Money Talks: Institutional Investors and Voice in Contract

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Contracts are the building blocks of markets, where participation is typically understood through choice: to buy or not to buy, and if so, from whom? In other words, contract choices allow participation by exit, with little need for discussion. However, in some instances markets may be open to a fair degree of voice. Market behavior is not always a take it or leave it endeavor, and market participation does not always entail the kind of passivity associated with the role of the price taker. At least when some contract parties put their minds to it, markets may retreat from the mechanics of pure preference satisfaction and interact with a realm of reasoned deliberation, where some market reasons are significantly public-minded. This essay explores the potential of contracts to become a locus of deliberative participation in the context of institutional investment (primarily by pension funds) and investors' pursuit of commitments to nonfinancial goals.

Introduction

Markets are in essence webs of contracts, agglomerations of contractual exchange. Contract, in turn, is a central social and legal institution. For ages, contract's underlying justification has been linked to autonomy. As Lon Fuller put it decades ago, "Among the basic conceptions of contract law the most pervasive and indispensable is the principle of private autonomy."[1] A

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* Professor of Law, Tel Aviv University. For helpful discussions, I am grateful to Yishai Blank, Hanoch Dagan, Sharon Hannes, Ron Harris, Doreen Lustig, Nadav Orian Peer, Ariel Porat, and participants at the conference on Freedom, Choice and Contracts, and in particular to Kathryn Judge for her insightful comments. Cite as: Roy Kreitner, *Money Talks: Institutional Investors and Voice in Contract*, 20 Theoretical Inquiries L. 511 (2019).

1 Lon L. Fuller, *Consideration and Form*, 41 Colum. L. Rev. 801, 806 (1941). He continues: "This principle simply means that the law views private individuals as possessing a power to effect, within certain limits, changes in their legal

world where contracts are pervasive may often be conceived of as a market society. Further, the connections among choice, contracts, and markets seem almost intuitive, as thriving markets characteristically supply a wide range of choices. From there, it is but a short step to construe markets rich in choice as supportive of autonomy.[2] And yet, there are good reasons to take this step more slowly. The connotations of choice and its almost unidirectional role as expanding autonomy seem partial (in both senses of the word).

While the slide from choice to autonomy is tempting, it quickly raises a suspicion that autonomy and choice might also be in tension. For much political discourse, and most recently for the brand of contract theory that ties choice most closely to autonomy,[3] choice is a "feel-good" word, a word people like to like, an instantaneous positive association. With good reason, of course: "black, green, or herbal?" "indie rock or opera?" "property rule or liability rule?" are autonomy-enhancing choices. On the other hand, "to be or not to be?" or "your money or your life?" seem less so. Drama aside, there may be as many tragic choices as autonomy-enhancing choices.[4] It is no longer news that the proliferation of choice can be overwhelming and even demoralizing, yielding paralysis rather than liberation.[5] Ultimately, our autonomy is more dependent on the quality of the choices we confront than on the sheer number of things we might choose from.

More specifically, two caveats about choice seem pertinent by way of introduction. First, lionizing choice orients the analysis away from the costs or burdens of choice, and particularly from an engagement with the possibility that choice may undermine welfare, or at least the welfare of some.[6] This is

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relations… What has just been stated is not presented as an original insight; the conception described is at least as old as the Twelve Tables." *Id*. at 806-07.

2 For a wide-ranging account of the importance of choice for the rise of modern individualism, see Lawrence M. Friedman, The Republic of Choice: Law, Authority, and Culture (1990).

3 Hanoch Dagan & Michael Heller, The Choice Theory of Contracts 1 (2017).

4 I say this in the colloquial sense, and not in reference to the particular kind of life and death matters that dominate the literature that adopts this term. *See* Guido Calabresi & Philip Bobbitt, Tragic Choices: The Conflicts Society Confronts in the Allocation of Tragically Scarce Resources (1978).

5 For the argument that people suffer, in terms of happiness and psychological wellbeing, from over-expansion of choice, see Barry Schwartz, The Paradox of Choice: Why More is Less (2004).

6 For the argument that people respond to choice overload in ways that diminish their welfare, see Sheena S. Iyengar & Emir Kamenica, *Choice Proliferation, Simplicity Seeking, and Asset Allocation*, 94 J. Pub. Econ. 530 (2010); Simon Botti & Sheena S. Iyengar, *The Dark Side of Choice: When Choice Impairs Social*

particularly problematic in those important areas where the rhetoric of choice provides the argumentative thrust for weakening collective engagement[7] and for individualizing risk, as it has in areas such as healthcare[8] and in the crucial context of retirement savings,[9] which will supply much of my focus. Of course, this is not an argument against choice, but rather merely a warning sign that choice is not an unmitigated good or a guaranteed tool always and everywhere in the service of autonomy.

Second, and more directly pertinent to my concerns here, choice sounds in the individual. This is of utmost importance for modern contract theory. A generation ago, Charles Fried's *Contract as Promise* breathed new life into the autonomy-based justification of contract and its individualistic basis: "The regime of contract law, which respects the dispositions individuals make of their rights, carries to its natural conclusion the liberal premise that individuals have rights. And the will theory of contract, which sees contractual obligations as essentially self-imposed, is a fair implication of liberal individualism."[10] Dagan and Heller's more recent invigoration of autonomy for contract extends

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Welfare, 25 J. Pub. Pol'y & Marketing 24 (2006). The idea has recently reached legal controversy in the context of suits alleging that sponsors of retirement savings programs violated their fiduciary duties by offering *too much* choice, *e.g.*, *Sacerdote v. New York University*, No. 16-cv-06284 (KBF) (S.D.N.Y. Aug. 25, 2017); *Henderson v. Emory University*, 252 F. Supp. 3d 1344 (N.D. Ga. 2017). For a brief overview of the extent of the phenomenon, see Jacklyn Wille, *College Litigation Frenzy Highlights Perils of Choice*, Bloomberg BNA (Aug. 24, 2016), https://www.bna.com/college-litigation-frenzy-n73014446755/. Thanks to Clay Gillette for pointing me toward these lawsuits; many more have been filed, and most have survived, in partial form, motions to dismiss.

7 So called "right-to-work" laws are typically supported as choice-enhancing measures. For straightforward examples from the policy promotion world, see F. Vincent Vernuccio, Worker's Choice: Freeing Unions and Workers from Forced Representation (2015), https://www.mackinac.org/archives/2015/s2015-03.pdf; James Sherk, *Right to Work Increases Jobs and Choices* (The Heritage Foundation, Working Paper No. 3411, 2011), http://www.heritage.org/jobs-and-labor/report/right-work-increases-jobs-and-choices. For more substantive treatment, see Catherine L. Fisk & Benjamin I. Sachs, *Restoring Equity in Right-to-Work Law*, 4 U. Cal. Irvine L. Rev. 857 (2014).

8 *See* Jacob S. Hacker, *Privatizing Risk without Privatizing the Welfare State: The Hidden Politics of Social Policy Retrenchment in the United States*, 98 Am. Pol. Sci. Rev. 243 (2004).

9 Michael A. McCarthy, Dismantling Solidarity: Capitalist Politics and American Pensions since the New Deal (2017); Michael A. Hiltzik, The Plot Against Social Security (2005).

10 Charles Fried, Contract as Promise 2 (1981).

that vision. Today's connection between autonomy and individualism is more nuanced than Fried's, as Dagan and Heller insist that "as free people, we do not live each on our own island, isolated in perfect independence."[11] Even so, their conception of community is for the most part dyadic: the paradigmatic instance of thick community is that of two contractual individuals seeking non-instrumental value in special bonds.[12]

The focus on the individual nonetheless raises difficulties of two different sorts, both of which revolve around the problems of accounting for the importance of collective action for instantiating self-government.[13] The first problem is structural — choice may be great for those with good initial endowments, but much less attractive for others, for whom meaningful choice has to harness the collective.[14] Second, and closer to my focus here, choice implies a frame in which the choice is yes/no, take it, or take something else. Choosing among options, as an image, makes little room for a central aspect of self-government, which is voice, or the possibility of redefining the options in the first place. At an extremely basic level, choice and voice are different types of participation. When someone else has determined the menu, my choice exists within the menu's parameters, with no input as to its features on my part. I can choose among the options on the menu, but have no opportunity to influence what kinds of options will appear. On the other hand, when a group comes together and deliberates about a course of action, when members of the group offer reasons or ways of thinking about why one course of action is better than another, the members engage one another. They participate in a process of reflection about the reasons, about the way to conceptualize the costs or the benefits of the action, and in essence open themselves up to changing their opinions. This kind of openness to reflection is a central aspect of self-governance.

I pursue these general points about the flavor of choice somewhat obliquely, beginning in Part I with an elaboration of the way choice in markets is conceived generally, then briefly suggesting the role that voice can play in

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11 Dagan & Heller, *supra* note 3, at 1.

12 *Id*. at 58-61.

13 For a broad account, relying in part on a critique of the channeling of choice through individual rather than social vision, see Renata Salecl, The Tyranny of Choice (2010); Renata Salecl, *Violence as a Response to the Ideology of Choice*, 33 Cardozo L. Rev. 2275 (2012).

14 This is also a problem with the emphasis on individual authorship as the focus of autonomy. When opportunities for genuine self-authorship are widely enough distributed, the goal is indeed admirable. But a singular focus on it makes the pursuit of structural goals seem always secondary, when in fact it is a precondition for the attractiveness of the individual vision.

supplementing typical considerations of market choice. Part II examines the role voice plays in shaping institutional investment at the very heart of capitalism — the capital market — in the context of retirement savings. Part III reflects on some of the implications for the ways voice might be developed in capital markets, especially the way that the expansion of voice might enhance self-government.

I. Choice vs. Voice, or Choice as the Market's Master Trope

Champions of market ordering argue for the existence of a tight connection between freedom writ large and economic freedom, understood as a wide scope for voluntary choice in markets that supply the lion's share of life's needs. They argue that markets harness individuals' self-interest to serve goals toward which they are indifferent (or of which they are unaware), by rewarding those who make themselves useful to others. They explain that market prices promote individual, decentralized direction of behavior in accordance with dispersed demands of which individual actors have no knowledge, in a way that circumvents the need for such knowledge. That feat of coordination allows efforts to be directed where they will have the greatest impact, ensuring vast increases of wealth as compared to non-market systems.[15] Critics of these views typically accept many of the claims regarding the benefits of markets, but argue in turn for the necessity of limitations on the scope of market activity. They claim, for example, that extensive markets erode and eventually undermine the moral values that ground the market itself. Markets, especially the market for wage labor, are corrosive of the social bonds that form the sinews of traditional institutions. By subjecting ever extended fields of social life to monetary calculation, markets corrupt practices' internal modes of valuation, and in turn corrupt the practitioners themselves. Finally, market exchange tends to concentrate rather than disperse economic power, and the concentration of economic power translates into concentrated political power.[16]

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15 Ludwig von Mises, Liberalism: The Classical Tradition (Ralph Raico trans., Bettina Bien Greaves ed., 2005); Friedrich A. Hayek, *The Moral Imperative of the Market*, *in* The Unfinished Agenda 141 (Martin J. Anderson ed., 1986); Milton Friedman, Capitalism and Freedom (1962).

16 Karl Polanyi, The Great Transformation (1944); Elizabeth Anderson, Value and Ethics in Economics (1993); Eric MacGilvray, The Invention of Market Freedom (2011); Michael J. Sandel, What Money Can't Buy (2012).

The contest between market advocates and market skeptics is well worn, and happily beyond my scope. More interesting than their division, for present purposes, is their shared conception of how the market operates and of the meaning of market choices. For critics and skeptics alike, a central feature of market exchange is a special kind of silence about the motives that underlie any given transaction. Consider first, the somewhat folksy description in Milton and Rose Friedman's aptly titled, *Free to Choose*:

> Th[e] key insight [that voluntary exchange takes place only when both parties believe they will benefit] is obvious for a simple exchange between two individuals. It is far more difficult to understand how it can enable people living all over the world to cooperate to promote their separate interests.
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> The price system is the mechanism that performs this task without central direction, without requiring people to speak to one another or to like one another. When you buy your pencil or your daily bread, you don't know whether the pencil was made or the wheat was grown by a white man or a black man, by a Chinese or an Indian. As a result, the price system enables people to cooperate peacefully in one phase of their life while each one goes about his own business in respect of everything else.[17]

Friedrich Hayek generalizes the example in explaining a spontaneous order that arises through exchange, which makes it possible to achieve "peace beyond the small groups pursuing the same ends, because it enable[s] each individual to gain from the skill and knowledge of others whom he need not even know and whose aims could be wholly different from his own."[18] Hayek actually goes farther, claiming that agreement as to the purposes of the exchange might even be a hindrance to successful cooperation and that "the parties are in fact the more likely to benefit from exchange the more their needs differ." This leads to a striking conclusion worth quoting at some length:

> In the Great Society we all in fact contribute not only to the satisfaction of needs of which we do not know, but sometimes even to the achievement of ends of which we would disapprove if we knew about them. We cannot help this because we do not know for what purposes the goods or services which we supply to others will be used by them. That we assist

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17 Milton Friedman & Rose Friedman, Free to Choose: A Personal Statement 13 (1980).

18 2 Friedrich A. Hayek, Law, Legislation and Liberty: The Mirage of Social Justice 109 (1982).

> in the realization of other people's aims without sharing them or even knowing them, and solely in order to achieve our own aims, is the source of strength of the Great Society. So long as collaboration presupposes common purposes, people with different aims are *necessarily enemies* who may fight each other for the same means; only the introduction of barter made it possible for the different individuals to be of use to each other without agreeing on the ultimate ends.[19]

Hayek's conclusion is overdrawn, but as often is the case, extremity yields analytical clarity. His formulation suggests that the fact that the parties do not discuss their ultimate ends or their reasons for exchange is not a question of saving time or avoiding superfluous information that might cloud the price signal. Instead, active silence as to the reasons for exchange brings ostensible enemies into cooperative relations, and is the necessary condition for exiting a condition of "end-connected tribal society."[20]

While market skeptics might be less inclined than Hayek to credit market society with diminishing tribal enmity, they are typically in accord with his vision of how the market operates, in fact. Elizabeth Anderson, for example, develops an account of market norms that flow from the ideal of economic freedom. Those norms are impersonal, meaning that they regulate the interaction of strangers who are means to one another's ends. They are egoistic, meaning that each actor pursues her individual interests without considering the interests of others. They are exclusive, in the sense of dealing with goods that can be appropriated individually. They are want-regarding, by which Anderson means preference-satisfying, without regard to the reasons why people have particular preferences. Finally, they are oriented to exit rather than voice, such that market activity is conducted on a take-it-or-leave-it basis.[21]

Albert Hirschman's account, from which Anderson draws, has become canonical and requires no elaboration here. By now Hirschman's framework defines the traditional typology of markets and politics that suggests that markets are dominated by the choice to buy or not to buy, or in other words by the binary mode of participation through exit; politics would be dominated by voice.[22] The market, reading these views together, thus becomes individualized

19 *Id*. at 109-10 (emphasis added).

20 *Id*. at 110.

21 Anderson, *supra* note 16, at 145-46.

22 Albert O. Hirschman, Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States (1970). The stark contrast is part of a model, not a direct description of reality. Hirschman elsewhere notes that much relational exchange relies on voice rather than exit "to correct mutual dissatisfaction and … make for meaningful tie-forming interaction between parties to transactions." Albert

yet completely general. And it takes its form as a realm disengaged from communal decision-making regarding value. Each individual expresses values without discussion (no voice, no deliberation), and those expressions come together in the price system, which reports the results of a nonpolitical system of valuation.

These visions of market ordering have a contract theory counterpart. In recent work separately developed, Daniel Markovits and Nathan Oman have pursued similar claims. They each develop a conception of contract whose morality is tied directly to the market, a conception that does not rely simply on the morality of the promissory relationship between individuals, but rather highlights the context of developed markets as an independent moral good. Further, that morality is geared toward interaction among people who succeed in collaborating without communicating over the reasons they value things. In fact, the great virtue of market contracting is that people who might have deep-seated animosities toward one another will collaborate peacefully, in a framework that brings them together as equals.[23] Market contracts allow people to measure things on a single scale of value, without merging their value systems. The market is a recipe for peace, but importantly, it functions as such as long as voice is banished. Market exchange is the very definition of decentralization, with contractors initially (but temporarily) imagined as collections of signals: buying and selling, and thus creating information for potential producers, but only information about actual buying and selling itself. Deeper meaning is submerged, hidden (as actual utility is hidden and not subject to interpersonal comparison) behind the price signal, the only information necessary.[24] In other words, all the potential disagreements about what is valuable and why we should value it are bracketed; they become

O. Hirschman, *Rival Interpretations of Market Society: Civilizing, Destructive, or Feeble?*, 20 J. Econ. Literature 1463, 1474 (1982).

23 Nathan Oman, The Dignity of Commerce (2017); Daniel Markovits, Guido Calabresi Professor of Law, Inaugural Lecture at Yale Law School: Market Solidarity (Apr. 9, 2012).

24 This characterization of the position has much in common with Hayek's claims as to how a spontaneous order can ensure that "men can live together in peace and mutually benefitting each other without agreeing on the particular aims which they severally pursue." However, Hayek continues: "The decisive step which made such peaceful collaboration possible in the absence of concrete common purposes was the adoption of barter or exchange." Hayek, *supra* note 18, at 109. One of the contributions of contract theorists on this score is the recognition that barter is clearly *not* enough. Developed markets and a developed law of contract are a must.

personal, privatized in the sense that they are not part of the public pricing mechanism.

My claim is that these visions of what makes markets workable and valuable are partial. They capture a piece of reality, but obscure something just as important, which is that markets potentially provide extensive room for discussion of the reasons to value a product, a service, or an investment. Contracting in markets can be a site of reasoned discussion about what the market should achieve, rather than exclusively a single-minded means to maximize returns. Markets are at times an opportunity to recruit others to our projects, not only because they are financially profitable, but because they are normatively attractive. To clarify, consider an extreme and simplified example. A group of people discuss the development of some new product, one they believe will be desired by others. They may think that their best course of action is to develop the product within a profit-maximizing framework, and that a limited liability corporation will be the best vehicle for advancing the project. They will strategize about how to structure the corporation so that investors will have an attractive profit horizon, knowing that such a structure will always have to deal with the tension inherent in dividing returns on the project between capital and labor. On the other hand, they may decide that the best course of action is to pursue the project in the framework of a cooperative, one that will be owned and operated by its members. They will face different challenges in pursuing the project, with completely different profit horizons both for the founders and for those who join the project later on. And they may believe that the best reason for proceeding in this fashion is that it obviates the otherwise inherent tension between founders and workers. This example assumes that the product is only possible where some kind of market exists. But it shows clearly that people often pursue different goals within market settings, goals that raise questions about what it will mean to work or live together.

Recruiting people for such projects can be at work within a particular contract, or in building the institutional setting within which multiple contracts will be concluded.[25] It is neither necessary nor necessarily attractive to imagine

25 Recent work on contracting in settings where innovation is a crucial feature highlight parties' mixed motives. They are geared toward profit, but along the way they are interested in learning about the possibilities for collaboration and about the ways they can transform themselves and their surroundings, and their mixed motives have significant implications for how lawmakers should respond. *See, e.g.,* Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Contract and Innovation: The Limited Role of Generalist Courts in the Evolution of Novel Contractual Forms*, 88 N.Y.U. L. Rev. 170 (2013); Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Braiding: The Interaction of Formal and Informal*

markets as fundamentally and consistently dependent on shutting out broader normative thinking. The key to contract's broader potential is a recognition of the place of voice, and particularly collective voice, within its institutional frame. Market behavior does not have to be (always and everywhere) a take-it-or-leave-it endeavor, and market participation does not necessitate the kind of political passivity associated with the role of the price taker. At least when some contract parties put their minds to it, markets may retreat from a realm of pure preference satisfaction and interact with a realm of reasoned deliberation, where some market reasons are significantly public-minded.

II. Voice and the Capital Market

In order to gain some traction on the issue of contractual voice, I will attempt in what follows to lay out an extended example of one area where such voice may be able to contribute to autonomy: the issue of retirement savings.[26] Crucially, this is an area where autonomy, even if conceived as ultimately serving the individual, must be pursued and developed collectively. As will become clear momentarily, nobody truly saves alone; just as importantly, nobody could exert voice in this context alone.[27] The rhetoric of choice and privatization that has accompanied the shifts in the mode of saving for retirement may have eroded an earlier version of solidarity,[28] but the entire mechanism is collective through and through, though the particular collectives involved are neither static nor inevitable. All of this requires a fair amount of background that entails teasing apart the knot of actors involved in our

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Contracting in Theory, Practice, and Doctrine, 110 Colum. L. Rev. 1377 (2010); Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration*, 109 Colum. L. Rev. 431 (2009).

26 I am actually referring to long-term savings more generally, including the other major concern of savers, which is usually directed to college tuition. This is a smaller subset of the general issue, with a limited (though still significant) scope and a shorter time horizon. Many of the considerations are the same, and I refer to retirement savings for ease of presentation.

27 Of course, there is a trivial sense in which no one can exert voice alone, in that voice is communicative and needs at least two actors to become meaningful. But I have in mind a broader sense of the power of voice, in the sense that effective voice relies on convincing and eventually mobilizing large groups.

28 McCarthy, *supra* note 9.

long-term savings scheme.[29] It is to that work of unraveling the context (in broad strokes) that I turn now.

We should view the retirement savings system in the U.S. from at least two directions, beginning with the perspective of workers. Social Security was established in 1935 to supply a basic income in old age, but by the end of WWII benefits had eroded so that additional savings for retirement were crucial. The occupational pension system began in earnest during the 1950s in a series of collectively bargained agreements between unions and major employers. Initially, employers promised to pay out certain benefits at the time of retirement without committing to any mechanism for funding such payments other than as operating expenses.[30] The passage of the Employee Retirement Security Act (ERISA) in 1974 mandated standards for private pensions, requiring employers to set aside and invest funds to cover pension obligations. As long as pensions were organized to guarantee specific levels of benefits, workers did not bear the risks or enjoy the benefits of any investments made by employers, short of the employer becoming insolvent. And indeed, the threat of employer insolvency was one of the impetuses for enacting ERISA. Increasingly throughout the years, defined benefit programs were replaced by pensions designed around defined contributions: employers and employees contributed to a retirement fund invested for the employee and available at retirement (actually, from age fifty-nine and a half). For these plans, the upside of the investments as well as the risk of poor investments lie squarely on the shoulders of workers.[31]

The other key perspective is that of the development of the capital market. Before the rise of the modern pension system, institutional investors were a small part of a small (compared to today's) stock market. In 1950, institutional investors held just over 6% of U.S. equities, and in 1970 holdings had grown only to about 10%. By 1980, however, institutional investors held over 28% of the market, and by today hold more than half of all public equities, and

29 With minor comparative asides, I will only be discussing the situation in the United States. Some of the dynamics in other developed countries are similar, but the differences are significant enough to make generalization extremely tricky.

30 Jacob S. Hacker, The Divided Welfare State: The Battle over Public and Private Social Benefits in the United States 85 (2002); Daniel Beland, Social Security: History and Politics from the New Deal to the Privatization Debate (2005); McCarthy, *supra* note 9, at 42-45.

31 McCarthy, *supra* note 9, at 30-33; Jeffrey N. Gordon, *Employees, Pensions, and the New Economic Order*, 97 Colum. L. Rev. 1519, 1538-52 (1997).

close to three quarters of the equity in the thousand largest corporations.[32] In the meantime, the size of the capital market compared to total output has grown by more than 300% — from about 40% in 1975 to 147% today.[33] In other words, institutional investors went from being small fish in a small pond to being whales in a great lake. It is no exaggeration to claim that the U.S. capital market as we know it would be unrecognizable without institutional investors, and these in turn would be a mere shadow of their present selves were they not wielding the combined savings of over half the working population.

The result of these developments has arguably been a reorientation of U.S. capitalism generally, and certainly of the structure of capital markets. Peter Drucker's *Unseen Revolution* and Hyman Minsky's "money manager capitalism" offered early accounts of what was in play.[34] In what turned out to be prescient analyses arising from different perspectives, both Drucker and Minsky noticed early that the traditional model of dispersed shareholding could no longer adequately describe the structure of ownership or control of U.S. corporations. In addition, both Drucker and Minsky highlighted that the same institutions owned large portions of corporate debt as well as equity. But at least as far as Drucker was concerned, this early analysis was mistaken in assuming that ownership could be translated into meaningful control.[35]

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32 Kathryn Judge, *Intermediary Influence*, 82 U. Chi. L. Rev. 573, 602 (2015); Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 Colum. L. Rev. 863, 874 (2013).

33 *Market capitalization of listed domestic companies (% of GDP)*, The World BANK, https://data.worldbank.org/indicator/CM.MKT.LCAP.GD.ZS?locations=US (last visited Oct. 31, 2018). If we were to take this figure back to 1950, the comparison would likely be even more dramatic.

34 Peter F. Drucker, The Unseen Revolution: How Pension Fund Socialism Came to America (1976); Larry Randall Wray, *Minsky's Money Manager Capitalism and the Global Financial Crisis*, 40 Int'l J. Pol. Econ. 5 (2011).

35 Minsky's picture is considerably more complex and concentrates primarily on the dynamics created by orienting decision making through finance (his concern was that financial drivers generate heightened instability and would not necessarily align with the goal of accumulating capital). Drucker, however, argued that the United States had become a socialist country:

> In terms of Socialist theory, the employees of America are the only true "owners" of the means of production. Through their pension funds they are the only true "capitalists" around, owning, controlling, and directing the country's "capital fund." … Only in the United States do the employees both own and get the profits, in the form of pensions, as part of wage income. Only in the United States are the employees through their pension funds

Instead, the new structure of corporate ownership has multiplied (at the very least doubled) the traditional agency problem engendered by the separation of ownership and control. Ronald Gilson and Jeffrey Gordon call this structure "agency capitalism" and explain the double agency problem it creates: the beneficial owners of equity (*i.e.*, the savers or employees) have an agency relationship with their investment company, be it a pension fund or a mutual fund; that fund in turn has an agency relationship with the management of the portfolio company whose shares it holds. This latter relationship is in some sense similar to the traditional agency relationship analyzed since Berle and Means, but with a twist: because institutional investors hold large blocks of stock, and because as a group they generally hold a majority of the stock, their attitude toward the firm's operations is different from the rationally apathetic investor who holds a negligible portion of the stock.[36]

Over the past three decades, increasing awareness of the large-scale concentrated holdings of equity by institutional investors has led to a wide range of attempts to harness the potential influence implied by such holdings. The wide range encompasses various goals, not all of which necessarily cohere. But before detailing some of those attempts, one general point brings us back to the issue of voice. In the naïve story about the workings of stock exchanges, they are perhaps the closest thing to the ideal markets discussed above in philosophical terms: completely impersonal, buying and selling with no discussion over the reasons for valuation, and exclusively oriented toward exit rather than voice. But for institutional investors, the situation is not as neat. Such investors often hold large blocks of stock, and selling all at once threatens to move the stock price and create immediate losses. Moreover, in the case of very large blocks it may be the case that selling is only possible to another institutional investor. As a class, then, exit is not always an attractive option, at least not as an exclusive strategy.[37] In all events, the possibility of

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> also becoming the legal owners, the suppliers of capital, and the controlling force in the capital market.

DRUCKER, *supra* note 34, at 4.

36 Gilson and Gordon maintain that while mutual funds are not proactive, they are not passive either, often opposing management on core governance issues. However, they generally follow an activist's lead, rather than spearheading campaigns for change on their own. For this reason, Gilson and Gordon claim that the legal regime should be amenable to coordination between activists and institutional investors, as the latter would otherwise undervalue governance rights. Gilson & Gordon, *supra* note 32, at 896-902.

37 Peter F. Drucker, *Reckoning with the Pension Fund Revolution*, 69 HARV. BUS. REV. 106, 106 (1991); Anat R. Admati & Paul Pfleiderer, *The "Wall Street Walk"*

influence is great enough to ensure that some mode of engagement, and thus voice rather than exit, will surely be on the table.

It should therefore come as little surprise that voice, in particular the voice of those special shareholders — the institutional investors — has become an issue of central concern. It is an issue that has drawn attention not only from scholars of corporate law, but also from organization and management studies, from sociology and economics, as well as from a host of practical political projects that seek avenues for successful activism.[38] And in addition to a great deal of academic attention (or perhaps better understood as the very reason for such attention), an entire industry or group of industries has evolved to change the landscape of institutional investment. The range of developments on this score is enormous, so for present purposes it pays to engage in a provisional (if slightly artificial) mapping of different layers of engagement. This will allow me to focus on one particular area — the different ways institutional investor voice may advance member interests other than profit — that has received less attention than others, and that is particularly central to the goal of advancing self-government through contract.

Recall that as an initial matter, while institutional investors are often large block holders, they are traditionally reticent regarding the management of portfolio companies.[39] In this sense, what might have been the core layer of institutional investor voice is relatively quiet. But even this quiet layer is far from silent. In particular, as calls for transparency in investment policy surfaced over the years and grew in intensity, many funds market certain attributes of their investments. While most of this work is geared toward screening (*i.e.*, the choice of portfolio companies, or the exit/entry model), it does supply a measure of importance to the discourse surrounding investment.[40] Close to

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and Shareholder Activism: Exit as a Form of Voice, 22 Rev. Fin. Stud. 2445 (2009).

38 For a taste of some of the range, see for example, Alex Gorman, *Exit vs. Voice: A Comparison of Divestment and Shareholder Engagement*, 72 N.Y.U. Ann. Surv. Am. L. 113 (2017); Jennifer Goodman, Celine Louche, Katinka C. van Cranenburgh & Daniel Arenas, *Social Shareholder Engagement: The Dynamics of Voice and Exit*, 125 J. Bus. Ethics 193 (2014); Jean-Pascal Gond & Valeria Piani, *Enabling Institutional Investors' Collective Action: The Role of the Principles for Responsible Investment Initiative*, 52 Bus. & Soc'y 64 (2012); Fabrizio Ferrao & Daniel Beunza, Why Talk? A Process of Model of Dialogue in Shareholder Engagement (Mar. 26, 2014) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2419571.

39 Gilson & Gordon, *supra* note 32.

40 For just one significant example, consider TIAA (Teachers Insurance and Annuity Association), which manages nearly a trillion dollars in assets. *See About*,

the core we find additional investors, primarily activist hedge funds, which harness the voice of traditional institutional investors. As Gilson and Gordon elucidate, "activist investors specialize in monitoring portfolio company strategy and formulating alternatives when appropriate for presentation to the institutional investors," thus acting as "governance entrepreneurs, arbitraging governance rights that become more valuable through their activity."[41] This is the layer of activity that has generated the most heat within corporate law scholarship.[42]

Activist hedge funds mobilize voice (or at the very least voting power), but importantly for our mapping here, their goals are typically narrowly framed: the idea is to increase the profitability of the targeted company. The next layer of engagement expands the menu of desired payoffs, typically in the direction of some goal considered socially responsible. Socially responsible or "impact" investors may include core institutional investors (like TIAA mentioned above), socially responsible hedge funds (who act in the same way as governance activists but with additional goals on their agenda), or funds of funds. The growth in these types of investors over the past decade is, while hard to pin down, enormous by any measure.[43] An additional and

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TIAA https://www.tiaa.org/public/about-tiaa/how-we-help/how-we-invest/responsible-investment (last visited Mar. 11, 2019). For the growth of direct involvement by pension funds in socially responsible investment, see Justin Marlowe, *Socially Responsible Investing and Public Pension Fund Performance*, 38 Pub. Performance & Mgmt. Rev. 337 (2014).

41 Gilson & Gordon, *supra* note 32, at 897.

42 For a sense of the positions, including a discussion of the methodology for understanding the terrain, see, e.g., Leo E. Strine, Jr., *Who Bleeds When the Wolves Bite?: A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System*, 126 Yale L.J. 1870 (2017); Lucian A. Bebchuk, Alon Brav & Wei Jiang, *The Long-Term Effects of Hedge Fund Activism*, 115 Colum. L. Rev. 1085 (2015); Alon Brav, Wei Jiang & Hyubseob Kim, *The Real Effects of Hedge Fund Activism: Productivity, Asset Allocation, and Labor Outcomes*, 28 Rev. Fin. Stud. 2723 (2015).

43 One account, admittedly open to being in part hype, claims that $25 trillion is invested with environmental/social/governance concerns in mind, and that sustainable, responsible and impact investing assets are at $9 trillion in the U.S. alone. *See Why Impact Investing Has Reached a Tipping Point*, Whart. (May 30, 2017), http://knowledge.wharton.upenn.edu/article/social-impact-investing-interest-manpower-and-money-pour-in/. For a more conservative approach to gauging the size of the sector, see Abhilash Mudaliar et al., *Annual Impact Investor Survey 2017*, Global Impact Investing Network (May 17, 2017), https://thegiin.org/research/publication/annualsurvey2017. *See also*, US SIF, Forum for Sustainable and Responsible Investment: 2016 Annual Report 9,

somewhat intriguing layer comprises organizations whose goal is to facilitate collective action on the part of institutional investors. At times, organizations like this can play some of the same roles as activist hedge funds in mobilizing voice. At other times, these organizations pursue information gathering and standardization that allow institutional investors to measure impacts on the issues for which they advocate.

Two examples of such organizations that work on a wide scale are instructive. CDP (formerly the Carbon Disclosure Project) is a not-for-profit organization that runs a disclosure system primarily geared toward aiding institutional investors direct their funds toward environmental engagement. It claims to have built the most extensive and comprehensive collection of self-reported environmental data in the world, and significantly, to service a network of investors representing over $100 trillion.[44] One example of CDP's work is the Carbon Action Initiative, in which investors with $25 trillion under management engage with portfolio companies on three concrete proposals.[45] The second example is the United Nations program on Principles for Responsible Investment (PRI). Self-described as "the world's leading proponent of responsible investing," it has built an international network of investor signatories who agree to uphold its principles.[46] The signatories represent over $50 trillion in assets. "Because of its size, prominence, and

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https://www.ussif.org/files/Publications/2016USSIFAnnualReport_online.pdf (last visited Oct. 31, 2018). For a broad account, see Judith Rodin & Margot Brandenburg, The Power of Impact Investing: Putting Markets to Work for Profit and Global Good (2014); The Routledge Handbook of Responsible Investment (Tessa Hebb et al. eds., 2015); Marlowe, *supra* note 40; World Economic Forum, From the Margins to the Mainstream: Assessment of the Impact Investment Sector and Opportunities to Engage Mainstream Investors, World Econ. F. (Sept. 11 2013), https://www.weforum.org/reports/margins-mainstream-assessment-impact-investment-sector-and-opportunities-engage-mainstream-investors.

44 *About Us*, CDP, https://www.cdp.net/en/info/about-us (last visited Oct. 31, 2018). *See also* Andrew Winston, *The Most Powerful Green NGO You've Never Heard of*, Harv. Bus. Rev. (Oct. 5, 2010), https://hbr.org/2010/10/the-most-powerful-green-ngo.

45 *Carbon Action*, CDP, https://b8f65cb373b1b7b15feb-c70d8ead6ced550b4d987d7c03fcdd1d.ssl.cf3.rackcdn.com/comfy/cms/files/files/000/000/703/original/carbon-action-infographic-2016-5.html (last visited Oct 31, 2018). CDP has additional programs on cities, forests, water, and supply chains. The environmental issues are its top priority.

46 *About the PRI*, PRI, https://www.unpri.org/about-the-pri/about-the-pri/322.article (last visited Oct. 31, 2018).

first-mover status, the PRI is likely the most important global responsible investment initiative in existence today," and the rate of adoption among new signatories does not appear to be slowing down.[47]

There are many more initiatives of this sort (though these are the largest). One interesting aspect of this layer of involvement is that its prime movers are not profit seekers. They play some of the same roles that Gilson and Gordon locate for activist shareholders, but their orientation toward inclusion and generality allow them to generate certain voice-enhancing features that activist shareholders would have trouble pursuing. In particular, the information gathering work and the standardization of reporting allow for significant development of both discourse and decision making regarding ESG factors. Rather than pursue gain by utilizing private information and incidentally completing the market, these organizations make possible the gathering and publication of information and perform a market-completion function without drawing off rents.[48] Thus, this nonprofit intermediary can change the conditions for exercising voice, perhaps as significantly as actors who mobilize voice regarding particular target companies.

A further noteworthy feature of this latter layer is the framing of its goals. Despite the fact that CDP and PRI are nonprofit initiatives in themselves, they generate a discourse in terms amenable to profitability. In developing the 'business case' for social responsibility, the discourse on socially responsible investing claims that SRI requires no tradeoff with profit. There are two recurring arguments on this score. Some SRI proponents emphasize profit opportunities in areas with unrealized potential (this is the mode, for example, for green energy investment).[49] The other argument is to characterize behavior that is not socially responsible as a risk for the corporation — whether because it entails direct liability risk (say in the case of environmental accidents) or reputational risk, or the risk that new regulation will force a change in a mode of activity.[50] While there are exceptions, most of the discourse is geared toward

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47 Arleta A.A. Majoch, Adnreas G.F. Hoepner & Tessa Hebb, *Sources of Stakeholder Salience in the Responsible Investment Movement: Why Do Investors Sign the Principles for Responsible Investment*, 140 J. Bus. Ethics 723, 723 (2017).

48 The claim here is not that such organizations can replace hedge fund activism, but it is at least food for thought that some of the same functions can be pursued from a different direction, where the intermediary does not have incentives to entrench its position. For the more extreme cases of entrenchment, see Judge, *supra* note 32.

49 This is the mode of argumentation, for example, in Rodin & Brandenburg, *supra* note 43.

50 The language of risk management appears across the spectrum of investment discourse: in proposals at the firm level, in evaluations by institutional investors,

'doing well while doing good' in a way that leans to the Panglossian, leading one commentator to suggest that "in the context of public pension funds, the 'socially responsible' concept has broadened to the point of irrelevance."[51] But the level of effectiveness is of less concern for present purposes: the various layers of engagement surveyed here are enough to make it clear that institutional investors play a large role in the expansion of deliberation; voice is no stranger to the capital markets, and on a large scale.

Just beyond these types of organizational activity lies an additional layer of involvement with even more ambitious attempts to harness voice that comes with investing power. In this layer, institutional investors consciously gear their investments strategically toward specific goals that lie beyond profit maximization. Leading examples are driven by institutional investment that concentrates on organized labor. In particular, large-scale investments, often in infrastructure projects, are made conditional on using unionized labor throughout, creating a "virtuous circle" for labor. One concrete case of such investment can be seen in the Ready to Fly JFK – One project, with a coalition of investors led by the Carlyle Group and including labor-based investors like the Union Labor Life Insurance Company (Ullico) and in partnership with North American Building Trades Unions. The investment seeks profitability, but at the same time claims that it will create 30,000 new unionized jobs.[52] Unionized construction workers get hired and then make additional contributions to their pension funds, which in turn gather strength for additional investment.[53]

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in the marketing of funds, and so on. For a relatively early academic elucidation, see Gordon L. Clark & Tessa Hebb, *Why Should They Care? The Role of Institutional Investors in the Market for Corporate Global Responsibility*, 37 Env't & Plan. 2015 (2005).

51 Marlowe, *supra* note 40, at 355. It should be noted that Marlowe's conclusion is not that SRI is actually irrelevant, but rather that it has productive potential and that the arguments against it are no longer valid, even if they might have been decades earlier when framed.

52 For the role of union-backed pension investment in infrastructure as an opportunity for a virtuous circle, see David Webber, The Rise of the Working-Class Shareholder: Labor's Last Best Weapon 245-50 (2018). Regarding the JFK terminal project, see The Carlyle Group, https://www.carlyle.com/media-room/corporate-videos/ready-fly-%E2%80%93-one-jfk (last visited Mar. 11, 2019).

53 Additional examples include Ullico's dedicated infrastructure fund, and the Multi-Employer Property Trust (MEPT) investment in an environmentally friendly residential skyscraper in New Haven. Webber, *supra* note 52; Sara C. Bronin, *Building-Related Renewable Energy and the Case of 360 State Street*, 66 Vanderbilt L. Rev. 1875, 1915-16 (2012). Slightly different, but

The various layers of voice that already exist in large-scale investments in capital markets are in essence just a beginning, at least as far as their potential is concerned. For some it is merely a matter of a slightly better alignment of disparate goals (for instance, maintaining profitability while avoiding complicity with commercial practices deemed problematic, like animal testing or child labor). But for others, deeper engagement may be at stake. Particularly in the case of labor-led investment, goals like job creation serve multiple functions. The existing workers who make such investments have an interest in expanding job opportunities, but they also have an interest in swelling their own ranks as more unionized jobs allow unions to grow stronger along several dimensions: growing membership increases traditional union voice in the political realm; larger unions have more leverage in collective bargaining; and greater membership increases the strength of the union as a pension provider. Such cascading effects may be even greater for other groups whose initial organization is less stable. Successful mobilization of investor voice has the potential to create something like ad hoc communities who may continue to pursue joint interests beyond any single investment project.

III. Implications of Voice

The centrality of voice in capital markets is the first of two general points I would like to draw from the discussion thus far, and merits a bit of expansion. Shareholder voice, writ large, is a well-worn category, a deeply familiar phrase. Nonetheless, it is worth pausing over its significance to our theorization of markets more generally. On the one hand, capital markets often pose as the paradigmatic case, indeed, they are often the object of the definite article in the term, *the* market. And yet, for the most important actors involved, the capital market simply does not behave like the market of theory. The small retail

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still related examples, include municipal government movements to divest funds from Wells Fargo Bank because of its funding of the Dakota Pipeline. *See* Bill Chappell, *2 Cities to Pull more than $3 Billion from Wells Fargo over Dakota Access Pipeline*, NPR (Feb. 2, 2017), https://www.npr.org/sections/thetwo-way/2017/02/08/514133514/two-cities-vote-to-pull-more-than-3-billion-from-wells-fargo-over-dakota-pipelin; Ben Cushing, *As Divestment Movement Grows, Wells Fargo Feels the Heat*, Sierra Club (Aug. 1, 2017), https://www.sierraclub.org/lay-of-the-land/2017/08/divestment-movement-grows-wells-fargo-feels-heat. True, these are instances of political actors (cities) in a market context, rather than individual citizens. But the use of the market setting for political expression is nonetheless extremely clear in this case. *See* Yishai Blank, *City Speech*, Harv. Civ. R. Civ. Lib. L. Rev (forthcoming).

investor (to the extent that he or she is more than a figment of the imagination or a historical memory) may be an impersonal price taker. But the institutional players, with or without the help of activists or other intermediaries, are willing to deliberate, to attempt to influence firm behavior, to engage, and at times to use their voices like weapons. And all of this at the heart of market capitalism: when big money enters the market, it is not willing to settle for silent, exit-oriented choice among profitmaking possibilities. Instead, big money talks, sometimes loudly.[54]

The second point to draw from the survey of institutional investor voice is that it is nearly all concentrated on influencing one of the two agency relationships discussed above: that between the institutional investor as holder of portfolio companies and the management of those companies. Everything is geared toward changing or directing the behavior of portfolio companies. What it leaves more or less untouched is the relationship between the workers or savers (the beneficial owners, in Gilson and Gordon's terminology referred to above) and the institutional investor. This means that whatever mechanisms that allow for institutional investors to assert some measure of control, at the very least by requiring deliberate, articulated accountability and the possibility of raising issues for discussion, are missing for the ultimate investor, the individual (and often even the unionized) worker.[55] The fact that the investment system might not be serving its supposed ultimate beneficiaries was noted and documented over two decades ago.[56] More recently, one commentator has emphasized the issue in stark terms:

> As a human investor, you turn your capital over every paycheck to funds available among fund families chosen by your employer. Those

54 For a particularly stark example, consider the attention lavished on Larry Fink's annual letters to CEOs, considered at times a warning about how his giant investment firm Blackrock will wield its financial might. Berkeley Lovelace Jr., *BlackRock's Larry Fink Warns CEOs to Consider Shareholders' Long-term Interest*, CNBC (Jan. 24, 2017), https://www.cnbc.com/2017/01/24/blackrocks-larry-finks-warning-to-s-and-p-ceos.html; Andrew Edgecliffe-Johnson, *Beyond the Bottom Line: Should Business Put Purpose before Profit?*, Financial Times (Jan. 4, 2019), https://www.ft.com/content/dd72c4b4-faca-11e7-9b32-d7d59aace167.

55 One nuanced study discusses standard attempts at injecting social considerations into pension fund decision making as "more about silencing multiple discourses in line with perceived necessity to conform to mainstream asset management." Frank Han de Graaf & Matthew Haigh, *Activism in European Pension Funds: Exerting Pressure on Intermediaries*, *in* Finance and Sustainability: Towards a New Paradigm? A Post-Crisis Agenda 119, 128 (William Sun, Céline Louche & Roland Pérez eds., 2011).

56 Gordon, *supra* note 31.

> funds are effectively available to you only when you hit fifty-nine-and-a-half years old. Thus, for decades or even generations, the money is not available to you to meet your expenses. During that time, you do not get to pick the shares of stock bought on your behalf or to *express any view* about how those shares are voted. Rather, you are a direct stockholder of a mutual or index fund, a status that in essence means you have *no real voice at all*… Exit is your only option, and that exit is to another fund in the same mutual fund family or another family selected by your employer, most of which will look the same as the one you exited.[57]

If we return to Drucker's assumptions articulated forty years ago, we can see that he had it all right and all wrong at the same time. Workers, as the ultimate "owners" of institutional investors, indeed own most of the equity in the capital market. But they control neither the portfolio companies in which their funds invest, nor in which companies to choose to invest; rather, workers are functionally silenced. And that means that workers, or at least the huge majority of workers whose entire capital market activity is mediated through the funds, exert no control over a central aspect of their economic destiny and thus, in large measure, their social destiny as well. This situation is not the product of some natural or spontaneous development. Tamping down worker voice regarding pension investments was at many stages a conscious and contested process.[58]

Clearly, the idea of worker voice (or investor voice more generally) is far from a one-way street guaranteeing cascading benefits. Many long-term savers may prefer to keep their voice or any other forms of activism and their retirement savings completely separate. And even those who would value a one-time choice of a socially responsible fund might not want any involvement beyond checking off a box on a form to opt in. Making the market, particularly the investment market, into a locus of political involvement can be a consuming affair, and I am not suggesting that everybody would be interested. And there is no denying that the political considerations that groups may exert in the market arena could exacerbate tensions that make politics an arena of acrimonious conflict. In addition, the stark opposition between voice

57 Strine, *supra* note 42, at 1912-13 (emphasis added). Owners of traditional pensions may have even less flexibility as far as exit is concerned, of course. People investing through 401Ks at least have the type of choice referred to in the quotation, whereas traditional pensioners are locked in.

58 McCarthy, *supra* note 9. The legal story is too complex to be told here in detail, but changes in the types of considerations money managers are permitted to consider is a central part of the story.

and exit, while useful for heuristic purposes, is also far from complete. Where the credible threat of exit exists, voice is at least potentially enhanced. So nothing in the analysis thus far points in the direction of mandating a system of greater saver involvement in the voice-related actions of institutional investors. The goal thus far has been to point to potential benefits, especially for those people minded toward merging some of their economic activities with understandings of community benefits that are not exhausted by profits.

The overall situation — one of a widespread disconnection or gulf between ultimate ownership and voice — raises a number of concerns, all of which will lead us back to the question of how the contractual system can support autonomy. Now, for the sake of argument, I will for the most part abandon the supposition that voice will come for free; in other words, I will not assume that worker/saver voice will necessarily improve their financial outcomes.[59] But this isn't because I'm sure it would not. It is far from clear that workers whose pension savings are funneled into equities will be better off in terms of returns at the time of their retirement. At the very least, such workers have become subject to much greater volatility as their pension savings become more speculative. But even if we assume that the bottom line at the moment of retirement is a net gain (again, not a sure bet by any stretch of the imagination, as retirees during 2008-09 will attest), the overall effects of such a major shift are dubious as far as workers are concerned. The most startling problems arise when a retirement fund makes a strategic investment that directly harms members of the fund, for instance by making possible the outsourcing of their jobs.[60] Indeed, there are aspects of fiduciary law whose current dominant understandings are wide open to instances of undermining beneficiaries' interests, in the name of maximizing the value of the fiduciary fund.[61]

The current situation focuses the investment strategy of the funds on a single goal, which is maximizing fund value. It ignores two aspects of long-term savings that could be crucial for the savers: first, the importance of stability; and second, the potential impact of the investment in real time. For illustrative purposes, imagine being given the following choice: 1. Invest in an index of

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59 Zohar Goshen & Richard Squire, *Principal Costs: A New Theory for Corporate Law and Governance*, 117 Colum. L. Rev. 767 (2017).

60 David H. Webber, *The Use and Abuse of Labor's Capital*, 89 N.Y.U. L. Rev. 2106 (2014).

61 At the periphery of the discourse, there are voices calling for an overhaul to fiduciary law that would reorient the kinds of goals and considerations that should guide decision makers. Edward J. Waitzer & Douglas Sarro, *Fiduciary Society Unleashed: The Road Ahead for the Financial Sector*, 69 Bus. Law. 1081 (2014).

foreign stocks, with your average expected return being 100 — however with equal chances of its being 75 or 125; 2. Invest in a community development project *in your own community* with an average expected return of 95 with low volatility (say, equal chances of 98 or 92).[62] Now factor in the fact that the work in your own community also promises positive externalities in the community. Perhaps some of those positive externalities are even monetizable.[63] With these numbers, this is an easy case, and not just for the risk-averse. But at least according to many (perhaps dominant) understandings of current fiduciary law, the money managers would have to prefer the wrong choice.

The current focus of fiduciary law on maximizing the size of the fund is overly narrow.[64] Existing critical discussions of the problem generally focus on the question of long-term versus short-term considerations, but even these are more geared toward what is conceived of as a final outcome (*i.e.*, the size of the invested pie at the time of retirement). And a straight translation of the discussion on institutional investor voice — in other words, their influence over existing portfolio companies — to the voice of workers does not capture all the relevant considerations. The major question that isn't touched upon by most of these discussions is not how much money there will be at retirement, but about what that money is doing now.

The suggestion here is straightforward, and follows both from the pathologies of the long-term investment strategies we have and the potential of alternative strategies we might adopt. The opening thought for developing such strategies is that voice is worth something. The sense of self-government that comes with control of investment is in itself a worthwhile goal, and at least the

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62 For these numbers to be plausible, even in a thought experiment, choice number 1 is based in equities, while choice number 2 takes the form of a bond, so the upside is limited. As always, if other risk mitigators (like government guarantees) are not in place, diversification will be an issue and will of course diminish local impact.

63 This example is obviously oversimplified, but it is not completely fanciful. On the volatility, see a back of the envelope calculation resembling the example in Michael Hiltzik, *You Really Want to Privatize Social Security in THIS Market?*, L.A. Times (Aug. 24, 2015), http://www.latimes.com/business/hiltzik/la-fi-mh-you-really-want-to-privatize-social-security-20150824-column.html. On the issue of positive externalities representing monetizable gains that do not show up in the investment value, consider that a community project (lighting, transportation, education) can generate increases in real estate value. For owners (and maybe long-term renters with sticky rents), this will be a major win. Renters, on the other hand, will have to pay for the benefits. This just shows that the distributive outcomes are not simple, even in a simplified example.

64 Waitzer & Sarro, *supra* note 61.

option of pursuing it should be made viable. There is no need to take this insight to extremes: rational people who appreciate self-government should be willing to trade off some promise of financial benefit; trading off too much (eliminating retirement security) would not be attractive. But currently, the option itself seems missing. A move from a situation of no voice at all to some meaningful voice looks, at least from this preliminary and speculative angle, like low-hanging fruit.

If autonomy is indeed the ultimate goal of the contractual system, this is an area where it seems threatened. Moreover, there seems to be no way to enhance autonomy on this plane without considering the means of collective action. The possibility of meaningful voice in the investment system depends on pooling (Bill Gates or Warren Buffet excepted). The older system of pooling (one workplace, non-transferable pensions) was flawed, and even that did not guarantee much voice.[65] The current system of pooling consciously short-circuits worker/saver voice. The institutional innovations necessary to mobilize such voice are not trivial, but neither are they beyond the reach of some legal engineering. Such pooling would have to retain some version of mobility, and would probably have to take into account some kind of local ties.[66] The challenges in creating such an avenue for investment are significant, but hardly seem insurmountable.

To appreciate this point, it pays to think again about the overarching goals of a capital market. At bottom, a capital market is a mechanism to facilitate the channeling of efforts into socially beneficial projects. Those efforts take shape as investments of money — but money is ultimately a go-between. It is a way to direct human energy. The mechanism works by harnessing the profit motive and competition for investments, and the competition is primarily conducted with an eye to profitability. But profitability is only a proxy for social benefit. For many well-known reasons, not all socially beneficial projects can compete when profit is the only metric. To the extent that people succeed in mobilizing voice in order to shift the priorities when channeling efforts, they will be participating in some of the most basic questions that a society deals with through its economic activity: they will be deliberating about what should count as value. In that sense, they will be direct and active participants in a process of self-government.

65 However, there is at least some chance that unions even now present at least one avenue for mobilizing voice in the setting of pension savings. For an extended treatment, see Webber, *supra* note 52.

66 As a completely speculative matter, it seems likely that there would be a large role for municipalities or other local or regional governments in organizing such pooling.

Conclusion

In a recent essay, Andrzej Rapaczynski likened impact investing to a form of lobbying.[67] In that, he was recognizing the similarity between investor influence and voice in the political arena. But Rapaczynski went much further, claiming that "an impact investor is 'bribing' the corporate decision makers to use other investors' money to foster the impact investor's own preferred social objectives."[68] Moreover, he argued that impact investors undermine the "*systemic presupposition*" of American capitalism according to which investors have "essentially *identical* interests."[69] In the end, he accuses impact investors of "not playing by the rules" in trying to reach non-market ends through the institutions of the market.[70]

Without engaging the argument in its details (problematic in my view, but unnecessary for present purposes), the stark opposition between a financial-profit-only market and a political realm responsible for social goals is a useful foil. The question is whether, and to what extent, we ought to imagine our market activity as divorced from the other modes of seeking good lives. The current choices about the scope of markets and the way the power to direct market actors is allocated is not neutral background, but rather the product of active engineering. Even when directed to single-minded considerations of profit, it always rests on additional and prior determinations about who owns what, and who can exert which kinds of pressure on others. Recognizing that markets are often largely infused with voice is a reminder that markets themselves are political institutions. The extent to which we shield them from particular moral or political arguments is enormously plastic. Markets are products of legal engineering that can mobilize and amplify voice, or attempt to silence it. That is one choice we have to make over and over again, in each recurring moment of institutional design.

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67 Andrzej Rapaczynski, *Impact Investing as a Form of Lobbying and its Corporate-Governance Effects*, 11 Capitalism & Soc'y 1 (2016).

68 *Id*. at 5.

69 *Id*. at 6 (italics in the original).

70 He writes:

> To the extent that markets are not perfect, there may be many potentially worthy (as well as nefarious) objectives of this kind [individual non-financial preferences of the shareholders]. But what I am arguing here is that while some such objectives may be properly pursued through the political system, the fact that the market does not price them correctly is the reason why their injection into the ordinary mechanisms of corporate governance amounts to 'not playing by the rules.'

Id. at 11.