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VOTING RIGHTS IN CORPORATE GOVERNANCE: HISTORY AND POLITICAL ECONOMY

SARAH C. HAAN*

ABSTRACT

Political voting rights have become the subject of sharp legal wrangling in American political elections and the focus of headlines and popular debate. Less attention has focused on American corporate *elections, where something similar has been happening: the last two decades have witnessed significant unsettling of basic shareholder voting rights, including laws and practices that were mostly stable throughout the twentieth century. Today, shareholder voting rights are in flux and, increasingly, in controversy. This Article connects the current moment of instability to the last significant era of change in shareholder voting rights—the nineteenth century—and brings historical context to a new era of dynamic change.*

A small but potent literature has explored the historical evolution of nineteenth-century shareholder voting rights in corporate law, establishing that per-share vote allocations changed significantly over that century. This literature, which focuses on the shift from "democratic" vote allocations (one-person-one-vote and restricted voting) to "plutocratic" voting (one-share-one-vote), has treated vote allocations as the exclusive determinant of shareholder voting power. The literature has raised as many questions as it has answered, and it ultimately has failed to produce agreement among scholars or a cohesive narrative to explain how or why the modern framework for shareholder voting rights emerged.

This Article presents an alternative account of transformations in

* Class of 1958 Uncas and Anne McThenia Professor of Law, Washington and Lee University School of Law. For their thoughtful feedback on drafts of this article, the author thanks Eric Hilt, Andrew Jennings, Elizabeth Pollman, and Jonathon Zytnick, and the faculties of Brooklyn Law School and the University of Houston Law Center. She is grateful to Alexander Keyssar for his generous insights, and to the editors at the Southern California Law Review for their superb editing.

shareholder voting rights that tracks three evolving sets of legal rules. It shows how the voting-rights framework that was cemented by the end of the century—the framework that would go on to define twentieth-century corporate control—was determined by the interrelation of the three. One regulated the shareholder's right to delegate votes (proxy voting), another set per-share vote allocations, and a third addressed the shareholder's right to cumulate votes (cumulative voting). The Article shows why these three sets of rights must be understood as coactive and interdependent. It contributes new ideas to the longstanding debate about why American corporate law shifted to the rule of one-share-one-vote and concludes by returning to the present moment, arguing that shareholder voting rights have become newly unsettled through shifts along these same fault lines.

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INTRODUCTION

Voting rights became the subject of sharp legal wrangling in American political elections when the U.S. Supreme Court decided *Bush v. Gore* in 2000 and *Shelby County v. Holder* in 2013.[1] The result has been a resurgence of legal action, academic debate, and media attention focused on Americans' voting rights. Today, the political franchise is dynamically evolving through legislation and court battles—a process that is commanding headlines and reshaping fundamental relationships of political power in American institutions.

Something similar has been happening to *shareholder* voting rights in the United States over the same period, though it has garnered much less attention. Shareholder voting laws and practices that were mostly stable throughout the twentieth century, and which capital markets participants took for granted, have become newly contested in the twenty-first century. Many aspects of shareholder voting rights are now in flux, with major debates and regulatory battles playing out over such issues as dual-class structures, ballot access, broker voting, and the universal proxy. The corporate law literature has noted many of these developments—but mostly in isolation and without a broad sweep of perspective.

In particular, over the last two decades, a small literature has emerged at the intersection of corporate law and economic history to examine the history of shareholder voting rights.[2] Its focus has been narrow. The literature has explored changes to per-share vote allocations over the nineteenth century, noting how the law moved away from restricted voting—which placed limits on the voting power of a corporation's large shareholders—in favor of one-share-one-vote. This literature uses the term

1. Bush v. Gore, 531 U.S. 98 (2000); Shelby Cnty. v. Holder, 570 U.S. 529 (2013).

2. Notable contributions to this literature include Henry Hansmann & Mariana Pargendler, *The Evolution of Shareholder Voting Rights: Separation of Ownership and Consumption*, 123 YALE L.J. 948 (2014) [hereinafter Hansmann & Pargendler, *Separation of Ownership and Consumption*]; Eric Hilt, *Shareholder Voting Rights in Early American Corporations*, 55 BUS. HIST. 620 (2013) [hereinafter Hilt, *Shareholder Voting Rights*]; and Colleen A. Dunlavy, *From Citizens to Plutocrats: Nineteenth-Century Shareholder Voting Rights and Theories of the Corporation*, *in* CONSTRUCTING CORPORATE AMERICA: HISTORY, POLITICS, CULTURE 66 (Kenneth Lipartito & David B. Sicilia eds., 2004) [hereinafter Dunlavy, *Citizens to Plutocrats*].

"shareholder voting rights" exclusively to mean per-share vote allocation, and, though it has shed light on some corners of early-nineteenth-century corporate practice, it has raised as many questions as it has answered. To date, there is no consensus among scholars about the purpose served by restricted corporate voting in the nineteenth century, and no consensus about why, by the turn of the twentieth century, it had been replaced by one-share-one-vote.

This Article ties the past to the present day, contributing to the debate over nineteenth-century corporate law history and providing some perspective on current developments. It argues that, in the nineteenth century, shareholder voting rights actually evolved along *three* parallel tracks. It presents a holistic and ultimately more satisfying account of this history than the literature has previously provided and connects this history of dynamic legal change to the current moment, when, once again, power struggles among the same set of players—corporate managers, large shareholders (now asset managers), and small shareholders—are reshaping shareholder voting rights along these same dimensions.

The first dimension of nineteenth-century legal change involved proxy voting, a system of rules by which a shareholder could delegate his or her vote. Because it expanded the geographic scope of a corporation's investor base, proxy voting was important for corporate finance in a nationalizing economy. It was also a major, pro-shareholder convenience and held the potential to empower small shareholders through collective action. In practice, however, proxy voting became a mechanism for sidelining shareholders in corporate governance, mainly for the benefit of corporate managers. The group most aggrieved by this sidelining, which was described as "proxy abuse," was large block holders—wealthy elites—who had the most invested and thus the most to lose if unscrupulous or low-quality management entrenched itself through the proxy system. State corporate laws relating to proxy voting changed considerably over the nineteenth century, moving from a regime in which proxy voting was disfavored to one in which shareholders enjoyed a nearly inviolable right to delegate their votes. Restrictions on proxy voting, enacted by many state legislatures during the nineteenth century to curb proxy abuse, were virtually swept away in the last quarter of the century, creating the modern proxy system.

The second dimension of change involved the allocation of votes per share of stock. In the early nineteenth century, a significant proportion of corporations limited the voting power of large block holders.[3] Over time,

3. When Colleen A. Dunlavy first called attention to this history in 2004, it surprised many corporate law scholars. *See* Dunlavy, *Citizens to Plutocrats*, *supra* note 2, at 67 ("Nearly every historian,

however, law and practice began to shift in favor of "plutocratic" voting, or one-share-one-vote.[4] Though this shift likely had several causes, this Article focuses in particular on a cause that has not been recognized in the literature: one-share-one-vote was a way for wealthy investors, particularly at large, widely held companies, to protect against managerial proxy abuse—a significant problem that was just becoming apparent with the expansion of proxy voting. Strengthening the voting power of the largest block holders helped offset managers' abilities to aggregate and vote the proxies of small shareholders.

The interdependence of proxy voting and vote allocations was self-evident. A shareholder's theoretical vote allocation mattered little if the shareholder could not cast *any* vote. Nineteenth-century proxy laws sometimes disenfranchised whole categories of shareholders, such as non-U.S. residents, out-of-state citizens, shareholders behind in their subscription payments, fiduciaries, and shareholders residing a long distance from the meeting place. For a time in Pennsylvania, male shareholders could vote by proxy only if they resided at a distance of ten miles or more from the shareholders' meeting; the rule was different, and more generous, for female shareholders.[5] The most significant categorical prohibition restricted officers and directors of a corporation from voting other holders' shares by proxy, in some cases under threat of criminal penalty.[6] This prohibition is notable not only because it had significant implications for corporate power at the time, but also because proxy voting by a corporation's management is, today, the dominant form of corporate voting.[7]

The shift to one-share-one-vote partially tempered problems associated with the emerging proxy system, at least at widely held corporations. However, this shift disempowered small stockholders in relation to wealthy, large holders, catalyzing yet a third counter-balancing trend: the rise of

I suspect, takes it for granted that the power of individual shareholders has always been proportional to their investment . . . ." But "[t]his essentially timeless view of the distribution of power among shareholders . . . is simply wrong.").

4. *See* Colleen A. Dunlavy, *Social Conceptions of the Corporation: Insights from the History of Shareholder Voting Rights*, 63 WASH. & LEE L. REV. 1347, 1355–56 (2006) ("Plutocracy, government by the wealthy, best describes the social conception of the corporation embodied in this voting rule because it apportioned power among the shareholders according to their investment in the company.").

5. Act of Apr. 7, 1849, No. 368, 1849 Pa. Laws 563 (encouraging manufacturing operations in Pennsylvania). Other states, too, used shareholder sex to determine proxy voting rights. *See infra* note 27 and accompanying text.

6. Research for this Article turned up prohibitions on officer proxy voting in public statutes or special legislative charters in Connecticut, Indiana, Massachusetts, New Jersey, Ohio, Pennsylvania, New Jersey, South Carolina, and West Virginia. *See infra* notes 46–91 and accompanying text.

7. *See* Melvin Aron Eisenberg, *Access to the Corporate Proxy Machinery*, 83 HARV. L. REV. 1489, 1490 (1970) ("It is well known that proxy voting has become the dominant mode of shareholder decisionmaking in publicly held corporations.").

cumulative voting, often as a state constitutional right, starting in the 1870s. Cumulative voting allowed shareholders to aggregate their votes for director candidates, providing a means for small shareholders to gain information and a voice on the board. By 1900, a dozen states had added a right to cumulative voting to their constitutions, while other states mandated cumulative voting through statutory law. However, the most popular states for business incorporations in the twentieth century—Delaware, New Jersey, and New York—never embraced it, preferring an enabling approach that was mostly in place by the turn of that century.[8]

The creation of the proxy system marked a split between corporate and political governance that set the two regimes on diverging regulatory paths.[9] It invited proxy *solicitation*, the practice in which savvy actors pursued shareholders to request—or even purchase—their delegated votes. Proxy solicitation would go on to absorb vast corporate resources and become a major focus of regulation. It is, today, the heart of federal regulation of corporate governance. Yet for the better part of two centuries, proxy voting practices sharply limited shareholders' franchise in one important way: shareholders voting by proxy could not easily choose among competing candidates in a contested election. In the summer of 2021, the U.S. Securities and Exchange Commission ("SEC") amended its regulations of the proxy system by introducing the "universal proxy," which places all candidates for election to the board on a single proxy form that resembles a political ballot.[10] Starting in late 2022, companies soliciting proxies were required to present shareholders with the full slate of candidates in contested elections, and, for the first time in American corporate history, shareholders began exercising voting choice that resembles political voting.[11]

The new universal proxy potentially upends one of the three dimensions of shareholder voting rights: proxy voting. It is one of several ways in which proxy voting has recently been reshaped, including reforms to broker voting rules and, at major asset managers, the emergence of pass-through voting. These changes come on the heels of a recent, significant change to per-share vote allocations: the popularization of dual-class structures, which give extra voting strength to stock held by large, powerful holders. Both the universal proxy and dual-class structures unsettle paradigms that date back to the nineteenth-century history recounted in this Article. Framed in the context

8. *See infra* Part III.

9. This was true, for example, regarding the regulation of electoral speech. *See infra* notes 21–22 and accompanying text.

10. *See* Universal Proxy, Exchange Act Release No. 93,596, Investment Company Act Release No. 34,419, 86 Fed. Reg. 68330 (Dec. 1, 2021); *infra* Part IV.

11. Because most public companies hold their annual meetings during "proxy season," from March to June each spring, the full effect of this change will not be evident until mid-2023.

of the three-dimensional evolution of shareholder voting rights, these twenty-first-century developments potentially signal a new era of dynamic change to shareholder voting rights—change on a level not seen since the nineteenth century.

Part I describes delegated or "proxy" voting and the rise of the American proxy system. Part II shows how the decreasing use of restricted voting, and the increasing use of one-share-one-vote, were related to the emerging proxy system and, in particular, to problems with that system. Part III introduces cumulative voting and connects its rise in the 1870s to the proxy system and the popularity of one-share-one-vote. It includes a synthesis of the three-track history and the shareholder voting rights framework at the end of the nineteenth century. An epilogue, Part IV, sketches the rising tide of new legal change to shareholder voting rights in the twenty-first century. These changes include the appearance of dual-class structures, the new universal proxy, reforms of broker voting, pass-through voting, and client-directed voting, which in combination recall the nineteenth-century era of voting-rights dynamism.[12]

I. THE SHAREHOLDER'S RIGHT TO DELEGATE THE VOTE

The earliest corporate laws assumed that shareholders would vote *in person*, gathered together in a meeting hall.[13] However, in the eighteenth and early nineteenth centuries, at a time when American corporations were mostly formed through special legislative acts, it was common for legislatures to approve charters that authorized shareholders to vote without attending a shareholders' meeting by delegating their votes to a person who did attend the meeting.[14] This was called voting *by proxy*, or *by attorney*. One study of New York corporate charters secured between 1790 and 1825 found that 82% of corporations entitled shareholders to vote by proxy; every

12. On the surge of dual-class shares, see Dunlavy, *supra* note 4, at 1349 (describing the increase since 1985 and especially 1994); *infra* Part IV.

13. Not coincidentally, this was also how voting in political institutions worked—and many municipalities were corporations. *See* Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 WM. & MARY Q. 51, 53 (1993) (observing that "about two-thirds of the acts of incorporation" enacted in Massachusetts "in the first decade under the state constitution of 1780, and nearly half of those enacted in the 1790s, made 'bodies politic' of towns, districts, or other units of local government"); *see also id.* at 79 (" 'A corporation,' according to the definition in Francis Lieber's *Encyclopaedia Americana* (1830), 'is a political or civil institution . . . conducted according to the laws of its constitution.' ").

14. For an example of an eighteenth-century legislative charter granting shareholders the right to vote by proxy, see Act of Mar. 16, 1790, ch. 26, 1790 N.Y. Laws 148, 150 (incorporating the stockholders of the New York Manufacturing Society and authorizing stockholders to "give their respective votes, either by themselves, or their agents thereunto specially appointed"). For an example of a nineteenth-century legislative charter that did *not* give shareholders a right to vote by proxy, see Act of Dec. 31, 1824, 1824 N.J. Laws 158 (incorporating the Morris Canal and Banking Company).

bank charter provided this right, while only 21% of the charters for bridge corporations did.[15]

Over the nineteenth century, the laws and practices that regulated proxy voting became complex, evolving in ways that shaped the balance of power within corporations. These laws and practices comprised what came to be known as the "proxy system," establishing the contours of corporate control. Today, the proxy system remains the main instrument—the beating heart—of corporate power. Since the New Deal, for publicly traded companies, it has also been the crux of federal regulation of corporate governance.

During the first half of the nineteenth century, courts of virtually all states agreed that, in the absence of a statute or provision in the legislative charter conferring a right to vote by proxy, shareholders could vote only in person at a shareholders' meeting.[16] This nearly unanimous approach by the states reflected a preference for shareholder governance that encouraged a democratic-style exchange of ideas among decision makers. In 1834, New Jersey's Supreme Court put it this way:

> It may be for the personal convenience of members, but it cannot be for the good of the corporation, that its business or election should be conducted by proxies. The interest of the company, the good of the public, would be better promoted and more effectually secured by the personal attendance of, and mutual interchange of opinions among the members, than by the action of proxies.[17]

In 1856, Pennsylvania's Supreme Court wrote that, since corporate shareholders were "embarked in a common enterprise," it was reasonable to require that director elections "take place under circumstances favorable to a consultation with each other, so that [shareholders] might have the benefit

15. Eric Hilt, *When Did Ownership Separate from Control? Corporate Governance in the Early Nineteenth Century*, 68 J. ECON. HIST. 645, 658 tbl.1 (2008) [hereinafter Hilt, *Ownership/Control*]. This study included 153 manufacturing corporations chartered under New York's 1811 general incorporation law for manufacturing firms, which entitled shareholders to vote by proxy.

16. *See, e.g.*, Philips v. Wickham, 1 Paige Chan. 590 (N.Y. Ch. 1829). Only one state's courts took a different view. In 1812, the Hartford Bridge Company created a bylaw that let its shareholders vote by proxy, even though proxy voting was not specifically allowed under the company's charter nor state law. After a contested election led to a challenge to the bylaw, a Connecticut judge upheld it even in the absence of clear legal authority. To do this, the judge drew a conceptual line between voting among shareholders of "monied institutions"—that is, commercial corporations like the bridge company—and voting at other types of institutions, such as non-profit and municipal corporations. State *ex rel.* Kilbourn v. Tudor, 5 Day 329, 333 (Conn. 1812). The idea was that voting in profit-seeking corporations could be accomplished through delegation, while political voting could not—a framework that endures to this day.

17. Taylor v. Griswold, 14 N.J.L. 222, 229 (1834). New Jersey courts held virtually the same view at the century's end. *See, e.g.*, Cone's Ex'rs v. Russell, 21 A. 847, 849 (N.J. Ch. 1891) (observing that the "duty of corporators to attend [shareholder meetings] in person, and execute the trust or franchise reposed in or granted to them" was "implied in and forms a part of the fundamental constitution of every charter in which the contrary is not expressed").

of each other's views and information relative to their common interest."[18]

A. Proxy Solicitation

Early lawmakers probably imagined that shareholders would vote by proxy only when necessary, using care in the selection of a person to exercise their delegated votes. In reality, proxy voting became the dominant mode of corporate voting (and remains so today), and the proxy system produced an elaborate machinery for the *solicitation* of proxies.[19] Parties soliciting proxies reached out and asked shareholders for their delegated votes—and shareholders handed them over. This led to the development of strategies to cajole proxies from shareholders, ranging from the use of postage-paid mailers, to private investigators, to, eventually, the rise of professional proxy solicitors.[20]

Two things are noteworthy about the emergence of this solicitation regime. First, actors seeking proxies quickly learned to use lies and misrepresentations to get them. This led to the enactment of laws regulating *speech* about corporate elections. In the early twentieth century, state lawmakers began enacting statutes that prohibited false or misleading statements in connection with a request for a shareholder's proxy. This marked a serious point of divergence between political governance and corporate governance in American law. To this day, American law strongly protects false and misleading speech intended to influence political elections,[21] yet condemns false and misleading speech designed to influence corporate elections.[22] During the New Deal of the 1930s, proxy solicitation provided the "hook" for a significant regime of federal speech regulation

18. Brown v. Commonwealth, 3 Grant 209, 209 (Pa. 1856). This was similar to arguments articulated by corporate experts in other states. For example, New York lawyer Simon Sterne critiqued proxy voting for eliminating "[t]he change of opinion which may be brought about by debate" in shareholder meetings. 4 PROCEEDINGS OF THE SPECIAL COMMITTEE ON RAILROADS, APPOINTED UNDER A RESOLUTION OF THE ASSEMBLY TO INVESTIGATE ALLEGED ABUSES IN THE MANAGEMENT OF RAILROADS CHARTERED BY THE STATE OF NEW YORK 4013 (1879) (summing up on behalf of Chamber of Commerce and Board of Trade and Transportation by Simon Sterne) [hereinafter PROCEEDINGS OF THE SPECIAL COMMITTEE ON RAILROADS].

19. *See* Eisenberg, *supra* note 7, at 1491 ("[P]roxy solicitation . . . [is] the process of systematically contacting shareholders and urging them to execute and return proxy cards which authorize named proxies to cast the shareholder's votes, either in a manner designated in the proxy card or according to the proxies' discretion.").

20. *See id.* (describing how proxy solicitation involved "widespread mailing of written materials to shareholders, and follow-up letters and phone calls to those who do not respond," with professional proxy solicitors "hired to do the follow-up, adding significantly to total expense"). Though aggressive solicitation tactics were reported throughout the nineteenth century, the modern proxy solicitation firm did not emerge until the 1940s, after proxy solicitation had become a focus of federal securities regulation. *See* GEORGESON & CO., REPORT TO OUR CLIENTS 1970 (1971) (noting the creation of the firm in 1948).

21. *See* U.S. v. Alvarez, 567 U.S. 709 (2012).

22. *See* 17 C.F.R. § 240.14a-9 (2021).

related to corporate elections, administered by the SEC.

Second, early practices allowed a party soliciting proxies to create the form of proxy (or "proxy card") used by the shareholder to sign away her vote. Forms sometimes did not specify how a proxy vote would be cast; eventually, a practice developed in which the proxy card listed only the soliciting-proxyholder's preferred candidates, omitting the names of any other candidates running for election to the board. Shareholders signed the form weeks or even months in advance and may not have known that other candidates were running. They were, in effect, giving up any right to choose among candidates in a contested election. This practice, which was extremely effective at suppressing votes for dissident candidates, became hard-baked into corporate practice and only ceased in late 2022, when a new securities regulation went into effect. Under new SEC rules, parties soliciting proxies (typically the corporation itself) must use a "universal proxy" that lists all candidates for election, giving shareholders a choice—and a proxy form that looks, for the first time, like an electoral ballot. The effect of this change is difficult to predict, but it is already upsetting the balance of power inside firms, as shareholders voting by proxy exercise real choice for the first time.[23]

B. BENEFITS OF PROXY VOTING

Proxy voting was a major convenience for shareholders at a time when transportation and communication technologies were rudimentary. For many shareholders, especially those of modest means, travel to a shareholders' meeting was too costly and time-consuming to make the trip worthwhile.[24] As the nineteenth century unfolded, large, capital-intensive businesses were increasingly financed by far-flung investors. This was especially true of banks in the early decades of the century. By the 1880s, a significant proportion of railroad stocks, sometimes a majority of a corporation's stock, was held in Europe.[25] The value of proxy voting to foreign investors

23. Shaun J. Mathew & Daniel Wolf, Sha*reholder Activism: Lessons from the First Season of Universal Proxy*, HARV. L. SCH. FORUM ON CORP. GOV., July 11, 2023, at https://corpgov.law.harvard.edu/2023/07/11/shareholder-activism-lessons-from-the-first-season-of-universal-proxy/ [https://perma.cc/RL7U-WZFD] (finding that the number of proxy fights remained the same, but that at least one activist board candidate was elected in 67% of proxy fights, up from 40% the year before).

24. *See, e.g.*, Eisenberg, *supra* note 7, at 1490–91 ("Physical attendance at a shareholders' meeting is normally an uneconomical use of a shareholder's time when he can vote by proxy."); *Debate on the Bank Bill*, RALEIGH REG., Jan. 3, 1811, at 1 ("It is objected that it will be extremely inconvenient for stockholders [of a proposed state bank] to attend at Raleigh, to vote for Directors; but the bill provides for voting by proxy . . . .").

25. *See, e.g.*, DOROTHY R. ADLER, BRITISH INVESTMENT IN AMERICAN RAILWAYS 1834–1898, at 174 n.19 (1970) (noting, for example, that by 1883, more than half of the stock of the Denver & Rio Grande Railroad was held in Europe); *Women Own Stock*, FORT WAYNE NEWS, Mar. 23, 1903, at 5

increased the pressure for legislatures to liberalize proxy voting rights.

Proxy voting could also prevent small shareholders from being disenfranchised altogether by common, practical challenges, such as work responsibilities and even gender-based obligations. Some early corporate laws specified that only women could vote by proxy, for example, recognizing contemporaneous social practices that kept women home-bound.[26] New Hampshire enacted a law in 1856 prohibiting railroad proxyholders from exercising more than fifty proxy votes—and then, the following year, amended it to restore the right of proxy voting to "female stockholders."[27] Laws allowing women, but not men, to vote by proxy revealed a desire by legislatures to protect the franchise of small and vulnerable shareholders.

As this suggests, not all shareholders could vote by proxy; some states employed categorical prohibitions that limited the privilege of proxy voting to a select few. For example, in the early 1800s, it was common for proxy voting to be limited to U.S. residents or state residents only.[28] In addition, the fiduciary law of many states did not allow guardians, trustees, or executors to delegate votes.[29] In these states—under laws that continued well

(noting that fifty-two percent of the stock of the Pennsylvania Railroad was owned overseas in 1890).

26. Around the middle of the nineteenth century, legislative acts in several states distinguished between male and female shareholders with regard to proxy voting. *See, e.g.*, Act of Apr. 7, 1849, No. 368, § 4, 1849 Pa. Laws 563, 564 ("[N]o stockholder, females excepted, residing within ten miles of the place appointed for such general meeting or election, shall vote by proxy . . . ."). A published transcript of a debate on the floor of Pennsylvania's House of Representatives in 1842 included a discussion of whether women's right to vote by proxy should be cut off by a proposed bill. *See House of Representatives, Monday, Feb. 7, 1842*, KEYSTONE (Harrisburg, Pa.), Feb. 9, 1842, at 2. The debate recognized not only that women had a special need to vote by proxy but also that women were already voting by proxy, and, thus, a change to the law would uniquely impact women shareholders. *See also, e.g.*, Act of Jun. 27, 1857, ch. 1951, 1857 N.H. Laws (relating to voting by proxy). In another example, a special legislative charter enacted by New Jersey's General Assembly in 1860 allowed only "female stockholders" to vote by proxy. *See* Act of Mar. 21, 1860, ch. 185, § 2, 1860 N.J. Laws 470 (incorporating the Gloucester County Glass Manufacturing Company).

27. *See* Act of July 12, 1856, ch. 1839, § 1, 1856 N.H. Laws 1748 (limiting the right of voting by proxy in railroad corporations) ("No person shall, at any meeting of the stockholders of any railroad corporation in this State, vote by proxy on more than fifty shares . . . nor on a greater number of shares by proxy, than will be sufficient together with shares owned and voted on by himself at said meeting, to make up the number of shares as aforesaid; nor shall any stockholder authorize more than one person to vote on his shares by proxy at the same meeting . . . ."); Act of June 27, 1857, ch. 1951, § 1, 1857 N.H. Laws (explaining that proxy voting prohibition "shall not affect the right of female stockholders to vote at such meeting in the way and manner provided by existing laws").

28. In New Jersey, some special legislative charters enacted in the early nineteenth century specifically disenfranchised shareholders who resided outside the state; an 1849 statute re-enfranchised them all. *See* Act of Mar. 2, 1849, 1849 N.J. Laws 310 (supplementing the Act entitled, "An Act Concerning Corporations") ("[S]o much and such parts of the several acts of incorporation in this state, as prohibits stockholders residing out of the state, from voting on stock held by them, be, and the same are hereby repealed.").

29. *See, e.g.*, Lyle A. Anderson, Corporate Proxies 4 (Apr. 15, 1961) (M.S. thesis, Butler University) (on file with Butler University Libraries) (surveying the law and finding that fiduciaries could

into the twentieth century—fiduciaries could vote in person only, which probably meant that much stock held in the name of fiduciaries was not voted at all. In addition, some states restricted the class of people who could vote as proxyholders to those owning their own stock in the company,[30] while other states *prohibited* shareholders from exercising others' proxy votes.[31]

As the geography of corporate finance expanded, as shareholding atomized (dividing into small stakes), and as women and workers joined the ranks of shareholders, shareholder attendance at meetings fell. This created a risk that too few shares (or shareholders) would be present at shareholder meetings to satisfy quorum rules, preventing the annual election of directors, which was required under most states' laws.[32] Thus, proxy voting was sometimes presented as essential to basic corporate governance and to the ordinary operation of firms.

In addition to offering convenience in a nationalizing (and globalizing) economy, proxy voting held unique potential as a mechanism for shareholder collective action. At least in theory, proxy voting could have allowed shareholders to act together by giving their proxies to the same person or group, who could vote them all for the same purpose. In practice, however, the collective action benefits for small shareholders never materialized. Instead, a different group of actors learned to use proxy voting to their advantage.

C. PROXY ABUSE

Despite its promise for shareholder empowerment, proxy voting swiftly became known as a mechanism for abuse. Over the first half of the nineteenth century, business leaders, especially corporate officers, learned to harvest proxy votes from absent shareholders and vote them to control the outcome of elections for their own, personal benefit.[33] The tactics used to solicit,

vote by proxy in only 28 states in 1961).

30. *See, e.g.*, Matter of Lighthall Mfg. Co., 47 Hun. 258 (N.Y. 1st Dep't 1888) (invalidating a bylaw requiring a proxyholder to be a shareholder).

31. *See* Dividend-Paying Corporations, ch. 149, § 22, 1891 N.H. Laws 411, 414 ("Except in railroad corporations [for which there were different, more restrictive rules], any person not a stockholder . . . may vote as proxy in the right of such stockholder; but no stockholder shall act as proxy for any other stockholder, nor shall any person act as proxy for more than one stockholder, or vote as proxy for shares exceeding one eighth of the whole capital stock.").

32. The concern about proxy voting and quorum requirements persisted into the twenty-first century. *See, e.g.*, REPORT AND RECOMMENDATIONS OF THE PROXY WORKING GROUP TO THE NEW YORK STOCK EXCHANGE 4 (2006) (concluding that New York Stock Exchange ("NYSE") Rule 452, regarding broker voting of uninstructed customer stock, "continues to have an important role in the proxy process today, particularly with respect to allowing issuers to achieve a quorum for regular meetings").

33. One writer described this practice as a "growing evil" in 1856:

> It has been the practice, lately, of some of those interested in carrying any measure in a corporation, to send their agents to the different stockholders to obtain their proxies, so that a

aggregate, and exercise proxy votes in annual corporate elections grew increasingly sophisticated over the nineteenth century. Proxy abuse sparked public outrage but proved challenging for legislatures to discourage through statutory law.

Because shareholders had few informational rights under nineteenth-century corporate law, attendance at the shareholders' meeting was the main way for shareholders to obtain basic information about the corporation's financial condition.[34] If managers did not provide sufficient information at the meeting, shareholders who were present could ask questions and raise matters for discussion. Of course, shareholders who did not attend the meeting, but instead voted by proxy, could not obtain information about the corporation through this traditional manner. Though proxy voting became increasingly popular over the nineteenth century, laws requiring the provision of information to absent shareholders lagged.[35] As a result, during the early decades of the nineteenth century, shareholders who delegated their votes to proxyholders risked being left completely in the dark about the corporation's operations and prospects.

In 1850, a New York banker described how a corporation's "reigning directors" could collaborate "to perpetuate their own control."[36] "[S]ome leader among them," the "*emperium in emperio*," would "carefully gather[] up proxies, under the facility of knowing the residence of every stockholder, and being officially in correspondence with him."[37] The banker was pointing out the serious advantages that corporate managers had over ordinary shareholders when it came to proxy solicitation.[38] A corporation's managers had access to the transfer book and the stockholder list and could impede the access of others. They knew who owned how many shares of stock and where the shareholders lived. And because of the nature of the relationship between shareholder and corporation, the management had regular

> contest regarding the policy or propriety of a proposed measure, was not as to what was right or politic, but as to who shall succeed in obtaining the most proxies.

Recent Legislation—New Hampshire, 9 MONTHLY L. REP. 326, 328 (1856).

34. Eric Hilt's study of New York corporations chartered from 1790 to 1825 found that only fourteen percent required annual financial statements. *See* Hilt, *Ownership/Control*, *supra* note 15, at 651, 659 (noting that New York manufacturing firms "only rarely required annual financial statements").

35. *See id.* at 660 (noting that in early-nineteenth-century New York "the rapid proliferation and increasing sophistication of corporations outpaced the efforts of the legislature and the courts to protect the interests of investors").

36. A.B. Johnson, *Advantages and Disadvantages of Private Corporations*, 23 HUNT'S MERCHANTS' MAG. 626, 630 (1850).

37. *Id.*

38. *See* Stockholder, *The Use of Proxies in the Election of Railroad Directors—Reply to Hon. E. Corning*, N.Y. TIMES, Feb. 23, 1858, at 8 (writing that "the command of a stock list, of an abundance of postage stamps, and of a press to strike off circulars, may be the most efficient means of perpetuating power in the hands that already hold it").

communication with all its shareholders, financed by the corporation itself.

Corporate managers were prominent members of the community, and this gave them an edge in soliciting proxies. "[T]he respectability of the directors and their officers gives them an influence," one writer asserted, "[and] their particular stations give them opportunities to procure as often as transfers are made at the bank, proxies from the new stockholders to vote in their names at elections."[39] The writer went on,

> You my friend know something of human nature, and can judge whether a request for this purpose coming from such a quarter, made with gentleness and affability, but with an apparent expectation that as a matter of course it will be granted.—*You* can judge whether it is likely in many instances to be refused.[40]

In other words, managers were tempted to exploit their position to obtain proxies, which the author suggested was "an inconvenience inseperable [sic] from the system of voting by proxy."[41]

Evidence suggests that some officers and directors used dishonest tactics to obtain proxies. A Massachusetts author described in his 1863 book, *Some of the Usages and Abuses in the Management of Our Manufacturing Corporations*, "tricks, subterfuges, and expedients" used by corporate managers to exploit the proxy system.[42] One practice, he alleged, was for the corporate treasurer's office to require shareholders to sign their name twice to receive a dividend payment: "one book or paper, which is a receipt, and another, which is a proxy."[43] As he explained, the stockholders often did not understand that they had signed away their votes:

> By this process a majority of the proxies of any corporation is easily taken, and kept in possession of the officers to be used by them, or their partizans [sic], at the annual meeting, for their own purposes; which, of course, gives them entire control of the franchise of the Corporation.[44]

Widely held, dispersed stock made a corporation vulnerable to proxy abuse. Corporations with atomized shareholdings were likely to have many small shareholders who failed to vote at all. When many shareholders abstained from voting, the number of proxy votes needed to win an election fell, making it easier to seize control by proxy. If shares were held by speculators, those holders probably had little interest in voting in corporate

39. *For the New-York Daily Advertiser*, N.Y. DAILY ADVERTISER, Oct. 30, 1819, at 2.

40. *Id.*

41. *Id.*

42. J.C. AYER, SOME OF THE USAGES AND ABUSES IN THE MANAGEMENT OF OUR MANUFACTURING CORPORATIONS 15 (Lowell, Mass., C. M. Langley & Co. 1863).

43. *Id.* at 4.

44. *Id.*

elections and may have been open to selling their proxies.[45] Overseas investors often held stock through brokers, who were known to sell proxies. Over time, many kinds of investors—rural, working-class, and overseas investors—probably became habituated to proxy voting, easily signing away their delegated votes.

D. STATUTORY LIMITS ON PROXY VOTING

The earliest restrictions on proxy voting were enacted for banking corporations, which were the most widely held corporations in the early nineteenth century.[46] Pennsylvania's legislature passed its first law placing limits on proxy voting at banks in 1812[47] and enacted a law with more extensive limits on proxy voting, at a broader range of corporations, in 1820.[48] Special legislative charters for Ohio banks included provisions prohibiting proxy voting by salaried officers as early as 1813.[49] Ohio was broadly prohibiting proxy voting by salaried bank officers by 1816.[50] In March 1837, the legislatures of both Virginia and Massachusetts discussed limits on proxy voting at bank corporations;[51] Virginia enacted a prohibition that year,[52] and Massachusetts did so in 1840.[53]

In an address in January 1840, Pennsylvania Governor David Rittenhouse Porter called on the state's legislature to forbid proxy voting in

45. *See infra* notes 95–98 and accompanying text.

46. *See* John Majewski, *Toward a Social History of the Corporation: Shareholding in Pennsylvania, 1800–1840*, *in* THE ECONOMY OF EARLY AMERICA: HISTORICAL PERSPECTIVES & NEW DIRECTIONS 294, 302 (Cathy Matson ed., 2006) (finding that "more than twenty thousand individuals purchased shares in Pennsylvania banks" in 1814 and that ten banks chartered in Pennsylvania in 1814 had more than one thousand shareholders).

47. Act of Feb. 3, 1812, ch. 26, § 1, 1812 Pa. Laws 35 (regulating voting by proxy in several incorporated banks).

48. Act of Mar. 28, 1820, ch. 113, § 2, 1820 Pa. Laws 169, 170 (creating new requirements including, *inter alia*, a six-month limit on proxies, a prohibition against blank proxies, and a requirement that proxy holders voting in elections of officers swear an oath, subject to punishment for "willful and corrupt perjury").

49. *See, e.g.*, Act of Feb. 5, 1813, ch. 33, § 5, 1812 Ohio Laws 79, 81 ("[N]o officer of the bank, receiving a salary, shall be permitted to vote as a proxy for any stockholder.").

50. *See* Act of Feb. 23, 1816, ch. 361, § 20, 1816 Ohio Laws, *reprinted in* 2 THE STATUTES OF OHIO AND OF THE NORTHWESTERN TERRITORY, ADOPTED OR ENACTED FROM 1788 TO 1833 INCLUSIVE 913–24 (Salmon P. Chase ed., Corey & Fairbank 1834).

51. *Massachusetts Legislature*, BOS. COURIER, Mar. 4, 1837, at 3 (reporting that a Massachusetts state senator had moved for an inquiry into "the expediency of providing by law, that no stockholder in any corporation shall be allowed to vote for himself as a Director, or to carry more than—votes by proxy").

52. Act of Mar. 22, 1837, ch. 82, § 6, 1837 Va. Acts 57, 64 ("[N]o president, cashier, clerk or teller of said bank shall be permitted to vote at any election for directors, as the attorney, agent or proxy of any stockholder.").

53. Act of Mar. 21, 1840, ch. 61, 1840 Mass. Acts 208 (prohibiting any shareholder of a bank from voting more than fifty votes by proxy, and limiting bank directors, cashiers, and officers to ten votes by proxy).

banks altogether—or, if that was "going too far," at least to prohibit shareholders from giving proxies to a bank's own officers, directors, or agents.[54] Proxy voting "prevents those who are interested in banks from investigating their management," he said, presumably because managers would vote the proxies to defeat any investigation of their own actions.[55] When Pennsylvania's House of Representatives debated a banking bill a few years later in 1842, its members argued over whether to eliminate proxy voting at banks only or also at insurance companies.[56] One legislator announced that proxy voting was "well known" to have given rise to "the grossest abuses," and another claimed that it had "destroyed the banking system of the country."[57]

Pennsylvania's legislature finally ended proxy voting in the state's banks in April 1843.[58] Six years later, it issued special limits on proxy voting for manufacturing corporations, too, including a prohibition against any party voting the proxies of more than two absent shareholders.[59] The same statute limited large shareholders to no more than one-third of the votes, regardless of their shareholding or the size or capital structure of the firm.[60] In other words, it limited the power of both corporate managers and wealthy block-holders, making small shareholders the beneficiaries of both changes.[61]

54. Message from Governor Porter to Both Houses of the Legislature of Pennsylvania (Jan. 15, 1840), *in* 2 HAZARD'S UNITED STATES COMMERCIAL AND STATISTICAL REGISTER 33, 40 (Hazard ed., 1840). John Majewski found that, in Pennsylvania, "significantly fewer individuals owned [bank] stock in 1840 than in 1815" and attributed this to the legislature's discouragement of bank investment. Majewski, *supra* note 46, at 305. Something similar appears to have been going on in Massachusetts. That year, Massachusetts's legislature enacted "An Act regulating the use of Proxies at the meeting of Stockholders of Banks." Act of Mar. 21, 1840 ch. 61, 1840 Mass. Acts 208 (prohibiting any shareholder of a bank from voting more than fifty votes by proxy and limiting bank directors, cashiers, and officers to ten votes by proxy). Three years later, Massachusetts extended similar limits on proxy voting to railroad corporations. *See* Act of Mar. 24, 1843, ch. 68, § 3, 1843 Mass. Acts 32, 33 (limiting individual railroad shareholders to fifty votes by proxy, and railroad directors, treasurers, and other officers to twenty votes by proxy). In 1857, Massachusetts prohibited bank officers from soliciting any proxies at all—a move that suggested the 1840 act had not been effective at ending proxy abuses by bank management. *See* Act of May 28, 1857, ch. 243, § 1, 1857 Mass. Acts 595, 595. In 1871, Massachusetts passed further legislation to place limits on proxy voting at street railway corporations. *See* Act of May 26, 1871, ch. 381, § 5, 1871 Mass. Acts 730, 731 (limiting proxy voting to fifty votes per proxyholder).

55. Message from Governor Porter to Both Houses of the Legislature of Pennsylvania, *supra* note 54, at 40.

56. *House of Representatives, Monday, Feb. 7, 1842*, *supra* note 26.

57. *Id.*

58. Act of Apr. 8, 1843, No. 88, § 2, 1843 Pa. Laws 184, 184. Connecticut also prohibited proxy voting at banks from 1842 to 1844. *See* Act of June 9, 1842, ch. 3, § 4, 1842 Conn. Pub. Acts 8, 9; Act of June 6, 1844, ch. 4, 1844 Conn. Pub. Acts 6 (repealing the prohibition).

59. Act of Apr. 7, 1849, No. 368, § 4, 1849 Pa. Laws 563, 564.

60. *Id.*

61. *Id.* ("[E]ach stockholder shall be entitled to as many votes as he owns shares of stock in said company, but no person shall in any case be entitled to more than one-third of the whole number of votes to which the holders of all the shares in the capital stock of such company would be entitled . . . .").

In New York, in December 1857, a controversy arose about managerial proxy abuse at the New York Central Railroad. Soon thereafter, Horatio J. Stow, a state senator, introduced a bill prohibiting officers of railroad corporations and banking corporations from exercising proxy votes.[62] Writing anonymously in the *New York Times*, one New York Central stockholder bemoaned how proxy voting had become "objectionable," in spite of its convenience.[63] "[N]o Board of Directors should exist," he wrote, "as that one man by proxies, or any other way, should make the Board in fact a board of mere subservients, without paying any decent regard to the feelings and votes of stockholders who are active enough to bestir themselves and offer their own votes personally."[64] Despite these concerns, Senator Stow's bill did not become law, and the managers of New York railroads continued to harvest shareholders' proxies.

In the 1860s, a shareholders' meeting of the Albany & Susquehanna Railroad revealed the sort of extraordinary misconduct to which New York's proxy system was vulnerable. Seeking to control the outcome of the meeting, a shareholder hired a group of New Yorkers to vote as proxies—"a rough, low class of men, such as in common parlance would doubtless be classed among the roughs and fighting men of that city."[65] The mastermind of the scheme paid the men to travel by train to Albany, fed them, distributed proxies among them, and brought them to the small meeting room, which they filled to capacity. Other shareholders were either excluded for lack of space or intimidated into silence. A judge concluded that these practices were "a gross perversion and abuse of the right to vote by proxy, and a clear infringement of the rights of the bona fide stockholders of the company."[66]

In 1864, a group associated with the struggling Chicago & Northwestern Railroad Company harvested proxies for the profitable Galena & Chicago Union Railroad Company—in part by buying proxies from New York "money brokers"[67]—and orchestrated the consolidation of the two railroad corporations, essentially bootstrapping a failing company to a successful one. In litigation that followed, Galena shareholders described an elaborate proxy scheme that took advantage of the fact that few Galena shareholders typically attended shareholders' meetings.[68] At the June 1864 meeting in which control of the Galena had been seized via proxy, only about

62. *Election of Moneyed Corporations*, N.Y. TIMES, Feb. 5, 1858, at 5.
63. Stockholder, *supra* note 38.
64. *Id*.
65. People v. Albany & Susquehanna R.R. Co., 1 Lans. 308, 339 (N.Y. Sup. Ct. 1869).
66. *Id.* at 341.
67. *See, e.g.*, *Great Suit in the U.S. District Court*, CHI. TRIB., Jan. 16, 1865, at 2.
68. *See, e.g.*, *id.*

900 of the corporation's 60,284 outstanding shares were represented in person.[69] Shareholders alleged that proxies had been obtained dishonestly.[70] Instead of invalidating the consolidation, a federal judge ordered the Chicago & Northwestern to pay complaining Galena shareholders more for their stock.[71] However, the high-profile case may have set the stage for Illinois to become,[72] just a few years later, the first state in the U.S. to adopt corporate cumulative voting to protect the rights of minority stockholders.[73]

Massachusetts was among the first states to limit the exercise of proxy votes by railroad officers, in 1843.[74] Its legislature limited railroad directors, treasurers, and other officers to twenty votes when acting as a proxy.[75] In 1865, Massachusetts expanded these prohibitions in substance and scope.[76] The new law was not limited to railroads but applied broadly to "any corporation." It authorized an officer or director to vote no more than twenty shares as a proxy, unless all the shares voted by proxy came from one person. It prohibited a salaried officer from voting as a proxy at all. And it specifically prohibited officers and directors from "ask[ing] for, receiv[ing], procur[ing] to be obtained or us[ing] any proxy vote in the corporation" beyond those limits.[77] An officer or director who violated the act could be fined up to $500, removed from corporate office, and "forever" disqualified from holding any office in that corporation again.[78] In the decades that followed, Massachusetts's legislature affirmed these prohibitions in various acts relating to cemetery corporations,[79] manufacturing corporations,[80] street

69. *See* WM. H. Brown, Orrington Lunt, B.W. Raymond, S.B. Cobb, John H. Foster, Nathaniel Norton, Samuel McKay, WM. H. Gillman & WM. M. Larrabee, *To the Stockholders of the Galena and Chicago Union R. R. Co.*, CHI. TRIB., Jan. 30, 1865, at 1 (detailing the proxy plot); ELLIOTT ANTHONY, A TREATISE ON THE LAW OF CONSOLIDATION OF RAILROAD COMPANIES 191–92 (Chicago, Beach & Barnard 1865) (same).

70. *See id.*

71. *See Chicago and Northwestern Railway*, CHI. TRIB., Oct. 23, 1866, at 1.

72. In press coverage, the *Chicago Tribune* called it "The Great Railroad Case"; the presiding judge was U.S. Supreme Court Justice David Davis. *See The Great Railroad Case*, CHI. TRIB., Aug. 9, 1865, at 2; ANTHONY, *supra* note 69.

73. *See infra* Part III.

74. *See* Act of Mar. 24, 1843, ch. 68, § 3, 1843 Mass. Acts 32, 33 (limiting ordinary shareholders from voting more than fifty shares as a proxy). The 1843 prohibitions were extended in an 1858 statute. Act of Mar. 24, 1858, ch. 76, § 2, 1858 Mass. Acts 58, 58.

75. Act of Mar. 24, 1843, ch. 68, § 3, 1843 Mass. Acts 32, 33; Act of Mar. 24, 1858, ch. 76, § 2, 1858 Mass. Acts 58, 58. Connecticut also prohibited officers of railroad corporations from voting "upon any other stock than his own," or soliciting proxies, in an 1852 statute. *See* Act of June 29, 1852, ch. 62, § 2, 1852 Conn. Pub. Acts 74, 74.

76. Act of May 13, 1865, ch. 236, § 1, 1865 Mass. Acts 624, 624 (distinguishing between "officers" (that is, directors) and "salaried officers").

77. *Id.*

78. *Id.* § 2.

79. *See* Act of Mar. 26, 1866, ch. 104, 1866 Mass. Acts 68.

80. *See* Act of May 9, 1870, ch. 224, § 19, 1870 Mass. Acts 154, 159–60.

railway corporations,[81] and railroad corporations,[82] and, in 1870, capped proxy votes exercised by persons other than officers and directors at fifty votes.[83]

However, a reversal was on the horizon. In early 1888, the president of the Fitchburg Railroad Company, Elijah Brigham Phillips, was caught in an elaborate, illegal scheme to solicit proxies from shareholders and distribute them to paid agents, including fifty "tramps" recruited from a Boston charity, who voted as proxyholders to ensure Phillips's reelection to the board.[84] As controversy swirled about Phillips's upcoming trial, the Massachusetts legislature repealed the fifty-vote cap on proxy votes exercisable by independent proxyholders, signaling their willingness to remake this area of law.[85]

There was little question that Phillips was guilty: at trial, numerous witnesses testified to the secret proxy plot. However, Phillips offered a bold defense. Instead of denying the proxy plot, his lawyers admitted it—and argued that it was "a common practice" among railroads.[86] Phillips was found guilty of illegally soliciting proxies and faced possible removal from the Fitchburg's presidency. Instead, the judge deferred his sentence and, in the spring of 1889, the Massachusetts legislature repealed the law that he had been convicted of violating.[87] After the repeal, the judge dismissed the petition against Phillips, and he suffered no consequences.[88] The Fitchburg story highlights the significant political power wielded by the state's large railroad corporations, which they used to legalize voting practices that, just a few decades earlier, had been considered serious infringements on corporate governance.

Pennsylvania's 1820 law required a person voting another

81. *See* Act of May 26, 1871, ch. 381, § 4, 1871 Mass. Acts 730–31 (adding a limit on proxy voting to fifty votes per proxyholder).

82. *See* Act of June 27, 1874, ch. 372, § 42, 1874 Mass. Acts 347, 361–62. Massachusetts's proxy voting prohibitions also survived a substantial reorganization of the state's statutes in 1882. S*ee, e.g.*, Mass. Gen. Laws ch. 105, § 14 (1882) (relating to railroad corporations).

83. *See* Act of May 9, 1870, ch. 224, § 19, 1870 Mass. Acts 154, 159–60 (adding that "no person shall, as proxy or attorney, cast more than fifty votes, unless all the shares so represented by him are owned by one person").

84. This account of Phillips's proxy scheme and subsequent trial come from the *Boston Globe*, which followed the saga closely. *See A Pooh-Bah Trio*, BOST. GLOBE, Oct. 6, 1888, at 1; *Phillips Proxies: Judge Holmes Finds Against Him on the Facts*, BOST. GLOBE, Oct. 18, 1888, at 2; *King Phillips and His Dissatisfied Subjects*, BOST. GLOBE, Jan. 29, 1889, at 1.

85. Act of Apr. 3, 1888, ch. 188, § 1, 1888 Mass. Acts 152, 152.

86. *A Pooh-Bah Trio*, *supra* note 84.

87. *See* Act of Apr. 5, 1889, ch. 222, § 1, 1889 Mass. Acts 932, 932.

88. In fact, in the months between his conviction and the law's repeal, Phillips had been reelected to Fitchburg's board yet again—at a shareholders' meeting that he did not even attend. *King Phillips and His Dissatisfied Subjects*, *supra* note 84.

shareholder's proxy to swear an oath, under penalty of perjury, confirming that he or she had complied with all applicable proxy rules. This created the possibility of *criminal* liability for proxy violations at private companies, a trend that took hold in other states.[89] Over the years, several states would authorize criminal punishments for proxy voting violations, even including imprisonment. New York authorized imprisonment for violations of its proxy law for railroad corporations in an 1880 statute; proxyholders could be prosecuted for perjury for giving false oaths, and substantive violations of the proxy law were misdemeanors.[90] New Hampshire's 1891 general corporation law went further, authorizing imprisonment and fines, for, among other things, "fraudulently procur[ing] or receiv[ing] the transfer of a share for the purpose of voting thereon," or "directly or indirectly solicit[ing] a proxy for any other person to vote upon."[91]

E. THE PURCHASE AND SALE OF PROXIES

In the Galena & Chicago Union proxy abuse scandal, described above, proxyholders were reported to have gained control of the railroad by purchasing proxies from New York brokers. This hinted at a wider set of practices that plagued the proxy system.

In the late nineteenth century, many American railroad corporations were financed overseas by investors from Europe.[92] The logistics of overseas finance encouraged brokers to keep stock registered in the brokers' own names. For example, when a Wall Street broker purchased stock in an American corporation for sale in Europe, the broker would have the stock transferred into its own name, in case the stock certificates were lost "by an accident to the steamer, miscarriage or robbery of the mails."[93] It was simply easier to have the certificates re-issued if they were registered in the broker's own name. In addition, because of the snail's pace of international travel, changes in overseas stock ownership could take "intervals of several months" before stock lists would accurately record the owner of the shares,

89. New Hampshire's 1891 corporate law, for example, allowed a person who "directly or indirectly solicit[s] a proxy for any other person to vote upon" to be sentenced to "imprisonment not exceeding one year, or by [a] fine not exceeding five hundred dollars, or both." Dividend-Paying Corporations, ch.149, § 26, 1891 N.H. Laws 411, 414.

90. *See* Act of May 29, 1888, ch. 510, § 2, 1888 N.Y. Laws 720, 721 (specifying that stockholders or proxyholders convicted of violating the substantive provisions of the statute could be punished with imprisonment no longer than a year, a fine no more than $5,000, or both). New York extended the oath requirement to proxyholders in banks in an 1882 statute. *See* Act of July 1, 1882, ch. 409, § 204, 1882 N.Y. Laws 581, 659.

91. Dividend-Paying Corporations, ch.149, § 26, 1891 N.H. Laws 411, 414.

92. As one example, fifty-two percent of the stock of the Pennsylvania Railroad was reportedly owned overseas in 1890. *See Women Own Stock*, *supra* note 25.

93. PROCEEDINGS OF THE SPECIAL COMMITTEE ON RAILROADS, *supra* note 18, at 4015–16.

which presented problems if the new stockholders wanted to vote or receive their dividends.[94] A broker could collect the dividend and credit it to the client's account.

All of this tended to encourage practices in which Wall Street brokers held large amounts of clients' stock in their own name, giving them voting rights in corporations in which they lacked a financial interest. Brokers quickly learned they could monetize this practice by selling proxies for their clients' stock. In 1878, New York's Hepburn Committee, formed to investigate abuses by the management of railroad companies, uncovered evidence of proxy abuse, including the purchase and sale of proxies.[95] A corporate lawyer testified under oath that he had personally purchased proxies from brokers for an election of the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company.[96] The practice was not illegal at the time, though the president of the Erie Railroad testified that he found the sale of proxies "extremely objectionable."[97] New York's legislature prohibited the sale of proxies in railroad corporations two years later, in 1880, and, in 1890, at all corporations.[98]

Even where brokers were not selling proxies, they were voting their clients' stock. A banker for Kuhn, Loeb & Company, admitted to the Hepburn Committee that his brokerage house had voted 56,000 shares of its clients' stock, which stood in the firm's name, in the 1877 directors' election of the Erie Railroad.[99] The 1880 railroad proxy law included language designed to outlaw this practice as well, but the practice endured.[100] The New York Stock Exchange ("NYSE") finally stepped in in 1937—nearly sixty

94. *Id*. at 4015.

95. *Id*. (describing Wall Street brokers "hawk[ing] around the proxies on shares which may thus happen to stand in their names, for the profit they can make on them").

96. *Id*. at 3568 (testimony of Samuel L. M. Barlow, director of the Erie Railroad from 1872–1877) (Nov. 26, 1879).

97. 2 PROCEEDINGS OF THE SPECIAL COMMITTEE ON RAILROADS, *supra* note 18, at 1447 (testimony of Hugh J. Jewett, president of the Erie Railroad).

98. *See* Act of May 29, 1880, ch. 510, § 2, 1880 N.Y. Laws 720, 721 ("No person having the right to vote upon stock or bonds shall sell his vote or issue a proxy to vote upon such stock or bonds to any person for any sum of money, or any thing of value whatever."); Act of Jun. 7, 1890, ch. 564, § 54, 1880 N.Y. Laws 1066, 1077 ("No stockholder shall sell his vote, or issue a proxy to vote, upon any stock or bonds to any person for any sum of money, or anything of value."); *see also* Act of May 18, 1892, ch. 687, § 20, 1892 N.Y. Laws 1800, 1808 ("No member of a corporation shall sell his vote or issue a proxy to vote to any person for any sum of money or anything of value."). New York's prohibition against selling proxies endures to this day, with some limitations. *See* N.Y. Bus. Corp. Law § 609(e) (McKinney 2022).

99. 3 PROCEEDINGS OF THE SPECIAL COMMITTEE ON RAILROADS, *supra* note 18, at 2520–21 (testimony of Abraham Wolff, of Kuhn, Loeb & Company); *Railroad Rebates*, N.Y. DAILY HERALD, Oct. 12, 1879, at 6.

100. *See* Act of May 29, 1880, ch. 510, § 2, 1880 N.Y. Laws 720, 721 (requiring proxyholders to give an oath, if requested, that "I have not, either directly or indirectly or impliedly, given any promise or any sum of money, or any thing of value whatever to induce the giving of authority to vote upon such stock . . . to me").

years later—to regulate brokers' voting of client stock, enacting the "ten-day rule."[101]

Another way that proxies were monetized was through the "hypothecation" of stock. The president of the Erie Railroad told the Hepburn Committee that it had become common for stock held as collateral to be "transferred upon the books [of the corporation] into the name of the party holding it as security," giving the creditor the right to vote the stock; the creditor would then sell a proxy for the stock for "a payment of $2 a share, or $1 a share, or $5 a share, according to the emergency of the case."[102] The shares would be transferred back into the name of the debtor once the debt was paid, per the agreement formed between creditor and debtor. The Erie's president objected to this transfer of voting control, telling the committee that the practice "ought in some way to be regulated and controlled."[103] Here, again, it appears that New York legislators struggled to draft statutory language that could effectively regulate the practice.

F. PROXY VOTING AS A SHAREHOLDER RIGHT

In the last three decades of the century, nearly every state made delegated voting a right of shareholding. Massachusetts was among the states that did so, in an 1870 law (for manufacturing corporations).[104] However, by then it had already placed significant limitations on proxy voting, including a prohibition against proxy solicitation by corporate officers.[105] Massachusetts's 1870 law left the gist of these proxy restrictions in place.[106] Five years later, in 1875, New Jersey's legislature used nearly identical language in its own law to entitle stockholders to vote by proxy but omitted the limitations on proxy voting that Massachusetts had embraced.[107] In 1883, when Delaware substantially revised its corporate law, it adopted the language from the New Jersey statute nearly word-for-word, creating an entitlement to proxy voting with no limitations.[108] Thus, by the time of the 1888 Fitchburg Railroad Company election, Massachusetts's continuing restrictions on proxy voting made it an outlier among Eastern states. This may help explain why Phillips defended himself by claiming that *all* railroad

101. Jill E. Fisch, *Standing Voting Instructions: Empowering the Excluded Retail Investor*, 102 MINN. L. REV. 11, 26 (2017).

102. 2 PROCEEDINGS OF THE SPECIAL COMMITTEE ON RAILROADS, *supra* note 18, at 1447 (testimony of Hugh J. Jewett, president of the Erie Railroad).

103. *Id.*

104. *See* Act of May 9, 1870, ch. 224, § 19, 1870 Mass. Acts 154, 159–60.

105. Act of May 13. 1865, ch. 236, § 1, 1865 Mass. Acts 624, 624.

106. *See* Act of May 9, 1870, ch. 224, § 19, 1870 Mass. Acts 154, 159–60.

107. N.J. Rev. Stat. § 21 (1875).

108. Act of Mar. 14, 1883, ch. 147, § 18, 1883 Del. Laws 570, 576.

managers used the proxy system to control electoral outcomes—and why Massachusetts's legislature changed its laws when they were challenged.

By 1900, only one or two states still had laws in force that restricted who could vote by proxy, and who could exercise proxy votes. Indeed, the story of how the prosecution of the president of the Fitchburg Railroad for illegally soliciting proxies resulted in the repeal of *all* of Massachusetts's proxy-voting restrictions, despite the president's admitted guilt and the railroad's poor financial condition, evidences the significant power that corporate managers wielded at the end of the century to end proxy voting restrictions. The widespread (and permanent) elimination of proxy voting restrictions at the end of the century made possible a growing "separation of ownership and control," as corporate managers became increasingly adept at harvesting and voting shareholders' proxies.

Only a handful of U.S. states did not place meaningful restrictions on proxy voting at some point in the nineteenth century. Coincidentally, those same states—New Jersey, Delaware, and New York—would play key roles in the "race to the bottom" in the 1880s, 1890s, and early 1900s. Though the conventional story of the "race to the bottom" has ignored proxy voting restrictions, it hardly seems plausible that corporate promoters were not paying close attention to such laws when they sought jurisdictions in which to incorporate large, new companies that would be financed through the sale of stock to the public. What is likely, instead, is that promoters and managers did not publicize their interest in shopping for state laws that gave managers the greatest ability to solicit, aggregate, and vote holders' proxies, because doing so might have revived public outrage about proxy abuse. Though financial writers continued to wring their hands about proxy abuse in the twentieth century, these concerns did not lead to legislative action until the New Deal.

* * *

By the end of the nineteenth century, proxy voting had become a *right* of shareholding in virtually every state; a corporation could set ground rules for proxy voting but could not prevent shareholders from delegating their votes. Not only had categorical exceptions been swept away, but courts in several states had started invalidating corporations' proxy regulations on the ground that they "restricted [the shareholder's] liberty of choice of the person authorized to vote under his proxy."[109] In 1888, a New York court threw out a manufacturing company's bylaw on that basis; it had required a

109. Matter of Lighthall Mfg. Co., 47 Hun. 258, 262–63 (N.Y. 1st Dep't 1888); People's Home Sav. Bank v. Super. Ct., 38 P. 452, 453 (Cal. 1894).

proxyholder to be a shareholder of the company.[110] California's highest court reached a similar decision in 1894 for a bank corporation, asserting that such a bylaw constrained a California stockholder's "substantial right" to vote by proxy in corporate elections, which was guaranteed by state statutory law.[111] Though presented as a win for shareholders, of course, this new "liberty" was, in practice, an advantage for corporate managers. It foreclosed shareholders' ability to contract for proxy voting rules in the charter or bylaws that would have aligned proxyholders' voting interests with their financial interests, and it allowed virtually anyone to solicit, aggregate, and vote proxies in a corporation in which they held no interest. Some corporations even prevented their own stockholding workers from attending shareholders' meetings, citing the workers' power to delegate their votes.

II. PER-SHARE VOTE ALLOCATIONS

Part I showed how the rise of a proxy system of delegated voting shaped shareholders' voting rights and created opportunities for proxy abuse, leading to a proliferation of state statutes designed to regulate proxy voting and to curb abuses. In spite of tightening laws, proxy abuse quickly became a means for sophisticated actors to control corporate elections, causing harm to shareholders, arousing public anger, and prompting round after round of legal reform.

This Part shifts focus to a separate but contemporaneous change to shareholders' voting rights: the elimination of restricted voting and the rise of one-share-one-vote in its place. The historical literature has documented how, over the nineteenth century, corporate law evolved significantly with regard to per-share vote allocations. Though the century began with a mix of approaches in use, many of which reduced the voting power of large shareholders, it ended with most states mandating one-share-one-vote, or "plutocratic" voting.[112] One-share-one-vote would go on to define twentieth-century voting rights until, very recently, dual-class structures emerged to reintroduce differences in stock voting strength.[113]

An enduring puzzle, however, is *why* state corporate laws moved away

110. *Matter of Lighthall Mfg.*, 47 Hun. at 262–63.

111. *People's Home Sav. Bank*, 38 P. at 453 ("The substantial rights of a stockholder under the law cannot be taken from him, or even abridged by the by-laws. The right to vote by proxy is a most substantial right . . . .").

112. Dunlavy noted that the usage of the word "plutocracy" widened after the middle of the nineteenth century, "just as one vote per share was becoming more common." Dunlavy, *Citizens to Plutocrats*, *supra* note 2, at 73.

113. However, twenty-first century dual-class stock allocates *greater* voting rights to stock held in large blocks by wealthy shareholders than to ordinary common stock. This reverses the nineteenth-century paradigm, which reduced the voting power of large holders. *See infra* Part IV.

from restricted voting in favor of mandatory one-share-one-vote during the nineteenth century.[114] The literature has advanced three theories of the purpose of restricted voting: a democracy theory, an investor-protection theory, and a consumer-protection theory.[115] Each of these theories implies a different reason for the shift away from restricted voting to one-share-one-vote.

This Part posits that the interplay between proxy voting practices and restricted voting schemes, particularly at widely held firms, heightened problems associated with the emerging proxy system. At widely held corporations, restricted voting schemes made it easier for managers to solicit and aggregate proxies from small holders to control corporate elections. Shareholders who held large blocks of stock might have acted to defeat proxy abuse—and had strong incentives to oppose managerial self-dealing—but they were hobbled by limits on their voting power. In addition, proxy voting could be used to *defeat* restricted voting: wealthy shareholders could "parcel out" their holdings to affiliates, then obtain and vote proxies for those shares. By breaking up large blocks of stock subject to voting restrictions, wealthy shareholders could increase the voting power of their shares—and unless they were subject to proxy voting restrictions, they could exercise those votes as proxyholders. The expanding use of proxy voting, combined with restricted voting, disempowered large shareholders who acted in good faith (and complied with vote restrictions)—those who might have played a useful stewardship role—but probably did not prevent less scrupulous actors from turning a corporate election to their advantage.

Evidence suggests that some states initially may have responded to rising proxy abuse by experimenting with *tighter* voting restrictions. When that failed to produce results, legislatures may have become more open to one-share-one-vote as a countervailing strategy—and investors themselves may have demanded it. At the same time, the nationwide trend in favor of cumulative voting, starting in the 1870s, may have encouraged adopting states that had not already done so to mandate one-share-one-vote for all types of corporations.

114. "Voting rights regimes [at American bank corporations] are not predictable from readily observable state-level economic, financial, or political variables." Howard Bodenhorn, *Voting Rights, Share Concentration, and Leverage at Nineteenth-Century U.S. Banks* 24 (Nat'l Bureau of Econ. Rsch., Working Paper No. 17808, 2012), https://www.nber.org/system/files/working_papers/w17808/w17808.pdf [https://perma.cc/RAG4-N9WE].

115. *See infra* notes 135–162 and accompanying text.

A. RESTRICTED VOTING IN CORPORATE ELECTIONS

Though one-share-one-vote is the norm today in American corporate governance, this was not true in the early 1800s. Instead, at that time, a mix of approaches was in use. Some corporations used one-*person*-one-vote, while others employed graduated voting or voting caps (or both).[116] These strategies, which limited the voting strength of large shareholders, constituted *restricted voting*.[117] One-person-one-vote, sometimes described today as "democratic" voting, gave all shareholders equal rights in the management of the corporation, from the holder of a single share to the wealthiest investor.[118] For example, when the Wilmington Spring Water Company was incorporated in Delaware in 1804, its legislative charter specified that "no stock-holder shall be entitled to more than one vote."[119]

In graduated voting, smaller shareholdings had greater voting power per share, with diminished votes allocated to additional shares.[120] Graduated voting schemes could have two, three, four, or more tiers of voting strength.[121] As discussed in more detail below, in 1837, Virginia's legislature created a four-tiered graduated voting scheme for bank corporations. The law gave one vote per share up to ten shares; one vote per five shares, from eleven to one hundred shares; one vote per ten shares, from one hundred one to three hundred shares; and one vote for every twenty-five shares above three hundred shares.[122] Some corporations used more elaborate sliding-scale

116. *See* Hilt, *Shareholder Voting Rights*, *supra* note 2, at 622 ("A spectrum of different voting rights configurations were offered to shareholders in early American corporations . . . ."); Dunlavy, *Citizens to Plutocrats*, *supra* note 2, at 73 ("Though remarkably diverse in practice, shareholder voting rights in the ante-bellum period may be arrayed along a spectrum ranging from democratic to plutocratic.").

117. *See* Hilt, *Ownership/Control*, *supra* note 15, at 647 (noting that restricted voting schemes "originated in seventeenth-century English business corporations, and were sometimes quite complex"); David L. Ratner, *The Government of Business Corporations: Critical Reflections on the Rule of "One Share One Vote*,*"* 56 CORNELL L. REV. 1, 3–6 (1970) (describing additional history).

118. One-person-one-vote was the common law rule at the turn of the nineteenth century, though it was rare to find a corporate charter that failed to specify a voting rule. *See* Dunlavy, *Citizens to Plutocrats*, *supra* note 2, at 73 (noting the common law rule and stating that "[l]inking [corporate] suffrage to human beings rather than to an amount of capital, the common law prescribed the most democratic form of shareholder voting rights").

119. Act of Jan. 23, 1804, ch. 150, § 6, 1804 Del. Laws 331, 332 (specifying that, at director elections, "no stock-holder shall be entitled to more than one vote, which may be given by proxy").

120. Dunlavy described how Alexander Hamilton advocated graduated voting, which he described as a "prudent mean" between one-person-one-vote and one-share-one-vote, for the first Bank of the United States. *See* Dunlavy, *supra* note 4, at 1356–57. Dunlavy herself adopted the term "prudent-mean voting" for graduated voting. *Id.*

121. Hilt coined the term "graduated voting" to describe such a scheme. *See* Hilt, *Ownership/Control*, *supra* note 15, at 653 (explaining that graduated voting rights schemes "granted one vote per share when small numbers of shares were held, but then after some threshold, a shareholder was entitled to less than one vote per share").

122. *See* Act of Mar. 22, 1837, ch. 82, 1837 Va. Acts 57, 61–62; *infra* notes 173–190 and accompanying text.

approaches, but, whatever the specifics, the effect of graduated voting was to limit the voting power of large block-holders in relation to small holders.[123] In fact, the leveling effect was greatest at companies that had a few large holders and many small holders.

Voting caps placed an upper limit on the total number of votes a holder could cast in an election. Some caps set a vote limit,[124] while others prohibited a holder from exercising more than a certain percentage of the corporation's total votes. For example, in 1849, Pennsylvania's legislature enacted a general incorporation act for manufacturing corporations that gave all shareholders one vote per share up to one-third of the total votes.[125] Other states imposed more restrictive caps. New Hampshire's 1891 general corporate law statute capped a shareholder's total votes at one-eighth of the stock.[126] Massachusetts's second general incorporation statute for railroads, enacted in 1874, capped shareholders at one-tenth of total shares.[127] Some states employed graduated voting schemes and voting caps together, the most restrictive approach available.

Restricted voting introduced a confounding problem to corporate governance: unless the entire share distribution of the corporation was analyzed, the relative percentage of votes exercisable by any one shareholder was unknown.[128] Thus, a shareholder who held twenty-five percent of a corporation's shares could not necessarily exercise twenty-five percent of votes; that shareholder's percentage voting power depended on whether (and to what degree) the votes associated with all of the corporation's other shares were restricted.[129] In practical terms, restricted voting made it difficult for a party plotting to accumulate proxies to know how many votes were needed to win an election—at least without analyzing the full list of stockholders.

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123. *See* Dunlavy, *supra* note 4, at 1357 (describing elaborate graduated voting schemes); Hilt, *Shareholder Voting Rights*, *supra* note 2, at 620.

124. For examples of Delaware charters that capped the votes of large block-holders, see Act of Jan. 29, 1833, ch. 218, § 3, 1833 Del. Law 221, 223 (specifying one-share-one vote, but capping a shareholder's votes at one hundred in a corporation with one thousand authorized shares); Act of Feb. 6, 1833, ch. 268, 1833 Del. Laws 274 (same).

125. Act of Apr. 7, 1849, No. 368, § 4, 1849 Pa. Laws 563, 564 ("All elections shall be by ballot, and each stockholder shall be entitled to as many votes as he owns shares of stock in said company, but no person shall in any case be entitled to more than one-third of the whole number of votes to which the holders of all the shares in the capital stock of such company would be entitled . . . .").

126. Dividend-Paying Corporations, ch. 149, § 19, 1891 N.H. Laws 411, 413 ("Every stockholder in a corporation, except banks whose charters otherwise provide, may give one vote at any meeting thereof for every share he owns therein, not exceeding one eighth part of the whole number of shares.").

127. Act of Jun. 27, 1874, ch. 372, § 41, 1874 Mass. Acts 347, 361.

128. *See* Hilt, *Ownership/Control*, *supra* note 15, at 654 (discussing this problem).

129. *See, e.g.*, Untitled Article, N.Y. DAILY ADVERTISER, July 16, 1819, at 2 (describing a "General Meeting of the Stockholders of the Winchester Commercial Bank" in Kentucky, attended by "84 Stockholders and proxies, representing eleven hundred and eighty seven shares; and entitled when scaled (according to the Act of Assembly) to five hundred and twenty votes").

This fact helped give the corporation's managers the upper hand in soliciting proxies. Managers had untrammeled access to the most current list of stockholders, and thus a head start in determining how many votes could be exercised at an upcoming meeting, how many votes constituted a majority, and which shareholders enjoyed the greatest voting power—and therefore should be targeted for a proxy solicitation.[130] In this way, restricted voting and proxy voting could intersect to give managers, even those owning little stock, a control advantage in the emerging proxy system.

Over the decades, nearly all states moved from mandating restricted voting for at least some kinds of corporations, to mandating one-share-one-vote for all corporations.[131] In a sample of New York corporations incorporated between 1790 and 1825, Eric Hilt found that roughly the same proportion of companies used one-share-one-vote (48%) as used graduated voting and one-person-one-vote schemes combined (47%).[132] Colleen Dunlavy's study of special legislative charters from 1825 to 1835 found that 27% used graduated voting.[133] Though empirical research on corporate voting rights in this period has produced some conflicting results, all scholars generally agree that graduated voting was in wide use in the early decades of the nineteenth century.[134]

B. THREE THEORIES

Why did states employ restricted voting in corporate elections? The literature has offered three theories about the purpose of restricted voting in early-nineteenth-century corporations. One theory emphasizes political and social factors; the other two focus on economic considerations. Scholars who have contributed to this literature concede that none of the three theories is a perfect fit with the evidence from this period and that empirical studies have produced "contradictory findings."[135] The theories are not even necessarily mutually exclusive.[136] It is possible that restricted voting served a

130. For example, New York did not require corporations to make the list of stockholders available for inspection by shareholders until 1825. *See* Act of Apr. 21, 1825, ch. 325, § 1, 1825 N.Y. Laws 48, 48.

131. *See* Dunlavy, *supra* note 4, at 1358 (2006) ("Over the course of the nineteenth century, the dominant pattern of shareholder voting rights in the United States changed dramatically [via this shift].").

132. Hilt, *Ownership/Control, supra* note 15, at 658 tbl.1.

133. Dunlavy, *supra* note 4, at 1357. Overall, Dunlavy found that 65% of charters in her sample used either one-person-one-vote or restricted voting. *Id.* at 1358. Hilt has questioned this result, *see* Hilt, *Shareholder Voting Rights*, *supra* note 2, at 620–21 (discussing Dunlavy's analysis), but even if his critique is correct, Dunlavy's findings still support the overall conclusion that restricted voting was in wide use at this time.

134. *See* Hilt, *Shareholder Voting Rights*, *supra* note 2, at 620–22 (discussing "contradictory findings" of empirical studies of voting rights schemes in early American corporations).

135. *Id.*; *see also* Dunlavy, *Citizens to Plutocrats*, *supra* note 2, at 66–68 (noting major gaps in our understanding of early American corporate governance).

136. Hilt, *Shareholder Voting Rights*, *supra* note 2, at 618; *see also id.* at 621 (both the investor-

combination of political, social, and economic objectives.

Dunlavy has argued that restricted voting is explained by Americans' political conception of the business corporation and their post-Revolutionary commitment to democratic governance, which they transmitted to the corporation.[137] According to this theory, early corporate norms "tended to treat shareholders more like citizens in a relatively egalitarian polity," following a democratic model.[138] Advocates of this *democracy theory* argue that restricted voting suppressed the power that large shareholders exercised in the corporation not only to reduce power inequities among shareholders but also with an eye to the corporation's growing importance in the community and the economy. The democracy theory suggests that the shift to one-share-one-vote reflected changing political and social conceptions of the corporation and its role in society.

Though Dunlavy makes a persuasive case that early Americans viewed corporate organization through a political lens—and that, following the American Revolution, zeal for democracy was strong—nineteenth-century corporate governance diverged from political governance in some significant ways. The use of different restricted voting schemes for different industries suggests that Americans were not pressing for the same level of democratic voting at all types of corporations.[139] Importantly, delegated voting was not a democratic norm; proxy voting was rejected for political elections across the United States. Thus, the popularization of proxy voting in corporate elections distinguished corporate governance from democratic political governance, again suggesting that lawmakers and corporate promoters perceived differences between the two. If democratic values shaped early thinking about corporate governance, they appear to have had less salience by the middle of the nineteenth century, when a writer could comfortably

protection theory and the consumer-protection theory "imply that graduated voting rights should have been used only in firms that would be expected to have a reasonable degree of inequality in the size of the blocks of stock held").

137. *See* Dunlavy, *supra* note 4; Dunlavy, *Citizens to Plutocrats*, *supra* note 2, at 67 ("Through the early decades of the nineteenth century, corporate governance was much more 'democratic' than it came to be by the end of the century."); Ratner, *supra* note 117114, at 6 ("[R]estrictions on voting rights were at least in part attributable to widespread public concern that grants of power to corporations and those who controlled them would weaken democratic government."); *see also* Maier, *supra* note 13, at 84 (describing how "[i]n attempting to construct corporations appropriate for republican America, state legislators of the late eighteenth and early nineteenth centuries grafted them firmly onto the institutional structure of the United States").

138. Dunlavy, *Citizens to Plutocrats*, *supra* note 2, at 67; *see also* Maier, *supra* note 13, at 77 (describing restricted voting as "a democratic 'counterpoise' to corporate power such as other societies found . . . in kings, nobles, and great landed families").

139. Hilt, *Shareholder Voting Rights*, *supra* note 2, at 619 ("[I]t is not clear why graduated voting rights would be chosen in some industries and not in others if there was a general preference for democratic governance.").

assert in the *New York Times* that "[t]he theory of all corporate bodies is that every member of them should have a vote and an influence equal to his interest."[140]

A second group of scholars, writing mainly from the law-and-economics perspective, contends that restricted voting schemes served an *investor-protection purpose* by helping small shareholders protect themselves from self-dealing by large holders.[141] Because early nineteenth century corporate law offered few shareholder protections, such as informational rights, voting rights may have been particularly important to investors; Eric Hilt has posited that "graduated voting rights were chosen at least in part in order to attract small investors by limiting the voting power of large shareholders."[142] Hilt's study of New York corporations chartered through 1825 found that corporations in industries with the greatest ownership concentration were associated with more-restricted voting rules, evidencing a relationship that would support his theory.[143]

The democratic and investor-protection theories offer similar explanations for the purpose of restricted voting. Writings from the middle of the century connected restricted voting to intra-corporate power without specifying whether the power in question was managerial or financial. In 1850, for example, a banker wrote that restricted voting had been employed in New York to "guard against the dangers" posed by a controlling shareholder.[144] A railroad stockholder, writing a few years later, explained that "limit[ing] the number of votes of large stockholders" through graduated voting was "not unusual" and was done "in order to prevent too much concentration of power."[145] Was the problematic concentration of power strictly a financial problem for investors, or was it also a problem of managerial dominance and political might? Nineteenth-century Americans probably perceived these concerns as overlapping, making it plausible that restricted voting served *both* political and investor-protection objectives.

The democratic and investor-protection theories imply different reasons for the shift to one-share-one-vote, however. Dunlavy suggests that changing political conceptions of the corporation contributed to the shift to one-share-one-vote. In contrast, the investor-protection theory implies that the need for

140. Stockholder, *supra* note 38.

141. Hilt, *Shareholder Voting Rights*, *supra* note 2, at 618; Bodenhorn , *supra* note 114.

142. Hilt, *Ownership/Control*, *supra* note 15, at 648. Hilt asserts that "there were few if any legal constraints on self-dealing by directors" in the early nineteenth century and concludes that "[c]onflicts between large shareholders and small shareholders" were "the central concern in early corporate governance." *Id.* at 649.

143. *Id.* at 647–48.

144. Johnson, *supra* note 36, at 630.

145. Stockholder, *supra* note 38.

restricted voting diminished as new investor protections were created. Though investor protections did eventually strengthen in the United States, particularly in the early twentieth century, this timing post-dates the popularization of one-share-one-vote. Research has not yet confirmed that one-share-one-vote grew alongside investor protections during the early or mid-nineteenth century.

Neither the democracy theory nor the investor-protection theory accounts for all of the ways in which nineteenth-century Americans perceived that shareholder voting intersected with corporate power. For example, in 1871, the managers of the Missouri Pacific Railroad pressed the state's legislature to enact a proposed law authorizing railroad corporations to switch from restricted voting to one-share-one-vote. The editors of the *Missouri Republican* supported the new law, which allowed a railroad company to eliminate restricted voting upon a shareholder vote.[146] The editors wrote that the original voting scheme for the Pacific Railroad had used graduated voting because "there was fear of the road becoming a political machine in the hands of the city and county of St. Louis," which once had owned large blocks of stock.[147] After that stock had moved into private hands, the editors reasoned, it "seem[ed] but just" to change the vote allocation.[148] The law was passed.[149] The episode revealed the complexity of considerations that influenced voting-rights schemes at some companies.

Finally, a pair of scholars has advanced a *consumer-protection theory*.[150] Henry Hansmann and Mariana Pargendler point out that many shareholders of early American corporations were also consumers of the corporations' products and services.[151] They posit that restricted voting empowered consumer-shareholders to use their franchise to prevent large shareholders from raising prices or harming them as consumers.[152] According to these scholars, the consumer-protection theory explains the

146. *Liberal Railroad Legislation*, MO. REPUBLICAN, Mar. 8, 1871, at 2.

147. *Id.*

148. *Id.*

149. *See* Act of Mar. 17, 1871, ch. 63, 1871 Mo. Laws 52 (amending chapter sixty-three of the General Statues, entitled "of Railroad Companies," by adding certain sections thereto).

150. Hansmann & Pargendler, *Separation of Ownership and Consumption*, *supra* note 2, at 953–54.

151. *See id.*

152. Hansmann and Pargendler did not merely argue that consumer-protection interests contributed to legal changes in vote allocations, but that the investor-protection theory was incorrect. *Id.* at 948 ("[R]estricted voting rules generally served not to protect shareholders as investors, but to protect them as consumers."). Hilt argued that the existence of "direct consumer protections," that is, price-setting provisions in corporate charters, weakens the consumer-protection theory and that the nineteenth-century sense of the word "monopoly" was different from the usage adopted by Hansmann and Pargendler. *See* Hilt, *Shareholder Voting Rights*, *supra* note 2, at 619.

relative incidence of restricted voting across industries,[153] particularly what they claim was an earlier shift to one-share-one-vote among manufacturing corporations, as compared to transportation companies.[154] Research for this Article did not find support for such a comparative shift or bright-line distinction across industries, however, as discussed below.[155] The consumer-protection theory suggests that vote allocations changed after "superior substitutes" to restricted voting were developed for the purpose of protecting consumers.[156]

All three of these theories were developed in part in reliance on studies of corporate charters from the earliest decades of the nineteenth century.[157] This research has yielded important insights but must be viewed with caution.[158] Study samples have been limited to a small subset of states, like New York, to the exclusion of other states.[159] They have mostly included very early corporations; the most rigorous body of work analyzing voting allocations in corporate charters was limited to the period from 1790 to

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153. Hansmann & Pargendler, *Separation of Ownership and Consumption*, *supra* note 2, at 954.

154. *Id.* at 959–64 (turnpike companies); *id.* at 985–87 (manufacturing companies).

155. *See infra* notes 180–182 and accompanying text (discussing the rejection of one-share-one-vote for manufacturing firms in some states during the period studied by Hansmann and Pargendler, and tighter voting restrictions for manufacturing firms than for turnpike companies in Virginia in particular). The charter sample studied by Hansmann and Pargendler excluded more than half of corporations chartered during this time in the states they examined, and they acknowledge that the voting rule was specified for less than half of the 22,419 corporations in their sample. Hansmann and Pargendler noted that this raised the possibility of systematic bias in their sample. Hansmann & Pargendler, *Separation of Ownership and Consumption*, *supra* note 2, at 1010.

156. Hansmann & Pargendler, *Separation of Ownership and Consumption*, *supra* note 2, at 954–55.

157. *See* Hilt, *Ownership/Control*, *supra* note 15, at 658; W.C. Kessler, *A Statistical Study of the New York General Incorporation Act of 1811*, 48 J. POL. ECON. 877 (1940) (empirical study of manufacturing corporations chartered in New York from 1811–1848); Hansmann & Pargendler, *Separation of Ownership and Consumption*, *supra* note 2, at 960 (empirical study of a subset of special legislative charters (those specifying a voting rule) from 1790 to 1859 from Connecticut, Delaware, Georgia, Maryland, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, and Virginia); Dunlavy, *supra* note 4, at 1354–55 (study of a sample of 1,200 corporate charters from 1825 to 1835).

158. The main limitation is that most charter studies include only special legislative charters, and exclude charters obtained under general incorporation statutes. Only Hilt's study of New York corporations chartered between 1790 and 1825 includes both kinds of charters. In addition, charter studies have generally not distinguished between charters of corporations that never operated (or immediately failed) and corporations that successfully operated for a period of years. Hilt determined that, of 812 corporations chartered in New York by the end of 1825, only 282 (or 35%) were still operating in 1826 or 1827. Hilt, *Ownership/Control*, *supra* note 15, at 663 tbl.2. This is a significant failure rate, and its relationship to shareholder governance remains unexplored.

159. Hilt's work has illuminated many aspects of early New York corporate charters and notes the significant role that New York played in the development of the American economy. *See* Hilt, *Ownership/Control*, *supra* note 15, at 650 (describing the development of New York City into "the preeminent center of business and finance in the United States" between 1790 and 1825); *see also*, Kessler, *supra* note 157 (empirical study of manufacturing corporations chartered in New York from 1811–1848); Hansmann & Pargendler, *Separation of Ownership and Consumption*, *supra* note 2, at 960 (listing states).

1826.[160] Hansmann and Pargendler's study included legislative charters enacted as late as 1859 but excluded charters obtained under general incorporation statutes, which were common by the 1850s.[161] Because the shift to mandatory one-share-one-vote occurred in nearly all states *after* the Civil War, charter studies have provided, at best, an incomplete picture of changing corporate governance laws and practices.[162]

C. ONE-SHARE-ONE-VOTE AND GENERAL INCORPORATION LAWS

The literature associates the move to one-share-one-vote with the rise of general incorporation statutes in the United States.[163] This association is explained by researchers' emphasis on the state of New York, which enacted one of the first general incorporation statutes, for manufacturing corporations, in 1811.[164] New York's 1811 law mandated one-share-one-vote, a fact that may have led scholars to associate the shift to one-share-one-vote with the rise of general incorporation laws.[165]

If we consider states outside New York, a different picture emerges. Ohio enacted a general incorporation law for manufacturing corporations in 1812 that mandated *graduated* voting.[166] New Jersey's legislature experimented with one-share-one-vote for manufacturing corporations from

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160. Analysis of corporate charters in early-nineteenth-century New York includes Hilt and Kessler. Hilt, *Ownership/Control*, *supra* note 15 (empirical study of the charters of 812 corporations (of all kinds) incorporated in New York between 1790 and 1825, including both special legislative charters and charters secured under the 1811 general incorporation act); Kessler, *supra* note 157 (empirical study of the charters of 512 manufacturing corporations incorporated in New York from 1811–1848, including both special legislative charters and charters secured under the 1811 general incorporation act).

161. *See* Hansmann & Pargendler, *Separation of Ownership and Consumption*, *supra* note 2, at 1010. According to Susan Pace Hamill, 63% of U.S. states had general incorporation statutes by 1859, including eight of the eleven states that Hansmann and Pargendler studied. *See* Susan Pace Hamill, *From Special Privilege to General Utility: A Continuation of Willard Hurst's Study of Corporations*, 49 AM. U. L. REV. 81 app. at 178 (1999).

162. *See, e.g.*, Bodenhorn, *supra* note 114, at 6 (stating that "[o]ne share-one vote did not emerge as the standard [in the U.S.] until the late nineteenth century"); Dunlavy, *supra* note 4, at 1358–59 ("[S]tates had fallen in line by the 1880s.").

163. *See, e.g.*, Dunlavy, *supra* note 4, at 1358 (noting the shift in "state statutes, particularly those making general incorporation increasingly the norm").

164. *See* Act of Mar. 22, 1811, ch. 67, 1811 N.Y. Laws 151. Hilt's research found that shareholders of early New York manufacturing corporations were significantly wealthier, and held much larger stakes, than shareholders in other industries in New York. *See* Hilt, *Shareholder Voting Rights*, *supra* note 2. The greater comparative wealth (and associated political clout) may help explain why New York's legislature permanently mandated one-share-one-vote for manufacturing corporations decades before virtually any other state did.

165. In fact, the earliest general incorporation statutes mandated graduated voting—for turnpike companies. *See* Act of Mar. 13, 1807, ch. 38, § 2, 1807 N.Y. Laws 50, 50; Act of Jan. 7, 1817, 1837 Ohio Laws 104; *see also* Act of Feb. 7, 1817, ch. 38, § 20, 1816 Va. Acts 41, 49.

166. Act of Jan. 11, 1812, ch. 15, 1811 Ohio Laws 24.

1816[167] to 1819,[168] then repealed one-share-one-vote and allowed corporate promoters to choose a voting rule for themselves.[169] Evidence from Virginia likewise suggests resistance to one-share-one-vote for manufacturing corporations. In 1833, Virginia's House of Delegates rejected a one-share-one-vote provision in a proposed charter for the Sidney Manufacturing Company, replacing it with a deeply-graduated voting scheme.[170] The four other manufacturing corporations chartered during the same legislative session used graduated or capped voting, suggesting that Virginia's General Assembly was consistent in requiring restricted voting for manufacturing corporations at this time, even when corporate promoters sought a rule of one-share-one-vote.[171] Virginia's 1837 corporate laws, described in the next section, required graduated voting for manufacturing corporations in the state. Even after the mid-century, West Virginia enacted a general incorporation law that mandated graduated voting for manufacturing firms.[172] Thus, while one-share-one-vote was found with increasing frequency in general incorporation statutes as the nineteenth century wore on, it was not the case that general incorporation statutes ushered in a rule of one-share-one-vote.

D. VIRGINIA'S 1837 VOTING-RIGHTS SCHEME

Virginia's legislature responded to surging demand for corporate charters in the 1836–1837 economic boom[173] by enacting three new sets of

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167. Act of Feb. 9, 1816, 1816 N.J. Laws 17, 19 ("[E]ach stockholder shall be entitled to as many votes as he owns shares of the stock of the said company . . . .").

168. Act of Feb. 11, 1819, 1819 N.J. Laws 25 (repealing the 1816 law).

169. In 1841, New Jersey made one-share-one-vote the default rule for all incorporated stock companies. *See* Act of Mar. 11, 1841, § 2, 1841 N.J. Laws 116, 117. Five years later, New Jersey's legislature changed the rule for manufacturing corporations by removing the default; corporations could choose their own vote allocation. *See* Act of Feb. 25, 1846, § 11, 1846 N.J. Laws 64, 66.

170. *See Virginia Legislature*, RICHMOND ENQUIRER, Dec. 19, 1833, at 3 (describing the amendment of the charter to remove one-share-one-vote and replace it with a five-tiered graduated voting scheme); Act of Jan. 3, 1834, ch. 184, § 8, 1834 Va. Acts 229, 231.

171. *See, e.g.*, Act of Jan. 20, 1831, ch. 185, § 8, 1834 Va. Acts 231, 234 (providing the graduated voting scale); Act of Feb. 17, 1834, ch. 186, § 5, 1834 Va. Acts 234, 235 (providing the graduated voting scale); Act of Mar. 12, 1834, ch. 187, § 5, 1833 Va. Acts 236, 236–37 (providing a voting cap); Act of Mar. 4, 1834, ch. 188, § 4, 1834 Va. Acts 237, 238–39 (providing the graduated voting scale).

172. *See* Act of Oct. 26, 1863, ch. 83, § 22, 1863 W. Va. Acts 76, 80 (applying to "manufacturing, mining or insuring" corporations, among others, and mandating "one vote for every share of stock not exceeding one hundred; and one vote for every four shares exceeding one hundred"). New Hampshire also mandated restricted voting for manufacturing and other corporations as late as the 1890s. *See* Dividend-Paying Corporations, ch. 149, § 19, 1891 N.H. Laws 411, 418 ("Every stockholder in a corporation, except banks whose charters otherwise provide, may give one vote at any meeting thereof for every share he owns therein, not exceeding one eighth part of the whole number of shares.").

173. *See* Kessler, *supra* note 157, at 878–79 (describing 1836 and 1837 as "speculative years" and noting "the 'bursting' of this famous 'bubble' " thereafter). Table 1 documents 35 incorporations of manufacturing firms in New York in 1836, and 24 in 1837; in 1838, only 11 manufacturing corporations were chartered statewide. *Id.* at 879 tbl.1.

corporate laws.[174] These laws regulated vote allocations by industry, mandating graduated voting for (1) bank corporations, (2) railroad corporations, and (3) manufacturing and mining corporations.[175] The statutes were not general incorporation laws, but rather broad "regulatory" statutes that were designed to streamline the special legislative charter process.[176] Because all three laws were enacted by the same legislature during the same year, it seems likely that the use of different vote-allocation schemes was purposeful.[177] Virginia's legislature assigned the most graduated voting scheme to banks;[178] the bank statute recognized *four* voting tiers, from one-share-one-vote for small holders (up to ten shares) to twenty-five-shares-one-vote (above three hundred shares).[179] It assigned *three* tiers of graduated voting to manufacturing and mining corporations[180] and *two* tiers of graduated voting to railroad corporations.[181] However, the railroad voting scheme was still considerably *more* restrictive for large holders than a two-tiered scheme enacted for turnpike corporations in 1817, which was still in force.[182]

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174. Two other states that enacted new corporate law schemes in response to this boom were Massachusetts (1836) and Connecticut (1837). Massachusetts "retained various caps on the voting power of shareholders in railroad, banking, and insurance corporations, but manufacturing corporations were permitted to set their own voting rights in their bylaws." Dunlavy, *Citizens to Plutocrats*, *supra* note 2, at 79. In contrast, Connecticut mandated one-share-one-vote for manufacturing and mining corporations, *see id.*, while, as discussed in the text, Virginia took yet a third approach by mandating graduated voting for manufacturing and mining companies.

175. Act of Mar. 22, 1837, ch. 82, 1837 Va. Acts 57; Act of Feb. 13, 1837, ch. 84, 1837 Va. Acts 74; Act of Mar. 11, 1837, ch. 118, 1837 Va. Acts 101.

176. The year it enacted the manufacturing and mining company law, Virginia's legislature also applied it to three of four spring companies it incorporated by special legislative charter. *See, e.g.*, Act of Mar. 24, 1837, ch. 201, § 1, 1837 Va. Acts 197, 197.

177. *See* Bodenhorn, *supra* note 114, at 20 (discussing the possibility that vote allocations were random). In 1849, Virginia's legislature simplified the 1837 laws and replaced them with a single, four-tiered voting scale to apply to all joint-stock corporations.

178. Bodenhorn observes that, although one-share-one-vote was "standard language" in bank charters in New York by 1830, this was "more the exception than the rule." *Id.* at 9–10.

179. Act of Mar. 22, 1837, ch. 82, § 6, 1837 Va. Acts 57, 62 (providing that, if challenged, a stockholder will give an oath affirming "that the stock on which his vote is to be given is *bona fide* his own property, or the property of his ward, or of his testator or intestate's estate . . . and moreover, that such stock is not held by him by means of any transfer, contrived or designed to evade the provisions of this act, regulating the number of votes to be given by the stockholders respectively, or to give to himself or any other a greater number of votes than he is fairly entitled to under the provisions of this act").

180. *See* Act of Feb. 13, 1837, ch. 84, § 5, 1837 Va. Acts 74, 76 ("[S]tockholders shall be entitled to one vote for every share owned by them respectively, up to the number of fifteen inclusive, and to one additional vote for every five shares from fifteen to one hundred, and to one additional vote for every twenty shares over and above one hundred; and may vote in person or by proxy . . . .").

181. Act of Mar. 11, 1837, ch. 118, § 18, 1837 Va. Acts 101, 108 ("In counting all votes of the company, each stockholder shall be allowed one vote for each share not exceeding ten shares, and one vote for every ten shares above ten by him held at the time in the stock of the company.").

182. The 1837 railroad law gave shareholders one-share-one-vote up to ten shares and one vote for ten shares above ten. *Id.* The 1817 turnpike law gave shareholders one-share-one-vote up to ten shares and one vote for *five* shares above ten. Act of Feb. 7, 1817, ch. 38, 1816 Va. Acts 41.

Why did Virginia's legislature create the most deeply graduated voting scheme for banks? Researchers have found that banks in jurisdictions mandating one-share-one-vote at this time had fewer shareholders, and greater concentration of ownership, than banks operating in jurisdictions with restricted voting.[183] Thus, one possibility is that legislators believed that enacting a deeply-graduated vote allocation scheme would encourage more Virginians to invest in banks. Legislators may have believed that benefits would accrue to the Virginians who decided to invest, creating widely-shared prosperity, or to the financial system itself, in the form of reduced risk.

Virginia's 1817 law for turnpike corporations had imposed a less-restrictive voting-rights scheme than any of the 1837 laws. Why would statutes enacted in 1837, twenty years after Virginia's first turnpike general incorporation laws, impose *greater* restrictions on the voting power of large shareholders than the turnpike law did? (Recall that, under the consumer-protection theory, the voting power of large shareholdings should have been *more* restricted for turnpike companies than for manufacturing companies, because the former had many consumer-shareholders seeking to keep prices low, while the latter did not.)

Virginia's legislature may have been more concerned about proxy abuse and electoral fraud in 1837 than it had been in 1817. As we have already seen, in New Jersey, fraudulent corporate elections had become a significant problem by 1825[184] and apparently did not improve after a first round of legislation, resulting in additional legislative action in 1841.[185] In New York, important legislation regulating corporate elections was enacted in 1825[186] and, for "monied corporations," in 1827.[187] And evidence from

183. Hilt, *Ownership/Control*, *supra* note 15 (discussing fewer shareholders); Harold Demsetz & Kenneth Lehn, *The Structure of Corporate Ownership: Causes and Consequences*, 93 J. POL. ECON. 1155 (1985) (discussing greater concentration); Bodenhorn, *supra* note 114, at 18, 25, 33–34 (discussing the research and concluding that "[b]anks in states that limited the voting rights of large shareholders exhibited more diffuse ownership, which suggests that at least some shareholders were concerned with tunneling, looting and other forms of self-dealing by majority shareholders"). Bodenhorn also presents evidence that graduated voting was associated with lower bank risk-taking and notes that, because bank runs were recurrent events in the early nineteenth century, voting rules may have had important implications for the economy.

184. Act of Dec. 8, 1825, 1825 N.J. Laws 81 (creating Supreme Court jurisdiction to hear complaints about corporate elections and regulating various aspects of electoral process).

185. Act of Mar. 11, 1841, 1841 N.J. Laws 116 (making one-share-one-vote the default rule).

186. *See* Act of Apr. 21, 1825, ch. 325, 1825 N.Y. Laws 48 (requiring, among other things, that the list of stockholders be open to inspection by stockholders for thirty days prior to any election).

187. Act of Sept. 11, 1827, ch. 18, tit. 2, §§ 37–42, 1827 N.Y. Laws 577, 596–97 (concerning the "Election of Directors of Monied Corporations").

Pennsylvania[188] and Massachusetts[189] suggests that serious proxy abuse had emerged at banks in those states by 1840. Problems associated with corporate elections were on the rise during the 1820s and 1830s, a fact that may have prompted Virginia's General Assembly to experiment with strong new restrictions on the voting power of large shareholders. Indeed, evidence suggests that the use of restricted voting *increased* in legislative charters from the early 1800s to the 1850s.[190]

E. One-Share-One-Vote as a Protection Against Proxy Abuse

If state legislatures believed that tightening limits on the voting power of large shareholders at banks and railroads would curb proxy abuse, however, they were disappointed. Though restricted voting evened the playing field between wealthy elite shareholders and small shareholders, it provided a uniquely potent opening for unscrupulous managers skilled in proxy manipulation. Ambitious actors could solicit proxies from a company's many absent, small holders to defeat the restricted votes of larger holders.

As we have seen, by the 1840s and 1850s, lawmakers and commentators were complaining of scenarios in which sophisticated corporate managers, owning little stock themselves, had developed strategies to solicit and vote small shareholders' proxies, establishing de facto control.[191] The most aggrieved group in such a scenario—wealthy elites with large ownership interests in a corporation—likely recognized that they would be in a better position to exercise countervailing power in firms if the full voting power of their investments was recognized. Thus, pressure to move to one-share-one-vote may have come from business and political leaders seeking to put an end to proxy abuse.

In addition, proxy voting could be used to *defeat* restricted voting:

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188. *House of Representatives*, *supra* note 26 (quoting Representative Hahn as saying that it "was well known that the grossest abuses had sprung up under this [proxy] system, as it enabled a few individuals to unite together and obtain the whole control of a banking or other institution, and manage it to suit their own ends").

189. Act of Mar. 21, 1840, ch. 61, 1840 Mass. Acts 208 (prohibiting any shareholder of a bank from voting more than fifty votes by proxy and limiting bank directors, cashiers, and officers to ten votes by proxy).

190. Dunlavy, *Citizens to Plutocrats*, *supra* note 2, at 80. In a study of 1,233 special legislative charters from 1825 to 1835, five of the seven charters that used one-person-one-vote "were granted not in the early years but at the end of the period (in 1835—one in Kentucky, four in Ohio)." *Id.* The percentage of corporations using restricted voting was higher in the 1850s than the 1820s for seven out of nine industrial categories. Hansmann & Pargendler, *Separation of Ownership and Consumption*, *supra* note 2, at 1012 tbl.1.

191. *See, e.g.*, *House of Representatives*, *supra* note 26; Stockholder, *supra* note 38 (addressing the president of the New York Central Railroad Company and stating that he had "the power, by proxy, to act according to your own simple will and pleasure, and thereby to promote your own ends").

wealthy shareholders could "parcel out" their holdings to affiliates, then obtain and vote proxies for those shares. Virginia's 1837 bank law (but *not* its laws enacted the same year for railroads and manufacturing and mining companies) prohibited efforts to "evade" graduated voting or to give any party "a greater number of votes than he [was] fairly entitled to under" the act.[192] This suggests a general awareness, by the late 1830s, that large shareholders at banks sometimes took steps to defeat restricted voting. As early as 1818, shareholders of the Bank of the United States had engaged in tactics to evade that bank's deeply restricted voting scheme.[193] Though the Bank's charter capped shareholders at thirty votes, one writer alleged that the Bank's "southern stockholders" had achieved one vote per share by transferring shares to friends and obtaining proxies for the shares.[194]

In later decades, the same tactics would be observed in the railroad industry. The Atlantic & North Carolina Rail Road Company sharply curtailed the voting rights of large shareholders using a graduated voting scheme that was still in place as late as 1921.[195] In the 1870s, however, some large shareholders defeated the restrictions by "parceling out" their stock "by assignment, by gift, and otherwise," then turned around and obtained proxies for those shares.[196] In 1877, a judge had to step in and enjoin the practice.[197] The persistence of such tactics, across industries, suggests that restricted voting did not always even the playing field between large and small shareholders and that it may have encouraged wealthy actors to defy corporate governance laws.[198]

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192. Act of Mar. 22, 1837, ch. 82, 1837 Va. Acts 57, 62. It would not be surprising if bank corporations were among the first to evidence electoral fraud and proxy abuse in Virginia. Other states sought to regulate proxy voting at banks *first*, as early as 1813, and only later at other kinds of corporations. Banks were among the most widely held American corporations in the early decades of the nineteenth century, a fact that may help explain why they were the first type of corporation to evidence widespread proxy abuse and, perhaps, other forms of electoral fraud. *See* Eric Hilt & Jacqueline Valentine, *Democratic Dividends: Stockholding, Wealth, and Politics in New York, 1791–1826*, 72 J. ECON. HIST. 332, 344, 344 tbl.4 (2012) (finding, in a study of 1826 New York corporations, that banks had far more shareholders than corporations in manufacturing, transportation, or other industries).

193. *See* Valerius, *Bank of the United States*, NAT'L ADVOC., Dec. 29, 1818. In 1819, Congress passed a new law to enforce the Bank's voting restrictions; it placed special requirements on any shareholder who attempted to exercise more than thirty votes, including the shareholder's own votes and proxy votes. *See* Act of Mar. 3, 1819, § 2, ch. 73, 3 Stat. 508, 508–09; *see also* Hilt, *Ownership/Control*, *supra* note 15, at 657 (noting similar efforts to defeat restricted voting by shareholders of the Second Bank of the United States).

194. Valerius, *supra* note 193 (suggesting that the Bank's deeply-graduated voting scheme was "neither just or politic").

195. REPORTS OF THE OFFICERS OF THE A. & N. C. R. R. CO. TO THE STOCKHOLDERS AT THEIR 67TH ANNUAL MEETING HELD AT MOREHEAD CITY, N.C., THURSDAY, AUGUST 4TH, 1921, AND PROCEEDINGS OF LAST MEETING 14–20 (1921) (stockholders list).

196. *See* CECIL KENNETH BROWN, A STATE MOVEMENT IN RAILROAD DEVELOPMENT 245–46 (1928) (describing how this was done at the Atlantic & North Carolina Railroad in the late 1870s).

197. *Id.*

198. *See, e.g.*, Hansmann & Pargendler, *Separation of Ownership and Consumption*, *supra* note 2

Hilt's study of early-nineteenth-century New York corporations found a positive association between one-share-one-vote and managerial ownership.[199] Corporations whose directors owned significant stock had higher values on Hilt's voting rights index, meaning that they were closer to one-share-one-vote. This is consistent with the thesis that one-share-one-vote discouraged proxy abuse. If a corporation's officers and directors were also its largest shareholders, they did not need to engage in proxy abuse to obtain control. They could exercise control by voting their shares and would likely have preferred a rule of one-share-one-vote. On the other hand, if a corporation's directors did not own much stock, they could exercise control only through proxy solicitation, and they probably would have preferred restricted voting. Thus, we would expect to find—as Hilt did—that corporations run by managers who owned little stock were more likely to use restricted voting.

The cumulative voting trend, which swept the United States after Illinois first adopted cumulative voting in its 1870 constitution, also pushed states toward one-share-one-vote. This is described in greater detail in Part III.

F. Shareholder Voting Beyond Director Elections

In state laws, corporate charters, and common practice, restricted voting applied to director elections, but not to other matters put to a vote. Shareholders voted on a range of matters and, outside of director elections, a strong default existed in favor of per capita voting.[200] When shareholders

(acknowledging that restricted voting did not necessarily succeed at reducing "monopoly"). In his study of New York corporations between 1790 and 1825, Hilt investigated the relationship between restricted voting, ownership concentration, and the percentage of shareholders with a common last name (a higher percentage of shareholders with the same last name might indicate that a large shareholder was parceling out stock to relatives to defeat restricted voting). Hilt found no relationship between voting rights and ownership concentration, *see* Hilt, *Ownership/Control*, *supra* note 15, at 671, but he did find an "extremely small" positive relationship between restricted voting and commonality of the shareholders' surnames, *see* Hilt, *Ownership/Control*, *supra* note 15, at 672. Curiously, however, manufacturing corporations chartered under New York's 1811 general incorporation act, which mandated one-share-one-vote, were *more* likely than corporations with special legislative charters to have owners with surnames in common (and also had fewer shareholders). Hilt, *Ownership/Control*, *supra* note 15, at 673. This is the opposite of what we might expect if shareholders were parceling out stock to relatives to defeat restricted voting, since large shareholders at corporations using one-share-one-vote had no reason to redistribute their stock.

199. *See* Hilt, *Ownership/Control*, *supra* note 15, at 674 tbl.7 (highlighting a study of shareholders of 132 New York corporations that were chartered between 1790 and 1825 and still operating in 1826 or 1827, whose complete list of shareholders could be found) ("[H]igher values of the voting rights index were associated with greater degrees of managerial ownership, and amplified the voting power of their larger stakes.").

200. *See, e.g.*, Dunlavy, *supra* note 4, at 1355, 1355 n.23. In the nineteenth century,

> [i]f a charter described a voting rule as applying specifically to elections, then all other decisions (e.g., regarding strategy) were to be made according to the common law—one vote per

cast votes to decide other matters, "they did so democratically: each shareholder, large and small alike, cast only one vote."[201] As a result, it was common for stockholders' meetings to employ a mix of voting rules: the "stock vote" for director elections and a show of hands, or voting *viva voce*, for other matters.[202]

A Philadelphia lawyer described the default in 1884 as "the majority in number rules at corporation meetings," unless a special provision of law could be shown that required a stock vote.[203] "[T]he stock vote is never demandable," he explained, adding that "the charter and by-laws must in each case be examined" to determine which corporate issues had to be determined by a stock vote.[204] Large, publicly-held companies in the United States were still reporting voting results on a per capita basis, in addition to a share basis, as late as the 1950s, purely by custom.[205] Corporate managers and shareholders alike derived meaning from the per-capita data, which provided a snapshot of shareholder voting from the democratic perspective.

G. THE DISAPPEARANCE OF RESTRICTED VOTING

The rise of one-share-one-vote advanced "very unevenly" and restricted voting remained common up to and after the Civil War.[206] Hansmann and Pargendler found that 42.6% of special legislative charters (across all industries) that were enacted in the 1850s and specified a voting rule employed restricted voting.[207] Sixty-eight percent of special legislative charters analyzed by Dunlavy for 1855 used either one-person-one-vote or

> person. . . . [but b]y the turn of the century, charter provisions regarding voting in elections were viewed as applying to all decisions of shareholders.

Id.

201. Dunlavy, *Citizens to Plutocrats*, *supra* note 2, at 74.

202. LILLIAN DORIS & EDITH J. FRIEDMAN, CORPORATE MEETINGS, MINUTES, AND RESOLUTIONS 32–33 (6th. ed. 1947) (noting that as late as the 1940s some types of shareholder votes could be conducted on a "consensus" basis, "either by a showing of hands or by a viva voce vote"). Dunlavy notes that per capita voting was also called "vote by acclamation." Dunlavy, *Citizens to Plutocrats*, *supra* note 2, at 74.

203. THE LAW OF PROCEDURE IN CORPORATION MEETINGS: AN ADDRESS BY GEORGE M. DALLAS, ESQ. BEFORE THE LAW ACADEMY OF PHILADELPHIA, JANUARY 15TH, 1884, at 26 (Philadelphia, Allen, Lane & Scott 1884).

204. *Id.*

205. Examples include General Motors and Standard Oil (N.J.). Procedural matters continued to be resolved according to a rule of one-shareholder-one-vote as late as the 1970s. *See* J. Daniel Mahoney, *Conduct of the Shareholder Meeting*, *in* STRUCTURING THE ANNUAL MEETING 153, 159 (J. William Robinson ed., 1973) (concluding that "matters relating solely to the procedure of the meeting may usually be handled by per capita vote") (citing Carrol R. Wetzel, *Conduct of a Stockholders' Meeting*, 22 BUS. LAW. 303, 308 (1967)).

206. Dunlavy, *Citizens to Plutocrats*, *supra* note 2, at 81.

207. Hansmann & Pargendler, *Separation of Ownership and Consumption*, *supra* note 2, at 1012 tbl.1. Notably, this was a higher overall percentage than for legislative charters enacted in the 1820s; the use of restricted voting appears to have risen. *Id.*

restricted voting.[208] New York used general incorporation statutes to gradually mandate one-share-one-vote.[209] However, in 1887, New York's legislature tried to reverse course, passing a bill that would have allowed corporations to authorize per capita voting in the charter.[210] New York's governor did not sign the bill, and it did not become law.[211] New Jersey eventually also moved to one-share-one-vote.[212] Delaware's first two general incorporation acts for manufacturing corporations (1875 and 1883) made one-share-one-vote the default, but the state did not mandate one-share-one-vote until 1899.[213] For reasons that are unclear, Delaware's General Assembly changed its law again only two years later to make one-share-one-vote a default rule, rather than a mandatory one, and this remains the rule there today.[214]

In the last three decades of the nineteenth century, vote allocations shifted decisively in favor of one-share-one-vote. Some state legislatures took action to allow existing corporations to change their graduated vote allocations to one-share-one-vote with shareholder approval.[215] In New Jersey, caselaw at the end of the century suggested that one-share-one-vote might be enforced retroactively against corporations that had been chartered

208. Dunlavy, *supra* note 4, at 1358.

209. *See, e.g.*, Act of Apr. 2, 1850, ch. 140 § 5, 1850 N.Y. Laws 211, 213 (mandating one-share-one-vote).

210. *See* Act of Feb. 17, 1887, No. 650, § 1, 1887 N.Y. Laws ("A corporation having a capital stock may provide in its articles or certificate of incorporation, that each stockholder, irrespective of the amount of stock he may own, shall be entitled to one vote, and no more, at any election of directors, or upon any subject submitted at a stockholders' meeting . . . ."); *Heroes of Gettysburg*, N.Y. TIMES, Feb. 18, 1887, at 5 (noting the introduction of the bill by Mr. Kruse).

211. David B. Hill, Governor, Annual Message: State of New York (Jan. 4, 1887), *in* 8 STATE OF NEW YORK: MESSAGES FROM THE GOVERNORS 294, 469 (Charles Z. Lincoln ed., 1909) (explaining that Governor Hill did not sign the bill).

212. *See, e.g.*, Act of Apr. 2, 1873, ch. 413, § 5, 1873 N.J. Laws 88, 90.

213. The 1875 law applied to a limited category of companies and required one-share-one-vote only at the organizational meeting of shareholders. *See* Act of Mar. 26, 1875, ch. 119, 15 Del. Laws 181 (1875). The 1883 general incorporation law applied to a broader category of corporations and made one-share-one-vote the default. *See* Act of Mar. 14, 1883, ch. 147, § 18, 17 Del. Laws 570, 576 (1893). Even after the passage of these laws, however, Delaware's legislature continued to enact special legislative charters. One scholar found that, in 1897, only ten corporations were chartered under the 1883 general incorporation law, in comparison to "115 special act incorporations, amendments and renewals, other than those relating to municipal charters." S. Samuel Arsht, *A History of Delaware Corporation Law*, 1 DEL. J. CORP. L. 1, 5 (1976). In 1897, Delaware's constitution was amended to eliminate the legislature's power to enact special legislative charters, but it was not until 1899 that Delaware enacted a new general incorporation law. *See id.* at 6. The 1899 law mandated one-share-one-vote. *See* Act of Mar. 10, 1899, ch. 273, § 20, 21 Del. Laws 445, 451 (1899).

214. Act of Mar. 7, 1901, ch. 273, § 17, 21 Del. Laws 255, 278 (1901) (returning one-share-one-vote to a default rule); DEL. CODE ANN. tit. 8, § 212(a) (2023).

215. *See* Act of Mar. 17, 1871, sec. 2, § 54, 1871 Mo. Laws 52, 53 ("Any railroad heretofore incorporated under special laws of this State, by the provisions of whose charter stockholders are restricted in voting according to the number of shares held, may remove such restrictions by a vote of the stockholders . . . .").

with graduated voting years earlier as a matter of law.[216]

Why did restricted voting disappear from American corporate governance? Hilt noted some of its costs, including "cumbersome and uncertain director elections," and impacts on the market for corporate control, as well as the fact that shareholders circumvented restricted voting rules.[217] This Article adds to the possibilities. Restricted voting worsened problems associated with the emerging proxy system; one-share-one-vote provided a means for large shareholders to push back. At a minimum, one-share-one-vote increased the odds that the individuals controlling the company owned significant stock in it. And, as outlined in Part III, the cumulative voting trend, which began in the 1870s to empower minority shareholders in relation to large holders, also pushed corporate governance toward one-share-one-vote.[218]

The solution to the problem of proxy abuse eluded American lawmakers. Corporations in a nationalizing economy needed to raise large amounts of capital, which they did by selling stock to many investors who lived far from the location of the annual shareholders' meeting. Lawmakers probably did not want to eliminate proxy voting altogether, which risked choking off an important source of corporate finance. On the other hand, state laws designed to regulate proxy voting did not end proxy abuse. At the middle of the century, one writer suggested that states had abandoned restricted voting "from an opinion that every guard can be easily evaded, and that stockholders had better be presented with a known evil, than deluded with a fallacious remedy."[219]

* * *

Restricted voting faded away in the second half of the nineteenth century.[220] Dunlavy placed the shift "from democratic to plutocratic voting rights" in the period that followed the Civil War—the decade or so that also witnessed the invention of cumulative voting.[221] By the end of the nineteenth

216. *See* Rankin v. Newark Libr. Ass'n, 45 A. 622 (N.J. 1900) (reversing a lower court decision that had upheld a graduated voting scheme at a library corporation in light of an 1897 statute that mandated one-share-one-vote for library corporations).

217. Hilt, *Shareholder Voting Rights*, *supra* note 2, at 631.

218. Since the emergence of financial derivatives and structured finance techniques, some scholars have argued that the rule of one-share-one-vote is no longer optimal in all situations. *See* Shaun Martin & Frank Partnoy, *Encumbered Shares*, 2005 U. ILL. L. REV. 775, 776 (2005) ("[T]reating shares equally leads to perverse results.").

219. Johnson, *supra* note 36, at 630.

220. *See, e.g.*, *Shareholder Voting Rights*, *supra* note 2, at 628 ("Certainly by the end of the nineteenth century graduated voting rights became uncommon.").

221. Dunlavy, *Citizens to Plutocrats*, *supra* note 2, at 72. ("[The shift] put in place radically new power relations in the corporation, centralizing control in boards of directors dominated by the largest

century, most states required one-share-one-vote for newly chartered corporations.[222] However, many corporations that had been chartered decades earlier, under different legal regimes, continued to employ graduated or capped voting into the twentieth century. Thus, vestiges of restricted voting likely influenced shareholders' rights and corporate control as late as the 1920s or beyond.

III. THE SHAREHOLDER'S RIGHT TO CUMULATE VOTES

Part I described the evolution of the shareholder's right to vote by proxy and the development of the American proxy system. Part II connected that development to legal changes regarding per-share vote allocations. Together, these parallel tracks of change produced a system in which shareholders were entitled to delegate their votes, and voting power grew in direct proportion to investment. Proxy voting and one-share-one-vote developed synergistically: the former opened a gap between ownership and control, creating opportunities for expropriation and self-dealing, while the latter partly rebalanced power by empowering large shareholders to stand up to grasping corporate "kings"—the managers who might otherwise solicit, aggregate, and vote proxies, wielding unaccountable power over commercial empires.[223]

This Part shifts focus to the third major dimension of shareholder voting power—one that did not take shape until the last decades of the nineteenth century. This was cumulative voting: the shareholder's right to aggregate votes across open seats in a director election. The invention of cumulative voting—and its instant popularization across American states—responded to a shifting balance of intra-corporate power, which had emerged to favor corporate managers and large block-holders at the expense of small shareholders. Essentially, the shift to one-share-one-vote, which gained momentum after the Civil War, was disempowering small shareholders in relation to wealthy, large holders, upsetting the balance of power that had been struck, however temporarily, at the beginning of the century. One-share-one-vote reintroduced the problem that restricted voting had sought to solve—the large holdings of wealthy investors translated directly into outsized voting power, relegating small shareholders to the margin of corporate governance.

Cumulative voting arose as a right of shareholding, starting in the

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shareholders and turning the mass of smaller shareholders into mere investors by the 1870s.").

222. *See* Ratner, *supra* note 117, at 8 ("By the end of the nineteenth century . . . statutory restrictions on the rule of one vote per share in business corporations had virtually disappeared . . . .").

223. *See, e.g.*, *King Phillips and His Dissatisfied Subjects*, *supra* note 84 (describing the president of the Fitchburg Railroad Company as its "king").

1870s, in counterbalance to that trend. Sometimes called "minority representation" by contemporaneous writers, cumulative voting provided a means for small shareholders to pool their votes to gain representation on the board. By 1900, nearly half of states had created a *right* to cumulative voting in corporate elections, reflecting significant political support for minority representation in American corporate governance and evidencing the hydraulic nature of intra-corporate power dynamics.[224] Yet, cumulative voting faced strong resistance from corporate managers and was largely defeated by obstructive tactics, litigation, and the rise of the classified board. In the 1920s, Harvard economist William Z. Ripley observed that cumulative voting had been "repeatedly attacked, whittled down, actively debated, over and over again" since the late nineteenth century.[225]

A significant literature has described the rise and fall of cumulative voting in American corporate governance.[226] This Part summarizes that history, presents cumulative voting as one of the three dimensions of nineteenth-century shareholder voting rights, and shows how it related both to delegated corporate voting and to the shift to one-share-one-vote.

A. THE INVENTION OF CUMULATIVE VOTING

New York, a leading state in the trend to mandate one-share-one-vote, was the first state to consider cumulative voting. A delegate to the 1867 New York constitutional convention proposed corporate cumulative voting during a period of significant proxy abuse in the state.[227] The proposal was voted down after a debate.[228] New York would never mandate cumulative voting but did pass a statute allowing corporations to opt in to cumulative voting in 1892.[229]

Two years after New York's failed attempt to introduce corporate cumulative voting, the *Chicago Tribune* advocated cumulative voting as a cure for "many of the evils, mismanagements, and corruption of our private

224. *See* Jeffrey N. Gordon, *Institutions as Relational Investors: A New Look at Cumulative Voting*, 94 COLUM. L. REV. 124, 144 chart I (1994) (showing changes in mandatory and permissive cumulative voting in U.S. states from 1870–1992).

225. WILLIAM Z. RIPLEY, MAIN STREET AND WALL STREET 105 (1927).

226. Major works on cumulative voting include Gordon, *supra* note 224; Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J. L. & ECON. 395 (1983); Whitney Campbell, *The Origin and Growth of Cumulative Voting for Directors*, 10 BUS. LAW. 3 (1955); and CHARLES M. WILLIAMS, CUMULATIVE VOTING FOR DIRECTORS (1951) [hereinafter WILLIAMS, CUMULATIVE VOTING].

227. *See supra* notes 62–67 and accompanying text (describing the New York Central proxy abuse scandal of 1857–1858 and the 1869 proxy abuse scandal at the Albany & Susquehanna Railroad; another major proxy abuse scandal, in Illinois in 1864, involved the Galena & Chicago Union Rail Road Company and New York stock brokers).

228. SALEM DUTCHER, MINORITY OR PROPORTIONAL REPRESENTATION 52–53 (1872).

229. WILLIAMS, CUMULATIVE VOTING, *supra* note 226, at 36 (discussing New York's approach).

corporations" in advance of Illinois's upcoming constitutional convention.[230] Cumulative voting was proposed at the Illinois constitutional convention for both political and corporate elections.[231] "Give all the share-holders the right to plump their votes," the *Tribune* argued.[232] Illinois's constitutional convention went on to adopt cumulative voting for corporate elections, making it the first state to do so.[233] The convention delegate who proposed it, Joseph Medill, was an owner of the *Chicago Tribune* and would become, the following year, Chicago's mayor. Medill championed John Stuart Mill's ideas about minority representation in democracy, which Mill had published in an 1861 work, and he also connected cumulative voting directly to proxy abuse.[234] In a speech at the convention, Medill said,

> The men who get control of stock by proxies, which they coax or purchase on misrepresentation, elect the entire board and then do as they please. The remainder of the stockholders are in the dark. . . . This majority having obtained absolute control of the offices of the company proceed to plunder the stockholders by high salaries, multiplication of offices, speculating in its money and franchises, and abusing their trusts in every respect. That this practice is common, is notorious throughout the Union as well as within this State, and it is growing worse all the time. This provision will unquestionably afford every stockholder more power of self-protection than he now possesses.[235]

Medill's words reveal how, at its origin, cumulative voting was presented as a solution to problems that arose from the proxy system—problems that appear to have hit a new high point by 1870.[236]

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230. *Personal Representation*, CHI. TRIB., Sept. 20, 1869, at 2; *Reform in Private Corporations*, CHI. TRIB., Sept. 17, 1869, at 2.

231. *See* WILLIAMS, CUMULATIVE VOTING, *supra* note 226, at 22–23 ("[T]he idea [of cumulative voting in corporate elections] appears to have developed from a contemporaneous proposal in the convention to provide for cumulative voting for members of the lower house of the legislature," which "aroused much opposition and debate.").

232. *Reform in Private Corporations*, *supra* note 230.

233. ILL. CONST. art. XI, § 3 (1870) ("The general assembly shall provide, by law, that in all elections for directors or managers of incorporated companies, every stockholder shall have the right to vote, in person or by proxy, for the number of shares of stock owned by him, for as many persons as there are directors or managers to be elected, or to cumulate said shares, and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock, shall equal, or to distribute them on the same principle among as many candidates as he shall think fit; and such directors or managers shall not be elected in any other manner."); Campbell, *supra* note 226, at 6.

234. Campbell, *supra* note 226, at 4; Gordon, *supra* note 224, at 142 n.44 (describing Medill's enthusiasm for Mill's ideas); JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT (1861).

235. WILLIAMS, CUMULATIVE VOTING, *supra* note 226, at 24 (quoting Medill). According to Williams, no arguments in opposition to corporate cumulative voting were made at the convention. *Id.* at 25.

236. In 1873, Illinois's Supreme Court interpreted the constitutional provision on cumulative voting as "a constitutional expression in favor of the policy of voting by proxy in private corporations." People *ex rel.* Chritzman v. Crossley, 69 Ill. 195, 198 (1873) (questioning the election of directors of the Illinois

Cumulative voting did not, of course, take off in American political law.[237] But it quickly soared to popularity in corporate law—and, in a number of states, was constitutionalized as a right. Illinois's 1870 constitution stated that "every stockholder shall have the *right* to vote, in person or by proxy," cumulatively, "and such directors or managers shall not be elected in any other manner."[238] Within ten years of Illinois's invention of corporate cumulative voting, five states had added corporate cumulative voting to their constitutions;[239] seven more added it to their state constitutions by the century's end.[240] Colorado, Michigan, and Ohio[241] made cumulative voting mandatory by statute rather than in their state constitutions over the same period.[242] Texas enacted a statute making cumulative voting mandatory for railroad corporations in 1876.[243]

Charles M. Williams reviewed the debates that led to the adoption of

Masons' Benevolent Society).

237. Though this is true, it has been used in some state and local elections. From 1870 to 1980, Illinois used a system of proportional representation for three-seat districts in the lower house of its state legislature. *See* John R. Low-Beer, The Constitutional Imperative of Proportional Representation, 94 Yale L. J. 163, 186 n.103 (1984). From June 1871 to March 1873, Pennsylvania experimented with cumulative voting in town councils. *See* Act of Mar. 28, 1973, 1885 Pa. Laws 208 (abolishing cumulative voting originally established under " 'an act for the further regulation of boroughs' "); *see also* Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. CHI. LEGAL F. 241 (1995) (describing the use of cumulative voting in Chilton County, Alabama, to elect representatives to the County Commission and Board of Education since 1988).

238. ILL. CONST. art. XI, § 3, (1870).

239. Campbell, *supra* note 226, at 7 (discussing West Virginia, Pennsylvania, Missouri, Nebraska, and California) (noting that California removed cumulative voting from its constitution in 1930 but retained mandatory cumulative voting for corporations in its statutory law); *see* PA. CONST. art. XVI, § 4 (1874).

240. Campbell, *supra* note 226, at 7 (discussing North and South Dakota, Montana, Mississippi, Idaho, Kentucky, and South Carolina).

241. In 1887, Ohio's Supreme Court construed the state's corporate statute narrowly to avoid recognizing a right of cumulative voting. State *ex rel.* Baumgardner v. Stockley, 13 N.E. 279 (Ohio 1887). The state's General Assembly passed a law requiring cumulative voting in 1898. Act of Apr. 23, 1898, sec. 1, § 3245, 1898 Ohio Laws 230; Schwartz v. State *ex rel.* Schwartz, 56 N.E. 201 (Ohio 1900). *See generally* June A. Striegel, *Cumulative Voting, Yesterday and Today: The July, 1986 Amendments to Ohio's General Corporation Law*, 55 CIN. L. REV. 1265 (1987) (describing changes to Ohio's laws regarding cumulative voting). In 1927, Ohio's legislature amended the state's corporate law to require shareholders to give advanced, written notice of the intent to cumulate votes and to allow staggered boards, "thus counteracting the effectiveness of cumulative voting." Striegel*, supra*, at 1270–71; Ohio Rev. Code Ann. § 8623–50 (1926). Ohio's General Assembly amended the state's corporate law in 1986 to make cumulative voting permissive rather than mandatory. *See generally* Striegel*, supra*.

242. After the turn of the century, six more states enacted mandatory cumulative voting: Arizona (1910), Wyoming (1911), Alaska (1923), Arkansas (1927), Washington (1933), and Hawaii (1945). *See* WILLIAMS*,* CUMULATIVE VOTING, *supra* note 226, at 34 exhibit 2. The National Banking Act was amended to require cumulative voting in 1933 as part of the New Deal. Banking Act of 1933, ch. 89, sec. 19, § 5144, 48 Stat. 162, 186–88. The 1928 Uniform Business Corporation Act included a provision for mandatory cumulative voting, as did the 1950 Model Business Corporation Act; the 1955 version of the model act made a change by including alternative provisions for either mandatory or permissive cumulative voting. *See* Campbell, *supra* note 226, at 9.

243. Campbell, *supra* note 226, at 10.

cumulative voting in states across the U.S. and identified the main arguments offered in its support.[244] The most prominent of these was an informational argument. Advocates argued that cumulative voting would enhance the information flowing to minority shareholders about the corporation's affairs. Proponents of cumulative voting also argued that it would give a voice to minority shareholders in decision making, extend ownership participation to the corporation akin to that found in the partnership, and contribute to the "public welfare."[245] When Pennsylvania's Supreme Court was called to interpret the state's new constitutional provision on cumulative voting in 1876, it wrote that the legislature's intent "was to work a radical change in the method of conducting corporate elections."[246] Leading corporate law experts, such as William W. Cook, argued in favor of cumulative voting to strengthen shareholders' power at the end of the century.[247] In 1927, economist William Z. Ripley acknowledged its "validity for the purpose of tempering unduly autocratic management."[248]

Of the nineteen states that adopted a right to cumulative voting in corporate elections between 1870–1900, several—including Pennsylvania and West Virginia—moved to mandatory one-share-one-vote and cumulative voting at the same moment.[249] For example, prior to adopting cumulative voting, West Virginia had mandated *graduated* voting for most types of corporations.[250] Under its first general incorporation statute, enacted in 1863, shareholders were entitled to one-vote-per-share up to one hundred shares, but only one vote for every four shares over one hundred shares.[251] When, nine years later, in 1872, West Virginia amended its constitution to create a right to cumulative voting, it simultaneously mandated one-vote-

244. WILLIAMS, CUMULATIVE VOTING, *supra* note 226, at 26–30.

245. *Id.* at 27–30.

246. Hays v. Commonwealth *ex rel.* McCutcheon, 82 Pa. 518, 521–22 (1876).

247. WILLIAM W. COOK, THE CORPORATION PROBLEM 87 (1891) ("Cumulative voting gives the minority of stockholders a representative in the board of directors. Their representative, as a director, will know the innermost secrets of the corporation, and will be able to expose and prevent many of the frauds that are perpetrated by a board which represents the majority interest alone.").

248. RIPLEY, *supra* note 225, at 105.

249. From 1849 to 1874, Pennsylvania capped votes at some kinds of manufacturing corporations at one-third of total votes. Act of Apr. 7, 1849, No. 368, 1849 Pa. Laws 563. Pennsylvania's legislature repealed the 1849 law in the 1874 statute that enacted cumulative voting. Act of Apr. 29, 1874, No. 32, §§ 10–46, 1874 Pa. Laws 73, 78–107.

250. Act of Oct. 26, 1863, ch. 83, 1863 W. Va. Acts 76 (applying to corporations chartered for "manufacturing, mining or insuring," for "savings institutions, savings banks, or banks exclusively of discount and deposit," for corporations "constructing lines of magnetic telegraph, and carrying on the business properly pertaining to telegraph companies," for corporations "establishing hotels, springs companies, gas works, water works, cemeteries, or building associations," and various non-profit corporations).

251. *Id.* § 22.

per-share and eliminated graduated voting.[252]

It made sense to do this. First, cumulative voting was presented as increasing the voice of minority shareholders in firms with concentrated ownership—a main purpose of restricted voting. Thus, some state legislatures may have understood cumulative voting as an alternative to restricted voting. In addition, cumulative voting added to the complexity of director elections but its procedures were streamlined by moving to one-share-one-vote. West Virginia's provision gave shareholders the right to "give one candidate as many votes as the number of directors multiplied by the number of his shares of stock shall equal, or to distribute them on the same principle among as many candidates as he shall think fit."[253] The provision would have needed different, more complex wording if cumulative voting was to be paired with graduated voting. In other words, cumulative voting may have seemed more workable if every share of stock was accorded the same voting power.

B. CUMULATIVE VOTING MEETS RESISTANCE

Corporate managers resisted cumulative voting in a national trend that underscored their fear about the potential for cumulative voting to shift power to minority shareholders. Corporations tried creative strategies, reflecting the growth, by that time, of a sophisticated bar of corporate lawyers. In 1885, the management of the Central California Water Company tried to defeat cumulative voting by electing directors one at a time, rather than together as a group; a California court rejected this as violating the state's constitutional provision.[254] By 1900, a case about Michigan's cumulative voting statutes had reached the U.S. Supreme Court. In *Looker v. Maynard*, the Supreme Court held that Michigan's 1885 cumulative voting statute made cumulative voting mandatory for an insurance company that had been incorporated in 1869 under a different version of the state's corporate law.[255]

The robustness of the right conferred by cumulative voting laws turned, in part, on the size of the board itself and whether it was classified.[256] As a result, state laws setting the size of the board and authorizing (and placing

252. W. VA. CONST. art. XI, § 4 (West, Westlaw through 2022).

253. *Id.*

254. Wright v. Cent. Cal. Water Co., 8 P. 70, 73 (Cal. 1885).

255. Looker v. Maynard, 179 U.S. 46, 54 (1900).

256. Campbell, *supra* note 226, at 11 ("Mathematically, where there are three places on the board, a voting unit which represents one share more than one-fourth of all shares represented at the meeting, and votes its shares cumulatively for one director, can elect its candidate. If the number of directors to be elected is seventeen, a voting unit which represents only one share more than one-eighteenth of all shares can elect a director.").

limits on) board classification shaped the rights that shareholders enjoyed in states where cumulative voting was mandatory. To the extent that a state's constitution made cumulative voting an individual *right*, statutory laws about board size and classification operated to limit those rights and, eventually, were challenged in court as violating state constitutions.[257] In the middle of the twentieth century, a shareholder of an Illinois corporation succeeded on a claim that a state law authorizing a staggered board conflicted with his state constitutional right to cumulative voting.[258] This was followed by a second case, in Pennsylvania, in which several large corporations filed amicus briefs to preserve the use of classified boards.[259] The Pennsylvania Supreme Court sided with the companies and held that classified boards were permissible despite the state-law right to cumulate votes.

Delaware, New York, and New Jersey—the three states that would dominate twentieth-century corporate law—declined to adopt mandatory cumulative voting. Instead, all three eventually allowed companies to opt in to cumulative voting. New York led the pack by enacting a statute in 1892 that permitted cumulative voting.[260] New Jersey adopted the same approach in 1900,[261] and Delaware did so in 1917.[262] One study found that, by 1937, 45% of corporations registered with the SEC were incorporated in these "permissive" states.[263] By 1956, the permissive states claimed a majority of companies listed on the NYSE.[264]

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257. The most important of these cases was *Wolfson v. Avery*, decided by the Illinois Supreme Court in 1955. Wolfson had argued that provisions of the Illinois Business Corporation Act that authorized a classified board, elected on a staggered basis for terms of two or three years, violated the Illinois state constitution's guaranty of a right to cumulate votes for corporate directors. Wolfson was the leader of an insurgent group seeking to depose the managers of the Montgomery Ward corporation; the Montgomery Ward proxy contest in 1955 was one of the biggest corporate issues in the press. The case went all the way to the Illinois Supreme Court, which held that the statute conflicted with the constitutional provision and was therefore invalid. Wolfson v. Avery, 126 N.E.2d 701, 701–12 (Ill. 1955).

258. *Id.*

259. *See* Janney v. Philadelphia Transp. Co., 128 A.2d 76 (Pa. 1956).

260. WILLIAMS, CUMULATIVE VOTING, *supra* note 226, at 36 (discussing New York's approach).

261. 2 N.J. COMP. STAT. § 36a (1911).

262. At least one commentator, writing at the end of the century, believed that cumulative voting could not be used in Delaware. *See* THOMAS CONYNGTON, THE ORGANIZATION AND MANAGEMENT OF A BUSINESS CORPORATION: WITH SPECIAL REFERENCE TO THE LAWS OF NEW YORK, NEW JERSEY, DELAWARE, WEST VIRGINIA 178 (1900) ("In the State of Delaware, through an unfortunate provision in the State Constitution, it is doubtful whether cumulative voting would be legal in corporations organized under the state law."). When Delaware got around to authorizing cumulative voting in 1917, it may already have been a dead letter. In 1914, New York lawyer Samuel Untermyer wrote that there had never "yet been any justification attempted of the failure to enforce minority representation in corporations through cumulative voting." SAMUEL UNTERMYER, REASONS AND REMEDIES FOR OUR BUSINESS TROUBLES: AN ADDRESS DELIVERED BEFORE THE COMMERCIAL CLUB AND THE PITTSBURGH INDUSTRIAL DEVELOPMENT COMMISSION AT PITTSBURGH, MAY 22, 1914, at 11 (1914).

263. WILLIAMS, CUMULATIVE VOTING, *supra* note 226, at 12.

264. ETHE SOLOMON & ROGER M. PEGRAM, NAT'L INDUS. CONF. BD., INC., STUDIES IN BUSINESS POLICY, NO. 90: CORPORATE DIRECTORSHIP PRACTICES 26 (1959).

C. A CENTURY OF RELATIVE STABILITY

The nineteenth century gave way to a new century in which shareholder voting rights stabilized. Twentieth-century corporate managers continued to enjoy significant advantages in proxy solicitation and voting, which they refined and enhanced. Starting in the New Deal, federal regulation of the proxy system gradually increased requirements for parties soliciting proxies to disclose accurate, material information to the shareholders whose delegated votes they sought. But it did not fundamentally change the proxy system or rebalance power within it. For the most part, the American proxy system continued to exist, largely in the form that it had achieved by the end of the nineteenth century, for another hundred years.

One-share-one-vote remained the dominant—even exclusive—approach to vote allocations in the United States until the very end of the twentieth century. In 1926, the NYSE expressly outlawed dual-class structures in corporations listed on its exchange; the prohibition endured until the 1990s when the major stock exchanges began allowing corporations to go public with dual-class structures.[265]

Cumulative voting, which had exploded in popularity at the end of the nineteenth century, had also been hobbled by countermeasures, such as the classified board, employed widely by corporate managers. Still, cumulative voting laws remained politically popular. Jeffrey Gordon noted a "high water mark" for mandatory cumulative voting laws in the late 1940s.[266] Thereafter, corporate managers began a largely successful campaign to end cumulative voting rights.[267] The timing of those efforts coincided with a surge of shareholder activism seeking to strengthen cumulative voting—a central plank of the "corporate democracy" movement. Cumulative voting was also championed by shareholder activists who fought to add women to corporate boards, a campaign that gained significant public attention in the late 1940s and early 1950s.[268] In 1943, the first woman shareholder to successfully

265. *See* Caley Petrucci, *Equal Treatment Agreements: Theory, Evidence & Policy*, 40 YALE J. ON REG. 620, 631-32 (2023).

266. Gordon, *supra* note 224, at 145 (1994). Gordon reached this conclusion by studying the chronology of cumulative voting provisions in state constitutions and statutes.

267. Gordon explains that change began in the 1950s:

> The seven states that adopted cumulative voting in this period all chose the permissive form. In the 1960s and early 1970s the trend was even more pronounced: states began switching wholesale from mandatory to permissive. The 1980s were a rout. Twelve states switched from mandatory to permissive. By 1992, only six states maintained mandatory cumulative voting; forty-four jurisdictions (including the District of Columbia) chose the permissive form; one state (Massachusetts) did not permit cumulative voting. No important corporate law jurisdiction maintained mandatory cumulative voting.

Id. at 145–46.

268. *See* Sarah C. Haan, *Corporate Governance and the Feminization of Capital*, 74 STAN. L. REV. 515, 515–16, 537, 578 (2022).

present a shareholder proposal under the SEC's new Shareholder Proposal Rule submitted a proposal that, among other things, demanded cumulative voting.[269]

Over the 1950s and subsequent decades, shareholder activists lost the company-by-company battle for cumulative voting, and it became increasingly uncommon. Today, only six states entitle shareholders to use cumulative voting in director elections, and cumulative voting is rarely utilized by shareholders.[270] Unlike proxy voting, which empowered corporate managers, and one-share-one-vote, which empowered large shareholders, cumulative voting—which was designed from the start to empower small shareholders—never fulfilled its promise.[271]

IV. EPILOGUE: A NEW ERA OF DYNAMIC CHANGE

After the turn of the twenty-first century, shareholder voting rights entered a new era of accelerating change. In 2008, Marcel Kahan and Edward Rock proclaimed that voting had never been more important in corporate law.[272] Yet, at that moment, corporate law was still years away from important upheavals in broker voting, pass-through voting, client-directed voting, and proxy voting mechanics. Delaware's legislature authorized corporations to hold virtual-only shareholder meetings in 2000,[273] but it wasn't until the COVID-19 pandemic of 2020–2022 that tech-enabled, virtual meetings became dominant, accelerating the pace of technological advancement for shareholder voting.[274]

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269. Harriett K. Skipwith, a shareholder of the White Sewing Machine Company, was one of the first thirteen individuals to submit a shareholder proposal under the SEC's new rule. Skipwith submitted six proposals, five of which related to shareholder voting at the company. *See* Rolf Enno Wubbels, Regulation of Stockholder Proxies 87–91 (1949) (MBA Thesis, New York University Graduate School of Business Administration). Skipwith's cumulative voting proposal won 23.75% of the vote. *Id.* at 106.

270. *See* ARIZ. REV. STAT. ANN. § 10-728(b) (2022); CAL. CORP. CODE § 708 (West 2022); HAW. REV. STAT. § 414-149 (2022); NEB. REV. STAT. § 21-270 (2022); S.D. CODIFIED LAWS § 47-1A-728 (2022); W. VA. CODE § 31D-7-728 (2022); *see also* John F. Coyle, *Altering Rules, Cumulative Voting, and Venture Capital*, 2016 UTAH L. REV. 595, 600–01 (2016) (noting that nineteen states gave shareholders a right to cumulate votes in 1980 but, by 2016, only Arizona, California, Hawaii, Nebraska, South Dakota, and West Virginia did). Other states continue to allow companies to opt in to cumulative voting, but do not provide a right to cumulative voting otherwise.

271. *See* Coyle, *supra* note 270, at 607 (describing how cumulative voting is "all but unknown in Silicon Valley," despite California's law entitling shareholders to cumulate their votes in director elections).

272. Marcel Kahan & Edward Rock, *The Hanging Chads of Corporate Voting*, 96 GEO. L.J. 1227, 1227 (2008).

273. *See* Lisa M. Fairfax, *Virtual Shareholder Meetings Reconsidered*, 40 SETON HALL L. REV. 1367, 1367 (2010).

274. *See* Sergio Alberto Gramitto Ricci & Christina M. Sautter, *Wireless Shareholder Meetings*, (unpublished manuscript) (on file with the author) (documenting the recent rise of virtual shareholder meetings).

This Part summarizes evidence that the United States has entered a new era of change in shareholder voting rights, recalling the strenuous change that characterized the end of the nineteenth century, when accelerating forces pulled shareholder voting rights in competing directions. Current developments invite a comparison between shareholder voting rights in the Gilded Age of the late nineteenth-century and the so-called New Gilded Age of the twenty-first.[275] During both periods, shifts in the balance of power among three core corporate constituencies—corporate managers, large shareholders (now asset managers), and small shareholders—put pressure on shareholder voting rights law. This building pressure coincided with major fault-line shifts in shareholder voting rights, as the "tectonic plates" of shareholder voting—proxy voting rights, vote allocations, and cumulative voting rights—moved in relation to each other. In the present moment, technology is transforming shareholder voting. Advancements in technology, especially those relating to the dissemination of information and voting mechanics, are making possible changes that could not have occurred in the nineteenth century.

A. THE RE-CONCENTRATION OF VOTING POWER IN THE BIG THREE

The re-concentration of shareholding into a very small set of private actors is the headline story of twenty-first-century corporate organization. It has reversed more than a century of increasingly dispersed shareholding—what once was called the "democratization" of shareholding[276]—by channeling voting power away from retail investors into institutional investors. At first, this power was exercised by a varied group that included mutual funds, pension funds, insurance companies, and banks, among others. More recently, that power has continued to re-concentrate into a very small set of actors, especially the "Big Three" asset managers: BlackRock, State Street, and Vanguard.[277]

Because the Big Three have the voting power to drive corporate policy,

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275. *See* Jack M. Balkin, *The First Amendment in the Second Gilded Age*, 66 BUFF. L. REV. 979, 979–80 (2018). Balkin writes,

> The First Gilded Age was the era of industrial capitalism that began in the 1870s and 1880s and continued through the first years of the twentieth century, leading to the Progressive Era. . . . The Second Gilded Age begins, more or less, with the beginning of the digital revolution in the 1980s, but it really takes off in the early years of the commercial Internet in the 1990s, and it continues to the present day.

See also, Kent Greenfield, *Reclaiming Corporate Law in a New Gilded Age*, 2 HARV. L. & PL'Y REV. 1, 3–4 (2008) (describing factors contributing to a new Gilded Age).

276. *See* Haan, *supra* note 268, at 518, (describing rhetoric in the 1950s that characterized the expansion of shareholding as its "democratization").

277. *See, e.g.*, Lucian Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B.U. L. REV. 721 (2019) (arguing that voting in most significant public companies may come to be dominated in the future by the Big Three).

and have shown an increasing willingness to intervene in corporate policy, this re-concentration has upset the balance of power between shareholders and managers; corporate managers can no longer rest assured that they control voting outcomes through proxy voting. (Indeed, in a twist of irony, retail shareholders have emerged as a more consistent source of voting support of management than institutional investors.)[278] The power of the Big Three is potentially kept in check only by state regulation and by their fiduciary obligations to beneficial holders. Corporate law and finance academics continue to assess this re-concentration, especially in light of the Big Three's new willingness to exercise power and push for corporate reforms.[279]

B. A COUNTERVAILING TREND: DUAL-CLASS STRUCTURES

Dual-class corporate structures allocate different levels of voting strength to different classes of stock. Dual-class structures began appearing in the 1980s, ending almost a century of adherence to the rule of one-share-one-vote.[280] Google's adoption of a dual-class structure in 2004 popularized the approach, and it has been used with increasing frequency in prominent Silicon Valley firms to cement insider control.[281] In 2021, twenty-three percent of all initial public offerings in the U.S. utilized a dual-class structure.[282] The swift rise of dual-class structures has attracted academic interest, producing a growing literature on the subject, especially since 2017.[283]

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278. *See, e.g.*, Alon Brav, Matthew Cain & Jonathon Zytnick, *Retail Shareholder Participation in the Proxy Process: Monitoring, Engagement, and Voting*, 144 J. FIN. ECON. 492, 504 (2022) (finding, in an empirical study, that "[m]ore retail ownership leads to more successful management proposals and fewer successful shareholder proposals, consistent with retail having stronger support for management than other shareholders in close votes").

279. *See id.* at 502; Dorothy S. Lund, *Asset Managers as Regulators*, 171 U. PA. L. REV. 77 (2022).

280. *See* T. Boone Pickens Jr., *Second-Class Stock Impairs Market*, WALL ST. J., Feb. 13, 1986, at 30 (protesting the recent emergence of dual-class capitalizations and arguing in favor of sunset provisions).

281. *See* Adi Grinapell, *Dual-Class Stock Structure and Firm Innovation*, 25 STAN. J.L. BUS. & FIN. 40, 43 (2020) (describing the "rapidly growing use of dual-class structures among technology-based firms" from Google in 2004 to Snap in 2017); Young Ran (Christine) Kim & Geeyoung Min, *Insulation by Separation: When Dual-Class Stock Met Corporate Spin-offs*, 10 U.C. IRVINE L. REV. 1, 27 (2019) (noting that the current debate about dual-class structures "was sparked when Google (now Alphabet) adopted unequal voting rights at its IPO in 2004" and was "inflamed when Snap, Inc.'s founders offered only non-voting stock to the public in its IPO in 2017").

282. *Newly Public Operating Companies Snapshot: 2021*, COUNCIL OF INSTITUTIONAL INVS. (2021), https://www.cii.org//Files/issues_and_advocacy/Dual%20Class%20post%206-25-19/2022_1_19%20Dual-Class%20IPO%20Snapshot%202021_.pdf [https://perma.cc/35SF-7FN2] (includes traditional IPO, direct listing, and de-SPAC merger).

283. On dual-class stock, *see generally* Zohar Goshen & Assaf Hamdani, *Corporate Control, Dual Class, and the Limits of Judicial Review*, 120 COLUM. L. REV. 941 (2020); Grinapell, *supra* note 281; Kim & Min, *supra* note 281; Andrew Winden & Andrew Baker, *Dual-Class Index Exclusion*, 13 VA. L. & BUS. REV. 101 (2019); Dov Solomon, *The Importance of Inferior Voting Rights in Dual-Class Firms*,

The modern trend does more than merely return shareholder voting to the nineteenth-century model, in which different shares of stock carry different vote allocations. It *reverses* the restricted voting paradigm of the nineteenth century. In the nineteenth century, restricted voting *diminished* the voting strength of shares held by large stockholders, creating what some commentators described as a more democratic (or equal) voting power between middle-income investors and wealthy elites. As we saw in Part I, however, restricted voting also functioned to empower corporate managers because it made it easier for them to seize control by proxy. Though the popularity of restricted voting early in the nineteenth century may have reflected a democratic impulse (this is up for debate), it did not produce more democratic governance of corporations.

Today, dual-class structures *enhance* the voting strength of elite shares—and, this time, those shares are most likely to be held by management itself, often a company founder.[284] Commentators have argued that dual-class strategies are a direct response to the twenty-first-century empowerment of institutional investors.[285] As institutional investors' power has increased, corporate managers at some companies have responded by using per-share vote allocations to rebalance power in their favor.

Modern dual-class structures empower corporate managers by comparatively diminishing the voting rights of other shareholders. That dual-class structures are common in the tech industry, where behemoths like Alphabet and Facebook, or Meta, exercise near-sovereignty over key, communicative aspects of Americans' lives, only underscores how this voting-rights reform reverberates across corporate policies. Although shareholder advocates largely oppose dual-class structures, there is no sign that dual-class structures are going away, or even that limits on dual-class structures (such as sunset provisions), which are popular with academics and practitioners, will be mandated by law. The struggle between concentrating shareholder voting power on one side (asset manager capitalism) and concentrating management voting power on the other (dual-class stock) has yet to play out.

2019 BYU L. REV. 533 (2019); Lucian A. Bebchuk & Kobi Kastiel, *The Untenable Case for Perpetual Dual-Class Stock*, 103 VA L. REV. 585 (2017).

284. *See, e.g.*, Kim & Min, *supra* note 281, at 26 ("Dual-class stock enables high-vote stockholders to dominate all shareholder voting agendas, from annual director elections to mergers and acquisitions approvals.").

285. *See, e.g.*, Goshen & Hamdani, *supra* note 283, at 992 ("Today, with the increasing dominance of institutional investors' ownership and the rise of hedge fund activism, managers need *formal* control to pursue their idiosyncratic vision even when investors think that they are wrong, and the most effective tool to accomplish that end is a dual-class structure.").

C. CHANGES IN FAVOR OF BENEFICIAL HOLDERS

The re-concentration of ownership in asset managers has been met not only with push-back from corporate managers but also with new demands from small shareholders. As a result of decades of change that began around the middle of the twentieth century, Americans mostly hold public-company stock through intermediaries, such as funds and brokers.[286] Though this re-concentration has empowered asset managers, it also has sparked demands that asset managers provide greater transparency, accountability, and control over voting to beneficial holders—the clients for whose benefit the asset managers invest.[287] Internet technology has played a key role by providing a means for investors to learn more about their funds' voting practices.[288]

The first steps occurred in 2003. That year, new SEC rules went into effect requiring mutual funds to make public their policies on proxy voting and to disclose information about the votes they cast.[289] These rules were designed to provide investors with tools to choose funds whose proxy voting aligned with investors' own preferences. At the same time, the NYSE restricted uninstructed broker voting on executive compensation—the first of several moves to limit broker voting of client stock.[290] In 2006, an NYSE working group recommended that brokers be prohibited from voting uninstructed stock in uncontested director elections.[291] This change did not go into effect until 2010.[292] Two years later, in 2012, the NYSE further

286. Scott Hirst, *Frozen Charters*, 34 YALE J. ON REGUL. 91, 93 (2017) (asserting that "[a]pproximately 85% of investors hold shares through brokers").

287. Jill E. Fisch, *Standing Voting Instructions: Empowering the Excluded Retail Investor*, 102 MINN. L. REV. 11, 27–29 nn.98–112 (2017) (summarizing many of these changes).

288. Kathleen Day, *Prodding for Disclosure of Funds' Proxy Votes: Most Portfolio Managers Don't Reveal Policies or Results, but the SEC Is Taking a Closer Look*, WASH. POST, Apr. 8, 2001, at H1 (discussing the role of the internet in spurring disclosure by mutual funds of proxy voting).

289. *See* Disclosure of Proxy Voting Policies and Proxy Voting Records by Registered Management Investment Companies, Securities Act Release No. 8188, Exchange Act Release No. 47,304, Investment Company Act Release No. 25,922, 68 Fed. Reg. 6564 (Feb. 7, 2003); Burton Rothberg & Steven Lilien, *Mutual Funds and Proxy Voting: New Evidence on Corporate Governance*, 1 J. BUS. & TECH. L. 157, 159 (2006). A few years earlier, some socially responsible mutual funds had begun voluntarily providing investors with proxy voting information. *See* Day, *supra* note 288 (reporting that the Domini Social Fund did so in 1999).

290. *See* Orders Relating to Equity Compensation Plans, Exchange Act Release No. 34-48108, 68 Fed. Reg. 39995 (June 30, 2003)*; see also* Hirst, *supra* note 286, at 103–04 ("Because almost all brokers are members of the NYSE, the NYSE Rules govern essentially all broker voting in companies listed on U.S. exchanges.").

291. REPORT AND RECOMMENDATIONS OF THE PROXY WORKING GROUP TO THE NEW YORK STOCK EXCHANGE, *supra* note 32, at 4.

292. NYSE Rule 451, 2 N.Y.S.E. Guide (CCH) ¶ 2451 (Dec. 2009); NYSE Rule 452, 2 N.Y.S.E. Guide (CCH) ¶ 2452 (Dec. 2009). Section 957 of the 2010 Dodd-Frank Act codified this change. Scott Hirst asserted in 2017 that this change "went almost unremarked upon by academic researchers." Hirst, *supra* note 286, at 98.

expanded "Broker May Not Vote" matters to include proposals to declassify the board and to eliminate a supermajority voting requirement, among other matters.[293]

The crux of all these changes has been to make both funds and brokers accountable to their clients when they vote their clients' stock—a relatively uncontroversial move that reduces agency costs while also protecting the interest of beneficial holders in determining how stock held for their benefit is voted. Yet the implication of these changes for the exercise of power in firms is substantial. These changes shift power from holders of record (asset managers and brokers) to beneficial holders, a group that includes public pension funds and retail shareholders. After many decades in which the voting power of intermediaries grew at the expense of small holders, these recent changes present a countervailing shift of power in favor of smaller holders.

D. PASS-THROUGH & CLIENT-DIRECTED VOTING

Another significant trend has been the rise of pass-through and "client-directed" voting strategies, especially through the use of new technologies. In 2021, one of the largest asset managers, BlackRock, announced new pass-through voting for index fund clients. Under this policy, the votes for about forty percent of indexed equities will be directed by clients of the asset manager.[294] This change restores to pension funds, who invest in indexed products, something close to direct voting rights. It reflects both client demand for direct voting and a willingness of asset managers to relinquish voting power over shares under their control. Since it is adopted as a matter of practice, and is not required by law or regulation, the asset manager controls how voting control is allocated—for example, there is nothing stopping asset managers from allocating all of a fund's votes based upon the preferences of a majority of clients.

Client-directed voting is a term coined in 2006 to describe advance voting instructions—a mechanism in which clients instruct the voting of their shares in advance, using specified criteria.[295] This "set it and forget it"

293. Information Memorandum from NYSE Regul. to All NYSE and NYSE AMEX Equities Members and Member Orgs. (Jan. 25, 2012), https://www.nyse.com/publicdocs/nyse/markets/nyse/rule-interpretations/2012/12-4.pdf [https://perma.cc/N5KP-RAJM].

294. *See, e.g.*, Dorothy Flynn & Keir Gumbs, *Corporate Governance Trends in 2022 and Beyond*, HARV. L. SCH. F. ON CORP. GOV. (Feb. 28, 2022), http://corpgov.law.harvard.edu/2022/02/28/corporate-governance-trends-in-2022-and-beyond/ [http://perma.cc/G4SK-L9DF] (explaining that under BlackRock's approach to pass-through voting, investors can "submit their votes using their own infrastructure").

295. *See, e.g.*, Fisch, *supra* note 287; James McRitchie, *An Open Proposal for Client Directed Voting*, HARV. L. SCH. F. ON CORP. GOV. (July 14, 2010), http://corpgov.law.harvard.edu/2010/07/14/an-

approach could vest significant power in the intermediary if the intermediary determines which advanced instructions its clients will choose among. Various market participants have endorsed the idea of client-directed voting, but the SEC has yet to enact rules that would make its implementation possible.

Both pass-through and client-directed voting respond to rising interest among investors, including retail shareholders, in direct-voting strategies.[296] Put simply, investors want the benefits of index investing and brokerage accounts, combined with the benefits of voting choice.

E. The Universal Proxy

Even more recently, reform of the proxy system has occurred at the federal level. While the proxy system was relatively stable over the twentieth century, one problem remained constant: shareholders who signed away their votes did so using proxy cards that limited their choice of candidates.[297] For all of the twentieth century, and almost a quarter of the twenty-first, shareholders generally could not vote by proxy without accepting limits on their freedom of choice.[298]

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open-proposal-for-client-directed-voting/ [https://perma.cc/MR82-K4RE] (crediting the term to Stephen Norman in 2006); ALAN L. BELLER, JANET L. FISHER & REBECCA M. TABB, COUNCIL OF INSTITUTIONAL INVS., CLIENT DIRECTED VOTING: SELECTED ISSUES AND DESIGN PERSPECTIVES (2010), http://www.cii.org/files/publications/white_papers/08_31_10_client_directed_voting_white_paper.pdf [http://perma.cc/LP62-KL84] (describing client directed voting as "one of the 'next new things' ").

296. *See Working to Expand Proxy Voting Choice for our Clients*, BLACKROCK (Oct. 31, 2021), http://www.blackrock.com/corporate/about-us/investment-stewardship/proxy-voting-choice [http://perma.cc/HD4P-T37E] ("[M]ore of our clients are interested in having a say in how their index holdings are voted.").

297. For more than a century, proxy rules and practices had made it difficult for shareholders to successfully nominate and elect dissident candidates to the board. In 2010, the SEC adopted a rule allowing shareholders to include their own director nominees in the company's proxy materials; the D.C. Circuit Court of Appeals invalidated the rule. Bus. Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011); *see* Jill E. Fisch, *The Destructive Ambiguity of Federal Proxy Access*, 61 EMORY L.J. 435, 435 (2012). Meanwhile, Delaware amended its corporate law to authorize a corporation's shareholders to adopt a proxy access bylaw. *See* DEL. CODE ANN. tit. 8, § 112 (2009). By 2019, proxy access had become a "mainstream bylaw provision at S&P 500 companies," but no shareholder had successfully taken advantage of a proxy access right. *See* Holly J. Gregory, Rebecca Grapsas & Claire Holland, *The Latest on Proxy Access*, HARV. L. SCH. F. ON CORP. GOV. (Feb. 1, 2019), http://corpgov.law.harvard.edu/2019/02/01/the-latest-on-proxy-access/ [http://perma.cc/88MP-Z7JD].

298. *See* James D. Cox & Randall S. Thomas, *A Revised Monitoring Model Confronts Today's Movement toward Managerialism*, 99 TEX. L. REV. 1275, 1293 (2021). Under longstanding rules,

> a shareholder who does not attend the stockholder meeting is unable to vote for some of management's nominees and the nominees of the dissidents on the dissidents' proxy. This is because, under corporate law, if a shareholder submits two different proxies the most recently executed proxy is counted on the theory it revokes the earlier proxy.

Id. In the 1990s, shareholders began withholding votes for candidates on the slate provided on the proxy form, to "express their lack of confidence in management's performance." *See* Joseph A. Grundfest, *Just Vote No: A Minimalist Strategy for Dealing with Barbarians Inside the Gates*, 45 STAN. L. REV. 857, 865 (1993). This practice only underscored the shareholder's lack of real choice when voting by proxy in a contested election.

Director elections held after August 31, 2022, are subject to new SEC rules that introduce the universal proxy.[299] The universal proxy allows shareholders who vote by proxy to "mix and match" votes among candidates from different slates, the way that American voters can choose among candidates from different political parties in political elections.[300] Though sometimes described as a "universal proxy ballot," a universal proxy is *not* a ballot in the conventional sense.[301] A proxy card is a form delegating the shareholder's vote—and a universal proxy simply offers the shareholder a greater range of choice for instructing the proxyholder about how to exercise the delegated vote. American shareholders may *perceive* the universal proxy as a ballot because it will resemble an absentee or mail-in ballot of the sort used in political elections. The universal proxy brings shareholder voting close to the political model. It may affect electoral outcomes, in particular by making it easier for dissident candidates (those not on the management slate) to get elected.[302]

* * *

The new developments described in this Part represent potentially significant changes to two of the three dimensions of shareholder voting rights explored in this Article (proxy voting and vote allocations). The history shows that the dimensions of nineteenth-century shareholder voting rights functioned interdependently; changes along one track influenced other, parallel tracks, in a process that shifted voting power back-and-forth among three core constituencies: corporate managers, small shareholders, and large shareholders. Though these tracks were governed by state law during the nineteenth century, they are significantly in the domain of federal law (or national stock exchanges) today.

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299. *See* Kai Liekefett Derek Zaba & Beth Berg, *SEC Dramatically Changes the Rules for Proxy Contests*, HARV. L. SCH. F. ON CORP. GOV. (Nov. 19, 2021), http://corpgov.law.harvard.edu/2021/11/19/sec-dramatically-changes-the-rules-for-proxy-contests/ [http://perma.cc/C9Z5-6DFN]; Universal Proxy, Exchange Act Release No. 93,596, Investment Company Act Release No. 34,419, 86 Fed. Reg. 68330 (Dec. 1, 2021). The SEC had originally proposed a universal proxy in 2016. *See* Universal Proxy, Exchange Act Release No. 79,164, Investment Company Act Release No. 32,339, 81 Fed. Reg. 79122 (Nov. 10, 2016). As Cox and Thomas explain, the SEC let the matter lapse "[i]n the face of strong opposition from company CEOs, who argued the universal proxy would prove disruptive." Cox & Thomas, *supra* note 298, at 1294.

300. Scott Hirst, *Universal Proxies*, 35 YALE J. ON REGUL. 437, 455–57 (2018) (originating the helpful "mix and match" explanation).

301. *Id.* at 453 ("The proxy card is not a ballot—submission of a proxy card does not represent the act of voting itself."); Paul Menke, *Universal Proxy Ballots and Private Ordering*, 46 J. Corp. L. 445, 445 (2021).

302. The literature on the universal proxy is thin. *See generally* Menke, *supra* note 301 (arguing that corporations should be able to opt-in to universal proxies); Hirst, *supra* note 300 (arguing that the universal proxy is likely to cause distorted proxy contest outcomes in some cases).

With change occurring along three dimensions, shareholder voting rights in the nineteenth century were relatively fluid—and they proved difficult for legislatures to regulate effectively. The result was a long period of state-by-state experimentation, with significant variation. By the end of that century, however, state experimentation was coalescing into the now-familiar "race to the bottom." Corporate managers had reshaped the law governing shareholder voting rights in ways that struck the balance of power in their own favor. This generated political resistance that would endure for decades. It set the stage for the tremendous industrial growth of the twentieth century, but it also assured that small shareholders would play little meaningful role in the governance of the companies in which they invested.

Several lessons emerge from this history. First, the primary conflict in corporate law is not binary but tripartite, among small shareholders, large shareholders (now asset managers), and corporate managers. Second, the wins and losses in this conflict can be difficult to discern except in hindsight. However, there can be little question that corporate power is distilled through changes to shareholder voting rights—and that changes in one area of shareholder voting increases or relieves pressure on other areas. Corporate power is hydraulic. Finally, when the dust settles, one set of actors may hold legal advantages that persist for decades. At the end of the nineteenth century, corporate managers emerged victorious and exercised de facto voting control over most big corporations for much of the twentieth century. Today, large asset managers are challenging corporate managers for power, with technologically-enabled small shareholders demanding greater voice. Whether corporate managers will again emerge as winners remains to be determined.

CONCLUSION

This Article has presented nineteenth-century shareholder voting rights in a new light, expanding the conventional account from one dimension of legal change to three. This new account is not merely academic—it helps us understand present-day currents that are shaping corporate law.

By the nineteenth century's end, an evolving paradigm revealed three groups jockeying for power inside firms: wealthy elites holding large blocks of stock; corporate managers, who often sought a role at the top of the corporate hierarchy with little financial stake; and a growing mass of small stockholders. Legal innovations in shareholder voting over the nineteenth century created a nearly constantly changing balance of power in corporate governance, which was made only more complex by economic developments in a dynamic, industrializing economy. Against this backdrop, the balance of power inside firms was slowly tilting in favor of corporate

managers, who entered the twentieth century with the upper hand.

In nineteenth-century America, per-share vote allocations were an important determinant of shareholder voting power, and so were two other dimensions of shareholder voting: the rights to delegate and to cumulate the shareholder vote in a corporate election. As this Article has shown, these three dimensions of shareholder voting developed dynamically over what was, in hindsight, a century of kinetic change in corporate power. The three-dimensional model helps explains that kinetic change—and provides a new perspective on the rise of one-share-one-vote—while reconceptualizing the present. When we cease to focus exclusively on vote allocations, our picture of shareholder voting rights gains significant depth.

This Article's new account of nineteenth-century history suggests that the rise of proxy voting contributed to the shift to one-share-one-vote. The question of why democratic corporate voting was replaced by one-share-one-vote over the nineteenth century remains an important, if unresolved, historical mystery. Today we know, for example, that the shift to one-share-one-vote was essential to the emergence of the "rationally apathetic shareholder" who devalues or even foregoes control rights.[303]

Assessment of nineteenth-century shareholder voting rights reveals not only three interactive dimensions of shareholder voting, but a tripartite division of power operating behind them. The three-group paradigm is evident in the changing mix of voting-rights laws and the interests that these changes served. Graduated voting schemes, which were common in the early nineteenth century, curbed the voting power of wealthy block-holders in favor of small shareholders. Proxy voting, too, held promise to empower small shareholders—but was swiftly co-opted by corporate managers to enhance their own power. Corporations that used restricted voting were particularly vulnerable to proxy abuse. In a few states, legislatures enacted laws prohibiting proxy voting by managers—but states also responded with a gradual shift in favor of one-share-one-vote, first as a default and later as a mandatory rule. One-share-one-vote shifted power in favor of wealthy block-holders, problematizing shareholder governance all over again. The invention of the right to cumulative voting, in the last three decades of the century, functioned to restore a measure of voting power to small holders as a partial response to vote allocations and proxy practices that had empowered both large block-holders and corporate managers. The political popularity of

303. *See, e.g.*, Hirst, *supra* note 286, at 104 (noting that it is not "rational" for shareholders to vote in corporate elections because "acquiring information to vote is costly and the likelihood of an individual influencing the outcome of an election is vanishingly small," and adding that "[b]ecause shareholder votes are weighted by the number of shares held, it is even less likely that an individual shareholder will influence the outcome of a shareholder vote").

cumulative voting was a testament to Americans' urgent desire to rebalance power inside corporations.

The three-group paradigm is important not only because it lies behind the three-dimensional change in shareholder voting rights during the nineteenth century (and today), but also because it stands in contrast to the two-group paradigm that would go on to define twentieth-century corporate theory. Early twentieth-century corporate theorists noted an emerging separation of ownership and control, and law-and-economics scholars characterized the separation as involving two—not three—corporate constituencies battling each other for dominance. The separation of ownership and control collapsed distinctions among shareholders and treated wealthy, block-holding shareholders and working-class, small shareholders as members of a monolithic group. In the classic model, shareholders and managers faced off across a bilateral divide. Yet, a close history of nineteenth-century shareholder voting rights suggests a *trilateral* power struggle, one that was recognized politically and in law.

Recent developments are challenging paradigms that were nearly set in stone by the end of the nineteenth century. Two of the three dimensions of shareholder voting rights are once again in flux, with dual-class structures responding to re-concentration and with new rules around mutual fund voting, broker voting, pass-through voting, and the universal proxy. Though the ultimate result of these changes cannot be known—and though today's change is being driven at the national level, in contrast to the nineteenth century's state-by-state change—the history of nineteenth-century shareholder voting rights provides some clues about what happens when parallel sets of rules governing shareholder voting rights evolve in relation to each other. Winners and losers will emerge as power resolves itself through the shareholder franchise.