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In Search of Good Corporate Governance

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ABSTRACT. In this *Forum* Response, Dorothy Lund considers whether the "corporate governance gap" between large and small public companies is the product of harmful or beneficial forces, and in so doing, rejects the idea that there is a single governance framework that is optimal for all public companies.

INTRODUCTION

What is the right governance framework for a public company? This question sits at the core of decades of empirical and theoretical research, and yet we still lack consensus about its basic principles. Instead, there are different camps: Agency-cost essentialists support governance structures that maximize accountability to the company's shareholders,[1] while proponents of board-centered models,[2] as well as stakeholder governance advocates,[3] prefer arrangements that

1. Zohar Goshen & Richard Squire, *Principal Costs: A New Theory for Corporate Law and Governance*, 117 COLUM. L. REV. 767, 769-70 (2017) (coining the term "agency-cost essentialism"); Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 865-70 (2005) (arguing for increased shareholder power and opportunities for shareholders to take part in governance).
2. Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735, 1749 (2006); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 280-81 (1999) (advocating for directors to be viewed as "mediating hierarchs" who should balance the interests of shareholders, employees, creditors, and other stakeholders).
3. Leo E. Strine, Jr., Aneil Kovvali & Oluwatomi O. Williams, *Lifting Labor's Voice: A Principled Path Toward Greater Worker Voice and Power Within American Corporate Governance*, 106 MINN. L. REV. (forthcoming 2021) (manuscript at 50-53), https://ssrn.com/abstract=3792492 [https://perma.cc/J8XU-VEQS] (advocating for the adoption of stakeholder governance for firms that are systemically important to the economy); Simon Deakin, *The Corporation as*

insulate management from shareholder influence. Still others contend that there is no one-size-fits-all governance arrangement.[4] Despite this range of views, agency-cost essentialists have mostly won the day: in both academic and professional circles, "good governance" is generally defined as the extent to which a company aligns management with shareholder interests.[5] In addition, many companies have adopted governance structures that increase management's alignment with shareholders and enhance shareholder power, including majority voting for director elections, shareholder proxy access, and unified boards.[6]

But as Professors Kastiel and Nili reveal in their impressive article, the companies that adhere to "good governance" practices are not as prevalent as one might suspect.[7] Moreover, these companies are not evenly dispersed. The largest companies in the market have bowed to pressure from academics, investors, and other "agents of change" to maximize accountability to shareholders and give them greater control and intervention rights.[8] But beyond the S&P 500—the popular market index that tracks 500 of the largest public companies in the United States—the corporate governance landscape looks different. For example, the authors show that in 2020, only 10% of the S&P 500 had classified boards; by contrast, over 40% of the 200 smallest companies in the Russell 3000[9]

Commons: Rethinking Property Rights, Governance and Sustainability in the Business Enterprise, 37 QUEENS L.J. 339, 339 (2012) (proposing that a business enterprise is a "commons" for a variety of stakeholders where each stakeholder's interest is important to protect).

4. David F. Larcker & Brian Tayan, *Loosey-Goosey Governance: Four Misunderstood Terms in Corporate Governance*, ROCK CTR. CORP. GOVERNANCE 1 (Oct. 7, 2019), https://www.wlrk.com/docs/SSRN-id3463958.pdf [https://perma.cc/EM66-EPRN] ("Our understanding of governance suffers from . . . the tendency to overgeneralize across companies—to advocate common solutions without regard to size, industry, or geography, and without understanding how situational differences influence correct choices.").

5. *See* Kobi Kastiel & Yaron Nili, *The Corporate Governance Gap*, 131 YALE L.J. 782, 797-798 (manuscript at 10) ("Fresh Del Monte operates without any of the putative markers of what investors often consider to be good governance practice. Not only is its board classified, effectively protecting it from shareholder takeovers, but the CEO also acts as the chair. While the company has a lead independent director position, only three very limited powers are allocated to the position. The board also lacks a nominating committee. This structure remains in place without shareholder proposal challenges, and shareholders lack the ability to call a special meeting." (citations omitted)).

6. *See* Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. (forthcoming 2021) (manuscript at 9-10), https://ssrn.com/abstract=3775846 [https://perma.cc/3DSC-LFE8].

7. Kastiel & Nili, *supra* note 5, at 787.

8. *Id.* at 798.

9. The Russell 3000 is an index that includes the 3,000 largest U.S. companies by market capitalization. *See* Emily Guy Birken & Benjamin Curry, *What Is the Russell 3000 Index?*, FORBES (June 10, 2021, 2:49 PM) https://www.forbes.com/advisor/investing/russell-3000-index [https://perma.cc/PNW6-UYPT].

did.[10] Likewise, as of 2020, 91% of S&P 500 companies had adopted majority voting for director elections, but only 29% of the "Bottom 200" required it.[11] Small companies are also less likely to remove a supermajority voting requirement for charter amendments, give shareholders the right to call a special meeting, implement proxy access, separate the position of CEO and chair of the board, and improve board independence.[12]

Shedding light on this "corporate governance gap" is a major contribution in itself and leads to a number of possible conclusions. In particular, Kastiel and Nili's takeaway is that the marketplace would benefit from all firms modeling their governance on that of the S&P 500, and they suggest policy recommendations that would facilitate this development. However, in this *Forum* Response, I marshal evidence in favor of two competing views. The first, which I explore in Part I, is that the corporate governance ecosystem facing large firms is flawed because it is shaped by market actors, and largely indexed mutual fund blockholders[13] in particular, that drive homogeneity in governance without creating value. Under this competing view, the market would be better off if large firms were insulated from these forces so that corporate planners would have greater ability to customize their company's governance to meet their unique business needs. The second competing view, which I explore in Part II, is that the corporate governance ecosystem on the whole is working exactly as it should, and that there are good reasons for the governance gap between large and small companies. Because each of these competing views has some merit and is supported by ample evidence (including my own work), more research is needed to rule one of them out.

I. THE CORPORATE GOVERNANCE ECOSYSTEM FACING LARGE FIRMS MAY BE FLAWED

In their article, Professors Kastiel and Nili generate a body of evidence showing that a governance gap exists between the largest and smallest public companies.[14] The authors persuasively argue that the gap is the product of change

10. Kastiel & Nili, *supra* note 5, at 798.

11. *Id.* at 828-29.

12. *Id.* at 829-36.

13. Blockholders are large shareholders that play an important role in corporate governance as a result of their size. *See* Alex Edmans, *Blockholders and Corporate Governance*, 63 ANN. REV. FIN. ECON. 23, 24 (2014).

14. The gap that they observe is a close cousin of one that has received much more scholarly attention: the difference between the governance of public and private companies. *See* Lund & Pollman, *supra* note 6, at 46-48. Indeed, as many have observed, private companies, and startups in particular, tend to have founder-friendly governance structures that are the hallmarks

agents, ranging from large mutual fund blockholders to corporate "gadflies," that usually target large public companies. From this observation, the authors conclude that private ordering is alive and well at large public companies, but that something has gone wrong outside of the S&P 500. Put differently, the authors posit that if investors and management of smaller firms could freely bargain, those firms would resemble the larger firms with regard to their governance.[15]

My research suggests that the authors may have it exactly backwards, and that there is good reason to believe that private ordering has failed at the largest public firms, rather than the smallest ones. As Elizabeth Pollman and I explore in *The Corporate Governance Machine*, there is a corporate governance ecosystem composed of institutional investors and other market players that operates with maximum force on the largest public companies in the market and drives them toward homogenous governance structures.[16] Indeed, Kastiel and Nili's empirical findings support this theory by revealing that there is much greater governance diversity at smaller public companies than at larger ones, which suggests that private ordering is alive and well at the bottom of the market rather than the top.

In the Sections that follow, I develop this point further, marshalling evidence that suggests that the corporate governance ecosystem facing large firms is flawed. I first discuss why the authors' evidence suggests that private ordering is limited at the largest firms in the marketplace, rather than at smaller firms. In particular, I highlight how the entities that influence large firm governance are subject to agency costs that force them to dictate one-size-fits-all "good governance" mandates. I then discuss the implications that can be drawn from this analysis.

A. Private Ordering and Homogeneity

Private ordering is at the core of American corporate law. In essence, firms can choose not only the state that they wish to incorporate in (and the default corporate law rules associated with that choice), but also to depart from default rules and customize their charters and bylaws to meet their particular business

of "bad governance." *See* Elizabeth Pollman, *Startup Governance*, 168 U. PA. L. REV. 155, 178-88 (2019); *see also* Renee M. Jones, *The Unicorn Governance Trap*, 166 U. PA. L. REV. ONLINE 169, 178-83 (2017) (describing the governance challenges faced by large-scale startups which choose to forego an initial public offering).

15. In particular, the authors claim that corporate governance agents of change are resource constrained and so they can only afford to target the largest firms in the market. *See* Kastiel & Nili, *supra* note 5, at 801-802.

16. Lund & Pollman, *supra* note 6, at 10-29.

needs.[17] Corporate law is therefore "enabling"[18]—it allows corporate participants to adopt a governance structure that is customized to businesses' unique needs, rather than force different companies to adopt the same governance blueprint. Indeed, many view this enabling feature as the "genius" of American corporate law.[19] Participants can bargain and ultimately select the optimal arrangement of terms that will allow their company to thrive because "[n]o one set of terms will be best for all."[20]

As Professors Kastiel and Nili contend, private ordering is limited for certain firms in the modern market environment.[21] Contrary to their conclusion, however, there is good reason to think that the limit on private ordering comes from the corporate governance change agents that the authors embrace. In other words, their empirical results establish that private ordering is alive and well at the *bottom* segment of the market. As an example, the smaller S&P 500 companies exhibit much more diversity with regard to staggered boards: as of 2020, approximately 42% of the bottom of the Russell 3000 (the "Bottom 200") had a staggered board, versus 10% of the larger companies in the S&P 500.[22] Likewise, as of 2020, 91% of the S&P 500 had majority voting for director elections, compared to 29% of the Bottom 200.[23] The Bottom 200 has remained stable with approximately 60% to 70% independent directors over the past decades, while the S&P 500 moved to a high point of 86% independent directors in 2019.[24]

In sum, the aspect of the authors' results that is most striking, in my mind, is not the gap, but the homogeneity at the top: the largest companies are nearly identical in their governance structures, and the further down you go, the more variation you find. As the classic account of private ordering emphasizes, diversity is expected when law is enabling—so it appears that private ordering is being frustrated, rather than enhanced, at the largest companies.

Digging into the authors' explanation for their evidence provides more thorough proof of this point. As the authors explain, modern governance is the product of interactions between multiple players: large investors, founders, corporate

17. *See generally* ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW (1993) (exploring the importance of federalism in American corporate law).

18. Frank H. Easterbrook & Daniel R. Fischel, *Corporate Contract*, 89 COLUM. L. REV. 1416, 1417 (1989) (describing how corporate law "allows management and investors to write their own tickets, to establish systems of governance without substantive scrutiny from a regulator and without effective restraint on the permissible methods of corporate governance").

19. ROMANO, *supra* note 17, at 1.

20. Easterbrook & Fischel, *supra* note 18, at 1418.

21. Kastiel & Nili, *supra* note 5, at 802-803.

22. *Id.* at 827.

23. *Id.* at 827.

24. *Id.* at 835.

management, and the people who advise them.[25] And in modern public markets, a necessary precondition for any governance change to succeed is support from the large mutual fund shareholders—known as the "Big Three" (Vanguard, State Street, and BlackRock)—that cast 25% of the votes of S&P 500 companies on average.[26] As the authors recognize, mutual funds are time and resource constrained: their business model generally limits the amount of time and money that they can spend researching any company in their large portfolios.[27] As a result, they (like the proxy advisors that advise them[28]) prefer blanket, one-size-fits-all governance solutions, promulgated in the form of low-cost voting guidelines.[29] And the Big Three's voting guidelines closely track the arrangements that the authors argue constitute "effective governance": majority voting for director elections, more director independence, greater shareholder power, and an absence of antitakeover protections, among others.[30]

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25. *Id.* at 799-814; *see also* Lund & Pollman, *supra* note 6, 18-28 (describing how the modern governance environment has become a system composed of multiple institutional players).

26. Lucian Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B.U. L. REV. 721, 736 (2019). Bebchuk and Hirst project that the average voting percentage of the "Big Three" will increase to nearly 40% by 2038. *Id.* at 740.

27. Kastiel & Nili, *supra* note 5, at 802, 805-06, 851, 858-59; *see also* Dorothy S. Lund, *The Case Against Passive Shareholder Voting*, 43 J. CORP. L. 493, 512 (2018) ("This low-cost trading strategy also means that the fund will have to incur additional resources to evaluate shareholder proposals and governance interventions proposed by other investors. A passive fund that incurred these expenses would need to charge a higher fee, which would likely drive fee-sensitive investors to competitor funds."); Lucian Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 COLUM. L. REV. 2029, 2055 (2019) (demonstrating that an index fund manager could only justify stewardship up to the amount of money the fund would receive as a fractional fee from the rise in a company's value).

28. *Cf.* David F. Larcker, Allan L. McCall & Brian Tayan, *And Then a Miracle Happens!: How Do Proxy Advisory Firms Develop Their Voting Recommendations?*, ROCK CTR. CORP. GOVERNANCE 2-4 (Feb. 25, 2013), https://www.gsb.stanford.edu/sites/default/files/publication-pdf/cgri-closer-look-31-proxy-firms-voting-recommendations.pdf [https://perma.cc/6ZBU-5VLS] (describing how proxy advisors develop policies that are applied in thousands of shareholder meetings each year).

29. *See* Lund, *supra* note 27, at 495; *see also* Lund & Pollman, *supra* note 6, at 23-24; Michal Barzuza, Quinn Curtis & David H. Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243, 1256 (2020) (describing how, in order to provide advice at scale, proxy advisors set generalist governance guidelines, which are then enforced through the voting guidelines they provide to investors).

30. *Principles and Policies*, VANGUARD, https://about.vanguard.com/investment-stewardship/principles-policies [https://perma.cc/M3DA-B8WM]; *Investment Stewardship*, BLACKROCK, https://www.blackrock.com/corporate/about-us/investment-stewardship [https://perma.cc/ECL9-6M5P]; *Asset Stewardship*, STATE ST. GLOB. ADVISORS, https://www.ssga.com/us/en/institutional/ic/capabilities/esg/asset-stewardship [https://perma.cc/X4G7-RYZJ]; *see also* Lund, *supra* note 27, at 516 ("In spite of the fact that there are no generally accepted best practices for governance, the Big Three have adopted nearly identical voting guidelines: each

In light of their influence and nearly identical governance preferences, these mutual fund blockholders substantially contribute to the homogenization in governance that has occurred at the largest companies.[31] Notably, the consolidation of assets in the hands of the Big Three has accelerated in the past decade, meaning that in the early 2000s, they were not nearly as powerful in corporate governance. In 1998, the Big Three held only a combined total of 5.2% of the S&P 500.[32] By 2008, that number had risen to 13.5%, and today, it exceeds 20%.[33]

Kastiel and Nili's evidence suggests that the corporate governance gap began to grow and deepen with the rise of these mutual fund blockholders. For example, S&P 500 companies started to abandon staggered boards in the early 2000s—around the time when the Securities and Exchange Commission (SEC) strongly encouraged institutional investors to vote, which meant that the large institutional investors that inconsistently exercised their governance rights were forced to use them.[34] Likewise, the incidence of staggered boards hit a low point in 2014, contemporaneous with the ascendance of the Big Three, and that trough has persisted to this day.[35] The rise in majority voting for S&P 500 companies similarly accelerated around 2009, when the Big Three were becoming a major force in governance.[36]

This is not to say that the Big Three have driven these changes by themselves. Indeed, most of these trends were catalyzed by proactive change agents such as pension funds, institutional investor advisory groups,[37] and activist investors,

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institution articulates a preference for director independence; some relationship between long-term company performance and executive compensation; and skepticism about anti-takeover provisions and major changes to the corporation, such as mergers, reorganizations, or changes to capital structure.").

31. *See* Ian R. Appel, Todd A. Gormley & Donald B. Keim, *Passive Investors, Not Passive Owners*, 121 J. FIN. ECON. 111, 113-14 (2016) (showing that an increase in index fund ownership is correlated with a higher percentage of implementation of governance proposals favored by the Big Three).

32. Bebchuk & Hirst, *supra* note 26, at 734 fig.1.

33. *Id.*

34. 17 C.F.R. §§ 239, 249, 270, 274 (2021); *see also* Lund, *supra* note 27, at 134 (describing how this rule was "widely interpreted as mandating that mutual funds vote all of the shares of their portfolio companies").

35. *See* Kastiel & Nili, *supra* note 5, at 827.

36. *Id.* at 34-35. The Big Three did not catalyze these changes, but their voting power in support of them likely contributed to the rise of majority voting across the largest companies. *See* Marcel Kahan & Edward Rock, *The Insignificance of Proxy Access*, 97 VA. L. REV. 1347, 1359-60 (2011) (describing the shift from plurality voting to majority voting at S&P 500 companies in the mid-2000s).

37. *See generally* Holly J. Gregory, Rebecca Grapsas & Claire Holland, *The Latest on Proxy Access*, HARV. L. SCH. F. CORP. GOVERNANCE (Feb. 1, 2019),

which generally tee up proposals for the Big Three to vote on.[38] The Big Three's voting positions and governance preferences have also been influenced by proxy advisors and other institutional players whose business models rely on establishing corporate governance best practices that can be enforced at scale.[39] The important point, however, is that as the Big Three became more powerful, they and their advisors contributed to the homogeneity experienced at the largest public companies.

Of course, this dynamic represents a form of private ordering—mutual fund blockholders are not regulators, after all. But the fact remains that as a result of their large ownership positions and broad diversification, certain governance arrangements have become prohibitively costly to adopt—at least for the firms in the market that count the Big Three as their largest shareholders. For these large firms, departing from corporate governance "best practices" is a costly proposition: any deviation can subject the company to withhold-the-vote campaigns, shareholder proposals, no votes on say-on-pay, and other forms of investor activism, all of which are more likely to pack a potent punch when supported by mutual fund blockholders.[40]

Before turning to the normative takeaway, a question remains: why does the corporate governance machine have such a strong effect on the largest public companies? It may be, as Kastiel and Nili point out, that mutual fund blockholders choose to spend their limited resources engaging with larger companies—I will return to this point in the next Section. A related and more important reason is that mutual fund blockholders tend to hold larger stakes at the largest companies—a phenomenon attributable to the rise of indexing[41]—and can therefore be much more influential at those companies.

Consider, as just one example, a company at the bottom of the Russell 3000, the life-insurance company Vericity. Vericity has a market capitalization of $130 million and a controlling shareholder—a private-equity-fund subsidiary owns

https://corpgov.law.harvard.edu/2019/02/01/the-latest-on-proxy-access [https://perma.cc/2ETV-T7PN] (describing the role of the Council of Institutional Investors).

38. 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, 867 (2013) (describing the relationship between rationally reticent mutual funds and activist hedge funds, which tee up interventions for the blockholders to vote on).

39. For a deeper analysis of these dynamics and how they drive homogeneity in governance, see Lund & Pollman, *supra* note 6, at 42-44.

40. *Id.* at 39; Lund, *supra* note 27.

41. Bebchuk & Hirst, *supra* note 26, at 721.

approximately 75% of the company's equity.[42] As a result, it is a "controlled company" exempt from Nasdaq director-independence requirements.[43] In addition, mutual funds hold only a tiny fraction of the company's shares: BlackRock has a .038% stake, State Street, a .13% stake, and Vanguard, a .18% stake.[44] Compare Vericity to Apple, a company at the very top of the S&P 500 with a market capitalization of more than $2.472 trillion.[45] Apple has no controlling shareholder. Instead, as of September 13, 2021, mutual fund giants own the largest positions in the company, with Vanguard holding a 7.65% stake, BlackRock a 6.22% stake, and State Street a 3.77% stake—for a combined total of nearly 20% of the company's equity.[46] It is not surprising, therefore, that the governance of Apple meshes with the corporate governance best practices espoused by these blockholders. For example, it lacks a staggered board, uses majority voting for director elections,[47] and allows shareholder proxy access.[48] It also adheres to director-independence requirements as a condition of remaining listed on the Nasdaq stock exchange.[49]

As this example illustrates, the governance of large public companies is substantially influenced by mutual fund blockholders and the proxy advisors that guide them—as well as stock exchange listing standards, stock indices, and other

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42. *Vericity, Inc.*, GOOGLE FIN., https://www.google.com/finance/quote/VERY:NASDAQ?sa=X&ved=2ahUKEwj48rDnpbHzAhU2DzQIHZOmD2AQ3ecFegQIDBAS [https://perma.cc/H2YW-P827].

43. Vericity, Inc., Proxy Statement Pursuant to Schedule 14A (Aug. 5, 2020), https://www.sec.gov/Archives/edgar/data/0001575434/000119312520174923/d949278ddef14a.htm [https://perma.cc/L4TK-BSKC] ("As we are a 'controlled company' we have availed ourselves of the 'controlled company' exception under the Nasdaq rules and will not be subject to the Nasdaq listing requirements that would otherwise require us to have a board of directors comprised of a majority of independent directors, a compensation committee composed solely of independent directors or a nominating committee composed solely of independent directors.").

44. *Vericity*, SIMPLY WALL ST., https://simplywall.st/stocks/us/insurance/nasdaq-very/vericity#ownership [https://perma.cc/3UCG-XRFD].

45. *Apple Inc. (AAPL)*, YAHOO! FIN., https://finance.yahoo.com/quote/AAPL?p=AAPL [https://perma.cc/7K37-DUGW].

46. *Id.*

47. Apple Inc., Proxy Statement Pursuant to Section 14(a) of the Securities Exchange Act of 1934 4 (Jan. 8, 2019), https://d18rn0p25nwr6d.cloudfront.net/CIK-0000320193/a8df81df-3da2-4fcf-ac99-9579fc963fb3.pdf [https://perma.cc/FT3V-Z5BG].

48. APPLE INC., AMENDED AND RESTATED BYLAWS OF APPLE INC. 13-14 (Dec. 13, 2016), https://s2.q4cdn.com/470004039/files/doc_downloads/gov_docs/Amended_Bylaws.pdf [https://perma.cc/86CY-9GE6].

49. *See Top 30 US Companies in the NASDAQ Index 2021*, DISFOLD (July 9, 2021), https://disfold.com/top-companies-us-nasdaq [https://perma.cc/HN5T-J6XQ]; Laura Anthony, *Nasdaq Board Independence Standards*, LAWCAST (Dec. 3, 2019), https://lawcast.com/2019/12/03/nasdaq-board-independence-standards [https://perma.cc/DBN4-QFGR].

institutional players that make up the corporate governance ecosystem. By contrast, the governance of smaller companies is more likely to be determined by investors, founders, and management who bargain freely with each other and customize governance arrangements based on the unique needs of the particular company.[50] As such, these smaller companies are more likely to exhibit the private ordering that is thought to be the genius of American corporate law.

B. Change Agent Agency Costs and Implications

The previous Section argued that private ordering in the form of arms-length bargaining for terms—the feature of U.S. corporate law that scholars deem its best—is alive and well at the smallest public companies. By contrast, large public companies are more likely to have their governance structures determined by powerful institutional players that dictate a one-size-fits-all blueprint for corporate governance. This Section outlines reasons to critique this outcome. Specifically, it is possible that the change agents that push the largest public companies to adopt uniform governance structures do so not because they are optimal, but because their business models force them to adopt and promote low-cost governance mandates.

Consider index funds, the growth of which has fueled the rise of the Big Three.[51] Index funds are a type of mutual fund that track a market index. As a result, the fund's trading decisions are automated.[52] Importantly, this trading strategy lowers the fund's costs and allows it to charge much lower fees.[53] But it also means that the fund has fewer resources available for stewardship than funds that rely on active trading strategies.[54]

For this reason, thoughtful interventions in governance are particularly costly for index funds.[55] Index funds generally lack firm-specific information about the companies in their large portfolios, which means customized interventions would require additional research.[56] In addition to increasing the fund's costs, this research is unlikely to benefit the fund that undertakes it—mutual funds compete on the basis of relative performance, and so any investment in

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50. Note again the parallels to private company governance, which exhibits greater diversity as a result of being heavily negotiated by investors and founders. *See supra* note 14.

51. Bebchuk & Hirst, *supra* note 26, at 721; Lund, *supra* note 27, at 493-96.

52. Lund, *supra* note 27, at 494; Adriana Z. Robertson, *Passive in Name Only: Delegated Management and "Index" Investing*, 36 YALE J. ON REG. 795, 797 (2019).

53. *See* Lund, *supra* note 27, at 494.

54. *Id.* at 516; Bebchuk & Hirst, *supra* note 27, at 2082-83.

55. Lund, *supra* note 27, at 495.

56. *Id.*

stewardship will increase costs while benefitting rival funds.[57] Therefore, even cost-justified investments in monitoring and stewardship—investments that mutual fund beneficiaries would prefer the fund to undertake—will be forsaken because these expenditures will not help the fund's portfolio manager outcompete rivals.[58]

Given that largely indexed mutual fund complexes reap few benefits from stewardship, why do they vote and engage with companies? For a while, they did not. It was not until the early 2000s, when the SEC and Department of Labor emphasized investment adviser voting as an aspect of fiduciary responsibility, that mutual fund complexes started to regularly vote investor proxies.[59] To this day, mutual funds (or rather, the centralized governance teams that dictate the institution's governance activities[60]) almost always vote.[61] But as discussed, these groups adhere to low-cost governance strategies: they promulgate ex ante voting guidelines that espouse corporate governance "best practices" and then enforce them through their voting.[62] Further, they outsource a substantial fraction of the voting decisions to proxy advisors, who are also forced to adopt blanket policies on common governance issues.[63] The Big Three rarely undertake firm-specific interventions, engaging with only a tiny fraction of the companies in their portfolio each year.[64]

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57. *Id.* at 495, 500.

58. Another reason to believe that index funds will underinvest in stewardship has to do with the way that portfolio managers are compensated. Index fund portfolio managers receive a tiny fraction of the percentage of the fund's assets under management. This leads the portfolio manager to underinvest in in stewardship because the manager will capture only a small fraction of the gains. Bebchuk & Hirst, *supra* note 27, at 2135-37.

59. *See* 17 C.F.R. § 275 (2021); Lund, *supra* note 27, at 516-17 (noting that the SEC imposed a fiduciary duty to cast a vote upon investment managers in 2003).

60. *See* Lund, *supra* note 27, at 515; *see also* Sean J. Griffith & Dorothy S. Lund, *Conflicted Mutual Fund Voting in Corporate Law*, 99 B.U. L. REV. 1151, 1169-70 (2019) ("To manage this task, most mutual fund sponsors generally centralize their voting and governance activities within a corporate governance team.").

61. *See Proxy Voting by Registered Investment Companies, 2017*, 25 ICI RSCH. PERSP., July 2019, at 1, 11, https://www.ici.org/system/files/attachments/pdf/per25-05.pdf [https://perma.cc/39Q6-UHRG] (finding that registered investment companies, primarily mutual funds, placed 95.9% of their allocated proxy votes in 2017).

62. Lund & Pollman, *supra* note 6, at 42-44.

63. Larcker et al., *supra* note 28, at 2-4; Lund & Pollman, *supra* note 6, at 21, 23.

64. Lund, *supra* note 27, at 515-16, 519 (showing statistics that indicate that the vast number of BlackRock, State Street, and Vanguard portfolio companies did not receive a single engagement in 2015); Bebchuk & Hirst, *supra* note 27, at 2088 ("The incidence of engagement is especially low for Vanguard and SSGA, which had *any* engagement with fewer than 6% of their portfolio companies each year from 2017 to 2019. Although BlackRock's level of

In other words, the rise of index investing and large mutual fund blockholders has led to the proliferation of low-cost governance models that are enforced across vastly different firms with different needs. A core problem with this trend is that there is not much in corporate governance that lends itself to a one-size-fits-all approach. Some companies, such as those that find themselves undervalued due to circumstances outside of their control, might benefit from implementing staggered boards or antitakeover provisions.[65] Others, such as a technology company with a visionary executive team at the helm, might perform better with a dual-class equity structure.[66] And a company with complex operations may be better run with a smaller number of independent directors and a greater number of insider directors that are familiar with the intricacies of the company's business.[67]

There may be exceptions to my general skepticism toward one-size-fits-all precepts in governance. One is board diversity, where the empirical evidence generally suggests that greater diversity can create greater shareholder value (in addition to the larger social value that comes from facilitating greater workplace diversity).[68] As such, we should celebrate the Big Three's push for greater board

engagement was higher, the percentage of its portfolio companies with which it had any engagement in a given year was less than 12%, on average, during the period from 2017 through 2019.").

65. *See* Lund & Pollman, *supra* note 6, at 41-44. For example, in the midst of the COVID-19 pandemic, many companies that faced steep stock-price declines adopted poison pills to prevent opportunistic acquisitions. In this moment, even the shareholder-friendly proxy advisors, Glass Lewis and Institutional Shareholder Services (ISS), recognized that "[a] severe stock price decline as a result of the COVID-19 pandemic is likely to be considered valid justification in most cases for adopting a pill of less than one year in duration." Paul J. Shim, James E. Langston & Charles W. Allen, *ISS and Glass Lewis Guidances on Poison Pills During COVID-19 Pandemic*, HARV. L. SCH. F. CORP. GOVERNANCE (Apr. 26, 2020), https://corpgov.law.harvard.edu/2020/04/26/iss-and-glass-lewis-guidances-on-poison-pills-during-covid-19-pandemic [https://perma.cc/7SVK-UNJX] (quoting ISS Glob. Pol'y Bd., *Impacts of the COVID-19 Pandemic*, INSTITUTIONAL S'HOLDER SERVS. 6 (Apr. 8, 2020), https://www.issgovernance.com/file/policy/active/americas/ISS-Policy-Guidance-for-Impacts-of-the-Coronavirus-Pandemic.pdf [https://perma.cc/6GZM-5FMQ]); *see also* Emiliano M. Catan, *The Insignificance of Clear-Day Poison Pills*, 48 J. LEGAL STUD. 1, 1-2, 38-39 (2019) (empirically demonstrating that prior studies may be mistaken in concluding that adopting poison pill provisions harms value).

66. *See* Lund & Pollman, *supra* note 6, at 43-44; *see also* Zohar Goshen & Assaf Hamdani, *Corporate Control and Idiosyncratic Vision*, 125 YALE L.J. 560, 579-81 (2016) (discussing how visionary founders losing control of their company can impede their company's success).

67. Lund & Pollman, *supra* note 6, at 43-44.

68. Gennaro Bernile, Vineet Bhagwat & Scott Yonker, *Board Diversity, Firm Risk, and Corporate Policies*, 127 J. FIN. ECON. 588, 589-91 (2018) (showing that board diversity lowers risk); David A. Carter, Daniel A. Rogers & Betty J. Simkins, *Corporate Governance, Board Diversity and Firm Value*, 38 FIN. REV. 33, 51 (2003) (showing that after controlling for size, industry, and various corporate governance measures, the presence of women or minorities on the board of a firm diversity.[69] Even so, a one-size-fits-all approach can ultimately be detrimental if investors focus only on that aspect of diversity at the exclusion of other reforms that would do more to improve equality in the workplace.

In sum, the governance uniformity at the top of the market may be suboptimal if it is dictated by powerful institutional intermediaries that lack incentives to invest in firm-specific monitoring and stewardship, and instead discharge their fiduciary obligations by adhering to one-size-fits-all governance mandates that might not create value. This observation cautions against addressing the governance gap by empowering change agents to exert their influence on the smaller companies in the market, as the authors propose.[70] Instead, it would suggest that the better course of action would be to limit the influence of the flawed intermediaries in the corporate governance of the largest companies.[71]

II. THE CORPORATE GOVERNANCE ECOSYSTEM MAY BE WORKING EXACTLY AS IT SHOULD

There is a happier conclusion that can be drawn from the authors' results: perhaps everything is working exactly as it should. More specifically, it may be that the governance ecosystem that pushes large public companies (and not

increases its value); Yu Liu, Zuobao Wei & Feixue Xie, *Do Women Directors Improve Firm Performance in China?*, 28 J. CORP. FIN. 169, 170 (2014); Jiao Ji, Hongfeng Peng, Hanwen Sun & Haofeng Xu, *Board Tenure Diversity, Culture and Firm Risk: Cross-Country Evidence*, 70 J. INT'L. FIN. MKTS., INSTS. & MONEY, 2021, at 2 (showing that board diversity lowers risk); Waqas Bin Khidmat, Muhammad Ayub Khan & Hashmat Ullah, *The Effect of Board Diversity on Firm Performance: Evidence from Chinese Listed Companies*, 13 INDIAN J. CORP. GOV. 9, 10-11 (2020) (showing a positive correlation between board diversity and firm performance in Chinese A-listed firms); Claude Francoeur, Réal Labelle & Bernard Sinclair-Desgagné, *Gender Diversity in Corporate Governance and Top Management*, 81 J. BUS. ETHICS 83, 83 (2008) (showing that abnormal positive returns are associated with a high proportion of female officers); Niclas L. Erhardt, James D. Werbel & Charles B. Shrader, *Board of Director Diversity and Firm Financial Performance*, 11 CORP. GOV. INT'L. REV. 102, 102 (2003) ("[B]oard diversity is positively associated with [return on asset and investment].").

69. *See also* Barzuza et al., *supra* note 29, at 1265-68 (describing State Street's "Fearless Girl" campaign and others by Vanguard and BlackRock that have resulted in increased diversity on corporate boards).

70. Kastiel & Nili, *supra* note 5, at 58.

71. *See* Sean J. Griffith, *Opt-In Stewardship: Toward an Optimal Delegation of Mutual Fund Voting Authority*, 98 TEX. L. REV. 983 (2020) (suggesting that mutual funds should not vote on all issues); Lund, *supra* note 27, at 528-29 (proposing the elimination of passive fund voting); Dick Weil, *Passive Investors, Don't Vote*, WALL ST. J. (March 18, 2018, 6:44 PM ET), https://www.wsj.com/articles/passive-investors-dont-vote-1520552657 [https://perma.cc/FN34-DKED]. For another method to decrease the influence of weakly motivated investors in the marketplace, see Dorothy S. Lund, *Nonvoting Shares and Efficient Corporate Governance*, 71 STAN. L. REV. 687, 701, 716-18 (2019).

smaller ones) toward governance structures that maximize accountability to shareholders is the most efficient result because large companies have different governance needs than small companies. In this Part, I marshal support for this conclusion. I first detail the differences between small and large companies and the reasons the latter group might benefit from a governance structure that promotes greater accountability to shareholders. I then discuss the implications that can be drawn from this analysis.

A. *Pro-Shareholder Governance Offers Fewer Benefits for Small Companies than Large Ones*

Recall that the Kastiel and Nili's evidence reveals that the largest firms in the marketplace are more likely to subscribe to "good governance" practices—those that promote accountability to shareholders and give them greater control and influence over the company's operations. Could this result be responsive to the unique governance needs of large public companies? There are a few reasons to think that small companies would reap fewer benefits from pro-shareholder governance structures than large ones. As the authors observe, smaller public companies have a much higher percentage of insider ownership compared to large companies.[72] Small public companies are also more likely to have a controlling shareholder that can control voting outcomes.[73] These differences are of critical importance. Because smaller firms are more likely to have large shareholders that are insiders, the problem of separated ownership and control is lessened. When large shareholders are insiders, they have access to firm-specific information and have a greater ability to influence corporate decision-making. Therefore, managerial agency costs—the costs that come from seeking to control the divergence of interests between management and shareholders—are less of a problem, which means there is of less a need to promote accountability to shareholders through the company's governance structure.

A second and related point is that a company with a controlling shareholder will not reap much benefit from a pro-shareholder governance structure. Regardless of whether boards are staggered, and whether shareholders can elect directors by a plurality or a simple majority or call a special meeting, the controlling shareholder will determine the outcome of the election. Again, given that small companies are much more likely to have a controlling shareholder, it is not surprising that small firms are also less likely to have governance structures with these features.

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72. Kastiel & Nili, *supra* note 5, at 814.

73. *Id.* at 14.

Moreover, small firms are subject to many market forces that operate as substitutes for investor activism. Small firms are more susceptible to being taken over than large firms—it is easier to buy a controlling stake in a small firm than a large firm—and this "market for corporate control" operates as a constraint on mismanagement.[74] Shareholders of smaller firms may hold shares that are less liquid, which prevents them from an easy exit.[75] These shareholders therefore have greater reason to monitor and intervene when problems appear on the horizon.[76] Small firms also have lower market shares than large firms and therefore face greater product-market competition, providing another check on managerial slack or self-dealing.[77]

In addition, hedge fund activism operates as a more potent constraint on small firms than large firms.[78] True, activist hedge funds are targeting large public firms with greater regularity than ever before. But these high-profile examples are the exception rather than the rule. Indeed, the majority of activist campaigns (65% in 2020) focus on companies with less than $1 billion in market capitalization, and most targets are well below that number.[79]

In other words, small firms are more routinely subject to hedge-fund activism than large firms, despite the fact that they are also more likely to have a relatively unfriendly governance structure and maybe even a controlling shareholder.[80] As Kastiel and Nili recognize, this observation squares with the hedge

74. For the original academic theorization of this dynamic, see Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 112-14 (1965); *see also* BRIAN CHEFFINS, THE PUBLIC COMPANY TRANSFORMED 79 (2018) (describing how the market for corporate control operated as a constraint on management during the 1980s takeover wave).

75. Kastiel & Nili, *supra* note 5, at 809.

76. ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 33 (1970) (describing how individuals with limited exit options are forced to use their voice).

77. For a discussion of how small and large firms compete with each other, see Ming-Jer Chen & Donald C. Hambrick, *Speed, Stealth, and Selective Attack: How Small Firms Differ from Large Firms in Competitive Behavior*, 38 ACAD. MGMT. J. 453 (1995).

78. The implication from the authors' discussion is that hedge fund activism at small companies is being underprovided, and that they are worthwhile targets and interventions that hedge funds are not undertaking. I am reminded of the economist's classic question about why someone would fail to pick up a $100 bill sitting on the ground.

79. *Review and Analysis of 2020 U.S. Shareholder Activism and Activist Settlement Agreements*, SULLIVAN & CROMWELL LLP 21 (Dec. 2, 2020), https://www.sullcrom.com/files/upload/sc-publication-review-analysis-2020-US-shareholder-activism.pdf [https://perma.cc/K9MY-BUE4].

80. Activism can occur at companies with controlling shareholders. *See* Kobi Kastiel, *Against All Odds: Hedge Fund Activism in Controlled Companies*, 2016 COLUM. BUS. L. REV. 60, 60-67 (2016) (providing examples of activists engaging with controlled companies and describing the channels used for such engagement).

fund activist's business model—it is very expensive (and risky) for a hedge fund to amass a large position capable of influencing management at a giant, mature public company.[81]

All in all, small public companies are subject to many market forces that check the prospect of management agency costs, making some of the governance arrangements that promote accountability to shareholders less important in that context. That is not to say that these market forces entirely check problems. Indeed, there are many examples of poorly run and poorly governed small companies. But poor performance does not necessarily mean that the company's governance is to blame. Ultimately, the link between corporate governance and operating performance is somewhat weak. Companies with "excellent" corporate governance—like General Electric—can underperform.[82] Companies with "bad" corporate governance—like Alphabet—can perform exceptionally well over time.[83] These examples support my reluctance to view governance as a magic

81. The authors contend that the prospect of increased media attention may motivate activists to target larger companies. Kastiel & Nili, *supra* note 5, at 817-18. Such attention, however, operates as a double-edged sword. Although hedge funds may be able to paint their interventions in a beneficial light, the media more generally refers to activist campaigns in disparaging terms. For a few modern examples, see Nell Mackenzie, *Bosses Are Wary of the Return of the Corporate Raider*, BBC NEWS (Jan. 8, 2020), https://www.bbc.com/news/business-50609165 [https://perma.cc/KL3Q-96J3]; Shin Jang-Sup, *How Hedge Fund Activists Prey on Companies*, EVONOMICS (Sept. 3, 2018), https://evonomics.com/hedge-fund-activists-prey-companies [https://perma.cc/2TTN-EUQD]; James Surowiecki, *When Shareholder Activism Goes Too Far*, NEW YORKER (Aug. 14, 2013), https://www.newyorker.com/business/currency/when-shareholder-activism-goes-too-far [https://perma.cc/6YRX-FXL6]; Robert L. Martin, *Activist Hedge Funds Aren't Good for Companies or Investors, So Why Do They Exist?*, HARV. BUS. REV. (Aug. 20, 2018), https://hbr.org/2018/08/activist-hedge-funds-arent-good-for-companies-or-investors-so-why-do-they-exist [https://perma.cc/DC67-NZ95]; Mariah Summers, *Employees Often End Up the Losers in Activist Investing Campaigns*, BUZZFEED NEWS (Apr. 21, 2014, 12:05 PM ET), https://www.buzzfeednews.com/article/mariahsummers/employees-often-end-up-the-losers-in-activist-investing-camp [https://perma.cc/4MAJ-65ST].

82. *Governance Principles*, GEN. ELEC. CO. (2021), https://www.ge.com/sites/default/files/Governance_Principles_Aug_2021.pdf [https://perma.cc/HBB6-BEGZ] (explaining that General Electric has a majority of independent directors, a unified board, and that directors are elected by a majority shareholder vote); Sarah Hansen, *The Rise and Fall of General Electric*, INVESTOPEDIA (Mar. 26, 2020), https://www.investopedia.com/insights/rise-and-fall-ge [https://perma.cc/5M5M-9LN2].

83. Alphabet has a dual-class structure—a hallmark of "bad governance"—that ensures that its two founders keep control of the company, leaving public shareholders to purchase nonvoting or low voting shares. Lund, *supra* note 27, at 694; *Alphabet Inc. (GOOGL)*, YAHOO! FIN., https://finance.yahoo.com/quote/GOOGL?p=GOOGL [https://perma.cc/M4H5-A8RD] (showing a rise in stock price from $55.00 per share to $2400.00 per share in approximately 17 years).

bullet for corporate performance.[84] In particular, there is no guarantee that a shift to "good" corporate governance will improve underperformance. And more to the point, a governance structure that promotes accountability to shareholders might offer greater benefits at large firms than small firms because large firms face less of a threat of a takeover or proxy contest and may be under less competitive pressure. Likewise, small firms are more likely to have controlling shareholders and a high percentage of insider owners, meaning that a pro-shareholder governance structure will not offer as much (or any) benefit.

B. Implications

The previous Section suggests that the governance gap between large and small companies is a natural byproduct of differences between these companies, rather than the product of "systemic deficiencies in the channels of governance-making at smaller companies."[85] This Section considers the implications that can be drawn from that analysis. In particular, it suggests that Kastiel and Nili's proposed reforms aiming to ease the prospect of shareholder proposals and "good governance" reforms at small companies could be counterproductive.

For companies with controlling shareholders, easing the prospect of shareholder activism will not make much of a difference in how those companies are run.[86] No matter the governance structure, a company with a controlling shareholder is not an attractive target for a proxy contest,[87] and the board of directors will be unlikely to implement a precatory shareholder proposal or policy that is not embraced by the controlling shareholder. The same is true for companies with a substantial fraction of insider shareholders—those shareholders will have an outsized influence on the future direction of the company, as well as the success of any activist that challenges management's plans. As such, proposals to change the governance structure of these companies and increase the incidence

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84. Indeed, one of the authors has a paper that casts doubt on empirical findings showing a link between "good governance" and firm performance. *See* Jens Frankenreiter, Cathy Hwang, Yaron Nili & Eric L. Talley, *Cleaning Corporate Governance*, 170 U. PA. L. REV. 1 (forthcoming 2021).

85. Kastiel & Nili, *supra* note 5, at 856.

86. Indeed, I wonder whether the presence of the controlling shareholder somewhat explains the difference in governance between large and small companies. When the authors remove the controlled small companies from the samples, are the differences as stark?

87. Activist shareholders rarely take a controlling stake in a targeted company, and instead rely on building investor coalitions to succeed. Marcel Kahan & Edward B. Rock, *Hedge Funds in Corporate Governance and Corporate Control*, 155 U. PA. L. REV. 1021 (2007). As a result, a company with a controlling shareholder is unlikely to be an appealing target, unless the controlling shareholder is aligned with the activist.

of shareholder proposals would not be particularly useful and could even be detrimental if they increased voting burdens on investors and companies.

For companies that lack controlling shareholders, a governance structure that makes it easier for shareholders to wage proxy contests or bring shareholder proposals could provide easier opportunities for investor activism. The benefit, of course, is that this potential for activism would reduce managerial agency costs by making management hyperattuned to shareholder interests. However, such a structure may have its own costs.[88] For example, John G. Matsusaka and Oguzhan Ozbas theorize that giving shareholders the right to propose corporate changes can push management to be unduly deferential to activist shareholders whenever there is uncertainty about the outcomes of votes.[89] If the activist has extreme preferences not shared by other shareholders, these proposal rights could reduce firm value.[90] Other studies have demonstrated a weak link between the ability to bring shareholder-governance proposals and firm value.[91] In particular, Jonathan K. Karpoff, Paul H. Malatesta, and Ralph A. Walkling find that governance proposals brought by shareholders rarely improve corporate performance – even those that a majority of shareholders approve.[92]

Therefore, for small companies, the costs of a governance structure that makes management especially vulnerable to shareholder influence may have costs that exceed its benefits. As mentioned, small companies are already particularly susceptible to outside pressure – investors can more easily take them over or wage a proxy contest. Removing further impediments to shareholder influence may make management overly attuned to shareholder activists, who may not always offer good ideas. As Kastiel and Nili recognize, the activists that target small companies may be less reputable, raising questions about whether their

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88. *See generally* Zohar Goshen & Richard Squire, *Principal Costs: A New Theory for Corporate Law and Governance*, 117 COLUM. L. REV. 767 (2017) (demonstrating that an optimal governance structure would take into account principal costs, in addition to agency costs); Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255 (2008) (proposing that the rules of fiduciary duty should apply to activist shareholders to curb any potential greed and self-interested action).

89. John G. Matsusaka & Oguzhan Ozbas, *A Theory of Shareholder Approval and Proposal Rights*, 33 J.L., ECON., & ORG. 377, 377-81 (2017).

90. *Id.* at 379.

91. Jonathan M. Karpoff, Paul H. Malatesta & Ralph A. Walkling, *Corporate Governance and Shareholder Initiatives: Empirical Evidence*, 42 J. FIN. ECON. 365, 365-66 (1996) (showing that firms that attract shareholder proposals usually perform poorly before the proposals, and yet, the proposals do not improve the firm's subsequent performance); Artem M. Joukov & Samantha M. Caspar, *The Alarming Legality of Security Manipulation Through Shareholder Proposals*, 44 SEATTLE U. L. REV. (forthcoming 2021) (demonstrating that a shareholder proponent could submit a proposal calculated to lower firm value while holding a sizeable short position).

92. Karpoff et al., *supra* note 91.

activism necessarily benefits investors.[93] And even neutral or helpful proposals have costs—for example, gadfly shareholder proposals cost companies an average of $87,000 per proposal—and small companies may find such costs a greater drag on their performance than larger companies.[94]

For these reasons, making it easier for investors to pressure small public companies could be harmful in aggregate. This observation would caution against implementing any of the policy recommendations that the authors suggest.

III. CONCLUSION

In highlighting an often-overlooked facet of the modern corporate governance landscape—the difference between large and small public company governance and the dynamics that create it—Kastiel and Nili's article makes a substantial contribution to the literature, and the implications of their analysis deserve further study. It may be, as the authors contend, that the governance gap requires a remedy; however, the form of the remedy remains unclear. Are the market forces that shape governance at the largest firms or those that affect the smaller firms the source of the problem? The homogeneity in governance experienced at the top of the market suggests that private ordering may be limited there, rather than at the bottom. If so, then the suboptimality may be coming from the change agents that the authors embrace as the solutions to the problem. Another plausible interpretation is that the corporate governance gap is efficient and is the result of differences between large and small firms and in particular, their varying potential for managerial agency costs. If this is the case, the authors' proposed fixes would be valueless and possibly harmful. The only thing that can be said for certain at this early stage, however, is that the corporate governance gap will motivate theoretical and empirical research for years to come.

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93. *See also* C.N.V. Krishnan, Frank Partnoy & Randall S. Thomas, *The Second Wave of Hedge Fund Activism: The Importance of Reputation, Clout, and Expertise*, 40 J. CORP. FIN. 296, 296-98 (2016) (demonstrating an association between interventions by less-reputable activists and lower stock returns).

94. Kobi Kastiel & Yaron Nili, *The Giant Shadow of Corporate Gadflies*, 94 S. CAL. L. REV. 569, 617 (2021) (citing Stephen Foley & Jennifer Bissell, *Corporate Governance: The Resurgent Activist*, FIN. TIMES (June 22, 2014, 6:45 PM), http://ig-legacy.ft.com/content/e13ce5fa-f6cf-11e3-b271-00144feabdc0#slide3 [https://perma.cc/K943-2JKK]).