

Climate damage: can corporate governance stop it faster?

29 June 2018, Smart, University of Oslo

[@ewanmcg](https://twitter.com/ewanmcg) ~ ewan.mcgaughey@kcl.ac.uk

School of Law, KCL ~ Centre for Business Research, Cambridge

Structure of this talk:

- **(1) Liability for climate damage**
- **(2) Duty to invest in renewables**
- **(3) Corporate and investment governance**

Are we powerless?

- Lord Sumption, 'The Limits of Law' (2013) sceptical of 'unbounded confidence' of 'law as an engine of social and moral improvement'. Judicial decisions are supposedly a 'constraint on the democratic process'.
- Mariana Pargendler, 'The corporate governance obsession' (2016) 42 Journal of Corp Law 359, suggests we shouldn't be 'meddling' with corporate law to fix social problems of inequality, injustice or environmental harm: better to use the state: or you're 'obsessed'.
- Maria Lee, 'Climate Change Tort' (2015) ssrn.com, despite sympathy for solutions, says 'any action against emitters will face profound and extensive doctrinal challenges, at every step of the process.'
- *These assessments are wrong. These arguments strangle the capacity for human action in the cradle, and pretend without justification that it's impossible for humanity to solve it's own problems.*

(1) Liability for climate damage

- The basic principle in tort law is that people should be responsible for harm they cause. This protects people's rights to health and safety, property, intangible interests, etc.
- *But* climate damage might be seen as an issue that is so gigantic that the courts should not touch it.
- *And* it could be argued that climate damage is too complex, with too many actors, for the law to do anything about: because it's so big, and because we all contribute (to differing degrees) to the causes, tort law is powerless.

Questions for corporate torts

1. Is there damage?
2. Is there a duty of care (foreseeability, proximity, fair, just and reasonable)?
3. Is there a breach (standards of reasonable person)?
4. Is there causation? Which is not too remote?
5. Does court have jurisdiction, a choice of law?
6. Can there be an injunction, damages (exemplary)?
7. Is damage authorised by statute?
8. *Is it politically desirable for a court to intervene?*

Key issues for climate damage

- 1. The 90 largest carbon emitters are responsible for 63% of all historical emissions causing *climate damage*.
- 2-3. There's clearly a *duty of care* and *breach* when companies pollute.
- 4. For causation, a product liability case, *Sindell v Abbott Laboratories* 26 Cal 3d 588 (1980) suggests you can allocate responsibility by market share. In *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22 found liability for materially increasing the risk of harm when causation was uncertain.
- 5. *Lungowe v Vedanta Resources plc* [2018] EWCA Civ, found a London parent co of a Zambian copper mining subsidiary responsible for damage to local environment and workers. English law was applicable under the Rome II Regulation. Will appeal to UKSC.
- 6. Established precedent in UK law says you get punitive damages when a tort is 'calculated to make a profit': *Rookes v Barnard* [1964] UKHL.
- 7. You could argue that statutes authorise climate damage – e.g. Petroleum Act 1998 licenses oil drilling. But a licence to dig it up isn't burning it

(2) Duty to invest in renewable energy

- Under the Companies Act 2006 s 174, every director must exercise ‘care, skill and diligence’ that should be expected of their office: big co’s can be expected to exercise more care.
- Further, s 172 says directors must consider ‘the long term’, the ‘environment’, while promoting company success for members as a whole.
- This gives directors significant discretion, *but* when there are **simple procedural failures**, which all reasonable director would follow, directors will be liable
 - eg *Re D’Jan of London Ltd* [1994] 1 BCLC 561, a director was liable for failing to properly fill out an insurance form, before a warehouse burned down.

Medforth v Blake [1999] EWCA Civ 1482

- Medforth sued his insolvent's pig farm company's receiver for failing to buy cheap pig food. After the company went bust in 1984, the main creditor (a bank) appointed a receiver which ran the business until 1988. Medforth could pay his debts back. Medforth pleaded with the receiver to use a discounting scheme to buy cheaper pig food – to save around £1000 a week.
- Court of Appeal held a duty of diligence was breached in equity, to save the money.
- *Applies to any fiduciary: any director, asset manager.*

Bringing a claim

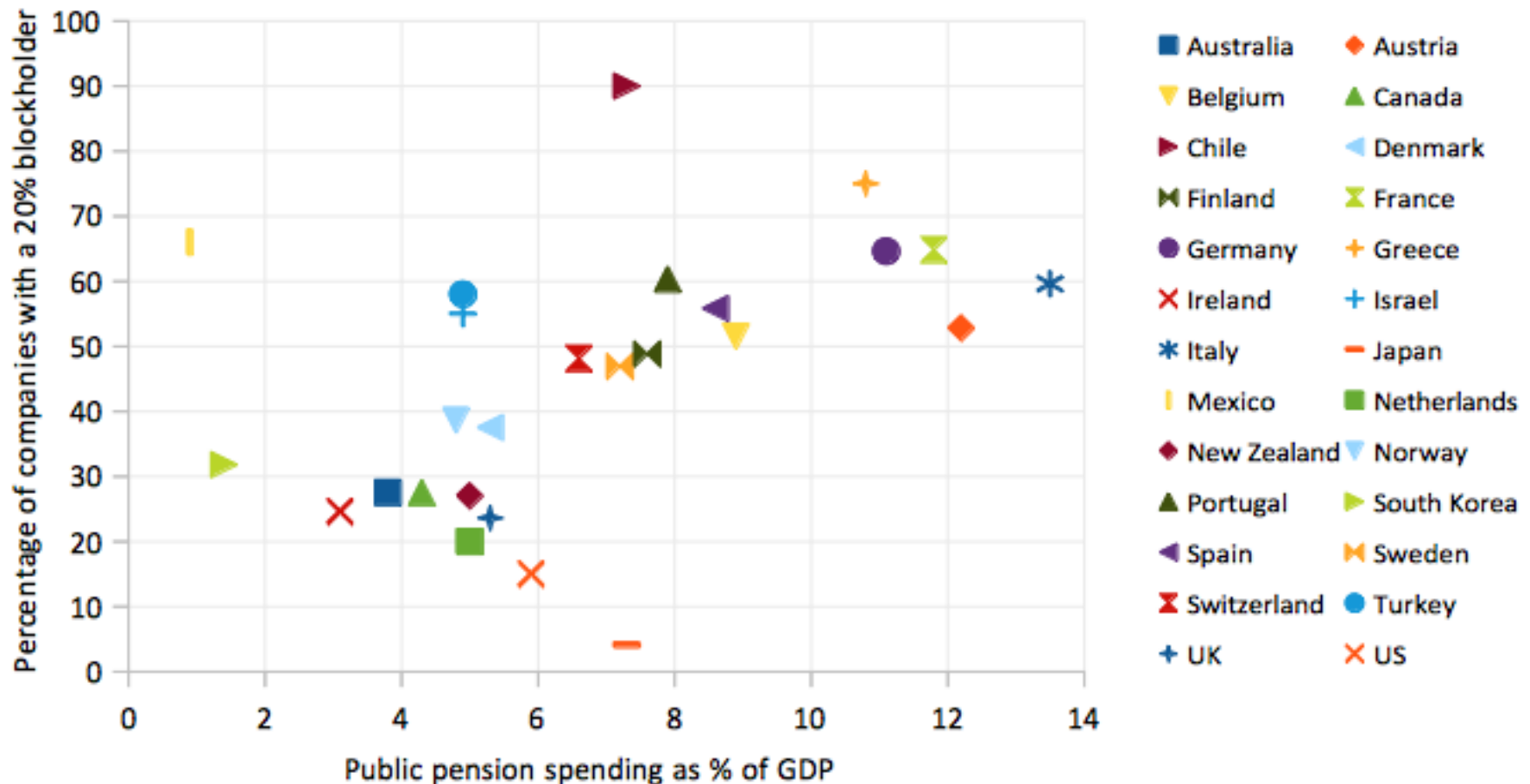
- Under the UK Companies Act 2006 ss 260-263, any company member can bring a derivative claim, to vindicate breaches of directors' duty (i.e. the duty of care under s 174).
- *Any* shareholder or member (i.e. pension funds, UK-based or foreign) could sue to compel the directors' to take action, requesting an injunction to invest. No requirement for a minimum no. of shares. If successful, the co bears litigation costs.
- *Re Fort Gilkicker Ltd* [2013] EWHC 348, Briggs J it's also possible for members of members to bring derivative claims (e.g. a pension fund holding a beneficial interest in shares)
- The claimant has to prove the claim is in the interests of the company: very likely for negligence claims.

(3) Corporate, investment governance

- In most countries corporate governance is monopolised by shareholders using ‘other people’s money’:
 - asset managers in diversified shareholding systems like the UK, US, Australia, etc
 - banks in systems where there are more blockholders, eg Germany, Switzerland, etc
- The reasons for different shareholding structure have been extensively debated in law and economics, but the evidence suggests it depends upon a country’s pension system...

Share ownership dispersion and public pension spending

Sources: Gourevitch and Shinn (2005) 18 and OECD (2013) 171



Bigger (income linked) **state pensions mean** stock markets are (1) smaller (2) less diversified, meaning (3) **more blockholding shareholders**. Minimum state pension systems mean more share dispersion: people have to save in occupational pensions. That money floods into the stock market, and floods out blockholding shareholders.

Pension fund organisation

- The UK **Association of Member Nominated Trustees** organised in 2010, among employee or union elected pension trustees. Its members have £600bn in assets under management.
- In 2016 released its '**Red Line Voting**' policy, which aims to instruct asset managers (who manage pension fund money) on how to vote: E S G
 - E1.) Requirement for an **Environmental Sustainability Committee** (or vote against the chair of the company's board of directors)
 - E2.) Disclosure of information via CDP (**Carbon Disclosure Project**) questionnaires (71% of FTSE 100 co's disclosed in 2014, graded)
 - E3.) Company support for international agreement between governments on climate change (if not, vote against the chair)
 - E4.) Introduction and **disclosure of emission reduction targets**
 - E5.) Environmental damage (if there is a history of disasters, vote against the chair unless there is a clear account of improvement)

Investment fund accountability

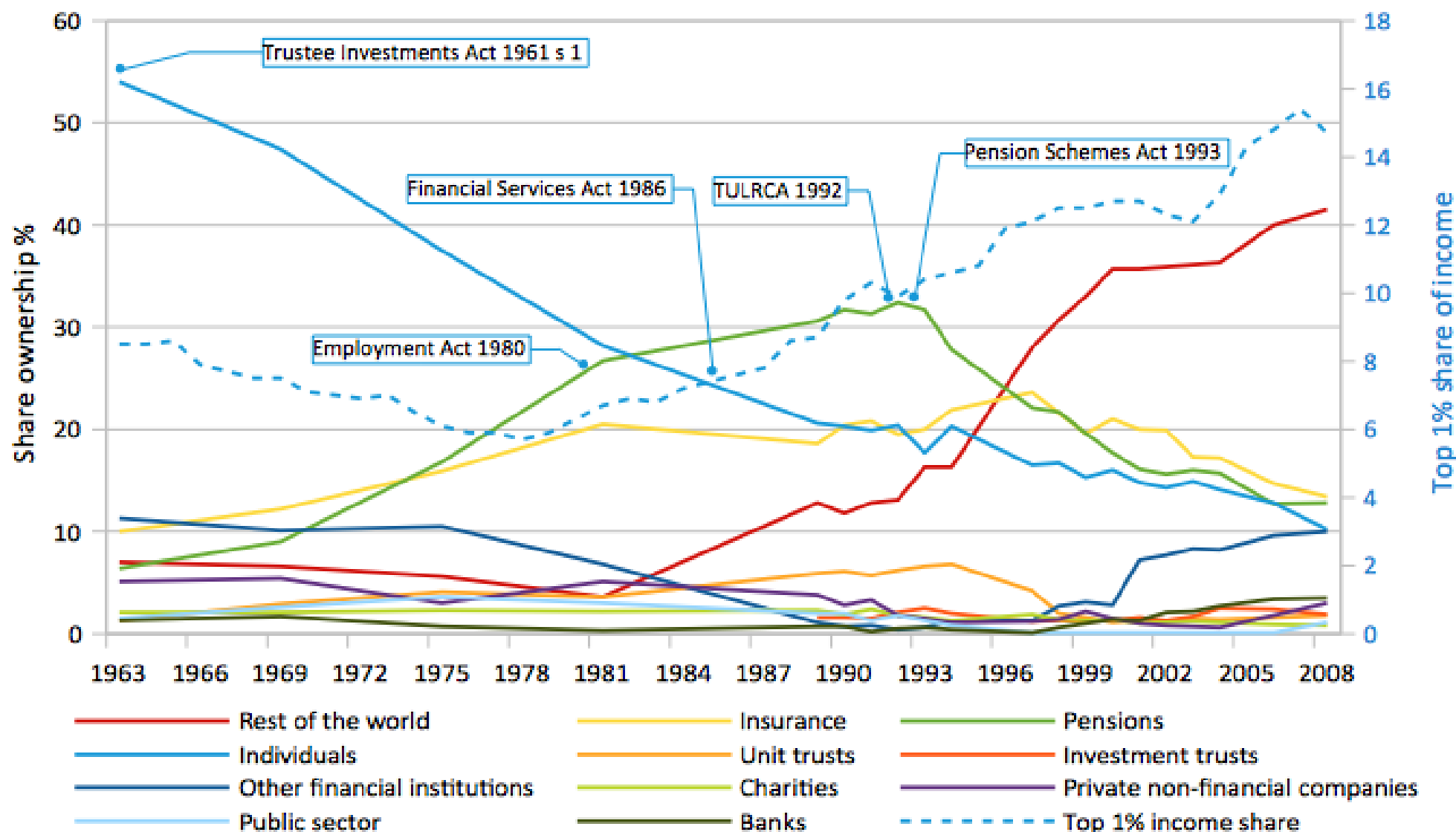
- Church of England outperformed all other funds in 2017 with a policy of ethical investment and divestment from fossil fuels or toxic stocks
- *Harries v Church Commissioners* [1992] 1 WLR 1241 held that funds are allowed to invest according to principles consistent with a trust's purpose (e.g. upholding Christian values) – in other words it is always possible and lawful to invest ethically.

Conclusion

Everything is going to be fine.

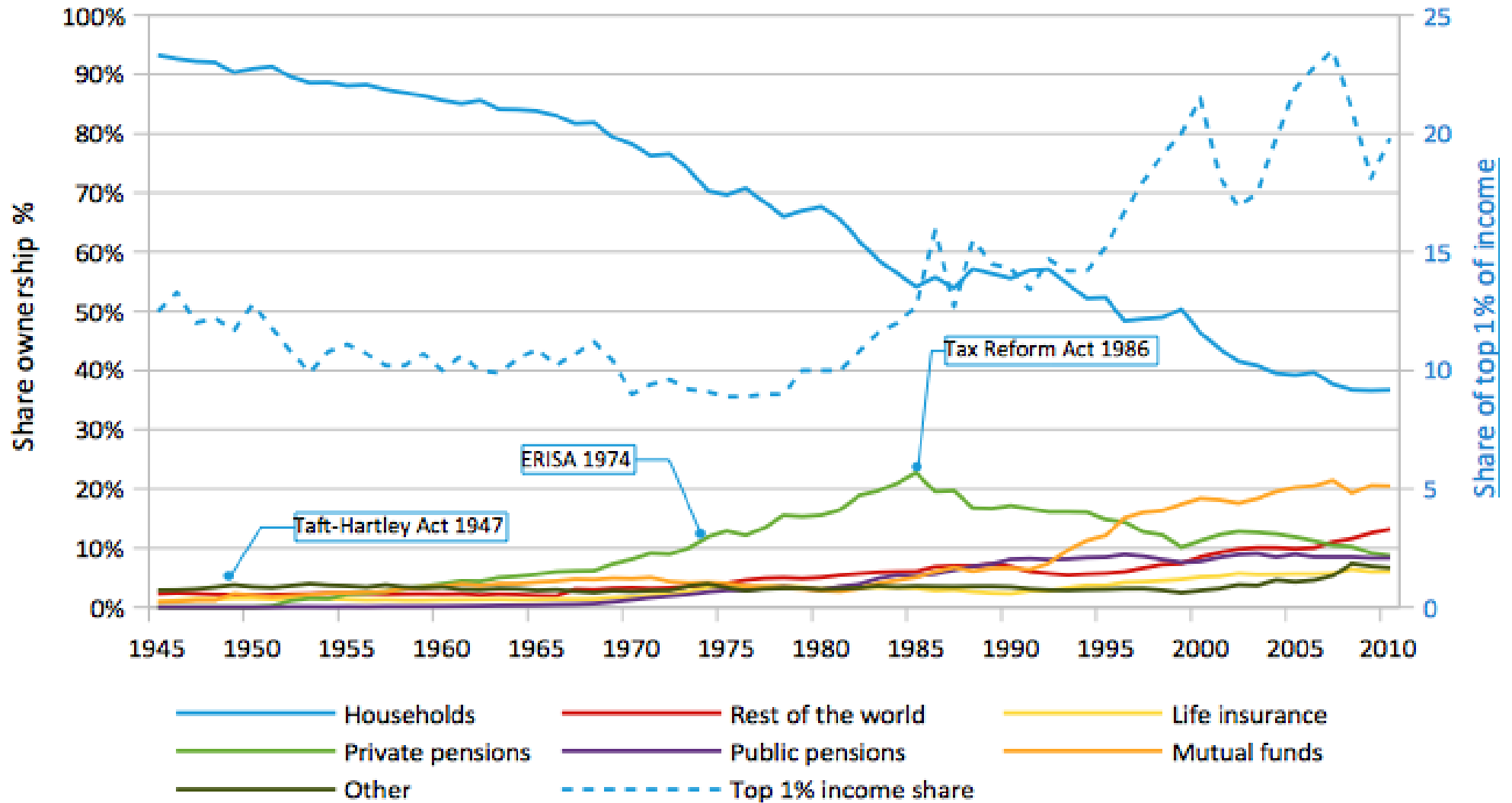
UK share ownership 1963 to 2008

Sources: ONS (2008) and Piketty (2014)



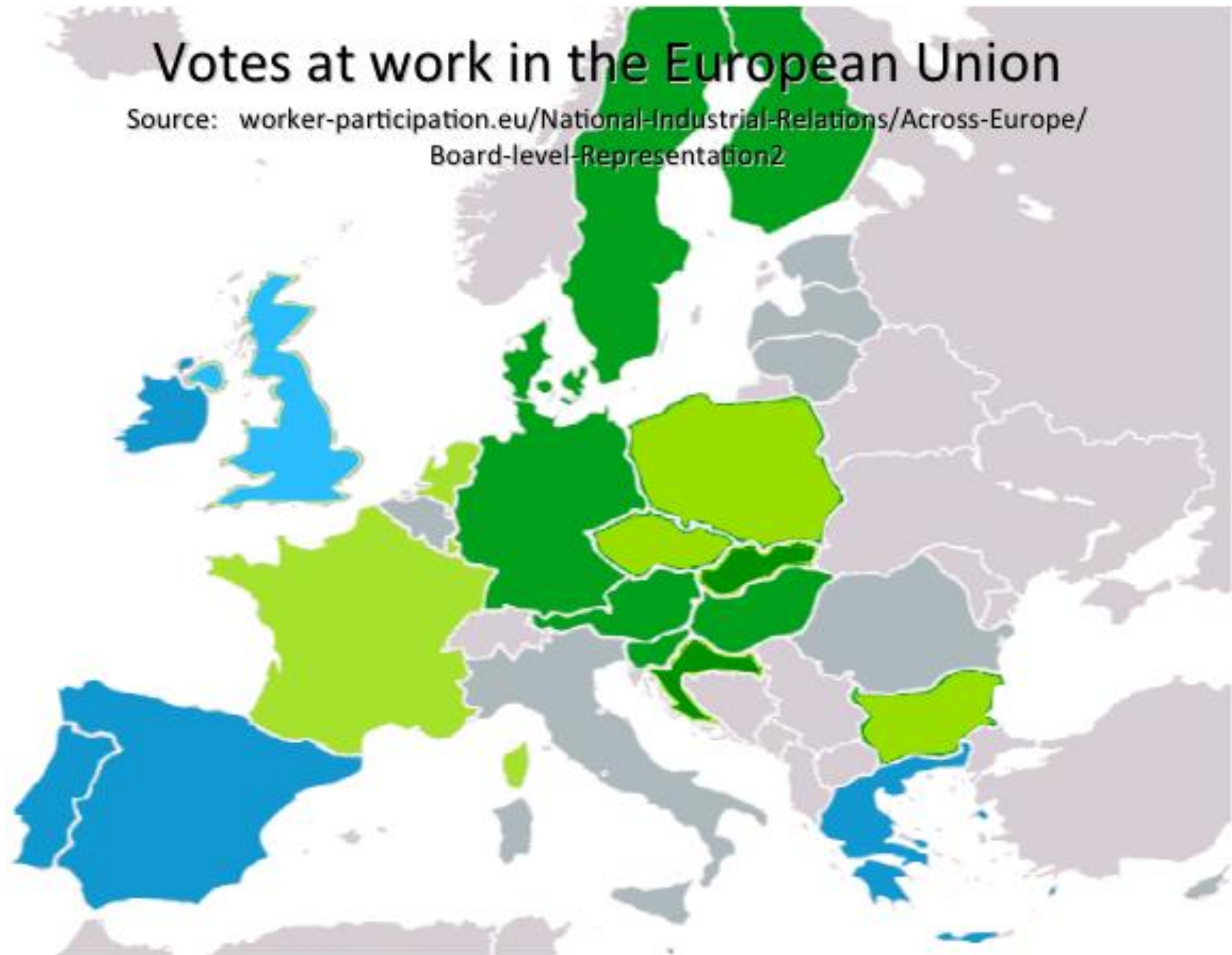
US share ownership 1945-2010

Sources: Federal Reserve, Flow of Funds (2011) L.213 and Piketty (2014)



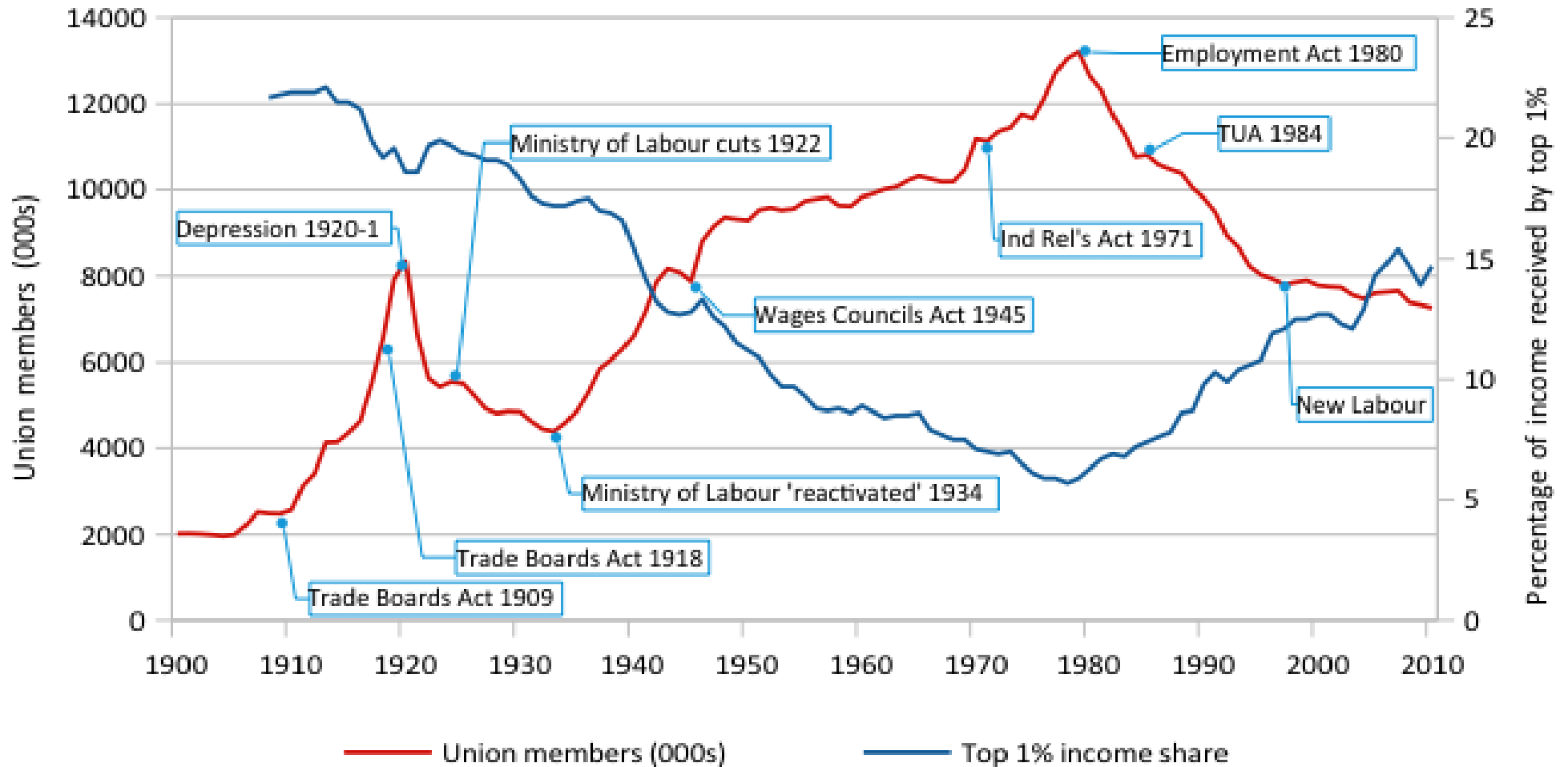
Votes at work in the European Union

Source: worker-participation.eu/National-Industrial-Relations/Across-Europe/Board-level-Representation2



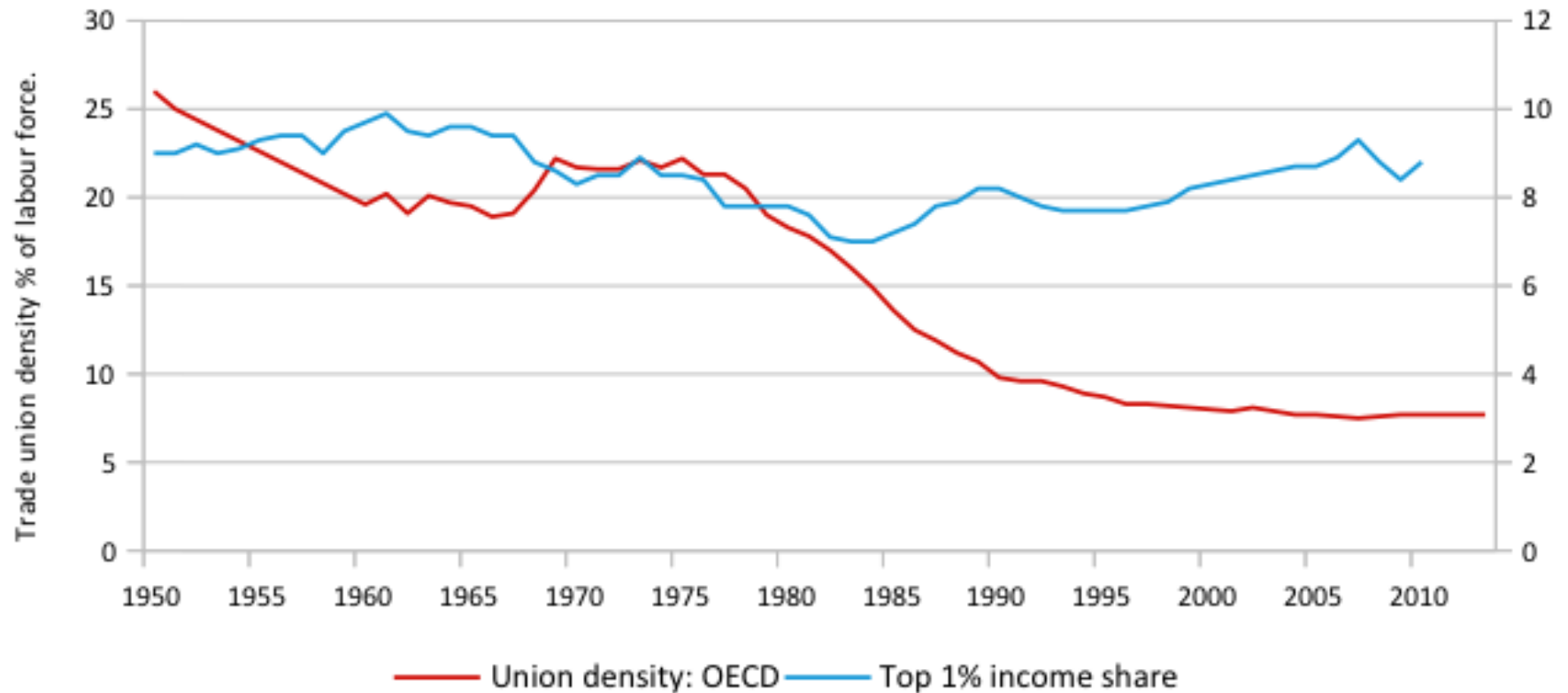
UK union membership and income inequality 1900-2010

Sources: N Brownlie, Trade Union Membership 2011 (DBIS 2012) 22-23
T Piketty, Capital in the Twenty-First Century (2014) Technical Appendices, Table S9.2



Union membership and inequality in France

Sources: OECD Trade Union Density. Piketty (2014) Table S8.1.



Union membership and inequality in Denmark

Sources: OECD Trade Union Density. Piketty (2014) Table S9.2

