HOW TO IMPLEMENT SHAREHOLDER DEMOCRACY

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Abstract

Thanks to their popularity, a few index funds have achieved substantial voting power in all the leading American companies. We argue that this power lacks both internal (vis-à-vis investors) and external (vis-à-vis the public at large) legitimacy, and that this lack of legitimacy cannot be resolved simply through pass-through voting. We propose a novel approach to improve both internal and external legitimacy. Based on the experience of citizen assemblies in the political sphere, we propose that a randomly drawn assembly of an index fund's investors or beneficiaries should have the power to decide (or recommend) how the fund should vote in corporate ballots on environmental, social, and political issues. We analyze the advantages and limitations of such an approach and discuss various implementation issues.

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Introduction

In 2024, fifteen Republican state finance chiefs lambasted BlackRock's CEO, Larry Fink, for sacrificing his investors' returns to advance his climate agenda and for profiting from his investments in China at the expense of U.S. security.[1] In other words, they criticized him for maximizing financial return at the expense of a value (patriotism) and not maximizing it in the name of another value (the environment). Gone are the days when asset managers could do their jobs unencumbered by moral and political considerations. Today, large asset managers like BlackRock, Vanguard, and State Street are pressured in different, sometimes irreconcilable, directions. The pressure is not only on what to divest from but also on how to cast their corporate ballots. Shareholders' proposals are becoming increasingly prescriptive.[2] How should asset managers behave in response?

In this paper, we try to answer this question. We start by explaining why the issue has become so controversial in recent years. Index funds' success and strong economies of scale in their industry have concentrated a large chunk of the voting power of all the major American corporations in just three funds. This power lacks both internal (vis-à-vis investors) and external (vis-à-vis the public at large) legitimacy. To deflect this problem, fund managers have tried different strategies: pretending they are powerless, claiming they have no discretion, invoking the old idea that investors should vote with their feet, and finally distributing some of their voting power to investors through pass-through voting. We argue that none of these strategies works. In particular, pass-through voting is doomed to fail for two reasons. First, investors are affected by rational apathy, so most will not opt for any of the guidelines offered, leaving the fund with voting power. Second, if investors overcame rational apathy and made a choice, they would empower proxy advisors, recreating the concentration problem this strategy was trying to overcome.

We argue that, faced with the threat of a breakup or other forms of legislative intervention, one way for the three largest asset managers to save their business model is for them to shed their voting power and transfer the decision over "values versus value" to a body that can legitimately claim to represent the fund's investors.

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[1] James Reinl, *GOP Finance Chiefs Demand Answers from BlackRock over ESG "Woke Capitalism" Agenda and Iffy Trades in Coal, China, and Climate Change*, Daily Mail (Aug. 8, 2023), https://www.dailymail.co.uk/news/article-12385889/GOP-finance-chiefs-demand-answers-BlackRock-funds-ESG-woke-capitalism-agenda-iffy-trades-coal-China-climate-change.html [https://perma.cc/5SA3-JQU3].

[2] Kenneth Khoo & Roberto Tallarita, *Expanding Shareholder Voice: The Impact of SEC Guidance on Environmental and Social Proposals*, at 13–15 (Eur. Corp. Governance Inst. – L., Working Paper No. 822, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4913660 [https://perma.cc/S2N4-3275].

Drawing on the experience of citizen assemblies in the political arena, we argue that one plausible candidate to fulfill this representative function would be a randomly selected assembly of investors, or what we call an "investor assembly." We outline the characteristics that such an assembly should possess to achieve legitimacy, while maintaining legal and economic feasibility and political neutrality.

We discuss the major objections that have been made to citizen assemblies and can be made to investor assemblies as well: lack of expertise, capture, selection bias, governance issues, and legal feasibility. In all these cases, we argue that the problem is less severe than in the alternatives and can be contained with institutional design. Finally, we present evidence that citizen assemblies and citizen assembly-like institutions, such as deliberative polls and juries, have been used successfully worldwide.

We are not the first to argue that randomly drawn assemblies can be used in corporate governance. Cooper and Bauer have pioneered this idea with a Dutch pension fund.[3] Our contribution is to articulate the theoretical foundations for this use of lot-based deliberation for index funds as a solution to the legitimacy crisis that U.S. large asset managers are facing. We also provide an institutional blueprint for how fund governance should be designed to maximize the chances of addressing this legitimacy issue.

In the first section, we explore the legitimacy issue. In the second section, we explain how an investor assembly can overcome this problem. In the third section, we describe how investor assemblies will work. In the fourth section, we highlight the desirable properties of this solution. In the fifth section, we answer common objections. In the sixth section, we present the available evidence. Conclusions follow.

I. The Legitimacy Question

The growing popularity of index funds and, later, Exchange-Traded Funds (ETFs) has led to greater concentration of voting power in a few hands. In 1975, index funds accounted for only 0.5% of the S&P 500 index's capitalization.[4] In 2005, they reached 2%; in 2015, 11%; and by the end of 2024, 19%.[5] At the same time, the mutual fund and ETF industry became more concentrated: the Big Three mutual fund companies (Vanguard, BlackRock, and State Street) went from 12% of the mutual fund industry in 2000 to 36%

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[3] *See* Emmeline Cooper & Rob Bauer, *How to Democratise Pension Funds: Designing a Deliberative Mini-Public at Pensioenfonds Detailhandel*, Netspar (2024); Rob Bauer, et al., *Investor Democracy* (Eur. Corp. Governance Inst. Working Paper No.1125, 2026).

[4] Andrei Shleifer, *Do Demand Curves for Stocks Slope Down?*, 41 J. Of Fin. 579, 584 (1986).

[5] *See* Jacopo Marini & Luigi Zingales, *Who Owns Corporate America* (U. Chi. Working Paper, 2026).

in 2025.[6] As a result, the combined median stake of the Big Three in S&P 500 companies went from 7.1% in 2000[7] to about 22% in 2025.[8] If we consider the vote cast, the Big Three is approximately 29%.[9]

By wielding their voting power inside corporations, the Big Three can become de facto market regulators.[10] For example, when State Street launched a campaign targeting companies with fewer than 15% female directors on the board, BlackRock and Vanguard quickly joined the effort, and 495 U.S. companies added at least one female director.[11] This is similar to the impact of a government rule. In a democracy, however, there are clear procedures to ensure the legitimacy of regulation. What are the procedures in place in the mutual fund industry?

"[W]henever there is a question of power[,] there is a question of legitimacy," wrote Adolf Berle.[12] By the legitimacy of power, philosophers typically mean the normative justification for it, that is, its defensibility and acceptability on a moral and political level.

Given the enormous power of the Big Three over the economy as a whole and even parts of the political sphere, it is only natural for an increasing number of observers to question what, exactly, is the moral and political justification for that power. And when the justification is found lacking, it can lead to calls for taking that power away, as in a recent proposal by three influential scholars to break up large funds.[13]

A. *What Is Legitimacy?*

We just offered a brief definition of legitimacy, but it is a term of art that deserves further specificity. By legitimacy, we mean, basically, the justified right to do something, and in particular, in the case of political entities, the right to exercise power and sometimes even violence. Legitimacy in that sense

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[6] Share of mutual fund's total net assets managed by the Big Three in last quarter of 2025, from CRSP mutual fund database and authors' calculations.

[7] Scott Hirst & Lucian Bebchuk, *Big Three Power, and Why It Matters*, 102 B. U. L. Rev. 1547, 1556 tbl. 1 (2022).

[8] Authors' own calculations from LSEG/Thomson Reuters SEC 13F holdings data.

[9] Median share of total votes cast at a meeting that could be attributed to the combined holdings of BlackRock, Vanguard, and State Street in S&P 500 companies in 2024, based on ISS Voting Analytics, LSEG/Refinitiv institutional holdings data and authors' calculations.

[10] *See* Dorothy S. Lund, *Asset Managers as Regulators*, 171 U. Pa. L. Rev. 77 (2022).

[11] *State Street Global Advisors Marks Third Anniversary and Progress of Fearless Girl Campaign, Reports 681 Companies Added Female Board Members*, Business Wire (Mar. 5, 2020), https://www.businesswire.com/news/home/20200305005491/en/State-Street-Global-Advisors-Marks-Third-Anniversary-and-Progress-of-Fearless-Girl-Campaign-Reports-681-Companies-Added-Female-Board-Members [https://perma.cc/GB5N-9WXT].

[12] Adolf Augustus Berle, Economic Power and the Free Society 16 (1957).

[13] Eric A. Posner, Fiona M. Scott Morton & E. Glen Weyl, *A Proposal to Limit the Anti-Competitive Power of Institutional Investors*, 81(3) Antitrust L.J. (2017), https://papers.ssrn.com/abstract=2872754 [https://perma.cc/WW6V-HX8E].

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is also the condition under which those subject to that power have sufficient reason to accept and comply with it.[14]

Political theorists tend to think of legitimacy as a continuum, something an entity can have more or less of, with various contributing factors. A classic distinction further identifies three dimensions of political legitimacy: input, throughput, and output legitimacy.[15] Input legitimacy is a function of who gets to decide: For example, is it just one person or many? Throughput legitimacy depends on how decisions are made: For example, are they made in a transparent, accountable, and informed way? Output legitimacy, finally, is all about the nature and quality of outcomes: Did the political entity in charge produce "better" outcomes, for example in the sense of more economic growth or political stability? In politics, the legitimacy of authorities depends on doing reasonably well across these three dimensions, though oftentimes doing very well only on the output dimension (think double digit economic growth) can sustain a regime for a very long time (the classic case is China). In democracies, the emphasis tends to be placed on input (making sure to include a full range of voices) and throughput legitimacy (with a premium on transparency and accountability), though outputs obviously matter as well.

What complicates things about discussing legitimacy in the context of investment funds is that there are at least two kinds of distinct though partly overlapping publics subject to the power of the Big Three: directly, the shareholders of corporations included in the index funds and, indirectly, the larger political community, whose citizens (some of whom are also investors) are affected by the concentration of power in the index funds.

Because investors and society are two distinct publics, we propose to distinguish between asset managers' *internal legitimacy* (vis-à-vis investors) and *external legitimacy* (vis-à-vis the democratic public at large). While the two forms of legitimacy are distinct (including because they combine differently the three elements of input, throughput and output legitimacy delineated above) and theoretically independent, they can reinforce or weaken each other: a lack of internal legitimacy inside investor funds may compound the problem of their external legitimacy in the eyes of the public, and the lack of external legitimacy may make solving the internal legitimacy problem more urgent. As two prominent legal scholars write: "Failure to represent beneficiaries'

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[14] Legitimacy as we understand it is therefore the normative, as opposed to merely legal, right to use power. It is about the kinds of philosophical reasons that can be adduced to justify power, by contrast with merely legal legitimacy, as entrenched by law (since the law can be imperfect and legitimize morally illegitimate power structures). Normative legitimacy is also distinct from mere sociological legitimacy, namely, a specific public's actual support of the authority in question. That said, for our purposes here, sociological legitimacy today offers a good proxy for normative legitimacy because the public's growing unease about the power of the Big Three broadly tracks philosophical reasons.

[15] *See* Vivien A. Schmidt, *Democracy and Legitimacy in the European Union Revisited: Input, Output, and, 'Throughput,'* 61 POL. STUDIES 2 (2013); FRITZ SCHARPF, GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC? (1999).

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views not only harms those whose views are ignored [that is the problem of what we call internal legitimacy] but is deeply undemocratic. Issues like how to address climate change are fundamental public policy questions, and fund managers lack [what we call external] legitimacy to make such choices on their own."[16] Implicit here is the idea that the problem of external legitimacy compounds the problem of internal legitimacy, and vice versa.

Academics are not alone in being concerned about the power of asset managers, even though most people tend to focus on the problem of external legitimacy. The State of Florida's chief financial officer, Jimmy Patronis, stated it is "undemocratic of major asset managers to use their power to influence societal outcomes."[17] Interestingly, he does not dispute the power of rich individuals to influence societal outcomes. He disputes the power of asset managers to do so. In other words, the problem of internal legitimacy exacerbates external legitimacy concerns, opening the door to political intervention. By pressuring a few mutual funds, each side can achieve its political objectives without requiring legislation. Given the difficulty of passing legislation, this method is very tempting. If we do not improve both internal and external legitimacy, this concentration of power will be abused.

B. Denial

In the face of this increased power, index funds' initial reaction has been denial. The most extreme form of this denial consists in claiming that their small stakes do not entitle them to have influence. In a 2023 letter to shareholders, Larry Fink, the CEO of BlackRock, wrote, "As minority shareholders, it's not our place to be telling companies what to do. . . . [A]s I have said consistently over many years now, it is for governments to make policy and enact legislation, and not for companies, including asset managers, to be the environmental police."[18] Unfortunately, this statement contradicts what Fink wrote in 2020: "We will be increasingly disposed to vote against management and board directors when companies are not making sufficient progress on sustainability-related disclosures and the business practices and plans underlying them."[19]

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[16] Jill Fisch & Jeff Schwartz, *Corporate Democracy and the Intermediary Voting Dilemma*, 102 Tex. L. Rev. 1, 5 (2023).

[17] Kate Aronoff, *The Right Has It In for Woke Investors. The Only Problem? They Don't Exist*, The New Republic (Feb. 15, 2023), https://newrepublic.com/article/170229/right-woke-investors-problem-dont-exist? [https://perma.cc/X8KN-6GVG].

[18] Larry Fink, *Larry Fink's Annual Chairman's Letter to Investors*, Harv. L. Sch. F. on Corp. Governance (March 17, 2023), https://corpgov.law.harvard.edu/2023/03/17/larry-finks-annual-chairmans-letter-to-investors/ [https://perma.cc/4SR2-CRMJ].

[19] Larry Fink, *A Fundamental Reshaping of Finance*, BlackRock (2020), https://www.blackrock.com/corporate/investor-relations/2020-larry-fink-ceo-letter [https://perma.cc/5RGM-Z9FP].

The second reaction is to claim that, while index funds formally have the voting power, their fiduciary duty towards investors imposes such rigid guidelines that they have no discretion. In a debate at Davos, Fink stated, "We live in a world where the Department of Labor gave us this guidance about what is our fiduciary responsibility as investors. We only have one responsibility as investors: to maximize return. That's it."[20] If investors cared only about returns and if maximizing financial return were akin to maximizing a mathematical function, the fiduciary duty would indeed eliminate all discretion and resolve any legitimacy problem.

1. Do Investors Care Only About Return?

It is true that if investors care only about money, they will want their asset managers to focus only on maximizing financial return.[21] The problem is that the evidence does not support the idea that investors care only about money. The fifteen Republican state finance chiefs mentioned in the introduction were adamant that patriotic considerations are important. This attitude is consistent with the demand, expressed in a survey, for companies to boycott Russia after the Ukrainian invasion despite the costs this decision implies.[22] These preferences persist even when people incur real monetary costs for their choices.[23]

A subtler argument was put forward by Milton Friedman.[24] Friedman recognized that investors might care about things other than money. Yet, he argued that companies should ignore these non-monetary preferences when making decisions. Investors are better off if a company focuses on maximizing profit and lets shareholders decide how to allocate this profit to the social causes they care about. This separation of monetary and non-monetary goals makes sense in the case of charitable donations. Investors are better off if a company does not donate at the corporate level, but lets each shareholder decide how much of their dividend to donate at the personal level. Each shareholder

[20] ProMarket writers, *Unusual Debate at Davos: Lobbying, Maximizing Shareholder Value and the Duty of CEO's*, ProMarket (Apr. 1, 2016), http://www.promarket.org/2016/04/01/unusual-debate-at-davos-lobbying-maximizing-shareholders-value-and-the-duty-of-ceos/ [https://perma.cc/NBG5-EN9P].

[21] There is still a question about whether the intermediary should maximize financial return company by company or the aggregate return of all the companies in the investors' portfolio. We return to this issue below.

[22] Oliver Hart, David Thesmar & Luigi Zingales, *Private Sanctions*, 39 Econ. Pol'y 203 (2024).

[23] Rob Bauer, Tobias Ruof & Paul Smeets, *Get Real! Individuals Prefer More Sustainable Investments*, 34 Rev. of Fin. Stud. 3976 (2021); Malcolm Baker, Mark L. Egan & Suproteem K. Sarkar, *How Do Investors Value ESG?* (NBER, Working Paper No. 30708, 2022).

[24] Milton Friedman, *A Friedman Doctrine-- The Social Responsibility of Business Is to Increase Its Profits*, N.Y. Times (Sep. 13, 1970), https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html [https://perma.cc/HE8R-TR3T].

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can donate to their favorite charity instead of being forced to donate to charities they may not support. In this way, separation maximizes the total welfare of the investors.[25]

Friedman's separation result, however, holds only when a firm's business activities and social activities are completely independent (as is the case for charitable donations). This is rarely the case. Take a firm whose money-making activities lead to pollution. In general, it is cheaper to curb pollution than to pollute and clean up, and so socially responsible shareholders may prefer that the firm curbs pollution even if this reduces profit. In these situations, we have shown elsewhere that the firm should maximize the welfare of its shareholders, not profit, where shareholder welfare includes the utility investors derive from the environment, a safer country, and the well-being of others.[26]

As another example, consider Oxfam's proposal to Pfizer's and Moderna's shareholders to share the patents of their COVID-19 vaccines with African countries, which obtained 27.3% and 24% of the votes at the respective shareholder meetings.[27] The standard inefficiency of monopoly pricing tells us that even if all shareholders of the two companies were to donate all their additional monopoly profits in Africa to African countries to buy vaccines, they would not be able to achieve the same social objective (in terms of human lives saved) as distributing the vaccine at (constant) marginal cost in Africa. Thus, again, Friedman's separation result fails, and shareholders' social preferences become relevant for firms' optimal decision-making.

2. Is Return Maximization an Objective Standard?

Even if we accept that investors care only about returns, we have to recognize that long-term shareholder value cannot be objectively measured. Among the hundred environmental and social resolutions filed with S&P 100 companies between 2021 and 2023, the Big Three voted the same way only 31% of the time.[28] Moreover, whereas Vanguard voted against 72% of the proposals, BlackRock voted against 45% and State Street 28%. BlackRock supported 73% of the resolutions on civil rights and racial equity, while

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[25] *But see* Oliver Hart and Luigi Zingales, *The New Corporate Governance*, 1 U. Chi. Bus. L. Rev. 195, 211–12 (2022).

[26] Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J. L. Fin. & Acct. 247 (2017); Hart and Zingales, 2022, supra; *see also* Eleonora Broccardo, Oliver Hart & Luigi Zingales, *Exit Versus Voice*, 130 J. Pol. Econ. 3101 (2022).

[27] Jonathan Josephs, *Investors Lose Vote to Share Covid Vaccine Know-How*, BBC (Apr. 28, 2022), https://www.bbc.com/news/business-61262065 [https://perma.cc/7CZ7-WSKU].

[28] Lindsey Stewart, *Proxy-Voting Insights: How Differently Do The Big Three Vote on ESG Resolutions*, Harv. L. Sch. F. on Corp. Governance (July 3, 2023), https://corpgov.law.harvard.edu/2023/07/03/proxy-voting-insights-how-differently-do-the-big-three-vote-on-esg-resolutions/ [https://perma.cc/L2YJ-TBLH].

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Vanguard opposed all of them.[29] This behavior seems inconsistent with random errors in the valuation process but consistent with subjective values influencing the valuation.

We see clear evidence that values influence valuations through credit analysts' expectations of U.S. economic growth.[30] Democratic credit analysts had more optimistic forecasts of the economy than Republican analysts when Obama was president, but the rankings reversed under Trump. If values spill into expectations and estimation, all these questions of value are ultimately questions of values. This brings us back to the question of legitimacy: Who has the moral right to make these value-values arbitrages? Or, in other words, whose values should shape the decision process?

C. Exit

A third way out of the legitimacy question is based on the idea that investors can effectively vote with their feet if they do not feel adequately represented. Known as the Wall Street Rule, the conventional wisdom has been that investors either support management or sell.[31] This rule makes sense when ownership is highly fragmented, and investors care only about monetary returns. In such a situation, small investors have no power to change managerial decisions, and if they do not like them, they are left only with the option of selling the stock. This option, however, is not worthless. By putting downward pressure on prices, exiting can incentivize an activist to intervene in the company and replace management.[32]

"Consent or exit," however, is a rule that does not make sense in a world where ownership is more concentrated, and investors have objectives other than profit maximization. Today, the three largest institutional investors have enough votes to change the outcome of most corporate proposals (like the one on sharing the COVID-19 vaccine). Thus, investors have an additional and distinctively political option besides consent or exit, namely "voice"—or the capacity to shape an organization's decisions from within.[33] Further, it can be shown that voice is more effective than exit in pushing companies toward pursuing objectives other than profit maximization. Exit is unlikely to

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[29] *Id.*

[30] Elisabeth Kempf & Margarita Tsoutsoura, *Partisan Professionals: Evidence from Credit Rating Analysts*, 76 J. Fin. 2805 (2021).

[31] Edward S. Herman, Corporate Control, Corporate Power: A Twentieth Century Fund Study (1st ed. 1981) (first known use of the term); Adolf A. Berle, Power Without Property: A New Development in American Political Economy (1959) (earlier reference to idea).

[32] Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. Pol. Econ 110, 111 (1965).

[33] *See* Albert O. Hirschman, Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States (1970).

change company behavior since the downward pressure on prices caused by exit attracts more selfish investors to buy the stock, attenuating or muting the incentives to change objectives.[34] In contrast, under voice, socially responsible investors can make their preferences felt by remaining as shareholders.[35]

Last but not least, index funds have no exit option (they have to replicate the index), and most of their investors, who access the index fund through a 401(k) plan, have little or no exit options either. Most 401(k) plans offer limited investment options, and the alternatives to the index fund available in every plan tend to be more expensive and less diversified. If they want to achieve a reasonable level of diversification at a reasonable cost, most citizens have no choice with their pension money other than investing in the index fund offered by their 401(k) plan. Deprived of their exit option, investors' only alternative is to start demanding a voice.

D. Pass-Through Voting

Since 2021, growing concerns about the outsized influence of the Big Three index managers have spurred them to introduce pass-through voting, where asset managers enable fund investors to direct how the votes associated with their fund shares are cast.[36] BlackRock pioneered pass-through voting with a program called Voting Choice, which was directed at institutional investors. By the end of 2023, $2.6 trillion of its assets under management were eligible for Voting Choice, and almost $600 billion was enrolled in Voting Choice.[37] In 2024, BlackRock extended Voting Choice to some retail investors. Retail investors are not offered the option to vote on each individual ballot, but instead can choose among a limited set of proxy advisors' voting guidelines or delegate their votes to the fund itself. The latter is also the default option in the case where investors do not make a choice.

In February 2023, Vanguard launched "Investor Choice," which allows some of its retail investors to choose among a limited set of voting guidelines.[38] Similarly, in 2022, State Street launched a program dubbed "Proxy Voting Choice," first offered to institutional clients in separately managed

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[34] Robert Heinkel, Alan Kraus & Josef Zechner, *The Effect of Green Investment on Corporate Behavior*, J. Fin. & Quant. Analysis 431 (2001).

[35] Broccardo, Hart & Zingales, *supra* note 27, at 3101.

[36] Emmanuel Tamrat, Governance Guide: Proxy Voting 18–19 (2024).

[37] Thomas P. Skulski, *Institutional Pass-Through Voting*, Lexology (Mar. 18, 2024), https://www.lexology.com/library/detail.aspx?g=caaec1da-20a9-4fe6-be7a-21b0d2620c98 [https://perma.cc/EMF7-68T6].

[38] *Vanguard Launches Proxy Voting Choice Pilot*, Vanguard (Feb. 1, 2023), https://corporate.vanguard.com/content/corporatesite/us/en/corp/who-we-are/pressroom/press-release-vanguard-launches-proxy-voting-choice-pilot-020123.html [https://perma.cc/7B55-X8UJ].

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accounts and only later to some retail investors, where investors can choose among a predetermined set of guidelines.[39]

These programs have worked relatively well with institutional owners, but not with individual investors. BlackRock and State Street do not report the percentage of retail investors who enrolled in these programs. Vanguard reports that only 2% of retail investors who were offered "Investor Choice" actually made a choice. Of these, 40% chose to delegate their voting decision back to Vanguard, effectively reverting to the default.[40] If pass-through voting was designed to diffuse the concentration of the index funds' voting power, it has failed so far. It has failed for the simple reason that most retail investors do not bother to avail themselves of the option; they suffer from rational apathy, a concept we will explain in the next section. Since funds retain the voting decision for all the investors who do not opt for pass-through voting, the problem of concentrated power is only attenuated, but not eliminated.

In addition, pass-through voting does not solve the informational problem. Even the retail investors who do vote are likely to make decisions with limited information, again, for the rational apathy reasons we will explain in the next section.

Finally, pass-through voting keeps a large amount of the actual power, namely, agenda-setting, in the hands of the asset managers, who remain in charge of formulating the voting guidelines available to shareholders. A well-known distinction in political science is made between decision-making power and agenda-setting power. And because agenda-setting power comes first and shapes the menu of options, it often matters more than the actual power to decide. Sometimes it is even all that matters. So, under pass-through voting, despite the illusion of choice, investors are not empowered to act as a collective agent and develop their own guidelines but are relegated to react individually, in an atomized manner, to the voting guidelines formulated for them by asset managers. Pass-through voting is at best a very partial devolution of power to shareholders.

If we want to solve this problem, we need to find a system of decision-making by mutual funds that truly empowers shareholders and is both internally and externally legitimate, legally and economically feasible. In a very polarized political landscape, this solution should also be politically neutral, i.e., not systematically favor one side over another. Otherwise, it would be undone every time there is a change of majority in Congress.

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[39] *Proxy Voting Choice*, State Street, https://www.ssga.com/us/en/about-us/what-we-do/asset-stewardship/proxy-voting-choice [https://perma.cc/N4BV-ZMPC] (last visited July 30, 2025).

[40] Alon Brav et al., *The Proxy Voting Choice Revolution* 19 tbl. 4 (Eur. Corp. Governance, Working Paper No. 875, 2025).

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II. The Investor Assembly Solution

A. The Challenge

Having identified the sources of the increased demand for legitimacy, we will now explain how we plan to satisfy this demand in light of two challenges. First, individual preferences over corporate decisions need to be aggregated. This cannot be done easily through a poll because shareholders are uninformed. Take Oxfam's proposal to share COVID-19 vaccine patents with African countries. If implemented, would it save lives in Africa? What is the cost? What are the long-term consequences for scientist recruitment and customer acquisition?

Most investors lack the knowledge to make the appropriate decision, not because they are incapable, but because they have not taken the time to acquire this information. Most importantly, they have no incentive to learn this information. With typically 500 companies in their portfolios (if they hold an index fund or are otherwise well-diversified), and a trivially low probability of being pivotal, it is rational for them to remain uninformed. This is the standard Downs' rational apathy argument applied to corporate voting.[41] In this context, the argument is even more compelling than in the political sphere because in political elections, most voters feel a moral obligation to become at least somewhat informed and vote, and voting retains a social and public dimension. None of this applies (at least so far) in corporate elections.

This brings us to the second challenge. In the last 250 years, the solution to legitimacy problems in the political sphere has been elections, which allow citizens to choose their representatives and remove them from office if they prove disappointing or unresponsive to citizens' preferences. Elections thus ensure both legitimacy (the normative right to rule) and responsiveness and accountability through the threat of power removal.

We could, in theory, similarly ask investors to elect a group of representatives who would define the guidelines for value-values trade-offs for them. The candidates would run campaigns about the kind of trade-offs they would recommend once in "office" and after a suitable period where they would be free to exercise this recommendation power (we assume for now that asset managers are still the ones in the ultimate decision-making position), they would be subjected to the constraint of reelection.

We will not pursue this solution here, however. Elections are cumbersome, costly, and have shown their limits in politics, in terms of both responsiveness and accountability. They seem particularly inappropriate for the world of finance, as they would run into the same problems of attention

[41] *See* Anthony Downs, *An Economic Theory of Political Action in a Democracy*, 65 J. Pol. Econ. 135 (1957).

deficits as proxy voting. In other words, due to rational apathy, we can predict that investors will not bother to read the candidate statements and will most likely not vote en masse. For the same reason, the mechanism of electoral accountability, already rather weak in political democracies, would likely be toothless in the world of investment funds.

What we propose instead is a system inspired by electoral democracy's failings. It does not require mass investor participation and does not rely on electoral sanction as an accountability mechanism. Instead, it creates representatives who think like the population of investors because they are a statistically representative sample of that population. We now turn to this solution.

B. Citizen Assemblies

Faced with the widely noted "crisis of democracy," governments have started experimenting with citizen assemblies. Citizen assemblies are relatively large bodies of individuals (anywhere between fifty and several hundred) chosen at random (technically through stratified random sampling) from the larger population. Think of large juries aimed to capture the full diversity of a population and, in the ideal scenario, offer an accurate demographic mini-portrait of it. Unlike in the case of juries, however, participation is voluntary. Citizen assemblies are typically convened to deliberate at length and develop policy recommendations on topics ranging from abortion and end-of-life issues to climate justice, electoral law, and urban planning. Importantly, the members of such assemblies are compensated for their time, and their expenses are paid upfront (to maximize take-up). They are also provided with resources, briefing materials, and access to experts and informational resources. Deliberation takes place in both facilitated plenaries and a variety of small groups.

Citizen assemblies are by design much more descriptively representative of the larger population's views than elected parliaments, which over-represent educated socio-economic elites, or the highly self-selected public of "notice and comment" outreach efforts. Consequently, the results of their deliberations are more likely to track what the larger public wants and is likely to agree with. The deliberative process also generates solutions and recommendations that polls alone or even ballot initiatives cannot generate (as those simply aggregate opinions about predefined options from people who may not be very well informed for the reasons enunciated above).

This legitimacy-enhancing role of citizen assemblies is consistent with what Tocqueville wrote about American juries.[42] By involving ordinary people

[42] Alexis de Tocqueville, *Causes which Mitigate the Tyranny of the Majority in the United States*, *in* Democracy in America 261 (Henry Reeve trans., Dearborn & Co. 1838).

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in judicial decisions, juries diffuse power, check elite dominance, and reinforce equality. Tocqueville also thought that juries act as a counterbalance to the judiciary, preventing the bench from becoming oligarchic or unaccountable. Recent empirical work confirms Tocqueville's insights. Countries with jury trials have better-performing criminal adjudication systems and exhibit higher trust in the judiciary.[43]

III. Investor Assemblies

In what follows, we argue that this idea can be applied to the world of investments, but it is not a simple transposition. The concept needs to be adapted and refined.

A. At What Level?

Investors' shares in corporations are predominantly held by mutual funds. Many of these mutual funds belongs to the same mutual fund family (Vanguard, Fidelity, etc.). In principle, investor assemblies could be organized at the company level, at the mutual fund level, or at the mutual fund family level.[44] There are several reasons why it is impractical to organize them at the company level. If we restrict our attention to S&P 500 companies, that amounts to 500 assemblies per year, which could be pretty costly. An assembly per company would also be inefficient, as many companies face similar issues (environmental, diversity, patriotism) and share many of the same shareholders. Thus, organizing these assemblies at the fund level makes more sense. Last but not least, decisions made in one company can have important effects on other companies. If we want to ensure companies can internalize these externalities, the decisions should be made at the portfolio level, not at the company level.[45]

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[43] Lei Chen & John Zhuang Liu, *Jury Trial and Public Trust in the Judiciary: Evidence from Cross-Countries Comparison*, 28 Asia Pac. L. Rev. 412 (2021).

[44] Pension funds could also organize them. *See supra* note 3.

[45] The concept of universal ownership was first advanced by Robert Monks and Nell Minow and later developed by other authors. *See* Robert A. G. Monks & Nell Minow, Corporate Governance (5th ed. 2011); James P. Hawley & Andrew T. Williams, The Rise of Fiduciary Capitalism: How Institutional Investors Can Make Corporate America More Democratic (2000) (developing the concept further). Many scholars now support the idea of universal ownership. *See* Ellen Quigley, *Universal Ownership in the Anthropocene*, Univ. of Cambridge (2019); Fred Alexander, *An Honorable Harvest: Universal Owners Must Take Responsibility for Their Portfolios*, 32 J Applied Corp. Fin. 24 (2020); Jeffrey N. Gordon, *Systematic Stewardship*, 47 J. Corp. Law 3, 627 (2022).

But see José Azar, Martin C. Schmalz & Isabel Tecu, *Anticompetitive Effects of Common Ownership*, 73 J. Fin. 1513 (2018) (arguing universal ownership can also lead to competition problems, because rival companies with a common ownership will compete less aggressively).

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The answer is more ambiguous if we consider whether the assembly should be organized at the fund or the fund family level. Vanguard has two vehicles to invest in the S&P 500: its ETF and its mutual fund. Having just one investor assembly makes sense since these two funds have the same portfolio. Besides their S&P 500 funds, the Big Three manage many active funds with different portfolios. Thus, it is probably reasonable for each of the Big Three to have several assemblies. Because of the large economies of scale, we think that the assemblies should initially be limited to the largest funds, with the possibility of extending them to smaller funds, depending on an analysis of costs and benefits. In what follows, we assume that the entity whose votes will be directed by the investor assembly is an S&P 500 index fund or an S&P 500 ETF (or the two together).

B. Opt-Out Option

The goal of an investor assembly is to represent investors too busy to become informed and vote. However, not everyone is in this category. If some investors (most likely the largest ones) want to become informed and vote, we will allow them to opt out of the investor assembly before the selection process. If they opt out, they will retain the right to vote through pass-through voting. This opt-out system will also make it easier for funds to introduce this mechanism because they are not changing the condition of their investment contract; they are changing just the default.

More questionable is whether to allow people to opt out after the investor assembly has been organized and the voting guidelines have been decided. The risk of this additional option is that some (large) investors might play strategically: try to influence the investor assembly and, if they fail, withdraw their votes after the assembly has taken place, thereby reducing the assembly's influence.

One possibility is to explicitly prohibit large investors from participating in the assembly. Another is to reduce their influence. In any case, this risk should be weighed against the moral outrage of some investors learning that the assembly's recommendation conflicts with their values. Consider some deeply Catholic investors. They might be too busy to become informed, and they might go along with the guidelines devised by the investor assemblies until one of these guidelines promotes access to abortion. In such a case, the noise in the media is so loud that they realize their votes will conflict with their morals and they become outraged.

To avoid this risk, we propose that, at least initially, investors have the right to opt out even after the investor assembly has decided on the voting guidelines.

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C. Optimal Size

The size of the investment assembly should be determined based on three parameters: representativeness, sampling errors, and cost. We define representativeness as the probability that a group representing a fraction x of the population has a voice in the assembly, i.e., at least one member is present.[46] If we let n be the size of the assembly, the likelihood that a group representing a fraction x has a voice equals $1 - (1 - x)^n$.

In what follows we are going to consider two possible extremes: 100, which is arguably the minimum size for sufficient descriptive representativeness and therefore legitimacy, and 150, which is the average size of the three French assemblies conducted to date. Thus, with an assembly of size 100, the probability that a 5% minority is represented is 99.4%, but the likelihood that a 2% minority is represented is only 86.7%. If we increase the size to 150, the probability that a 2% minority is represented rises to 95.2%.

We assume that it is very costly to implement rules when the majority of the population does not support them. This leads us to define the sampling error as the probability that a position supported by a fraction $p < 0.5$ of the underlying population wins a vote in an investor assembly, where the threshold for winning is set at $q > 0.5$. Note that we are taking a conservative stand here. We do not consider the opposite cost: decisions supported by a majority are not implemented. We think this is a reasonable position, at least at the beginning, given the initial diffidence about investor assemblies.

The probability that a strict minority position $p = 0.3$, say, will prevail is trivial (0.00169% with a 50% threshold and 100 people).[47] The concern becomes serious when the position is a minority, but close to the 50% threshold. Take, for instance, the case of $p = 0.49$. If the threshold is 50%, the sampling error is high: 38.2% with 100 participants and 34.3% with 150. Yet, this error can be reduced by increasing the threshold. At a 55% threshold, the likelihood of sampling error drops to 13.6% with 100 participants and 4.8% with 150 participants. At a 60% threshold, the likelihood of sampling error drops to 1.3% with 100 participants and 0.1% with 150 participants.

Finally, there is the cost component. There are two major costs involved. The first is a function of the assembly's organization. If it is two weekends, both in person, the marginal cost per person is the cost of flying, lodging, feeding, and compensating each participant. If it is online, the marginal cost is only the cost of compensating each participant. We estimate the marginal cost of a two-weekend in-person investor assembly to be roughly $4,400 per

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[46] *See* Paolo Spada & Tiago C. Peixoto, *The Limits of Representativeness in Citizens' Assemblies: A Critical Analysis of Democratic Minipublics*, 1 J. Sortition 137 (2025).

[47] If the draws are independent, the sum X will be distributed as a Binomial(n,p). Thus, $Prob\ \{\frac{x}{n} > q\} = \sum_{i=nq+1}^{n} \binom{n}{i} p^i (1-p)^{n-1}$.

participant, so an extra 50 participants cost $220,000. If we do both weekends online, the cost drops substantially, and the marginal cost of 50 extra participants is simply their compensation, i.e., $40,000 (50 × 4 × $200). In addition, there is the coordination cost. One of the key elements of the success of citizen assemblies is the ability of their members to know one another, befriend each other, and deliberate effectively.[48] Recall that the number of dyadic relationships in a group of size n is $\frac{n(n-1)}{2}$. Thus, the complexity increases with the square of the number of group members.

Given all these considerations, we settle for an n of 150, which happens to be also the Dunbar's number, i.e., the number of stable relationships human brains can handle, according to British anthropologist Robin Dunbar.[49] Conservatively, we set the quorum at 60%. Of course, these numbers can be adjusted with experience.

D. Chances of Being Extracted

Each investor who does not opt out will receive a number of lottery tickets proportional to their investment in the fund. From this pool, we will extract 150 of these tickets; thus, larger investors will be more likely to be drawn. The sample should be appropriately stratified so that if one chosen investor decides not to participate in the assembly, we can draw a similar one instead.

Note that this design choice to assign lottery tickets in proportion to investment shares is a departure from regular citizen assemblies in the political sphere, which operate based on "one person, one lottery ticket" (though, in practice, stratified random sampling also somewhat violates that equality). We justify this variation—"one share, one lottery ticket"—to respect the notion of "shareholder democracy," which similarly apportions votes according to the number of shares investors hold.

To give a very simple example, suppose that a fund has 2 million investors, a million of whom each have $20,000 invested in the fund, and a million of whom each have $10,000 invested in the fund. Assume further that the first group is 70% male and 30% female, and the second group is 60% female and 40% male. Then, since the first group accounts for two-thirds of the total investment, 100 of the 150 assembly members will come from this group, and 50 from the second group. If stratification is based on gender, 70 of the first group will be men and 30 women, while 30 of the second group will be women and 20 men. To achieve this mix, men from the first group will be randomly chosen until 70 accept, women from the first group until 30 accept, etc.

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[48] *See, e.g.*, Hélène Landemore, Politics Without Politicians: The Case for Citizen Rule (2026).

[49] *See, e.g.*, Dunbar, Robin, How Many Friends Does One Person need?: Dunbar's Number and Other Evolutionary Quirks (2010).

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We allow each investor to be drawn only once. Thus, if CalPERS (the California Public Employees Retirement System) owns 10% of the Vanguard S&P 500 index, it will be assured of having one representative at the assembly, but no more than one.[50] But we expect a large investor like CalPERS to opt out and do its own voting. The assembly is designed for small investors who are otherwise rationally apathetic.

Once the investors are drawn, each representative will have equal voting power and status in the assembly. This is important as we believe that deliberation works best if only the "forceless force of the better argument" is at play, as opposed to differences of status in the assembly (given what we know of human dynamics, differences of status are likely to emerge anyway in the deliberative process, but we don't want to bake them in from the beginning). By extension, if it were known that some people were granted more votes down the line, it would retroactively affect how people engage in prior deliberation, even if they have equal status. Since the point of deliberation is to decide issues on the merits, we think it is essential to equalize participants' status.

E. Agenda Setting

Citizen assemblies are generally called upon with a precise topic in mind. Investor assemblies will have to deal with many different issues (at least over time). The prioritization of these issues is an important policy decision and must be left to the assembly.

We envision that investor assemblies will take place in the fall of each year, in preparation for the following year's proxy season. Thus, as soon as they are selected, representative investors will receive a package of information covering topics discussed in past assemblies and new issues that have come up for a vote in corporate ballots during the last proxy season.

After receiving this information, the representatives will meet for one weekend. During this weekend, representatives will be randomly assigned to 15 groups of 10 each, with a (human and/or AI) facilitator ensuring that speaking rights are equally distributed and that everyone has a chance to be heard. Each group will discuss the topics they consider important. Halfway through, these groups will be dissolved, and new randomly selected groups will be reconfigured to allow everyone to meet and deliberate with more assembly members. At the end of the session, each group will present two topics to the general assembly, and the general assembly will deliberate on which two to choose (it may choose more than two). To organize the proceedings, the

[50] Imagine that besides CalPERS, the fund has 1 million investors, each owning one share in the fund. Then the probability of CalPERS being drawn is approximately equal to $0.1 \times \sum_{i=0}^{149} 0.9^i \approx 1$.

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groups will also choose a representative (using the method of their choice), and the 10-person committee will then select a chairperson (using the method of their choice).

Immediately after the first meeting, this 10-person governance committee will meet to decide what information on these topics should be provided to all members to aid the assembly's deliberation. They will also decide who the appropriate experts are to deliver this information.

During the month following the first meeting, the assembly members will receive all the requested information, either in written form or online presentations. Finally, they will meet for another weekend and deliberate.

The goal of the assembly is to develop voting guidelines to be implemented by the fund, not unlike the corporate governance guidelines each fund today prepares, but chosen by the investor assembly rather than hired experts such as Institutional Shareholder Services. For example, the first investor assembly could recommend that the fund support resolutions calling on companies to obtain shareholder approval for lobbying campaigns. Later investor assemblies will deliberate on voting guidelines in response to the specific lobbying campaigns that have emerged from the previous recommendation.

Some of the assembly's guidelines could be very specific, e.g., "curb CO_2 emissions as long as the cost of curbing them does not exceed $100 a ton." Others might be more generic, e.g., "prevent undue animal suffering." Either way, the fund would retain some discretion on how to vote on the actual proposals. We are not very concerned about this discretion for several reasons. First, this is much less than the discretion they have today. Second, investor assemblies in the following year can provide feedback on how that discretion was used, potentially tightening the guidelines for future votes. Third, so far, we have ignored the supply of shareholder proposals. Today, the supply is dominated by activists. These activists will likely adjust their proposals to meet the guidelines so they can be approved.[51] If activists know that a large set of investors will support any proposal to curb CO_2 emissions as long as the cost of doing so does not exceed $100 per ton, they will present proposals that fit this guideline. Last but not least, investor assemblies can ask the underlying funds to present their proposals. For example, they can ask the fund to file a proposal with all companies that produce or consume meat to prohibit the preventive use of antibiotics in animal production, which tends to promote antibiotic resistance.

At least initially, these assemblies should be conceived of as consulting bodies. The fund will retain the right to overrule the recommendation, but must provide very detailed justifications for doing so.

An investor assembly will operate for one year. As the next fall approaches, a new randomization will occur, and a new assembly will be chosen.

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[51] Roberto Tallarita, *Stockholder Politics*, 73 Hastings L.J. 1697 (2021).

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IV. Desirable Properties

Several criticisms of citizen assemblies can also be applied to investor assemblies. Before discussing those, we want to benchmark investor assemblies against our goal of a politically legitimate and politically neutral mechanism that is legally and economically feasible in a world affected by rational apathy.

A. Political Legitimacy, Internal and External

Recall the distinctions we introduced at the beginning between the three components of legitimacy: input, throughput, and output. How do investor assemblies fare along each of these dimensions in terms of internal legitimacy (i.e., vis-à-vis the shareholders)?

Since by design they form a representative sample of the shareholders (the demos of reference here), they do well in terms of input legitimacy: A vast array of views will be included in the decision process. Additionally, we have designed the operations of the investor assemblies' decision-making process to maximize deliberation (rather than pure vote aggregation) and transparency. Thus, they do well in terms of throughput legitimacy. In terms of output legitimacy, finally, scholarship in "epistemic democracy" suggests that the performance of randomly selected assemblies, which tap a form of collective wisdom, is higher than that of a small subset of appointed or even elected officials.[52] To the extent that investor assemblies are about making value-values arbitrages analogous to those of political assemblies, the epistemic benefits should travel as well.

Now, what about the legitimacy of a corporate governance structure that would include, as part of the decision process, investor assemblies in the eyes of the larger public (external legitimacy)? From the public's perspective, investor assemblies certainly enhance input legitimacy. While the population of investors is substantially richer and older than the voting population, it is certainly more diverse and more aligned with the voting population than the communities of experts who currently make the voting decisions. The deliberation process inside investor assemblies and the resulting explanations of voting decisions that can be made available to society at large will also greatly improve the legitimacy of throughput vis-à-vis the status quo in the eyes of the public.

Finally, while there is no guarantee that the decisions produced by an investor assembly will maximize social welfare (the relevant output legitimacy

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[52] Josiah Ober, Democracy and Knowledge: Innovation and Learning in Classical Athens 342 (2008); Hélène Landemore, Democratic Reason: Politics, Collective Intelligence, and the Rule of the Many 304 (2013).

in this case), we have shown elsewhere that small investors may act in a surprisingly socially responsible manner. The reason is that when a small investor decides on whether a company should sacrifice profit for the common good, the direct effect of the sacrifice on the investor will be negligible, and so the common good effect is likely to dominate.[53] So in that regard too, the investment policies coming out of investment funds advised by investor assemblies are likely to be more closely aligned with the ends of a democratic society (though significant gaps will likely remain). By contrast, evidence shows that mutual funds' voting behavior and proxy advisors' voting guidelines fail to reflect the values of the vast majority of investors.[54]

B. Political Neutrality

In a fractured society such as America today, any proposal risks being judged solely by whether it advances the Republican or Democratic agenda, not on its intrinsic merits. Each political side will fight tooth and nail to prevent the introduction of a mechanism that would see it lose. We think that investor assemblies have the additional benefit of being politically neutral. On a priori grounds, we are unable to determine the likely winner. Liberals tend to believe that humans are more prosocial, while conservatives tend to believe that they are more selfish. Thus, either side will think its side will prevail. Political neutrality is a big advantage in any situation. It is particularly so when it comes with political legitimacy, as is the case with an investor assembly.

C. Legal Feasibility

There is a fair amount of ambiguity on what is feasible under current legislation. Under Delaware law, corporate directors have a fiduciary duty, a duty of loyalty and care, "to the corporation and its stockholders."[55] Yet, the business judgment rule allows directors a great deal of discretion in interpreting the interests of the corporation and its stockholders.

In *Shlensky v. Wrigley*,[56] the Illinois Appellate Court refused to consider a suit against a director's decision in the absence of "fraud, illegality, or conflict of interest in making that decision."[57] Without those conditions, shareholders cannot easily sue directors for failure to maximize shareholder value, let

[53] *See* Broccardo et al., *supra* note 27.

[54] B. Pablo Montagnes, Zachary Peskowitz & Suhas A. Sridharan, *How Well Do Voting Choice Policies Represent Public and Investor Preferences?* 23 (Emory University Working Paper, 2024).

[55] Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939).

[56] Shlensky v. Wrigley, 237 N.E.2d 776 (Ill. App. 1968).

[57] *Id.* at 780.

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alone failures to represent their (moral and political) values at the expense of (financial) value.

Justice Alito arrived at a similar conclusion in the 2014 Hobby Lobby case, regarding whether the Religious Freedom Restoration Act applies to corporations. Writing for the majority opinion, Alito states, "For-profit corporations, with ownership approval, support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives. . . . Hobby Lobby and Mardel stores close on Sundays, even though the Greens calculate that they lose millions in sales annually by doing so."[58] So Justice Alito recognizes the right of a majority shareholder to choose values over value.

The issue is more controversial regarding the casting of votes by an asset manager in favor of a proposition like closing stores on Sunday. An asset manager has a fiduciary duty to the fund's investors. The 1940 Investment Companies Act establishes that "investment companies are organized, operated, or managed in the interest of holders of securities." Under the authority of the 1940 Act, in 2003, the SEC clarified the need for adequate procedures to ensure votes were cast in clients' best interests. As recently as 2019, the SEC reiterated that "to satisfy its fiduciary duty in making any voting determination, the investment adviser must make the determination in the best interest of the client and must not place the investment adviser's own interests ahead of the interests of the client." [59] Nowhere does the SEC state that the client's best interests are limited to a financial interest. Thus, a client can instruct a mutual fund to "vote for proposals calling for tobacco companies to cease the production of tobacco products" on their behalf, as the Catholic Faith Guideline of the Institutional Shareholder Service does, without violating any rule.[60]

The question is more problematic for investments made under a retirement plan subject to the 1974 Employee Retirement Income Security Act (ERISA), which states that the assets of a pension plan "shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries."[61] In 2014, the Supreme Court ruled that "benefits" to be pursued by ERISA fiduciaries as their "exclusive purpose" do not include "nonpecuniary benefits."[62] This decision has induced some authors to conclude that

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[58] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 717 (2014).

[59] Securites and Exchange Commission, Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers (2019).

[60] Institutional Shareholder Services, *United States Catholic Faith-Based Proxy Voting Guidelines: 2025 Policy Recommendations*, 89 (2025).

[61] Employment Retirement Income Security Act of 1974, 29 C.F.R. § 2550.404(a)(1).

[62] Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 412 (2014).

"a pension trustee breaches the duty of loyalty whenever the trustee acts other than to benefit the beneficiaries financially."[63]

This dispute, however, was over the application of the "presumption of prudence" in an employee stock ownership plan (ESOP). The Supreme Court explicitly stated that "We limit our review to the duty-of-prudence claims."[64] For this reason, Yifat Naftali Ben Zion concludes that "legal arguments concerning the duty of loyalty that rely on this judgment ought to be rejected."[65]

In fact, two prominent legal scholars, Jill Fisch and Jeff Schwartz, argue that not only can fund managers seek input on investor values, but they also have a fiduciary duty to do so.[66] Their mechanism differs from ours in that it assigns a crucial role to professional managers in translating beneficiary preferences into votes. Yet it confirms that legal reasons do not prohibit taking into account investors' preferences over values, including when these run counter to their strict financial interests.

D. Economic Feasibility

Between its ETFs and mutual funds, Vanguard has $1.2 trillion indexed to the S&P 500. The average expense ratio is four basis points. Thus, the revenues generated by these two funds are $480 million a year. We have drafted a budget, available on request, for a two-weekend investor assembly of 150 people, including travel and lodging, with a $200 per diem stipend. The total, if both weekends are in person, is approximately $1.1 million. Thus, it represents one seven-thousandth of a basis point of additional cost: too small to register even in the fierce competition for low-cost funds. A further factor is that a fund that announces it will set up an investor assembly will, if people see the merits of the idea, find this a selling point for investors.

BlackRock discloses that it employs roughly 70 people to decide on the proxies for the companies in its index funds.[67] At a cost of $150,000 per person (the actual cost might be much higher), this team costs $10.5 million. We are not suggesting that all these people will become redundant, but the number would certainly be reduced. Thus, investor assemblies are very competitive even from a cost point of view.

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[63] *See* Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 Stan. L. Rev. 2, 381 (2020).

[64] *Fifth Third Bancorp*, 573 U.S. at 412–13.

[65] Yifat Naftali Ben Zion, *Ethical Investments: Correcting ERISA's Misinterpretation*, Conn. L. Rev. 57, 945(2024).

[66] *See* Fisch & Schwartz, *supra* note 17, at 1.

[67] Angel Au-Yeung, *How a small group of BlackRock analysts speaks for millions of investors*, Fin. News 4 (2022), https://www.fnlondon.com/articles/how-a-small-group-of-blackrock-analysts-speak-for-millions-of-investors-20220620 [https://perma.cc/MA9T-DASA].

V. Criticisms

A. *Need for Expertise*

One of the main criticisms of citizen assemblies, which is likely to translate to investor assemblies, is that randomly drawn people do not have the expertise to make competent decisions. This criticism assumes that political competence to decide about values versus value is akin to a form of expertise. Political democracy, however, is founded on the postulate that such trade-offs are a matter of common sense and collectively achieved political judgment, which can be informed by expertise, but are not inherently a matter of expertise. Assuming the opposite is a form of political elitism that runs against the fundamental premise of political equality. This fundamental premise, in the United States, translates into the Constitution's recognition of universal suffrage and the allocation to randomly drawn sets of individuals, called juries, the right to incarcerate people and even (in rare but significant cases) to nullify the law.

Nobody is asking an assembly of randomly drawn persons to perform brain surgery or decide whether a hub-and-spoke system is better than a point-to-point one for a specific airline. These are technical decisions that can best be addressed by experts. Investor assemblies would also not be asked to calculate the optimal hedging strategy against interest rate risk. Instead, they would be asked whether they are willing to accept a slightly lower return in order to treat slaughtered animals in a more humane way. This decision is not a technical decision; it is a values versus value decision. Financial experts can opine on the economic cost of treating animals humanely. Meanwhile, welfare animal specialists and scientists can opine on how much animals have feelings or how much pain they are likely to experience when slaughtered in different ways. Yet, the final trade-off is a moral decision that nobody is better qualified to make than the owner of the shares (who also suffers the economic consequences of these decisions).

A misconception about citizen assemblies is that they would not involve expert advice at all. Far from it, almost all such processes to date have relied heavily on experts, with the caveat that they should be "on tap, and not on top."[68] In the French Climate Convention, economists came to plead for the efficiency of a carbon tax (also President Macron's favored solution). The citizens found it too regressive and socially unjust and rejected it at the national level. But they listened to experts on many other dimensions, including the

[68] *See* Hélène Landemore & Théophile Pénigaud, *Citizen Legislators: Citizens on Top and Experts on Tap in the French Convention for Climate (2019–20)*, Persp. on Pol. (2026), https://doi.org/10.1017/S1537592725104295 [https://perma.cc/ZGS8-XEXU].

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need to launch a massive housing renovation plan, reduce meat consumption, and take measures to increase city density and resist urban sprawl.

In an ideal world (where there are no costs of getting informed), every investor would be able to decide on their ideal trade-off, and a vote would aggregate their opinions. Unfortunately, we do not live in an ideal world, and it would be prohibitively costly for each individual to undergo this process. Statistically, investor assemblies replicate the ideal outcome at a small fraction of the cost.

B. Risk of Capture

A second criticism often raised against citizen assemblies (and applicable to investor assemblies too) is the risk of capture by vested interests (or even outright corruption). Citizen assemblies represent a unique combination of power (if citizen assemblies are decisive on some important issue, each member can in principle be very powerful) and a lack of electoral accountability.[69] This combination renders them particularly vulnerable to capture by powerful actors.

This is a very serious issue, but it implicitly compares citizen assemblies with an idealized world where no capture exists, or at least a world where elections provide sufficient accountability that elected representatives are not captured.[70] In the case of investment funds, accountability mechanisms are even weaker than in political democracies because investors are less engaged, and the ability to punish a fund for its voting behavior by choosing an alternative fund family is limited by the choice of investable funds made by the 401(k) plan's corporate sponsor. As a result, the gap between voters' preferences and representatives' votes is even wider than in the political case.[71]

A better way to reframe the same question is to ask: To what extent are investor assemblies more prone to capture than existing mechanisms of vote determination (for example, proxy advisors)? We know that consulting contracts with a firm influence proxy advisors' recommendations vis-à-vis that firm.[72] Are investor assemblies better or worse?

There are theoretical reasons why capture is more difficult in citizen or investor assemblies. The first reason is that those selected for the assembly can remain anonymous at least until the assembly's business is complete, and

[69] *See* Dimitri Landa & Ryan Pevnick, *Is Random Selection a Cure for the Ills of Electoral Representation?*, 29 J. Pol. Phil. 46 (2021).

[70] There are some serious doubts about whether this is the case in our political democracy. *See* Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 Persp. on Pol. 3, 564 (2014).

[71] *See* Montagnes, Peskowitz & Sridharan, *supra* note 55.

[72] Tao Li, *Outsourcing Corporate Governance: Conflicts of Interest Within the Proxy Advisory Industry*, 64 Mgmt. Sci. 2951 (2018).

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possibly even afterwards. Voting within the assembly can also and indeed should be anonymous. Second, capture relies heavily on the presence of assembly members with a particular kind of expertise who can then be plausibly employed in a revolving-door manner by powerful interests seeking to buy their votes. Citizen participants in an assembly have no easily identifiable expertise to sell. And in the case of the occasional banker, lawyer, or otherwise relevant professional in the mix (as will happen just by virtue of chance), they can easily be restricted from being employed by firms with a great interest in the issue at stake. The fact that elected assemblies have not successfully created firewalls between the public and the private sectors does not mean the same needs to be true of citizen or investor assemblies.

The third reason is that capture is particularly likely when an elected office is part of a career. To overcome the cost of running for office, with the associated risk of failure, the politician's career must provide a large payoff in case of victory, in the form of either power or access to remunerative future jobs in the private sector. Only people with a predisposition and an interest in those jobs will run for office, maximizing the risk of capture. This problem does not arise with citizen or investor assemblies.

The evidence on juries also sheds light on this issue since randomly drawn juries are small citizen assemblies, albeit with the distinguishing feature that participation is mandatory, and in criminal trials, their decisions should be unanimous (in the U.S.). Countries with a jury system experience less corruption than those without one, and countries that employ jury trials have a more effective criminal justice system.[73]

Finally, there is a risk that participants in investor assemblies might engage in insider trading. This risk can be easily mitigated by having participants sign a pledge not to engage in insider trading and by requiring them to disclose their trades. Note that this risk is already present for employees of proxy advisors. In fact, it is much higher for proxy advisor employees, since they are more sophisticated and they find themselves repeatedly in that position.

C. Self-Selection

The weakest point of citizen and investor assemblies is self-selection. One form of self-selection is based on the extrinsic motivation to participate. On the one hand, if reimbursement and compensation are insufficient to cover out-of-pocket costs, poorer people will not be able to participate. On the other hand, people with a very high opportunity cost will not be fully compensated for the time they devote to the assembly and thus are unlikely to participate. The first selection problem can be reduced by paying people adequately and

[73] *See* Stefan Voigt, *The Effects of Lay Participation in Courts — A Cross-Country Analysis*, 25 Eur. J. of Pol. Econ. 327 (2009); *see also* Chen & Liu, *supra* note 44, at 48.

ensuring their expenses are paid in advance, thereby avoiding a cash crunch. The attrition of wealthy people cannot be avoided if we want to maintain equal pay and not break the budget. Yet, wealthy people are overrepresented in a system where the more dollars you have invested the more likely you are to be selected. Thus, it is likely that their point of view will be adequately represented. Hence, this bias will partially or fully compensate for the other.

The other form of selection is based on intrinsic motivation. Environmentalists will be highly motivated to participate in an investor assembly dedicated to setting environmental guidelines, while in assemblies devoted to animal welfare, animal lovers will. To overcome this problem, the agenda for investor assemblies should not be set in advance: the assembly itself should determine the agenda after participants are selected.

The overall effect of these biases is hard to assess theoretically, but it can easily be addressed empirically. Unlike in citizen assemblies, in the case of investor ones, it is relatively easy for the organizers to survey the entire population before the random extraction.[74] Given this, the sample can be stratified to match the whole population among several dimensions, including the initial priors on some key issues. The criteria used in the stratified randomization and the final difference between the selected sample and the entire population should be published to enhance trust in the procedure.

D. Governance

There is a major difference between citizen (or investor) assemblies and deliberative polls of the kind pioneered by James Fishkin.[75] Deliberative polls are primarily scientific tools designed to measure changes in opinion within a deliberative body of ordinary citizens compared to a carefully constructed control group. Citizen assemblies, by contrast, are political actors, meant to generate impactful policy recommendations. In both cases, the questions or agenda put to the citizens are set by the entity commissioning the process. But there is a lot more leeway for participants to reshape or expand the agenda, and even the process, in a citizen assembly, which is sometimes and to a degree co-governed by citizens themselves (as opposed to being entirely managed from the outside by experts in the case of deliberative polls). Since our goal is to empower investors, not just use them as a focus group, we prefer the citizen assembly approach, with the added feature that the investor assembly will choose its own agenda.

One key design feature in that respect is the question of the investor assembly's governance. The assembly's governance is essential not just for

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[74] A mutual fund has the phone numbers and the emails of all its clients. Thus, it is easier for a mutual fund to survey its clients than for the government to survey its citizens.

[75] James S. Fishkin, Democracy When the People Are Thinking: Revitalizing Our Politics through Public Deliberation (1st ed. 2018).

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the agenda setting, but also for selecting the information provided and who provides it. The timing of our investor assemblies' meetings is designed to enable them to control the process, making their own choices about the allocation of time and the selection of experts.

E. Precatory Votes

Another risk is that these investor assemblies become totally ineffective, a side show without any bite. After all, the shareholder proposals we discussed are all precatory, and firms can choose to ignore them. While this risk exists, we do not consider it severe. We have seen that when mutual funds announce a policy (as in the case of diversity on boards), companies tend to comply. The reason is simple: Mutual funds can retaliate by withholding their votes for corporate directors. Thus, they carry a very serious implicit threat. They do not even need to formalize this threat with a vote; just the announcement that they will vote against directors if the directors ignore them will be sufficient. The same can happen for investor assemblies if they represent enough votes.

So far, we have limited the investor assemblies to drafting the proxy guidelines. At the beginning, we expect them to limit themselves to these guidlines, but if these guidelines prove ineffective, we are confident they will escalate to other forms of engagement. For example, they can ask mutual fund managers to communicate their preferences to companies directly, as large mutual fund managers currently do.

VI. Existing Evidence

A. Juries

Cross-national data show that perceived corruption is lower in countries with jury trials.[76] Yet, too many factors can affect this comparison. More reliable studies are experimental or quasi-experimental. Harry Kalven and Hans Zeisel conducted the classic study of judge-jury agreement. They found that jurors' and judges' decisions agree 75% of the time.[77] More recent studies seem to confirm this result.[78] Judges are just as susceptible as laypeople to three of the five most common behavioral biases, while they are slightly less affected by the remaining two.[79]

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[76] Stan Hok-Wui Wong, *Juries, Judges, and Corruption: A Cross-National Analysis*, 9 Pub. Integrity, 133 (2007).

[77] Harry Kalven & Hans Zeisel, The American Jury (1966).

[78] Brian H. Bornstein, *Judges vs. Juries*, 43 Am. Judges Ass'n 2 (2006).

[79] Chris P. Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 Corn. L. Rev. 777 (2001).

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The advantage of judges is that they are more educated and have accumulated some field-specific skills. The advantage of juries is twofold. The deliberation process tends to smooth out individual idiosyncrasies, and collective intelligence can allow a jury to process a greater proportion of the evidence than a single judge.

B. Other Citizen Assemblies

A report by the Organization for Economic Cooperation and Development (OECD), subtitled "Catching the Deliberative Wave," documented 733 minipublics (as of 2023) across thirty-four countries.[80] Among them, at least a dozen were of sufficient duration and scope to qualify as full-on citizen assemblies at the national level. Among the most famous and well-studied of these are the 2004 British Columbia Citizens' Assembly in Canada, which gathered 160 randomly selected citizens to deliberate about electoral reform; the Irish Citizens' Assemblies on marriage equality, abortion, and gender equality, which gathered around 100 citizens each; and the French Citizens' Convention on Climate (150 citizens) and on End-of-Life Issues (184 citizens). In the United States, precedents include Washington State's 2021 Climate Assembly, the 2026 Connecticut Citizens' Assembly on Property Taxes, and a few other examples at the local level.

One distinguishing feature of the Irish experience was that the deliberations of several of its assemblies were later endorsed by a referendum of the entire population, providing evidence that citizen assemblies produce outcomes that the general public supports.[81]

C. Early Corporate Examples

The idea of citizen assemblies is not only gaining momentum in the political sphere but is also starting to penetrate the corporate one. In the fall of 2022, after some initial trial phases at the national level, Meta gathered what they call a "community forum," involving six thousand randomly selected people from its global user base, to deliberate online on how to regulate

[80] Organisation for Economic Co-operation and Development, Innovative Citizen Participation and New Democratic Institutions: Catching the Deliberative Wave, OECD Pub. (2020), https://doi.org/10.1787/339306da-en [https://perma.cc/9TJB-DTBB].

[81] *See* Henry McDonald, *Ireland becomes first country to legalise gay marriage by popular vote*, Guardian (May 23, 2015), https://www.theguardian.com/world/2015/may/23/gay-marriage-ireland-yes-vote [https://perma.cc/E69P-QGFT] (providing evidence concerning the Convention on the Constitution, the Irish citizens' assembly that tackled marriage equality, among other topics); Henry McDonald, Emma Graham-Harrison, & Sinead Baker, Ireland votes by landslide to legalise abortion, Guardian (May 26, 2018), https://www.theguardian.com/world/2018/may/26/ireland-votes-by-landslide-to-legalise-abortion [https://perma.cc/QXL3-ULRR].

cyberbullying in the Metaverse. In October 2023, Meta followed up with another community forum of 1,545 online participants recruited to represent the general public in four countries (Brazil, Germany, Spain, and the United States). This forum discussed and then voted on what principles should guide generative AI's engagement with users.

In early 2024, a Dutch pension fund organized an investor assembly to discuss responsible investments.[82] 55 investors from the pension fund were randomly drawn and brought to the city of Utrecht for three different days, during which they approved 49 proposals for responsible investment to submit to the board. The role of the Dutch assembly was advisory.

Finally, a coalition of seven Norwegian non-profits recently organised a citizen assembly of 56 Norwegians, called the *Framtidspanelet*, or Future Assembly. These ordinary citizens met from January to April 2025 to deliberate about the use of the Oil Fund (the Norwegian Government Pension Fund Global or GPFG), whose income represents today 20% of the government budget. The panel's report, presented to the Norwegian Parliament in May 2025, contained 19 recommendations balancing domestic needs (such as education, defense, research, and innovation) and global responsibilities toward present and future generations (such as supporting global work on public health, medical research, and the climate crisis).[83]

VII. Conclusions

The rise in popularity of index funds and ETFs has concentrated corporate votes in the hands of three asset management firms, granting them an unprecedented level of power. This power lacks internal and external legitimacy, prompting several attempts to intervene at the legislative level. In response to this pressure, the Big Three have adopted some form of pass-through voting. While pass-through voting mitigates the concentration problem, it does not eliminate it, because it does not resolve the rational apathy problem small investors face. This solution also leaves the Big Three's agenda power untouched, since they remain in charge of formulating the voting guidelines available to shareholders.

To overcome the limitations of pass-through voting, we propose an alternative: A randomly chosen group of investors should be gathered together in the form of an investor assembly to deliberate among themselves about how large institutional investors should cast their votes on shareholder proposals

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[82] Emmeline Cooper, Remco van der Stoep & Rob Bauer, *Deelnemersdialoog Report* (2024), https://pensioenfondsdetailhandel.nl/content/publications/Deelnemersdialoog-English.pdf [https://perma.cc/7PWY-Q22X].

[83] *Norway's Citizens Want to Share Their Fortune with Future Generations and the World*, DemocracyNext's Newsletter (June 12, 2025), https://demnext.substack.com/p/norways-citizens-want-to-share-their [https://perma.cc/MFH8-PUAM].

and more generally how they should engage with companies; investors can opt out of the assembly and its voting recommendations but they have to do so explicitly. We have described how this procedure can deliver the outcome that investors would arguably have converged on had they had all the information needed and the opportunity to deliberate among themselves.

We present this solution as a private solution, adopted by the large index funds in response to the threat of legislation. Yet, it can also be interpreted as a regulatory mandate to address the excessive concentration of voting power. Finally, it is a move in the direction of shareholder democracy, an explicit goal of the Securities Exchange Act of 1934, which remains unfulfilled more than ninety years later.[84]

[84] *See Med. Comm. for Hum. Rts. v. SEC*, 432 F.2d 659, 676–77 (D.C. Cir. 1970) ("It is obvious to the point of banality to restate the proposition that Congress intended by its enactment of section 14 of the Securities Exchange Act of 1934 to give true vitality to the concept of corporate democracy.").

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