspective*, 48 AM. BUS. L.J. 597, 603 (2011) (discussing the commonplace of shareholder passivity and its role in both theoretical and practical debates).

109. Bernard S. Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520, 523 (1990); *see also* Morley & Curtis, *supra* note 20, at 88–89; Michael C. Schouten, *Why Governance Might Work in Mutual Funds*, 109 MICH. L. REV. FIRST IMPRESSIONS 86, 86 (2011) ("Shareholder activism in mutual funds nevertheless remains uncommon, which is widely attributed to collective action problems. Because shareholders in mutual funds are typically household investors, their stakes are said to be too small to make activism worthwhile.").

voluntary transaction in the traditional sense of the phrase.[110] Second, the employer determines the participating funds and offers a fixed list of investment options, not the full panoply of securities available on the market. Third, mutual fund products are the predominant asset class offered in such plans.[111] For example, IBM offers nineteen funds in its 401(k) PLUS Plan.[112] Of these nineteen funds, eleven are mutual funds (eight U.S.-based equities and three foreign equity funds), four are bond funds, two are real estate REITS, and one is a money market fund.[113] These structural conditions facilitate citizens investing in the market, most in the form of mutual funds, and most entering the market through employer-sponsored funds.

The following example demonstrates the distorting affect of indirect ownership on traditional shareholder rights intended to strike the appropriate power balance between shareholders and managers in the agency paradigm. Investor A is a direct investor in IBM, and Investor B is a mutual fund investor invested in BlackRock mutual funds through her employer's (Wal-Mart's) plan. BlackRock mutual fund invests in IBM, along with other funds. Annually, Investor A can vote to elect the board of directors of IBM[114] and recommend certain corporate policies through the proxy process.[115] Investor A receives proxy statements from IBM before the annual director elections and votes on other matters of

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110. The system is set up so that the default is to invest, and it takes positive action on behalf of the employee to avoid that result. It is not voluntary in the traditional sense of the word because it is not a transaction that was independently sought out by the individual and completed in the absence of encouragement or inducement to do so. *See, e.g*., Medill, *supra* note 17, at 481 (noting that automatic enrollment plans were "a new and growing trend in the world of 401(k) plans").

In 2010, Hewitt Associates reported that 58% of mid- to large-sized companies were using automatic enrollment 401(k) plans. Christine Dugas, *Efforts to Raise 401(K) Participation Hit Snag*, USA TODAY, Jan. 10, 2010, http://www.usatoday.com/money/perfi/retirement/2010-01-10-401k-retirement-fix_N.htm.

The rise of the automatic enrollment 401(k) plans began in 1998 when the IRS "issued a series of revenue rulings that encourage employers who sponsor 401(k) plans to enroll all eligible workers in the plan, deduct a set percentage of employee compensation (typically one to three percent), and contribute that amount to employee 401(k) plans." Medill, *supra* note 17, at 515.

111. Mutual funds or index funds of U.S. and international securities make up a majority of plan investment options and are supplemented by bond funds and low-interest earning money market accounts. *See, e.g.*, *infra* notes 143–44.

112. *International Business Machines (IBM) 401k Plus Plan*, MY PLAN IQ, http://www.myplaniq.com/LTISystem/f401k_view.action?ID=675# (last visited Feb. 12, 2012).

113. *Id.*

114. "To be sure, shareholders in the American public corporation have the right to vote on the election of directors." Bebchuk, *supra* note 2, at 837.

115. *Id.* at 846–47 (describing end-of-game decisions that the board can bring to the shareholder for an approval/veto vote).

corporate significance such as proposed mergers.[116] If Investor A becomes dissatisfied with the returns generated, concerned by the social practices, or conflicted with the political positions of IBM, Investor A may sell her shares on the secondary market through vehicles like E-Trade or another broker and reinvest in another company of her choice.[117]

Compare this to the rights of Investor B, who also has investments in IBM through her mutual fund shares in BlackRock. Investor B has no right to vote in IBM elections, although she may exercise voting rights in the BlackRock mutual funds. Only BlackRock can vote in IBM elections. Additionally, Investor B has no right to receive information directly from IBM and thus has diluted information rights. Investor B also has significant barriers to removing her investment due to diluted information rights. And her alternative investment options are constrained by the other funds included in Wal-Mart's 401(k) plan.[118] These distinctions are further discussed below.

For a majority of investors, their voting rights are limited to matters affecting the intermediary mutual fund[119] but not the final destination of the investment, the individual company. This limit means that an individual invested in a mutual fund with 100 companies in the fund's profile would have money in the 100 individual companies but no voting rights associated with that "investment." Thus, the scope of the voting rights for mutual fund investors is reduced along with the power of such votes. In practice, mutual fund investors bear the risks of ownership without the protection of rights typically associated with ownership.[120] As demonstrated in the example above, Investor A can participate in the corporate democracy of IBM, but Investor B cannot.[121] These diminished rights could be viewed as the cost of the convenience offered by mutual

116. *See* Exchange Act § 14, 15 U.S.C. § 78n (1988); 17 C.F.R. §§ 240.14a-1 to 14b-2 (1990); 17 C.F.R. § 240.14a-101 (1990); *see also* Black, *supra* note 109, at 536–41 (describing shareholder notice and voting rules); MARK SARGENT & DENNIS HONABACH, PROXY RULES HANDBOOK, § 2:12 (2011) (describing proxy voting rules).

117. *See, e.g.*, Morley & Curtis, *supra* note 20, at 89.

118. *See, e.g.*, *infra* notes 175–77 (describing the fund options within the 401(k) plans offered by the three case study companies: Wal-Mart, IBM, and WellPoint).

119. *See, e.g.*, Daniel S. Alterbaum, *To "Make Full Disclosure and Play No Tricks": A Proposal to Enhance Fee Transparency After* Jones v. Harris Associates, 120 YALE L.J. 1579, 1581–82 (discussing an investor's right to vote on mutual fund matters as guaranteed through the Investment Company Act of 1940).

120. Taub, *supra* note 5, at 851.

121. The mutual fund invested in IBM can, however, participate in IBM's corporate democracy. *Id.* at 848. "The intermediaries who stand between investors and corporate managers have their own interests, which are often at odds with the investors who trust them, and at times aligned with corporate management." *Id.* at 847.

funds—the price paid to have a third party manage individual investment portfolios.[122]

Mutual fund managers, and other institutional investors, represent indirect shareholders' interests and should be good stewards because they have better access to financial and company information,[123] greater incentive than retail investors to participate in corporate democracy,[124] and a powerful "voice" in voting due to the size of their holdings.[125] Mutual fund managers, however, have a history of passivity, routinely voting with management.[126] Current trends suggest that mutual fund managers often delegate voting decisions to professional proxy voting services like Institutional Shareholder Services (ISS),[127] but the data are inconclusive as to whether or not mutual funds have truly embraced shareholder activism.[128]

> 122. [F]or indirect shareholders who hold fund shares through a retirement plan, benefits include the ability to invest a relatively small amount of money and yet have access to the expertise of professional money managers. Individual shareholders also benefit from achieving a diverse portfolio of securities that would otherwise be difficult to hold efficiently given the small amount of dollars invested.

Id. at 852; *see also* Booth, *supra* note 83, at 444 ("It is so cheap and easy for investors to diversify that it is simply unnecessary for investors to take company-specific risk."); Fisch, *supra* note 43, at 880 ("By investing their money through an intermediary, investors delegate to that intermediary complete authority over investment decisions subject only to the specified terms of the investment vehicle.").

123. *See, e.g*., Lee Harris, *The Politics of Shareholder Voting,* 86 N.Y.U. L. REV. 1761, 1785–86 (2011) ("In any event, the vast majority of shareholder-voters are institutional investors. These entities do not need shorthand to sort through information that may be expensive, or otherwise difficult, to procure. Rather, these institutions have the resource, the ability, and the duty to stay apprised of the content of shareholder proposals.").

124. Katharine V. Jackson, *Towards a Stakeholder-Shareholder Theory of Corporate Governance: A Comparative Analysis*, 7 HASTINGS BUS. L.J. 309, 323 (2011).

125. *Id*.; James Cotter, Alan Palmiter & Randall Thomas, *ISS Recommendations and Mutual Fund Voting on Proxy Proposals*, 55 VILL. L. REV. 1, 2 (2010) ("Mutual funds represent the largest shareholder voting bloc in U.S. corporate governance . . . .").

126. Palmiter, *supra* note 30, at 1430–31 (summarizing the history of mutual fund voting prior to 1970, as well as academic studies concluding that mutual funds are passive investors).

> 127. We find that mutual funds tend to vote in line with ISS recommendations across the board. First, mutual funds vote consistently with ISS recommendations more often than do all shareholders. Second, mutual funds vote consistently with ISS recommendations more often than with management recommendations, both on non-routine management proposals and shareholder proposals, and on specific types of anti-takeover and corporate governance proposals.

Cotter, Palmiter & Thomas, *supra* note 122, at 2.

128. *Compare id*., *with* JACKIE COOK & BETH YOUNG, THE CORPORATE LIBRARY, FUND VOTING IN 2006: AN ANALYSIS OF 29 LARGE FUND FAMILIES' VOTING RECORDS 2 (2007), *available at* http://www.complianceweek.com/s/documents/Compliance%20Week%202007/Resource%20Materials/Minow,%20Nell%20-%20The%20Corporate%20Library/FundVoting2006_ExecSumm.pdf. In

While mutual fund investors are represented by mutual fund managers who vote on behalf of the fund and its investors, academics debate the efficacy of such representation.[129] The primary concerns regarding mutual fund representation of investors' interests include the following: the conflict of interest between the mutual fund managers' desire to align interests with the fund sponsor (the employer or plan distributor) rather than the fund participants (the employees);[130] the interests of mutual fund managers are inherently conflicted with those of their investors because of how they are compensated and their performance evaluated;[131] the free-rider problem where mutual funds are asked to bear the costs of activism without securing the sole benefit;[132] and both fund sponsors and participants choose funds based on recent returns.[133] When there are

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an independent study conducted in 2006, the Corporate Library concluded that major mutual fund families vote in favor of management resolutions over shareholder proposals. *Id.*

129. *See supra* note 25.

130. "[T]he [mutual fund] industry's true customers are not individual investors, but rather portfolio companies that can decide how to allocate their employee-thrift business." Cotter, Palmiter & Thomas, *supra* note 122, at 15.

131. Palmiter, *supra* note 30, at 1432; Taub, *supra* note 5, at 845, 867–75 (describing the conflicts of interests between mutual fund managers and investors).

> [P]ersonal managerial motivations to some degree influenced by a firm's culture explain the desire to meet earnings targets. Managers may lose their jobs, fail to be promoted, or find their opportunities to move to other firms impeded by their failure to meet earnings targets. In addition, managers may suffer a decrease in compensation. To increase their compensation, managers may seek short-term performance to enhance their bonuses (based on accounting-earnings performance), stock compensation (based on stock-price performance), or compensation based on the amount of assets under management that is enhanced by short-term profits that draw additional assets to their funds.

Lynne L. Dallas, *Short-Termism, the Financial Crisis, and Corporate Governance*, 37 J. CORP. L. 265, 272 (2012); *see also* ASPEN INST., OVERCOMING SHORT-TERMISM: A CALL FOR A MORE RESPONSIBLE APPROACH TO INVESTMENT AND BUSINESS MANAGEMENT 2 (2009), *available at* http://www.aspeninstitute.org/sites/default/files/content/docs/pubs/overcome_ short_state0909_0.pdf (discussing the concerns regarding the "influence of money managers, mutual funds and hedge funds—and those intermediaries who provide them capital—who focus on short-term stock price performance, and/or favor high-leverage and high-risk corporate strategies designed to produce high short-term returns . . . .").

132. Roberta Romano, *Institutional Shareholders and Corporate Governance in the US*, *in* CORPORATE GOVERNANCE IN THE US AND EUROPE: WHERE ARE WE NOW? 55 (Geoffrey Owen et al. eds., 2006); *see also* Dallas, *supra* note 128, at 270 (asserting that "shareholders prefer short-term results and focus on short-term information").

133. Alan R. Palmiter & Ahmed E. Taha, *Mutual Fund Performance Advertising: Inherently and Materially Misleading?*, 46 GA. L. REV. 289, 297 ("Studies have found that [historical high returns] might be the most important factor for the typical investor choosing among funds."); *see also* Noel Capon et al., *An Individual Level Analysis of the Mutual Fund Investment Decision*, 10 J. FIN. SERVS. RES. 59, 66 (1996); INV. CO. INST., UNDERSTANDING INVESTOR PREFERENCES FOR MUTUAL FUND INFORMATION 3 (2006), *available at* http://www.ici.org/pdf/rpt_06_inv_prefs_full .pdf. Mutual fund managers have also been criticized for short-term investment horizons as evidenced by the turnover rates of mutual fund investments. *See, e.g.*, CHRISTINE BENZ ET AL.,

compelling criticisms regarding the efficacy of mutual fund representation of indirect owners' interests the citizen shareholder argument should not be dismissed on the grounds that indirect owners' interests are already represented in the agency paradigm.

Perhaps the most compelling view of a mutual fund investor's diminished rights, however, is exit rights. While others have argued that the fungible nature of mutual funds makes it an even more liquid asset than investment in an individual company and therefore contains strengthened exit rights, this view does not take into account the realities of how a majority of investors enter and remain in the market.[134] The defined environment in which many Americans invest erodes the strength of the popular remedy of voting with dollars or feet.[135] The idea behind exit remedies, or voting with your feet,[136] is that dissatisfied shareholders can express their disapproval by selling their investment on the open market and investing elsewhere.

Investments through employer-sponsored plans thwart traditional exit remedies in two respects. First, the increased distance between mutual fund investors and the companies held by the fund decreases shareholder involvement in and awareness of the underlying companies' actions.[137] As to the first concern, effective exit remedies require a minimum level of corporate and mutual fund information provided to the investor. A direct owner receives information straight from the company, but a mutual fund investor has no such right to receive information from the companies in which her fund invests. Returning to the original example, Investor B has no right to receive information directly from Compa-

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MORNINGSTAR GUIDE TO MUTUAL FUNDS 11 (2004) (reporting a 114% average annual turnover in stock mutual fund portfolios).

134. *See, e.g.*, Morley & Curtis, *supra* note 20, at 88–89 (asserting that investors in mutual funds have greater exit rights as compared to direct investors because the assets remain with the company being exited by direct investors, whereas a mutual fund's assets are the investor's cash, and exit from a mutual fund removes the fund's assets and therefore poses a greater threat).

135. The contained choice for investors among mutual funds participating in their employer's plan alters the exit remedy in that they may not have the option of an alternative mutual fund that offers the same diversification and investment strategy, *see infra* note 142, or a fund that is also not invested in the offending company.

136. Voting with feet is an expression used to describe the exit remedy of withdrawing shares from one investment when dissatisfied and investing elsewhere. *See, e.g.*, Taub, *supra* note 5, at 878 ("The most common defense given by passive institutional investors, including Advisers, for not actively participating in corporate governance reform efforts is that they "vote with their feet" or sell their shares if they do not like what management is doing.").

137. ICI 2011 FACTBOOK, *supra* note 13, at 32 ("Index funds continued to remain popular with investors. Of households that owned mutual funds, 31 percent owned at least one index mutual fund in 2010. As of year-end 2010, 365 index funds managed total net assets of $1 trillion.").

ny X whereas Investor A, as a direct owner, would.[138] Investor B can access other sources of information such as publicly available information on the internet and disclosures made by the mutual fund directly to Investor B.[139] Investor B, however, faces an onerous responsibility if she is tasked with both monitoring and aggregating information about all of the companies in which her fund invests. Additionally, the current policy and corporate law debate over reporting obligations and shareholder voting rights for corporate political expenditures demonstrates that a base level of reporting does not exist for direct or indirect shareholders with respect to the full range of issues that may prompt exit by the investor.[140]

Second, there are structural constraints to exit for a mutual fund investor who must balance dissatisfaction with one fund company as compared to the performance of the other fund companies, as well as to alternative investment options before making an exit choice. Even if Investor B through her information-gathering efforts became dissatisfied with a particular company that is one of 100 within her fund, she must choose between the risks and downsides of that one company as compared to the benefits of the other ninety-nine. Additionally, just as employer-sponsored plans constrain an investor's initial choice of funds,[141] they also restrict the investor's ability to choose to exit by limiting the pool of

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138. *See supra* notes 105–07 and accompanying text.

139. *See Selective Disclosure and Insider Trading (Reg. FD)*, SECURITIES EXCHANGE COMMISSION, *available at* http://www.sec.gov/rules/final/33-7881.htm; 17 C.F.R. pts. 240, 243, 249 (2000). "[E]lectronic media increases market efficiency by allowing dissemination of market information in a more cost efficient, widespread, and equitable manner than traditional paper based methods." Jack A. Rosenbloom, *Direct Public Offerings on the Internet: A Viable Means of Obtaining Capital?,* 2000 COMPUTER L. REV. & TECH. J. 85, 93; *see also* Use of Electronic Media for Delivery Purposes, 60 Fed. Reg. 53458 (Oct. 13, 1995) (codified at 17 C.F.R. pts. 231, 241, 271); Disclosure of Proxy Voting Policies and Proxy Voting Records by Registered Management Investment Companies, Securities Act Release No. 8188, Exchange Act Release No. 47,304, Investment Company Act Release No. 25922, 2003 WL 215451, at *2 (Jan. 31, 2003); *see also* Taub, *supra* note 5, at 865–66 (discussing mutual fund proxy voting reporting requirements).

140. *See, e.g.*, Ciara Torres-Spelliscy, *Corporate Political Spending and Shareholders' Rights: Why the U.S. Should Adopt the British Approach*, *in* RISK MANAGEMENT AND CORPORATE GOVERNANCE 391, 394 (Abol Jalilvand & A.G. Malliaris eds., 2011).

141. An employee participating in an employer-sponsored plan with automatic enrollment may opt-out of the participating funds and self-manage. To do so, however, requires the investor to take positive action and thereafter assume a much greater role in managing his or her retirement account. Medill, *supra* note 17, at 481; *see also* Stevens, ICI Speech, *supra* note 17. The anecdotal evidence—which I suspect comports with the experience of the majority of readers—as well as the research supports the conclusion that few employees choose to do so. *Id.* ("In Vanguard's experience, auto-enrollment plans have participation rates of 82 percent of workers. That's significantly higher than similar plans with voluntary enrollment."). The tax incentives for employees to contribute a portion of their earnings before tax is also inducement to participate. *Id.* This inducement serves a positive social goal of encouraging retirement savings, but how and why investors enter the market should be understood and taken into account when evaluating investors' rights.

alternative plans. If there are twenty funds participating in her employer's plan, Investor B's exit choice is influenced by the attractiveness (or lack thereof) of the other nineteen options. Additionally, if the company, like IBM, is a large company traded on a U.S. exchange, it may be difficult for Investor B to find a suitable alternative mutual fund offering a similar risk and diversification portfolio[142] that does not also invest in IBM.[143] Investor B may be structurally constrained from exercising even her weakened exit rights under the terms of modern, indirect investment.

In sum, the predominant form of investment in this country, mutual funds, distorts the traditional shareholder rights—voting, disclosures, and exit. The identity of the shareholder in the agency paradigm is outdated and relies on the image of the direct shareholder, which is not the economic reality for a majority of investors. As a result, the agency paradigm excludes the interests of indirect investors from its inquiry into shareholder interests. Finally, even though they are granted as a means to achieve the appropriate power balance between shareholders and managers, basic shareholder rights lose significant value in the context of modern, indirect investment. Therefore, many proposed corporate reforms are short-sighted because they aim to tweak the power balance between corporate managers and the traditional shareholders—direct owners. The agency paradigm should be modernized to incorporate the unique interests of mutual fund investors with a definition of shareholder that includes this growing class of citizen shareholders.

III. Growing Corporate Spaces in Society

The economic reality of corporate functions, investments, and interconnectivity further supports incorporating the citizen shareholder identity into the agency paradigm.

In 1932, Adolf Berle wrote that the "administration of corporations—peculiarly, a few hundred large corporations—is now the crux of

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142. For example, most 401(k) plans offer a variety of funds with different investment strategies or goals, such as international equity-focused funds, fixed income funds, U.S. equity funds, target-date retirement funds, and bond funds. Those categories, particularly the international and U.S. equity funds, are often further subdivided to be an index fund to mirror the market and thus offer a sample of securities from the top performing companies listed on a certain exchange, or are categories according to the asset value of the participating companies (i.e., small, mid, and large capitalization funds), or whether the participating companies are considered to be value or growth securities. *See, e.g.*, *WellPoint 401K Retirement Savings Plan,* My Plan IQ, http://www.myplaniq.com/LTISystem/f401k_view.action?ID=993# (last visited Feb. 12, 2012).

143. *See, e.g.*, *infra* Figure 2: Interconnectedness between Mutual Funds, Corporate 401(k) Plans, and Corporate Sponsor of the Plan.

American industrial life."[144] The ubiquity of corporations has grown as evidenced, in part, by the burgeoning number of American households invested in the securities of publicly traded companies.[145] As more invest in corporations, the capitalization levels of corporations rise,[146] and with that the production and revenue power of those corporations increase. The rise in corporate revenues has also been accompanied by an emergence of private entities performing public functions, such as health care, retirement savings, and participation in the political process.

The result is that "corporate spaces" in society are increasing. I use the phrase corporate spaces to refer to the size and scope of corporations in terms of revenue amounts, number of employees, and number of investors. It also reflects the concentration of wealth among the top companies,[147] demonstrating the tremendous power that can be wielded by a few private actors. Additionally, the phrase encompasses the public functions performed by corporations and how economic interests are inextricably intertwined with social and political interests, as discussed below.

Using 2010 Gross Domestic Product (GDP) figures from the World Bank and publicly available information about 2010 corporate revenues, I created a ranking of the top economies in the world, including both private (corporations) and public economies (countries).[148] Similar figures have been relied upon in corporate law scholarship, but much of it is now out-dated.[149] My results, based on 2010 data, are consistent with earlier conclusions from older data. [150]

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

145. *See supra* notes 52–56; *see also* Harrison Hong et. al., *Social Interaction and Stock-Market Participation*, 59 J. FIN. 137, 137–38 (2004), *available at* http://economics.harvard.edu/faculty/stein/files/Social_InteractionJofF.pdf (discussing the growing trend of stock ownership and the reasons for it).

146. *See* Palmiter, *supra* note 30, at 1428 (noting the recent "influx of individual investors into the capital markets . . . .").

147. For example, looking at 2010 data, the top 5% of companies whose primary listing is on an American stock exchange accounted for "70% ($10.6 trillion) of the market value and 90% ($765 billion) of the total profit . . . ." *They Are the 5%*, *supra* note 31.

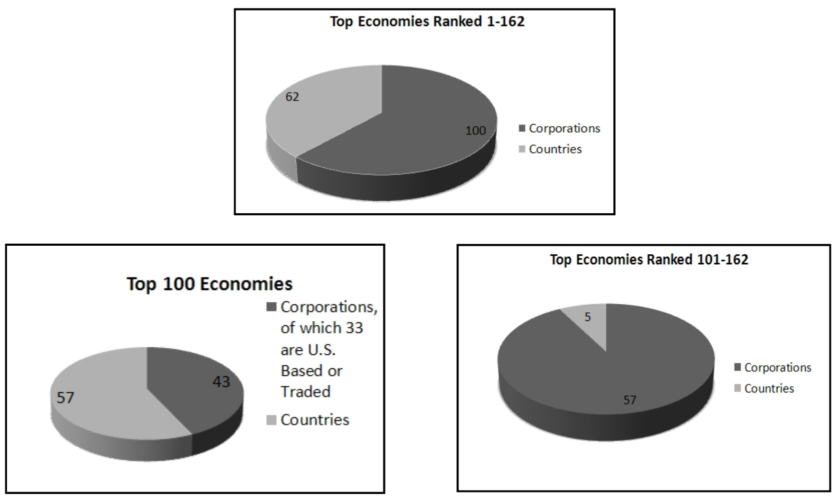
148. *See infra* Table 7: Top Economies of the World in 2010; Table 8: Top 100 Corporations by Revenue in 2010.

149. While corporate law scholarship has included similar claims, the data supporting those claims were from the late 1990s. I did not originally intend to do original research for this Article, but concluded that the earlier assertions were an important component of my argument, and if to be included, had to be modernized. *See, e.g.*, Siebecker, *supra* note 149, at 171; Tsoutsoura, *supra* note 149, at 4.

150. Compare this data to a 1999 study of the top 100 economies of the world, measured by the GDP and corporate revenue, which revealed that 51 were U.S.-based corporations and 49 were countries. SARAH ANDERSON & JOHN CAVENAGH, INST. OF POLICY STUDIES, TOP 200: THE RISE OF CORPORATE GLOBAL POWER 3 (2000), *available at* http://www.ips-dc.org/files/2452/top200.pdf; *see*

In 2010, 43 of the top 100 economies in the world were corporations, 33 of which are traded on U.S. exchanges or are U.S.-based.[151] The 100 top-earning corporations ranked among the top 162 economies of the world. Demonstrating a strong concentration of corporate rankings in the 100–162 range, 57 companies ranked between numbers 100 and 162 of the top economies of the world.[152] Of the 100 top-earning corporations discussed herein, 65 are U.S.-based corporations or are traded on U.S.-regulated exchanges.[153]

Figure 1: Top Economies in 2010



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also Michael Siebecker, *A New Discourse Theory of the Firm After* Citizens United, 79 GEO. WASH. L. REV. 161, 171 (2010) (describing the influence of corporations in modern society in terms of political voice and economic power); Margarita Tsoutsoura, Corporate Social Responsibility and Financial Performance 5 (Mar. 2004) (unpublished working paper), *available at* http://www.escholarship.org/us/item/111799p2 (describing prior research exploring the link between financial success and corporate social responsibility and describing current methodologies that confirm the existence of a positive correlation); *Trade Liberalization Statistics*, WORLD TRADE ORGANIZATION, http://www.gatt.org/trastat_e.html (last visited Dec. 9, 2011) ("51 of the 100 largest economies in the world are corporations. The Top 500 multinational corporations account for nearly 70 percent of the worldwide trade; this percentage has steadily increased over the past twenty years." (citing *Corporate Globalization Fact Sheet*, CORPWATCH, (Mar. 22, 2001), http://www.corpwatch.org/article.php?id=378)).

151. *See infra* Table 7: Top Economies of the World in 2010; Table 8: Top 100 Corporations by Revenue in 2010.

152. *See infra* Table 7: Top Economies of the World in 2010; Table 8: Top 100 Corporations by Revenue in 2010.

153. *See infra* Table 8: Top 100 Corporations by Revenue in 2010.

This section provides data documenting the public functions of 3 of the top 100 corporations: Wal-Mart (ranked the #1 corporation and #24 on the integrated list); International Business Machines (IBM) (ranked as the #48 corporation and #106 on the integrated list); and WellPoint (ranked the #100 corporation and #162 on the integrated list).[154] Additionally, this section discusses companies' relationship to and dependence on the securities market by discussing their 401(k) plans and institutional investors. Later, in Part III.B, I discuss the case study companies in greater detail.

The scale of the modern corporation is expanding on all fronts—increasing in the number of investors, size, and concentration of economic power. This increase in corporate spaces raises questions probing both the actual and the ideal relationship between corporations and society.[155]

A. Public Functions of Private Entities

The ways in which private entities have evolved to serve increasingly public functions suggests that corporate space in society is increasing. Corporate involvement with public functions further emphasizes the significance of the citizen shareholder identity, one that captures the interests and realities of a majority of investors. Berle wrote that a "major function" of the modern American corporation is to "provide safety, security, or means of support for that part of the community . . . ."[156] In other words: private entities perform public functions. Corporations earn returns for investors and employ a workforce, both private functions; corporations are also key actors in the provision of health insurance, the building of individual retirement savings, and the election of candidates for office, all public functions.[157]

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154. *Id.*

155. The rise of the modern corporation has brought a concentration of economic power which can compete on equal terms with the modern state—economic power versus political power, each strong in its own field. The state seeks in some aspects to regulate the corporation while the corporation, steadily becoming more powerful, makes every effort to avoid such regulation. Where its own interests are concerned, it even attempts to dominate the state. The future may see the economic organism now typified by the corporation, not only on an equal plane with the state, but possible even superseding it as the dominant form of social organization. The law of corporations, accordingly, might well be considered as a potential constitutional law for the new economic state, while business practice is increasingly assuming the aspect of economic statesmanship.

BERLE & MEANS, *supra* note 7, at 357.

156. Berle, *supra* note 145, at 1365.

157. Wade, *supra* note 37, at 325. ("When private companies manage prisons, public schools, and hospitals, and distribute welfare benefits, the inmates, students, patients, and welfare recipients they purport to serve become human commodities that are more like the widgets manufactured by more typical corporations than they are like the constituencies of traditional companies.").

If corporations are private entities, when, how, and why did they begin performing public functions?[158] Are corporations larger and more widely invested in because of the public functions that they serve, or do they serve increasingly public functions because of the size or scale of corporations, which is fueled in part by investments? The answers are difficult to pinpoint because corporate space impacts the terms of investment and the public roles performed by corporations that, in turn, augment the space that corporations occupy in society. The cycle is easiest to see in the context of retirement savings where stock investment is the predominant (and growing) means of individual saving for retirement, which in turn impacts the space that corporations occupy. Tax incentives, default rules like automatic enrollment, and information asymmetries between mutual fund managers and the average investor, all encourage employee participation in corporate-sponsored retirement plans. As more citizens are invested in securities for the purpose of individual retirement savings, the link between the activities of private enterprises and the financial security of the country as a whole is evident: private entities with public impact.

The assumed dichotomy between public and private functions,[159] which is a foundational principle in corporate law, no longer reflects the corporate reality in which a majority of Americans invest. It is a tenet of corporate law that corporations are private entities,[160] created by the state,[161] governed by contract,[162] and subject only to certain state and, where applicable, federal regulations.[163] Because corporations are private

158. For a discussion of the early connection between private entities and public functions, specifically in the railroad industry, see JONATHAN BARRON BASKIN & PAUL J. MIRANTI, A HISTORY OF CORPORATE FINANCE 132–66 (1997).

159. *Id.*; *see also* Darren Rosenblum, *Feminizing Capital: A Corporate Imperative*, 6 BERKELEY BUS. L.J. 55, 68–70 (2009).

160. *See* Mark M. Hager, *Bodies Politic: The Progressive History of Organizational "Real Entity" Theory*, 50 U. PITT. L. REV. 575 (1989). *See generally* STEPHEN M. BAINBRIDGE, CORPORATE LAW 12–29 (2nd ed. 2009).

161. BAINBRIDGE, *supra* note 161, at 12–13; FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 12 (1991) (noting the "many actors" who collectively participate in the firm); Stephen M. Bainbridge, *The Board of Directors as Nexus of Contracts*, 88 IOWA L. REV. 1, 4, 25 (2002) (referencing state corporate law statutes as the foundation of corporate law); Bebchuk, *supra* note 2, at 844 ("Although different states within the United States have different corporate codes, these codes have many similarities.").

162. EASTERBROOK & FISCHEL, *supra* note 162, at 12; Bainbridge, *supra* note 162, at 9–11.

163. *See, e.g.*, DEL. CODE ANN. tit. 8, §101 (2011) (establishing the requirements for forming and maintaining a corporation); 15 U.S.C.A. § 78p (2010) (establishing disclosure requirements for directors and officers with ownership interests of 10% or more).

entities, often viewed as associations of their owners (shareholders),[164] corporations are vested with certain rights that are similar to or derivative from those held by individual shareholders.[165] The agency paradigm is premised on the need for corporate law to ensure that those who control a corporation do so in service to the individual owners. As already explained, the identity of a "shareholder" is evolving. This section discusses how corporations' roles are also evolving, and whether those changes justify modernizing the agency paradigm to accommodate the full scope of interests held by modern investors. I conclude that yoking public functions to the function of private enterprises further demonstrates the need to supplement the traditional shareholder identity with that of the citizen shareholder.

B. Case Study Company Data: The Public Functions of Wal-Mart, IBM, and WellPoint

The case studies illustrate the arguments made in this section—that corporations are performing increasingly public functions, that corporations are interconnected, and that modern shareholders' economic interests are related to and have an impact on social and political interests. This section presents data related to the top (Wal-Mart), middle (IBM), and bottom (WellPoint) U.S.-based companies on the top 100 corporate revenue list.[166] This section also identifies the public actions of these

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> 164. If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech. If the antidistortion rationale were to be accepted, however, it would permit Government to ban political speech simply because the speaker is an association that has taken on the corporate form.

Citizens United v. FEC, 130 S.Ct. 876, 904 (2010).

> 165. All the provisions of the Bill of Rights set forth the rights of individual men and women—not, for example, of trees or polar bears. But the individual person's right to speak includes the right to speak *in association with other individual persons*. Surely the dissent does not believe that speech by the Republican Party or the Democratic Party can be censored because it is not the speech of "an individual American." It is the speech of many individual Americans, who have associated in a common cause, giving the leadership of the party the right to speak on their behalf. The association of individuals in a business corporation is no different—or at least it cannot be denied the right to speak on the simplistic ground that it is not "an individual American."

Id. at 928 (Scalia, J., concurring); *see also* Amy J. Sepinwall, *Guilty by Proxy: Expanding the Boundaries of Responsibility in the Face of Corporate Crime*, 63 HASTINGS L.J. 411, 427–30 (2012).

166. *See* Table 9: Top Corporate, Mutual Fund, and Government Institutional Investors in Case Study Companies.

three private entities and demonstrates how the broader interests of citizen shareholders are impacted by corporate action.

Table 2: Case Study Companies & Public Functions[167]

	Wal-Mart[168] (#1)	IBM[169] (#48)	WellPoint[170] (#100)
Provide Health Insurance	Yes	Yes	Yes
Provide 401(k)	Yes	Yes	Yes
Political Spending	Yes	No	Yes
Political Action Committee	Yes	No	Yes
Lobbyist Expenditures	\$6.1M (2010)[171]	None reported	\$20.3M (2010)[172]

All three companies provide health insurance to employees.[173] Similarly, all three provide 401(k) plans for employees. Not surprisingly, the funds provided in the three companies' 401(k) plans include funds in the

167. 401(k) participation is available to full- and part-time employees, but health care coverage is limited to full-time employees at Wal-Mart, and is uncertain for IBM and WellPoint, although their business models are unlikely to be as reliant on part-time employees as the major retail chain is.

168. *Careers: Benefits*, WALMART, http://walmartstores.com/careers/7750.aspx (last visited May 8, 2012).

169. INTERNATIONAL BUSINESS MACHINES, INC., http://www.ibm.com (last visited May 8, 2012); *see also Pay & Benefits*, IBM, http://www-03.ibm.com/employment/us/li_pay_benefits.shtml; *IBM Policies*, IBM, http://www.ibm.com/ibm/responsibility/policy5.shtml (last visited May 8, 2012) ("It is IBM's long-standing policy that we participate in politics as private citizens, not as IBMers. Therefore, it is the policy of the IBM Company not to make contributions of resources such as money, goods or services to political candidates or parties. This policy applies equally in all countries where IBM does business, regardless of whether or not such contributions are considered legal in any host country.").

170. WELLPOINT, INC., http://www.wellpoint.com/ (last visited Apr. 5, 2012); *Wellness Programs*, WELLPOINT, http://www.careersatwellpoint.com/Wellness-Program.aspx; *Benefits*, WELLPOINT, http://www.careersatwellpoint.com/Benefits.aspx?clicked=0 (last visited May 8, 2012); *Wellpoint, Inc. Wellpac-2010 FEC PAC-Qualified Committee*, FIND THE DATA, http://fec-political-committees.findthedata.org/l/7505/Wellpoint-Inc-Wellpac (last visited May 8, 2012). Note that WellPoint is the parent of Blue Cross/Blue Shield and Anthem entities, and thus, their contributions are included in the data reported directly above.

171. *Annual Lobbying by Wal-Mart Stores*, OPENSECRETS.ORG, http://www.opensecrets.org/pacs/lookup2.php?strID=C00093054&cycle=2010 (last visited May 8, 2012).

172. This figure includes the spending of subsidiaries like Blue Cross/Blue Shield and Anthem. *Wellpac-2010 FEC PAC-Qualified Committee*, *supra* note 171; *Blue Cross/Blue Shield Client Profile: Summary, 2010*, OPENSECRETS.ORG, http://www.opensecrets.org/lobby/clientsum.php?id=D000000109&year=2010.

173. *See supra* notes 169–71.

top mutual fund companies (see Table 3). Political spending is discussed separately below in Part III.E.

Table 3: Mutual Funds Included in Case Study 401(k) Plans

Top Mutual Funds	Part of Wal-Mart 401(k)[174]	Part of IBM 401(k)[175]	Part of Well-Point 401(k)[176]
Vanguard	Ø	12 funds	15 funds
American	1 fund	Ø	2 funds
Fidelity	2 funds	Ø	Ø
PIMCO	2 funds	2 funds	1 fund
BlackRock	1 fund	Ø	Ø
Total funds offered	16 funds	21 funds	30 funds

174. *Wal-Mart Profit Sharing and 401(k) Plan*, MY PLAN IQ, http://www.myplaniq.com/LTISystem/f401k_view.action?ID=995 (last visited Apr. 5, 2012). Plan options include the following: American Funds EuroPacific Blend, Barclays iShares Foreign Blend Index Trust, Laudus Mondrian International Equity Trust, Fidelity Advisor International Small Capital Equity Trust, iShares Russell 1000 Index, David NY Venture A, Rainier Large Capital Equity Index, Dreyfus/The Boston Company Small/Mid Capital Growth Fund, GAMCO Westwood Small Cap Equity Fund, BlackRock Inflation Protected Bond, PIMCO Total Return Bond Fund, Prudential Core Plus Bond III, Stable Value Government Bonds, PIMCO All Asset Institutional Index, and Fidelity Advisor Global Balanced Asset Fund. *Id.*

175. *International Business Machines (IBM) 401K Plus Plan*, MY PLAN IQ, http://www.myplaniq.com/LTISystem/f401k_view.action?ID=675# (last visited Apr. 5, 2012). Plan funds include the following: ING Global Real Estate, Vanguard REIT Index, Vanguard Pacific Stock Index, Vanguard European Stock Index, State Street Global Advisors, International Stock Selection, PIMCO Commodity fund, PIMCO Emerging Markets Bond, Vanguard Inflation-Protected Bonds, Vanguard Long-Term Investment-Grade Bonds, Vanguard Short-Term Bond index, Vanguard Large Cap Index, Vanguard Total Stock Market Index, Vanguard Growth Index, Vanguard Value Index, State Street Global Advisors Small/Mid Capital Fund, Vanguard Small Capital Growth Index, Vanguard Small Capital Value Index, Lehman Brothers Holdings, Total Bond Market, and a money market account. *Id.*

176. *WellPoint 401K Retirement Savings Plan*, MY PLAN IQ, http://www.myplaniq.com/LTISystem/f401k_view.action?ID=993# (last visited Apr. 5, 2012). Participating funds include the following: Dimensional Fund Advisors Emerging Markets, Vanguard Total International Stock Index, Van Kampen International Growth Fund, PIMCO Total Return Bond Fund, Vanguard Total Bond Market Index, Vanguard Institutional Index, Wells Fargo Advantage Index Fund, American Funds Growth Fund of America, Touchstone Sands Capital Select Growth Fund, Vanguard PRIMECAP Fund, American Beacon Large Capital Value Fund, Vanguard Windsor II Large Value Fund, Vanguard Mid-Capitalization Index Fund, Vanguard Explorer Small Growth Fund, Wells Fargo Advantage Small Capital Growth Fund, Goldman Sachs Small Capital Value Fund, Vanguard Wellington Fund, Vanguard Target Retirement Income Fund, Wells Fargo Advantage Dow Jones Target Fund, Vanguard Money Market Fund, Wells Fargo Advantage Dow Jones Target 2010, Vanguard Target Retirement 2015 Fund, Wells Fargo Advantage Dow Jones Target 2030 Fund, Vanguard Target Retirement 2035 Fund, Wells Fargo Advantage Dow Jones Target 2040 Fund, Vanguard Target Retirement 2045 Fund, and Wells Fargo Advantage Dow Jones Target 2050 Fund. *Id.*

The case study companies also serve as an investment source for many of the top companies and top mutual funds discussed in this Article, as well as to government pension plans.[177] Securities Exchange Commission form 13F[178] filings identify institutional investors, of a certain size, with holdings in publicly traded companies, including the case study companies.[179] While all of the top mutual funds are invested in the case study companies to some degree, seven of the eleven mutual funds discussed above own 200,000 shares or more in the case study companies[180] For an additional illustration of the level of intra-company investment, see Table 9: Top Corporate, Mutual Fund, and Government Institutional Investors in Case Study Companies, included in the Appendix, ranking institutional investors among the top 100 companies, top mutual funds discussed herein, and government pension plans in the three case study companies.

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177. *See infra* Table 4: Top Mutual Fund Funds with 200,000 Shares or More in Case Study Companies (2010); Table 5: Top Mutual Funds in 2010.

178. 17 C.F.R. § 240.13f-1 (2011); *see also Form 13(f)—Reports Filed by Institutional Investment Managers*, U.S. SECURITIES AND EXCHANGE COMMISSION, http://www.sec.gov/answers/form13f.htm (last visited Apr. 5, 2012).

179. Form 13F is a report required by the SEC for institutional investment managers with more than $100M assets under their control, including banks, insurance companies, broker/dealers, corporations, and pension funds. 17 C.F.R. § 240.13f-1 (2011); SECURITIES & EXCHANGE COMMISSION, Division of Investment Management, *Frequently Asked Questions about Form 13F* , (Sept. 2011), http://www.sec.gov/divisions/investment/13ffaq.htm.

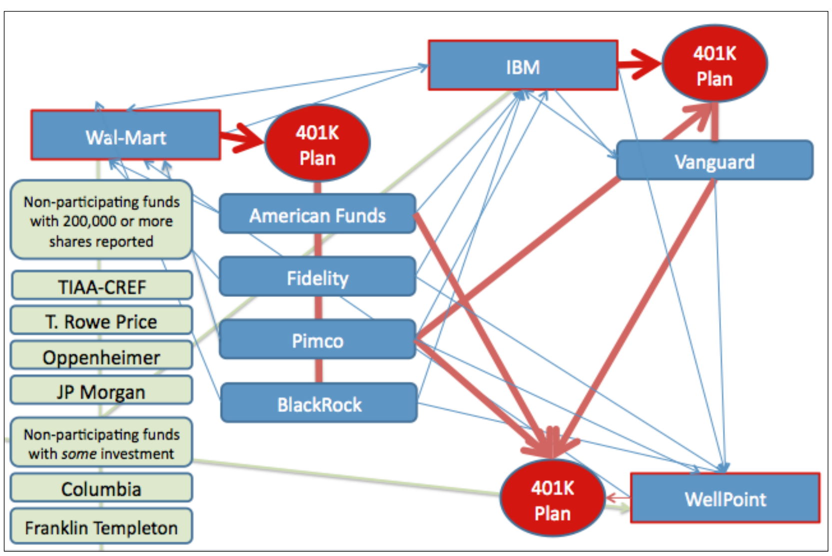
180. The cut-off point for tracking investments is an arbitrary selection made by the author.

Table 4: Top Mutual Fund Funds with Significant Investment in Case Study Companies[181]

Mutual Funds	Invested in Wal-Mart	Invested in IBM	Invested in WellPoint
Vanguard	x	x	x
American			
Fidelity	x	x	x
PIMCO			
TIAA-CREF	x	x	x
Franklin Templeton			
T. Rowe Price	x	x	x
Columbia			
Oppenheimer Funds	x	x	x
JP Morgan	x	x	x
BlackRock	x	x	x

Table 4 highlights the interconnectedness of corporate investment. This point is further illustrated by the following diagram:

Figure 2: Interconnectedness Between Mutual Funds, Corporate 401(k) Plans, and Corporate Sponsor of the Plan.



181. List of Section 13(f) filings for the case study companies on file with the author.

Figure 2 illustrates the level of investment between the case study companies and the top mutual funds. The results are not surprising, but the visual representation conveys more than words alone. Each of the three case study companies are listed along with the names of the top mutual funds participating in their 401(k) plans. For Wal-Mart, the fund participants are American Funds, Fidelity, PIMCO, and BlackRock; for IBM, the participants are Vanguard and PIMCO; for WellPoint, the participants are American Funds, PIMCO, and Vanguard. Each of the top mutual fund family participants has some level of investment[182] in each of the three case study companies, with T.Rowe Price, Oppenheimer, JP Morgan Chase and TIAA-CREF having reported holdings of over 200,000.

This interconnectedness provides another justification for conceptualizing modern mutual fund investors as citizen shareholders. Moreover, corporate interconnectedness underscores the universal investor theory: what a modern investor owns is a share in the market as a whole, not a share in an individual company.[183] The diagram illustrates that risk is not isolated to one company or even within one industry for the citizen shareholder. The financial health of corporations—and therefore the financial health of their investors—depends on the health of other corporations and the market as a whole.

Additionally, the level of intra-company and mutual fund investment in the top companies demonstrates how closely tied personal retirement savings are to corporate performance. Corporations, as private entities, perform a public function by serving as the foundation of individual retirement savings. The number of government-sponsored pension funds invested in the case study companies further evidences this public function. For example, of the reported institutional investors owning 200,000 shares of stock or more in the case study companies, forty were government-sponsored pension plans.[184] This also means that while the

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182. Here I am discussing *any* corporate investment, not a significant investment of 200,000 shares or .01% as gathered from form 13(f) filings.

183. Fairfax, *supra* note 78, at 83–85; HAWLEY & WILLIAMS, *supra* note 28, at 21.

184. *See infra* Table 9: Top Corporate, Mutual Fund, and Government Institutional Investors in Case Study Companies. Institutional investors are listed in rank order by size of holdings, from largest to smallest until the cut-off threshold of 200,000 shares. Wal-Mart had twenty registered, U.S. public pension investors in 2010: CALPERS; N.Y. State Common Ret. Fund; N.Y. State Teachers' Ret. Sys.; Fla. State Bd. of Admin.; Cal. State Teachers' Ret. Sys.; State of Wis. Inv. Bd.; State of N.J. Common Pension Fund; Ohio Pub. Emps. Ret. Sys.; State Teachers Ret. Sys. of Ohio; Tex. Teacher Ret. Sys.; Va. Ret. Sys.; State Treasurer of Mich.; Colo. Pub. Emps.' Ret. Ass'n; Tex. Permanent Sch. Fund; Emps. Ret. Sys. of Tex.; Pub. Sector Pension Inv. Bd.; Commonwealth of Pa. Pub. Schs.; Ky. Teachers' Ret. Sys.; N.M. Educ. Ret. Bd.; and Or. Pub. Emps. Ret. Sys. IBM had

stock market investment numbers are currently at 54% of American households, there is an even greater number of people (households dependent on government-backed pensions for retirement savings) for whom the private performance of corporations will determine, in part, their individual economic stability.

C. Growing Corporate Spaces: Health Care

As demonstrated with the case studies, providing health insurance to employees is one way that private corporations perform a public function that impacts individuals.[185] Employer-provided health insurance as a form of employee benefit is a primary means through which Americans obtain health insurance coverage.[186] In 2010, 45% of Americans received health insurance through an employer-based plan.[187] Compare that with the 25% of Americans who received health insurance through the government in the form of Medicare, Medicaid, and military/veterans insurance, and the 17% of Americans who remain uninsured.[188]

Access to health care is a meaningful measure of economic and social stability and is tracked domestically and internationally as an indicator of stability and health.[189] Heath care is internationally considered a

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seventeen registered, U.S. public pension investors in 2010: N.Y. State Common Ret. Fund; CALPERS; N.Y. State Teachers' Ret. Sys.; Fla. State Bd. of Admin.; Cal. State Teachers' Ret. Sys.; State of Wis. Inv. Bd.; Ohio Pub. Emps. Ret. Sys.; State Teachers Ret. Sys. of Ohio; Colo. Pub. Emps.' Ret. Ass'n; N.J. Div. of Inv.; Tex. Teacher Ret. Sys.; Tex. Permanent Sch. Fund; State Treasurer of Mich.; Emps. Ret. Sys. of Tex.; Ky. Teachers' Ret. Sys.; Commonwealth of Pa. Pub. Schs.; and Va. Ret. Sys. WellPoint had twelve registered, U.S. public pension investors in 2010: N.Y. State Common Ret. Fund; CALPERS; N.Y. State Teachers' Ret. Sys.; State Teachers Ret. Sys. of Ohio; Cal. State Teachers' Ret. Sys.; State of Wis. Inv. Bd.; Emps. Ret. Sys. of Tex.; Ohio Pub. Emps. Ret. Sys.; State of N.J. Common Pension Fund; Colo. Pub. Emps.' Ret. Ass'n; Tex. Permanent Sch. Fund; and State Treasurer of Mich.

185. *See, e.g.*, Bratton & Wachter, *supra* note 34, at 852 ("[T]he corporation, as the nation's primary employer, becomes the primary supplier of employee welfare provisions preferred by the state . . . ," including health insurance.).

186. *See, e.g.*, Danny King, *Fewer Americans Get Employer Health Insurance*, DAILY FINANCE.COM, (Mar. 7. 2011), http://www.dailyfinance.com/2011/03/07/fewer-americans-get-employer-health-insurance/ (asserting that employer-provided health insurance accounts for the coverage of 45% of Americans).

187. Elizabeth Mendes, *Employer-Based Health Insurance Continues to Trend Down*, GALLUP (Nov. 11, 2011), http://www.gallup.com/poll/150692/Employer-Based-Health-Insurance-Continues-Trend-Down.aspx.

188. *Id*.

189. MARK W. STANTON, AGENCY FOR HEALTHCARE RESEARCH & QUALITY, EMPLOYER-SPONSORED HEALTH INSURANCE: TRENDS IN COST AND ACCESS, (2004), *available at* http://www.ahrq.gov/research/empspria/empspria.htm; John M. Eisenberg & Elaine J. Power, *Transforming Insurance Coverage Into Quality Health Care: Voltage Drops From Potential to Delivered Quality*, JAMA, Oct. 25, 2000, at 2100, 2101.

human right[190] and remains at the center of political debates in the United States.[191] Health insurance is one way to ensure appropriate access to health care and is an indicator of overall health.[192] Private employers,

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190. Article 25 of the Universal Declaration of Human Rights states:

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

Universal Declaration of Human Rights, G.A. Res. 217 (iii) A, U.N. Doc. A/RES/217(iii), art. 25 (Dec. 10, 1948).

> 1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
> 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
> (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
> (b) The improvement of all aspects of environmental and industrial hygiene;
> (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
> (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

United Nations, International Covenant on Economic, Social, and Cultural Rights art. 12 (1966).

191. *See, e.g.*, Florida *ex rel*. Atty. Gen. v. U.S. Dept. of Health & Human Servs., 648 F.3d 1235, 1241 (11th Cir. 2011) (challenging the constitutionality of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010)); Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 608 (2011) (granting cert. review for 648 F.3d 1235 on the severability issue); Dept. of Health & Human Servs. v. Florida, 132 S. Ct. 604 (2011) (granting cert. on the minimum coverage issue in *Florida ex rel. Att'y Gen.*, 648 F.3d 1235); Florida v. Dept. of Human & Health Servs., 132 S. Ct. 604 (2011) (granting cert. review for *Florida ex rel. Att'y Gen.*, 648 F.3d 1235, on the issue of Congress's spending power and ability to link federal funding to state compliance). CNN reports on its "Top Campaign Issues" that health care is a top issue and provides further commentary:

> Most Republican candidates are pushing to "repeal and replace" much of the health care reform bill passed by a Democratically controlled Congress and signed into law by President Obama in spring 2010. The law has proved less popular than Obama and Democrats anticipated when they used considerable political capital to pass it. But the GOP is also exposed on health care. Gov. Mitt Romney is plagued by comparisons between the Democratic law and a similar bill he supported and signed while governor of Massachusetts.

Election Center: Top Campaign Issues, CNN, http://www.cnn.com/ELECTION/2012/campaign-issues.html.

192.
> Health care coverage promotes access to medical goods and services, as well as providing financial security against unexpected or serious illness . . . . Most OECD countries have achieved near-universal coverage of health-care costs for a core set of services, which usually include consultations with doctors and specialists, tests and examinations, and surgical and therapeutic procedures.

ORG. FOR ECON. COOPERATION & DEV. (OECD), HEALTH AT A GLANCE 2011: OECD INDICATORS 132, *available at* http://www.oecd.org/dataoecd/6/28/49105858.pdf. The United States is one of four OCED countries that does not provide universal health coverage. *Id.* The OECD cautions that "[t]he many of whom are corporations, provide health insurance for nearly half of all Americans and by doing so perform a public function.

When corporations are the predominant providers of health insurance (through employee benefit plans), private economic conditions influence the provision of that public function. Combining shareholder returns and health insurance in the same analysis demonstrates the blending of economic, social, and political interests for investors and citizens alike. For example, the number of Americans with health insurance has been declining since the economic crisis in 2008; the sharpest decline, in fact, is among individuals who receive their health insurance through employer-sponsored plans.[193] For example, in 2011, Wal-Mart—the largest revenue-producing company, ranked as the 24th largest economy in the world,[194] and the largest private employer[195]—announced a new policy that it would not provide health insurance for new, part-time employees.[196] Corporate policies are likely to impact health insurance coverage rates directly and access to health care indirectly. In the face of insurance premium increases at 9% a year, the debate regarding health care coverage and its implications for business (and vice versa) is likely to continue.[197]

The issue of health insurance can serve as a lens through which to examine the bifurcated interests of citizen shareholders. This issue has direct economic consequences for corporate returns as well as discernible social and political consequences. Discussing health insurance solely in light of the economic interests of shareholders overlooks an important component of the interests involved, particularly when half of Americans

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problem of persistent uninsurance is a major barrier to receiving health care, and more broadly, to reducing health inequalities among population groups . . . ." *Id.*

193. Mendes, *supra* note 187; *see also* King, *supra* note 186.

194. *See infra* Table 7: Top Economies of the World in 2010.

195. *Nation's Largest Employers*, NEW YORK JOB SOURCE, http://nyjobsource.com/largestemployers.html (last visited Apr. 5, 2012); *see also America's Ten Largest Employers*, 24/7 WALL STREET, http://247wallst.com/2011/04/24/americas-ten-largest-employers (last visited Apr. 5, 2011) ("Wal-Mart is both the largest private employer in the world as well as the largest company ranked by annual revenue.").

196. Mendes, *supra* note 187; Steven Greenhouse & Reed Abelson, *Wal-Mart Cuts Some Health Care Benefits*, N.Y. TIMES, Oct. 21, 2011, http://www.nytimes.com/2011/10/21/business/wal-mart-cuts-some-health-care-benefits.html?pagewanted=all.

> The increased cost of health insurance is a central fact in any discussion of health policy and health delivery. As annual premiums surge beyond $13,000 for an average family, costs are blamed for rising uninsured and 'under-insurance.' For those Americans who are fully-covered, these cost realities affect employers, both large and small . . . .

Health Insurance: Premiums and Increases, NATIONAL CONFERENCE OF STATE LEGISLATURES, (Aug. 2011), http://www.ncsl.org/default.aspx?tabid=14514.

197. Greenhouse & Abelson, *supra* note 196.

are invested in the stock market and nearly the same number of people obtain their insurance from the companies listed thereon.

For example, this Article focuses on citizen shareholders—mutual fund investors participating in employer-sponsored plans—who have an interest in market stability and performance as a whole. A corporate decision regarding health insurance may impact both the workforce and the market as a whole. For example, the recently excluded part-time employees without medical insurance may see doctors less, buy fewer prescription drugs and health-related products, as well as incur higher costs associated with emergency care needs exacerbated by delayed treatment. While enduring these economic consequences, if the employee also invests in a 401k plan, she is likely to be indirectly invested in Wal-Mart through several avenues (mutual fund invested in Wal-Mart and companies included in fund also are likely to hold Wal-Mart stock).

D. Growing Corporate Spaces: Retirement

As documented above, investment through employer-sponsored retirement plans is the primary method of market entry for citizen shareholders and demonstrates the growing dependence of Americans on the performance of the market as a means to secure individual financial stability.

The fastest growing class of private investment is in mutual funds through the proliferation of employer-sponsored retirement vehicles such as the 401(k) and other defined contribution plans.[198] Private wealth savings,[199] largely for retirement,[200] is achieved primarily through 401(k)

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198. Employer-sponsored plans are also called defined contribution plans and include the 401(k) plans, 403(b) plans, and 457 plans for government employees. Individual retirement accounts (IRAs)

> were designed with two goals when they were created in 1974 under the Employee Retirement Income Security Act (ERISA). First, they provide individuals not covered by workplace retirement plans with an opportunity to save for retirement on their own. Second, they allow workers who are leaving jobs a means to preserve the tax benefits and growth opportunities that employer-sponsored retirement plans provide.

ICI 2011 FACTBOOK, *supra* note 13, at 103–104, 112.

199.
> It is a matter of experience that during two periods of man's life, childhood and old age, he can not support himself; and that sickness, childbearing, and incidental economic readjustments will make even further lacunae. The only bridge, in our system, to cover these gaps is private property. The common law has based its whole fabric on this premise.

Berle, *supra* note 145, at 1369.

200.
> Mutual funds play a key role in achieving both the long- and short-term savings goals of U.S. households. In 2010, 74 percent of mutual fund-owning households indicated that their primary financial goal for their fund investments was saving for retirement.

plans, whereby an employer partners with an investment company to offer investment opportunities to the employees through a limited offering of special funds and products.[201] The "choice" to invest is limited and often encouraged by the pre-tax investment advantages and possibility for employer matching funds.[202]

Similarly, the choice regarding *how* to invest is also limited and constrained by the employer-sponsored plan. The nearly compulsory nature of stock ownership makes such investments closely mirror an employment tax with a residual, long-term personal benefit, much like the intended framework of social security. The tax-like nature of employee investment raises serious theoretical questions as to the appropriate role of corporations and the responsibilities they bear to the individual investors and to society, perhaps elevating concerns such as long-term stability, sustainable practices, and research and development for longevity.

Mutual funds have also been evolving. The pool of assets managed by U.S. mutual funds is increasing, as is the concentration of assets in the top funds. The twenty-five largest funds managed 60% of the mutual fund assets in 2000 and almost 75% in 2010.[203] The market share of the

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> Ninety-one percent of households that owned mutual funds held shares inside workplace retirement plans, individual retirement accounts (IRAs), and other tax-deferred accounts. Households were more likely to invest their retirement assets in long-term mutual funds than in money market funds. Defined contribution (DC) retirement plans and IRA assets held in stock, bond, and hybrid mutual funds totaled $4.3 trillion in 2010 and accounted for 48 percent of those funds' assets, whereas retirement account assets in money market funds were $351 billion, or 13% of those funds' assets.

ICI 2011 FACTBOOK, *supra* note 13, at 84.

201. Taub, *supra* note 5, at 851.

202. *Id.*; *see also The 401k Advantage*, PROFIT SHARING/401K COUNCIL OF AMERICA, http://www.401k.org/LinkClick.aspx?fileticket=uEnqkTNfg14%3D&tabid=71&mid=410 (last visited Apr. 5, 2012) ("401(k) contributions are made pretax, which means that when your money goes into the plan it is not subject to federal income tax or most state and local income taxes. Likewise, investment earnings on your savings are not taxed until they are withdrawn from the plan."); Lee Ann Obringer, *How 401 K Plans Work*, HOW STUFF WORKS, http://money.howstuffworks.com/personal-finance/retirement-planning/401k2.htm (last visited Apr. 5, 2012).

"Without the tax incentives, Section 401(k) plans would just become an investment account with a great deal of restrictions on the accounts." Beckett G. Cantley, *The Cure Causes New Symptoms: Capital Control Effects of Tax Enforcement, Gold Regulation, and Retirement Reform*, 7 S.C. J. INT'L L. & BUS. 75, 106 (2010) (discussing the effect on 401(k) plans if government-regulated accounts became the new mechanism for individual retirement savings and the tax advantage of 401(k) plans was eliminated).

203. The top eleven mutual funds, by asset values, are listed in Table 5. "The share of assets managed by the largest 25 firms increased to 74 percent in 2010 from 68 percent in 2000." ICI 2011 FACTBOOK, *supra* note 13, at 23.

top eleven funds is almost 55%,[204] achieved, in part, by participating in employer-sponsored retirement plans.

The top mutual funds are listed below in Table 5.

Table 5: Top Mutual Funds in 2010 [205]

Firm	Total Assets[206] (in U.S. $ million)	Market Share[207]
Vanguard	1,200,000	15.58%
American	814,000	11.01%
Fidelity	743,000	10.05%
TIAA-CREF[208]	453,000	5.8%
PIMCO	449,000	6.07%
Franklin Templeton	323,000	4.37%
T. Rowe Price	247,000	3.34%
Columbia	146,000	1.97%
Oppenheimer Funds	131,000	1.78%
JP Morgan	130,000	1.75%
BlackRock	127,000	1.72%

Unsurprisingly, there is a significant cross-investment among the mutual funds listed herein (Table 5), and the top 100 companies, listed in Table 8.

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204. *Id*. ("In addition, the share of assets managed by the largest 10 firms in 2010 was 53 percent, up from the 44 percent share managed by the largest 10 firms in 2000.").

205. *Largest Mutual Fund Firms*, INVESTMENT NEWS, http://www.investmentnews.com/apps/pbcs.dll/gallery?Site=CI&Date=20111012&Category=free&ArtNo=101209993&Ref=PH&Params=Itemnr=1 (last visited Apr. 5, 2012) (based on data available from Morningstar's Fund Flow Direct Database at http://corporate.morningstar.com/US/asp/subject.aspx?xmlfile=2955.xml&ad=van).

206. *Id.*

207. *Id.* Market share indicated by the Investment News ranking is based on a U.S. Mutual fund market of $7.69 trillion assets. The *2011 Investment Company Factbook*, however, reports the total U.S. mutual fund market at $11.8 trillion. ICI 2011 FACTBOOK, *supra* note 13, at 197. The market share percentage for TIAA-CREF is calculated from the $7.69 trillion number used in the rest of the rankings.

208. Press Release, TIAA-CREF, TIAA-CREF and the Future Fund Partner on Ownership of 685 Third Avenue Tower, (Mar. 9, 2011), *available at* http://www.tiaa-cref.org/public/about/press/about_us/releases/pressrelease376.html ("With more than USD$453 billion in combined assets under management as of December 31, 2010, TIAA-CREF is best known as the leading provider of retirement services in the academic, research, medical and cultural fields and one of the largest institutional real estate investors in the U.S."); *see also Who We Serve*, TIAA-CREF, http://www.tiaa-cref.org/public/about/identity/who_we_serve/index.html (Apr. 5, 2012).

Private investment, which serves the quasi-public function of retirement savings, generates private economic power and fuels concentration of wealth.[209] As discussed in Part II, the nature of modern stock ownership—through employer-sponsored retirement funds—erodes traditional, market-based checks on old agency problems in corporations. It also increases the need for the system of investment to work fairly and appropriately for both the security of the individual investor, as well as for society which is dependent on the private provision of a public safety net.[210]

E. Growing Corporate Spaces: Political Speech

As seen with the case study companies, political speech is a third way in which corporations, as private entities, participate in or serve a public function.[211] Corporate actions funded by corporate treasuries have decidedly political and democratic consequences.[212] Even the SEC has recognized the uniquely political components of corporate actions, describing political contributions as the "type of social issue that might be significant to shareholders even though not significant to the bottom line."[213] Additionally, increasing corporate spaces have social and political impact. "As corporations gain political power and encroach more deeply into territory once solely occupied by government, the private boardroom rather than the public forum represents the relevant battlefield for determining the most important aspects of our lives."[214]

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209. *See generally* Edward A. Zelinksy, *The Defined Contribution Paradigm*, 114 YALE L.J. 451 (2004) (discussing the rise and role of defined contribution plans such as the 401(k)).

210. "The role of institutional investors is growing in many countries, with many economies moving away from 'pay as you go' retirement systems. This increased delegation of investment has raised the need for good corporate governance arrangements." STIJN CLAESSENS, GLOBAL CORPORATE GOVERNANCE FORUM OF THE WORLD BANK, CORPORATE GOVERNANCE AND DEVELOPMENT 7 (2003), *available at* http://www.ifc.org/ifcext/cgf.nsf/AttachmentsByTitle/Focus_1_CG_and_Development/$FILE/Focus_1_Corp_Governance_and_Development.pdf.

211. *See, e.g.*, Torres-Spelliscy, *supra* note 141, at 392 ("[T]he Supreme Court used *Citizens United* as an opportunity to expand corporate speech rights by overturning *Austin*'s and *McConnell*'s limits on corporate political spending.").

212.
> The decisions affecting some of the most important aspects of our individual and communal lives now get made inside the boardroom rather than in the public eye . . . . [C]orporate actors may likely dominate the political agenda and the public opinion on any matters that remain open for discussion in the public realm. In some real sense, the ability to direct corporate decisions represents the ability to control political life.

Siebecker, *supra* note 149, at 164–65.

213. Bebchuk & Jackson, *supra* note 37 (citing to a 1996 no action letter).

214. Siebecker, *supra* note 149, at 169.

While restricted from making direct candidate donations,[215] corporations participate in political speech through (1) contributions to political action committees (PACs), (2) expenditures on direct lobbying efforts, and (3) the use of corporate funds to encourage employees to support or oppose a particular candidate or issue.[216] Corporations are actively using the channels for political speech.[217] For example, in 2010, reported spending on lobbying was over $2.6 billion, with a majority coming from corporations or corporate-backed organizations or associations such as the Chamber of Commerce.[218] Additionally, § 441b of the McCain-Feingold Act contained exemptions for media corporations[219] and for communications of "non-profit organizations and political organization[s] if the communication is paid for exclusively by funds provided directly by individuals who are United States citizens or nationals or lawfully admitted for permanent residence."[220]

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215. *See* Bipartisan Campaign Reform Act of 2002 (McCain-Feingold), Pub. L. No. 107-155, 116 Stat. 81 (codified primarily in scattered sections of 2 and 47 U.S.C.) (addressing the increased role of soft money in campaign financing and the proliferation of issue-advocacy advertisements). Under § 441b, corporations were prohibited from "using general treasury funds to make direct contributions to candidates or independent expenditures that expressly advocate the election or defeat of a candidate, through any form of media, in connection with certain qualified federal elections." Citizens United v. FEC, 130 S. Ct. 876, 887 (2010).

216. *See* KENT R. MIDDLETON & WILLIAM E. LEE, THE LAW OF PUBLIC COMMUNICATION 302 (7th ed. 2011) ("Profit-making corporations . . . may support PACs and engage in partisan communication—including advocating the election of specific candidates—provided the communications are directed only to the corporate . . . 'family.' A corporation may use corporate funds to urge management, shareholders, and their families to vote for a specific candidate . . . .").

217. For example, OpenSecrets.org reported on April 16, 2012 that outside groups such as parties, Super PACs, corporations, and other groups had spent $103,293,322 in the 2012 election. *Outside Spending*, OPENSECRETS.ORG, http://www.opensecrets.org/outsidespending/. Corporations, available to fund independent political expenditures after the decision in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), provided Super PACs with 19% of their budgets in 2010 and 23% (thus far) in the 2012 election cycle. T. W. Farnam, *Corporations Are Sending More Contributions to Super PACs*, WASH. POST, Feb. 2, 2012, http://www.washingtonpost.com/politics/corporations-are-sending-more-contributions-to-super-pacs/2012/02/02/gIQAL4dYlQ_story.html.

218. Bennett Roth & Alex Knott, *Lobbying Dollars Dip for the First Time in Years*, ROLL CALL (Feb. 1, 2011), *available at* http://www.rollcall.com/issues/56_75/-202990-1.html; *see also Who's Up, Who's Down*, OPENSECRETS.ORG, http://www.opensecrets.org/outsidespending/ (last visited Dec. 22, 2012) (providing data on total lobbying expenditures by year and breaking down annual and quarterly lobbying reports by industry and date).

219. *See* 2 U.S.C. § 431(9)(B) ("The term 'expenditure' does not include—(i) any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate . . . .").

220. *Id.* § 441b(c)(2). Nonprofit corporations that were formed solely to promote political ideas, that did not collect funds from for-profit corporations, and that did not engage in business

The 2010 U.S. Supreme Court opinion *Citizens United v. FEC*[221] expanded avenues for corporate political speech by eliminating restrictions on political expenditures made by corporations and labor unions that are uncoordinated with the candidate, the candidate's committee, or the party.[222] Outside spending, the type of political speech now available to corporations after *Citizens United*, is a rapidly growing category, with significant increases in the 2010 midterm elections and predicted growth for 2012.[223] The rapid growth in this category of spending is also attributable to the creation of the Super PAC. Super PACs are a fundraising entity created by the outcome of a federal court case, *SpeechNow.org v. FEC*,[224] that expands the independent expenditure rights created in *Citizens United*.[225] Super PACs are technically known as "independent expenditure-only committees" and can raise unlimited sums of money from corporations, unions, associations, and individuals, and then spend unlimited sums to overtly advocate for or against political candidates.[226]

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activities were also exempted from the restrictions on corporate expenditures under § 441b. FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 263–64 (1986).

221. *Citizens United*, 130 S. Ct. 876.

222. *See id.* at 909 ("[W]e now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."). Earlier, in *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court had reasoned that uncoordinated expenditures undermine the value of such speech to the candidate and therefore decrease the threat of quid pro quo reciprocation from the candidate or elected official. *Citizens United*, 130 S. Ct at 908.

223. Dana Bash, *Cash Flows in 2010 Cycle*, CNN POLITICS, Oct. 27, 2010, http://politicalticker.blogs.cnn.com/2010/10/27/cash-flows-in-2010-cycle; *Outside Spending*, OPENSECRETS.ORG, http://www.opensecrets.org/outsidespending/index.php (last visited Apr. 5, 2012).

224. SpeechNow.org v. FEC., 599 F.3d 686 (2010) (holding unconstitutional a provision limiting contributions by individuals to political committees that made only independent expenditures). "The FEC has applied *Citizens United* and *SpeechNOW* to allow unlimited contributions to, and expenditures by such PACs known as expenditure-only committees or SuperPACs." Jan Witold Baran et al., *Political Contributions and Expenditures by Corporations*, 1901 PLI/Corp 137, 153 (2011); *see also* FEC Advisory Opinion 2010-9; FEC Advisory Opinion 2010-11.

225. But after recent changes in campaign finance laws, these newly empowered PACs are allowed to raise unlimited funds which they can donate to a campaign with few restrictions. Since the 2008 presidential race, "the biggest change is the growth of these super PACs that can accept unlimited contributions and spend unlimited amounts," said Anthony Corrado, a professor of government at Colby College in Waterville, Maine.

Soaring PAC Donations May Fund a Shocking $6 Billion 2012 Election, RAW STORY (Nov. 3, 2011), http://www.rawstory.com/rs/2011/11/03/pac-donations-fund-6-billion-2012-election/.

226. Technically known as independent expenditure-only committees, Super PACs may raise unlimited sums of money from corporations, unions, associations and individuals, then spend unlimited sums to overtly advocate for or against political candidates. Super PACs must, however, report their donors to the Federal Election Commission on a monthly or quarterly basis—the Super PACs choice—as a traditional PAC would. Unlike traditional PACs, Super PACs are prohibited from donating money directly to political candidates.

Through existing channels for corporate money to enter the political debate and the increased avenues provided by independent expenditures and Super PACs, the category of outside spending outpaced the overall increases in election spending by 565%[227] between the 2006 and the 2010 midterm election years. The upcoming presidential election in 2012 will further document the level of corporate involvement in the political debate for the election of federal candidates.[228] While controversial as to the appropriate role of corporate political speech, the numbers demonstrate that corporate money is playing an undeniable role in political elections.

The following table demonstrates the increasing role that corporate-sponsored money plays in political elections.

Super PACs, OPENSECRETS.ORG, http://www.opensecrets.org/pacs/superpacs.php (last visited Feb. 10, 2012).

227. The total cost of the 2006 midterm election cycle is reported at $2.85 billion, with $37 million in independent expenditures. The total cost of the 2010 midterm election cycle was reported at $3.6 billion, with over $210 million in independent expenditures. The growth in overall cost of the election between 2006 and 2010 was 26%, whereas the increase in independent expenditures from these two cycles was 319%. *The Money Behind the Elections*, OPENSECRETS.ORG, http://www.opensecrets.org/bigpicture/ (last visited Apr. 16, 2012) (stating the reported costs of the elections); *Total Outside Spending by Election Cycle, Excluding Political Parties*, OPENSECRETS.ORG, http://www.opensecrets.org/outsidespending/cycle_tots.php (last visited Apr. 16, 2012). Data after the 2012 presidential election should provide a more complete picture regarding the role of corporate political spending in the form of independent political expenditures.

228. *See, e.g.*, W. Tradition P'ship, Inc. v. Att'y Gen. of Mont., 271 P.3d 1 (Mont. 2011).

Table 6: Election Spending 2006–2012[229]

2006 Election *Midterm*	*Total cost*	$2.85 B
	Independent Expenditures	$37 M
2008 Election *Presidential*	*Total cost*	$5.3 B
	Independent Expenditures	$157 M
2010 Election *Midterm*	*Total cost*	$3.6 B
	Independent Expenditures	$210 M
2012 Election *Presidential*	*Total cost*	Estimated between $6–7 B[230]
	Independent Expenditures	Unknown (over $98 M 4/2012)

Corporate political speech raises three distinct concerns. First, corporate political speech is economically motivated speech[231] that threatens to commoditize the marketplace[232] of political and social ideas and endeavors. The distorting nature of economically motivated speech is recognized in other areas of corporate regulation, including the Commercial Speech Doctrine,[233] and such speech receives a discounted level of protection under the First Amendment.[234]

229. *The Money Behind the Elections*, *supra* note 227 (stating the reported costs of the elections); *Total Outside Spending by Election Cycle, Excluding Political Parties*, *supra* note 227.

230. *Estimated Cost of 2012 Campaign: $6 Billion*, PUB. RADIO INT'L (Apr. 8, 2012), http://www.pri.org/stories/politics-society/government/estimated-cost-of-2012-campaign-6-billion3276.html.

231. Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in* Citizens United, 61 CASE W. RES. L. REV. 497, 521–27 (discussing the economic motivations of corporate political speech).

232. For a discussion of the marketplace of ideas, a metaphor used in free-speech cases, see *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986) and *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 792–95 (1978).

233. The Supreme Court established the Commercial Speech Doctrine in *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). *Cf.* Valentine v. Chrestensen, 316 U.S. 52 (1942) (establishing prior Supreme Court precedent that commercial speech was not protected by the Constitution). Commercial speech includes expressions that propose commercial transaction and which are solely tied to the speaker's or audience's economic interests, or which will likely influence the commercial decisions of consumers. The most common example is advertising goods for sale. *See* 16B C.J.S. *Constitutional Law* § 812 (2005).

234. Commercial speech is recognized under the First Amendment but receives limited constitutional protection. *See* Antony Page & Katy Yang, *Controlling Corporate Speech: Is Regulation Fair Disclosure Unconstitutional?* 39 U.C. DAVIS L. REV. 1, 47–60 (2005) (describing the different standards of review applied to commercial and noncommercial speech).

Second, by interpreting the First Amendment Freedom of Association[235] Clause to include for-profit corporations,[236] corporations have a derivative right to speak on behalf of their owners.[237] Unlike other forms of associations, however, shareholders lack a homogeneous set of interests and ideals[238] outside of interest in economic returns; therefore, when speaking derivatively, corporations cannot accurately represent the political and social interests of owners and investors.[239]

The third concern is the threat of compelled speech on behalf of dissenting shareholders.[240] Traditionally, dissenting shareholders could use corporate democracy measures such as director elections and shareholder proxy proposals, or as a matter of last resort, choose to sell the shares.[241] But investment in mutual funds through employer-sponsored retirement plans limits these rights because of lack of information,[242] shareholder passivity,[243] and limited exit rights.[244] Indirect ownership

235. "The First Amendment prohibits Congress from fining or jailing citizens, or associations of citizens, for engaging in political speech . . . ." Citizens United v. FEC, 130 S. Ct. 876, 884 (2010).

236. "Political speech is 'indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation.'" *Id.* (citation omitted).

237. *See, e.g.*, *id.* at 900; Buckley v. Valeo, 424 U.S. 1, 22–23 (1976); *Bellotti*, 435 U.S. at 783.

238. *See, e.g.*, Anabtawi, *supra* note 28, at 564 ("This Article disputes the characterization of shareholders as having interests that are fundamentally in harmony with one another.").

239. *See, e.g.*, Tucker, *supra* note 231, at 528–34.

240. *Id*. at 535–43.

241. "Shareholder objections raised through the procedures of corporate democracy can be more effective today because modern technology makes disclosures rapid and informative." *Citizens United*, 130 S. Ct. at 916 (internal citations omitted). "If and when shareholders learn that a corporation has been spending general treasury money on objectionable electioneering, they can divest." *Id.* at 978 (Stevens, J., dissenting).

242. "[T]he inherent limitations of the tax law and a recent FEC interpretation of federal campaign finance law led to an unprecedented lack of political transparency in the election cycle." *A Guide to the Current Rules for Federal Elections: What Changed in the 2010 Election Cycle*, CAMPAIGN LEGAL CTR., http://www.campaignlegalcenter.org/index.php?option=com_content&view=article&id=1187%3Aa-guide-to-the-current-rules-for-federal-elections&catid=48%3Amain&Itemid=59. For example, under the federal tax code, 501(c)(3) organizations are not required to publicly disclose their donors, even if the organization engages in political speech. "This aspect of the tax law is not new; it has just become more salient in light of the surge in spending by corporations and outside groups in the 2010 election cycle." *Id.* Disclosure of corporate contributions for political speech are further hidden by a 2007 Federal Elections Commission formal explanation of its rules that "groups running these election ads would have to disclose only those contributions that were specifically designated for election ads . . . . In other words, non-disclosure is the default under the FEC's interpretation of the law." *Id.*; *cf. Citizens United*, 130 S. Ct. at 916.

243. [T]he notion that investors are expected to be largely passive has become well entrenched as a matter of law and business practice. In the retail market, mutual funds operate on the assumption that most investors are not interested in getting involved in investment decisions because they are too busy or unqualified. Investors are

complicates the traditional market-based remedies of both knowing about how corporate money is spent (additional distance between true owners and management) and then selling one's stock if unhappy with the outcome.[245] Additionally, exit can occur only after the speech; thus, shareholders are left without a preventative remedy against compelled, disagreeable speech.[246]

The tension between a right to a return on investments (or even the simple ability to save for retirement) and the ability to support political causes and participate in the democratic process raises a crucial point. The conundrum of investors potentially forced to choose between economic returns and fidelity to political ideology demonstrates the comingling of economic interests with social and political concerns as democratic participants. The number of Americans invested in the market elevates the impact of this tension. Even though mutual fund investors may experience a diluted harm if only one out of 100 companies in a fund engages in incongruent speech, the aggregate effect of dissonant political speech given the majority of Americans invested in the market is hard to ignore.[247]

> considered customers, who buy financial products, rather than active owners of investment assets.

Richardson, *supra* note 108, at 603.

244. *See supra* notes 135–44 and accompanying text.

245. Modern technology may help make it easier to track corporate activity, including electoral advocacy, but it is utopian to believe that it solves the problem. Most American households that own stock do so through intermediaries such as mutual funds and pension plans, which makes it more difficult both to monitor and to alter particular holdings. Studies show that a majority of individual investors make no trades at all during a given year. Moreover, if the corporation in question operates a PAC, an investor who sees the company's ads may not know whether they are being funded through the PAC or through the general treasury.

Citizens United, 130 S. Ct. at 978 (Stevens, J., dissenting) (citations omitted).

246. The injury to the shareholders' expressive rights has *already* occurred; they might have preferred to keep that corporation's stock in their portfolio for any number of economic reasons; and they may incur a capital gains tax or other penalty from selling their shares, changing their pension plan, or the like.

Id. (emphasis added).

247. One might argue that the diluted remedy for the mutual fund investor indicates a diluted harm to the investor. How harmful can the incongruent speech be when it is only from one firm out of one hundred composite firms comprising an index? When a significant portion of the voting population is invested in this type of investment vehicle, however, the aggregate effect of dissonant or incongruent political speech is hard to ignore . . . . Our law recognizes the value of aggregate harms in mechanisms such as class action lawsuits and allowing a series of seemingly insignificant breaches over time to constitute a material breach. Here too the aggregate harm of incongruent political speech should be recognized despite the minimal effect on the rights of the individual citizen-shareholder.

Tucker, *supra* note 231, at 542–43.

Infusing public debates with private dollars blurs the lines between the public and private functions of corporations. An election stream infused with corporate money is the original context in which I first used the phrase citizen shareholder as a means to capture the bifurcated interests between economic and democratic rights.[248] The phrase has been expanded here to represent the full scope of interests held by the majority of investors who enter the market in mutual funds through employer-sponsored defined contribution plans. The number of citizens invested in the market this way underscores the need for a modernized conceptualization of the shareholder that can take into account the relationship between economic, social, and political interests.

IV. CONCLUSIONS

Departing from the corporate law perspective of internal organization and examining the agency paradigm from the perspective of the majority of American investors reveals that the traditional agency model is broken. A litmus test for corporate action is whether or not corporate action serves shareholder interests. The traditional agency paradigm seeks to align the actions of corporate management with shareholders, but that paradigm and the rules developed under it are based on the notion of an individual, direct shareholder.[249] The current agency paradigm excludes the interests of indirect owners and consequently excludes most American investors. Premising corporate law theories and remedies on a model that excludes a majority of American investors evokes anti-democratic concerns and seems counterintuitive.

The citizen shareholder should be incorporated into the agency paradigm for three reasons. First, a majority of modern investors enter the market and purchase mutual funds through employer-sponsored defined contribution plans, such as 401(k) plans. The data regarding modern investments and policy changes to 401(k) plan administration, like auto-

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248. *Id.* at 502 n.14; Anne M. Tucker, *Rational Coercion:* Citizens United *and a Modern Day Prisoner's Dilemma*, 27 GA. ST. U. L. REV. 1105, 1129 (2011).

249. The shareholders in whose interests corporations must speak are not the human beings who own (or, more often, on whose behalf other institutions own) the shares. Indeed, they are not citizens at all, but rather moments in the market, legal abstractions that have interests quite different from those of real citizens in their full complexity. Unlike real people, the fictional shareholder is an entirely one-sided abstraction; it seeks to increase the value of its shares without regard for any other value. Corporations, then, when they act as they are supposed to, pursue only one goal of the many that are important in a civilized society. Corporate agents, in short, work for a principle, not a principal.

Greenwood, *supra* note 74, at 1003.

matic enrollment, indicate that this trend has a long trajectory and that the majority threshold will quickly be surpassed by increasingly more investors.

Second, there are structural constraints in this type of investment that weaken, and in some cases, eliminate rights intended to protect shareholders and serve as a check on mismanagement. Mutual fund investors have limited voting, exit, and information rights. As more investors are grouped in a class of assets with the least mechanisms for choice and accountability, one must question the current power balance struck in corporate law. Additionally, the nature of what one owns as a mutual fund investor is different from what one owns as a direct shareholder so that indirect owners bear the risk of ownership (i.e., market decline) without the benefit of traditional shareholder rights. These differences may make mutual fund holders more concerned with market performance as a whole, and more hostile to externalities and risk exposure than a direct shareholder.

Third, corporations perform increasingly public functions that blur the lines between public and private, and intertwine economic, social, and political interests. Corporate actions have decidedly political and social consequences for both investors and non-investors alike. These consequences elevate the importance of adequately representing the rights of indirect investors in the agency paradigm. With a majority of households invested in private entities that serve public functions, accountability is paramount.

This Article urges a modernization of the traditional agency paradigm by adopting language that reflects the unique interests of modern investors: mutual fund holders in employer-sponsored plans—the citizen shareholders. When analyzing whether corporate actions serve the interests of investors, the agency paradigm must incorporate these indirect owners' interests. Such interests include a preference for policies and actions that support broad market performance rather than those that promote excessive risk taking or creating externalities. Additionally, expanding the shareholder identity to include the citizen shareholders modernizes the language and captures the scope of investments, the purposes served, and the consequences of corporate action that are broader than the daily rise or fall of an individual company (or fund) share price.[250]

250. The final chapter in Berle and Means's *The Modern Corporation and Private Property* focused on this very point. BERLE & MEANS, *supra* note 7, at 352–57 ("More slow, but equally sure is the development of social pressure demanding that the [corporate] power shall be used for the benefit of all concerns. This pressure, constant in ecclesiastical and political history, is already making its appearance in many guises in the economic field."); *see also* Bratton & Wachter, *supra* note

Corporate law scholarship has long advocated for incorporating such interests;[251] this Article suggests that one way to incorporate these broader interests is to reconceptualize the identity of the shareholder within the traditional agency paradigm. Thus, the definition of shareholder expands and the framework evolves to reflect the investment realities for a majority of American investors.

At this stage, the approach of the citizen shareholder is conceptual, not procedural, and is a starting point for thinking about how to infuse traditional corporate law models with current economic realities. Perhaps more importantly, this project looks outside the walls of corporations and asks how and why individuals invest in the market and how can (or should) corporate law respect, incorporate, and serve the interests of modern investors. Current corporate law debates are largely divorced from the reality of how over 90 million Americans who, typically through a system of confined choice and encouraged by tax incentives, link their individual financial security with private, corporate actions. The implicit trust placed upon corporate actions by both individuals investing in this fashion and our society as a whole merits the acknowledgment and inclusion of those interests within the agency paradigm. Conceptualizing this class of 401(k) investors as the citizen shareholder, and modernizing the agency paradigm to accommodate these investors' interests—primarily in market stability to secure retirement savings—is a step in the right direction.

34, at 851–52 (describing the evolution of Berle's vision of the form and function of corporations to one where corporate entities had social responsibilities, even though how such duties would be incorporated into the governance model was not then clear).

251. *See*, *e.g.*, Blair & Stout, *supra* note 8; *see also* Ho, *supra* note 8; Taub, *supra* note 5, at 860 ("[T]hose with a stakeholder perspective see corporate accountability more broadly. They would claim that corporations need to serve all important stakeholders, beyond just shareholders . . . employees, suppliers, customers, the local community, the environment, future generations, and perhaps anyone impacted significantly by externalities resulting from corporate operations.").

Appendix

Table 7: Top Economies of the World in 2010

Rank	**Economy**	**GDP/ Revenue**[252]	**Rank**	**Economy**	**GDP/ Revenue**
1	United States	14,582,400	24	Wal-Mart Stores	408,214
2	China	5,878,629	25	Venezuela, RB	387,852
3	Japan	5,497,813	26	Austria	376,162
4	Germany	3,309,669	27	Saudi Arabia	375,766
5	France	2,560,002	28	Argentina	368,712
6	United Kingdom	2,246,079	29	South Africa	363,704
7	Brazil	2,087,890	30	Iran, Islamic Rep.	331,015
8	Italy	2,051,412	31	Thailand	318,847
9	India	1,729,010	32	Denmark	310,405
10	Canada	1,574,052	33	Greece	304,865
11	Russian Federation	1,479,819	34	Colombia	288,189
12	Spain	1,407,405	35	Royal Dutch Shell	285,129
13	Mexico	1,039,662	36	Exxon Mobil	284,650
14	Korea, Rep.	1,014,483	37	BP	246,106
15	Australia	924,843	38	Finland	238,801
16	Netherlands	783,413	39	Malaysia	237,804
17	Turkey	735,264	40	United Arab Emirates	230,252
18	Indonesia	706,558	41	Portugal	228,538
19	Switzerland	523,772	42	Hong Kong SAR, China	224,458
20	Poland	468,585	43	Singapore	222,699
21	Belgium	467,472	44	Egypt, Arab Rep.	218,912
22	Sweden	458,004	45	Israel	217,334
23	Norway	414,462	46	Toyota Motor	204,106

252. Revenue listed in millions of U.S. dollars. *Gross domestic product 2010*, WORLD BANK (July 1, 2011), http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf (Ranking national economies by millions of U.S. dollars); *Global 500 List*, CNN MONEY (July 26, 2010), http://money.cnn.com/magazines/fortune/global500/2010/full_list/. Ranking compiled by author; corporate revenue confirmed for U.S.-traded companies based on 10K filings in 2011 for year-end 2010 (on file with the author).

Rank	Economy	GDP/ Revenue	Rank	Economy	GDP/ Revenue
47	Ireland	203,892	73	New Zealand	126,679
48	Chile	203,443	74	Assicurazioni Generali	126,012
49	Japan Post Holdings	202,196	75	Allianz	125,999
50	Philippines	199,589	76	AT&T	123,018
51	Nigeria	193,669	77	Carrefour	121,452
52	Czech Republic	192,152	78	Ford Motor	118,308
53	Sinopec	187,518	79	ENI	117,235
54	State Grid	184,496	80	J.P. Morgan Chase & Co.	115,632
55	AXA	175,257	81	Hewlett-Packard	114,552
56	Pakistan	174,799	82	E.ON	113,849
57	China National Petroleum	165,496	83	Berkshire Hathaway	112,493
58	Chevron	163,527	84	GDF Suez	111,069
59	ING Group	163,204	85	Daimler	109,700
60	Romania	161,624	86	Nippon Telegraph & Telephone	109,656
61	Algeria	159,426	87	Samsung Electronics	108,927
62	General Electric	156,779	88	Citigroup	108,785
63	Total S.A.	155,887	89	McKesson	108,702
64	Peru	153,845	90	Verizon Communications	107,808
65	Bank of America Corp.	150,450	91	Crédit Agricole	106,538
66	Volkswagen	146,205	92	Banco Santander	106,345
67	Kuwait	148,024	93	General Motors	104,589
68	Kazakhstan	142,987	94	HSBC Holdings	103,736
69	ConocoPhillips	139,515	95	Siemens	103,605
70	Ukraine	137,929	96	Vietnam	103,572
71	BNP Paribas	130,708	97	American International Group (AIG)	103,189
72	Hungary	130,419	98	Lloyds Banking Group	102,967

Rank	Economy	GDP/ Revenue	Rank	Economy	GDP/ Revenue
99	Bangladesh	100,076	124	Iraq	82,150
100	Cardinal Health	99,613	125	Nissan Motor	80,963
101	Nestlé	99,114	126	Pemex	80,722
102	CVS Caremark	98,729	127	Panasonic	79,893
103	Wells Fargo	98,636	128	Proctor & Gamble	79,697
104	Qatar	98,313	129	LG	78,892
105	Hitachi	96,593	130	Telefónica	78,853
106	International Business Machines (IBM)	95,758	131	Sony	77,696
107	Dexia Group	95,144	132	Kroger	76,733
108	Gazprom	94,472	133	Groupe BPCE	76,464
109	Honda Motor	92,400	134	Prudential	75,010
110	Electricité de France	92,204	135	Munich Re Group	74,764
111	Aviva	92,140	136	Statoil	74,000
112	Petrobras	91,869	137	Nippon Life Insurance	72,051
113	Royal Bank of Scotland	91,767	138	AmerisourceBer-gen	71,789
114	Morocco	91,196 a	139	China Mobile Communications	71,749
115	PDVSA	91,182	140	Hyundai Motor	71,678
116	Metro	91,152	141	Costco Wholesale	71,422
117	Tesco	90,234	142	Vodafone	70,899
118	Deutsche Telekom	89,794	143	BASF	70,461
119	Enel	89,329	144	BMW	70,444
120	Slovak Republic	89,034	145	Zurich Financial Services	70,272
121	United Health Group	87,123	146	Valero Energy	70,035
122	Angola	84,391	147	Fiat	69,639
123	Société Générale	84,157	148	Deutsche Post	69,427

Rank	Economy	GDP/ Revenue	Rank	Economy	GDP/ Revenue
149	Industrial & Commercial Bank of China	69,295	156	Peugeot	67,297
150	Archer Daniels Midland	69,207	157	CNP Assurances	66,556
151	Toshiba	68,731	158	Barclays	66,533
152	Legal & General Group	68,290	159	Home Depot	66,176
153	Boeing	68,281	160	Target	65,357
154	U.S. Postal Service	68,090	161	ArcelorMittal	65,110
155	Lukoil	68,025	162	WellPoint	65,028

Table 8: Top 100 Corporations by Revenue in 2010

Rank	**Company**	**Revenues**[253]	**Stock Exchange**[254]
1	Wal-Mart Stores	408,214	NYSE
2	Royal Dutch Shell	285,129	NYSE
3	Exxon Mobil	284,650	NYSE
4	BP	246,106	NYSE
5	Toyota Motor	204,106	NYSE
6	Japan Post Holdings	202,196	Not on U.S. exchange
7	Sinopec Financial Holdings Co. Ltd.	187,518	Not on U.S. exchange
8	State Grid Corp. of China	184,496	Gov't Owned
9	AXA	175,257	NYSE Euronext
10	China National Petroleum	165,496	Not on U.S. exchange
11	Chevron	163,527	NYSE

253. Revenue is listed in millions of U.S. dollars. *Global 500 List*, *supra* note 252. Ranking compiled by author; corporate revenue confirmed for U.S.-traded companies based on 10K filings in 2011 for year-end 2010 (on file with the author).

254. Exchange listing information obtained from exchange-based databases of listing companies. Exchanges searched included the NYSE Euronext, *Listing Directory*, NYSE EURONEXT (2012), http://www.nyse.com/about/listed/lc_ny_name_A.html?ListedComp, as well as the NASDAQ, *Company List (NASDAQ, NYSE, & AMEX)*, NASDAQ, http://www.nasdaq.com/screening/company-list.aspx. Data compiled by author.

A securities exchange is a U.S.-registered exchange if it files with the Securities and Exchange Commission under Section 6 of the 1934 Act:

> An exchange may be registered as a national securities exchange under the terms and conditions hereinafter provided in this section and in accordance with the provisions of section 19(a) of this title, by filing with the Commission an application for registration in such form as the Commission, by rule, may prescribe containing the rules of the exchange and such other information and documents as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78f (2010). Registered securities exchanges include the following: NYSE Amex; BATS Exchange, Inc.; BATS Y. Exchange, Inc.; NASDAQ OMX-BX, Inc. (formerly Boston); C2 Options Exchange, Inc.; Chicago Board Options Exchange, Inc.; Chicago Stock Exchange, Inc.; EDGA Exchange, Inc.; EDGX Exchange, Inc.; International SEC Exchange, LLC; the Nasdaq Stock Market, LLC; National Stock Exchange, Inc.; New York Stock Exchange, LLC (referred to in Table 8 as the "NYSE"); NYSE Arca, Inc.; and NASDAQ OMX PHLX, Inc. (formerly Philadelphia Stock Exchange). *Exchanges*, U.S. SECURITIES AND EXCHANGE COMMISSION, http://www.sec.gov/divisions/marketreg/mrexchanges.shtml. For a complete listing of international stock exchanges, see Aldas Kirvaitis, *Stock Exchanges Worldwide Links*, http://www.tdd.lt/slnews/Stock_Exchanges/Stock.Exchanges.htm (last visited May 8, 2012).

Rank	**Company**	**Revenues**[253]	**Stock Exchange**[254]
12	ING Group	163,204	Euronext
13	General Electric	156,779	NYSE
14	Total S.A.	155,887	NYSE Euronext
15	Bank of America Corp.	150,450	NYSE
16	Volkswagen	146,205	Not on U.S. exchange
17	Conoco Phillips	139,515	NYSE
18	BNP Paribas	130,708	NYSE Euronext
19	Assicurazioni Generali	126,012	MP
20	Allianz	125,999	ADR[255] on NYSE
21	AT&T	123,018	NYSE
22	Carrefour	121,452	Euronext
23	Ford Motor	118,308	NYSE
24	ENI	117,235	ADR on NYSE
25	J.P. Morgan Chase & Co.	115,632	NYSE
26	Hewlett-Packard	114,552	NYSE
27	E.ON	113,849	Not on U.S. exchange

255. ADR stands for American Depository Receipt:

> ADRs can be called American Depository Receipts, Global Depository Receipts . . . . A security issued by a depository against a deposit of stock held in the local marketplace . . . . [W]hen we're talking about an ADR, we're talking about a security where the ADR and the ADS is registered with the SEC, at least marginally, and trades publicly in the United States . . . .

Remarks of Harry Wellington, Dean of the New York Law School, *The Russian Securities Markets: Regulation and Practice*, 18 N.Y.L. SCH. J. INT'L & COMP. L. 1, 13 (1998); *see also ADR Basics: What is an ADR?*, INVESTOPEDIA, http://www.investopedia.com/university/adr/adr1.asp#axzz1m6ZODLIU (last visited Feb. 12, 2012) ("An American depository receipt (ADR) is a stock that trades in the United States but represents a specified number of shares in a foreign corporation. ADRs are bought and sold on American markets just like regular stocks, and are issued/sponsored in the U.S. by a bank or brokerage.").

Additionally, some foreign-owned securities are referred to as American Depository Shares or ADS:

> A U.S. dollar-denominated equity share of a foreign-based company available for purchase on an American stock exchange. American Depositary Shares (ADSs) are issued by depository banks in the U.S. under agreement with the issuing foreign company; the entire issuance is called an American Depositary Receipt (ADR) and the individual shares are referred to as ADSs.

American Depository Share—ADS, INVESTOPEDIA, http://www.investopedia.com/terms/a/ads.asp#ixzz1m6aBMcqD (last visited May 8, 2012).

Rank	Company	Revenues[253]	Stock Exchange[254]
28	Berkshire Hathaway	112,493	NYSE
29	GDF Suez	111,069	NYSE Euronext
30	Daimler	109,700	Not on U.S. exchange
31	Nippon Telegraph & Telephone	109,656	NYSE
32	Samsung Electronics	108,927	Not on U.S. exchange
33	Citigroup	108,785	NYSE
34	McKesson	108,702	NYSE
35	Verizon Communications	107,808	NYSE
36	Crédit Agricole	106,538	NYSE Euronext
37	Banco Santander	106,345	NYSE
38	General Motors	104,589	NYSE
39	HSBC Holdings	103,736	NYSE
40	Siemens	103,605	ADR on NYSE
41	American International Group (AIG)	103,189	NYSE
42	Lloyds Banking Group	102,967	NYSE
43	Cardinal Health	99,613	NYSE
44	Nestlé	99,114	ADR on NYSE
45	CVS Caremark	98,729	NYSE
46	Wells Fargo	98,636	NYSE
47	Hitachi	96,593	ADR on NYSE
48	International Business Machines (IBM)	95,758	NYSE
49	Dexia Group	95,144	Euronext
50	Gazprom	94,472	Not on U.S. exchange
51	Honda Motor	92,400	Not on U.S. exchange
52	Electricité de France	92,204	Euronext
53	Aviva	92,140	NYSE
54	Petrobras	91,869	Not on U.S. exchange
55	Royal Bank of Scotland	91,767	ADR by NYSE
56	PDVSA	91,182	Not on U.S. exchange

Rank	Company	Revenues[253]	Stock Exchange[254]
57	Metro A.G.	91,152	Not on U.S. exchange
58	Tesco	90,234	Not on U.S. exchange
59	Deutsche Telekom	89,794	Not on U.S. exchange
60	Enel	89,329	Not on U.S. exchange
61	United Health Group	87,138	NYSE
62	Société Générale	84,157	ARS on Euronext
63	Nissan Motor	80,963	OTC by ADR
64	Pemex	80,722	Gov't owned
65	Panasonic	79,893	NYSE
66	Proctor & Gamble	79,697	NYSE
67	LG	78,892	Not on U.S. exchange
68	Telefónica	78,853	ADR by NYSE
69	Sony	77,696	NYSE
70	Kroger	76,733	NYSE
71	Groupe BPCE	76,464	Privately owned
72	Prudential	75,010	NYSE
73	Munich Re Group	74,764	Not on U.S. exchange
74	Statoil	74,000	NYSE
75	Nippon Life Insurance	72,051	Not on U.S. exchange
76	AmericsourceBergen	71,789	NYSE
77	China Mobile Communi-cations	71,749	Not on U.S. exchange
78	Hyundai Motor	71,678	Not on U.S. exchange
79	Costco Wholesale	71,422	NASDAQ
80	Vodafone	70,899	NASDAQ
81	BASF	70,461	Not on U.S. exchange
82	BMW	70,444	Not on U.S. exchange

Rank	Company	Revenues[253]	Stock Exchange[254]
83	Zurich Financial Services A.G.	70,272	Not on U.S. exchange
84	Valero Energy	70,035	NYSE
85	Fiat	69,639	ADR on NYSE
86	Deutsche Post	69,427	Not on U.S. exchange
87	Industrial & Commercial Bank of China	69,295	Not on U.S. exchange
88	Archer Daniels Midland	69,207	NYSE
89	Toshiba	68,731	Not on U.S. exchange
90	Legal & General Group	68,290	Not on U.S. exchange
91	Boeing	68,281	NYSE
92	U.S. Postal Service	68,090	Gov't owned
93	Lukoil	68,025	Not on U.S. exchange
94	Peugeot	67,297	Euronext
95	CNP Assurances	66,556	Euronext
96	Barclays	66,533	ADR on NYSE
97	Home Depot	66,176	NYSE
98	Target	65,357	NYSE
99	ArcelorMittal	65,110	Euronext
100	WellPoint	65,028	NYSE

Table 9: Top Corporate, Mutual Fund, and Government Institutional Investors in Case Study Companies[256]

Wal-Mart Stores Institutional Investors[257]	**IBM** Institutional Investors	**WellPoint** Institutional Investors
1. Vanguard *(86M shares)*	1. Berkshire Hathaway *(64M shares)*	2. Vanguard *(15.15M shares)*
3. Berkshire Hathaway	3. Vanguard	3. Fidelity
4. BlackRock[258]	4. Blackrock	7. BlackRock
8. Fidelity	8. Fidelity	9. Oppenheimer
11. BlackRock	10. BlackRock	10. T. Rowe Price
13. BlackRock	11. Bank of America	14. BlackRock
14. Bank of America	12. JP Morgan Chase	18. BlackRock
16. Legal & General Group	13. BlackRock	24. BlackRock
18. JP Morgan Chase	14. TIAA-CREF	30. TIAA-CREF
20. TIAA-CREF	20. BlackRock	32. Bank of America
21. CALPERS	22. T. Rowe Price	43. BlackRock
26. T. Rowe Price	25. Legal & General Group	47. Legal & General Group
29. BlackRock	36. Wells Fargo	48. JP Morgan Chase
33. N.Y. State Common Ret. Fund	38. N.Y. State Common Ret. Fund	49. N.Y. State Common Ret. Fund
41. N.Y. Teachers' Ret. Sys.	40. CALPERS	53. CALPERS
45. AXA	43. N.Y. State Teachers' Ret. Sys.	61. BlackRock

256. These data reflected in this table were hand-collected by the author based on publicly available 13f filings for the case study companies. (on file with author).

257. Institutional investors are listed in rank order by size of holdings, from largest to smallest until the cut-off threshold of 200,000 shares of the company is met. The number next to the institutional investor name indicates the rank of that investor among all institutional investors, not just those included in this table. Institutional investors included in this table are (a) one of the top 100 companies, (b) one of the top mutual funds discussed in this Article, or (c) a pension fund associated with a state or municipal government in the U.S.

258. Note, there are several different BlackRock funds, and as well other institutional investors, that hold stock under different registered entities operating under the corporate parent umbrella. For purposes of this table, the parent company is identified and given a separate entry for each 13F filing that demonstrated holdings over 200,000 shares in the case study companies in 2010.

Wal-Mart Stores Institutional Investors	**IBM** Institutional Investors	**WellPoint** Institutional Investors
50. Allianz	48. BlackRock	68. N.Y. State Teachers' Ret. Sys.
64. Fla. State Bd. of Admin.	52. Citigroup	72. State Teachers Ret. Sys. of Ohio
66. Cal. State Teachers' Ret. Sys.	53. Fla. State Bd. of Admin.	94. Cal. State Teachers' Ret. Sys.
68. Wells Fargo	58. AXA	98. AXA
69. BlackRock	59. Cal. State Teachers' Ret. Sys.	103. State of Wis. Inv. Bd.
75. BlackRock	63. Oppenheimer Funds	111. Emps. Ret. Sys. of Tex.
79. State of Wis. Inv. Bd.	66. BlackRock	114. HSBC
83. ING	67. State of Wis. Inv. Bd.	123. Ohio Pub. Emps. Ret. Sys.
90. Wells Fargo	70. Wells Fargo	129. Credit Agricolé
91. Citigroup	75. Credit Agricolé	134. Wells Fargo
99. BlackRock	79. Ohio Pub. Emps. Ret. Sys.	145. State of N.J. Common Pension Fund
106. Credit Agricolé	80. BlackRock	151. Barclays
109. State of N.J. Common Pension Fund	81. State Teachers' Ret. Sys. of Ohio	172. AXA
112. Ohio Pub. Emp. Ret. Sys.	82. HSBC	183. Colo. Pub. Emps.' Ret. Ass'n
113. State Teachers' Ret. Sys. of Ohio	88. Colo. Pub. Emps.' Ret. Ass'n	191. Tex. Permanent Sch. Fund
116. HSBC	89. N.J. Div. of Inv.	196. ING
127. Oppenheimer Fund	95. General Electric	198. State Treasurer of Mich.
133. Tex. Teacher Ret. Sys.	99. Allianz	
137. Va. Ret. Sys.	111. BNP	
146. State Treasurer of Mich.	120. Royal Bank of Scotland	
151. Colo. Pub. Emps.' Ret. Ass'n	124. Tex. Teacher Ret. Sys.	

Wal-Mart Stores Institutional Investors	**IBM** Institutional Investors	**WellPoint** Institutional Investors
159. Tex. Permanent Sch. Fund	125. ING	
169. Allianz	129. Tex. Permanent Sch. Fund	
173. IBM	130. IBM	
197. Emps. Ret. Sys. of Tex.	144. State Treasurer of Mich.	
229. Pub. Sector Pension Inv. Bd.	146. Emps. Ret. Sys. of Tex.	
236. Royal Bank of Scotland	171. AIG	
242. AIG	200. Ky. Teachers' Ret. Sys.	
245. INC	204. Commonwealth of Pa. Pub. Schs.	
246. Commonwealth of Pa. Pub. Schs.	236. Allianz	
249. Exxon	256. BNP	
262. Fidelity	273. AIG	
275. Allianz	275. Va. Ret. Sys.	
283. Ky. Teachers' Ret. Sys.		
308. N.M. Educ. Ret. Bd.		
309. BP		
341. AXA		
343. AIG		
355. Or. Pub. Emps. Ret. Sys.		
377. Wells Fargo		
389. BNP		
391. Wells Fargo		