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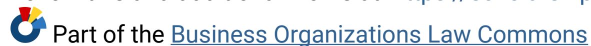
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Asking the Right Questions:

How Jill Fisch Debunks Narratives and Arrives at Solutions

Hillary A. Sale*

Introduction

Without a doubt, Professor Jill E. Fisch is one of the most influential scholars in the corporate and securities law space. Whether we measure her contributions by awards, areas of influence, or volume, Professor Fisch's work is at the top of the list. It is, indeed, no surprise that the Institute for Law and Economic Policy (ILEP) chose to honor Professor Fisch at this year's corporate and securities symposium, hosted with the *University of Pennsylvania Journal of Business Law*.[1] I am honored to write this introduction about Professor Fisch and explore her work and influence over time, with an emphasis on the connection between her work and corporate governance writ large.

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* Agnes Williams Sesquicentennial Professor of Leadership and Corporate Governance and Professor of Management, Georgetown. This article benefited greatly from the input and work of my research assistants, Amanda Di, Marvin Clark, Rosalie Gambrah, and Sophia Li.

[1] "The Future of ESG" Symposium hosted by the University of Pennsylvania *Journal of Business Law* and the Institute for Law and Economic Policy honored the scholarship and influence of Professor Jill E. Fisch on November 9 & 10, 2023. During the conference, I presented remarks on the scholarship and influence of Professor Fisch. Those remarks included comments from many of Jill's colleagues on the ILEP advisory board. Those comments are reproduced here, interspersed in the footnotes. They are not surprising. They too, reflect Professor Fisch's influence and impact, including on the work of others, on the shape of the academy, and on the development and growth of the laws and regulations that govern corporations and the markets.

To begin with, the sheer volume of Professor Fisch's scholarly work is impressive. She has published over 130 articles and book chapters, seventeen of which have received "top ten" recognition (more on this below). Over sixty unique journals have published her articles and a substantial number of those pieces (approximately forty) have been collaborations with thirty-three different co-authors. In addition, she has contributed to multiple amicus briefs, lending her influence and expertise to important topics before various courts. Professor Fisch has also given talks all over the world—from Sydney, Australia, to Beijing, China, to Frankfurt, Germany—and she has participated in panel discussions at a rate beyond that at which she has published.

Then, there is the quality, quantity, and reach of Professor Fisch's work. Anyone who has had the privilege of co-authoring with her, like me, knows that she is not only smart and quick, but she is deeply intellectual and will push and probe the limits of any subject to which she commits. No doubt, that is why so many fellow academics want to be her co-author, and why her work has been consistently selected by her peers as representing the very best that corporate academia has to offer. Indeed, Professor Fisch has had seventeen articles selected by

the Corporate Practice Commentator as "top ten" articles.[2] This is a prestigious award where academics in corporate and

[2] Professor Fisch's articles that have been selected for the top ten award include: *See* Jill E. Fisch, *Stealth Governance: Shareholder Agreements and Private Ordering*, 99 WASH. U. L. REV. 913 (2021) (listed in Vol. 63, Corp. Prac. Commentator, 241, 2021-2022); Quinn Curtis, Jill Fisch & Adriana Z. Robertson, *Do ESG Mutual Funds Deliver on Their Promises?*, 120 MICH. L. REV. 393 (2021) (reprinted in Vol. 64, Corp. Prac. Commentator, 243, 2022-2023) (listed in Vol. 64, Corp. Prac. Commentator, 241, 2022-2023); Jill Fisch, Assaf Hamdani & Steven Davidoff Solomon, *The New Titans of Wall Street: A Theoretical Framework for Passive Investors*, 168 U. PA. L. REV. 17 (2019) (listed in Vol. 62, Corp. Prac. Commentator, 209, 2020-2021); Jill E. Fisch, *Governance by Contract: The Implications for Corporate Bylaws*, 106 CAL. L. REV. 373 (2018) (reprinted in Vol. 61, Corp. Prac. Commentator, 89, 2019-2020) (listed in Vol. 61, Corp. Prac. Commentator, 249, 2019-2020); Jill E. Fisch, Jonah B. Gelbach & Jonathan Klick, *The Logic and Limits of Event Studies in Securities Fraud Litigation*, 96 TEX. L. REV. 553 (2018) (listed in Vol. 61, Corp. Prac. Commentator, 249, 2019-2020); Stephen J. Choi, Jill E. Fisch, Marcel Kahan & Edward B. Rock, *Does Majority Voting Improve Board Accountability?*, 83 U. CHI. L. REV. 1119 (2016) (listed in Vol. 60, Corp. Prac. Commentator, 241, 2018-2019); Matthew D. Cain, Jill E. Fisch, Sean J. Griffith & Steven Davidoff Solomon, *How Corporate Governance is Made: The Case of the Golden Leash*, 164 U. PA. L. REV. 649 (2016) (listed in Vol. 59, Corp. Prac. Commentator, 197, 2017-2018); Jill E. Fisch, Sean J. Griffith & Steven Davidoff Solomon, *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. 557 (2015) (reprinted in Vol. 57, Corp. Prac. Commentator, 493, 2015-2016) (listed in Vol. 58, Corp. Prac. Commentator, 2016-2017); Jill E. Fisch & Tess Wilkinson-Ryan, *Why Do Retail Investors Make Costly Mistakes? An Experiment on Mutual Fund Choice*, 162 U. PA. L. REV. 605 (2014) (listed in Vol. 57, Corp. Prac. Commentator, 251, 2015-2016); Stephen J. Choi, Jill E. Fisch & Marcel Kahan, *Who Calls the Shots?: How Mutual Funds Vote on Director Elections*, 3 HARV. BUS. L. REV. 35 (2013) (listed in Vol. 56, Corp. Prac. Commentator, 229, 2014-2015); Jill E. Fisch, *The Destructive Ambiguity of Federal Proxy Access*, 61 EMORY L.J. 435 (2012) (listed in Vol. 55, Corp. Prac. Commentator, 278, 2013-2014); Stephen J. Choi, Jill E. Fisch & Marcel Kahan, *The Power of Proxy Advisors: Myth or Reality?*, 59 EMORY L.J. 869 (2010) (listed in Vol. 53, Corp. Prac. Commentator, 275, 2011-2012); Stephen J. Choi, Jill E. Fisch & Marcel Kahan, *Director Elections and the Role of Proxy Advisors*, 82 S. CAL. L. REV. 649 (2009) (listed in Vol. 52, Corp. Prac. Commentator, 219, 2010-2011); Stephen J. Choi & Jill E. Fisch, *On Beyond CalPERS: Survey Evidence on the Developing Role of Public Pension Funds in Corporate Governance*, 61 VAND. L. REV. 315 (2008) (reprinted in Vol. 50, Corp. Prac. Commentator, 599, 2008-2009) (listed in Vol. 51, Corp. Prac. Commentator, 265, 2009-2010); Stephen J. Choi, Jill E. Fisch & A.C. Pritchard, *Do Institutions Matter? The Impact of the Lead Plaintiff Provision of the Private Securities Litigation Reform Act,* 83 WASH. U. L. REV. 869 (2005) (reprinted in Vol. 48, Corp. Prac. Commentator, 607, 2006-2007) (listed in Vol. 49, Corp. Prac. Commentator, App. I-1, 2007-2008); Stephen J. Choi & Jill E. Fisch, *How to Fix Wall Street: A Voucher Financing Proposal for Securities Intermediaries*, 113 YALE L.J. 269 (2003) (listed in Vol. 46, Corp. Prac. Commentator, App. I-1, 2004-2005); Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061 (2000) (listed in

securities law vote to select the top ten corporate and securities law articles published in legal journals in that year.[3] This achievement is only one small glimpse into how Professor Fisch has impacted her colleagues and her field. She is also generous with her time and comments on the work of other scholars, allowing them to grow their impact.[4]

In an attempt to do justice to the breadth of Professor Fisch's body of work, I have deployed the corporate governance framework, focusing on both traditional and non-traditional

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Vol. 42, Corp. Prac. Commentator, 947, 2001-2002) (reprinted in Vol. 42, Corp. Prac. Commentator, 65, 2001-2002).

[3] Only one other scholar has had more Top Ten articles than Professor Fisch. *See* The Corporate Practice Commentator, Top 10 Corporate and Securities Articles Poll, 1994-2022, http://professor-robert-b-thompson.weebly.com/annual-list-of-best-corporate-articles.html [https://perma.cc/CZ4M-8YBF] (showing that Marcel Kahan has been awarded more top ten articles than Jill E. Fisch's 17 articles).

[4] Consider the comments from two of Jill's colleagues on the ILEP advisory board: Professor Lisa Fairfax, one of Jill's colleagues at the Penn Carey Law School, University of Pennsylvania, said:

> One of the words I think of when I think of Jill is 'generous.' She is generous with her time, her thoughts and herself. Her generosity is evident in the many co-authors she has had, the time she takes to be present and take seriously the scholarship of others, the fact that she is such a prolific scholar, and the way she extends herself to others, including and especially those who do not look like her. She has helped shape the scholarship of women, but she has also done so for men, and women and men of color, offering her thoughts, ideas, and perspectives to help me and others refine our own scholarly voice; thus, giving others a sense of welcome and belonging. The corporate and securities academy looks vastly different from the way it did when Jill entered it, and it is Jill's extension of herself that has helped to ensure that the academy is not just diverse, but inclusive."
> And Professor Joel Seligman offered the following: Professor Joel Seligman, said "Jill is an exemplar of everything one could seek in a colleague: She is brilliant, consistently focusing on cutting edge issues, graciously supportive of those who labor in her field, invariably present at pivotal conferences and events.

Hillary A. Sale, Remarks on the Scholarship and Influence of Professor Jill E. Fisch, The Future of ESG Conference hosted by the University of Pennsylvania *Journal of Business Law* and the Institute for Law and Economic Policy (Nov. 9, 2023) (quoting Lisa Fairfax & Joel Seligman).

parties. From shareholders to directors, to gatekeepers, Professor Fisch has explored corporate governance from the inside out and from the outside in—developing theories about traditional governance partners (shareholders, and directors) and non-traditional parties (analysts, lawyers, and courts). Throughout her scholarship, she applies healthy skepticism to the law and its evolution, returning again and again to the purpose of the rule, statute, or common law to propose her own solutions. And, she pushes the boundaries to set out new theories, test new ideas, and advance the understanding of corporate governance and regulation and its evolution.[5] In short, she asks questions of herself and her co-authors and deploys data to debunk existing narratives and propose different solutions.

I. Traditional Parties

No matter how you count it, Professor Fisch has a tremendous number of articles exploring the traditional parties to the corporate governance "contract," including articles about

[5] Professor Donald Langevoort of Georgetown University Law Center commented both on the breadth of Professor Fisch's work and her impact when he said, "A while ago I came to believe that Professor Fisch had become the most productive, serious, and provocative securities regulation scholar we have in the U.S. Professor Fisch's work is diverse in the particular subjects about which she writes and always rigorous (as are her always-constructive comments on the work of others)." Hillary A. Sale, Remarks on the Scholarship and Influence of Professor Jill E. Fisch, The Future of ESG Conference hosted by the University of Pennsylvania *Journal of Business Law* and the Institute for Law and Economic Policy (Nov. 9, 2023) (quoting Donald Langevoort).

both corporate and securities law and regulation.[6] The articles also examine the role and powers of shareholders, both institutional and retail, as well as those of officers and directors.

Although a full consideration of the governance in the space of shareholders, officers, and directors is beyond the scope of this article, the basics are useful for understanding the breadth and nuance of Professor Fisch's work in this area. The initial corporate form was premised on a theory of owners who were also fully engaged in the development and running of the entity. This engagement was arguably a key rationale for the grant of limited liability: local and engaged owner-operators

[6] For example, Professor Fisch has written multiple pieces on insider trading and securities class actions. *See, e.g.*, Jill E. Fisch, *Constructive Ambiguity and Judicial Development of Insider Trading*, 71 SMU LAW REV. 749 (2018); Jill E. Fisch, *Family Ties: Salman and the Scope of Insider Trading*, 69 STAN. L. REV. ONLINE 46 (2016); Jill E. Fisch, *Start Making Sense: An Analysis and Proposal For Insider Trading Regulation*, 26 GA. L. REV. 179 (1991); Jill E. Fisch, *Federal Securities Fraud Litigation as a Lawmaking Partnership*, 93 WASH. U. L. REV. 453 (2015); Stephen J. Choi, Jill E. Fisch & A.C. Pritchard, *Do Institutions Matter? The Impact of the Lead Plaintiff Provision of the Private Securities Litigation Reform Act*, 83 WASH. U. L.Q. 869 (2005) (reprinted in Vol. 48, Corp. Prac. Commentator, 607, 2006-2007) (listed as a "Top Ten" article in Vol. 49, Corp. Prac. Commentator, App. I-1, 2007-2008); Jill E. Fisch & Jonah B. Gelbach, *Power and Statistical Significance in Securities Fraud Litigation*, 11 HARV. BUS. L. REV. 55 (2021); Jill E. Fisch, *The Future of Price Distortion in Federal Securities Fraud Litigation*, 10 DUKE J. CONST. L. & PUB. POL'Y 87 (2015); Jill E. Fisch, *The Trouble with Basic: Price Distortion after Halliburton*, 90 WASH. U. L. REV. 895 (2013); Robert Bartlett, Matthew D. Cain, Jill E. Fisch & Steven Davidoff Solomon, *The Myth of Morrison: Securities Fraud Litigation Against Foreign Issuers*, 74 BUS. LAW. 967 (2019); Jill E. Fisch, Jonah B. Gelbach & Jonathan Klick, *The Logic and Limits of Event Studies in Securities Fraud Litigation*, 96 TEX. L. REV. 553 (2018) (listed as a "Top Ten" article in Vol. 61, Corp. Prac. Commentator, 249, 2019-2020); Jill E. Fisch, *Confronting the Circularity Problem in Private Securities Litigation*, 2009 WISC. L. REV. 333 (2009).

would, in theory, exercise care and good faith in the operation of the enterprise, and their own reputations would serve as brakes, so to speak, on excessive risk-taking that could harm the community or other stakeholders.

Of course, over time, as Professor Fisch has noted, the corporate form has evolved, and the connection between ownership and control has changed.[7] More specifically, there is now a separation between ownership and control, and agency costs follow. The control of corporations has shifted from the owners (shareholders) to the operators (managers, which includes officers and directors).[8] That shift, coupled with the privilege of limited liability has allowed corporations to raise capital

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[7] *See, e.g.*, Jill E. Fisch, *Securities Intermediaries and the Separation of Ownership from Control*, 33 SEATTLE U. L. REV. 877, 881–83 (2010) (explaining how the institutional intermediation of the U.S. capital markets exacerbates the traditional separation of ownership and control by adding another layer of agency issues).

[8] The shift also contributed to the emphasis on shareholder primacy, a topic about which Professor Fisch has also written. Here, the premise is that corporate governance should put the interests of shareholders (i.e., maximizing wealth for shareholders) at the forefront. Professor Fisch challenged this use of shareholder primacy theory as the basis to judge corporate law in *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy. See* Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637, 646–62 (2006) (arguing that legal doctrine and economic theory provided little support for the shareholder primacy norm).

She has also explored the primacy question in the context of corporate purpose and the ESG debate. *See* Jill E. Fisch & Steven Davidoff Solomon, *Should Corporations Have a Purpose?*, 99 TEX. L. REV. 1309, 1346 (2021) (concluding that corporate purpose has an instrumental role and can serve as a voluntary tool to facilitate the goals of corporate participants). She returns to this issue in a second article, exploring the use of shareholder proposals under Rule 14a-8 as a mechanism for shareholders to signal views to management, but also noting that the process is dominated by institutional intermediaries who might not be accurately representing their beneficiaries' interests. *See* Jill E. Fisch, *Purpose Proposals*, 1 U. CHI. BUS. L. REV. 113 (2022).

with greater ease and to increase in size.[9] And, that, in turn, has led to further changes, new challenges and opportunities, and different agency costs. Professor Fisch's body of work explores these opportunities and challenges.

A. Shareholders

1. Institutional Investors and Proxy Advisors

Professor Fisch examines the role of proxy advisors, institutional investors, and intermediaries (a term she has used to describe proxy advisors and institutional investors as well as other "market" intermediaries and gatekeepers) in more than

[9] *See* Hillary A. Sale, *Leveraging Information Forcing in Good Faith*, *in* RESEARCH HANDBOOK ON LAW AND TIME 3 (forthcoming F. Fagan & S. Levmore eds., Edward Elgar 2024) (discussing how the separation of ownership and control, combined with the privilege of limited liability, facilitates free transferability from shareholder to shareholder and capital raising).

one piece.[10] Her earliest pieces in this area date back to twenty years ago,[11] and she continues to write about these topics today.

Consider her empirical work focused on proxy advisors and intermediaries. She has used various methods to debunk some popular narratives about the power and influence of the

[10] *See* Jill E. Fisch & Jeff Schwartz, *Corporate Democracy and the Intermediary Voting Dilemma*, 102 TEX. L. REV. 1 (2023); Jill E. Fisch, *Promoting Corporate Diversity: The Uncertain Role of Institutional Investors*, 46 SEATTLE L. REV. 367 (2023); Jill E. Fisch, *Rethinking the Regulation of Securities Intermediaries*, 158 U. PENN. L. REV. 1961 (2010); Stephen Choi, Jill E. Fisch & Marcel Kahan, *The Power of Proxy Advisors: Myth or Reality?*, 59 EMORY L.J. 869 (2010) (listed as a "Top Ten" article in Vol. 53, Corp. Prac. Commentator, 275, 2011-2012); Jill E. Fisch, *Class Action Reform: Lessons from Securities Litigation*, 39 ARIZ. L. Rev. 533 (1997); Stephen J. Choi & Jill E. Fisch, *On Beyond CalPERS: Survey Evidence on the Developing Role of Institutional Investors in Corporate Governance*, 61 VAND. L. REV. 315 (2008) (reprinted in Vol. 50, Corp. Prac. Commentator, 599, 2008-2009) (listed as a "Top Ten" article in Vol. 51, Corp. Prac. Commentator, 265, 2009-2010); Stephen Choi & Jill E. Fisch, *How to Fix Wall Street: A Voucher Financing Proposal for Securities Intermediaries*, 113 YALE L.J. 269 (2003) (listed as a "Top Ten" article in Vol. 46, Corp. Prac. Commentator, App. I-1, 2004-2005); Stephen J. Choi, Jill E. Fisch & A.C. Pritchard, *Do Institutions Matter? The Impact of the Lead Plaintiff Provision of the Private Securities Litigation Reform Act,* 83 WASH. U. L. REV. 869 (2005)(reprinted in Vol. 48, Corp. Prac. Commentator, 607, 2006-2007) (listed as a "Top Ten" article in Vol. 49, Corp. Prac. Commentator, App. I-1, 2007-2008); Stephen Choi, Jill E. Fisch & Marcel Kahan, *Director Elections and the Role of Proxy Advisors*, 82 S. CAL. L. REV. 649 (2009); Quinn Curtis, Jill Fisch & Adriana Z. Robertson, *Do ESG Mutual Funds Deliver on Their Promises?*, 120 MICH. L. REV. 393 (2021) (reprinted in Vol. 64, Corp. Prac. Commentator, 243, 2022-2023) (listed in *Id.*, at 241, 2022-2023); Jill E. Fisch, *Mutual Fund Stewardship and the Empty Voting Problem*, 16 BROOK. J. OF CORP., FIN. & COM. L. 71 (2021).

[11] *See* Stephen J. Choi & Jill E. Fisch, How to Fix Wall Street: A Voucher Financing Proposal for Securities Intermediaries, 113 YALE L.J. 269 (2003) (listed as a "Top Ten" article in Vol. 46, Corp. Prac. Commentator, App. I-1, 2004-2005).

advisors[12] as well as their incentives.[13] More specifically, unlike prior literature, Professor Fisch and her co-authors, Stephen Choi and Marcel Kahan, separate correlation from causation to examine both proxy advisor influence and other underlying factors that might impact a shareholder's vote.[14] In turn, they reveal that proxy advisor influence—a strong narrative in politics and governance—is overstated.[15] This research is important for multiple reasons. First, the prevailing account about the power of proxy advisory firms has influenced policy debates and fights over regulation; yet, as the article reveals, that influence might well have happened absent the merit attributed to the desired changes. Second, multiple academics have referenced the article when examining

[12] *See* Stephen Choi, Jill E. Fisch & Marcel Kahan, *The Power of Proxy Advisors: Myth or Reality?*, 59 EMORY L.J. 869, 906 (2010) (finding that an ISS recommendation likely "shifts 6% to 10% of shareholder votes—a material percentage but far less than commonly attributed to ISS"). An older work by Professor Fisch examines the federal structure of proxy regulation that impacts the ability of shareholders in publicly traded companies to exercise their voting rights (listed as a "Top Ten" article in Vol. 53, Corp. Prac. Commentator, 275, 2011-2012). *See* Jill E. Fisch, *From Legitimacy to Logic: Reconstructing Proxy Regulation*, 46 VAND. L. REV. 1129 (1993). She returns to her examination of those rules and processes in a recent work. *See* Jill E. Fisch, *Purpose Proposals*, 1 U. CHI. BUS. L. REV. 113 (2022).

[13] *See* Stephen J. Choi, Jill E. Fisch & Marcel Kahan, *Director Elections and the Role of Proxy Advisors*, 82 S. CAL. L. REV. 649, 696 (2009) (finding that advisor recommendations, at least with respect to uncontested director elections, are based on factors like good governance, director attention, and performance, and that withhold recommendations are based on issuer- and director-specific problems like financial restatements, SEC investigations, and lack of independence) (listed as a "Top Ten" article in Vol. 52, Corp. Prac. Commentator, 219, 2010-2011).

[14] *See* Choi, Fisch & Kahan, *supra* note 12, at 906.

[15] *See id.* ("[O]ur findings reveal that although an ISS recommendation has independent value, this value is greatly reduced once we take into account the company- and firm-specific factors that are important to investors.").

the power of proxy advisor influence on corporate democracy indicating it has traction and staying power.[16] And, third, as we will see, the piece exemplifies a key aspect of Professor Fisch's contributions: it deploys empirical methods to push back on and debunk an ongoing political or governance narrative and further shed light on directions for reform.[17]

Professor Fisch's work in the shareholder space also explores theories and arguments surrounding the allocation of power and the nature of agency costs. Consider some of her contributions to the zone of corporate democracy that focus on changes in the shareholder base. In 2008, Professor Fisch developed her first critical examination of the role of

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[16] *See* 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, 876 (2013); John C. Coffee Jr. & Darius Palia, *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance*, 41 J. CORP. L. 545, 558 (2016); 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. 1870,1921 (2017) (citing Choi, Fisch & Kahan, *supra* note 13).

[17] Another example of this type of work by Professor Fisch is exemplified in *Power and Statistical Significance in Securities Fraud Litigation. See* Jill E. Fisch & Jonah B. Gelbach, *Power and Statistical Significance in Securities Fraud Litigation*, 11 HARV. BUS. L. REV. 55 (2021). Indeed, Professor Frank Partnoy from UC Berkeley School of Law had this to say about that article:

> Jill has contributed to so many important areas of legal scholarship that it's easy to miss one, including one that is crucial to securities litigators. I want to highlight her co-authored work on event studies. Jill has helped to translate challenging econometric findings about the flaws in event studies in ways that significantly impact how lawyers, experts, and judges approach securities cases. Jill often motivates me to think about alternative policy approaches, and this work really sparked a fire. I encourage everyone, if you haven't already, to read Jill's work in this area. It'll spark you as well.

Hillary A. Sale, Remarks on the Scholarship and Influence of Professor Jill E. Fisch, The Future of ESG Conference hosted by the University of Pennsylvania *Journal of Business Law* and the Institute for Law and Economic Policy (Nov. 9, 2023) (quoting Frank Partnoy).

institutional investors in corporate governance. With Professor Stephen J. Choi, Professor Fisch used publicly available information along with interviews and survey data to provide a "status report" on the reality of public pension funds and corporate governance engagement.[18] The data in the article revealed that the reality of engagement was different from the narrative. Indeed, they found that the level and type of engagement at the time was limited both in terms of issues and by fund size, allowing for an understanding of which investors engaged in governance matters (as opposed to litigation) and when and how they chose to do so.[19] Moreover, they found that smaller funds that rely on outside agents, such as proxy advisors, engaged in less non-litigation activism.[20] And, public pension funds participated much more in litigation activities than governance activities.[21] Given the data, Professor Fisch and

[18] *See* Stephen J. Choi & Jill E. Fisch, *On Beyond CalPERS: Survey Evidence on the Developing Role of Institutional Investors in Corporate Governance*, 61 VAND. L. REV. 315, 317–34 (2008) (reprinted in Vol. 50, Corp. Prac. Commentator, 599, 2008-2009) (listed as a "Top Ten" article in Vol. 51, Corp. Prac. Commentator, 265, 2009-2010).

[19] *See id.* at 317–18 (explaining the study's key lessons: corporate governance activity levels vary dramatically and depend significantly on fund size, public pension activism is limited for the most part to low-visibility activities, and smaller funds and funds that delegate participate with equal frequency in litigation-related activism).

[20] *See id.* at 337, 343 (finding that large funds engage in significantly more non-litigation activism than small funds and that funds that choose to delegate engage in far less non-litigation activity as compared to other funds).

[21] *See id.* at 318, 349.

Professor Choi were thus skeptical of the depth of "institutional activism."[22]

Sixteen years later, Professor Fisch returned to institutional investor engagement, examining it with Professor Jeff Schwartz. In *Corporate Democracy and the Intermediary Voting Dilemma*, Professors Fisch and Schwartz review interventions in the shareholder power space, noting that the emphasis for much of the prior two decades was on decreasing agency costs by focusing on impediments to the exercise of shareholder rights.[23] Here, the focus is on ESG (Environmental, Social, and Governance) pressures and "values-based" investing. Professors Fisch and Schwartz are skeptical of the more recent emphasis on environmental and social issues, noting this focus is more on *values* rather than *shareholder value*.[24]

To address the issue, they explore how mutual and pension fund managers engage with companies and the pressure being

[22] *See id.* (at 318–19 (questioning the value and potential effectiveness of reforms such as the 1992 amendments to the federal proxy rules and proposals that would allow direct shareholder nomination of directors, and how fund agency problems will impact the effectiveness of institutional activism).

[23] *See* Jill E. Fisch & Jeff Schwartz, *Corporate Democracy and the Intermediary Voting Dilemma*, 102 TEX. L. REV. 1, 1 (2023).

[24] Describing their skepticism towards the emphasis on environmental and social issue:

> [A]s corporations are increasingly viewed more holistically, as social and economic institutions, rather than just economic ones, the relationship between beneficiary interests and value maximization breaks down. As a result, it is no longer safe to assume that fund managers automatically represent their beneficiaries' interests when they engage with portfolio firms.

Id. at 18–19.

exerted on them to focus on arguably contested "social" issues.[25] Then, they consider and reject multiple complex solutions already under discussion, proposing their own simple solution. Specifically, they consider and reject greater regulation in the form of stewardship codes, fund disclosure obligations, and even pass-through voting, which arguably would create more problems (including the agency costs) than these funds help solve through intermediation.[26] Instead, they argue that pension and mutual fund managers, who in today's world control a significant portion of the shareholder votes, should engage more with the beneficiaries they represent and fully disclose investment choices.[27] In short, they argue mechanisms (soliciting input from beneficiaries) already exist and should be used to ensure that fund managers have information about beneficiary interests before acting.[28] They also argue that regulators need to engage as well, including with formal requirements for fund managers to receive input from fund beneficiaries—-to ensure that the managers are fulfilling their fiduciary duties to the shareholders they represent.[29] They conclude with the

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[25] *See id.* at 16–20.
[26] *See id.* at 29–48.
[27] *See id.* at 48–50.
[28] *See id* (proposing that fund managers take reasonable steps to ascertain the voting and engagement preferences of fund beneficiaries and highlighting current industry participants' efforts to engage with investors).
[29] *See id.* at 50-51 (explaining why formal regulation of fund managers is needed).

recommendation that the Securities and Exchange Commission (and not private plaintiffs) should be tasked with enforcement.[30]

These two articles are bookends, examining similar arguments and challenges posed almost two decades apart and reflecting on the issues of the day. Yet, the articles land in different places, as is appropriate given the difference in engagement of the intermediaries over time. In the interim, Professor Fisch also explored many other questions about mutual funds, proposing market-based solutions and other options designed to balance the importance of mutual funds' role in solving the agency problems inherent in individual ownership in large corporations, with the power amassed by these funds through aggregation over time.[31] In doing so, she navigates changing politics and political views and debunks myths and narratives.[32]

The power of these articles and many others by Professor Fisch is not just that she engages with one of the most topical

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[30] *See id.* at 59 ("[W]e advocate that our proposal be subject exclusively to public enforcement and that any government regulation exclude a private right of action.").
[31] *See, e.g.*, Jill E. Fisch, *Mutual Fund Stewardship and the Empty Voting Problem*, 16 BROOK. J. CORP. FIN. & COM. L. 71, 89–95 (2021) (offering market-based and regulatory solutions to the empty voting problem).
[32] *See, e.g.*, Quinn Curtis, Jill Fisch & Adriana Z. Robertson, *Do ESG Funds Deliver on Their Promises?*, 120 MICH. L. REV. 393, 443 (2021) (suggesting that a regulatory response targeting ESG funds is unwarranted because their findings "stand in contrast to the criticisms of high costs, reduced performance, and greenwashing and generally point to" a market that is working.).

issues of the day, ESG,[33] but that she does so through an examination of the traditional role of shareholders as well as the economic and legal rationales for the definition and theory of that role. Indeed, in another article exploring ESG issues, *Do ESG Mutual Funds Deliver on their Promises*?, Professor Fisch and her co-authors, Quinn Curtis and Adriana Z. Robertson, conduct an empirical exploration of whether ESG mutual funds provide increased ESG exposure without increasing costs or reducing returns for the investors (i.e., maintain shareholder value).[34] Their findings indicate that ESG mutual funds do indeed deliver on their promises, offering a competitive investment product that upholds ESG values.[35]

She has also explored the challenges of the role of institutional investors in the push for corporate diversity in *Promoting Corporate Diversity: The Uncertain Role of Institutional Investors*.[36] Here, she investigated the tension that can arise when institutional investors (intermediary

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[33] *See, e.g.*, Jill E. Fisch & Adriana Z. Robertson, *What's in a Name? ESG Mutual Funds and the SEC's Names Rule* (Univ. Pa., Inst. L. & Econ. Rsch. Paper No. 23-12, S. Cal. L. Rev., European Corp. Gov. Inst. – Law Working Paper 697/2023), http://dx.doi.org/10.2139/ssrn.4398419.
[34] *See* Curtis, Fisch & Robertson, *supra* note 32.
[35] *See id.* at 423–442 (finding that ESG funds offer investors increased ESG exposure, are more likely than other funds to oppose management in proxy voting, and do not cost more or perform worse than comparable non-ESG funds).
[36] *See* Jill Fisch, *Promoting Corporate Diversity: The Uncertain Role of Institutional Investors*, 46 SEATTLE L. REV. 367 (2023) (describing how institutional investors have focused on increasing diversity in corporate leadership, the potential motivations for that focus, and these investors' limitations in confronting complex social issues).

shareholders) choose to promote corporate diversity. The goal of the piece is to examine the potential fiduciary trade-off between economic and non-economic considerations (i.e., corporate diversity in this instance) in the development of investment strategies.[37]

Not surprisingly, Professor Fisch's work examining and pressing for a greater understanding of the role and impact of institutional investors on corporate governance has also focused on director voting.[38] Indeed, one piece that has been cited by numerous other scholars is *Who Calls the Shots?: How Mutual Funds Vote on Director Elections*.[39] In this article, Professor Fisch and her co-authors, Stephen Choi and Marcel Kahan, revealed that, counter to the dominant account, in uncontested director elections, only a small portion of mutual funds blindly rely on Institutional Shareholder Services (ISS) recommendations and in fact, more blindly follow management recommendations than ISS recommendations.[40]

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[37] *See id.* at 367.

[38] *See* Stephen Choi, Jill Fisch & Marcel Kahan, *Who Calls the Shots?: How Mutual Funds Vote on Director Elections*, 3 HARV. BUS. L. REV. 35, 67 (2013) (listed as a "Top Ten" article in Vol. 56, Corp. Prac. Commentator, 229, 2014-2015).

[39] *See* Eric A. Posner, Fiona M. Scott Morgan & E. Glen Weyl, *A Proposal to Limit the Anticompetitive Power of Institutional Investors*, 81 ANTITRUST L.J. 669, 686 (2017); Zohar Goshen & Sharon Hannes, *The Death of Corporate Law*, 94 N.Y.U. L. REV. 263, 306 (2019); Sean J. Griffith & Dorothy S. Lund, *Conflicted Mutual Fund Voting in Corporate Law*, 99 B.U. L. REV. 1151, 1170 (2019); Marcel Kahan & Edward B. Rock, *Index Funds and Corporate Governance: Let Shareholders Be Shareholders*, 100 B.U. L. REV. 1771, 1781 (2020) (citing Stephen Choi, Jill Fisch & Marcel Kahan, *supra* note 38).

[40] See Choi, Fisch & Kahan, *supra* note **Error! Bookmark not defined.**, at 67 (finding that "[o]n an asset-weighted basis, reliance on management appears

These works, and there are many, do what Professor Fisch does so well. She approaches key and cutting-edge topics, dives into them, and then picks them apart. She engages with the data and empirical research, debunking narratives that are not supported by the research, and proposing new areas for research or policy. Indeed, she iterates from piece to piece, examining the purpose of the regulations, the laws, or the narratives, and then develops new ideas and solutions that go to the core of corporate governance.

2. Retail Investors

Not surprisingly, Professor Fisch has also written extensively about retail investors and their individual decisions—whether as direct market participants or as decision makers choosing pension or mutual funds in which to invest. Here again, the breadth of the work is impressive. She explores investor education and financial literacy, trust, retirement planning, target date funds, professional advisors, standing voting instructions, and more.[41] Along the way, she and her co-

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to be more significant than reliance on ISS, and a very small percentage of fund assets appear to be voted automatically in accordance with ISS recommendations.”).

[41] *See* Jill E. Fisch & John A. Turner, *Making a Complex Investment Problem Simple: Robo Target Date Funds*, 5 J. RETIREMENT 40 (2018); Jill E. Fisch & Jason S. Seligman, *Trust, Financial Literacy and Financial Market Participation*, 21 J. PENSION ECON. & FIN. 634 (2021); Jill E. Fisch, Tess Wilkinson-Ryan & Kristin Firth, *The Knowledge Gap in Workplace Retirement Investing and the Role of Professional Advisors*, 66 DUKE L. J. 633 (2016); Jill E. Fisch, *Standing Voting Instructions: Empowering the Excluded Retail Investor*, 102 MINN. L. REV. 11 (2017); Jill E. Fisch, *GameStop and the Reemergence of the Retail Investor*, 102 B.U. L. REV. 1799 (2022).

authors deploy various scholarly methods, including, using surveys to understand investor trust and knowledge levels[42] and engaging in an internet-based experiment to explore investor decision making.[43]

Individually and as a group, these articles contribute to the understanding of the decisions individual shareholders make and how worrisome some of those choices could be for society. For example, if shareholders are engaging in self-directed 401(k) plans, and they make bad investments resulting in underfunding their retirement, the costs to society will be significant.[44] Exploring various theories for why individuals might make bad decisions, Professor Fisch and her co-author Tess Wilkinson-Ryan, who is a trained psychologist, then use experimental methods to increase our knowledge.[45] Some of their primary findings include that investor choice, standing alone, does little to protect investors, that simplified rather than lengthy and confusing disclosure documents are unlikely to affect investor behavior significantly, but that offering investor education—even simple instructions—can make a big

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[42] *See* Fisch & Seligman, *supra* note 41; *see also* Jill E. Fisch, Annamaria Lusardi & Andrea Hasler, *Defined Contribution Plans and the Challenge of Financial Illiteracy*, 105 CORNELL L. REV. 741 (2020).

[43] *See* Fisch & Wilkinson-Ryan, *supra* note **Error! Bookmark not defined.**.

[44] *See* Fisch, Wilkinson-Ryan & Firth, *supra* note 41 at 668 (showing the "importance of financial literacy and offer[ing] reasons to question the viability of participant-directed investing as the primary vehicle for retirement savings.").

[45] *See* Fisch & Wilkinson-Ryan, *supra* note **Error! Bookmark not defined.** at 646–47.

difference.[46] Her work in this space also includes detailed literature reviews[47] and information based on actual investors that both discredits perceived "common knowledge" and offers policy makers and fund providers the opportunity to examine and revise their assumptions and marketing choices with respect to individual investors.

3. Dual Class Stock

Her examination of shareholders, their role, and their powers does not, however, begin or end with intermediaries or retail investors. She has also extensively explored the topic of dual class stock—where companies have more than one class of stock with voting rights allocated in a manner different from the default, one-share-one-vote approach. Dual class stock creates a governance issue that has irritated the same intermediaries—pension and mutual fund managers—challenged in the *Corporate Democracy* article.[48] Dual class stock has been an on again, off again, governance issue, including being forbidden by the exchanges at one point in time.[49] The reason for that concern is that owners (think Rupert Murdoch and Mark Zuckerberg) maintain all or most of the voting control in their

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[46] *Id.*
[47] *See* Fisch & Seligman, *supra* note 41.
[48] *See* Fisch & Schwartz, *supra* note **Error! Bookmark not defined.**.
[49] *See* Jill Fisch & Steven Davidoff Solomon, *The Problem of Sunsets*, 99 B.U. L. REV. 1057, 1060 (2019) (noting that major index providers excluded dual class stock from major indexes like the S&P 500).

companies, but the general public ends up holding shares with few or no voting rights. Proponents of dual class stock argue that the concentration of ownership in a dual class structure allows visionaries, often the Founder or CEO, to drive the direction of the company without focusing on stock price. Opponents argue, however, that dual class stock reduces accountability of management and reduces the regulation of the corporate governance structure, by decreasing the power of shareholders to engage and make change.

The shareholder power model is, in part, premised on the theory that shareholders can use their votes to make changes in corporate leadership if that leadership does not govern in their interests.[50] Yet, the existence of dual class stock disrupts the traditional shareholder power model, allowing, for example, founders of companies to hold onto robust voting rights that dwarf those of individual or even institutional shareholders.[51] That power shift has prompted debate about whether and how dual-class stock provides benefits and when it should be eliminated.[52]

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[50] *See generally* Jill E. Fisch, Darius Palia & Steven Davidoff Solomon, *Is Say on Pay All About Pay? The Impact of Firm Performance*, 8 HARV. BUS. L. REV. 101 (2018); Jill E. Fisch, *The Mess at Morgan: Risks, Incentives, and Shareholder Empowerment*, 83 U. CIN. L. REV. 651 (2015) (reprinted in Vol. 57, Corp. Prac. Commentator, 809, 2015-2016).

[51] See *City Pension Fund for Firefighters and Police Officers in Miami v. The Trade Desk, Inc.*, No. 2021-0560, 2022 WL 3009959, at *1 (Del. Ch. July 29, 2022) (involving a co-founder who owned 98% of the company's high-vote Class B common stock).

[52] *Compare* Robert J. Jackson Jr., Former Comm'r, SEC, *Perpetual Dual-Class Stock: The Case Against Corporate Royalty* (Feb. 15, 2018), https://www.sec.gov/news/speech/perpetual-dual-class-stock-case-against-

Sunset provisions are a key method advocated for managing the challenges of dual class stock. Sunsets are a compromise that proponents and opponents of the dual class structure have proposed and used, and Professor Fisch engages fully on them.[53] Dual class stock has a purpose: to allow the company to focus on issues other than stock price, to allow founders who can add tremendous value, to stay and continue to add that value, and more. On the other hand, sunset provisions address the concerns about overbearing founders and other governance issues that are inherent in dual class stock. As initially presented, the goal of sunsets is to automatically convert a corporation's dual class structure to a single class structure after a pre-designated period of time. There is an elegant beauty to these

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corporate-royalty [https://perma.cc/ZW9C-5U6Y](warning that perpetual dual class ownership removes entrenched managers from the discipline of the market forever, and may perpetually lock control over public companies in the hands of a small, elite group of corporate insiders), *and* Letter from Council of Institutional Invs. to Henry E. Gallagher, Jr., Council Chair, Corp. Law Section of the Delaware State Bar Ass'n (Sept. 13, 2019), https://www.cii.org/files/issues_and_advocacy/correspondence/2019/September%2013%202019%20Final%20DGCL%20letter.pdf (arguing that Delaware should require companies that choose to IPO with a multi-class voting structure to sunset those structures over seven years or less), *with* David J. Berger, *Why Dual Class Stock? A Response to CII's Petition to Nasdaq for Mandatory Sunset Provisions* (Mar. 28, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3365154 [https://perma.cc/3MF6-ZG7W] (arguing that dual class structures prevent institutional investors and hedge funds from gaining complete control over the election of directors, and that empirical evidence demonstrates that there is no basis to support mandatory sunset provisions of any length).

[53] *See* David J. Berger, Jill E. Fisch & Steven Davidoff Solomon, *Extending Dual Class Stock: A Proposal* (Univ. Pa., Inst. Law & Econ Rsch. Paper No. 23-13, Theoretical Inquiries L., European Corp. Gov. Inst. – L. Working Paper No. 707/2023), https://ssrn.com/abstract=4399551 [https://perma.cc/9ZUR-BCKR]; Fisch & Solomon, *supra* note 49; Byung Hyun Ahn, Jill E. Fisch, Panos N. Patatoukas & Steven Davidoff Solomon, *Synthetic Governance*, 2021 Colum. Bus. L. Rev. 476 (2021).

provisions. For example, they are simple. They also eliminate the need for a vote (which the public shareholders cannot control), and they allow for certainty. They also can be changed, but the change requires a vote, which presents the same issues all over again.

Nevertheless, Professor Fisch rejects the simplicity of mandatory sunsets. In one article, *The Problem of Sunsets*, she and Steven Davidoff Solomon explore event-based sunsets as an alternative to time-based sunsets, pointing out the lack of attention paid to the potential benefits of focusing on events.[54] They argue that time-based sunsets do not address the concerns that events, such as a decline in the founder's economic interest, may reduce the attractiveness of the dual class structure,[55] and that time-based sunsets may create "moral hazard" issues.[56] They highlight the conflicting research on whether dual class structures are value increasing (i.e., some studies show that dual class structures increase value, and some show that its inefficiencies decrease value in the firm).[57] They also probe the accepted narrative surrounding dual class

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[54] *See* Fisch & Solomon, *supra* note 49, at 1086 (noting that "[i]ssuers have adopted event-based sunsets in varying degrees, but they have received far less investor attention than time-based sunsets").
[55] *See id.* at 1081 ("[T]he length of the sunset period appears to be arbitrary and does not seem to correlate with any theory about the length of time necessary for a founder to implement his or her vision.").
[56] *See id.* at 1083–84 (arguing that time-based sunsets incentivize founders to use control, while they have it, to maximize their personal economic position and engage in short-termism behavior).
[57] *See id.* at 1070–73.

structures (that dual class structures pose a problem)[58] and press for a better understanding of the "importance" of shareholder rights.[59] Overall, their work reveals that empirical evidence has yet to clearly demonstrate whether dual class structures are a problem (or not) and identifies the issues that empirical studies face in this area.[60] And, they conclude by arguing that the solution lies in the problem. In short, the dual class "reform" debate should include more focus on how to deploy and manage shareholder voting rights when making changes in a dual class structure, because at the core, dual class structures implicate the voting power of public shareholders.

In a second article, *Synthetic Governance*, Fisch and her co-authors, Byung Hyun Anh, Panos N. Patatoukas and Steven Davidoff Solomon, examine whether governance-based index funds might offer a market-based solution to existing corporate governance debates on dual class stock.[61] Here, perhaps in an attempt to address the data concerns identified in the first article, this one proceeds by developing a dual class stock

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[58] *See id.* at 1092 ("[I]nvestors and the market do not know enough about either dual class or sunsets to use regulation, index requirements, or stock exchange rules to force companies into time-based sunsets. Instead, we should allow for private ordering . . . .").
[59] *See id.* at 1093 (noting that dual class structures raise questions about the importance of voting rights, the issues on which shareholders can and should exercise voting authority, and the viability of alternatives to voting for limiting the power of controllers).
[60] *See id.* at 1070–75 (highlighting the conflicting nature of studies and their econometric limitations).
[61] *See* Ahn, Fisch, Patatoukas & Davidoff Solomon, *supra* note 53.

index, analyzing its performance over time, and finding that it performed better than the market index in the same time period.[62] They then adjust the index by applying a "mandatory sunset" and excluding companies when they hit the sunset.[63] Their approach reveals that most of the value creation in the dual class firms may occur in the immediate post IPO years, indicating that some sort of sunset provision might be beneficial.[64]

Professor Fisch returns to dual-class stock and the governance debate in a third article, again with co-authors, David J. Berger and Steven Davidoff Solomon, in *Extending Dual Class Stock: A Proposal.*[65] They focus on the evolution and uncertainty of the judicial scrutiny surrounding decisions to extend dual-class sunsets.[66] That uncertainty, they contend, creates challenges at the IPO stage when compounded with practical uncertainties.[67] Shareholders who do not like the

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[62] *See id.* at 511–13 (comparing the performance of the dual class stock index they developed with various market indexes).

[63] *See id.* at 514 (creating effectively a synthetic sunset by shortening the length of time a company remains in the dual class stock index following its IPO, and by excluding dual class companies a designated number of years after their IPOs).

[64] *See id.* at 514–15 (finding that early-stage dual class companies generate higher returns for investors, which suggests that the dual class structure may be most valuable in the first few years post-IPO). This article also highlights how Professor Fisch has brought the law between two fields—corporate governance and securities regulation—together, revealing how securities regulation can improve the ability of markets to discipline corporate governance decisions.

[65] *See* Berger, Fisch, & Davidoff Solomon, *supra* note 53.

[66] *See id.*

[67] *See id.* (arguing that the legal and practical uncertainty of how Delaware law will treat sunset extensions creates two IPO stage problems: shareholders will likely address this uncertainty by discounting all dual class companies; and shareholders are likely *ex ante* to implement longer term sunsets than they otherwise would).

uncertainty may discount the stock inappropriately,[68] and the insiders who want the dual class structure may respond to the uncertainty by pushing for longer sunset provisions in the initial terms of dual class structures.[69]

To solve this issue, Fisch and her co-authors propose transparency, private-ordering, and parameters. Rather than the automatic deadline and its challenges, they propose that companies delineate in advance the terms surrounding any potential extension up front, at the IPO stage.[70] Those terms might address who can vote and which votes count, the timing of extensions, etc. In short, they are not persuaded by a simple sunset because of the uncertainty it can create. So, instead, they offer a solution that market participants could weigh and measure at the IPO stage and still preserve flexibility.[71] One can argue with whether the solution works (for example, it suffers from the potential for gaps that all contract-like

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[68] *See id.* (arguing that because shareholders do not know at the IPO stage the impact of the dual class structure or whether there will be an extension, they are likely to address this uncertainty by discounting all dual class companies based on their view that the dual class structure will be harmful).
[69] *See id.* (contending that founders who wish to retain control have an "incentive to bargain for as much protection of the dual class structure as they can reasonably obtain *ex ante* rather than taking the risk that they will be unsuccessful in a midstream effort for greater protection.").
[70] *See id.* ("[W]e propose that, when a company goes public with a dual class voting structure that is subject to a sunset provision, the mechanics and standards for a sunset extension be set forth in a company's charter at the time of an IPO.").
[71] *See id.* (explaining how defining the terms of sunset provisions at the time of an IPO would also provide shareholders with more information about the likelihood of a sunset extension, thereby reducing the lemons problem and enhancing predictability).

solutions can create). Nevertheless, it is one of the better ideas out there for addressing the issue, illustrating Jill Fisch's significant contributions to the discourse on corporate governance.

Taken together, these articles are "classic" Professor Jill Fisch. The topic is subject to ongoing and considerable debate. The debates are about power and rights and maybe, at least initially, not empirically based. She starts by asking questions, and then leans into the debate, highlights the gaps in the existing evidence, and works to fill them. She calls out inconsistencies, and she presses on transparency and market-based solutions, deploying sophisticated thinking about the markets, securities regulation, corporate law, and more. At the same time, she engages with co-authors who bring different perspectives and skills to the table, creating another form of added value. As a result, Professor Fisch's influence in the area of dual class stock extends past her own works. Indeed, dual class voting rights is an area where her thoughts, including that a one-size fits all solution for stock structures may not be the right approach, have influenced others' ideas on the subject.[72]

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[72] See, *e.g.*, Zohar Goshen & Assaf Hamdani, *Corporate Control, Dual Class, and the Limits of Judicial Review*, 120 COLUM. L. REV. 941, 964 (2020) (citing Fisch & Solomon, *supra* note 49, at 1084–86 to discuss the issues involved with empowering minority shareholders to veto a proposed capitalization); Kobi Kastiel & Yaron Nili, *The Corporate Governance Gap*, 131 YALE L.J. 782, 801

B. Directors

Of course, shareholders are just one of the traditional parties in the corporate governance zone. Directors are also key to the understanding of how governance works and how it could work better. Professor Fisch's contributions to this area of the law are also impressive.[73] Perhaps some of her most interesting work involves boards of directors and questions about their accountability and practices. She has explored compliance and the board's role (and failures),[74] as well as director independence and its potential for providing the check and balance that is expected.[75]

In addition, she and her co-authors-Marcel Kahan, Stephen Choi and Edward B. Rock-have examined, empirically, whether majority (as opposed to plurality) voting makes a significant

(2022) (citing Fisch & Solomon, *supra* note 49, at 1063 to support the argument that corporate governance requires private forces of implementation because not all companies need the same governance restraints).

[73] *See* Jill E. Fisch, *Taking Boards Seriously*, 19 CARDOZO L. REV. 265 (1997); Stephen J. Choi, Jill E. Fisch, Marcel Kahan & Edward B. Rock, *Does Majority Voting Improve Board Accountability?*, 83 U. CHI. L. REV. 1119 (2016) (listed as a "Top Ten" article in Vol. 60, Corp. Prac. Commentator, 241, 2018-2019); Jill E. Fisch, *Governance by Contract: The Implications for Corporate Bylaws*, 106 CAL. L. REV. 373 (2018) (reprinted in Vol. 61, Corp. Prac. Commentator, 89, 2019-2020) (listed as a "Top Ten" article in Vol. 61, Corp. Prac. Commentator, 249, 2019-2020).

[74] *See* Jill E. Fisch & Caroline M. Gentile, *The Qualified Legal Compliance Committee: Using the Attorney Conduct Rules to Restructure the Board of Directors*, 53 DUKE L.J. 517, 566–82 (2003) (discussing the problem of director passivity and proposing three alternative mechanisms for increasing director incentives to monitor effectively) (reprinted in Vol. 46, Corp. Prac. Comm., App. I-1, 2004-2005).

[75] *See* Fisch, *supra* note 73, at 267 (suggesting that director independence may enhance the board's ability to monitor effectively at the expense of a decline in the board's management capacity).

difference in director elections.[76] This paper is particularly interesting because, as with many empirical studies, the research produced unexpected results. Professor Fisch and her co-authors discovered that companies that were already shareholder-responsive were the early adopters of majority voting rules; thus, the rule was not a forecast of, and did not result in a change in, the company's approach.[77] Entities adopting majority voting rules later in time were presumably reluctant to do so in the early stages. Yet, the later adopters actually changed their behavior to become more shareholder responsive.[78] The power of this study is not only in these findings but also in the larger potential it has for governance reforms. In short, the possibility that early and late adopters of governance reforms might differ from each other means that the impact of the reforms might also differ (less for the earlies and more for the lates). This conclusion, they posit, could, in turn, help decision making about which types of reforms to pose in the first place.[79]

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[76] *See* Choi, Fisch, Kahan & B. Rock, *supra* note 73 (examining empirically the adoption and impact of a majority voting rule using a sample of uncontested director elections from 2007 to 2013).
[77] *See id.* at 1174 (finding that firms that adopted majority voting early had more success in director elections and more shareholder-oriented corporate governance prior to the adoption).
[78] *See id.* (finding that the adoption of majority voting by late adopters resulted in more shareholder-friendly governance).
[79] *Id.* at 1174-75.

She also explored the then emerging governance innovation[80] of the so-called golden leash in *How Corporate Governance is Made: The Case of the Golden Leash*,[81] which was selected as a top ten article.[82] Golden leashes are incentive packages provided to individual directors designed to ensure they act in the interest of an activist investor or hedge fund. These leashes have been criticized as creating incentives for the benefit of some, but not all shareholders, resulting in potential conflicts of interest. Yet, Professor Fisch's work reveals that the share prices of firms facing activist intervention reacted positively to events that make golden leashes more available and negatively to the implementation of protective measures against these leashes.[83] Professor Fisch and her co-authors thus posit that

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[80] This is also typical Jill Fisch—topical and scholarly. As Duke University Law School Professor James Cox said:

> Jill is a bright star within our corporate and securities law constellation among whom there is likely no brighter light than she in terms of repeatedly authoring or co-authoring papers literally on the cusp of THE emerging topic—e.g., 'Stealth Governance,' 'Mootness Fees,' 'Say on Pay,' 'Golden Leash,' 'Shifting Tides' to mention only a few of the many such developments that she was not only in the lead in shining a light on the issue but doing so with acuity and good sense so that her insights continue to guide us as these developments have become established. A true scholar in every sense of the expression.

Hillary A. Sale, Remarks on the Scholarship and Influence of Professor Jill E. Fisch, The Future of ESG Conference hosted by the University of Pennsylvania *Journal of Business Law* and the Institute for Law and Economic Policy (Nov. 9, 2023) (quoting James Cox).

[81] Matthew D. Cain, Jill E. Fisch, Sean J. Griffith & Steven Davidoff Solomon, *How Corporate Governance is Made: The Case of the Golden Leash*, 164 U. PA. L. REV. 649 (2016) (listed as a "Top Ten" article in Vol. 59, Corp. Prac. Commentator, 197, 2017-2018).

[82] Vol. 59, Corp. Prac. Commentator, 2016-2017.

[83] *See* Cain, Fisch, Griffith & Davidoff Solomon, *supra* note 81, at 690 (showing that when Wachtell's anti-golden leash bylaw was first made available, the share price of those firms most likely to implement it

this may suggest shareholders actually view these leashes as serving a valued function: providing discipline by empowering activists to challenge recalcitrant boards.[84]

C. Power Reallocations Between Traditional Parties

Professor Fisch has also explored contracts and shareholder agreements and how they impact our understanding of the roles, duties, and powers of the traditional parties in the corporate governance scheme and the allocation of power. For example, she examines the growth in forum selection, advance notice, and majority voting bylaws, analyzing how they are used to contract around default rules and power allocations.[85] The nub of the issue as she sees it is that both directors and shareholders have the power to amend bylaws, but the board's power experiences fewer limits. The result is a contractual imbalance between the two, which she addresses by proposing both that the

declined by 0.8% and that when significant obstacles arose to the adoption of the bylaw, such as proxy fights and 13D filing requirements, the share price of those firms most affected increased by over 1%).

[84] *Id.* at 698(suggesting that the market's consistently negative response to the Wachtell Bylaw can be seen as a vote in favor of activism and against entrenchment). The Wachtell Bylaw "prevents any person from qualifying 'for service as director if he or she is a party to any . . . . financial agreement, arrangement or understanding with any person or entity other than the Corporation, or has received any such compensation or other payment from any person or entity other than the Corporation.' Brandon S. Gold, *Why the Wachtell Bylaw on Director Compensation by Shareholders is Overbroad and May Fail Blasius Scrutiny*, The CLS Blue Sky Blog (May 31, 2013), https://clsbluesky.law.columbia.edu/2013/05/31/why-the-wachtell-bylaw-on-director-compensation-by-shareholders-is-overbroad-and-may-fail-blasius-scrutiny/.

[85] *See* Jill E. Fisch, *Governance by Contract: The Implications for Corporate Bylaws*, 106 CAL. L. REV. 373, 373-74(2018) (reprinted in Vol. 61, Corp. Prac. Commentator, 89, 2019-2020) (listed as a "Top Ten" article in Vol. 61, Corp. Prac. Commentator, at 249).

courts scrutinize with care bylaws adopted by boards without a shareholder vote, and that the legislature should examine and consider reforming the imbalance.[86]

She returns to contracts a few years later in two different articles, both of which advocate for the use of existing governance documents and transparency when decisions are made to opt out of default rules.[87] For example, in *Stealth Governance*, she examined the ways in which shareholder agreements have evolved and the challenges those agreements, which are outside of the charter and bylaws, present to corporate governance.[88] Indeed, here she terms the growth of these agreements as "stealth governance" and she does so because both are not part of the corporate governing documents; yet, they do control governance.[89] She pushes back on the growth of these agreements, arguing that using them for corporate governance sacrifices critical corporate law values, including standardization, transparency, and accountability.[90] As a result, she contends

[86] *See id*. at 409 (arguing the court or legislature should overturn existing limits on shareholder power or alternatively courts should reconsider how much deference they afford board-adopted governance provisions).
[87] *See* Jill E. Fisch, *Stealth Governance: Shareholder Agreements and Private Ordering*, 99 WASH. U. L. REV. 913, 958–59 (2021) (proposing that private ordering by startups should be limited to corporations' traditional constitutive instruments—charters and bylaws—which will facilitate the transparency of governance innovation) (listed as a "Top Ten" article in Vol. 63, Corp. Prac. Commentator, 241, 2021-2022).
[88] *See id.* at 927-959.
[89] *Id.* at 945.
[90] *See id.* at 945–53.

that corporations—both public and private—should engage in private ordering exclusively through their charter and bylaws.[91]

Then, in *A Lesson from Startups: Contracting out of Shareholder Appraisals*, Professor Fisch explores the recent phenomena of companies including appraisal waivers in their shareholder agreements.[92] This increase in the use of appraisal waivers is likely due to the Delaware decision upholding the validity of an appraisal waiver in a shareholder agreement.[93] As a reminder, appraisal rights are a shareholder's right to seek a judicial proceeding to evaluate the company's shares and determine a fair value of the company's stock. This appraisal right often comes into play when a company is being acquired or merged, and the shareholder(s) believe that the transaction price (dollar per share) is too low. Professor Fisch argues that in their modern role, appraisal rights are used to discipline the merger negotiation process and protect against any conflicts of interest that might arise during that process.[94] In doing so,

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[91] Describing corporations engaging in private ordering:

> The way to maintain a single version of corporate law is to require that all corporations, public and private, play by the same rules. Private ordering should take place through a corporation's constitutive documents, the charter and bylaws, and those documents should be subject in scope to the statutory and common law on the permissible scope of private ordering.

Id. at 954.

[92] *See* Jill E. Fisch, *A Lesson from Startups: Contracting out of Shareholder Appraisal*, 107 IOWA L. REV. 941, 941-42 (2022).

[93] *See* Manti Holdings, LLC v. Authentix Acquisition Co., 261 A.3d 1199, 1227 (Del. 2021) (holding that an appraisal waiver by common shareholders in a shareholders' agreement was valid and enforceable).

[94] *See* Fisch, *supra* note 92, at 941.

she reminds us that it is important to consider appraisal rights as an important component of corporate governance and not simply a personal right of shareholders, and challenges the legal analysis that distinguishes between contractual waivers and governance documents (i.e., contractual waivers of appraisal rights are governance documents).[95] Nevertheless, on the normative case for appraisal waivers, she argues that public and private companies should be able to adopt them because they reduce pressure for lawmakers to come up with one "right" standard or force a one-solution-fits-all situation upon companies.[96]

And, in the last piece in this space, *Shareholder Collaboration,* she also examines the evolution from simple bylaw and "contract" amendments, in which rights are in combat, to the world of shareholder collaboration with insiders, which presents both opportunities and challenges for the corporate form.[97] According to Professor Fisch, these collaboration agreements arose out of the venture capital area and then expanded into public companies.[98] They serve a different purpose from contracts that attempt to limit shareholder power or rights. Collaboration

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[95] *See id.*
[96] *Id.* at 942, 978 (arguing that the advantages of appraisal waivers—predictability, firm-specific tailoring, and limiting regulatory error—apply in both public and private companies).
[97] Jill E. Fisch & Simone M. Sepe, *Shareholder Collaboration*, 98 TEX. L. REV. 863, 866 (2020).
[98] *Id.* at 872–80.

agreements are bilateral and are about shared power and decision-making rather than unilateral authority.[99] The goal of these provisions, which are more common in public companies than in the past, is to recognize that both investors and insiders are contributing to the growth of the enterprise and in doing so help to solve for information gaps that occur as a result of public company board reliance on independent directors, the increase in the need for technological expertise and other "'knowledge' assets",[100] and the increased ability of institutional investors, like hedge funds, to deploy governance and strategic knowledge (as opposed to just capital) to the firms. The article is much more complex than is possible to cover here, but its insights are invaluable and similar to prior works: as the markets and the investors have changed and as the need for collaboration has increased, so too must our understanding of the roles of both investors and insiders and that, in turn, must shift our understandings the traditional obligations, fiduciary duties and responsibilities, and conflicts of interest.[101]

II. Non-Traditional Parties: Analysts, Lawyers, and Courts

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[99] *Id.*

[100] *Id.* at 877 (quoting IG INNOVATION CTR., THE PURPOSEFUL COMPANY: INTERIM REPORT 5 (2016), http://www.biginnovationcentre-purposeful-company.com/wp-content/uploads/2017/ll/thepurposefulcompany-interimreport.pdf [https://perma.cc/QK3D-LBNG]).

[101] *See id.* at 919-20.

In addition to her work on shareholders and directors and their rights and duties, Professor Fisch has delved into the roles of gatekeepers in the governance structure and in securities regulation. Like her work on traditional parties, her work here is very broad in scope, covering, for example, analysts[102] (traditional gatekeepers), but also exploring plaintiffs' counsel,[103] Delaware (the legislature and the courts),[104] the federal government (legislative and regulative),[105] and more. Here again, the breadth and volume are both impressive—and so is the content.

A. Analysts

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[102] *See* Ashiq Ali, Michael T. Durney, Jill Fisch & Hoyoun Kyung, *Managers' Private Communications with Analysts: The Effect of* SEC v. Siebel Systems Inc., 40 CONTEMP. ACCT. RES. 1641 (2023); Jill E. Fisch, *Does Analyst Independence Sell Investors Short?*, 55 UCLA L. REV. 39 (2007); Jill E. Fisch, *Fiduciary Duties and the Analyst Scandals,* 58 ALA. L. REV. 1083 (2007); Jill E. Fisch, *Regulatory Responses to Investor Irrationality: The Case of the Research Analyst*, 10 LEWIS & CLARK L. REV. 57 (2006); Jill E. Fisch & Hillary A. Sale, *The Securities Analyst as Agent: Rethinking the Regulation of Analysts*, 88 IOWA L. REV. 1035 (2003)(reprinted in Vol. 45, Corp. Prac. Commentator, 839, 2003-2004).

[103] *See* Matthew D. Cain, Jill E. Fisch, Steven Davidoff Solomon & Randall S. Thomas, *Mootness Fees*, 72 VAND. L. REV. 1777, 1809-11 (2019); Jill E. Fisch, Sean J. Griffith & Steven Davidoff Solomon, *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. 557, 562, 601 (2015) (reprinted in Vol. 57, Corp. Prac. Commentator, 493, 2015-2016) (listed as a "Top Ten" article in Vol. 58, Corp. Prac. Commentator, 2016-2017).

[104] *See* Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061 (2000) (listed in Vol. 42, Corp. Prac. Commentator, 947, 2001-2002) (reprinted in Vol. 42, Corp. Prac. Commentator, 65, 2001-2002); Jill E. Fisch, *The New Governance and the Challenge of Litigation Bylaws*, 81 BROOK. L. REV. 1637, 1675-78 (2016).

[105] *See* Jill Fisch & Eric Roiter, *A Floating NAV for Money Market Funds: Fix or Fantasy?*, 2012 U. ILL. L. REV. 1003 (2012).

For example, she has multiple articles on analysts and their role as gatekeepers, examining them from various angles.[106] These pieces consider whether analysts are sufficiently independent and whether investors can be trusted to understand analysts when they are not. For example, in *Fiduciary Duties and the Analyst Scandals*, Professor Fisch examines two regulations new at the time, Analyst Certification and Regulation FD—Fair Disclosure, which were designed to increase the reliability of analyst research and to restore analysts' roles as gatekeepers because analyst conflicts of interest were at the core of the analyst scandals.[107] Professor Fisch's pieces on analysts also explore selective disclosures and the role of management in making them, as well as the behavioral economics literature and how it connects to the role of analyst research and its impact on investors. She uses that literature to evaluate whether regulatory approaches to ensuring "analyst independence" are likely to work and, in addition, whether, normatively, regulators should even be engaged in determining what sorts of

[106] *See* Ashiq Ali, Michael T. Durney, Jill Fisch & Hoyoun Kyung, *Managers' Private Communications with Analysts: The Effect of* SEC v. Siebel Systems Inc., 40 CONTEMP. ACCT. RES. 1641 (2023); Jill E. Fisch, *Does Analyst Independence Sell Investors Short?*, 55 UCLA L. REV. 39 (2007); Jill E. Fisch, *Fiduciary Duties and the Analyst Scandals,* 58 ALA. L. REV. 1083 (2007); Jill E. Fisch, *Regulatory Responses to Investor Irrationality: The Case of the Research Analyst*, 10 LEWIS & CLARK L. REV. 57 (2006); Jill E. Fisch & Hillary A. Sale, *The Securities Analyst as Agent: Rethinking the Regulation of Analysts*, 88 IOWA L. REV. 1035 (2003) (reprinted in Vol. 45, Corp. Prac. Commentator, 839, 2003-2004).
[107] *See* Jill E. Fisch, *Fiduciary Duties and the Analyst Scandals*, 58 ALA. L. REV. 1085 (2007).

behavior are rational or what types of information are appropriate.[108] Indeed, her work on analysts, as in the more traditional governance areas, reveals her skepticism about the efficacy of regulation and regulatory instincts as opposed to transparency and market solutions.[109]

B. Plaintiffs' Counsel

She also examines plaintiffs' counsel as gatekeepers. In both corporate and securities litigation, plaintiffs' lawyers play important roles.[110] In corporate derivative litigation, they represent shareholders (increasingly institutional ones)[111] who, in turn, are attempting to represent the corporation, arguing that the board is not capable of doing so, at least for the purposes of the litigation.[112] Today's securities class actions

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[108] *See* Jill E. Fisch, *Regulatory Responses to Investor Irrationality: The Case of the Research Analyst*, 10 LEWIS & CLARK L. REV. 57, 80-82 (2006).
[109] *See* Jill E. Fisch, *Does Analyst Independence Sell Investors Short?* UCLA L. REV. 39, 96-97 (2007); *see also* Fisch, *supra* note 107, at 1100-02 (proposing a disclosure-based alternative to mandated independence—a mechanism for increasing transparency through a combination of analyst registration and a dedicated research analyst website).
[110] *See, e.g.*, Jill E. Fisch, *Teaching Corporate Governance Through Shareholder Litigation*, 34 GA. L. REV. 745 (2000).
[111] *See* Jill E. Fisch, *Aggregation, Auctions, and Other Developments in the Selection of Lead Counsel Under PSLRA*, 64 LAW & CONTEMP. PROBS. 53, 54 (2001); Jill E. Fisch, *Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction*, 102 COLUM. L. REV. 650, 652 (2002). In fact, Professor Brian Fitzpatrick, from Vanderbilt Law School, notes that "After all these years, [*Lawyers on the Auction Block*] is still the seminal piece on the subject, and dare I say, was instrumental to bringing the practice to an end. Ideas matter!". Hillary A. Sale, Remarks on the Scholarship and Influence of Professor Jill E. Fisch, The Future of ESG Conference hosted by University of Pennsylvania Carey Law School and Institute for Law and Economic Policy (Nov. 9, 2023) (quoting Brian Fitzpatrick).
[112] Early on, Professor Fisch argued that lead counsel auctions had not been examined closely enough and were not an effective method of selecting class counsel because they did not examine multiple criteria for selecting firms, could compromise the judicial role, and were unlikely to produce reasonable

also feature institutional investors at the helm with plaintiffs' counsel. This was not always the case. Indeed, just over twenty years ago, the nature of representative plaintiffs (institutional v. individual) was up for debate, and Professor Fisch was in the mix, analyzing new federal statutes and the outcomes, and urging skepticism and continued evaluation rather than wholesale acceptance of the benefits of the new rules.[113] Professor Fisch has also been critical of some of these lawyers' choices and pushed for the courts, as gatekeepers in their own right, to engage more deeply in those circumstances.[114]

C. Courts

Although she has been known to challenge the Delaware judiciary, she is also an advocate for it, particularly in her work on whether and how the federal government can or should play a role in corporate governance. The regulation of corporate governance has generally been subject to state law, which for most of the country's largest corporations is default in nature.

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fee awards. She proposed an alternative method of selecting lead counsel, an important role as a gatekeeper, through negotiation by the empowered lead plaintiff, a crucial player in derivative litigation. *See* Jill E. Fisch, *Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction*, 102 COLUM. L. REV. 650, 659-679 (2002).

[113] *See* Jill E. Fisch, *Taking Action Against Auctions: The Third Circuit Task Force Report*, 74 TEMP. L. REV. 813, 817-20 (2001).

[114] *See* Matthew D. Cain, Jill E. Fisch, Steven Davidoff Solomon & Randall S. Thomas, *Mootness Fees*, 72 VAND. L. REV. 1777, 1809-11 (2019); Jill E. Fisch, Sean J. Griffith & Steven Davidoff Solomon, *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. 557, 562, 601 (2015) (reprinted in Vol. 57, Corp. Prac. Commentator, 493, 2015-2016) (listed as a "Top Ten" article in Vol. 58, Corp. Prac. Commentator, 2016-2017).

Professor Fisch opines on the benefits of Delaware law, regulatory competition, and market demand and argues against additional federal regulation of corporate governance.[115] The "gatekeeper" here is Delaware, and Professor Fisch explores the power and benefits of the Delaware system (fast, expert courts, a responsive legislature) in multiple articles.[116] In doing so, she pays attention to the important role of plaintiffs' counsel as well as the incentives created by judicial decisions—for both plaintiff and defense counsel.[117] And, she examines the incentives with actual data, using that data to make normative arguments about additional changes.[118]

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[115] *See* Jill E. Fisch, *The New Federal Regulation of Corporate Governance*, 28 HARV. J. L. & PUB. POL'Y. 39, 48-49 (2004); Jill E. Fisch, *Leave it to Delaware: Why Congress Should Stay out of Corporate Governance*, 37 DEL. J. CORP. L. 731, 782 (2013).

[116] *See, e.g.*, Fisch, *supra* note 85, at 401 (noting that "Delaware courts are famous for their incremental and context-specific approach to corporate law, and for their sensitivity to market and institutional developments that warrant a reconsideration of their prior precedents."); Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1978 (2000) (listed as a "Top Ten" article in Vol. 42, Corp. Prac. Commentator, 947, 2001-2002) (reprinted in Vol. 42, Corp. Prac. Commentator, 65, 2001-2002); Jill E. Fisch, *The New Governance and the Challenge of Litigation Bylaws*, 81 BROOK. L. REV. 1637, 1675-78 (2016).

[117] *See* Jill E. Fisch, Sean J. Griffith and Steven Davidoff Solomon, *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. 557, 562 (2015) (reprinted in Vol. 57, Corp. Prac. Commentator, 493, 2015-2016) (listed as a "Top Ten" article in Vol. 58, Corp. Prac. Commentator, 2016-2017). *But see* Matthew D. Cain, Jill E. Fisch, Steven Davidoff Solomon & Randall S. Thomas, *Mootness Fees*, 72 VAND. L. REV. 1777 (2019) (examines the shift of merger litigation to federal courts and condemns the proliferation of "mootness fees" paid to plaintiffs' counsel because they cause transparency issues and increase potential for "blackmail litigation").

[118] See Fisch, Griffith & Davidoff Solomon, supra note 117, at 577-615. Professor Fisch also considers the role of lawyers to companies and their ability to do more to prevent fraud. *See* Fisch & Gentile, *supra* note **Error! Bookmark not defined.**, at 76; Jill E. Fisch & Kenneth M. Rosen, *Is There a Role for Lawyers in Preventing Future Enrons*, 48 VILL. L. REV. 1097, 1137-38 (2003).

Here, as in all of the other areas about which Professor Fisch has written, she has both written extensively and persuasively. She has worked with co-authors to build the creative friction that comes from working with others who are different from you,[119] and has, arguably increased her impact by doing so. She has challenged the status quo and predominant debates by pushing hard on current arguments and approaches, and, as a result, she has influenced outcomes and policy.

Conclusion

As the exploration of Professor Fisch's scholarship in this article makes clear, her impact is beyond question. It is exemplified by the recognition from her peers in the form of article awards and citations, of course, but also in the comments her fellow scholars made for this Symposium and which are included in the footnotes. She writes with clarity and precision. She engages with data, surveys, and econometrics as well as the empirical work of others, and she does so both because she is smart and curious, but also because she cares about making policy changes that actually work.[120] That goal is reflected throughout her work. It is reflected in her skepticism

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[119] *See, e.g.*, Donald C. Langevoort & Hillary A. Sale, *Corporate Adolescence: Why Did "We" Not Work?*, 99 TEX. L. REV. 1347 (2021).

[120] *See, e.g.*, Jill E. Fisch & Caroline Gentile, *Vultures or Vanguards?: The Role of Litigation in Sovereign Debt Restructuring*, 53 EMORY L.J. 1047, 1088-1112 (2004).

of prevailing narratives and her push to debunk them.[121] It is also reflected in her sense that laws and regulations should serve a purpose and not be needlessly complex or, when they do not work, be met with more regulation. And, it is present in the way she asks questions, reexamines and then iterates on her own work, and continually revisits the purpose or the goal of the duty, statute, or rule, to question whether existing "solutions" can be refined or might be preferred over the many others being debated and explored.

In short, Professor Fisch's work endures and continues to play a role in corporate governance and securities law debates not just because of its quantity or breadth, but because of her own willingness to ask questions, develop and deploy data, engage and reengage with ideas, iterate and update, and innovate and challenge herself (and her many co-authors) to stretch their thinking to the next level. As one of those co-authors, I hope I have done justice to her work and contributions in this article.[122]

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[121] *See, e.g.*, Jill E. Fisch, *The Overstated Promise of Corporate Governance*, 77 U. CHI. L. REV. 923, 950-58 (2010).

[122] It is worth noting here that when Professor Fisch began doing scholarship in the corporate governance area, she was one of very few women in the field and yet, by the time I joined the academy approximately ten years later, she was already a prominent and leading scholar. I am grateful for her support and insights over the years.