University of San Diego School of Law

Legal Studies Research Paper Series

Research Paper No. 15 - 187
March 2015

U.S. Hedge Fund Activism

Frank Partnoy

US hedge fund activism

Frank Partnoy[*]

RESEARCH HANDBOOK ON SHAREHOLDER POWER, Edward Elgar

Editors:
Randall S. Thomas, Vanderbilt Law School
Jennifer G. Hill, Sydney Law School

Hedge fund activism is a recent, but now prominent, topic in academic research. Since 2006, scholarship on hedge fund activism has grown from virtually non-existent to mainstream. A search for "hedge fund activism" in the Social Science Research Network database on March 17, 2015 generated 106 papers, none posted before 2006. The same search on Google Scholar generated approximately 20,000 results, but just 38 through 2006. "Hedge fund activism" did not appear in a published law review article until 2007; today, the term is common.

Research suggests that the new US hedge fund activism "era" began less than two decades ago. Scholars studying US hedge fund activism have focused primarily on the period from the late 1990s through 2007. Partnoy and Thomas assemble a sample of hedge fund activism from 1999 to 2005 (Partnoy and Thomas 2005). Kahan and Rock cite a string of widely-publicized hedge fund activism stories from 2005 and 2006 (Kahan and Rock 2007). Bratton collected, and later extended, a sample of activist targets from 2002 through 2006 (Bratton 2007; Bratton 2010). Klein and Zur use a sample of activist events from 2003 to

[*] I am grateful for comments from Jordan Barry, Jennifer Hill, Shaun Martin, Randall Thomas, and participants at the fall 2013 Vanderbilt conference on shareholder power, particularly insights from Robert B. Thompson, the commentator assigned to this chapter.

Conflicts Disclosure: As described in section III below, I worked as a consultant for Telus Corporation in the litigation between Telus and Mason Capital, though I did not submit a report in that litigation. I was not compensated for writing this chapter.

2005 (Klein and Zur 2009). Brav, Jiang, Partnoy and Thomas collect a larger sample from 2001 to 2006, and Bebchuk, Brav, and Jiang expand this sample to cover from 1994 to 2007 (Brav et al. 2008; Bebchuk et al. 2013). Gillan and Starks contrast hedge fund activism with earlier shareholder activism by other institutional investors, which suggests a transition from a period of activism dominated by traditional institutional investors to one dominated by hedge funds (Gillan and Starks 2007).

Likewise, securities filings suggest that hedge fund activism has been significant since the late 1990s, but not before. Figure 5.1 is based on Schedule 13D filings data contained in Table 1 of Bebchuk, Brav, and Jiang (as discussed below, 13D filings are a proxy for activism) (Bebchuk et al. 2013).

<Figure 5.1 near here>

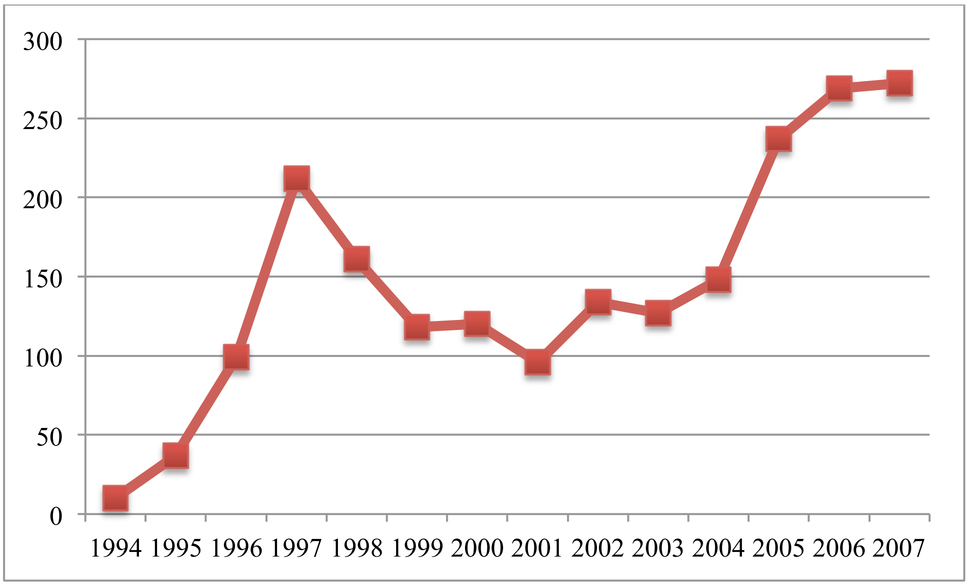

Figure 5.1 13D Filings by hedge fund activists

During recent years, hedge fund activism has become controversial in the media and among regulators and policy makers. The so-called "Billionaire Showdown" televised on CNBC between Bill Ackman and Carl Icahn, two prominent hedge fund activists, generated one of the most widely followed and contentious business debates of 2013. Views of hedge fund activism generally have been sharply divided. Thompson cites both the potential for hedge funds to solve the continuing central challenge of corporate law, the separation of ownership and control, and their portrayal as financial villains and the bane of our economic system (Thompson 2006). Macey concludes that hedge funds, together with private equity, "are the newest big thing in corporate governance and are likely to remain an important and controversial feature of the legal and financial landscape for some time to come" (Macey 2008).

Notwithstanding the growing and substantial focus on hedge fund activism, fundamental questions remain about academic research in the area. How much does hedge fund activism really matter? What has academic study contributed to the understanding of hedge fund activism? And what, if anything, does research on hedge fund activism illuminate about the viability of regulation in the area?

This chapter addresses these questions from three perspectives. First, it examines the historical development of scholarship on hedge fund activism, from the first attempts to define "hedge funds" and "activists," and to gather data about both. This development has depended on regulatory distinctions, and the central definitions that have driven scholarship in the area have changed as regulations have changed.

Second, the chapter examines one of the "hot issues" that has emerged from the debate about hedge fund activism: the potential separation of voting and economic interests. Some hedge fund activists have been accused of manipulating voting rights, and a significant body of scholarship has developed around these accusations. These alleged manipulations have received various labels, the most prominent of which, coined by Hu and Black, is "empty voting" (Hu and Black 2006). This section describes the extant approaches to the separation of voting and economic interests, and explores a few new possible approaches, including one based on tax regulation.

Third, the chapter compares regulatory approaches to hedge fund activism in the US with approaches elsewhere. It closes with a discussion of one recent and controversial incident of hedge fund activism in Canada, involving shares of the Telus Corporation, and examines the role of academic research in assessing that incident.

Overall, the answers to the fundamental questions about hedge fund activism are mixed. Academics have contributed valuable insights, arguments, and data to illuminate the collective understanding of hedge fund activism. They have generated debate, and moved issues related to law and finance and shareholder power into the mainstream. Some of these contributions are controversial. Many are ongoing. Collectively, the open questions in the field present an opportunity for scholars to step back and ask larger questions about the nature of the corporation and corporate law, and perhaps to understand shareholder power more generally.

<a>I. A BRIEF HISTORY OF HEDGE FUND ACTIVISM

Hedge funds date back to the 1940s. Shareholder activism – defined generally as efforts by shareholders to exact change at targeted firms – occurred even earlier. Scholarly research on hedge fund activism requires an understanding of the development of both topics.

Scholars generally attribute the development of the first hedge fund to Alfred Winslow Jones, a sociologist and journalist who in 1949 established a private investment partnership that reduced risk by buying one stock while selling short another stock in the same industry. Winslow's approach had several advantages: the investment partnership form was flexible and not subject to regulation under the Investment Company Act of 1940, he could trade positions quickly, and he could use leverage. Instead of charging a fixed fee, Jones set his compensation at 20 percent of profits (Fung and Hsieh 1991; Brown et al. 1999). Jones did not call his partnership a "hedge fund;" the term was later coined by the journalist Carol Loomis (Loomis 1966).

Jones apparently did not engage in shareholder activism. In any event, hedge funds clearly were not the first activists. Armour and Cheffins cite incidents of US shareholder activism beginning in the late nineteenth century and continuing throughout the twentieth century (Armour and Cheffins 2011). Bethel, Liebeskind, and Opler showed that during the 1980s there were numerous block purchasers of at least 5 percent of a company's shares by shareholders who were not financial or strategic investors (and therefore could be classified as "activist"); the most prominent examples from that period involved Carl Icahn, who scholars today would classify as a hedge fund activist (Bethel et al. 1998).

Accordingly, the initial questions confronted by scholars interested in studying hedge fund activism were straightforward and definitional. First, what is a hedge fund? Second, which hedge funds are activist? It was necessary to answer these preliminary questions early on, to make it clear how the study of hedge fund activism was distinct from the study of non-activist hedge funds and the study of activist non-hedge funds.

Until recently, there was no generally agreed-upon definition of a hedge fund. A Securities and Exchange Commission roundtable discussion of hedge funds considered 14 different possible definitions (Vaughan 2003). Partnoy and Thomas found that hedge funds typically were identified by four characteristics: (1) they were pooled, privately organized investment vehicles; (2) they were administered by professional investment managers with performance-based compensation and significant investments in the fund; (3) they were not widely available to the public; and (4) they operated outside of securities regulation and registration requirements (Partnoy and Thomas 2005). As with Jones, hedge funds generally avoided the Investment Company Act of 1940 by having a relatively small number of sophisticated investors (ibid.).

Regulatory distinctions were important in the task of distinguishing hedge funds from other types of institutional investors. During the 1990s, some scholars praised activism by “traditional” institutional investors, such as mutual funds and pension funds, as a promising way to reduce the agency costs arising out of the separation of ownership and control at US corporations (Black 1990; Roe 1991). Indeed, many such institutions had limited success with various kinds of activism through shareholder proposals, corporate governance changes, and in securities litigation, but traditional institutions proved unable or unwilling to force significant corporate change. Studies by Palmiter and Admati and Pfleiderer suggest that traditional institutions might be able to affect corporate policy by threatening to sell, but the “Wall Street Walk” has not become a meaningful source of activism (Palmiter 2002; Admati and Pfleiderer 2009). More generally, scholars have documented that traditional institutional investors, such as mutual funds and pension funds, face regulatory constraints, inadequate incentives, and conflicts of interest that have limited their ability to succeed as activists (Kahan and Rock 2007). These regulatory constraints, and other limitations, arguably did not apply to hedge funds.

There is no central database of activist hedge funds. Accordingly, one way for scholars to categorize activist hedge funds was to gather data about those investment funds that both sought to exact change at targeted firms and were not subject to the regulatory constraints applicable to other institutional investors. There were a few early attempts to study hedge fund activism based on such limited samples. Partnoy and Thomas conducted interviews and news research queries to generate a list of 88 investment funds that were involved in shareholder activism during 2005 but were not registered under the securities laws (Partnoy and Thomas 2005). Bradley, Brav, Goldstein, and Jiang collected a subsample of activism focused on opening up discounted closed-end funds (as contrasted to hedge fund activism focused on publicly traded companies) (Bradley et al. 2007). Both Bratton and Kahan and Rock assembled evidence of hedge fund activism focused on publicly traded companies, but these studies covered only a subset of hedge fund activist events (Bratton 2007; Kahan and Rock 2007).

Fortunately for scholars, hedge funds have not been entirely unregulated, and the disclosure requirements applicable to all investment funds, including hedge funds, became the key to facilitating the study of hedge fund activism more broadly. Section 13(d) of the 1934 Exchange Act provides that all investors, including hedge funds, must file a Schedule 13D with the Securities and Exchange Commission within ten days of acquiring more than 5 percent of any class of securities of a publicly traded company if they have an interest in influencing the management of the company. Congress intended that the filing of a Schedule 13D would notify the market that the filer might seek to force changes or seek control at a target company. Accordingly, scholars found that 13D filings could be viewed as a proxy for activism, and databases of 13D filings could be used to assess hedge fund activism more comprehensively. In addition, all institutional investment managers, including hedge fund managers, are subject to the disclosure provisions of Section 13(f) of the 1934 Exchange Act, which requires quarterly disclosure of major holdings, though not certain options, short, and other derivatives positions. Section 13(f) filings also helped researchers gather data on activism.

Several groups of scholars used the data required by these regulations to study hedge fund activism and to assess various financial and economic measures of such activism. Brav, Jiang, Partnoy, and Thomas filtered 13D filings to generate a list of 236 activist hedge funds and, as noted above, then analyzed the activist events by these funds during the period 2001 to 2006 (Brav et al. 2008). Bebchuk, Brav and Jiang used this list as well, and expanded the data to cover from 1994 to 2007 (Bebchuk et al. 2013). Klein and Zur used a more limited sample of 13D filings from 2003 to 2005 (Klein and Zur 2009). Clifford collected a 13D-based sample from 1998 to 2005 (Clifford 2008). Becht et al. examined nearly 1,800 cases of activism across Asia, Europe, and North America (Becht et al. 2014). Scholars have used a variety of approaches to assess the effects of hedge fund activism based on this data, some anecdotal and some more comprehensive.

The results of these studies suggest that hedge fund activism during the periods studied generated significantly higher abnormal stock returns during the window surrounding the announcement of activism than a control sample of passive block holders. This evidence further suggests that hedge fund activists achieved measurable success, at least in terms of traditional metrics of financial performance such as Tobin's Q and stock price changes, and that these gains were not reversed over the longer term. Indeed, Bebchuk, Brav, and Jiang find that hedge fund activism through 2007 was followed by improved operating performance during the five years after intervention (Bebchuk et al. 2013).

The question of whether post-2007 hedge fund activism has generated similar benefits is an open one. One study of hedge fund activism in Germany between 1999 and 2010 found that the abnormal stock returns associated with the announcement of activism were later reversed (Drerup 2012). Some evidence suggests that returns to activism have been declining over time. Brav, Jiang, Partnoy, and Thomas found that as hedge fund activism became more common, the average abnormal returns at the filing of a Schedule 13D dropped, from 15.9 percent in 2001 to 3.4 percent in 2006. That study concluded that "[i]f activism is viewed as another form of arbitrage, then it is likely that the abnormal returns associated with hedge fund activism will decline, or even disappear, as more funds chase after fewer attractive targets, and as the market incorporates the potential for investor intervention and improvement into security prices" (Brav et al. 2008: 1774). Bratton finds some evidence to support this conclusion, showing that when the sample in Bratton (2007) is expanded to cover through mid-2009, the successes of the hedge fund activists are less robust (Bratton 2010). Drerup, Katelouzou, Becht, and others are also more circumspect about the more recent success of hedge fund activism, particularly outside the US (Drerup 2012; Becht et al. 2014; Katelouzou 2014).

Why have US hedge fund activists had such apparent success, at least through 2007? The potential explanations are varied. One is light regulation, which permits hedge funds to borrow, sell short, and accumulate concentrated positions. Another is the potentially superior alignment of incentives. Hedge funds typically charge both a base percentage fee (typically in the range of 2 percent of assets under management) and a performance fee (typically in the range of 20 percent of the profits earned). This fee structure gives hedge fund managers a significant stake in the financial success of the fund's investments. As a result, many hedge funds seek high absolute returns, instead of returns relative to an index. Some scholars argue that hedge fund activists face less serious political pressure, agency costs, and conflicts of interest than do other investors.

Today, the regulations governing hedge funds have changed, making scholarship potentially easier in some ways though more difficult in others. Section 404 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 directed the SEC to establish reporting requirements for private funds, including hedge funds. In response, the SEC has established reporting requirements using Form PF, for "private funds," including hedge funds. As of mid-2013, 2,300 investment advisers managing over $7 trillion in fund assets have filed 4,000 Form PF reports. These reports cover 6,700 hedge funds, as well as numerous other types of private funds (U.S. Securities and Exchange Commission 2013).

Because of these new regulations, there is no longer any doubt about the first definitional research question that previously confronted scholars: what is a hedge fund? As defined in the glossary of Form PF, a private investment fund is a "hedge fund" if it: (1) may be paid a performance fee based on unrealized gains; (2) may borrow more than one-half of its net asset value (or have gross notional exposure in excess of twice its net asset value); or (3) may sell securities short (ibid.). Regulations further divide "hedge funds" based on size and other variables. Hedge funds with less than $150 million under management are not required to file Form PF (ibid.). According to the SEC, as of 2013 there were 6,683 hedge funds reporting, with $4.061 trillion of assets under management (ibid).

However, the new Form PF regulations leave many questions unanswered. They do not specify which funds should be categorized as activist. The rules might not capture all hedge funds, some of which have returned external money and restructured as family offices in order to attempt to avoid regulatory scrutiny.

Although the SEC supplies summary information about the Form PFs it receives, and has committed to providing annual reports based on the underlying data submitted by hedge funds, that underlying data is not publicly available. Accordingly, it remains an open question whether and how research will benefit from the new regulations and data.

<a>II. HEDGE FUND ACTIVISM AND THE SEPARATION OF VOTING/ECONOMIC INTERESTS

Historically, the canonical view of corporate voting was that corporate law treated shares equally and properly allocated votes to common shareholders as the residual claimants to a corporation's income. The rationale for the default rules that allocate one vote to each common share and no, or few, votes to other claimants – broadly known as the rule of "one-share/one-vote" – was that shareholders have "similar if not identical" preferences as to their desires for the firm, and collectively are the group with the appropriate incentives to make discretionary decisions because they receive most of the marginal gains and bear most of the marginal costs of those decisions (Easterbrook and Fischel 1983). Accordingly, one-share/one-vote was, at least in theory, seen as a mechanism for encouraging shareholders to maximize the corporation's value (Grossman and Hart 1988).

<b>A. Approaches to the Separation of Voting and Economic Interests

However, as Martin and Partnoy showed, "changes in the markets and in finance theory make it plain that the assumptions central to the paradigmatic position on corporate voting no longer hold, if they ever did" (Martin and Partnoy 2005). By the 1990s, financial innovation had made it a straightforward exercise to separate votes from the economic returns of stock, and shareholders frequently held, not "pure" financial claims, but portfolio positions that included options, forward contracts, and other financial derivatives. Although such financial innovation and "vote separation" were known among practitioners, their implications were not well understood. Martin and Partnoy first addressed these phenomena, labeling share positions as "economically encumbered" if the shareholder held a countervailing position that "encumbered" those shares (ibid). The simplest example was of a person who owned shares but also was short the same shares (ibid.).

The topic of "vote separation" became popular among researchers when news spread about a strategy Richard Perry's hedge fund, Perry Capital, used in the context of a proposed merger of Mylan Laboratories and King Pharmaceuticals. Mylan agreed to acquire King, subject to shareholder approval. Carl Icahn's hedge fund held shares of Mylan; Perry Capital held shares of King. As with many acquisitions, market participants perceived the Mylan-King deal to be bad for the acquirer Mylan (and Icahn), but good for the target King (and Perry Capital). Icahn threatened to vote his approximately 10 percent holding of Mylan shares against the deal.

In response, Perry Capital acquired 9.9 percent of the acquirer Mylan's shares and simultaneously entered into equity derivative transactions with two investment banks to hedge its economic exposure to Mylan's shares. Effectively, Perry Capital had little or no economic exposure to Mylan. But because Perry Capital held 9.9 percent of Mylan's shares, it could effectively "cancel out" Icahn's negative votes by voting in favor of the deal.

Media reports of Perry Capital's derivatives transactions spread widely, as did commentary about their implications. Icahn sued, and regulators began investigating, but the disputes were settled and the deal was scuttled. Nevertheless, news about Perry's strategy set off extensive academic study and debate.

Hu and Black coined the term "empty voting" to describe situations in which a shareholder held a voting interest that was greater than its economic interest (Hu and Black 2006). To the extent the voting interest exceeded the economic interest, the votes were dubbed "empty" (ibid.). "Empty voting" became an umbrella term used to describe both (1) the separation of economic and voting interests, and (2) other controversial practices ranging from buying and simultaneously shorting shares to record date capture trades to abuses related to share lending. Martin and Partnoy capture this distinction by labeling the first phenomenon "economic encumbrances" and the second "legal encumbrances," and refer to the two phenomena collectively as "encumbered shares" (Martin and Partnoy 2005).

Imagine that shareholder interests are arrayed along a spectrum, from the shareholder who has no other transactions or holdings related to its shares (i.e., a "Pure" shareholder) to the shareholder who has entered into a transaction, such as a short position on all of its shares, that negate all the economic risk associated with the underlying position in shares (i.e., a "Neutral" shareholder).

This spectrum is depicted below, with the amount of economic risk the shareholder retains declining from left to right, from 100 percent on the far left to 0 percent on the far right. There is an array of possibilities between "pure" and "neutral" shareholders. Shares can be viewed as "empty" anywhere from the "Neutral" point to the right. Shares can be viewed as "encumbered" anywhere to the right of the "Pure" point.

“Pure” …………………………………………………… “Neutral”

Scholars have extensively discussed the situation presented at or to the right of the “Neutral” point on the spectrum, where voting interests exceed economic interests and the shareholder can be described as “empty.” But less attention has been paid to the interior portion of the spectrum, where line-drawing potentially becomes more difficult. There are several categories of transactions that can be used to offload all or substantially all of the economic risk associated with a long share position without selling shares, so that the shareholder retains voting rights. These transactions include: partial short sales, option collars (a long put position plus a short call position), equity or total return swaps (and contracts for differences), forward transactions (especially variable prepaid forwards), and others that creative market participants, but perhaps not scholars, might conceive.

The distinctions among these transactions are important, particularly given the dominance of “regulatory arbitrage” in modern markets (Partnoy 1997; Fleischer 2010; Barry 2011). For example, a court assessing only whether a party has a short share position might permit options transactions. A regulator might find it costly to examine whether a shareholder has offshore prepaid forwards. When policy makers enact new rules that impose regulatory costs, sophisticated market participants often respond by transacting in ways that replicate the economic profile of regulated transactions while (at least arguably) falling outside the regulatory scope.

Accordingly, it is important for scholars to recognize the complexities associated with the more varied ways in which shares might be “encumbered,” but not necessarily “empty.” First, consider the simple case in which a shareholder owns 100 shares, and sells short 20 of those shares. They still would maintain a substantial economic interest through their net long share position of 80 shares. How would such a position be treated? Would it be an "empty voter" as to 20 shares? Or all 100? How should a policy maker specify when a rule will apply to a shareholder who engages in some shorting?

Alternatively, suppose the shareholder owns 100 shares, and enters into (1) a long put position on 100 shares, and (2) a short put position on 100 shares. If each option is "at the money" (i.e., the exercise price equals the price of the shares at the time it enters into the option transactions), the shareholder would – from an economic perspective – have eliminated all of the risk associated with the 100-share position. Would a regulator consider such a transaction to be "empty"? What if the option position were based on only 80 shares? Then the above discussion of partial short sales would apply and the question would become: how much of the position is "empty"?

Moreover, the shareholder might adjust the exercise prices of the options positions (perhaps to $99/$101 or $80/$120), so that it would hold options based on all of its 100 shares, but still maintain some economic risk. "Empty"?

Shareholders can use multiple types of transactions to execute these and similar trades (Martin and Partnoy 2005). Note further that these transactions could be cash settled, instead of physically settled, and individually negotiated so that they arguably would fall outside the scope of regulation, including the recent Dodd-Frank reforms.

One example illustrating the potential challenges of addressing the separation of economic and voting interests is the interesting, yet little-noticed, Delaware Court of Chancery case of *Deephaven Risk Arb Trading, Ltd. v. UnitedGlobalCom, Inc.* In essence, Deephaven Risk Arb Trading, Ltd., a hedge fund, had taken a net short position in UnitedGlobalCom, the acquirer in a merger (*Deephaven Risk Arb Trading, Ltd. v. UnitedGlobalCom, Inc* , 2005 WL 1713067 [2005]). Deephaven submitted a books and records request under Section 220 of Delaware's corporate law (ibid.). The court found that

Deephaven had standing to pursue an inspection, and declined to inquire into the consequences of Deephaven holding a net short position (ibid.). The court explained its ruling as follows:

<quotation>Practically, requiring an analysis of why and under what circumstances a § 220 plaintiff came to hold a company's shares could significantly complicate the nature of this summary and often expedited proceeding. It potentially would force courts to undertake a complex analysis to determine the plaintiff's financial position net of stock, options and other derivatives. One can imagine cases in which financial experts might be necessary to make such a determination. Moreover, the specter of being forced to disclose sophisticated and proprietary trading techniques could have a chilling effect on the use of § 220 by a substantial segment of stockholders. (ibid.)</quotation>

Note that the *Deephaven* court declined to engage in a relatively straightforward mathematical exercise: subtraction. It was easy to see that Deephaven's position was net short, or "empty." It appears from the judicial decision that Deephaven had not used any of the complex transactions described above. Yet the court recognized that future cases might not be as simple, and that the transaction costs of investigating a shareholder's countervailing economic interests might be too high.

US regulators generally have followed an approach similar to that of the *Deephaven* court (though without recognizing or citing the case). Although the debate about the separation of voting rights and economic exposure has generated a variety of proposals – ranging from required disclosure to rules that would ban shares from voting – regulators have largely taken a hands-off approach, declining to adopt detailed rules. One reason has been the potential transaction costs of line drawing. In addition, the question remains whether the kinds of manipulative transactions documented by scholars continue to be as widespread as researchers have found them to be in the past. It is difficult to answer this question, given limited reporting and the potential for regulatory arbitrage. The Form PF disclosures to the SEC might include reports of such transactions – or they might not. Either way, as noted above, academics do not have access to those reports.

<b>B. A Tax Perspective and “Substantially All”

Scholars seeking to address the line-drawing problems that arise from the separation of economic and voting interests might explore tax regulation. The Internal Revenue Service and the US Tax Court have addressed similar challenges posed by some of the above categories of transactions. Scholars might not view tax-related cases as analogous, because the motivation of the transacting party is typically different from that of an activist hedge fund such as Perry Capital. Instead of seeking to obtain a voting share position with little or no economic exposure, the transacting party in the tax context typically is an individual with an appreciated stock position who wants to generate liquidity without actually selling the stock (which would trigger a tax obligation). Yet the tax authorities have considered the difficulties of formulating specific ex ante rules to govern these complex activities, and, instead of attempting to do so, they have embraced a substantially different approach: setting forth an ambiguous standard ex ante with the hope and promise that enforcement will come ex post.

In 1997, the US Congress amended the Internal Revenue Code, establishing Section 1259, which was intended to prevent taxpayers from entering into transactions in order to substantially reduce or eliminate the risk of their stock positions (and receive cash in exchange) without triggering a taxable event. Section 1259 covers not only short sales, swaps, and forwards, but also other derivatives transactions that achieve the same effect: precisely the categories used by some activist hedge funds. Sales covered by Section 1259 generally are known as “constructive sales.” The central idea is that if the taxpayer has "constructively" sold its stock, it should be treated as if it actually sold the stock for tax purposes.

There has been a considerable amount of litigation under and discussion about Section 1259. The language of Section 1259 and its legislative history centered on a vague and undefined term: "substantially all." Congress used this term to grant to the Department of Treasury the vague and undefined regulatory authority to treat as constructive sales other financial transactions that have the effect of eliminating "substantially all" of the taxpayer's risk of loss and opportunity for income or gain (Office of Chief Counsel 2004). There are no specific rules delineating what "substantially all" means for particular transactions (ibid.).

US regulators have suggested that among the factors to be considered in assessing the question of whether a transaction eliminated "substantially all" risk are: the volatility of the stock price; the difference between the exercise prices of any put and call options; the maturity of the transaction, and whether the taxpayer remained entitled to receive dividends – in other words, many of the key variables in the examples set forth above. Volatility, exercise price, and maturity are important variables in assessing the valuation of any options, whether they are stand-alone transactions or are embedded in a transaction. (Receiving dividends is also regarded as a relevant factor because it, like voting, can be considered to be consistent with ownership.)

A few tax rulings related to variable prepaid forwards provide some guidance as to when a party has crossed the line and eliminated "substantially all" of its risk. For example, Rev. Rul. 2003-7, 2003-1 C.B. 363 has suggested that a spread of approximately 20 percent in the forward obligation to deliver shares in the future (i.e., the taxpayer might sell as few as 80 or as many as 100 shares) would be sufficient to conclude that a transaction did *not* eliminate "substantially all" of the taxpayer's risk (Office of Chief Counsel 2004). In 2010, the US Tax Court relied on this ruling to find that a variable prepaid forward transaction with a greater than 20 percent possible variation in the number of shares to be delivered did not involve the elimination of "substantially all" of the underlying share price risk, and therefore was not a constructive sale (*Anschutz Co. v. Commissioner of Internal Revenue*, 135 T.C. No. 5 [2010]).

As a general matter, the courts, regulators, and practitioners in the US have focused on the economic substance of transactions in assessing them for tax purposes. The central question in the tax area involves the extent to which, along the continuum of retained shareholder risk discussed at the beginning of this section, the taxpayer has eliminated the bulk of its risks. This question is essentially the same as asking about the degree to which shares have been "encumbered."

The US tax perspective illustrates the importance of considering the range of possible regulatory arbitrage transactions, and therefore might be useful for assessing hedge fund activists' "empty voting" practices, depending on the parameters that matter to the boundaries of "substantially eliminating" risk. In any event, the approach under US tax law illustrates the importance of considering how parties might use financial innovation to go beyond simple shorting and instead employ any of the above categories of transactions to attempt to retain votes while eliminating all or substantially all of their economic risk.

Although scholarly proposals to address the problems related to hedge fund activism and the separation of economic and voting interests have largely not been implemented, the study of voting-related phenomena at hedge funds has generated other benefits. Scholars have begun to rethink corporate voting theory in ways that are more sophisticated and pragmatic than the historical framework. For example, Thompson and Edelman develop a theory of voting based on error correction and provide a framework for distinguishing shareholder voting from public voting (Thompson and Edelman 2009). Barry, Hatfield and Kominers use a formal model to suggest that the normative effects of the separation of voting and economic interests depend on the degree of transparency in a market (Barry et al. 2013). Katelouzou presents a multiple-stage theoretical framework for understanding the underpinnings of an activist campaign (Katelouzou 2014). Although the policy impact of research has been limited, the academic focus on the potential separation of economic and voting interests has enriched and rejuvenated corporate voting theory.

<a>III. GLOBAL REGULATION OF HEDGE FUND ACTIVISM

Global regulators have devoted substantial resources to studying hedge fund activism, and some jurisdictions have implemented new rules, but overall regulators appear to have largely concluded that – apart from some problems related to share lending – nothing drastic should be done to police or deter the broad category of abuses involving the separation of voting and economic interests. The use of the umbrella term "empty voting" has created more regulatory confusion than action.

For example, European Union regulators overall do not appear to regard "empty voting" as frequent or problematic (ESMA 2012). In December 2010, after seeking feedback from market participants, EU regulators indicated that a majority of respondents did not support mechanisms to enhance transparency in this area (ibid.). In September 2011, the European Securities and Markets Authority, ESMA, launched a "Call for Evidence on Empty Voting," to analyze the topic in greater depth. Based on the input it received, the ESMA found that "there appears to be insufficient evidence to require further analysis or action at this stage" (ibid.). The ESMA could not even arrive at a definition of "empty voting," and expressed skepticism about a "one-size-fits-all" approach to "empty voting," given the lack of understanding of the phenomenon (ibid.). Indeed, ESMA concluded not only that regulatory action was unwarranted but that, given scarce resources and other priorities, there was not even a justification for further study: “ESMA will not conduct any further research on empty voting for now” (ibid.).

The EU responses suggest that, apart from a small number of incidents involving share lending, abuses have been uncommon. Some respondents explicitly said “empty voting” was rare; others said they had no direct awareness of any cases of “empty voting” (ibid.). Several respondents said the lack of cases was due to the regulatory landscape and market standards, which deterred “empty voting” (ibid.). The report summarized these responses as follows: “although almost everyone looks at empty voting as an inconvenient practice in general, the real impact of it on the voting results does not appear to be very significant” (ibid.: 10).

In place of regulation, private ordering by self-regulatory organizations and trade associations may have deterred the separation of voting and economic interests, though as with regulation the focus of self-regulation has been on share lending. The European Corporate Governance Forum has stated that parties should disclose when they have ceded all or part of the economic interest in shares, or else be deemed to have made an untrue statement (EUCGF 2010). The International Corporate Governance Network has issued a code of best practices, which states that voting by a share borrower with only a temporary interest can distort the result of general meetings and undermine confidence in the market (ICGN 2007). Share lending codes state that borrowing shares to acquire votes is inappropriate (ibid.). The Hedge Fund Standards Board has stated that, with certain narrow exceptions, a “hedge fund manager should not borrow stock in order to vote” (HFWG 2008).

The regulatory response in the United Kingdom has been similar to that in the EU: some proposals, some study, some concerns expressed about manipulative practices – but no new rules related to “empty voting” (Ringe 2013b). The same is largely true of Australia, notwithstanding the widespread skepticism about financial innovation among many

Australian commentators (ibid.). As with the EU, the lack of appetite for regulation appears to be due to an absence of evidence and data indicating problems, as well as proactive initiatives by market participants (ibid.). In sum, the focus on "empty voting" has generated a lot of attention outside the US, as it has inside the US, but ultimately there has been little or no policy change.

Nevertheless, one interesting dispute in Canada in 2012 presented an opportunity to apply recent academic research and to test whether the theory of "empty voting" might help courts resolve a dispute involving hedge fund activism. The background to the dispute, which involved shares of Telus Corporation, a Canadian-based telecommunication company, is described in Ringe (2013a).

Historically, Telus had a dual-class share structure: its voting shares traded at a premium of about 5 percent to its non-voting shares. For various reasons, in early 2012 Telus decided to collapse the two classes of shares into one class on a one-for-one basis (ibid.). When Telus announced this decision, many arbitrageurs, including hedge funds, bought Telus non-voting shares and sold short Telus voting shares; the 5 percent price difference between the two classes narrowed as their relative prices came to reflect market participants' expectations that the two classes of shares soon would be worth the same amount (ibid.).

As the prices narrowed, Mason Capital, a hedge fund, attempted to take advantage of an opportunity. Mason pursued the opposite strategy of previous arbitrageurs: it bought approximately 20 percent of the voting shares of Telus and sold short a similar number of non-voting shares (ibid.). Mason then opposed Telus's plan to collapse its dual-class share structure (ibid.). If Mason could defeat the plan by voting against it, Mason likely would profit: if the deal were rejected, Telus's voting shares likely would return to their historical premium of about 5 percent, and Mason would make money on its long voting share position relative to its short non-voting position (ibid.). Importantly, the profitability of Mason's strategy depended on the relative prices of the voting and non-voting shares of Telus, not solely on the absolute value of one class or the other. In other words, unlike a “pure” shareholder of Telus, voting or non-voting, Mason’s fortunes did not depend generally on the fortunes of Telus (ibid.).

Litigation ensued, and both Telus and Mason sought expert advice about Mason’s position. Henry Hu wrote an expert submission on behalf of Telus, and concluded that Mason was an “empty voter” (ibid.). Black wrote an expert submission on behalf of Mason, and concluded that Mason was not an “empty voter” (ibid.). As Ringe describes the experts’ roles, “[b]oth professors, Henry Hu and Bernard Black, came to different conclusions as to whether Mason was indeed engaged in empty voting” (ibid.: 4). Telus also hired me as a consultant and I was compensated for that work, though I did not submit a report in the litigation. As noted above, I was not compensated for preparing this chapter. Mason also hired Ronald Gilson, who submitted a report in support of Mason’s position.

Ultimately, Telus’s plan to collapse its shares was approved. The Canadian lower court examined the facts and criticized Mason for being indifferent to the overall value of Telus (ibid). However, an appellate court found that Mason’s economic position – or lack thereof – did not preclude a meeting to vote on the Telus plan. Later, the Canadian Supreme Court addressed the substance of Mason’s proposal to vote against Telus’s plan and found that “empty voting” was one factor to consider in assessing the fairness of Mason’s approach. (ibid.).

Black immediately published an article describing his views of the Telus matter (Black 2012). Hu and Gilson did not. In his article, Black stated:

<quotation>In a series of articles, Henry Hu and I have discussed how voting rights can be decoupled from economic interests and the implications of this decoupling. We developed and defined the concept of “empty voting,” which we define as a situation

in which investors have greater voting than economic ownership. I will use the term "empty voting" here in a narrower sense, to mean voting without a significant economic interest in the issue being voted on, or even a negative economic interest in that issue. Having co-invented the term "empty voting," I should be well positioned to explore what it does and does not mean. (2012: 4)</quotation>

Black included as part of the article a conflicts disclosure indicating that "I was compensated by Mason Capital for preparing this article" (ibid.).

What conclusions can be drawn from the Telus-Mason dispute? At the outset, it is striking that the two co-authors who coined the term "empty voting" did not, when presented with a relatively rare real-life example of the practice, agree on the meaning of that term. The co-authors' opposing interpretations raise a number of difficult issues. Perhaps most fundamentally, the uniqueness of Mason's strategy was not anticipated in the academic literature. Nor was Mason's strategy as complicated or novel as it could have been; Mason might have used any of the complex transactions described above, or other unanticipated strategies. These difficulties are one reason why regulators and judges have recognized the potential problems associated with the separation of economic and voting interests, but have not adopted rules designed specifically to combat the practices.

Black's definition of "empty voting" in the Telus-Mason litigation differed from the definition that is used in the academic literature, as Black acknowledged (Black 2012). This difference underscores the need for scholars to question what the definition of "empty voting" might be, and whether that definition – and, indeed, the theory – suffers from serious limitations. One obvious limitation is that the theory as applied in the Telus-Mason case led to different, conflicting conclusions.

If the issue in the litigation had instead been framed in terms of a theory of "encumbered shares" instead of a theory of "empty voting," would the result have been different? Would experts agree that Mason Capital's voting shares were "encumbered" by its short position in non-voting shares? If so, the question then would have become whether it was desirable, or even possible, to draw a line specifying how "encumbered" those voting shares would need to be to warrant a regulatory or judicial consequence. Scholars might very well disagree in answering this question, but at least the relevant theory and analytical framework would be consistent.

In addition, what if the legal question in the dispute had been focused on whether Mason had retained "substantially all" of its economic interest in the shares? Is retaining such an interest inherently part of what it means to be a shareholder entitled to a vote? More specifically, what if judges or regulators had used such language to require that shareholders retain "substantially all" of the economic interest in their voting shares in order to vote? Or what if corporations specified in their charters that only those shareholders who have retained such an interest are entitled to vote? In either a regulatory or private ordering approach, an analysis of transaction costs would be central to answering such questions and drawing such lines. It very well might be the case that regulating voting by specifying a broad principle ex ante (either in regulation or through private ordering) and then adjudicating based on that principle ex post would be too costly. But even if that were the case, it would be helpful for scholars to have a more logical and robust understanding of why policy makers and private actors have not undertaken more drastic steps to prohibit abuses involving the separation of voting and economic interests.

In advocating the "encumbered shares" approach, Martin and Partnoy demonstrate both the difficulty and the importance of drawing lines between abusive share transactions and similarly complex transactions that have real economic substance (Martin and Partnoy 2005). The "substantially all" approach likewise reflects the difficulty of defining the relevant distinctions among transactions. But flexibility can be a benefit, rather than a bug.

“Substantially all” injects a measure of uncertainty into any transaction that approaches the line between deals that eliminate all risk and deals that retain some risk. This uncertainty helps to deter abusive tax-motivated transactions, and likewise might deter abusive vote-motivated transactions.

When a purchase or sale is made primarily to reduce taxes, the possibility that such a benefit will not result weighs against consummating the trade, particularly given both transaction costs and expected tax penalties. The same likely would be true of transactions designed to capture vote-related benefits, but not other “real” benefits. By contrast, parties entering into transactions with “real” non-tax (or non-voting) economic substance are more likely to assess the expected cost of ex post regulatory scrutiny as relatively low – accordingly, this theory goes, those transactions with true economic value are more likely to go forward even in situations close to the line.

The benefits of an uncertain standards-based approach depend on the assumption that adjudicators will impose reasonable penalties, or at least that people will assume adjudicators will impose reasonable penalties. If adjudication is random or biased or ineffectual, or people think it will be, then there might not be a differential effect for “abusive” vs. “real” transactions. In other words, the key benefit to the vague standard over the bright-line rule is that the standard forces people to internalize expectations about the hopefully accurate or reasonable after-the-fact assessment by regulators. That, in a nutshell, has long been the advantage of common law.

Scholarship in the area of US hedge fund activism might benefit from more thinking about the above questions. They are hard questions. But at minimum, this discussion illustrates why, in fact, policy makers have decided not to implement costly and difficult-to-articulate, yet easily-circumvented, bright-line rules in this area.

Hedge fund activism continues to be a promising area of research, where both policy makers and scholars have only begun to confront the challenges of financial innovation. The evidence developed thus far appears to rebut the argument that hedge fund activists generally destroy shareholder value and are short-term in nature, at least for US hedge fund activism as of 2007. On the other hand, there is anecdotal evidence that some hedge fund activists engage in troubling practices, particularly related to the separation of economic and voting interests. And there is need for more research on post-2007 hedge fund activism.

The first generation of research on hedge fund activism established some tentative conclusions and disrupted some canonical theories, particularly as to the theory of corporate voting. Yet those conclusions and disruptions remain tentative. For the next generation, both empiricists and theorists will have plenty of interesting material.

<a>BIBLIOGRAPHY

Admati, Anat R. and Paul C. Pfleiderer. 2009. The “Wall Street Walk” and Shareholder Activism: Exit as a Form of Voice, *Review of Financial Studies*, 22: 2445–85.

Armour, John and Brian Cheffins. 2011. The Past, Present and Future of Shareholder Activism by Hedge Funds, *Journal of Corporation Law*, 37: 53.

Bainbridge, Stephen. 2005. Shareholder Activism and Institutional Investors, UCLA School of Law (Working Paper Series 05-20).

Barry, Jordan M. 2011. On Regulatory Arbitrage, *Texas Law Review*, 89: 69.

Barry, Jordan M., John William Hatfield and Scott Duke Kominers. 2013. On Derivatives Markets and Social Welfare: A Theory of Empty Voting and Hidden Ownership, *Virginia Law Review*, 99: 1103–67.

Bebchuk, Lucian A., Alon Brav and Wei Jiang. 2013. The Long-Term Effects of Hedge Fund Activism, Columbia Business School (Research Paper No. 13-66).

Becht, Marco, Julian R. Franks, Jeremy Grant and Hannes F. Wagner. 2014. The Returns to Hedge Fund Activism: An International Study, European Corporate Governance Institute (Finance Working Paper No. 402/2014).

Becht, Marco, Julian R. Franks, Colin Mayer and Stefano Rossi. 2009. Returns to Shareholder Activism: Evidence from a Clinical Study of the Hermes U.K. Focus Fund, *Review of Financial Studies*, 22: 3093.

Bethel, Jennifer E., Julia Porter Liebeskind and Tim Opler. 1998. Block Purchases and Corporate Performance, *Journal of Finance*, 53: 605.

Black, Bernard S. 1990. Shareholder Passivity Reexamined, *Michigan Law Review*, 89: 520–608.

Black, Bernard S. 2012. Equity Decoupling and Empty Voting: The TELUS Zero-Premium Swap, *The M&A Lawyer*, 16: 1, 4–8.

Boyson, Nicole M. and Robert M. Mooradian. 2011. Corporate Governance and Hedge Fund Activism, *Review of Derivatives Research*, 14: 169–204.

Bradley, Michael, Alon Brav, Itay Goldstein and Wei Jiang. 2007. Shareholder Activism and Price Dynamics: Evidence from Closed-End Funds, University of Pennsylvania (Working Paper).

Bratton, William W. 2007. Hedge Funds and Governance Targets, *Georgetown Law Review*, 95: 1375–433.

Bratton, William W. 2010. Hedge Funds and Governance Targets: Long-Term Results, University of Pennsylvania Institute for Law & Economics (Research Paper No. 10-17), 1–31.

Bratton, William W. and Michael L. Wachter. 2010. The Case Against Shareholder Empowerment, *University of Pennsylvania Law Review*, 158: 653.

Brav, Alon, Wei Jiang and Hyunseob Kim. 2009. Hedge Fund Activism: A Review, *Foundations and Trends in Finance* 4: 185.

Brav, Alon, Wei Jiang, Frank Partnoy and Randall Thomas. 2008. Hedge Fund Activism, Corporate Governance, and Firm Performance, *Journal of Finance*, 63: 1729–75.

Briggs, Thomas W. 2007. Corporate Governance and the New Hedge Fund Activism: An Empirical Analysis, *The Journal of Corporation Law*, 32: 681–738.

Brown, Stephen J., William N. Goetzmann and Roger Ibbotson. 1999. Offshore Hedge Funds: Survival and Performance, 1989–95, *Journal of Business*, 72: 91–117.

Cheffins, Brian R. 2012. Introduction, in Brian R. Cheffins, ed., *The History of Modern U.S. Corporate Governance*, Vol. 1, Cheltenham, UK and Northampton, MA, USA: Edward Elgar Publishing.

Choi, Stephen J., Jill E. Fisch and Marcel Kahan. 2009. Director Elections and the Role of Proxy Advisors, *Southern California Law Review*, 82: 649–701.

Clifford, Christopher P. 2008. Value Creation or Destruction? Hedge Funds as Shareholder Activists, *Journal of Corporate Finance*, 14: 323–36.

Cumming, Douglas J. and Na Dai. 2010. A Law and Finance Analysis of Hedge Funds, *Financial Management*, 39: 997–1026.

Drerup, Tilman H. 2012. Much Ado About Nothing: The Effects of Hedge Fund Activism in Germany, The Bonn Graduate School of Economics (Working Paper). Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1718365

Easterbrook, Frank W. and Daniel R. Fischel. 1983. Voting in Corporate Law, *Journal of Law and Economics*, 26: 395.

European Corporate Governance Forum (EUCGF). 2010. Statement of the European Corporate Governance Forum on Empty Voting and Transparency of Shareholder Positions. Available at http://ec.europa.eu/internal_market/company/docs/ecgforum/ecgf_empty_voting_en.pdf

European Securities and Markets Authority (ESMA). 2012. Feedback Statement: Call for Evidence on Empty Voting, at http://www.esma.europa.eu/hr/system/files/2012-415.pdf

Fleischer, Victor. 2010. Regulatory Arbitrage, *Texas Law Review*, 89: 227.

Fung, William and David A. Hsieh. 1991. A Primer on Hedge Funds, *Journal of Empirical Finance*, 6: 309–31.

Gillan, Stuart L. and Laura T. Starks. 2007. The Evolution of Shareholder Activism in the United States, *Journal of Applied Corporate Finance*, 19: 55–73.

Gilson, Ronald J. and Jeffrey N. Gordon. 2013. The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights, The Center for Law and Economic Studies, Columbia University School of Law (Working Paper No. 438).

Greenwood, Robin and Michael Schor. 2009. Investor Activism and Takeovers, *Journal of Financial Economics*, 92: 362–75.

Grossman, Sanford J. and Oliver D. Hart. 1988. One Share-One Vote and the Market for Corporate Control, *Journal of Financial Economics*, 20: 175.

Hedge Fund Working Group (HFWG). 2008. Hedge Fund Standards: Final Report. Available at http://www.efinancialnews.com/share/media/downloads/2008/01/2449616462.pdf

Hu, Henry T.C. and Bernard S. Black. 2006. The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership, *Southern California Law Review*, 79: 811–908.

Hu, Henry T.C. and Bernard S. Black. 2007. Hedge Funds, Insiders and the Decoupling of Economic and Voting Ownership: Empty Voting and Hidden (Morphable) Ownership, *Journal of Corporate Finance*, 13: 343–67.

Hu, Henry T.C. and Bernard S. Black. 2008. Equity and Debt Decoupling and Empty Voting II: Importance and Extensions, *University of Pennsylvania Law Review*, 165: 625–739.

International Corporate Governance Network (ICGN). 2007. ICGN Securities Lending Code of Best Practice. Available at http://www.sec.gov/comments/4-590/4590-10.pdf

Joint Committee on Taxation. 1997. General Explanation of Tax Legislation Enacted in 1997, JCS-23-97.

Kahan, Marcel and Edward B. Rock. 2007. Hedge Funds in Corporate Governance and Corporate Control, *University of Pennsylvania Law Review*, 155: 1021–93.

Karpoff, Jonathan M. 2001. The Impact of Shareholder Activism on Target Companies: A Survey of Empirical Findings, University of Washington (Working Paper), 1–35. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=885365

Katelouzou, Dionysia. 2014. The Legal Determinants of Shareholder Activism: A Theoretical and Empirical Comparative Analysis, Kings College London Law School (Research Paper No. 2014-8), 1–50. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2357547

Katz, Barbara G. and Joel Owen. 2013. Activism's Impact on Diversified Investors and the Market, New York University (Working Paper No. 2431/31697).

Klein, April and Emanuel Zur. 2009. Entrepreneurial Shareholder Activism: Hedge Funds and Other Private Investors, *Journal of Finance*, 63: 1729.

Listokin, Yair. 2009. Corporate Voting vs. Market Price Setting, Yale Faculty Scholarship Series (Working Paper No. 560). Available at http://digitalcommons.law.yale.edu/fss_papers/560

Loomis, Carol. 1966. The Jones Nobody Keeps Up With, *Fortune*, April: 237–47.

Macey, Jonathan. 2008. *Corporate Governance: Promises Kept, Promises Broken*, Princeton, NJ: Princeton University Press.

Martin, Shaun P. and Frank Partnoy. 2005. Encumbered Shares, *University of Illinois Law Review*, 2005: 775–813.

Office of Chief Counsel, Internal Revenue Service. 2004. Memorandum No. 20042305F, June 4, 2004, at 7–14.

Palmiter, Alan R. 2002. Mutual Fund Voting of Portfolio Shares: Why Not Disclose?, *Cardozo Law Review*, 23: 1419–91.

Partnoy, Frank. 1997. Financial Derivatives and the Costs of Regulatory Arbitrage, *Journal of Corporation Law*, 22: 211.

Partnoy, Frank and Randall Thomas. 2005. The New Shareholder Activism (Working Paper), 1–40. Available at http://ssrn.com/abstract=876344

Ringe, Wolf-Georg. 2013a. Empty Voting Revisited: The *Telus* Saga, University of Oxford Legal Research Paper Series, Paper No 18/2013.

Ringe, Wolf-Georg. 2013b. Hedge Funds and Risk-Decoupling: The Empty Voting Problem in the European Union, *Seattle University Law Review*, 36: 1027.

Roe, Mark J. 1991. A Political Theory of American Corporate Finance, *Columbia Law Review*, 91: 10–66.

Romano, Roberta. 2001. Less Is More: Making Institutional Activism a Valuable Mechanism of Corporate Governance, *Yale Journal on Regulation*, 18: 174–251.

Thomas, Randall S. and Kenneth Martin. 1998. Should Labor Be Allowed to Make Shareholder Proposals?, *Washington Law Review*, 73: 1, 41–80.

Thompson, Robert B. 2006. The Limits of Hedge Fund Activism, Law and Economics Workshop (Working Paper), 1–38. Available at http://escholarship.org/uc/item/5jq9d71m

Thompson, Robert B. and Paul H. Edelman. 2009. Corporate Voting, *Vanderbilt Law Review*, 62: 129.

U.S. Securities and Exchange Commission. 2013. Annual Staff Report on the Use of Data Collected from Private Fund Systemic Risk Reports, July 25.

Vaughan, David A. 2003. Selected Definitions of "Hedge Fund" Comments for the U.S. Securities and Exchange Commission Roundtable on Hedge Funds, May 14–15. Available at https://www.sec.gov/spotlight/hedgefunds/hedge-vaughn.htm

Zur, Emanuel. 2007. The Power of Reputation: Hedge Fund Activists, PhD dissertation, Stern School of Business, New York University. Available at http://www.kellogg.northwestern.edu/accounting/papers/zur.pdf