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SHOULD LABOR ABANDON ITS CAPITAL? A REPLY TO CRITICS

David H. Webber*

Several recent works have sharply criticized public pension funds and labor union funds ("labor's capital"). These critiques come from both the left and right. Leftists criticize labor's capital for undermining worker interests by funding financialization and the growth of Wall Street. Laissez-faire conservatives argue that pension underfunding threatens taxpayers. The left calls for pensions to be replaced by a larger social security system. The libertarian right calls for them to be smashed and scattered into individually-managed 401(k)s.

I review this recent work, some of which is aimed at my book, The Rise of the Working-Class Shareholder: Labor's Last Best Weapon*, and some of which is aimed at labor's capital more broadly. I argue that while critics of labor's capital make some reasonable points, none justify a retreat by labor from implementing capital strategies. None justify either wholesale abandonment of the current pension regime, or the smashing and scattering of pensions into individually managed-401(k)s. Leftist structuralist critiques underestimate new opportunities to advance labor's capital created by the ideological retreat of shareholder primacy and a newly-emboldened stakeholderism. They also overlook serious but curable errors by unions in permitting their capital to be used against them. They tend to critique labor's capital in a vacuum, making heroic assumptions about offstage policy preferences like a comprehensive new social security system or macrofinancial reform, though labor obtained neither when it was more powerful than it is today. Moreover, social security systems, important as they are, do not give workers voice in markets the way pensions do. At the other end of the spectrum, laissez-faire rightist critiques overstate the underfunding threat, which has subsided as markets have recovered from the Great Recession of 2008 and as forty-nine states have revised their funding formulas. They also exaggerate the risks to taxpayers of underfunding and fail to articulate any plausible reason why taxpayers shouldn't be on the hook to pay-in-full for services rendered by public servants.*

Properly organizing its capital to advance worker interests remains a critically important and attainable goal for labor in the 21st century.

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Introduction

Can labor's capital be used to advance labor's interests? Or is investment of worker retirement funds inherently a form of self-sabotage? Scholars have debated these questions at least since public pension and labor union funds began making substantial stock market investments in the 1970s and '80s. Some have argued that investment of worker retirement funds in the stock market would lead to "pension fund socialism" through the slow accumulation of capital assets via worker retirement funds.[1] Others saw labor's capital strategies as a way for workers to retain voice as unions crumbled and as political and economic power in the U.S shifted from the northeast to the southwest.[2] A third camp has argued that labor's capital is a Trojan-horse by which capital has infiltrated and undermined labor, turning it into just another investor, making it finance its own demise.[3] Finally, a

[1] Peter F. Drucker, The Unseen Revolution: How Pension Fund Socialism Came to America (1976).

[2] Jeremy Rifkin & Randy Barber, The North Will Rise Again: Pensions, Politics and Power in the 1980's (1978).

[3] *See* Benjamin Braun, *Fueling Financialization: The Economic Consequences of Funded Pensions*, 31 New Lab. F. 70, 72 (2022); Doug Henwood & Liza Featherstone, *Wall Street Isn't the Answer to the Pension Crisis. Expanding Social Security Is*, In These Times (Jan. 22, 2018), https://inthesetimes.com/features/pension_crisis_wall_street_social_security.html; Bob Farkas, *The Mirage of Pension Fund Activism*, Jacobin Mag. (Aug. 2018), https://www.jacobinmag.com/2018/04/pension-fund-activism-working-class-shareholder-review;

fourth camp, the laissez-faire right, has argued that pensions are unaffordable, and their costs will inevitably fall on taxpayers.[4] Therefore, collectively-managed defined-benefit pension plans should be converted into individually-managed 401(k)s.[5]

In *The Rise of the Working-Class Shareholder: Labor's Last Best Weapon* ("*Working-Class Shareholder*"), I placed myself firmly in the second camp.[6] I argued that labor's capital was an underutilized tool in advancing the interests of labor. I pointed to numerous successful uses of it, including: (1) the transformation of corporate governance via public pension and labor fund shareholder proposals, specifically, the spread of proxy access, majority voting, and the declassification of corporate boards; (2) the pushback against hedge funds trying to convert pensions into 401(k)s, in-

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Gary Rivlin, *A Giant Pile of Money: How Wall Street Drove Public Pensions into Crisis and Pocketed Billions in Fees*, THE INTERCEPT, Oct. 20, 2018, https://theintercept.com/2018/10/20/public-pensions-crisis-wall-street-fees/ (discussing the loose state laws and policies around public pension investments and the investigations Edward Seidle conducted into how legal investments by pension managers in hedge funds and alternatives have led to profit for Wall Street and loss for pension beneficiaries).

[4] *See Unaccountable and Unaffordable: Unfunded Public Pension Liabilities Total Nearly $5 Trillion*, AM. LEGIS. EXCH. COUNS. (2019), https://alec.org/wp-content/uploads/2020/06/2019-Unaffordable-FINAL.pdf ("Paying pension obligations by issuing bonds only kicks the can down the road to future taxpayers, as they will ultimately be responsible for solving the pension funding crisis."). Throughout this piece, I distinguish the laissez-faire right and other parts of the conservative movement, some of which have quite recently become more pro-labor.

[5] *See, e.g.*, *Americans for Prosperity Urges State to Fix Pension Crisis*, AMS. FOR PROSPERITY (Jun. 11, 2015), https://americansforprosperity.org/americans-for-prosperity-urges-state-to-fix-pension-crisis/; JOSH B. MCGEE, LAURA & JOHN ARNOLD FOUND., CREATING A NEW PUBLIC PENSION SYSTEM (2015), http://www.arnoldfoundation.org/wp-content/uploads/2015/07/Creating-a-New-Public-Pension-System.pdf; JOSH MCGEE & PAULINA S. DIAZ AGUIRRE, LAURA & JOHN ARNOLD FOUND., A BOOMTOWN AT RISK: AUSTIN'S MOUNTING PUBLIC PENSION DEBT (2016), http://www.arnoldfoundation.org/wp-content/uploads/LJAF_Austin PensionBrief_FINAL.pdf. Rich Berger, *From Defined-benefit to Defined Contribution: A Systematic Approach to Transitioning Retirement Plans,* SOC'Y FOR HUM. RES. MGMT. (Jan 5. 2012), https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/transitioning-plans.aspx; Shawn Mulcahy, *Overhaul to Texas state government employees' retirement accounts advanced out of Legislature*, TEX. TRIB. (May 31, 2021), https://www.texastribune.org/2021/05/26/texas-government-employee-retirement-system/; *About SB 321*, TEX. PUB. EMP. ASS'N., https://www.tpea.org/index.php/advocacy/legislation-tracker/about-sb-321; *see also* David Webber, *Reforming Pensions While Retaining Shareholder Voice*, 99 B.U. L. REV. 1001, 1019 (2019).

[6] DAVID WEBBER, THE RISE OF THE WORKING-CLASS SHAREHOLDER: LABOR'S LAST BEST WEAPON (2018). Numerous books have been written on the subject. For books alone, in addition to PETER DRUCKER, THE UNSEEN REVOLUTION: HOW PENSION FUND SOCIALISM CAME TO AMERICA (1976) and JEREMY RIFKIN AND RANDY BARBER, THE NORTH WILL RISE AGAIN: PENSIONS, POLITICS AND POWER IN THE 1980'S (1978), see also TERESA GHILARDUCCI, LABOR'S CAPITAL: THE ECONOMICS AND POLITICS OF PRIVATE PENSIONS (1992); ARCHON FONG, TESSA HEBB & JOEL ROGERS, WORKING CAPITAL: THE POWER OF LABOR'S PENSIONS (2001); MICHAEL A. MCCARTHY, DISMANTLING SOLIDARITY (2017); KEVIN SKERRETT, JOHANNA WESTSTAR, SIMON ARCHER AND CHRIS ROBERTS, THE CONTRADICTIONS OF PENSION FUND CAPITALISM (2017); THOMAS CROFT & ANNIE MALHOTRA, THE RESPONSIBLE INVESTOR HANDBOOK: MOBILIZING WORKERS' CAPITAL FOR A SUSTAINABLE WORLD (2016); and SANFORD M. JACOBY, LABOR IN THE AGE OF FINANCE: PENSIONS, POLITICS, AND CORPORATIONS FROM DEINDUSTRIALIZATION TO DODD-FRANK (2021).

cluding CalPERS's ultimate divestment from hedge funds; (3) the defense of workers in the Detroit bankruptcy; (4) the successful lobbying for pro-worker provisions in Dodd-Frank and for increased regulation of private equity funds at both the federal and state levels; (5) the filing of almost all successful securities fraud and deal litigation; (6) the adoption of responsible contractor policies to create union jobs (a trend that has accelerated since publication); and (7) the beginnings of resistance to the privatization of public services.[7] Since publication, labor's capital has been a leading filer of both climate change and racial equity audit proposals, and a leading proponent of human capital management and climate change disclosure.[8]

I also argued that these efforts illustrate another critically important point. In an era of powerful global capital markets, pensions offer workers a voice where it counts—inside the market—where they can pursue workers' interests in jobs, working conditions, and retirement savings alongside broader ESG interests. Advocates of regulatory and litigation solutions to traditional labor problems often argue that capital strategies substitute for purportedly more effective state-centered strategies. But it is not at all clear that one must choose between capital and regulatory strategies,[9] and even if one does, capital strategies are not necessarily the lesser option. I also pointed to two significant threats to labor's capital, mostly coming from the conservative-libertarian end of the political spectrum: excessively narrow interpretations of fiduciary duty, and pressure to "smash and scatter" collectively managed defined benefit pension plans into individually managed 401(k)s, which would silence its shareholder voice.

Several recent works taking aim at *Working-Class Shareholder*, or at labor's capital more generally, argue from a more traditional leftist/statist perspective that labor's capital strategies have undermined workers by fueling the growth of Wall Street and feeding the forces of financialization.[10] In this piece, I aim to respond to these critics, arguing that none of their claims undermine the view that labor's capital strategies remain vitally important for advancing the interests of workers in the 21st century. To begin, I want to

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[7] *See generally* WEBBER, *supra* note 6.

[8] *See Fortune 250 Shareholder Proposals*, PROXY MONITOR, https://www.proxymonitor.org/ (Last accessed Feb. 16, 2022) (reporting that between 2018 and 2022, labor's capital has filed 59 out of 437 shareholder proposals related to social policy, climate change, and racial justice); *see also* Ron S. Berenblat & Elizabeth R. Gonzalez-Sussman, *Racial Equity Audits: A New ESG Initiative*, HARVARD L. SCH. F. ON CORP. GOVERNANCE (Oct. 30, 2021), https://corpgov.law.harvard.edu/2021/10/30/racial-equity-audits-a-new-esg-initiative/ (arguing that it is becoming increasingly commonplace for serious filers' ESG proxies to be withdrawn where the corporation believes negotiation is the more prudent avenue, so the fifty-nine shareholder proposals by labor organizations is almost certainly understated).

[9] *See, e.g*, Aneil Kovvali, *Stark Choices for Corporate Reform*, COLUM. L. REV. (forthcoming) (manuscript at 1) ("There is no clear constraint that forces a choice between internal and external [corporate] reforms, and there are good reasons to believe that an internal strategy is more likely to generate valuable change.").

[10] *See* Braun, *supra* note 3; Featherstone & Henwood, *supra* note 3; Farkas, *supra* note 3.

address a persistent flaw in the critical literature, specifically, the increasingly misleading use of the term "labor's capital."

I. Defining Labor's Capital

One persistent source of confusion in the scholarship on labor's capital is how to define the term. Some scholars define it to include all or nearly all invested retirement assets.[11] This might have been appropriate when most U.S. pension assets were held in defined-benefit pension plans with at least some worker representatives on their boards. But that is no longer the case. The dominant retirement vehicle in the United States is the defined contribution 401(k), which strips workers of voice over their retirement funds, as I will argue below. To go on lumping together mutual funds, 401(k)s, corporate pensions, Individual Retirement Accounts, public pension funds, and labor union funds under the term "labor's capital" is misleading, as these vehicles are not fungible for analytical purposes. I use "labor's capital" to mean public pension and labor union funds alone. This is best for both semantic and what I'll call governance reasons, with the governance argument being particularly important.

The reason why a clear definition matters is not to score some pedantic scholarly point. It's because the imprecise use of the term has distorted much criticism of labor's capital. When scholars, particularly empiricists, lump together these diverse institutions, call them labor's capital, and look for effects, they risk obscuring a fundamental issue. At the heart of the question of whether labor's capital can be used to advance labor is a deeper question. Can democratically-structured retirement funds operating inside the market advance the interests of workers? Or is the market so rigged against workers that it makes no difference how one's retirement is invested? Do workers fare better when their retirements are invested via a pooled, collectively-managed pension with worker board representation? Or are their interests served just as well (or poorly) in "authoritarian" 401(k)s invested via a mutual fund? In my view, as a matter of both theory and existing empirical evidence, there is good reason to believe that properly-structured funds can advance the interest of workers. Here, I'll challenge some recent work that reaches the opposite conclusion.

In my view, if you start by calling all retirement assets "labor's capital" and then find, for example, that they do nothing for workers, you have unintentionally obscured analysis of the core question. Virtually no one has claimed that the 401(k) is structured to advance the interests of workers. Quite the contrary, the 401(k) stifles voice over how worker capital is invested. To call the vehicle that by design stifles worker voice "labor's capi-

[11] *See, e.g.*, Braun, *supra* note 3. Teresa Ghilarducci, Labor's Capital: The Economics and Politics of Private Pensions (1992). Jacoby, *supra* note 6 (confining his analysis to true labor's capital, public pension funds and labor union funds).

tal," and then to point out that it doesn't do much for workers is a category error, a restatement of the obvious, a self-fulfilling prophecy. Those of us who advocate for labor's capital as a tool for advancing workers do so for public pensions and union funds alone, and for any funds that might be restructured to look more like these in the future, that is, to be structured more democratically.[12]

A. *The Semantic Case for Narrowly Defining Labor's Capital*

Semantics bore people so I'll get to the point. The semantic case for limiting "labor's capital" to labor union and public pension funds is straightforward. Labor union funds invest the retirement savings of private-sector unionized workers.[13] Public pensions invest on behalf of at least a significant cohort of unionized workers.[14] True, most public employees are not unionized, but they are disproportionately so. In 2021, the union membership rate for public-sector workers was 37.6%, while the union membership rate for the private sector was 7%. Often, the very largest and most active pension plans, like those of New York City and California, are also the most highly unionized.[15] Unions often play a substantial role in selecting worker representatives who serve on public pension boards.[16] To the extent that we often apply the term "labor" not to any employee but to unionized workers, labor's capital best fits public pensions and labor union funds.

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[12] *See generally* Ewan McGaughey, *Democracy in America at Work: The History of Labor's Vote in Corporate Governance*, 42 Seattle U. L. Rev. 697 (2019) (arguing that labor's involvement in corporate governance matters is historically prevalent and can be rebuilt at the state-level using contemporary policy proposals).

[13] *See* Webber, *supra* note 6, at 8 ("union fund[s]. . .invest the retirement savings of private sector workers like carpenters, electricians, and construction and hotel workers."). *See generally* Jacob Silverman, *How Labor Unions Work*, HowStuffWorks, https://money.howstuffworks.com/labor-union.htm (last accessed Feb. 17, 2022).

[14] *See* Webber, *supra* note 6, at 8 (public pension funds, "invest the retirement savings of 30 million working and retired public servants like school teachers, police officers, firefighters, nurses, emergency room medical technicians, sanitation workers, and more."). *See generally* Eric Whiteside, *How do Pension Funds Work?*, Investopedia (Aug. 29, 2021), https://www.investopedia.com/articles/investing-strategy/090916/how-do-pension-funds-work.asp.

[15] *See Top 100 Largest Public Pension Rankings by Total Assets*, Sovereign Wealth Fund Inst. (2022), https://www.swfinstitute.org/fund-rankings/public-pension (ranking CalPERS 11th globally, CalSTRS 14th, New York State 16th, and New York City 17th.); s*ee also* Ellen Dewitt, *The Most Unionized States*, Stacker (Sept. 15, 2021), https://stacker.com/stories/1072/most-unionized-states ("New York stands with California as the only two states left with seven-figure union membership rolls.").

[16] *See Economic News Release: Union Members Summary*, U.S. Bureau of Lab. Stat. (Jan. 20, 2022), https://www.bls.gov/news.release/union2.nr0.htm (reporting union affiliation of employed wage and salary workers by occupation and industry shows the percentage breakdown between private and public sector employees in Table 3); *see also* Sarah F. Anzia & Terry M. Moe, *Interest Groups on the Inside: The Governance of Public Pension Funds*, 17 Persps. on Pol., 1059, 1068–69 (2019) (discussing union influence on public pension board members).

B. The Governance Case for Narrowly Defining Labor's Capital

More importantly, almost all public pension funds—even those with low unionization rates—and all labor union funds have worker representatives on their boards.[17] In my view, this is the bare bones minimum for any institutional investor that could plausibly be described as "labor's capital." It must have workers on its board of trustees. Any institution that flunks this test should be called something else. True labor's capital gives formal governance voice to workers. Public pension funds and labor union funds fit the bill.[18] Public pension fund board composition is determined (and varies) by state law, but almost all have participant/beneficiary board members and sometimes even majority participant/beneficiary control.[19] The balance of these boards is comprised of elected officials or their appointees/designees.[20] Private sector labor union funds are governed by the Taft-Hartley Act and are comprised 50/50 of worker and employer representatives.[21] In an era of serious debate about adding at least one worker representative to corporate boards, these participant/beneficiary pension trustees remain the only worker voice in capital markets. In this key respect, both public pensions and labor union funds stand in sharp contrast to mutual fund and corporate pension structures, which do not have participant or beneficiary board representatives, and do not have elected official representatives. These look more like traditional corporate boards. Thus, the governance of labor union funds and public pension funds differs sharply from mutual funds and corporate pension funds. These governance distinctions create distinct fund incentives resulting in distinct real-world behaviors, giving voice to different constituencies.[22]

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[17] *E.g.,* Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. § 186(c).

[18] *See Governance,* NAT'L ASS'N OF STATE RET. ADM'RS, https://www.nasra.org/governance (last visited Jan. 10, 2022) ("Most public retirement system boards include participant representatives, most often trustees who are working employees and members of the retirement system.").

[19] *See* Jean-Pierre Aubry & Caroline V. Crawford, *Does Public Pension Board Composition Impact Returns?*, CTR. FOR RET. RSCH. AT BOSTON COLL.: STATE AND LOCAL PENSION PLANS ISSUE IN BRIEF, no. 67, 2019, at 1, 3 ("As of 2018, on average, over half of board members were plan participants, 15 percent were ex-officio members, and 31 percent were members of the general public."); NAT'L ASS'N OF STATE RET. ADM'RS, *supra* note 18 ("The composition of public retirement system boards varies widely in terms of constituent groups that are represented; whether members are appointed, elected, or serve ex-officio; and what knowledge and experience, if any, are required."); *see also* Mark Funkhouser, *The Real Story of Public Pensions*, GOVERNING (Nov. 19, 2012), http://www.governing.com/gov-institute/on-leadership/col-alicia-munnell-book-public -pensions.html (discussing the role public-employee unions have played in lobbying for unsustainable benefits).

[20] *See* NAT'L ASS'N OF STATE RET. ADM'RS, *supra* note 18.

[21] *Introduction to Multiemployer Plans*, PENSION BENEFIT GUAR. CORP. (Feb. 17, 2022), https://www.pbgc.gov/prac/multiemployer/introduction-to-multiemployer-plans.

[22] *See* Larry Liu & Adam Goldstein, *Labor's Capital and Worker Well-Being: Do US Pension Funds Benefit Labor Interests?*, 100 SOC. FORCES 1080–90 (2021) (excluding single-employer (usually corporate) pension plans from their analysis of labor's capital activism and

Another difference between existing labor's capital and other investment institutions: almost all began as defined-benefit pension funds and most remain substantially so.[23] They are, as an asset class, the last substantial grouping of defined-benefit pension plans in America.[24] Defined-benefit pension plans guarantee workers fixed payments in retirement, placing the burden of investment returns on the plan sponsor, in contrast to defined contribution plans, which provide tax-favored treatment for individual retirement savings, leaving individuals with whatever they have in their accounts at retirement.[25] This, too, shapes plan incentives, and both the legal and political environment they operate in. Importantly, these plans are also pooled, collectively invested assets, as opposed to individually managed 401(k)s. I would therefore argue that even defined contribution funds that are pooled and overseen by a board with worker representatives could also fit the bill as "labor's capital."[26]

I won't fully review the literature here, but the presence of both worker and politician board trustees is a likely explanation for why true labor's capital tends to be so much more active than mutual funds and corporate pensions, not to mention other investors.[27] Worker or union representatives on trustee boards are themselves participants in the fund and therefore have skin in the game.[28] They are accountable to their co-workers. They have incentives to demonstrate their effectiveness as fund stewards.[29] The same is true for the elected officials on public boards, who respond to a much broader

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noting that "single-employer defined benefit plans are run by firms' management and, hence, are not considered labor shareholders for the purposes of this article.").

[23] *See* Pension Benefit Guar. Corp., A Predictable, Secure Pension for Life (2000) (on file with author) ("Almost all of the early pension plans were traditional pension plans—known as defined-benefit plans—that paid workers a specific monthly benefit at retirement.").

[24] *See, e.g.*, Barbara A. Butrica et al., *The Disappearing Defined-benefit Pension and Its Potential Impact on the Retirement Incomes of Baby Boomers*, Soc. Sec. Bull. (2009), https://www.ssa.gov/policy/docs/ssb/v69n3/v69n3p1.html.

[25] *See, e.g.*, Abbye Atkinson, *Commodifying Marginalization*, 71 Duke L.J. 773, 804 (2022) (describing shift from defined-benefit to defined contribution plans as shifting risks from employers to employees); *see also* Natascha van der Zwan, *Financialisation and the Pension System: Lessons from the United States and the Netherlands*, 15 J. Mod. Eur. Hist. 554, 557 (2017).

[26] *See generally* David Webber, *Reforming Pensions While Retaining Shareholder Voice*, 99 B.U.L. Rev. 1001 (2019).

[27] Roberta Romano, *Public Pension Fund Activism in Corporate Governance Reconsidered*, 93 Colum. L. Rev. 795, 822 (1993) (highlighting that public fund boards may be "more active in corporate governance than private funds" because political figures on boards can enhance their reputations "by populist crusading against corporate management"); *see* David Hess, *Protecting and Politicizing Public Pension Fund Assets: Empirical Evidence on the Effects of Governance Structures and Practices*, 39 U.C. Davis L. Rev. 187, 196 (2005) (showing that participant board member correlated with better returns).

[28] *See* Nat'l Ass'n of State Ret. Adm'rs, *supra* note 18 ("Most public retirement system boards include participant representatives, most often trustees who are working employees and members of the retirement system.").

[29] *See* Hess, *supra* note 27 (showing that participant board member correlated with better returns); *see also* David H. Webber, *Is Pay-to-Play Driving Public Pension Fund Activism in Securities Class Actions?*, 90 B.U. L. Rev. 2031, 2069 (2010) (finding that participant trustees were more likely to litigate securities fraud cases).

constituency—voters—than do worker trustees, though workers are voters, too, and public employee unions may play a large electoral role in some states and cities.[30] Elected officials also have strong incentives to demonstrate their effective stewardship of the funds and to publicize that stewardship.[31] These trustees are governed by fiduciary duties, and as they often oversee defined-benefit pension plans, they can be at least politically responsible for shortfalls.[32] And with roughly $4.5 trillion in assets in public pension funds their market sway is substantial.[33]

True labor's capital also lacks the conflicts of interest that tend to defang mutual fund and corporate pension fund shareholder activism. For example, true labor's capital isn't simultaneously trying to win 401(k) business from its investees, which is one frequently-proffered explanation for the comparative passivity of mutual funds.[34] Another is that mutual funds compete against each other and therefore face the free-rider problem when expending resources on activism.[35] Public pensions do not compete against each other. An unhappy CalPERS member can't shift her retirement funds to CalSTRS without changing careers. Public pensions are therefore relatively indifferent to free riders. These distinctions manifest in differing real world behaviors.

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[30] *See* Hess, *supra* note 27 (discussing how a former trustee of the New York pension fund publicized her activism while serving the fund to bolster her campaign for public office).

[31] Sarah F. Anzia & Terry M. Moe, *Polarization and Policy: The Politics of Public-Sector Pensions*, 42 LEGIS. STUD. Q. 33, 36 (2016) ("As union allies, Democrats had incentives to take the lead in pushing for generous pensions. But Republicans had reason to go along, as there were no interest groups to reward them for being opposed. The incentives for bipartisanship were reinforced, moreover, by the myopic political calculations that pensions induce—another example, as this approach emphasizes, of how the specifics of an issue determine its politics.").

[32] INTERNAL REVENUE SERV., RETIREMENT PLAN FIDUCIARY RESPONSIBILITIES (2021), *https://www.irs.gov/retirement-plans/retirement-plan-fiduciary-responsibilities*. *See also* van der Zwan, *supra* note 25, at 576 ("Complicating matters even further is the fact that pension funds are managed by fiduciaries— oftentimes a board of trustees—who invest the assets on behalf of the beneficiaries. While fiduciaries are bound by their legal duty to invest the assets prudently, it is not always clear what exactly is meant by prudent investment. Should plan assets be invested to realize a maximum return or may other considerations also be taken into account, such as social or environmental concerns?").

[33] *National Data*, PUB. PLANS DATA, https://publicplansdata.org/quick-facts/national/ (last visited Feb. 26, 2022).

[34] David H. Webber, *Private Policing of Mergers and Acquisitions: An Empirical Assessment of Institutional Lead Plaintiffs in Transactional Class and Derivative Actions*, 38 DEL. J. CORP. L. 1, 37 (2014).

[35] *Id.*

For example, mutual funds rarely file shareholder proposals,[36] and are more inclined to vote against them.[37] The world's largest asset manager, BlackRock, has never filed a proposal.[38] In contrast, public pension funds and labor union funds have filed 1,184 shareholder proposals in the past fifteen years, accounting for 13.8% of the total.[39] They have also successfully used their power as clients to induce otherwise passive investment managers to vote for those proposals, even if not to file them themselves. Using such proposals, labor's capital institutions transformed corporate governance in the 2010s, filing almost all the successful proxy access, majority voting, and board declassification proposals.[40] Similarly, mutual funds almost never file securities fraud suits, whereas public pension funds and labor union funds tend to account for about half of all lead plaintiffs in securities class actions.[41]

In *Working-Class Shareholder*, in an op-ed in the *New York Times*, and elsewhere, I have argued that these governance differences are at the core of the fight to control labor's capital.[42] I argued that a pension fund is like a union and a 401(k) is like right to work.[43] Workers have board representation and collective voice in a pension, much like they have in a union, but are powerless, atomized individuals in a 401(k), just like in a right-to-work state. Investor passivity is inherent in the structure of 401(k)s. This is not a bug but a feature of their design, and it is, I argued then and now, one of the main reasons why some critics, focusing on the pension underfunding argu-

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[36] Interfaith Ctr. On Corp. Responsibility, 2017 Proxy Resolutions and Voting Guide (2017) (on file with author) ("While investors do not own stock in privately held asset management firms like Vanguard, they are participants in their mutual funds, and thus have a definite "stake" in what they invest in and how they vote their proxies. While not used frequently, clients can file resolutions with the mutual funds in which they invest.").

[37] Angela Morgan et al., *Mutual Funds as Monitors: Evidence From Mutual Fund Voting* 17 J. Corp. Fin. 914, 915 (2011) ("We find that [mutual] funds, on average, are likely to vote against shareholder proposals.").

[38] Barbara Novick, Michelle Edkins & Tom Clark, *The Investment Stewardship Ecosystem*, Harvard L. Sch. F. on Corp. Governance (July 24, 2018), https://corpgov.law.harvard.edu/2018/07/24/the-investment-stewardship-ecosystem/.

[39] *See Fortune 250 Shareholder Proposals*, Proxy Monitor, https://www.proxymonitor.org/ (Last accessed Feb. 3, 2022) (follow "Advanced Search" hyperlink, set "Years Between" to 2006 to 2021, note the total results (8,552), then sort "Proponent Types" by "Labor," note the new results (1,184), and divide 1,184 by 8,552).

[40] *See* Kosmas Papadopoulos & Rodolfo Araujo, *Top 10 ESG Trends for the New Decade*, Harvard L. Sch. F. on Corp. Governance (Mar. 2, 2020), https://corpgov.law.harvard.edu/2020/03/02/top-10-esg-trends-for-the-new-decade/ ("At the start of the 2010s, market participants embraced corporate governance reform, focusing on restoring trust in the capital markets following the aftermath of the 2008 financial crisis.").

[41] *See David Abrukin & Douglas Bloom, A rising tide or a rogue wave? 2016 Securities litigation study,* PricewaterhouseCoopers (Apr. 2017), https://www.pwc.com/us/en/forensic-services/assets/313021-2017-securities-litigation-2017-v9.pdf (reporting that between 2012 and 2016, the shares of securities class actions with pension funds as lead plaintiff were as follows: 2012 (70%), 2013 (81.1%), 2014 (71.4%), 2015 (82%), 2016 (53.3%)).

[42] David H. Webber, *The Real Reason the Investor Class Hates Pensions*, N.Y. Times (Mar. 5, 2018), https://www.nytimes.com/2018/03/05/opinion/investor-class-pensions.html.

[43] *Id.*

ment, wants to see pensions "smash[ed] and scatter[ed]" into individually managed 401(k)s.[44] It's at least in part because doing so will silence worker shareholder voice.

The definitional question of what counts as labor's capital is muddled by the fact that most retirement funds once looked the way today's public pensions and labor funds do. As a further complication, public pensions and labor funds may invest through mutual funds and even alternative assets like hedge funds and private equity funds.[45] In some states, counties, and municipalities, at least a portion of pension assets have been shifted into 401(k)s.[46] In others, the pensions may retain a defined-benefit structure with some assets invested through or managed by mutual funds.[47] This may lead some to lump all such assets together as "labor's capital." But to my mind, that broader definition still obscures crucial differences, both actual and potential, as I will argue below. And that matters, particularly in assessing empirical studies of labor's capital.

I make this definitional point at the outset for two reasons. First, scholars should reconsider the appropriateness of lumping all retirement funds together without regard to their democratic nature, without regard to whether they give workers voice. To me, calling a 401(k) "labor's capital" is the analytical equivalent of calling a deliberately-disempowered worker council a "union" and then claiming unions don't help workers. It's important for scholars to directly research whether democratizing financial institutions can

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[44] *Id.* (describing efforts to smash and scatter defined-benefit pensions into 401(k)s). The pro-401(k) position is mostly associated with libertarian conservatives, but there are emerging pro-union voices in more traditional conservative circles. *See, e.g.*, *Sohrab Amari, Republicans Should Support the Amazon Labor Union,* THE AM. CONSERVATIVE (Oct. 26, 2021), https://www.theamericanconservative.com/articles/republicans-should-support-the-amazon-labor-union-effort/. That's why I distinguish libertarian right perspectives on union and pension issues from others on the conservative end of the political spectrum.

[45] Andrew J. Bowden, Director, Sec. & Exch. Comm'n Off. of Compliance Inspections & Examinations, Remarks at 2014 Private Fund Compliance Forum: Spreading Sunshine in Private Equity (May 6, 2014) (transcript available at https://www.sec.gov/news/speech/2014—spch05062014ab.html#_ftn2) ("The biggest investors in private equity include public and private pension funds, endowments and foundations, which account for 64% of all investment in private equity in 2012."); *Public Pension Funds Investing in Alternative Assets*, PREQUIN (Sept. 2015), https://docs.preqin.com/reports/Preqin-Public-Pension-Funds-September-2015.pdf ("Public pension funds have historically had high allocations to alternative assets and continue to allocate significant capital to the industry; for example, public pension funds currently account for 29% of aggregate capital currently invested in private equity.").

[46] Shawn Mulcahy, *Texas Senate approves overhaul of pension plans for new state employees*, TEX. TRIB. (Apr. 28, 2021), https://www.texastribune.org/2021/04/28/texas-pensioners-overhaul/ ("Senate Bill 321 would enroll new state workers hired after Sept. 1, 2022 in a cash balance plan — similar to a common 401(k) retirement account — rather than the traditional defined-benefit pension plan.").

[47] Eric Whiteside, *How Do Pension Funds Typically Invest?*, INVESTOPEDIA (Apr. 26, 2021), https://www.investopedia.com/articles/credit-loans-mortgages/090116/what-do-pension-funds-typically-invest.asp ("Larger funds, such as CalPERS, self-manage their stock portfolios. Smaller funds are likely to seek outside management—or else invest in institutional versions of the same mutual funds and exchange traded funds (ETFs) as individual investors. The prime difference here is that the institutional share classes do not have front-end sales commissions, redemption, or 12b-1 fees, and they charge a lower expense ratio.").

help workers or whether the capital market is rigged against workers. We cannot learn as much from studies that blur these distinctions. At the moment, the only U.S. institutions of any note that meet the labor's capital definition are public pension funds and labor union funds. At a minimum, if the investment fund has no worker representatives on its board of trustees, it should not be called "labor's capital." Advocates of labor's capital as a tool for advancing the interests of labor have historically meant defined-benefit pension plans, pooled plans primarily in the form of labor union funds and public pension funds, with worker representatives on their boards. This definitional question has real world import. It is fundamental to understanding what those of us who believe in the importance of labor's capital claim—and do not claim—on its behalf. First, in WORKING–CLASS SHAREHOLDER, while I tell the story of many shareholder activist successes by labor, my main message is that it has enormous, underutilized potential. It remains "a large stick lying on the ground, waiting to be picked up."[48] Second, I have always been skeptical of the claim, and have never claimed myself, that mutual fund assets or corporate pension assets—at least as currently structured—could be mobilized to advance the interests of workers. Quite the opposite, I have argued that the pressure to convert pensions into 401(k)s is motivated by the desire to eliminate that capacity. The dueling works of the 1970s, Peter Drucker's THE UNSEEN REVOLUTION, and Jeremy Rifkin and Randy Barber's THE NORTH WILL RISE AGAIN, were published in a different world, in which virtually all retirement assets were defined-benefit pension plans. Both books were published either before or at the same time as the birth of the 401(k). This makes it clear that the pro-labor's capital positions taken at the time were based on the pooled defined-benefit pension plan with substantial worker representation. The academic work in the ensuing decades has drifted about on these definitional claims. But I think it is fair to say that, from the beginning, the core claim for labor's capital as a pro-labor force rests on demonstrated but still underutilized (or unutilized) potential in public pension and labor union funds, or in institutions that look more like them.

Some recent criticisms of labor's capital miss the mark by treating mutual funds and corporate pensions as fungible with public pension and labor funds. They also go awry when insisting that the failure of labor's capital to systematically advance labor's interests to date—assuming this statement is even accurate—shows that it can never do so. For many critics, once labor is invested in markets, it has, by definition, made itself an accomplice to forces that will destroy it. Therefore, the governance distinctions just outlined are either meaningless or too trivial to take seriously.

Below, I aim to rebut these critics. But first, let's discuss what they have to say.

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[48] WEBBER, *supra* note 6, at xv.

II. The Structuralist Critique of Labor's Capital: Markets Can Only Undermine Workers

A. How An Overinclusive Definition of Labor's Capital Obscures The Core Research Question: Are "democratic" pensions better than "authoritarian" 401(k)s?

One recent example in which the definitional issue arises is Benjamin Braun's study, *Fueling Financialization: The Economic Consequences of Funded Pensions.*[49] Braun aggregates data from several sources to paint a grim picture of labor's capital. He sets up his piece as if it addresses Drucker's fears and Rifkin/Barber's hopes for worker pensions. But as noted, Drucker's book was published in 1976 and Rifkin/Barber's book was published in 1978—the same year the 401(k) was invented—by far the most dominant retirement vehicle in America today.[50] For the most part, the institutions they feared and admired were defined-benefit pension plans with worker representation, meeting the better definition of labor's capital. At that time, even corporate defined-benefit pensions—which have all but disappeared—might then have been negotiated by private sector unions via collective bargaining.[51] But Braun incorporates virtually all retirement savings, including 401(k)s, into his analysis of "labor's capital." (As noted, many other scholars have done the same). He argues:

> For almost half a century, this money has fueled the growth of the asset management sector, which in many countries has actively lobbied for pension privatization. When pension fund activism brought corporate governance reform, corporations' quest for shareholder value brought workplace fissuring and wage stagnation. When pension funds pushed into real estate assets for better returns, private equity firms delivered by raising rents and evicting those that could not pay.[52]

This paragraph reveals why it's flawed to label retirement savings in this way. With the exception of some very recent interventions, only one form of capital—labor's capital properly defined—brought corporate governance reform, as virtually all such reforms were obtained by public pension funds and labor union funds filing shareholder proposals.[53] No doubt, some

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[49] Braun, *supra* note 3

[50] Mark. P Cussen, *The Basics of a 401(k) Retirement Plan*, Investopedia (Dec. 13, 2021), https://www.investopedia.com/articles/retirement/08/401k-info.asp#citation-21 ("Since its inception in 1978, the 401(k) plan has grown to become the most popular type of employer-sponsored retirement plan in America.").

[51] *See* Rifkin & Barber, *supra* note 2.

[52] Braun, *supra* note 3.

[53] Stuart L. Gillan & Laura T. Starks, *Corporate Governance Proposals and Shareholder Activism: The Role of Institutional Investors*, 57 J. Fin. Econ. 275, 278 (2000) ("Some institutional investors, particularly public pension funds and union pension funds, began to abandon

of these same pensions invested in private equity firms. But did true labor's capital institutions, those which provide some democratic labor voice on the board, behave any differently in these investments than in others? There are certainly specific examples of them behaving differently, like adopting responsible contractor policies, but what about in the aggregate? Did the fact or the degree of worker board representation matter? Or rates of unionization? There's no way to tell from Braun's data.

Braun further writes that, "The importance of labor's capital for the growth of the mutual fund industry cannot be overstated."[54] But in my view, he overstates it. That's partly because of the definitional question just raised. He also points out that U.S. "pension assets"—again, I would not use this terminology—comprise 62% of pension assets worldwide.[55] But the classic form of labor's capital, as it would have been understood originally, and as it continues to exist today, is the defined-benefit pension plan with worker representation, if not outright control. According to the same Wills Towers Wilson report he relied upon for this 62% figure, just 36% of U.S. pension assets are defined benefit.[56] And this figure includes corporate defined-benefit pension plans unlikely to have been union negotiated alongside labor union funds and public pension funds. Labor union funds and public pension funds comprised about 10% of the U.S. stock market.[57] In other words, Braun's 62% figure for U.S. pension assets is overinflated, at least insofar as it is used to represent labor's capital. This overinflation is important to his argument, which is designed to show how labor's capital is the driving force behind worker-hostile financialization worldwide, when in fact, forms of savings stretching far beyond what anyone should reasonably call "labor's capital" are doing much of the work. Again, in glossing over the governance distinctions I described above, and treating a collectively managed pension as no different from a 401(k) in a mutual fund, Braun's methodology is over-inclusive and risks obscuring whatever distinctive signal true labor's capital might have sent, if any, in the prior decades.[58] Again, did labor's capital,

their traditional passive shareholder role and become more active participants in the governance of their corporate holdings. From 1987 to 1994, the Investor Responsibility Research Center reports that public pension funds sponsored 463 proxy proposals seeking changes in corporations' governance.").

[54] Braun, *supra* note 3, at 75.

[55] *Id.* at 72.

[56] Tim Hodgson et al., *Global Pension Assets Study – 2021*, WILLIS TOWERS WATSON (2021), https://www.thinkingaheadinstitute.org/research-papers/global-pension-assets-study-2021/.

[57] STEVE ROSENTHAL & THEO BURKE, URBAN-BROOKINGS TAX POL. CTR. WHO'S LEFT TO TAX? US TAXATION OF CORPORATIONS AND THEIR SHAREHOLDERS 5 (2020), https://www.law.nyu.edu/sites/default/files/Who's%20Left%20to%20Tax%3F%20US%20Taxation%20of%20Corporations%20and%20Their%20Shareholders-%20Rosenthal%20and%20Burke.pdf.

[58] Braun's article is not totally devoid of these distinctions. For example, in Figure 2A he breaks out public and private defined benefit and defined contribution plans as a percentage of retirement assets. *See* Braun, *supra* note 3, at 72 fig.2A. But that is about the extent of the attention paid to these distinctions.

properly defined, behave any differently than, say, mutual funds investing 401(k) money? We cannot tell from this data.

As I noted above, one strong reason why the defined contribution fund called the 401(k) has become the retirement vehicle of choice is precisely because it silences worker voice, structurally undermining the capacity for labor's capital to act as labor's capital.[59] Defined-benefit pension plans have boards of trustees that include worker representatives. In the United States, more than half of such trustees are themselves workers invested in the plan (or retirees).[60] Individually-managed 401(k)s are invested via mutual funds with no worker representation. It is hardly surprising that worker voice is silenced when workers are shifted from a defined-benefit pension fund to an individually-managed 401(k) with a limited, preselected menu of investment options to choose from and effectively no voting or exit options. That's one of the objectives of the shift: to silence that voice. That was the point of the opinion piece I mentioned above, arguing that a pension fund is like a union and a 401(k) is like right to work. Braun's methodology—though again, not his alone—describes the very retirement vehicle designed to silence labor's capital as itself labor's capital. It therefore is not surprising that he finds that these don't advance the interests of workers.[61] As I stated earlier, it's like calling a worker's council that was created to thwart unions a "union" and then pointing out that "unions" don't help workers.

In short, Braun's data cannot refute the claims made for true labor's capital. What he (and others) claim to be the weapon isn't what labor's capital advocates claimed it to be. I would not have expected mutual funds to fulfill the promises of labor's capital, though ironically, they have more recently offered at least some potential hints that they are capable of so doing.[62]

B. Labor's Capital Investment in Hedge Funds and Private Equity Is Grim, But More Complicated Than the Structuralist View Allows

Braun also shows how this overbroad version of labor's capital has funded asset managers generally, including private equity and hedge funds,

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[59] *See supra* notes 42–44 and accompanying text.

[60] Jean-Pierre Aubry & Caroline V. Crawford, *Does Public Pension Board Composition Impact Returns?*, CTR. FOR RETIREMENT RSCH. AT BOSTON COLL. (Aug. 2019), https://crr.bc.edu/briefs/does-public-pension-board-composition-impact-returns/ (see Figure 2).

[61] Braun, *supra* note 3, at 72 n.7 (citing Marek Naczyk, *Agents of Privatization? Business Groups and the Rise of Pension Funds in Continental Europe*, 11 SOCIO-ECON. REV. 441 (2013) and Nils Röper, *Capitalists against Financialization: The Battle over German Pension Funds*," 25 COMP. & CHANGE 428 (2021)).

[62] *See* Dawn Lim, *BlackRock Starts to Use Voting Power More Aggressively*, WALL ST. J. (Apr. 30, 2021), https://www.wsj.com/articles/blackrock-takes-aggressive-posture-on-esg-proxy-votes-11619775002 ("For the roughly 170 ESG shareholder proposals it voted on during the first half of the proxy year, BlackRock backed 91% of environmental proposals, 23% of social proposals and 26% of corporate-governance proposals.").

describing these asset classes as unremittingly hostile to workers. This last point is generally true, but also overlooks a more complicated picture, as I will discuss below.[63] According to Braun, by empowering the asset manager class, labor's capital—again, in my view, incorrectly defined—has made life worse for labor, and will only continue to do so absent major legal reforms. According to this perspective, which is by no means Braun's alone, labor's capital is just capital, part of a larger financial system that is inherently, structurally designed to undercut workers. Braun and other critics may be right about this, but my own intuition, as I will describe in Part III, is that this can be changed. Braun himself acknowledges as much: "Can labor's capital provide long-term patient capital for public and private, but primarily local, development-oriented, and green investment projects? The answer is yes, such a path exists, but it is rockier than the Barber-Rifkin tradition has been ready to acknowledge."[64] No doubt large as this challenge would be, I see no evidence that it is more challenging than the macrofinancial reform or massively enhanced Social Security system labor's capital critics tend to prefer.

Regardless of whether Braun and other critics happen to be right, the paper jumps from an argument about what he suggests the historical data show to one suggesting that these historical data prove that a rigid structure undergirds the trends he described. I believe these data don't support the claims made. But even if his data show what he claims they show, they do not inherently support the structural claim he makes. He writes: "financial capital earmarked for pensions is still financial capital in search of return, *structurally geared toward 'pushing the envelope' in terms of investment practices*, asset classes, and financial liberalization."[65] Rather than invest locally, in productive capacities that could presumably create jobs, pension capital is used to advance financialization, he asserts. Braun, referencing my book's subtitle, argues that his data shows "why this weapon tends to misfire."[66] He concludes: "Unlocking the progressive promise of labor's capital requires a macro-financial regime that strictly regulates finance and that allows for greater economic democracy . . . things would have to get worse for labor's capital before they get better for labor."[67] But can this conclusion be

[63] Braun, *supra* note 3, at 77.

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> In addition to seeking direct exposure to real estate and commodity assets, public pension funds in particular have shifted large amounts of money into private equity and hedge funds. Figure 3 plots this shift using data from 210 state and local pension plans (accounting for 95 percent of state and local plan assets), divided into size quintiles. It shows that across size groups, public pension funds have roughly tripled their alternatives share, from under 10 percent in 2001 to 30 percent in 2020.

Braun, *supra* note 3, at 76.

[65] *Id.* at 76–77 (emphasis added).

[66] *Id.* at 73.

[67] *See Id*. at 77. In critiquing my book, Bob Farkas makes similar arguments. *See* Farkas, *supra* note 3 ("In order to generate these returns, large pension funds are themselves structured

reached without studying directly the actual institutions upon which that promise is based? Can we conclude that labor's capital cannot advance the interests of workers absent macrofinancial reform, when we have not examined the institutions with actual worker representation on their boards, separate and apart from the very institutions that were designed to undermine them?

To the extent that even the narrower, truer version of labor's capital has flunked the test under Braun's terms, it is because, as noted, it has turned some of its assets over to the Big Three, to hedge funds, to private equity.[68] That some pension funds—labor's capital properly defined—have successfully clawed back power from private equity and hedge funds (or, in CalPERS's case, divested from hedge funds),[69] made demands of their investees, reduced their fees, fended off attacks on defined-benefit pension plans or successfully demanded they hire union labor—examples of which I provide in my book—are by definition overlooked by this methodology. So are instances of private equity funds created by labor for labor.[70] No doubt many pension investments in private equity have been atrocious for workers; I have detailed examples at length.[71] But that's a separate question from whether this is inevitably, structurally, unalterably the case. By assuming that any investment in the above is per se bad for workers, there is no need to inquire further as to whether any of these governance distinctions or the above actions make a difference. Same for recent changes to state and local law directly regulating public pension plan investments in private equity, like New York City's 2016 law and California's 2017 law,[72] governing some of the largest labor's capital institutions in the world, the California Public Employees' Retirement System, the California State Teachers' Retirement System, and the New York City Employees' Retirement System. These could open the door to more comprehensive regulation resetting the relationship between public pensions and private equity even without macrofinancial re-

as investment management corporations. They are mandated to maximize returns without taking on undue risk, and they deploy the sophistication and single-mindedness of other leading funds. They are extraordinarily effective at doing what they are set up to do, namely earn high and reliable returns. Union leaders and union trustees have little room to challenge this logic from the inside. Trustees are in fact under enormous pressure to "get with the program" and support the competitive hunt for investment returns, in order to ensure that members' pensions will be there in retirement.").

[68] *See* Bowden, *supra* note 45.

[69] David Webber, *supra* note 6, at 101–10.

[70] *See, e.g.*, *On private equity, E.S.G. and unions*, N.Y. TIMES DEALBOOK (Apr. 4, 2022), https://www.nytimes.com/2022/04/04/business/dealbook/twitter-stake-elon-musk.html (describing Blue Wolf Capital as a "private equity firm which focuses on midmarket investments that adhere to environmental, social, and governance . . . criteria [and] was founded by . . . a former finance official at the New York City Comptroller's office who also helped oversee the United Auto Workers' medical fund").

[71] *Id.* ch. 7.

[72] CAL. GOV. CODE § 7514.7 (Deering 2021).

form, but they get swamped in Braun's data, and if one adopts a structuralist view, such modest reforms are pointless.[73]

Braun is far from alone in accepting that private equity does what it pleases with true labor's capital, and perhaps the clear examples to the contrary are too negligible to have a measurable impact, yet, or ever. But there are different, even diametrically opposed, perspectives on who wields the power in the private equity-labor's capital relationship. It's not just that the examples I outlined above show that activists can use labor's capital to make private equity do its bidding, if only they would exercise that power more systematically. It's that there are those whose fears run in the opposite direction, that public pension power threatens private equity. According to one scholar, public pension power "complicates the orderliness and efficiency of private equity" leading to "less free contracting, more regulatory influence on [firms]," and forcing private equity funds to deal with ESG.[74] Labor's capital critics like Braun and others don't have to accept such arguments, but it's worth noting that there is a strain of scholarship that's concerned about the power wielded by public pensions over private equity, and not just the other way around.[75]

Finally, even if we were to conclude that the governance differences outlined above have yet to make any difference in the real world, and that Braun's interpretation of his data is correct, it does not inevitably lead to his policy conclusion requiring macrofinancial regime change, as I will also argue below. In sum, I think Braun makes provocative and interesting points, aligning with the views of many labor's capital critics, and perhaps providing some support for such views, but I do not think his data squarely address the labor's capital question, and I think they do not justify his policy conclusions. In addition, for reasons stated in Section III, even if the past were as Braun describes, it is not necessarily prologue, as new developments are expanding the possibilities for labor's capital. But before making the latter point, let me note a few other labor's capital critics too.

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[73] Incidentally, though Braun is correct that some labor's capital invests in private equity, one of his main examples is erroneous. He states that CalPERS and CalSTRS invested $750 billion and $450 billion, respectively, in the Blackstone Property Partners Europe Fund. These are typos. The correct figures are $750 million and $450 million. *See* Daniela Gabor & Sebastian Kohl, The Greens/EFA, My Home Is an Asset Class 47 (2022), http://extranet.greens-efa-service.eu/public/media/file/1/7461. It's worth noting that, given CalPERS's total assets of $477 billion and CalSTRS's $321.9 billion, the Blackstone Europe investments decried by Braun represent 0.16% and 0.14% of the pensions' assets, respectively. CalPERS, 2020-2021 Annual Comprehensive Financial Report 9 (2021), https://www.calpers.ca.gov/docs/forms-publications/acfr-2021.pdf; Thomas Lawrence, *CalSTRS selected as a best place to work in money management for seventh time*, CalSTRS (Dec. 13, 2021), https://www.calstrs.com/news-release/calstrs-selected-best-place-work-money-management-seventh-time.

[74] William W. Clayton, *How Public Pension Plans Have Shaped Private Equity*, Md. L. Rev. (forthcoming 2022).

[75] *Id.; see also* William W. Clayton, *Public Investors, Private Funds, and State Law*, 72 Baylor L. Rev 294 (2020).

C. Other Structuralist Critiques: From Underfunding to Indoctrination

In their 2018 cover story for *In These Times*, “Wall Street Isn’t the Answer to the Pension Crisis. Expanding Social Security Is,”[76] Doug Henwood and Liza Featherstone point to many outrageous examples of labor’s capital being used against labor, the phenomena broadly described by Braun’s data. They also build on arguments long put forth by laissez-faire conservative critics of pensions—that they are fatally underfunded—to argue that what is needed instead is a massively expanded Social Security system.[77] To be clear, Henwood and Featherstone embrace the underfunding argument propounded by more conservative critics of pensions, but offer as the solution not 401(k)s, but a robust Social Security system. In published responses to Henwood and Featherstone, Max Sawicky challenged their view that pensions were fatally underfunded, arguing that they were not. Developments since then have only strengthened Sawicky’s case. The underfunding argument Henwood and Featherstone made in 2018 was overstated and has only gotten weaker. Pensions are now 80% funded for the first time since the Great Recession, though it is true that these numbers could drop again in a new recession.[78] Eighty percent is considered the healthy funding threshold.[79] And once-distressed multiemployer plans will receive an $86 billion cash infusion under the American Rescue Plan.[80]

I also pointed out a contradiction in the Henwood and Featherstone argument.[81] Specifically, it makes little sense to advocate dismantling public pensions because they were once only 60% funded in favor of a purportedly more secure Social Security system that is currently zero percent funded. There are quite literally no funds for Social Security; it is a collection of IOUs from the federal government. I expect the federal government will

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[76] *See generally* Featherstone & Henwood, *supra* note 3.

[77]

> It’s time to go back to Plan A: Let’s strengthen Social Security, a system that works well but isn’t expansive enough to fully fund retirements. Unions should make that expansion a primary political demand, backed up with the argument that the more employed and prosperous everyone is, the more robust Social Security will be.

Id.

[78] Greg Mennis & David Draine, *The State Pension Funding Gap: Plans Have Stabilized in Wake of Pandemic*, Pew Rsch. Trusts (Sept. 14, 2021), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2021/09/the-state-pension-funding-gap-plans-have-stabilized-in-wake-of-pandemic.

[79] *See generally* Keith Brainard & Paul Zorn, Nat’l Ass’n of State Ret. Adm’rs, The 80-percent threshold: Its source as a healthy or minimum funding level for public pension plans (2012), https://www.nasra.org/files/Topical%20Reports/Funding%20Policies/80_percent_funding_threshold.pdf.

[80] Mary Williams Walsh & Alan Rappeport, *Rescue Package Includes $86 Billion Bailout for Failing Pensions*, N.Y. Times (Mar. 7, 2021), https://www.nytimes.com/2021/03/07/business/dealbook/bailout-pensions-stimulus.html.

[81] *See generally* Max B. Sawicky, *No, Pensions Aren’t All Collapsing, and We Don’t Need To Scrap Them*, In These Times (Jan. 25, 2018), https://inthesetimes.com/article/no-we-shouldnt-replace-pensions-by-expanding-social-security.

honor those debts, but the point is that they are debts, not assets sitting there waiting to be accessed by retirees. In this technical respect, the federal system is worse off than the state systems they criticize. It is not at all clear that a Social Security system backed by Washington, D.C. is more secure than a state-sponsored public pension backed by Albany, Boston, or Sacramento. That said, Henwood and Featherstone's main point—that in some instances Wall Street has done awful things with labor's money—cannot be denied.[82]

In making their case for a Social Security system, Henwood and Featherstone rely on Michael A. McCarthy's book *Dismantling Solidarity*, which argues that unions initially wanted such a system, settling instead for pensions when they could not win it. They view this as strengthening their argument. I think it weakens it. The best that can be said for this point is that it suggests that Social Security is more desirable than pensions; I argued the case for pensions in my *In These Times* reply to Henwood and Featherstone.[83] But it clearly weakens the *feasibility* of their preferred outcome, a challenge they do not address. Even if shutting down pensions in favor of expanded Social Security were desirable, why would the labor movement be able to win today what it could not decades ago? This strikes me as an even more formidable challenge than turning labor's capital to labor's benefit.

I have had the pleasure to debate two other prominent labor's capital critics, Kevin Skerrett (in person) and Michael McCarthy (online).[84] Skerrett makes similar arguments at the anecdotal level, drawing on his own direct experience working as a Canadian labor organizer to show how pensions in the narrower sense were used to fund privatization.[85] Writ small, these are examples of the macroclaim Braun makes, targeted at the very funds that should be best positioned to best advocate for workers.[86] McCarthy, in his book *Dismantling Solidarity*, argues that the creation of labor union pensions as an alternative to Social Security was driven, at least in part, by a desire to use worker retirement funds for capitalist investment. Given space constraints I won't reengage McCarthy here, but refer readers to our extended debate at the Law and Political Economy Project, *Is Labor's Future in Labor's Capital?*[87] Another skeptic, Bob Farkas, in a fair-minded but critical take on my book, makes similar arguments in *Jacobin Magazine*:

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[82] Webber, *supra* note 42.

[83] David H. Webber, *Will the Left Get Fooled into Abandoning Worker Pensions?*, In These Times (Aug. 9, 2018), https://inthesetimes.com/article/will-the-left-get-fooled-into-abandoning-worker-pensions.

[84] Workshop at 70th Annual Meeting of Labor and Employee Relations Association: The Contradictions of Pension Fund Capitalism (June 16, 2018).

[85] Kevin Skerrett et al., The Contradictions of Pension Fund Capitalism (2018).

[86] Braun, *supra* note 3, at 72 ("For almost half a century, this money has fueled the growth of the asset management sector, which in many countries has actively lobbied for pension privatization.").

[87] *Is Labor's Future in Labor's Capital? A Debate*, LPE Project (June 12, 2019), https://lpeproject.org/blog/is-labors-future-in-labors-capital-a-debate/.

> [Large pension funds] are extraordinarily effective at doing what they are set up to do, namely earn high and reliable returns. Union leaders and union trustees have little room to challenge this logic from the inside. Trustees are in fact under enormous pressure to "get with the program" and support the competitive hunt for investment returns, in order to ensure that members' pensions will be there in retirement. Webber spends considerable time looking at what the law does and doesn't require regarding trustee behavior. But legal pressures are just one constraint. In practice, trustees are systematically indoctrinated in order to support and facilitate the goal of generating competitive investment returns.[88]

Though they deploy different methodologies, I categorize the above arguments as "structuralist." They all more or less lead to the same conclusion: labor's capital is participating in a rigged game. The daily grind of labor's capital strategies includes reforming pension structures, liberalizing fiduciary duty, training and organizing pension trustees, engaging in shareholder activism, pushing investment in unionized infrastructure projects, divesting from bad actors, and advocating regulatory reform at the federal, state, and local level. But to structuralists, these are all basically pointless. At bottom, the structuralists conclude, the financial system can only produce one outcome for labor and any hope to reform it short of radical change—macrofinancial reform, massively expanded Social Security—is futile. To the extent labor's capital approaches might get in the system's way, the system just converts its enemies into maximize-returns zombies. To use Farkas's language, pension trustees are forced to "get with the program," they are "systematically indoctrinated."[89] Therefore, marshalling labor's capital will not work. Never, according to some. Only with revolutionary-level financial reform, according to others.

It is certainly any scholar's right to put labor's capital under the microscope. Nor would it be fair to demand that in so doing they put their own preferred policy outcome under the same microscope. If every work of scholarship or journalism had to address every related counterproposal with every publication, nothing would get published. Robust defenses of Social Security and macrofinancial reform are no doubt to be found elsewhere. Still, the Nirvana fallacy lurks in much of the criticism comparing microscopically (and often inaccurately) analyzed labor's capital to the heroic and mostly offstage alternatives of a robustly funded Social Security system, macrofinancial reform, a global income tax, or better yet, all three. Is it not fair to ask whether the critics believe macrofinancial reform, massive Social Security, and a global tax are on the horizon? Do they have no reason to doubt whether these will succeed? Would they advise labor leaders to ignore

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[88] *See* Farkas, *supra* note 3.
[89] *Id.*

the trillions of dollars in capital they control? Or to ignore the trillions more they might organize in favor of a strategy to push for the Social Security system or macrofinancial regulation some tried and failed to obtain when labor wielded much more electoral power than it does today?[90] More importantly, why assume it's one or another, when in fact labor's capital activism can work with related regulatory reform, as it has for issues like human capital management and climate change?

These challenges may be acknowledged by the critics as presenting some difficulty before returning to the critique at hand. Of course, any labor leader deciding whether to opt for a labor's capital solution, or some other form of activism will want some comparative perspective. Admittedly, pointing out the unexamined flaws of the offstage alternatives does not cure those of the one on the table. But it should put its flaws in perspective.

I will also note, before turning to counterarguments, that critics of labor's capital almost always ignore the benefits labor has derived as shareholder. Most labor's capital critics seem to follow an unwritten rule: *do not acknowledge or examine any benefits workers might have derived from shareholding*. Presumably, workers have gained something from stock ownership: the S&P 500 on January 15, 1982, forty years ago to the day on which I'm writing this sentence, was 116.33. Today it's 4,658.26. The omertà also covers labor's governance activism, which may well have benefitted labor not just as a shareholder but vis-à-vis the managerial class, a transfer of wealth and power that no other shareholder could have obtained. The same would doubtless be claimed about labor's capital participation in shareholder litigation. Multiple studies have shown that public pension fund service as lead plaintiff in securities or deal class actions results in higher recoveries for defrauded shareholders and lower attorneys' fees.[91] Time and again, mutual funds and hedge funds have demonstrated that they will not sue, even when defrauded.[92] But for the action taken by public pension funds, it is likely that these frauds would go undeterred and uncompensated. These facts tend to be ignored by labor's capital critics, but they clearly benefit workers in their retirement funds, and they also generate an absolutely vital public good, deterring corporate misconduct. The accepted methodological approach for critics of labor's capital is to consider its effects on labor as labor alone. I think that this omission is driven, in part, by the fact "that the American left—particularly the segment that is focused on worker

[90] *See generally* Jake Rosenfeld, *The rise and fall of US labor unions, and why they still matter*, The Conversation (Mar. 27, 2015), https://theconversation.com/the-rise-and-fall-of-us-labor-unions-and-why-they-still-matter-38263.

[91] Michael A. Perino, *Institutional Activism Through Litigation: An Empirical Analysis of Public Pension Fund Participation in Securities Class Actions*, 9 J. Empirical. Leg. Stud. 368 (2012) (reporting that public pension lead plaintiffs correlate with higher recoveries, lower attorneys' fees in securities class actions); Webber, *supra* note 34 (reporting that public pension lead plaintiffs correlate with higher recoveries, lower attorneys' fees in Delaware transactional class actions).

[92] Webber, *supra* note 34.

issues—is viscerally uncomfortable with labor wielding shareholder power, a capitalist weapon."[93]

Doubtless, there were alternatives to the neoliberal financialization of the past three decades that might have left workers better off. There can be no question about asymmetric power caused by capital's ability to round the globe at light speed, in contest with labor as a bounded, geographical phenomenon. It may be that the benefit to workers from shareholding is outweighed by the harm. That said, any true account of the cost to workers of neoliberal financialization should incorporate how labor has benefitted as shareholder, even if it has been harmed as labor. The goal should be to assess the relative and absolute welfare of workers *in toto*.

Finally, while we are listing unaddressed arguments, I'll leave an additional thought/provocation here:

> For far too long, labor and its progressive sympathizers have sought to transform the market from outside the market: from courts, from legislatures, from regulators, from street protests, from strikes. These tools are important. But ultimately, it is not possible to transform the market from the outside. It must be transformed from within.[94]

It seems to me that there is a serious argument that markets are already rapidly escaping the bounds of the nation-state. The future of regulation may well be from institutional investors acting as regulators on a global scale, the way the market itself does, and operating from inside companies using the mechanisms of corporate governance. Such institutions don't necessarily have to be privately held. For example, they could be sovereign wealth funds. If this view is correct, and it might not be, it has implications for the debate over labor's capital. Because abandonment of this capital would then be akin to protesting the government by not voting: a self-defeating mechanism of self-silencing, self-abnegation.[95] People interested in labor's capital are likely to be interested in this topic too, and I would invite debate and discussion of it.

I will set aside these frankly enormous issues. Instead, I'll aim to rebut some of these critiques of labor's capital below.

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[93] WEBBER, *supra* note 6, at xv.

[94] Michel Feher has also made a version of this argument, *see* MICHEL FEHER, RATED AGENCY (2018). I will also note that there are emerging conservative voices favoring worker empowerment in the corporate sector. *See, e.g.*, Oren Cass, *Why the US right wants to put workers in the boardroom*, FIN. TIMES (Feb. 17, 2022), https://www.ft.com/content/050e37b9-f5f9-4b4d-8b5d-a70e96981f28.

[95] WEBBER, *supra* note 6, at xv.

III. Limitations of the Structuralist Critique of Labor's Capital

The structuralist critique of labor's capital leads the critics to the same basic neighborhood. In that neighborhood, either labor's capital can never be bent to work for labor, or, nearby, in order for labor's capital to serve labor there must be such radical legal and regulatory reform as to fundamentally alter the way markets work. Both views are flawed.

A. Critics Offer No Explanation of the Supposed Exceptions to the Rule

First, structuralists who are committed to the view that the financial system cannot be internally rewired to produce pro-labor or other pro-social outcomes need to explain the historical, real-world examples that have defied the hardwiring. If the system functions as they describe, what explains the at least occasional departures from that function? What explains those situations when labor's capital appears to have clearly helped labor as labor?

For example, we observe in the marketplace some pension funds that have adopted responsible contractor policies.[96] We observe that, following the adoption of such responsible contractor policies, these funds make infrastructure or real estate investments either directly or through a private equity fund. We then further discover that the private equity fund hires union labor for the project. Those projects lead to the creation of unionized jobs and new pension fund contributors. Examples include the Union Labor Life Insurance Company's ("ULLICO") $2.34 billion investments in over 440 infrastructure projects, all of which must hire union labor as a condition of ULLICO making the investment.[97] Its recent investment, alongside private equity firm Carlyle, in rebuilding JFK Airport's Terminal 1 created 4,000 permanent union jobs.[98] We further observe that entities like ULLICO, or the AFL-CIO housing investment trust, or the AFL-CIO building investment trust, or the International Brotherhood of Electrical Workers, or the United Brotherhood of Carpenters have a decades-long track record of strong returns investing in

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[96] Statement, AFL-CIO Exec. Council, Pension Fund Responsible Contractor Policy (Feb. 20, 1997), https://aflcio.org/about/leadership/statements/pension-fund-responsible-contractor-policy.

[97]

> 'At Ullico, we believe that investing in infrastructure requires applying best practices like having long-term public and private partners, building strong community-driven solutions and having local partners, including local unions and local union contractors,' said Edward M. Smith, president and CEO of Ullico Inc. 'Our program focuses on investing in projects where the municipal partners and our investment partners share this philosophy. The capital improvements will be done with union labor, in accordance with our strong pro-organized labor contracting policies, which maximize the use of firms that employ union workers.'

William K. Cavanagh, *Ullico Announces First Infrastructure Investment*, Ullico, https://www.ullico.com/news-item/ullico-announces-first-infrastructure (last visited Apr. 17, 2022).

[98] *Ullico Infrastructure Fund, L.P.*, Ullico, https://www.ullico.com/investment-products/infrastructure-fund (last visited Apr. 17, 2022).

unionized projects.[99] We see examples of how AFSCME's relationship with JPMorgan helped spare Detroit workers serious cuts to pensions in that city's bankruptcy.[100] We see entities like KKR and Bain following the private equity playbook by sending Toys R Us into bankruptcy, only to be forced by investors like public pensions in Washington State and Minnesota to pay worker severance out of their own pockets.[101] It would seem that there are at least some specific, real-world examples justifying the hopes of the pro-labor's capital crowd. Perhaps standing alone these examples are too trivial to be detected at a more macro level.

But consider one recent study, by Larry Liu and Adam Goldstein, *Labor's Capital and Worker Well-Being: Do US Pension Funds Benefit Labor Interests?*[102] This piece focuses on labor's capital the way I would define it, narrowly. Their findings support the claims made by labor's capital proponents (even if the authors themselves hedge on this point). Liu and Goldstein find that, "intra-firm mobilization by [labor's capital] in the form of shareholder proposals is associated with modestly improved worker outcomes."[103] Specifically, the authors find that shareholder proposals filed by public pension funds are "associated with increased pension spending, wage and salary spending, and decreased financial extraction."[104]

Shareholder proposals are but one tool in the activist tool kit. They can be filed only at public companies, where labor's capital power is most diluted.[105] Such proposals are nonbinding on management even if passed by a shareholder majority.[106] And when it comes to public pension fund shareholder proposals and their effect on labor, the causal chain is somewhat removed. Public pension contributors are all, by definition, government employees who do not directly benefit when companies targeted by proposals treat their workers better or pay them more.[107] Given all of these limitations on shareholder proposals, this Liu/Goldstein result is remarkable and undersold by the authors.

Liu and Goldstein cautiously downplay their own results. They also emphasize that they find no correlation between public pension fund ownership and worker welfare, even in states with Democratic governors whom

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[99] *Id.*; *see also* Webber, *supra* note 6, ch. 8.

[100] Webber, *supra* note 6, at 115–36.

[101] Michael Corkery, *Pensions Get Bolder in Challenging Private Equity on Investments' Human Cost*, N.Y. Times (Oct. 8, 2018), https://www.nytimes.com/2018/10/08/business/toys-r-us-workers-public-pensions-private-equity.html.

[102] 100 Soc. Forces 1080–109 (2021).

[103] *Id.* at 1080.

[104] *Id.* at 1103.

[105] Doron Levit & Nadya Malenko, *Nonbinding Voting for Shareholder Proposals*, 66 J. Fin. 1579, 1580 (2011).

[106] *Id.*

[107] *See Contributions*, Nat'l Ass'n of State Ret. Adm'rs, https://www.nasra.org/contributions#:~:text=Public%20pensions%20are%20financed%20primarily,from%20both%20employees%20and%20employers./ (last accessed Feb. 17, 2022) (showing the breakdown for public pension revenue divided between employees, employers, and investment earnings).

we might expect to be more friendly to workers.[108] They say that this non-result casts doubt on the efficacy of "social investment as a strategy of social change."[109] Maybe so, but stock ownership in friendly hands should only matter insofar as it increases the potential for favorable action, like shareholder proposals, where the authors do find a result.[110] Organizational follow up is required to make something happen.

Liu and Goldstein's finding that public pension shareholder proposals correlate with worker well-being are not decisive. But they buttress the anecdotal data that labor's capital can indeed be turned towards advancing the interests of workers as workers. And in that regard they do not stand alone. For example, in *Corporate Governance Objectives of Labor Union Shareholders: Evidence From Proxy Voting*, an empirical study examining the proxy voting patterns of AFL-CIO affiliated unions, Ashwini Agarwal concluded:

> [U]nion pension funds have preferences that partly reflect union worker interests, rather than equity value maximization alone. Union funds are more likely to oppose directors of firms that employ workers of the same labor affiliation, particularly when conflicts arise between labor unions and management during union recruiting efforts and collective bargaining. *Their opposition also appears to benefit union workers at the expense of shareholder value*.[111]

Liu, Goldstein, and Agarwal do not address what it costed labor to obtain these results, and whether they can be scaled up. Liu and Goldstein see their findings as showing "*the potential capacity* of L[abor] P[ension] F[und] advocacy to induce more labor-friendly behaviors," albeit only where labor "mobilize[s] concertedly."[112] Agarwal's findings seem to show more than mere potential for such behaviors. It's worth pointing out that had Liu and Goldstein expanded their search to include mutual funds under the definition of labor's capital, they would have found no results because the Big Three rarely file such proposals, as do few other mutual funds, as noted above. Structuralist critics of labor's capital need to explain why these labor's capital trustees didn't "get with the program" in Farkas's words.[113] Why didn't the labor's capital weapon misfire here?

It seems to me that this evidence, assuming we accept it and believe it, must challenge those who believe that labor's capital cannot, by definition,

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[108] *See* Liu & Goldstein, *supra* note 102, at 1082–83.

[109] *Id.* at 1104.

[110] I'll also add that the paper relies on SEC Form13-f data, which can paint a distorted picture of ownership because if, for example, CalPERS invests assets through Blackrock those assets will be listed on Blackrock's 13-f with no way of tracing it back to CalPERS.

[111] 25 Rev. Fin. Stud. 187, 225–26 (2012) (emphasis added).

[112] *See* Liu & Goldstein, *supra* note 102, at 1103 (emphasis added).

[113] *See* Farkas, *supra* note 3.

advance labor's interests. It should at least induce such critics to consider the cost-benefit question, that is, how much benefit can labor's capital provide, and at what cost? It might well be the case that the cost-benefit calculus means labor would be better off investing in some other activism, but that is a fundamentally different question from the hard structuralist critique suggesting that labor's capital is hardwired to undermine the interests of labor.

I will offer a final point on this subject, one I made in *Working-Class Shareholder*. Apart from the specific examples just noted, how do structuralists explain hostility to the labor's capital project from the opposite end of the political spectrum? Why did Peter Drucker fear pension fund socialism? Why have the Koch brothers, the Arnold Foundation, and others worked so hard to dismantle labor's capital, to silence it by converting it into 401(k)s?[114] It is at least puzzling that while still in private practice, then-future Trump Labor Secretary Eugene Scalia—who as Secretary attempted to bar pension funds from voting their proxies and sharply limit ESG investment considerations[115]—sued the SEC on behalf of the Business Roundtable to strike down the proxy access rule.[116] Scalia argued that the rule would be used to advance "special interests"—those of public pension funds and labor union funds.[117] In ruling in his favor, the D.C. Circuit Court of Appeals opinion written by Judge Douglas Ginsburg, once nominated by President Reagan to the Supreme Court, specifically mentioned this concern in striking down the SEC's rule.[118] Leftist structuralists and libertarian conservatives are both trying to dismantle labor's capital, for opposing reasons. One of these two groups must be wrong about its potential. I think it's the structuralists.

B. Past Performance Is No Guarantee of Future Results

More importantly, in my view, studies like Braun's, Liu and Goldstein's, and Agarwal's can tell us, at best, how labor's capital has performed to date. That is not the same question as what it might achieve. There are strong reasons to believe that the past is not prologue, even if we accept the critics' views of the past. That's because, to date, all studies of labor's capital

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[114] WEBBER, *supra* note 6, ch. 8.

[115] Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, 85 Fed. Reg. 55,219 (Sept. 4, 2020).

[116] *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1146 (D.C. Cir. 2011).

[117]

> The petitioners next argue the Commission acted arbitrarily and capriciously by entirely fail[ing] to consider an important aspect of the problem, to wit, how union and state pension funds might use Rule 14a-11. Commenters expressed concern that these employee benefit funds would impose costs upon companies by using Rule 14a-11 as leverage to gain concessions, such as additional benefits for unionized employees, unrelated to shareholder value.

Id. at 1151 (internal quotation marks and citations omitted).

[118] *Id.* at 1152 ("By ducking serious evaluation of the costs that could be imposed upon companies from use of the rule by shareholders representing special interests, particularly union and government pension funds, we think the Commission acted arbitrarily.").

necessarily observe it operating under two severe constraints: the ideological dominance of shareholder primacy, and, relatedly, the view that corporate, securities, and trust law all require fiduciaries to maximize returns to the exclusion of virtually all other considerations.[119] Today, the forces operating to loosen those constraints have never been stronger. This has the potential to create new opportunities for labor's capital, enhancing what it can do for workers.

IV. The Retreat of Shareholder Primacy, The Expansion of Fiduciary Duty, and Its Implications for Labor's Capital

A. *Stakeholderism and Labor's Capital*

Structuralist critics assume that the financial system is only capable of prioritizing returns.[120] But to reach that conclusion we must assume that maximizing returns by expanding into, for example, nonproductive financialization is hardwired into the DNA of the financial system and fundamentally unalterable absent comprehensive legal reform. Perhaps it is. But it is also true that the entire history of labor's capital has been subsumed within the era of shareholder primacy.[121] If we trace the origins of labor's capital debates to the 1970s, again back to Drucker's *The Unseen Revolution* and Rifkin and Barber's The North Will Rise Again, (Michael McCarthy traces it back to the 1920s; Saul Alinsky included a chapter on the subject in his book *Rules for Radicals*)[122] then the notion of labor's capital advancing

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> For forty years, a strain of economic thinking, typically embraced by those who believe that society is best served when corporations focus solely on shareholder profit, has increased the power of economic elites and gone to war against the regulatory state and the protections put in place by the New Deal and Great Society to protect workers, consumers, and the environment. What has resulted is wage stagnation, growing inequality, climate change that threatens humanity, repeated bailouts by the many of the few, consumer exploitation, increased insecurity, social division, and racial and economic inequality. The late recognition of business elites that a corporate governance system contributing to such results needs reform was not the start of this debate; it was a signal that they knew that a long-standing debate threatened to come to a head and produce outcomes that they could not control.

Leo E. Strine, *Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy—A Reply to Professor Rock*, Harvard L. Sch. F. on Corp. Gov. (Jan. 7, 2021), https://corpgov.law.harvard.edu/2021/01/07/restoration-the-role-stakeholder-governance-must-play-in-recreating-a-fair-and-sustainable-american-economy-a-reply-to-professor-rock/; *see also* Jacoby, *supra* note 6, at 2 ("for the financial turn to succeed, unions needed allies like CalPERS. Of necessity this meant supporting the tenets of shareholder primacy."); Neil Fligstein & Adam Goldstein, *The Legacy of Shareholder Value Capitalism*, 48 Ann. Rev. Socio. 7.1–.19 (2022) (describing shareholder primacy as reaction to the economic crisis of the 1970s).

[120] *See Id.*

[121] Jacoby, *supra* note 6.

[122] Saul D. Alinsky, Rules for Radicals: A Pragmatic Primer for Realistic Radicals (1971).

the interests of workers has existed only and entirely within the era of shareholder primacy. From Milton Friedman's argument about the social responsibility of business, to Kaplow and Shavell's argument that the economic system should maximize welfare and leave redistributive concerns to the tax system, the intellectual and ideological architecture of the period under study elevated returns above all other considerations.[123] Given this ideological grip, it is not entirely surprising that labor has not managed to defy it all on its own, even if there are at least some examples of when it did.

At least rhetorically, shareholder primacy is in retreat, and stakeholderism is on the rise. As is now widely known, the Business Roundtable was forced to renounce shareholder primacy in 2019, opting for a stakeholderist model instead.[124] The rise of ESG investing is now ubiquitous. The idea that investment managers must not only consider the environment but even place it at the core of what they do is also a notion that has gone from marginal and quixotic to the mainstream.[125]

Of course, the turn to stakeholderism and ESG investing could all just be cheap talk. But as Michal Barzuza, Quinn Curtis and I have argued in two papers, the shift is more than rhetorical. It is driven by a sharp shift in values brought on by the rise of the Millennials and Generation Z.[126] I won't recapitulate all those arguments here, but I'll point to a few pieces of evidence. We cite studies showing that Millennials will take a pay cut to work for a more sustainable company.[127] We point to evidence that prioritizing environmental issues by the Big Three is driven by the competition to manage Millennial retirement funds.[128] We cite evidence that the environmental shareholder activism of the Big Three has reduced greenhouse gas emissions by the targets of said activism.[129] We show evidence that Millennials and

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[123] Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 17; LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 3–4 (2002).

[124] *Business Roundtable Redefines the Purpose of a Corporation to Promote "An Economy That Serves All Americans*," BUS. ROUNDTABLE (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans.

[125] *See, e.g.*, *id.* (stating that the free market is the best place to generate a healthy environment).

[126] 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 (2020); Michal Barzuza, Quinn Curtis & David H. Webber, The Millennial Corporation: Strong Stakeholders, Weak Managers (unpublished manuscript) (Sept. 10, 2021) (manuscript available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3918443).

[127] *15 Insights into Gen Z, Purpose and the Future of Work*, WESPIRE (last accessed Feb. 18, 2022), https://www.wespire.com/15-insights-gen-z-purpose-and-future-of-work/.

[128] *See* Barzuza et al., *supra* note 126, at 29.

[129] *See* Laurel Wamsley, *World's Largest Asset Manager Puts Climate at the Center of Its Investment Strategy*, NPR (Jan. 14, 2020), https://www.npr.org/2020/01/14/796252481/worlds-largestasset-manager-puts-climate-at-the-center-of-its-investment-strate; Bill McKibben, *Citing Climate Change, BlackRock Will Start Moving Away From Fossil Fuels*, NEW YORKER (Jan. 16, 2020), https://www.newyorker.com/news/daily-comment/citing-climatechange-black-rock-will-start-moving-away-from-fossil-fuels; Rakhi Kumar, Michael Younis & Caitlin

Gen Z'ers genuinely act to promote diversity and sustainability and will invest, work, and shop accordingly.[130] We also argue that in contrast to prior generations, Millennials take their politics with them everywhere, to work, to shopping, to the investment portfolio, and that this has feedback effects into the investment and corporate arenas.[131] Finally, we argue that the combination of social media call-out culture with a saturated information environment has empowered these generations to verify if companies are living up to their noble rhetoric and to excoriate those that say one thing while continuing to pollute, or discriminate, or exploit.[132] Of course, all of these have feedback effects into share price and any investor who ignores them may underperform those who pay attention.[133] But this is perfectly consistent with the idea that the Millennial corporation may pursue different ends than just maximizing share price, potentially making it less profitable but more socially useful than the pre-Millennial corporation.[134]

Even those who continue to promote shareholder primacy do so in a way that departs from the traditional understanding of the doctrine. In a recent unpublished paper, *The New Corporate Governance*, economists Oliver Hart and Luigi Zingales acknowledge growing shareholder interest in environmental and social issues.[135] Noting that, "in some cases, shareholders are pushing companies to take actions that may reduce shareholder value," they reject the shareholder value maximizing framework.[136] Instead, they propose that shareholder welfare maximization replace shareholder value maximization. There is a strong positivist aspect to their proposal. They argue for shareholder welfare maximization instead of shareholder value maximiza-

McSherry, *Incorporating Sustainability into Long-Term Strategy*, STATE ST. GLOB. ADVISORS (Feb. 2019), https://www.ssga.com/investmenttopics/environmental-social-governance/2019/02/incorporating-sustainability-into-long-term-strategy.pdf.

[130] *Two-Thirds of Consumers Worldwide Now Buy on Beliefs*, EDELMAN (Oct. 2, 2018), https://www.edelman.com/news-awards/two-thirds-consumers-worldwide-now-buy-beliefs; *Millennials are a Driving Factor in the Growth behind EESG Investments*, NASDAQ (May 25, 2021), https://www.nasdaq.com/articles/Millennials-are-a-driving-factor-in-the-growth-behind-esg-investments-2021-05-25.

[131] Barzuza et al., *supra* note 126, at 16 ("This is because, as we will show in this section, Millennials are more inclined to bring these values to work, to their consumer behavior than others, and liberals are more inclined to do so than conservatives.").

[132] *Id.* ("Raised on social media, Millennials are both able and willing to publicly attack companies that claim to do social good without backing it up with action.").

[133] Kian Bakhtiari, *Why Brands Need to Pay Attention to Cancel Culture*, FORBES (Sep. 29, 2020), https://www.forbes.com/sites/kianbakhtiari/2020/09/29/why-brands-need-to-pay-attention-to-cancelculture/?sh=4c754a1d645e; Berkeley Lovelace Jr., *CEOs' shift away from shareholder value was aimed at Millennials, says former Business Roundtable president*, CNBC (Aug. 19, 2019), https://www.cnbc.com/2019/08/19/ceos-shift-away-fromshareholder-value-aimed-at-Millennials-john-engler.html.

[134] *Id.*

[135] Oliver D. Hart & Luigi Zingales, *The New Corporate Governance* (Becker Friedman Inst. for Econ. at the Univ. of Chi., Working Paper No. 2022-55, 2022), https://ssrn.com/abstract=4094175.

[136] *Id.* at 1.

tion because it offers a better description of reality.[137] Labor's capital fits that description. Hart and Zingales use worker pension plans pushing for better treatment of workers as an example.[138]

In short, even without macrofinancial reform, cultural and ideological shifts in attitudes towards markets are already generating different market behaviors even from what we observed 5 or 10 years ago. We are witnessing the rise of generations that are focused on using the financial system to pursue ends other than just maximizing returns, and there is some evidence to support the proposition. This suggests the structuralist critics have mistaken for "hardwiring" what is in fact historically-contingent performance of labor's capital under shareholder primacy.

B. Expansion of Fiduciary Duty and Labor's Capital

These developments also have practical implications for the law governing the fiduciary duties of pension trustees. Farkas and others dismiss the significance of such legal constraints. I have already described at great length why they matter and won't recapitulate all those arguments here. But a little over a decade ago, when I started attending meetings of pension fund trustees, most reported that if they inquired about the labor or environmental impact of an investment, their fund lawyer would stop the meeting and explain that even asking this question was a breach of fiduciary duty. As I write this in early 2022, the United States Department of Labor is on the verge of adopting a regulatory reform that could make it clear that trustees may raise such issues.[139] The final form of the rule is not yet available. While I do not think it goes far enough on job creation and the avoidance of job destruction,[140] it does say that an investment fiduciary may consider, "Workforce practices, including the corporation's progress on workforce diversity, inclusion, and other drivers of employee hiring, promotion, and retention; its investment in training to develop its workforce's skill; equal employment opportunity; and labor relations."[141] We will see if this language is retained in the final version of the rule.

No one would call that macrofinancial reform. But if adopted in anywhere near its current form, it would be the most significant change to fiduciary duty since the adoption of ERISA in 1974. Given what we are seeing

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[137] *Id.* at 3. ("a further powerful criticism [of shareholder value maximization] is a positive one: the paradigm cannot explain what shareholders are actually pressuring companies to do.")

[138] Id at 6. ("Workers whose pension plans consist of shares have in recent years pushed companies to treat workers better, and this trend may grow.")

[139] Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 86 Fed. Reg. 57,272 (Oct. 14, 2021) (to be codified at 29 C.F.R. 2550).

[140] David H. Webber, Comment Letter on Proposed Rule on Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights (Dec. 29, 2021), https://www.regulations.gov/comment/EBSA-2021-0013-0770.

[141] Prudence and Loyalty in Selecting Plan Investments, 86 Fed. Reg. at 57,277.

the Big Three do on the environment and diversity, and the competitive nature of asset management, it seems quite plausible that pensions might use this reform to raise these workforce issues and invest, or engage, accordingly. As noted earlier, New York City and California have adopted provisions regulating public pension investment in private equity, and I believe more rules of this type are coming. It is entirely plausible that this will help labor's capital advance the interests of labor, regardless of one's views on how successful it has been to date. Perhaps, if nothing else, the change will allow empiricists to assess the impact of legal change on investment practice.

C. Another Counterexample: BlackRock Returns Voting Rights to Labor's Capital

Let me provide one other concrete example of how the changing culture of markets is affecting labor's capital today. Following broader populist trends that have spread to finance, and responding to both regulatory and customer pressure, BlackRock just announced that it will return proxy voting power to its pension clients.[142] While it is true that some pension fund clients had previously negotiated separate deals with BlackRock retaining voting and litigation rights, for most pension clients, investing through BlackRock also meant it voted on your behalf. No doubt State Street and Vanguard will follow suit. If you re-ran the Liu and Goldstein paper in an environment where more pensions voted their own proxies, instead of BlackRock, it is not difficult to imagine even stronger pro-labor results. Pensions always had the capacity to claw back their voting rights, and some have exercised them all along. Now BlackRock has essentially handed them back (after much lobbying from pensions, and, no doubt, because of regulatory fears too). Actions like these further empower labor's capital.

Moreover, even if tomorrow BlackRock gave all 401(k) holders the right to vote their shares—increased competition for retail investors from firms like Robinhood may eventually force their hand—the trivial impact of any one 401(k) holder's vote prompts rational apathy. Most non-401(k) retail

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> Our view is the choices we make available to clients should also extend to proxy voting. We believe clients should, where possible, have more choices as to how they participate in voting their index holdings. Beginning in 2022, BlackRock is taking the first in a series of steps to expand the opportunity for clients to participate in proxy voting decisions where legally and operationally viable. To do this, BlackRock has been developing new technology and working with industry partners over the past several years to enable a significant expansion in proxy voting choices for more clients.

Working to expand proxy voting choice for our clients, BLACKROCK (Oct. 2021), https://www.blackrock.com/corporate/about-us/investment-stewardship/proxy-voting-choice; *see also* Ewan McGaughey has advocated for European pensions to take similar actions. *Sustainable pensions, democratic governance, and EU law*, 23 EUR. J. SOC. SEC. 279 (2021).

shareholders already have the vote, and rarely exercise it.[143] In contrast, pooled defined-benefit pension plans with trustee fiduciaries, a substantial contingent of which is comprised of fellow worker-participants, are required to vote, can and do develop voting and investment policies, negotiate volume discounts, and the like.[144] In short, labor's capital can actively monitor its shares and has the capacity to wield collective investment authority, again, not unlike the difference between a unionized worker and an individual unrepresented one. This isn't to say that large mutual funds couldn't be converted into entities that were more capable of reflecting the interests of their investors, just that if they were converted, they come to look a lot more like what public pensions and labor funds look like right now.

BlackRock's return of voting rights looks like the beginning of a significant trend. It will further empower labor's capital, and it is yet another example defying the structuralist critique.

In sum, we are in the midst of the first serious ideological challenge to shareholder primacy since the 1970s, with some empirical evidence supporting the proposition that ESG and stakeholderism are real. We have some evidence of shareholder activism yielding outputs like improving the environment and diversity, two goals few would have said could be achieved by the financial system as recently as five years ago. There is substantial evidence that these effects are being produced by generational shifts in attitudes and behaviors. The financial system was not set up to improve environmental outcomes or increase diversity, and yet it has been shown, in at least limited circumstances, that it can be bent towards such ends. These market developments are having an impact on fiduciary duty and are also moving in the direction of letting labor's capital be used to advance the interests of labor.

Given the theoretical basis for believing in the potential of labor's capital to help workers, given some empirical evidence supporting its ability to do so in the past, even under severe constraints, and given strong evidence that these constraints are being relaxed, there are ample reasons to believe that labor's capital is well-positioned to fulfill its promise.

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[143] *See* Stacy Scapino, *Retail Shareholder Proxy Voting Apathy*, SEEKINVEST (Sept. 6, 2021), https://seekinvest.com/2021/09/06/retail-shareholder-proxy-voting-apathy/ ("They specifically identify three trends that have shifted affected retail shareholders in voting. 1, Companies must provide more disclosures across multiple issues, increasing required resources to assess the issues and how to vote. 2, Regulators and activist shareholders are forcing more issues to a shareholder vote, again increasing shareholder time and effort required in deciding how to vote. 3, Retail shareholders today hold a broader and more diversified portfolio, which translates to more holdings and more board meetings. Put simply – this information overload creates apathy.").

[144] Employee Retirement Income Security Act, Pub. L. No. 406, 88 Stat. 829 (1974).

Conclusion

The idea that labor's capital can be used to advance the interests of labor has been around for decades. At the theoretical level, labor can use the power inherent in shareholding—vote, engage, sue, sell—to impact its investees in ways that advance labor. Some of the empirical evidence suggests that labor's capital undermines labor. But other evidence suggests the opposite—that it can advance the interests of labor if properly deployed. Structuralist critiques that insist labor's capital is playing a rigged game have failed to explain those historical instances when labor's capital has fulfilled its promise. In addition, to the extent that the exercise of labor's capital to date has disappointed the high expectations of its advocates—and not everyone agrees it has—plausible culprits are shareholder primacy and an excessively narrow interpretation of fiduciary duty. Both of these constraints have been loosened in recent years. Stakeholderism is challenging shareholder primacy both rhetorically and in reality. Fiduciary duty is on the verge of expanding in ways that should facilitate the mission of labor's capital. No doubt, there are valid criticisms of labor's capital. None justify its abandonment. None justify the argument that labor's capital strategies are pointless absent drastic regulatory reform. None prove the desirability or the feasibility of abandoning pensions wholesale in favor of Social Security alone. The debate continues.