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Delegated Corporate Voting and the Deliberative Franchise

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Delegated Corporate Voting and the Deliberative Franchise

*Sarah C. Haan**

ABSTRACT

Starting in the 1930s with the earliest version of the proxy rules, the Securities and Exchange Commission (SEC) has gradually increased the proportion of "instructed" votes on the shareholder's proxy card until, for the first time in 2022, it required a fully instructed proxy card. This evolution effectively shifted the exercise of the shareholder's vote from the shareholders' meeting to the vote delegation that occurs when the shareholder fills out the proxy card. The point in the electoral process when the binding voting choice is communicated is now the execution of the proxy card (assuming the shareholder completes the card without error); proxyholders merely transmit the shareholder's instruction as a formality.

This shift is more significant than generally recognized because, as this Essay explains, it restores the potential for deliberative shareholder governance to the large, publicly held corporation. Furthermore, the shift has occurred at a moment in history when technologies exist to facilitate new processes of deliberative shareholder governance. Market actors now are leveraging technology to create such innovations as pass-through voting and advance voting instructions, and academic support is building for new rules that would require intermediaries to provide their beneficial holders with choice infrastructure. This is the realization of the New Deal project to make shareholder preference-satisfaction the crux of the shareholder franchise, and it holds real promise to move corporate governance beyond shareholder wealth maximization.

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CONTENTS

INTRODUCTION 484
I. DELEGATED VOTING AND SHAREHOLDER WEALTH MAXIMIZATION 489
II. THE INSTRUCTION (R)EVOLUTION 496
III. THE NEW DELIBERATIVE GOVERNANCE 504
CONCLUSION 509

INTRODUCTION

The electoral process may function as a mechanism for aggregating voters' pre-existing preferences. Alternatively, it may provide avenues for deliberation as a means for voters to *create* preferences and then advance them through voting. Political theorists debate the merits of these competing views, but in corporate governance, the battle between them was resolved in the nineteenth century, by the creation of the proxy system.[1] Proxy voting is delegated voting—and delegated voting forecloses deliberation. Proxy voting transforms the corporate election into a formality in which predetermined proxy votes are merely executed.

Shareholder preferences about matters of corporate policy *could* be created through deliberation at the point of the proxy solicitation, at least in theory. However, proxy solicitation has never functioned as an opportunity for shareholders to engage in deliberative governance in the United States. Proxies are very lightly regulated by state corporate laws, leading to a proxy system in which shareholders of large public companies were asked to provide the company's own management with an uninstructed delegation of the vote. The 1934 Securities Exchange Act, which authorized the Securities and Exchanges Commission (SEC) to improve the proxy system, made proxy solicitation an exercise of pure disclosure.[2] By federal design, the proxy materials merely inform shareholders about how the proxy-holder plans to vote the proxies, and shareholders are asked to either sign the proxy card or not (many shareholders do, in fact, abstain from voting). Thus, shareholders must decide whether to delegate their vote based solely on their preexisting interests.

In the usual case, the shareholder "vote" is reduced to this one decision of delegation. The typical public company director election presents

1. Corporate law statutes enacted in the twentieth century that permitted shareholder action on written consent further served to cement the pluralist-protective approach, which emphasizes preexisting interests and places no importance (and leaves no room) for deliberative processes in which a debate or discussion might reshape preferences.

2. *See* S. REP. No. 73-792, at 12 (1934) (stating that "[t]oo often proxies are solicited without explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought," and concluding that "the solicitation and issuance of proxies be left to regulation by the [Securities and Exchange] Commission.").

shareholders with a single slate of candidates running unopposed.[3] In the vast majority of cases, the corporation's management makes the only proxy solicitation. The shareholder franchise amounts to a binary choice—delegate or forego voting altogether. In a regime where voting has been reduced to an up-or-down delegation based on shareholders' pre-existing interests, a single question predominates: what is the voter's preexisting interest?

Here, of course, corporate theory has long supplied an answer: the shareholder's pre-existing interest is wealth maximization.[4] Because the proxy system itself forecloses the kinds of processes that might produce other shared preferences—deliberative processes are not possible when the shareholder is presented with a single up-or-down vote delegation as outlined—the shareholder wealth maximization norm is important. It has long served, both rhetorically and practically, as the determinant of the shareholder's decision to delegate the vote. Shareholders all share a pre-existing interest in wealth maximization. Therefore, a proxy solicitor need only advance the wealth maximization interest to justify the vote delegation. It is not that shareholders do not possess other interests—they do—but the modern proxy system was not designed to present shareholders with a range of options: every proxy solicitation is an up-or-down affair. The rise of intermediation, which followed the emergence of the proxy system, only served to further distance the beneficial holder from the vote in ways that made the identification of a shared, pre-existing interest of holders more essential.

Thus, over the twentieth century, a chasm opened up between shareholders' preferences and the actual composition of boards. The chasm was reflected not only in the growing dissatisfaction of many Americans in the direction of corporate policy, but also in the significant representative gap between corporate directors and the demographics of the modern workforce.[5]

Over this same period, a different transformation was occurring. Prior to 1938, parties had free rein to solicit an unrestricted proxy, meaning that the proxy-holder (i.e., management) retained complete discretionary

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3. *See, e.g.*, Reena Aggarwal, Sandeep Dahiya & Nagpurnanand R. Prabhala, *The Power of Shareholder Votes: Evidence from Uncontested Director Elections*, 133 J. FIN. ECON. 134, 134 (2019) ("Almost all director elections in the United States are uncontested."); Concept Release on the U.S. Proxy System, Exchange Act Release No. 62,495, Investment Company Act Release No. 29,340, 75 Fed. Reg. 42982, 42983 n.12 (July 14, 2010) (noting that "there ordinarily are not more candidates than seats" in corporate elections).

4. *See, e.g.*, Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 449 (2001).

5. I have some details about this in my forthcoming book chapter, *Exclusion in Corporate Law and Governance*, *in* the OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE (Jeffrey Gordon & Wolf-Georg Ringe, eds.) (*forthcoming* 2024) (on file with author).

authority to decide how to vote. In 1938, the SEC promulgated rules under the 1934 Act that required the form of proxy (the "proxy card") to offer shareholders an opportunity to instruct the proxy-holder about certain kinds of votes.[6] This was later amended to clarify that instruction options were *not* required for director elections. As a result, after 1938, proxies became *partially* instructed as a matter of federal law—they had to offer a choice of voting options for proposals (either management or shareholder proposals), but not for director elections.[7] For various reasons—shareholders likely did not understand their new options, and proposals were few and far between until the rise of Environmental, Social, and Governance (ESG) shareholder proposals in the twenty-first century—the requirement of a partially instructed proxy did not catalyze new processes of deliberative governance. Instead, many shareholders failed to make any instruction at all.[8]

Today, however, various factors (including new technologies) are making it easier for shareholders to treat the proxy delegation as the vote itself, in which they exercise discretion over voting choice. Shareholders now vote on more matters than they did in the 1930s, and the SEC has gradually required instruction for all these matters on the proxy card.[9] For example, after Congress passed the Dodd-Frank Act in 2011, the SEC added some additional requirements for instruction on Say-On-Pay.[10] (Securities regulation required proxy-holders to honor shareholders' choices on the proxy card.) Finally, in 2022, the universal proxy went into effect, which requires a fully instructed proxy on director candidates.[11]

In other words, between 1938 and 2022, the proxy system was transformed from a regime that relied on uninstructed proxies, to one that requires a fully instructed proxy. It is not quite true to say that the proxy card is now an absentee ballot, but the transformation is significant. It reflects a serious, decades-long, *expanding* federal commitment to shareholder

6. *See* discussion *infra* Section II.

7. *See* discussion *infra* Section II.

8. *See* David C. Bayne, Mortimer M. Caplin, Frank D. Emerson & Franklin C. Latcham, *Proxy Regulation and the Rule-Making Process*, 40 VA. L. REV. 387, 413–14 (1954).

> I submit that it is at least open to question whether the individual shareholder understands generally that in submitting his proxy, unlike the more familiar circumstances of voting in a political election, here he must, in order to vote for a proposal, not only mark his X in the appropriate box as he does a political election, but that he must also sign his name to the proxy ballot in order to vote for a proposal.

Id. (statement of Frank Emerson).

9. *See* discussion *infra* Section II.

10. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 951, 124 Stat. 1376, 1899 (2010) (codified as amended at 15 U.S.C. § 78n-1); Shareholder Approval of Executive Compensation and Golden Parachute Compensation, 76 Fed. Reg. 6009, 6009 (Feb. 2, 2011) (to be codified at C.F.R. pts. 229, 240, 249).

11. *See* Universal Proxy, Exchange Act Release No. 3596, Investment Company Act Release No. 34,419, 86 Fed. Reg. 68330 (Dec. 1, 2021).

preference–satisfaction beyond the simple metric of shareholder wealth maximization. The transformation has shifted the exercise of the shareholder franchise from the shareholders' meeting, to the proxy solicitation itself, opening new opportunities—previously foreclosed—for deliberative shareholder governance at the point of solicitation. The markets are just starting to awaken to this opportunity.

Already, corporate law experts are proposing reforms that would facilitate deliberative processes for shareholders at the solicitation stage. For example, law professor Sean Griffith has argued that the SEC and the Department of Labor should interpret funds' fiduciary duties to prevent them from exercising discretionary voting authority over ESG shareholder proposals; Griffith suggests that this would lead funds to develop technologies to facilitate pass-through voting.[12] Separately, law professors Jill Fisch and Jeff Schwartz argue that pension and mutual funds are analogous to elected representatives in a legislature, and should therefore have an obligation to survey their clients about how to vote in corporate elections.[13] Both sets of recommendations would create pressure on intermediaries to develop mechanisms for deliberative shareholder governance.

Though Fisch and Schwartz suggest an analogy between funds and elected representatives, this Essay argues that it might be more accurate to analogize funds (and their umbrella organizations, asset managers) to political parties. Like political parties, funds are private associations that create policy programs (published as "voting guidelines") and participate in the electoral process to actualize those policies across a wide field of elections (i.e., across firms and industries). Political parties help organize political action and make it more effective, yet they are constrained by accountability mechanisms that reduce the viability of extreme candidates and viewpoints. Asset funds arguably function similarly.

Asset managers are not political parties—far from it—but the analogy can help us imagine the sorts of processes that funds could employ to enhance deliberative shareholder governance at the point of solicitation. For example, political parties have both local and national organizing structures; they hold conventions and have their own internal nominating processes and primary elections. Asset managers could employ similar mechanisms. All signs suggest that some Americans would value the opportunity to participate in the formation of corporate policy platforms at

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12. Sean J. Griffith, *Opt-In Stewardship: Toward an Optimal Delegation of Mutual Fund Voting Authority*, 98 TEX. L. REV. 983, 1044–46 (2020). Griffith's article did not anticipate the SEC's move to a universal proxy in 2022, so some of his prescriptions require updating.

13. *See* Jill E. Fisch & Jeff Schwartz, *Corporate Democracy and the Intermediary Voting Dilemma* 56–58 (Eur. Corp. Governance Inst., Working Paper No. 683, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4360428 [https://perma.cc/A9QC-A6X3].

funds, while others merely would affiliate with funds as an expression of their identity. This mirrors how Americans participate in political parties.

Finally, the investor class already appears to be sorting itself into a new set of associations. The last decade has seen tremendous movement towards ESG funds, a sign that Americans are eager to affiliate with issue-oriented investment groups. Investors who buy stock through brokers have demanded advance voting instructions. Recently, the companies Broadridge and Iconik have developed platforms and applications designed to help shareholders create voting preferences.[14]

This Essay proceeds as follows: Part I explores the theory behind delegated voting in corporate elections and its connection to the shareholder wealth maximization norm. Part II describes the history of the modern proxy system and its transition from an unregulated regime utilizing uninstructed proxies (prior to 1938), to a regulated regime employing partially instructed proxies (mandated by the SEC from 1938 to 2022), to the current regime, which requires fully instructed proxies (mandated by the SEC beginning in fall 2022). Though the SEC itself has downplayed this evolution as implicating merely the format or presentation of proxy cards, there is little question that it has substantively impacted the exercise of the shareholder franchise. This Essay presents this history as a transformation and situates it within the rise of shareholder wealth maximization, which developed and gained strength over roughly the same period. It also notes that intensifying federal requirements for proxy instruction provided the basis for the "stewardship" movement of the twenty-first century.

Part III explains a piece is missing in this story. Individuals have bounded resources and lack the time and money to explore the policy dimensions of every company in their portfolios. They cannot be expected to execute informed voting instructions in dozens or hundreds of corporate elections each proxy season. Importantly, the task of instructing proxies is significantly more labor-intensive than signing management proxies. What is necessary to revitalize corporate governance is not only to make deliberative processes possible at the point of proxy solicitation. It also requires a party-like, aggregating function in the market that allows shareholders to vote their preferences with ease and efficiency.

Part III thus explores the analogy of asset managers to political parties and surveys some existing reform proposals for their capacity to encourage (or at least leave room for) deliberative shareholder governance. Already, ESG funds appeal to investors interested in matters such as

14. *See* Keir Gumbs, *The Universal Proxy: An Early Look*, HARV. L. SCHOOL FORUM ON CORP. GOVERNANCE (Feb. 28, 2023), https://corpgov.law.harvard.edu/2023/02/28/the-universal-proxy-an-early-look/ [https://perma.cc/WX92-STJT]; *How It Works*, ICONIK, https://www.iconikapp.com/advisors/how-it-works [https://perma.cc/83Z6-BEPZ].

women's empowerment and climate change, but their effectiveness has been limited. We may be just a few years away from the rise of non-profit asset managers that leverage charitable donations to fund nominations of candidates for board governance.[15]

I. DELEGATED VOTING AND SHAREHOLDER WEALTH MAXIMIZATION

This Part introduces and explores delegated voting as a core, unique aspect of the shareholder franchise. It shows how delegated (i.e., proxy) voting shapes the menu of interests that are relevant to corporate elections. Substance follows form: without processes in place to provide voters with options, the range of interests that can be advanced through an election is quite narrow. In particular, this Part reveals how delegated voting encourages proxy solicitors to reduce shareholders' voting interests to the narrowest, most universally shared interest common to the shareholder class: wealth maximization.

The corporate election is significantly undertheorized. The modern corporate law academy has produced only one significant theory of corporate voting, which looks at voting from the law-and-economics perspective.[16] Though this perspective is valuable, it was developed long after the shareholder franchise emerged and holds limited usefulness for understanding the historical development of shareholder voting and its intended purposes. At most, the law-and-economics perspective offers descriptive insights that could help explain why certain aspects of corporate voting promote efficiency, and thus, would be expected to persist in the law (assuming that the law always evolves toward the efficient rule). The law-and-economics literature on shareholder voting has largely ignored how political theory once influenced the development of corporate law.[17]

15. The precedent for this was set by Engine No. 1 in the now-famous 2021 corporate election at ExxonMobil. *See* Matt Phillips, *Exxon's Board Defeat Signals the Rise of Social-Good Activists*, N.Y. TIMES (June 9, 2021), https://www.nytimes.com/2021/06/09/business/exxon-mobil-engine-no1-activist.html [https://perma.cc/A79Z-NKNL].

16. Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J. L. & ECON. 395, 403 (1983) (arguing that "[v]oting exists in corporations because someone must have the residual power to act (or delegate) when contracts are not complete"). Easterbrook and Fischel wrote that, for shareholders,

> The right to vote is the right to make all decisions not otherwise provided by contract—whether the contract is express or supplied by legal rule. The right to make the decisions includes the right to delegate them. Thus voters may elect directors and give them discretionary powers over things voters otherwise could control.

Id. at 402.

17. The best example of this is the rise of cumulative voting in the 1870s. *See, e.g.*, SALEM DUTCHER, MINORITY OR PROPORTIONAL REPRESENTATION: ITS NATURE, AIMS, HISTORY, PROCESSES, AND PRACTICAL OPERATION 52 (1872). Political philosopher John Stuart Mill invented cumulative voting in the 1860s for political voting, but when brought to the United States, legislatures and constitutional conventions embraced it for shareholder voting instead. *See id.*; *see also* JOHN

Indeed, in the United States, the political electoral system and the corporate electoral system essentially emerged simultaneously, albeit not in identical ways. During the middle of the twentieth century, the influence of political theory on corporate governance waned while economic theory emerged as an influence on the field of political science.[18]

In political theory, two visions of electoral politics have emerged. One, sometimes called the "pluralist-protective position," views the purpose of politics as "the aggregation of individual or group preferences to enable voters either to obtain certain benefits from the government or to prevent the government from depriving them of pre-existing rights or entitlements."[19] This position emphasizes the preexisting nature of voters' interests and assumes that voters will use the political process to try to advance those preexisting interests.[20] In this view, elections constitute the sorting mechanism through which voters' preexisting interests are expressed and actualized through governance.

The other theory is the "republican-communitarian strand," which views politics as primarily about collective decision-making and deliberation.[21] From the republican-communitarian viewpoint, "politics is as much about creating preferences as it is about satisfying them."[22] Through deliberative processes that occur around elections and voting—through the very structure of the electoral system, as created by law—voters are encouraged to develop preferences and then to express them. For the voter, this process necessarily involves consideration of alternative perspectives and perhaps a bit of compromise.

These two competing visions can easily be applied to corporate governance and shareholder voting. The first view suggests the purpose of shareholder voting is to use the mechanism of the vote to aggregate preexisting shareholder interests, mainly through the annual election of directors. (Shareholder voting on management-sponsored or shareholder-sponsored proposals would also accomplish this, but it occurs less frequently.) The second view suggests the purpose of corporate elections is broader and serves to allow shareholders to form preferences about corporate policy. In this view, shareholder voting is a process in which shareholders learn about the business and then determine, through various active

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STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 151 (Currin V. Shields ed., 1861) ("[T]he first principle of democracy [is] representation in proportion to numbers.").

18. *See generally* ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957).

19. Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1723 (1999).

20. *Id.* at 1723–24.

21. *Id.* at 1724.

22. *Id.* (noting that politics in this view "consists of reasoned dialogue" and its purpose "is to debate about and decide collectively what the public good requires").

processes, what they prefer and how to effectuate those preferences through corporate strategy and action. Primarily, this would manifest as the election of directors who profess a commitment to shareholders' preferred strategies.

In politics, theorists debate about which view of electoral politics is descriptively accurate and normatively desirable. In corporate governance, however, there is no such debate. The battle between these two theories of electoral governance in corporate law was resolved in the nineteenth century, by the creation of the proxy system.[23]

Proxy voting is delegated voting—and delegated voting (at least in the form that has long existed in corporate law and practice) forecloses deliberation. Thus American corporate law has committed itself to the pluralist-protective theory, in which the shareholder vote serves to aggregate pre-existing shareholder preferences.

In politics, the American ideal is a deliberative, republican model in which the political process shapes voter preferences. That is deliberative democracy, and it is widely viewed as the basis of the First Amendment.[24] It is the crux of the vaunted "marketplace of ideas" metaphor.[25] Importantly, proxy voting does not exist in American political elections; one cannot delegate one's vote to another person in a local, state, or federal election. Of course, voters can eschew the deliberative approach and engage in naked interest-based politics, and no doubt many do. But American law carefully preserves space for robust, deliberative political processes, in recognition of the high value that Americans place on the deliberative model. The American democratic system has been designed to protect and encourage deliberative politics.

In American corporate law, proxy voting developed because capital-intensive businesses required financing from individuals who lived too far from the annual shareholders' meeting to vote in person. When legislatures authorized proxy voting in the early nineteenth century, they probably imagined that shareholders would vote by proxy only when necessary; if it were possible to show up, the shareholder would do so, and participate in the town-hall style of deliberative governance then common to both municipal, business, and charitable corporations. Legislatures likely imagined

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23. Proxy voting pre-dates the nineteenth century, but the modern "proxy system" was essentially created and refined during the nineteenth century. Corporate law statutes enacted in the twentieth century that permitted shareholder action on written consent further served to cement the pluralist-protective approach, which emphasizes pre-existing interests and places no importance (and leaves no room for) deliberative processes in which a debate or discussion might reshape preferences.

24. *See, e.g.*, Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 482 (2011) ("The value of democratic legitimization occurs . . . specifically through processes of communication in the public sphere.").

25. *Id.* at 478.

that if a vote had to be exercised by a proxy, the holder would use care in selecting the proxy to ensure fidelity to the holder's unique interests.

Such care was critical because, at least before the advent of federal proxy regulation in the 1930s, the proxy-holder usually had complete discretion over how to cast proxy votes.[26] As the law developed over the nineteenth century, a proxy could be "instructed" or "uninstructed."[27] That is, a shareholder could instruct the proxy-holder precisely about how to vote on the shareholder's behalf; or, the proxy could give the proxy-holder complete freedom about how to exercise the shareholder's vote.

Once proxy solicitation emerged as a widespread practice, it became common for individuals who solicited proxies to request an uninstructed proxy. In fact, proxy solicitation usually involved the presentation to the shareholder of a standard form that, once signed, would create an uninstructed delegation of the shareholder's vote. Naturally, the proxy solicitor—often corporate management itself—encouraged the shareholder to sign the form, by which it obtained full voting discretion.

It was common for early proxy cards to state nothing about how the proxy-holder planned to exercise the vote. Sometimes, shareholders claimed that proxy solicitors had made false representations to them about how the delegated vote would be cast.[28] This was arguably fraud, though it was not actionable because the shareholder had agreed to give the proxyholder full discretion.

Sometimes, the proxy-holder or an affiliate raised a matter for a vote at the meeting that the shareholder did not foresee. Though this is not common today, unforeseen matters were commonly raised at shareholders' meetings—and voted on—through the middle of the twentieth century.[29] For example, Lewis Gilbert, the famous "gadfly" shareholder activist, gained prominence at the start of his career when he moved the retirement of the chairman of Bethlehem Steel at its 1937 annual shareholders'

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26. *See* Sheldon E. Bernstein & Henry G. Fischer, *The Regulation of the Solicitation of Proxies: Some Reflections on Corporate Democracy*, 7 U. CHI. L. REV. 226, 226 (1940) (noting the "general practice" of "solicitation of unlimited discretionary authorizations" via proxy).

27. *See* Jill E. Fisch, *From Legitimacy to Logic: Reconstructing Proxy Regulation*, 46 VAND. L. REV. 1129, 1135 (1993) ("A proxy can either give the shareholder's nominee discretionary authority or specify the manner in which the shares are to be voted.").

28. *See, e.g.*, *Mr. Conklin's Argument. The Plea for the Defense in the Dinsmore Suit*, N.Y. TIMES, Nov. 28, 1883, at 2 (describing Roscoe Conkling's argument that proxies for the 1883 shareholders' meeting of the Reading Railroad were obtained through "deceit and duplicity" about how they would be voted).

29. *See* John Bainbridge, *The Talking Stockholder-II*, NEW YORKER, Dec. 18, 1948, at 33.

meeting; the matter went to a shareholder vote on the spot.[30] (Gilbert's motion was defeated because the management proxies were voted against it.)[31]

In another example, it was a widespread practice in the first decades of the twentieth century for the managers of a public company to call for a shareholder vote to ratify all acts of the board and officers since the last meeting.[32] Then, since management typically controlled a majority of votes through the proxies, it would vote the proxies in favor of ratification.[33] The practice insulated directors from shareholders' lawsuits, because shareholder ratification was a defense against unauthorized acts.[34] The problem was so pervasive that the SEC's general counsel had to issue a formal opinion in 1936 opposing the practice.[35] Shareholders did not know that their proxies would be used to ratify all of management's acts because there was no requirement, prior to the advent of federal securities regulation in the late 1930s, that a party soliciting a proxy disclose all the items that the proxy solicitor knew would be voted upon at the meeting.

New Deal securities regulation sought to fix problems with the proxy system, but it did so by reducing proxy solicitation to an exercise of disclosure.[36] Federal securities law merely required the proxy solicitor to disclose how the proxy-holder planned to vote for directors; the shareholder who signed the proxy card was acquiescing in those choices.[37] There was

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30. *Storm Marks Move to Retire Schwab*, N.Y. TIMES, Apr. 14, 1937, at 1–2 (reporting that Gilbert announced that Schwab had "outlived his usefulness," and that his motion was immediately seconded by another shareholder, teeing it up for a full vote). *But see Grace Intimates Common Dividend for Bethlehem*, WALL ST. J., Apr. 14, 1937, at 1–2 (reporting instead that Lewis Coshland made the motion, and Lewis Gilbert seconded it).

31. *Storm Marks Move to Retire Schwab*, *supra* note 30, at 2.

32. *See A Dominating President*, N.Y. Times, May 10, 1904, at 8 ("It is usual for stockholders of corporations at their annual meetings to pass a formal resolution confirming, ratifying, and approving all acts of the officers and Directors during the year.").

33. Arthur H. Dean, *Non-Compliance with Proxy Regulations: Effect on Ability of Corporation to Hold Valid Meeting*, 24 CORNELL L. Q. 483, 490–91 (1939).

34. In its report on the 1934 Act, the Senate Committee on Banking and Currency specifically criticized this practice:

> [I]n one case brought to the committee's attention, proxies were solicited by the president of a corporation by means of a letter which purported to describe certain transactions concerning which ratification by the stockholders was sought. The letter omitted all mention of other important details such as previously granted secret options in the corporation's stock, and the president's individual interest in an underwriting agreement made by the corporation, which furnished the real motive behind the request for ratification.

S. REP. NO. 73-792, at 12 (1934).

35. Exchange Act Release No. 461, 1936 WL 31470 (Jan. 21, 1936); *see also* Dean, *supra* note 33, at 491–92.

36. For a description of the federal proxy rules, see Fisch, *supra* note 27, at 1139–41.

37. *See, e.g.*, *Stock Market Study: Hearings Before the S. Comm. on Banking and Currency*, 84th 1621–29 (1695) (statement of Wilma Soss, President, Federation of Women Shareholders in American Business) (entering several proxy cards into the record).

no possibility that engagement or deliberation (either with the proxy solicitor or other shareholders) would sway the proxy-holder to vote differently for directors. At a shareholders' meeting, proxy-holders merely exercised the votes in the manner in which they had disclosed they would in the proxy statement published months earlier—and the proxy-holders' votes could not diverge, because this would render the proxy statement materially misleading.

As a result of these practices, nearly all outcomes in director elections were driven by holders' preexisting interests, expressed through the decision to either sign or refuse to sign the proxy. Although shareholder meetings were still held—and although thousands of shareholders sometimes attended—any deliberation that took place at the meeting was irrelevant to the election of the board. Thus, in the middle of the twentieth century, it was not uncommon for a company's management to announce the outcome of the shareholder vote before any discussion had taken place, and sometimes even before the shareholders who were present had voted.[38]

Cumulative voting, which remains legal in most states, though seldom used, also reflected a pre-existing-interest approach. Cumulative voting was specifically designed to give minority shareholders a way to aggregate their votes ex ante and pursue their shared, preexisting interests by electing a "minority" board representative. In some instances, shareholders had to notify the corporation before the election that they planned to cumulate their votes. Thus, cumulative voting only worked when minority shareholders agreed, long before the election, to act together for the single purpose of electing one agreed-upon individual.

One consequence of the proxy system's adoption of the preexisting interest approach is that no part of modern shareholder governance involves deliberation about the best policy or strategy choices for a company. In normal political governance, candidates present a platform to voters that articulates their ideas and principles for governing. This is completely missing from corporate governance—in the typical corporate election, shareholders are asked to vote for director candidates with absolutely no clue about their views on policy matters relevant to the corporation. Instead, the proxy statement merely provides biographical information about board candidates, such as their employment history.

All of this means that the corporate electoral system provided no opportunity for shareholders to communicate or deliberate about the corporation's policies, strategies, or leadership. Indeed, to the extent that

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38. *See, e.g.*, LAUREN TALNER, THE ORIGINS OF SHAREHOLDER ACTIVISM 12 (1983) (describing Gulf Oil Co.'s 1970 shareholders' meeting, when "the ballots of shareholders who voted in person were not collected until after the chairman had announced that management's slate had won").

stakeholder considerations have been pushed by shareholders at particular companies, it has mostly been through the "engagement" efforts of certain shareholders behind closed doors.[39] Other shareholders may not even learn of it, let alone participate.[40]

In a regime where voting expresses only the voters' preexisting interests, the identification of the shareholder's preexisting interests is tremendously important. The party soliciting proxies needs to appeal to those preexisting interests because the choice facing the shareholder is a binary one: delegate or do not delegate.

This is where wealth-maximization comes in. It is a pre-existing interest possessed by all shareholders, because all shareholders are made better off by a rising stock price.

Law-and-economic theorists tend to emphasize the *commonality* of the wealth-maximizing interest. These scholars acknowledge that shareholders might possess multiple, differing interests, but they assert that shareholders' *shared* interest is what matters. The reason that theorists are looking for some shared, ex-ante interest among shareholders is because the preexisting interest approach invites shareholders to identify preexisting interests that can be easily aggregated through proxy voting. Wealth-maximization fits the bill. Though some shareholders get more out of a high stock price (those holding more stock), all shareholders benefit from a high stock price.

If shareholders had a range of voting choices, many would vote to advance interests other than shareholder wealth maximization.[41] Indeed, scholars have pointed out that the current ESG movement has been driven not by workers or community members, but by shareholders themselves.[42] This is because many shareholders hold multiple interests in the firm: they are also employees, customers, and members of the corporation's community. Shareholders employed by a company in which they own shares might care more about their employee interests than they do about share value—possibly because they derive more income from their employment

39. *See* Sarah C. Haan, *Shareholder Proposal Settlements and the Private Ordering of Public Elections*, 126 YALE L.J. 262, 279–86 (2016).

40. *See generally id.* (discussing the private nature of the shareholder proposal).

41. *See, e.g.*, Diana Lee, *Stakeholder Focus Expands Proxy Voting Agendas*, ALLIANCE BERNSTEIN (Mar. 29, 2021), https://www.alliancebernstein.com/corporate/en/insights/esg-in-action/esg-in-action-stakeholder-focus-expands-proxy-voting-agendas.html [https://perma.cc/95XK-N87Q] ("Although shareholders are not required to consider the interests of other stakeholders, they hold the power to do so through proxy voting.").

42. *See* Cathy Hwang & Yaron Nili, *Shareholder-Driven Stakeholderism*, U. CHI. L. REV. ONLINE (Apr. 15, 2020), https://lawreviewblog.uchicago.edu/2020/04/15/shareholder-driven-stakeholderism-hwang-nili/ [https://perma.cc/U6AC-YPC6] (observing that shareholders "have been the driving force behind the environmental, social, and governance principles that often align with stakeholder governance").

than from their shareholding, or because their employment impacts other interests that are important to them, such as dignitary interests and well-being.

Intermediation only compounded this effect. With the rise of intermediation, most shareholders ceased to hold stock directly and ceded voting control of their equity interests to an intermediary, such as a fund—which itself was voting via a delegation, by signing the management proxy. The more remote the shareholder is from the vote itself, due to layers of intermediation, the more important it is to reduce shareholders' exercise of the franchise to a simple, shared, pre-existing interest. The ex-ante reduction of interests is important because it shapes the nature of the shareholder concerns to which a firm's managers will be responsive during the corporate electoral process. Unlike in political governance, corporate elections are held annually, meaning that the corporate electoral process is virtually continuous.

What is more, fund managers have a commercial interest in appealing to broadly-shared, pre-existing interests of beneficial holders. Successful funds grow assets under management by attracting many clients, and appeals to idiosyncratic interests potentially undermine a fund's broad appeal. This was true, at least, until the rise of specialized ESG funds, a phenomenon that recognized that competition among funds could expand, rather than contract, the interests that funds vote to advance.

The effect of all of this was a form of electoral governance that produced few of the benefits of democratic decision-making for shareholders or firms. Thus, to take a simple example, if a large proportion of a firm's shareholders care about reducing the firm's GHG emissions, but there is no way for them to express this interest through the vote, we would not expect the firm's board or officers to allocate resources to study the issue or to engage with shareholders about it.

In political governance, we recognize the practice of developing policy prescriptions and communicating about them as "politics" and value it highly. In corporate governance, resources do not need to be deployed to do any of these things, except as mandated by federal securities regulation (i.e., by disclosure mandates), because shareholders will not be able to vote to advance interests beyond wealth maximization. But the loss is not just to shareholders who want to reduce corporate GHG emissions; the corporation itself loses the opportunity to engage in processes that might produce beneficial strategy options.

II. THE INSTRUCTION (R)EVOLUTION

Until New Deal securities regulation began reworking the proxy system in the late 1930s, state corporate law did little to regulate the specifics

of how voting could be accomplished by proxy.[43] As a result, the proxy system had evolved to strip the vast majority of shareholders (those who did not travel to the meeting in person) of choice among electoral options. One author who attended the 1931 annual shareholders' meeting of a large, unnamed corporation described how proxy voting worked before the introduction of federal proxy regulation.[44] A proxy card was sent to shareholders in advance of the meeting that "named three men, all directors of the corporation and one its president, to exercise 'all the powers the undersigned would possess if personally present.'"[45] The proxy materials did not even state "how these three men proposed to vote on the matters outlined."[46] At the meeting, the proxy votes were all cast for the management slate of board candidates, which was successfully elected.[47] The election was thus accomplished "all without the owners of the stock so much as knowing who were up for election."[48] Shareholders who executed proxies were said to have voted in the election, but they had not been provided with basic information about who was running for corporate office or given an opportunity to communicate an electoral choice.[49] Shortly before the SEC issued the first comprehensive proxy rules in 1938, U.S. Senator Joseph O'Mahoney of Wyoming suggested to a witness in a Senate subcommittee hearing that "the handling of proxies has become a very serious question in modern business, particularly in the large corporations[.]"[50] "The management sends out the proxy request," Senator O'Mahoney observed, "and the stockholder is permitted to vote 'jah,' as though he were

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43. The main exception to state corporate law's idle regulation was the wide practice of the states to mandate a maximum duration for the proxy. The laws from this mandate remain in place. In Delaware, for example, a proxy is only valid for three years from its date of execution. *See* DEL. CODE ANN. tit. 8, § 212(b) (2023).

44. F. Emerson Andrews, *Our "Voting" Stock*, 8 VA. Q. REV. 400, 402 (1932).

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 403.

49. A similar account can be found in a 1948 publication, *Staff Report on the Securities and Exchange Commission*. It observed that prior to the 1934 Act,

> The form of proxy authorized the proxies named therein to vote the stockholder's shares in favor of the matters referred to, or "for the election of directors" (the directors not being named) and "on such other matters as may properly be brought before the meeting." Seldom was sufficient information furnished to enable the stockholder to exercise informed judgment on important matters on which his authorization to vote [was] requested. Frequently he was asked to "ratify and approve all acts and proceedings of the board of directors of the corporation since the date of the last meeting," without any indication of what those acts and proceedings might have been.

COMM. ON INDEP. REGUL. COMM'N, STAFF REP. ON THE SEC. & EXCH. COMM'N Appendix III-C-1 (Comm. Print 1948) (prepared by Carl F. Farbach).

50. *Federal Licensing of Corporations: Hearings Before a Subcomm. of the Comm. on the Judiciary on S. 10 and S. 3072*, 75th Cong. 397 (1938) (colloquy between Elmer T. Cunningham, Rep., National Association of Manufacturers, and Sen. Joseph C. O'Mahoney).

in Germany."[51] The witness, a representative of the National Association of Manufacturers, agreed.[52]

A few months later, the SEC promulgated the predecessor to Rule 14a-4(b), which regulates the information printed on the proxy card.[53] As this Part shows, the SEC's regulation of the proxy card has substantively shaped the shareholder's exercise of the franchise. The SEC's rules about what must be printed on the proxy card have, for all practical purposes, determined the voting options from which the vast majority of shareholders when they exercise the vote.[54] Nonetheless, the SEC has generally characterized its regulation of the proxy card as relating to the "presentation" or "format" of the card, without acknowledging the substantive significance of requiring (or not requiring) proxy cards to give shareholders options to elect. A requirement that the proxy card provide the proxy-giver with specified options (in the form of boxes to check) is not merely about format. By empowering the shareholder to make the electoral choice himself or herself, and by obligating the proxy-holder to execute that choice, the SEC began restoring to shareholders the ability to engage in deliberative governance.

In its initial 1938 rulemaking, the SEC mandated that a party soliciting a proxy provide a means

> whereby the person solicited is afforded an opportunity to specify, *in a space provided in the form of proxy or otherwise*, the action which such person desires to be taken pursuant to the proxy on each matter, or each group of related matters as a whole, described in the proxy statement as intended to be acted upon, other than the election of directors or other officials . . .[55]

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51. *Id.*

52. Mr. Cunningham responded, "That is the general course." *Id.*

53. The rule was designated Rule X-14A-2. *See* Amended Proxy Rules, 3 Fed. Reg. 1979, 1991 (Aug. 13, 1938).

54. In *Business Roundtable*, the D.C. Circuit described Rule 14a-4(b)(2), which provides the mechanism for the withhold vote, as lying "in a murky area between substance and procedure." Bus. Roundtable v. SEC, 905 F.2d 406, 411 (1990). In my view, this statement does not go far enough. By providing a choice to shareholders on the management proxy between voting for a director and not voting—rather than *no choice*—the rule is substantive. But note that the rule would be substantive either way—whether it *did* or *did not* require the proxy card to offer options from which the shareholder can choose. In either case, the shareholder's power to exercise the vote via proxy is determined.

55. Sec. & Exch. Comm'n Release Notice, Release No. 1,823, 1938 WL 33169, at *3 (Aug. 11, 1938) (emphasis added); *see also* Amended Proxy Rules, 3 Fed. Reg. 1991 (Aug. 13, 1938); COMM. ON INDEP. REGUL. COMM'N, STAFF REP. ON THE SEC. & EXCH. COMM'N Appendix III-C-6 (Comm. Print 1948) (prepared by Carl F. Farbach) (noting the requirement that the form of proxy allowing shareholders to "indicate the action [they] desired to be taken" was an "important innovation" of the 1938 proxy rules). The language of the rule was slightly changed in 1940; the phrase "elections to office" was substituted for "election of directors or other officials." *See* Amendment of Regulation X-14, 5 Fed. Reg. 174 (Jan. 12, 1940) (to be codified at 17 C.F.R. pt. 240).

Unfortunately, this poorly-worded rule did not clearly require a space for an instruction on the proxy card itself, and the language was revised in 1941 to read, "either in a space provided therefor or otherwise, in the form of proxy."[56] The SEC apparently was not satisfied with this wording either because it revised it more significantly the following year to read,

> Means shall be provided in the form of proxy whereby the person solicited is afforded an opportunity to specify by ballot a choice between approval or disapproval of each matter, or each group of related matters as a whole, which is intended to be acted upon pursuant to the proxy and the authority conferred as to each such matter or group of matters shall be limited to voting in accordance with the specifications so made.[57]

The SEC's use of the word "ballot" in this sentence was new, and a bit misleading—proxy cards are not ballots in the sense that we use that term in political elections—but it underscored the agency's view of the delegation as the point of exercise of the franchise.

The 1942 rewrite of the rule removed some language stating that the proxy card need not specify a choice for director elections. This led to confusion about whether the proxy card had to give the shareholder an opportunity to specify a choice for each candidate for the board (which might, then, have required the proxy to list all candidates for office—something that was not then a practice). In 1947, the wording of the rule was changed to clarify that it did not apply to "elections to office," meaning that a two-way proxy was not required for director nominees.[58] "Two-way proxy" referred to a form of proxy that provided a line-item, up-or-down choice to the proxy-giver; the term has disappeared from our lexicon, but was used by securities law experts like Louis Loss as late as the 1960s.[59]

The 1947 amendment finally provided clarity that, for companies that reported to the SEC, proxies were partially instructed as matter of federal law: the shareholder had to be given the opportunity to instruct the vote on proposals, but not for the election of directors. Because most companies did not do more than the bare minimum required by the SEC, shareholders who voted by proxy only ever got to instruct the proxy when a shareholder or management proposal was on the ballot.

In 1977, the SEC proposed a version of Rule 14a-4(b) that would have required a proxy card to list each director candidate by name, and

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56. Amendment to Proxy Regulations, 6 Fed. Reg. 744 (Feb. 4, 1941).

57. Solicitation of Proxies Under the Act, 7 Fed. Reg. 10655 (Dec. 22, 1942).

58. *See* Solicitations of Proxies, 12 Fed. Reg. 8769 (Dec. 24, 1947)

59. *See, e.g.*, Louis Loss, *The SEC Proxy Rules and State Law*, 73 HARV. L. REV. 1249, 1277 (1960) (describing Rule 14a-4(b) as the "two-way proxy rule").

give the shareholder the opportunity to instruct the proxy-holder about whether to vote "for" or "against" each individual nominee.[60] The proposal met with significant opposition and the SEC scaled it back, substituting "withhold authority" for a vote against a nominee.[61] Starting in 1979, shareholders had the ability to instruct the proxy-holder to withhold a vote for director nominees, though shareholders did not begin to cast "withhold votes" with any frequency until the early 2000s.[62] In 1990, in a presentation to the Council of Institutional Investors, law professor Joseph Grundfest proposed that institutional investors use the withhold vote to express disapproval of corporate performance.[63] The practice became popularized after the 2004 corporate election at the Walt Disney Company, when investors used "withhold votes" to signal dissatisfaction related to an executive compensation controversy at the company.[64]

From 2005 to 2007, most S&P 500 firms moved from plurality voting to majority voting for directors, which empowered shareholders to use the withhold vote more robustly; institutional investors first used it to signal rejection of the whole board, and later of targeted, individual board candidates.[65] A shareholder could instruct the proxy-holder to enter a withhold vote (essentially an abstention[66]) for a particular board candidate by filling out the proxy card. For firms that utilized a majority voting standard, a high proportion of withhold votes threatened the election of director candidates.

Although this regulatory reform was significant in theory, its practical impact was small. A study of withhold votes in 2010 found that most majority withhold votes at Russell 3000 companies occurred at companies with plurality voting standards—meaning that the withhold vote had zero

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60. Shareholder Communications, Shareholder Participation in the Corporate Electoral Process and Corporate Governance Generally, Securities Exchange Act Release No. 34-16,356, 44 Fed. Reg. 68764, 68764–66 (Nov. 21, 1979).

61. *Id.*

62. The "withhold vote" is not really a vote at all, but an instruction not to vote. *See* Comm. on Corp. L., ABA Section Bus. L., *Changes in the Model Business Corporation Act—Proposed Amendments to Chapter 8 and 10 Relating to Voting by Shareholders for the Election of Directors*, 61 BUS. LAW. 399, 408 n.22 (2005) (making this point).

63. Marcel Kahan & Edward Rock, *"The Insignificance of Proxy Access"*, 97 VA. L. REV. 1347, 1358 (2011); Jeffrey N. Gordon, *Proxy Contests in an Era of Increasing Shareholder Power: Forget Issuer Proxy Access and Focus on E-Proxy*, 61 VAND. L. REV. 475, 481 n.18 (2008).

64. Kahan & Rock, *supra* note 63, at 1359.

65. Concept Release on the U.S. Proxy System, 75 Fed. Reg. 42982, 42983 n.12 (July 14, 2010) (to be codified at 17 C.F.R. pts. 240, 270, 274, 275); *see also* Gordon, *supra* note 63, at 483 (describing withhold vote campaigns as "an accepted governance tool" by the early 2000s).

66. *Spotlight on Proxy Matters—The Mechanics of Voting* (May 23, 2012), https://www.sec.gov/spotlight/proxymatters/voting_mechanics.shtml [https://perma.cc/Z8L6-9ZGJ].

significance for the company's board composition.[67] Shareholders had a new voting option, but it was largely symbolic.

In 2011, Section 951 of the Dodd-Frank Act created "say-on-pay," a (precatory) shareholder vote on executive compensation, and the SEC promulgated regulations adding a new matter for a shareholder instruction on the proxy card.[68] The new rule required the proxy card to offer shareholders a choice to approve or reject the company's plan for executive compensation, and it also required *four* options regarding the frequency of the say-on-pay vote.[69] In its rulemaking release, the SEC wrote,

> [W]e would expect that the board of directors will include a recommendation as to how shareholders should vote on the frequency of shareholder votes on executive compensation. However, the issuer must make clear in these circumstances that the proxy card provides for four choices (every 1, 2, or 3 years, or abstain) and that shareholders are not voting to approve or disapprove the issuer's recommendation.[70]

The statement acknowledged some of the confusion that continued to plague proxy voting, in which shareholders had been habituated to understand their proxy delegation as a choice between approving (or withholding approval of) management's desired choice, rather than making their own choice.

Major changes were made in 2022. That year, following up on a rulemaking proposal it had published in 2016,[71] the SEC created the "universal proxy card," which significantly changed the voting options of shareholder voting by proxy in a contested board election. Under the new rule, the proxy card must list all nominees for the board.[72] While most director elections still have only a single slate running unopposed, the universal proxy kicks in if a dissident party complies with the nomination procedures in the company's bylaws and solicits proxies from holders of 67% of the company's shares.[73] Additionally, under the new rule, the proxy card must

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67. *See* Noam Noked, *Corporate Director Elections and Majority Withhold Votes*, HARV. L. SCH. F. ON CORP. GOV. (Sept. 1, 2012), https://corpgov.law.harvard.edu/2012/09/01/corporate-director-elections-and-majority-withhold-votes/ [https://perma.cc/WA7B-MFVA].

68. *See* 15 U.S.C. § 78n-1.

69. *See id.*

70. Shareholder Approval of Executive Compensation and Golden Parachute Compensation, Securities Act Release No. 9,178, 2011 WL 231597, at *16 (Apr. 4, 2011).

71. *See generally* Universal Proxy, Exchange Act Release No. 79,164, 81 Fed. Reg. 79122 (Nov. 10, 2016) (to be codified at 17 C.F.R. pt. 240).

72. Keir Gumbs, *The Universal Proxy: An Early Look*, HARV. L. SCH. F. ON CORP. GOV. (Feb. 28, 2023), https://corpgov.law.harvard.edu/2023/02/28/the-universal-proxy-an-early-look/ [https://perma.cc/TJA5-7L8P]; *see also Fact Sheet: Universal Proxy Rules for Director Elections*, https://www.sec.gov/files/34-93596-fact-sheet.pdf [https://perma.cc/E2AC-GEYU].

73. Gumbs, *supra* note 72.

group nominees together by the party nominating them.[74] For companies utilizing a majority voting standard for director elections, the new rules replace the "withhold" instruction with a choice of "against" or "abstain" but only if state law gives effect to a vote in opposition.[75] Delaware corporate law does not give effect to an "against" vote.

In its adopting release, the SEC suggested that it was revising its proxy rules to allow shareholders voting by proxy (i.e., virtually all shareholders) "to replicate the vote they could cast if they voted in person at a shareholder meeting."[76] The impact, which is consistent with that objective, is to turn the proxy card into an absentee ballot, at least for shareholders who follow instructions properly and make the necessary selections. Shareholders who mark the proxy card in error, by over-instruction or under-instruction, can still have discretion over their votes transferred away from them to the proxy-holder, however, so long as the proxy card states clearly that this is the outcome of erroneous instruction.

In its first full year of implementation, the new universal proxy did not lead to an increase in the number of proxy contests over the previous year.[77] However, there was an increase in the number of elections in which an activist won a partial slate of directors.[78] One analysis concluded that it had increased the scrutiny that was applied to the individual strengths and weaknesses of candidates during the electoral process.[79] In other words, the process for the election of corporate directors was changing in ways that produced a different information environment for voters and different electoral outcomes after the vote.

This evolution from 1938 to 2022 must be understood as the realization of a federal commitment to shareholder preference-satisfaction that originated with the New Deal. Leaders of the SEC in the 1930s, like William O. Douglas, wrote often of the "proxy machinery" and its susceptibility to abuse.[80] He spoke of the need to find "[n]ew tools to express and serve the investors' interests" in pursuit of "democracy in industry and in

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74. *Id.*

75. Universal Proxy, 86 Fed. Reg. 68330, 68332–44 (Dec. 1, 2021) (to be codified at 17 C.F.R. pt. 240).

76. *Id.* at 68331.

77. *See* William D. Regner & Marisa K. Demko, *2023 Proxy Season in Review*, HARV. L. SCH. F. ON CORP. GOV. (Aug. 15, 2023), https://corpgov.law.harvard.edu/2023/08/15/2023-proxy-season-in-review/#more-158740 [https://perma.cc/6ZHC-N4FQ].

78. *Id.*

79. *Id.*

80. William O. Douglas, *Directors Who Do Not Direct*, 47 HARV. L. REV. 1305, 1315–16 (1934) (adding: "The group that names the proxyholders controls the board. It is no easy task to design a system whereby widely scattered, lethargic, disorganized, and disinterested stockholders can be moved into a position of control over that strategic position.").

finance."[81] The SEC itself identified the proxy rules as "a desirable extension of corporate democracy."[82] Indeed, the SEC's creation of the Shareholder Proposal Rule (informally in 1938 and formally in 1942) reflected this interest in protecting shareholders' ability to pursue their preferences and interests through electoral choice.

As it advanced, the evolution also helped to inspire—and provided the procedural basis for—the "stewardship" movement, in which institutional investors came to view themselves as playing a key role in corporate governance.[83] As more items have required instruction options on the proxy card, institutional investors have gained power because the proxy process was providing them with low-cost ways to express preferences. Indeed, the culture of corporate governance was changing to accept and even encourage institutional investors' exercise of voting choice.

The SEC's commitment to shareholder preference-satisfaction, through improved (and technologically enhanced) electoral procedures, has helped to move corporate governance beyond the simple metric of shareholder wealth maximization. It is no longer necessary for shareholders to reduce their interests to the lowest common denominator of wealth satisfaction when deciding whether to sign the management proxy or not. Shareholders can sign the management proxy while exercising full choice as to all options. This helps explain why shareholder governance has become a new focal point for deliberation and contestation—and a new target for interest groups that oppose shareholder choice and would like to eliminate both shareholder proposals and the universal proxy.

Perhaps most importantly, by shifting the exercise of the shareholder franchise from the meeting to the proxy solicitation itself, the fully-instructed proxy card has opened up new opportunities—heretofore foreclosed—for deliberative shareholder governance at the point of solicitation. The next major frontier in corporate elections will focus on deliberative governance before the shareholder completes the proxy card or voting information form ("VIF")—educating shareholders about their choices, exploring and evaluating different options, and providing means for

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81. *See* William O. Douglas, Comm'r, Sec. & Exch. Comm'n, Democracy in Industry in Finance 1–11 (Mar. 24, 1937), https://www.sec.gov/news/speech/1937/032437douglas.pdf [https://perma.cc/WX3V-DXZ7]; *see also* Jerome Frank, *Book Review: The Modern Corporation and Private Property*, 42 YALE L.J. 989, 989 (1933) ("We thought that we had established corporate democracy, but it has vanished or is vanishing."). Both Douglas and Frank were chairmen of the SEC in the 1930s.

82. SEC. & EXCH. COMM'N, SIXTH ANNUAL REPORT OF THE SECURITIES AND EXCHANGE COMMISSION, FISCAL YEAR ENDED JUNE 30, 1940 114 (1940), https://www.sec.gov/about/annual_report/1940.pdf [https://perma.cc/AR48-CENU].

83. *See, e.g.*, Roni Michaely, Silvino Rubio & Irene Yi, *Voting Rationales* 2 (Eur. Corp. Gov. Inst., Working Paper No. 928, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4521854 [https://perma.cc/XG4B-KMKZ] (finding that "many institutional investors exert governance efforts when they vote").

shareholders to cast votes that truly reflect their preferences. Already, various actors are leveraging new technologies to help shareholders learn information about their voting choices, to communicate among themselves and form preferences, and to advance those preferences.

III. THE NEW DELIBERATIVE GOVERNANCE

The preceding parts explained how delegated corporate voting encouraged the rise of the shareholder wealth maximization norm, and how an evolution in federal proxy regulation has finally shifted the exercise of the shareholder franchise to the proxy solicitation—providing shareholders with a meaningful opportunity to express real electoral choice. During the Covid-19 pandemic, public companies began moving en masse to virtual shareholders' meetings;[84] some experts suggested that this development would lead to beneficial shareholder engagement and "improve shareholder democracy."[85] Instead, companies used their control over the format and procedure of virtual meetings to discourage shareholder engagement, and the revitalized, "town hall" shareholders' meeting failed to materialize.[86] Ultimately, this seems not to have mattered: asset managers have continued to forge ahead with their own tech-enabled innovations designed to facilitate shareholder self-governance. In fact, by failing to make virtual-only shareholder meetings the locus of shareholder

84. Delaware first permitted virtual-only shareholders' meetings in 2000. For a summary of the state-law embrace of virtual shareholders' meetings before the pandemic, see Lisa A. Fontenot, *Public Company Virtual-Only Annual Meetings*, 73 BUS. LAW. 35, 37–38 (Winter 2017–2018). Regarding the "sudden transition" to virtual shareholders' meetings during the pandemic, see Mark T. Wilhelm & Danielle Clifford, *Zooming In: Analyzing Annual Meeting Format Changes Amidst a Global Pandemic*, 80 WASH. & LEE L. REV. ONLINE 227, 242 (2023) (reporting the growth in virtual meetings from 5% of U.S. public companies in 2018 (almost 9% of S&P 500 companies) to over 71% in 2021 (85% of S&P 500 companies)). *See generally* BROADRIDGE, VIRTUAL SHAREHOLDER MEETINGS: 2020 FACTS AND FIGURES (2020), https://www.broadridge.com/_assets/pdf/vsm-facts-and-figures-2020-brochure-january-2021.pdf [https://perma.cc/7KDZ-6FSS].

85. Yaron Nili & Megan Wischmeier Shaner, *Virtual Annual Meetings: A Path Toward Shareholder Democracy and Stakeholder Engagement*, 63 B.C. L. REV. 123, 187–88 (2022) (observing that "[v]irtual meetings may promise a more engaged shareholder meeting led by" a new generation of tech-savvy retail investors); *see also* Lisa M. Fairfax, *Virtual Shareholder Meetings Reconsidered*, 40 SETON HALL L. REV. 1367, 1389–95 (2010) (summarizing risks and benefits of virtual meetings).

86. *See, e.g.*, Nina Trentmann, *Shareholders Feel Muted as Companies Switch to Virtual Annual Meetings*, WALL ST. J. (Aug. 23, 2020), https://www.wsj.com/articles/shareholders-feel-muted-as-companies-switch-to-virtual-annual-meetings-11598187600 [https://perma.cc/2DFP-NSYP]; Amy Borrus, Josh Zinner, Lisa Woll, Mindy Lubber, Sanford Lewis, *Letter to Clayton and Hinman on Virtual and Hybrid Meetings*, HARV. L. SCH. F. ON CORP. GOV. (July 28, 2020), https://corpgov.law.harvard.edu/2020/07/28/letter-to-clayton-and-hinman-on-virtual-and-hybrid-meetings/ [https://perma.cc/J7MH-XJLU] (raising concerns about virtual meetings from a shareholder perspective); Miriam Schwartz-Ziv, *How Shifting from In-Person to Virtual-Only Shareholder Meetings Affects Shareholders' Voice* 8–12 (Hebrew Univ. of Jerusalem & Eur. Corp. Gov. Inst., Working Paper No. 748, 2021), https://www.ecgi.global/sites/default/files/working_papers/documents/schwartz-zivfinal.pdf [https://perma.cc/E44K-4EVP].

democracy, companies may have inadvertently channeled investor demand for deliberative governance outside the company altogether.

But a piece is missing from this story: shareholders have bounded resources and lack the time and money to make thousands of choices. It is costly to explore the policy dimensions of every voting choice at every company in a portfolio of hundreds or even thousands of companies. Thus, shareholders need an aggregating function in the electoral process that allows them to vote their preferences efficiently and accurately across multiple, annual elections.[87]

However, internet-based technologies are now available that make this possible. When these technologies are harnessed for the use of shareholders in corporate elections, deliberative governance becomes possible. Shareholders can, if they choose, use tech-enabled processes to learn about policy issues and to argue over them; and to form preferences beyond shareholder wealth maximization. The system then provides them with opportunities to communicate these preferences through the instructed proxy.

Two emerging players in this area are Broadridge and Iconik, private companies that provide tech-enabled mechanisms to facilitate deliberative forms of shareholder governance. Broadridge's ProxyVote App allows shareholders to create voting preferences, and the company has pioneered "pass-through" voting mechanisms for institutional investors.[88] Iconik Securities, Inc., also offers app-based tools to advisors and funds for creating client-directed voting profiles at the individual and fund levels.[89]

In recognition of changes in the law and the use of technology, academics have started calling for new rules related to the corporate election, particularly concerning the exercise of voting discretion by intermediaries. Law professors Sergio Gramitto Ricci and Christina Sautter have advocated for the revitalization of the SEC's concept of an e-forum for shareholders.[90] Though the e-forum idea "failed to gain significant traction" around 2008 when the SEC promulgated Rule 14a-17 to encourage its use, Gramitto Ricci and Sautter argue that circumstances have changed sufficiently to make the idea newly viable.[91] Gramitto Ricci and Sautter

87. *See, e.g.*, Oliver Hart & Luigi Zingales, *The New Corporate Governance*, 1 U. CHI. BUS. L. REV. 195, 213 (2022) (asserting that pass-through voting "might work well for major pension funds and endowments" but is "unreasonable" for small shareholders, who cannot be expected to "express an opinion on all ballots of all the companies they own").

88. Keir Gumbs, *The Universal Proxy: An Early Look*, HARV. L. SCH. F. ON CORP. GOV. (Feb. 28, 2023), https://corpgov.law.harvard.edu/2023/02/28/the-universal-proxy-an-early-look/ [https://perma.cc/WX92-STJT].

89. *See How It Works*, *supra* note 14.

90. *See* Sergio Alberto Gramitto Ricci & Christina M. Sautter, *The Corporate Forum*, 102 B. U. L. REV. 1861, 1862–63 (2022); 17 C.F.R. § 240.14a-17 (2008).

91. Ricci & Sautter, *supra* note 90, at 1862–64.

imagine a tech-enabled, "centralized venue for all shareholders to discuss issues" and to "check information and seek clarification"—essentially, the information infrastructure for deliberative shareholder governance.[92]

While some have advocated reforms that would promote advance voting instructions for retail investors,[93] others would promote the use of pass-through voting, in which funds allow the vote to "pass through" to the beneficial holder; the holder tells the fund how it wants its interest in the fund voted, and the fund either votes its shares for the option preferred by a majority of beneficiaries, or divides its vote to match the division of client preferences.[94] Professor Sean Griffith has argued that the SEC and the Department of Labor should interpret funds' fiduciary duties in a way that prevents them from exercising discretionary voting authority over environmental and social shareholder proposals.[95] This, Griffith contends, would incentivize funds to develop technologies to facilitate pass-through voting.[96]

Separately, Professors Jill Fisch and Jeff Schwartz argue that pension and mutual funds should be under an obligation to seek the input of beneficiaries when they decide how to vote and engage.[97] Fisch and Schwartz argue that funds are analogous to elected representatives in a legislature, and should therefore have a legal obligation to survey their clients about how to vote in corporate elections.

92. *Id.* at 1867.

93. *See, e.g.*, Jill E. Fisch, *Standing Voting Instructions: Empowering the Excluded Retail Investor*, 102 MINN. L. REV. 11, 42 (2017).

94. *See, e.g.*, Jeff Schwartz, *Stewardship Theater*, 100 WASH. U. L. REV. 393, 451 (2022) (arguing that "asset managers should be required to vote based on input from mutual fund investors"); Eric C. Chaffee, *Index Funds and ESG Hypocrisy*, 71 CASE W. RES. L. REV. 1295, 1317 (2021) (arguing for pass-through voting in index funds); Danielle A. Chaim, *The Agency Tax Costs of Mutual Funds*, 25 FLA. TAX REV. 53, 113 (2021) (noting a divergence in the interests of mutual funds and their beneficiaries regarding tax treatment, and arguing in favor of pass-through voting for "key issues that directly affect [beneficiaries'] tax liability"); Jill E. Fisch, *Mutual Fund Stewardship and the Empty Voting Problem*, 16 BROOK. J. CORP. FIN. & COM. L. 71, 90–92 (2021); Paul G. Mahoney & Julia D. Mahoney, *"ESG" Disclosure and Securities Regulation*, 44 REGULATION 10, 12 (2021) (suggesting pass-through voting at mutual funds to address "the danger that some institutional investors are willing to prioritize their own policy preferences over the interests of their beneficiaries"); Dorothy S. Lund, *The Case Against Passive Shareholder Voting*, 43 J. CORP. L. 493, 530–31 (2018) (advocating pass-through voting only for "non-routine" matters on the corporate ballot).

95. Sean J. Griffith, *Opt-In Stewardship: Toward an Optimal Delegation of Mutual Fund Voting Authority*, 98 TEX. L. REV. 983, 1044–46 (2020). Griffith's article did not anticipate the SEC's move to a universal proxy in 2022, so some of his prescriptions require updating.

96. *Id.*

97. *See* Jill E. Fisch & Jeff Schwartz, *Corporate Democracy and the Intermediary Voting Dilemma* 4 (Eur. Corp. Gov. Inst., Working Paper No. 683, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4360428 [https://perma.cc/A9QC-A6X3]. Oliver Hart and Luigi Zingales recently have made a similar proposal. *See* Hart & Zingales, *supra* note 87, at 213 (suggesting that mutual funds might "elicit investors' preferences and then cast their votes based on an aggregation of these preferences.").

We might consider the analogy of funds to *political parties* instead.[98] The American political structure was designed by the Founders to operate without political parties (factions), yet parties quickly emerged and came to dominate the system. They are now viewed by political scientists as virtually indispensable to our democratic system.[99] Likewise, American securities markets originated before the appearance of investment funds or trusts. However, such intermediaries developed organically and have come to dominance; they are now viewed as indispensable in the market, and it is hard to imagine how securities investment (or corporate control) would work without them. Intermediaries now wield power as party-like organizations, and they stand in a relation to beneficial holders that allows them to introduce top-down structures for voting. There appears to be real demand among investors for structures that promote preference-formation and voting choice (preference satisfaction). Intermediation is being transformed by this demand.

Political parties are private associations of people who engage in political action. Individuals come together within the party organization to create and publish the party platform—the set of policies the party supports and will pursue with its political action. Political parties take a range of actions to push those policies across jurisdictions and institutions, including by nominating candidates for elected office. Importantly, political parties do not exercise a vote—they operate to make meaningful the votes of their members, and they will survive and flourish as long as they do this effectively.

Likewise, asset managers/funds are private associations that create policy platforms and distill them into "voting guidelines," which they publish. They work to advance those policies across companies and industries through various means, and we have even started to see them nominating and supporting issue-oriented candidates for corporate boards. They currently cast votes in corporate elections, but this practice may soon be revolutionized. If reforms were to push down the vote to beneficial holders, asset managers/funds would function chiefly to create the scaffolding for their clients to communicate voting choices.

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98. Jeff Schwartz has criticized what he calls "politically motivated asset-manager voting," the practice of large asset managers to vote in ways that advance their individual interests as asset managers (and that might conflict with the interests and preferences of their clients). Schwartz, *Stewardship Theater*, *supra* note 94, at 393. This kind of "politically motivated" activity involves asset managers acting on their own behalf, rather than acting to facilitate the participation of their clients. There is some indication that asset managers are embracing pass-through voting in part to avoid political controversy around some corporate policy issues.

99. *See, e.g.*, Tabatha Abu El-Haj, *The Associational Rights of Political Parties*, *in* THE OXFORD HANDBOOK OF AMERICAN ELECTION LAW (Eugene Mazo ed., forthcoming 2023) (manuscript at 1), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4495632 [https://perma.cc/2579-DCRG] ("Liberal democracy is descriptively unthinkable without independent political parties.").

A major purpose of political parties is to exert broad discipline over the political process, extending beyond a single officeholder. Voters can punish or reward a party across elections, and all electoral results together contribute to shape the party's overall policy program.[100] In such a system, extreme policies are discouraged. Asset managers/funds also operate across a large number of corporations and industries, and are broadly accountable to the interests of investors, who can freely change funds. This kind of accountability has likely driven the push for climate activism by asset managers, because climate change is a popular concern among investors. However, the need for funds to promote policies that work across industries—perhaps even at an entire index of interconnected companies—probably discourages extreme policies from winning elections, even at a small number of public companies.

Furthermore, even the leaders of major asset managers play roles that resemble party leaders. In politics, party leaders are high profile spokespeople for the party and actively promote the party's program. They may or may not run for office themselves, but they exercise considerable political power. The leaders of major asset managers, like Larry Fink, are prominent thought-leaders who publicly advocate for corporate policies, like board diversity and climate risk disclosure. These leaders communicate directly with companies, with clients, and with the press about matters of corporate policy, and they wield considerable influence.

In politics, individuals can affiliate with parties and participate in shaping the party's platform. In today's political climate, parties resemble brands and are constitutive of voters' identities. Likewise, investors affiliate with funds by investing in them, and the proliferation of ESG funds allows investors to express their identity through their investments. It is no surprise then, that many of the academic proposals cited above call for new participatory or deliberative mechanisms for investors to shape the policy programs of asset managers.

Additionally, candidates' party affiliations operate as heuristics that help individual voters decide how to vote. "[P]arties allow candidates to communicate in a succinct and powerful way to voters at least part of what they stand for," writes Joseph Fishkin.[101] "This allows voters to make choices even in races where voters may have no idea who the individual candidates are."[102] On the universal proxy card, candidates nominated by the same actors are grouped together. Thus, candidates' affiliations with

100. *See* Joseph Fishkin, *"What is a Political Party?"*, *in* THE OXFORD HANDBOOK OF AMERICAN ELECTION LAW (forthcoming 2023) (on file with author).

101. Fishkin, *supra* note 100.

102. *Id.*

funds and other groups can function as a signal about the candidates' policy stances.

In states where it is legal, political parties facilitate the vote execution by literally bringing people to the polls. They drive their members to polling places, disseminate information about how and where to vote, and collect and deliver absentee ballots. This is analogous to the tech-enabled proxy-holder, who now serves mainly as a conduit of the shareholder's electoral choices. Intermediaries that utilize advance voting instructions or pass-through voting will become the plumbing of corporate voting, rather than the decision makers. And, like parties, they may find that their efforts to make voting easy for their clients has the effect of increasing voter turnout and building the capacity of beneficial holders to contribute to shareholder governance.

CONCLUSION

The system of delegated shareholder voting that developed in the United States, which was largely in place before the New Deal, contributed to the rise of the shareholder wealth maximization norm. The proxy system narrowed the interests that could be served by shareholder elections, by forcing most shareholders to "vote" before the real election and by making only a single election, agreeing--or refusing to agree--to delegate the vote to someone else. This choice could be based only on shareholders' shared, pre-existing interests, and wealth maximization is that core interest.

Starting in 1938, however, the SEC began requiring proxy cards to provide instruction options that proxy-holders had to honor. Over the years—consistently and without backsliding, and with no objection from Congress or the courts—the SEC increased its requirements about instruction options, until the proxy card had to be fully instructed in all respects. At this point, the proxy card resembled an absentee ballot, and the proxy-holder became merely the conduit of the shareholder's electoral choices. Through this process, the SEC had shifted the exercise of the shareholder franchise from the meeting to the proxy solicitation, opening up new and important opportunities for shareholders to form and express preferences about corporate policy.

This shift, which was completed in 2022 with the introduction of the universal proxy, has come at a moment when new technologies exist to encourage and facilitate deliberative shareholder governance, and these technologies are being developed and deployed. The organizations that will deploy these technologies on behalf of shareholders and beneficial holders are asset managers, and they are already functioning partially in the mold of political parties: organizing clients, communicating around corporate policy, and creating deliberative structures. This all suggests that

we have moved from a regime devoted to shareholder wealth maximization to one that recognizes the necessity for shareholders to develop and advance a richer range of preferences. In this sense, the SEC may have finally succeeded at the New Deal project to "fix" the proxy system by enhancing shareholder democracy.