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A Long View of Shareholder Power: From the Antebellum Corporation to the Twenty-First Century

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A LONG VIEW OF SHAREHOLDER POWER: FROM THE ANTEBELLUM CORPORATION TO THE TWENTY-FIRST CENTURY

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Abstract

For most of the twentieth century, the conventional wisdom held—probably correctly—that shareholders in America's large, public corporations were passive and powerless and that managers wielded the real power. Beginning in the 1980s, however, shareholders in the form of institutional investors started to push for a greater say in corporate decision-making. In the twenty-first century, hedge funds have upped the ante, fighting for major changes in corporations whose shares they own. Once-imperial CEOs have now become embattled as they fight, but often lose, against activist shareholders demanding policy changes, new dividends, board representation, and even the sale or break-up of corporations. In short, things have changed.

This Article situates the present-day rise of shareholder power by taking a long view of the previous two centuries, moving beyond traditional accounts to reach all the way back to the beginnings of the American business corporation in the early nineteenth century, then following the story of shareholder power up to the present day. Its long view reveals the complicated and shifting nature of shareholder power, documenting how periods of greater shareholder power were interspersed with periods where shareholders had little power, how the focus of shareholder power has moved from controlling shareholders to autonomous managers, and how shareholder power has ebbed and flowed across the last two centuries. This Article not only provides the backstory to present-day developments, but also suggests that what has appeared as a hallmark of American corporate capitalism—the relative powerlessness of shareholders—may only have been typical of a few decades in the middle of the twentieth century.

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INTRODUCTION

Shareholder power is back.[1] For most of the last century, it has been scholarly and popular wisdom—and probably the truth—that shareholders, at least shareholders in public corporations in the United States, have little influence over the direction and activities of the corporations they are said to own, and that it is those corporations' managers who call the shots, even if they lack a large ownership stake in the firms.[2] Since the 1990s, however, these old accounts have been increasingly discarded in favor of a new narrative in which the balance of power between shareholders and managers has shifted decisively in shareholders' favor.[3] Now we are told that shareholders, chiefly hedge funds and other institutional investors, are gaining the upper hand, as they

1. For essays providing an introduction to the state of play, see generally RESEARCH HANDBOOK ON SHAREHOLDER POWER (Hill & Thomas, eds.) (forthcoming June 2015) (providing an analysis of shareholder power using a range of varying perspectives).

2. The classic expression of this view is Adolf Berle and Gardiner Means' treatise. ADOLF A. BERLE JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 4–5 (1932).

3. *See, e.g.*, Edward B. Rock, *Adapting to the New Shareholder-Centric Reality*, 161 U. PA. L. REV. 1907, 1907 (2013) (explaining how "the separation of ownership and control . . . has mostly been brought under control" and describing "the new shareholder-centric reality that has emerged").

are increasingly able to force major changes on many corporations.[4] CEOs are appearing less imperial than embattled.[5] Accounts of recent changes in corporate governance limn in great detail how today's activist shareholders use the tools at their disposal, from voting to lawsuits to "jawboning," to spur corporate management to do what the activists want.[6] Recently, activist investors have been successful at winning additional seats on, or even control of, corporate boards;[7] forcing corporations to pay special dividends;[8] pushing firms to sell off major operating units;[9] and, in a few cases, even forcing corporations to break up,[10] all against the initial wishes of corporate management.

In itself, this present-day upsurge in shareholder power provides a good opportunity to take a look back and to link present-day changes in

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4. For the rise of hedge funds in shareholder activism, see William W. Bratton, *Hedge Funds and Governance Targets*, 95 GEO. L.J. 1375, 1379 (2007); Alon Brav et al., *Hedge Fund Activism, Corporate Governance, and Firm Performance*, 63 J. FIN. 1729, 1733 (2008); Marcel Kahan & Edward B. Rock, *Hedge Funds in Corporate Governance and Corporate Control*, 155 U. PA. L. REV. 1021, 1028 (2007) [hereinafter Kahan & Rock, *Hedge Funds in Corporate Governance*].

5. Marcel Kahan & Edward Rock, *Embattled CEOs*, 88 TEX. L. REV. 987, 989 (2010) [hereinafter Kahan & Rock, *Embattled CEOs*]. This account has not gone unchallenged. *See* Jens Dammann, Response, *How Embattled Are U.S. CEOs?*, 88 TEX. L. REV. SEE ALSO 201, 202 (2009) (arguing that Marcel Kahan and Edward Rock "overstate the decrease in CEO power").

6. *See, e.g.*, Jeffrey N. Gordon, *The Shaping Force of Corporate Law in the New Economic Order*, 31 U. RICH. L. REV. 1473, 1489 (1997).

7. *See, e.g.*, William Alden, *Under Pressure from Ackman, Air Products Shakes up Board*, N.Y. TIMES (Sept. 26, 2013, 9:24 AM), http://dealbook.nytimes.com/2013/09/26/under-pressure-from-ackman-air-products-shakes-up-board/ (discussing Air Products addition of three board members in response to pressure from activist investors); Michael Calia, *Glenview Gets Approval to Replace Health Management's Board*, WALL ST. J. (Aug. 12, 2013, 5:20 PM), http://www.wsj.com/articles/SB10001424127887324769704579009152049605182 (stating that Health Management Associate Inc.'s largest stakeholder pushed for "a complete change in the boardroom" and received approval to replace the entire board); Nick Wingfield, *Microsoft Cuts Deal with Activist Shareholder to Avoid Fight*, N.Y. TIMES (Aug. 30, 2013, 6:46 PM), http://bits.blogs.nytimes.com/2013/08/30/microsoft-cuts-deal-with-activist-shareholder-to-avoid-fight/ (reporting that an activist shareholder company's president made a deal with Microsoft that gave him the option to join Microsoft's board).

8. *See, e.g.*, Sara Germano, *Sotheby's to Pay Special Dividend*, WALL ST. J. (Jan. 29, 2014, 11:45 AM), http://www.wsj.com/articles/SB10001424052702303519404579350483586334394.

9. *See, e.g.*, Dana Mattioli & Dana Cimilluca, *Activist Investors Gain in M&A Push*, WALL ST. J. (Jan. 5, 2014, 8:57 PM), http://www.wsj.com/articles/SB100014240527023036406045792966937307339 88 (stating that "there were 10 instances in 2013 in which a U.S. company agreed to break itself up or sell or exit businesses after an investor pushed it to make such changes").

10. *See, e.g.*, Steven Davidoff Solomon, *As Activist Investors Gain Strength, Boards Surrender to Demands*, N.Y. TIMES (Oct. 14, 2014, 4:30 PM), http://dealbook.nytimes.com/2014/10/14/as-activist-shareholders-gain-strength-boards-surrender-to-demands/ (discussing Hewlett-Packard's decision to split in two at the urging of its shareholders).

shareholder power to larger economic, political, and even intellectual and cultural currents. Yet such a look back also plays other valuable functions—for one, it shows us that shareholder power is not one thing, rather its meaning and contours have changed over time. During most of the past century, and indeed almost up to today, shareholder power in the United States played itself out in the terms first set by Berle and Means's canonical *The Modern Corporation and Private Property*,[11] taking shape in a struggle between shareholders and management, in which managers were dominant and shareholders lacked power, specifically the power to initiate significant corporate decisions.[12] Looking further back, though, we discover that in the nineteenth century the struggle for shareholder power took place in a very different context, one in which *some* shareholders always wielded power in a corporation—there were no autonomous managers wielding fundamental power over a corporation while lacking a major ownership stake.[13] Shareholder power in that era took shape in the struggle of minority shareholders against controlling shareholders.[14] This struggle, furthermore, took place in corporations that had far fewer shareholders than the publicly traded leviathans of the twentieth century. And even within these two eras, shareholder power, and the shareholder seeking power, have been understood and depicted in sharply different ways, depending on the likelihood of shareholders actually wielding power and the observer's opinion as to the desirability of that event. Witness how the activist institutional shareholder of 2014, who oftentimes can actually affect corporate actions, cuts a heroic or sinister figure depending on one's view of how corporations should be governed,[15] while the activist shareholder of the 1950s, who got a great

11. BERLE & MEANS, *supra* note 2.

12. Here I borrow and probably simplify the notion of shareholder power presented in Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 836–37 (2005) [hereinafter Bebchuk, *Case for Increasing Shareholder Power*]. Even today's accounts of renascent shareholder power seem to emphasize the surprising novelty of shareholders actually getting their way. Solomon, *supra* note 10 (noting that hiding from shareholders is no longer possible and that shareholder activism is quickly changing corporate America).

13. *See* Naomi R. Lamoreaux & Jean-Laurent Rosenthal, *Corporate Governance and the Plight of Minority Shareholders in the United States Before the Great Depression*, *in* CORRUPTION AND REFORM: LESSONS FROM AMERICA'S ECONOMIC HISTORY 125, 127–28 (Edward L. Glaeser & Claudia Goldin eds., 2006).

14. *See id.* The reader should note that elsewhere in the modern world the danger of various forms of expropriation of minority shareholders' interests by controlling shareholders remains. *See* Simon Johnson et al., *Tunneling*, 90 AM. ECON. REV. 22, 22–23 (2000).

15. *Compare* Lucian A. Bebchuk, *The Myth That Insulating Boards Serves Long-Term Value*, 113 COLUM. L. REV. 1637, 1638 (2013) [hereinafter Bebchuk, *The Myth*] (arguing that insulating boards from shareholders is conceptually weak and is not supported by empirical evidence), *with* William W. Bratton & Michael L. Wachter, *The Case Against Shareholder Empowerment*, 158 U. PA. L. REV. 653, 658–59 (2010) (asserting that the financial crisis indicated

deal of attention and accomplished very little, was in contrast most often portrayed as a ridiculous "gadfly."[16]

This Article also emphasizes the variety of methods that shareholders have used to wield or try to wield power within the corporation over the previous two centuries. For present-day scholars, "shareholder power" appears to be the power to force corporate decisions.[17] In a recent article focusing on CEOs' current struggles with activist shareholders, for example, Marcel Kahan and Edward Rock have depicted a CEO's power as the ability to "decide key issues facing the firm."[18] Similarly, Lucian Bebchuk has described shareholder power, at least the kind he wishes there was more of, as the power to initiate significant corporate decisions.[19] Over the long span, though, the term can usefully cover more than that.[20] This Article does not pretend to offer a deep meditation on the nature of organizational power generally,[21] but it does discuss the diverse forms that shareholder power can take, ranging from derivative lawsuits, to veto power over transactions great and small, to special voting rules. Each of these tools have, in a particular historical moment, given shareholders the power to make their voices heard within the corporation and to either force actions on corporate matters or, equally significant, to block actions of managers of the firms. Finally, the story of shareholder power is not the whole story of shareholding. Not every development that protected shareholders empowered them, and one theme playing in the background of this Article is that while some measures offering shareholders greater protection also offered them greater power, others did not. It may even turn out that shareholders during periods of low power nonetheless enjoyed significant protections, legal or otherwise, against managers or controlling shareholders; but

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that shareholder power has a negative impact on corporations and market price, and arguing for a return to the management-based corporate form).

16. *See, e.g.*, Andy Logan, *Hoboken Must Go!*, NEW YORKER, Mar. 17, 1951, at 34, *available at* http://www.newyorker.com/magazine/1951/03/17/hoboken-must-go (subscription required) (presenting an almost mocking account of shareholder gadfly Wilma Soss).

17. *See, e.g.*, Kahan & Rock, *Embattled CEOs*, *supra* note 5, at 989, 1012.

18. *Id.* at 992.

19. Bebchuk, *Case for Increasing Shareholder Power*, *supra* note 12, at 836.

20. The term "shareholder power" apparently only entered circulation after Berle and Means published *The Modern Corporation and Private Property*. BERLE & MEANS, *supra* note 2; *see also Ngram Viewer*, GOOGLE BOOKS, https://books.google.com/ngrams/ (last visited May 1, 2015) (search "shareholder power" without quotation marks) (showing that the frequency of the term "shareholder power" in a corpus of books increased from zero percent to a non-zero percent around 1932, which was the year *The Modern Corporation and Private Property* was published).

21. Kahan and Rock's *Embattled CEOs* offers a nuanced and theoretically sophisticated picture of the complex nature of CEO power, taking a more fine-grained approach than that necessitated by this Article's broader overview. *See* Kahan & Rock, *Embattled CEOs*, *supra* note 5, at 992–95.

tracing out the ligaments of shareholder power is itself an illuminating enterprise.[22]

There is continuity in this story as well as change. At its most basic level, all shareholders since the early American republic have had a clear but limited set of rights granted by state corporate law—the power to vote (for directors and on certain major transactions), to sell (their shares to someone else), and to sue (directors for breaches of duty).[23] A twenty-first century reader will find much familiar in perusing the first corporate law treatise ever published in the United States, Joseph K. Angell and Samuel Ames's 1832 *Treatise on the Law of Private Corporations Aggregate*, which depicts the corporation as a separate legal entity with ownership divided among persons who are able to elect a board to govern the corporation under terms set out in a state-issued charter.[24] But within this broad framework a wide array of battles were waged over power in the corporation with different contestants, at different times, wielding different legal weapons in pursuit of very different ends.

This Article draws on both original research and a rich array of recent historical and corporate law scholarship to present a synthetic account of the changing nature of shareholder power over the previous two centuries. It proceeds chronologically. Part I examines shareholder power in the decades preceding the Civil War, focusing on the rise of the for-profit business corporation and the evolving array of legal tools available to minority shareholders—from prudent-mean voting to the ultra vires doctrine—in ongoing attempts to limit the discretion and decisions of the controlling shareholders who ran those corporations. Part II moves to the late nineteenth-century Gilded Age and shows how in that era the erosion of older tools and doctrines left minority shareholders relatively defenseless. It also examines some of the alternative mechanisms that still provided minority shareholders limited protection against corporate controllers. Part III steps into the twentieth century and a new era of

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22. On shareholder protections across the twentieth century, see generally Brian R. Cheffins, Steven A. Bank & Harwell Wells, *Shareholder Protection Across Time* (Temple Univ. Legal Studies Research Paper No. 2015-24, 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2595693 [hereinafter Cheffins, Bank & Wells, *Shareholder Protection Across Time*].

23. Robert B. Thompson, *Preemption and Federalism in Corporate Governance: Protecting Shareholder Rights to Vote, Sell, and Sue*, 62 LAW & CONTEMP. PROBS. 215, 216–18 (1999). This formulation of shareholder power reaches far back. *See, e.g.*, J. A. LIVINGSTON, THE AMERICAN STOCKHOLDER 40–41 (1958) (identifying voting, suing, and selling as the "three primary rights" enjoyed by ordinary shareholders). And yes, the author recognizes that we can also find instances over the long span of American history of shareholders being denied each of these rights.

24. JOSEPH K. ANGELL & SAMUEL AMES, TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE 1 (1832); *see also* Douglas Arner, *Development of the American Law of Corporations to 1832*, 55 SMU L. REV. 23, 50, 52 (2002) (discussing the state of American corporate law in 1832 and the influence of Joseph Angell and Samuel Ames's treatise on it).

shareholder power(lessness), as the "separation of ownership and control" became the controlling metaphor for understanding how power flowed within the public corporation. Part IV uncovers dissident voices from this period, recounting how a few shareholders—first the "gadflies," then the social-issues activists—used the legal tools at their disposal to insist that corporate management still heed shareholders' voices, in so doing taking a lonely stand for shareholder power and responsibility in a time that valued neither. Part V takes the story up to the beginning of the twenty-first century, as economic changes and the growth of institutional investing opened the door to the possibility that shareholders could wield real power and demand that management take actions that shareholders desired.

I. SHAREHOLDER POWER IN ANTEBELLUM AMERICA

The American business corporation has its roots in English law. In England, civic, eleemosynary, governmental, and religious corporations have operated for centuries, with corporations organized for profit appearing as early as the sixteenth century,[25] and corporations and joint-stock companies, an unincorporated relative of the corporation, operating widely from the seventeenth century on.[26] (There are even older precedents for the business corporation if one looks back far enough.)[27] Many English ancestors of the American corporation had strikingly modern features. The East India Company, for instance, was governed by a Court of Directors elected by a larger court of all "members" who had ownership interests and claims on profits,[28] while the Virginia Company of London, which first settled the Virginia colony in 1606, had a similar organizational form and was an early site of shareholder activism.[29] By the early eighteenth century, one finds many British companies in which managers and shareholders wrestled over power through a framework set

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25. *See* RON HARRIS, INDUSTRIALIZING ENGLISH LAW: ENTREPRENEURSHIP AND BUSINESS ORGANIZATION, 1720–1844, at 39 (2000).

26. *See generally* MARK FREEMAN ET AL., SHAREHOLDER DEMOCRACIES? CORPORATE GOVERNANCE IN BRITAIN AND IRELAND BEFORE 1850 (2012) (discussing the origins and development of corporations and joint-stock companies in Great Britain in the seventeenth century).

27. *See generally* Henry Hansmann et al., *Law and the Rise of the Firm*, 119 HARV. L. REV. 1335 (2006) (analyzing the development of entity shielding by looking at ancient Rome, the Italian Middle Ages, seventeenth- to nineteenth-century England, and the present-day United States).

28. *See* JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA 21–24 (2003).

29. *See* Thomas Hall, *Shareholder Activism in the Virginia Company of London, 1606–1624*, *in* ORIGINS OF SHAREHOLDER ADVOCACY 123, 123 (Jonathan GS Koppell ed., 2011).

out in the company's charter.[30] As early as 1776, Adam Smith identified agency problems that would, he believed, bedevil managers and owners in joint-stock companies.[31] Yet in England, the collapse of the South Sea Bubble in 1720 and the passage of the Bubble Act pushed the business corporation and corporation law onto a different developmental path,[32] with particular growth of the joint-stock company, which raised its own set of legal issues.[33] By the time the American business corporation began to develop in the years after the American Revolution, it lacked a readily applicable legal model from the mother country. The American business corporation was, whatever its distant ancestry, largely home grown.[34]

In the years before the American Revolution, less than a dozen for-profit business corporations had been chartered in the American colonies,[35] possibly because the Bubble Act had been extended to the colonies in 1741.[36] With the end of English rule, however, incorporation picked up rapidly, and by century's end state legislatures had chartered over 300 corporations with for-profit business as one purpose.[37] The number of incorporations continued to rise through the Civil War, with

30. These companies were largely joint-stock companies and would have spoken not of state-issued charters but of a "constitution." *See* FREEMAN ET AL., *supra* note 26, at 58.

31. *See* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 606–07 (Edwin Cannan & Max Lerner eds., Random House, Inc. 1937) (1776).

32. FREEMAN ET AL., *supra* note 26, at 22–23. Ron Harris's work, in particular, has cast doubt on older accounts of this period that credit the South Sea Bubble and the resulting Bubble Act of 1720 for a straightforward interruption in corporate development. HARRIS, *supra* note 25, at 73.

33. FREEMAN ET AL., *supra* note 26, at 22–23. When English corporate law did develop during the nineteenth century, it drew on joint-stock and partnership law to give the corporation a more contractual cast than did American law, which looked more to a prescriptive charter. *See* Janette Rutterford, *The Shareholder Voice: British and American Accents, 1890–1965*, 13 ENTERPRISE & SOC'Y 120, 122 (2012), *available at* http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=9484588&fulltextType=RA&fileId=S1467222700010958. This is not to say that English law did not influence American corporate law in this and later periods; indeed, many nineteenth-century American cases cite English cases for precedent in areas such as derivative litigation and self-dealing. *See, e.g.*, David Kershaw, *The Path of Corporate Fiduciary Law*, 8 N.Y.U. J.L. & BUS. 400–01 (2012) (noting that mid-to-late nineteenth-century U.S. cases relied on and quoted a leading English case on corporate law from earlier in the century).

34. *See* ROBERT E. WRIGHT, CORPORATION NATION 19 (2014); Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 WM. & MARY Q. 51, 52 (1993).

35. *See* Samuel Williston, *History of the Law of Business Corporations Before 1800*, 2 HARV. L. REV. 149, 165–66 (1888).

36. SHAW LIVERMORE, EARLY AMERICAN LAND COMPANIES: THEIR INFLUENCE ON CORPORATE DEVELOPMENT 58 (1939). This work examines some of the largest American business organizations of the eighteenth century, arguing that joint-stock land companies were major precursors to the corporation. *See id*. at 1–8.

37. EDWIN MERRICK DODD, AMERICAN BUSINESS CORPORATIONS UNTIL 1860, at 11 (1954).

slight dips following major economic crises.[38] Historians Robert Wright and Richard Sylla have recently gathered the best available data.[39] It shows that from 1801 to 1810, state legislatures issued charters for 867 business corporations; in the next decade, 1477; and by the 1850s, almost 8000.[40] While they tended to cluster in the new nation's industrial Northeast, corporations appeared everywhere; by the 1830s, even frontier states recorded dozens of incorporations.[41] Overall, the antebellum era saw over 22,419 corporations chartered.[42]

These numbers, while the best available, are still imperfect. As one scholar has pointed out, until recently, the early nineteenth century was for business records a "statistical dark age."[43] One cannot tell how many of these corporations, once chartered, actually raised sufficient capital and entered into business.[44] These figures capture only those corporations that received a special charter from a state legislature. Late in this period, general incorporation laws had appeared in some states allowing a corporation to form by simply filing documents with state officials, but no one has done a systematic count of those general incorporations.[45] Finally, the numbers give no systematic insight into how long those corporations that actually formed operated or how successful they were.[46] All that said, business corporations were clearly a recognized figure in the antebellum economic landscape.

In broadest outline, these corporations resembled today's. They were established by state-granted charters—though until late in this period almost all of these charters were acts of "special incorporation" granted by individual acts of the state legislature, rather than the standard-form charters made available to all comers that characterize today's general incorporation regime.[47] These charters set out a framework for

38. *See* Robert E. Wright, *Capitalism and the Rise of the Corporation Nation*, *in* CAPITALISM TAKES COMMAND: THE SOCIAL TRANSFORMATION OF NINETEENTH-CENTURY AMERICA 145, 148–49 (Michael Zakim & Gary J. Kornblith eds., 2012).

39. *See generally* WRIGHT, *supra* note 34.

40. *See* Wright, *supra* note 38, at 150–51.

41. *Id.*

42. WRIGHT, *supra* note 34, at 59.

43. Eric Hilt, *History of American Corporate Governance: Law, Institutions, and Politics* 1, 2 (Nat'l Bureau of Econ. Research, Working Paper No. 20356, 2014) [hereinafter Hilt, *History of American Corporate Governance*].

44. *See* WRIGHT, *supra* note 34, at 67, 87–88.

45. *See id.* at 60–61.

46. These comments should not be taken as a criticism of Wright's work, which is formidable, and he is clear in acknowledging the limitations of his research. *See, e.g.*, *id.* at 61.

47. *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, 84 (1999). A national trend toward general incorporation acts began in the 1830s, but special incorporation did not die out for business corporations until the early twentieth century. *See id.* at 101, 119–22.

governance of the corporation to be supplemented by internally adopted bylaws attending to everyday organizational and operational matters.[48] Individuals with ownership stakes were empowered to elect managers,[49] and by the 1830s, doctrine was developing to impose on those managers—at least managers of business corporations—a fiduciary duty towards shareholders.[50] Terminology was still taking shape; "board of directors" described the men elected to oversee and operate the corporation, but sometimes they were "trustees," and until the 1830s "member" appears more often than the new term "shareholder," but their roles approximated present-day practice.[51]

In other ways, though, corporations were still taking on their familiar form. The earliest discussions of "corporations" often made little distinction between for-profit and not-for-profit organizations, perhaps because all corporations, even those for profit, were assumed to provide some public benefit.[52] The fact that for much of this period only a special legislative act could create corporations led to the widespread assumption that, in exchange for the "privilege" of a charter, a corporation would provide some public service that neither the government nor an unincorporated firm could provide.[53] Thus, one finds charters, particularly those granted in the early antebellum period, most frequently issued to businesses that would not only benefit from the ability to (for instance) amass large amounts of locked-in capital,[54] but which played a public role, such as banking, turnpike, canal, and later railroad

48. *See* ANGELL & AMES, *supra* note 24, at 45–50, 177.

49. *See id.* at 54.

50. *See* Bert S. Prunty Jr., *The Shareholders' Derivative Suit: Notes on Its Derivation*, 32 N.Y.U. L. Rev. 980, 981–82 (1957); *see also* Ann M. Scarlett, *Shareholder Derivative Litigation's Historical and Normative Foundations*, 61 BUFF. L. REV. 837, 871–73 (2013) (recognizing the first shareholder action in the United States in 1829 in which shareholders sued three directors for unfaithful conduct).

51. *See, e.g.*, ANGELL & AMES, *supra* note 24, at 62. *The Oxford English Dictionary* finds the earliest use of "shareholder" in the late 1820s and that of "stockholder" a bit earlier, in the 1750s, perhaps reflecting the earlier notion of a joint-stock company. *Compare* 15 THE OXFORD ENGLISH DICTIONARY 180 (J.A. Simpson & E.S.C. Weiner ed., Clarendon Press 2d ed. 1989), *available at* http://www.oed.com/view/Entry/177538, *with* 16 THE OXFORD ENGLISH DICTIONARY 741 (J.A. Simpson & E.S.C. Weiner ed., Clarendon Press 2d ed. 1989), *available at* http://www.oed.com/view/Entry/190620. Wright finds that until the mid-nineteenth century, "stock" referred to both equity and debt. *See* WRIGHT, *supra* note 34, at 32. In practice, for most of the period discussed here the terms appear interchangeably.

52. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 129–31 (3d ed. 2005) ("Almost all of the colonial corporations were churches, charities, or cities or boroughs."); WRIGHT, *supra* note 34, at 64–65.

53. *See* Hamill, *supra* note 47, at 138.

54. On the ways that the corporate form allowed capital lock-in during the nineteenth century, see Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387 (2003).

corporations.[55] In furtherance of their public purpose, many corporations received monopoly rights[56] and often had significant investment from state governments, which either demanded shares as the cost of chartering or invested to support the corporation's public purpose, such as building a turnpike.[57] Perhaps for this reason, into the 1830s, only a blurry line separated business and other kinds of corporations. The first edition of Angell and Ames's *Treatise on the Law of Private Corporations Aggregate*, for instance, made no sharp distinctions between nonprofit and business corporations.[58] Only later in this period, in the 1840s and 1850s, does one see sharper legal distinctions between business and other kinds of corporations as states, disillusioned by the collapse of many corporations in the Panic of 1837, withdrew from involvement in private corporations, and as an increasing number of manufacturing firms, which lacked an obvious public purpose, sought incorporation.[59]

While the term "stockholder" may have been slow to come into modern use, business corporations did have them, again more than one might expect. Ever since Berle and Means identified dispersed stockholding as a twentieth-century phenomenon, it has been tempting to imagine earlier corporations—at least those predating the 1870s—as closely held firms with only a few actively involved shareholders, largely lacking the agency problems Berle and Means identified in the modern public corporation.[60] Some twenty years ago, Walter Werner and Steven T. Smith derided this as the "erosion" view of corporate law and

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55. JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780–1970, at 17, 22–23 (1970).

56. *See* DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848, at 558 (2007) (noting that in exchange for services to the public interest, corporations received special favors, which some believed produced monopolies). The classic case dealing with whether a charter of necessity carried exclusive rights with it is *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837).

57. *See, e.g.*, HARRY N. SCHEIBER, OHIO CANAL ERA: A CASE STUDY OF GOVERNMENT AND THE ECONOMY, 1820–1861 (1969) (exploring the establishment of corporations in pre-Civil War Ohio and their role in public utilities including Ohio's canal system); WALTER WERNER & STEVEN T. SMITH, WALL STREET 60 (1991) (showing examples of instances when state and local governments supported corporations that could not otherwise raise enough funds).

58. *See generally* ANGELL & AMES, *supra* note 24. There is at least one important exception to this generalization: by this period most states had adopted special general incorporation laws for religious corporations, which were treated as distinct from other kinds of corporations. *See* Sarah Barringer Gordon, *The First Disestablishment: Limits on Church Power and Property Before the Civil War*, 162 U. PA. L. REV. 307, 317, 324 (2014).

59. *See* HURST, *supra* note 55, at 18, 22–23. On the widespread move by states to divest themselves of corporate securities, particularly after the Panic of 1837, see JOHN LAURITZ LARSON, INTERNAL IMPROVEMENT: NATIONAL PUBLIC WORKS AND THE PROMISE OF POPULAR GOVERNMENT IN THE EARLY UNITED STATES 217–18 (2001).

60. *See, e.g.*, WERNER & SMITH, *supra* note 57, at 115.

governance, arguing against it that many corporations had dispersed share ownership, even in the early nineteenth century, and thus corporations had always been marked by the separation of ownership and control and its attendant problems.[61] Recent research tends to support Werner and Smith's view. While generalization is tricky, it is clear that many antebellum corporations were widely held, if widely held means having at least a few hundred shareholders, many of whom must not have been able to participate in management. John Majewski's study of several Pennsylvania banks in the 1810s, for instance, found that each had more than 1000 shareholders.[62] A survey by Eric Hilt of corporations operating in New York in 1826 determined that they had an average of 74 shareholders, with one corporation having more than 560.[63]

Ownership could be dispersed. For example, in 1827, "384 shareholders who lived outside of New York" held half of the Manhattan Company's shares.[64] And shareholders were not always drawn from society's wealthiest stratum, at least in large cities. A follow-up to Hilt's New York study found that at least 11% of households in New York City owned stock in 1826.[65] The study of Pennsylvania corporations in the 1810s discovered that among those owning corporation shares were "[c]arpenters, grocers, draymen, hatters, innkeepers, and tailors—hardly the occupations associated with wealth and prestige."[66] During the 1830s, according to Wright, more than 65% of the shares of the Merchants Bank in Newburyport, Massachusetts, were held by public institutions or women, with another 17% held by working mechanics; of shares in the same town's Mechanics Bank, over 47% were held by women and public institutions, and nearly 30% were held by working mechanics.[67] While this data is not comprehensive, it does show that some corporations had relatively large numbers of shareholders and that shareholding reached beyond what modern observers would see as the financial classes. In some ways, this is not surprising. Corporations were not easy to form in this era—legislative lobbying was usually required, and corporate charters specified minimal capital required to begin operations—and their great attraction lay less in limited liability than in their ability to

61. *Id.* at 115–28.

62. John Majewski, *Toward a Social History of the Corporation: Shareholding in Pennsylvania, 1800–1840*, *in* THE ECONOMY OF EARLY AMERICA: HISTORICAL PERSPECTIVES AND NEW DIRECTIONS 302 (Cathy Matson, ed., 2006).

63. Eric Hilt, *When Did Ownership Separate from Control? Corporate Governance in the Early Nineteenth Century*, 68 J. ECON. HIST. 645, 664 (2008).

64. WERNER & SMITH, *supra* note 57, at 62.

65. Eric Hilt & Jacqueline Valentine, *Democratic Dividends: Stockholding, Wealth, and Politics in New York, 1791–1826*, 72 J. ECON. HIST. 332, 334 (2012).

66. Majewski, *supra* note 62, at 303.

67. WRIGHT, *supra* note 34, at 93–94.

amass and retain capital from many participants for significant undertakings.[68]

The separation of ownership and control that characterized these corporations is not exactly the separation trumpeted by Berle and Means a century later.[69] The corporations here paled before the size of the Berle–Means corporation. Control was not lodged in managers who lacked significant ownership interests in the corporation and whose power relied on the inability of dispersed shareholders to organize.[70] Instead, control in these nineteenth-century corporations rested with individuals who were themselves either major shareholders or their representatives.[71] The split in these firms—the gradient along which power moved—was not between atomized shareholders and autonomous managers but between different shareholder groups.[72] The main danger facing small shareholders was thus *other shareholders*, specifically controlling or majority shareholders who had opportunity to harm minority shareholders by expropriating the corporation's wealth. In this setting, one in which some shareholder or shareholder group always had the power to direct corporate policy, struggles over "shareholder power" were struggles over whether noncontrolling shareholders could block the actions of controlling shareholders or otherwise demand that their voices be heeded in corporate decision-making.[73]

In the face of this danger, corporate law itself provided some measures to control abuse.[74] Some provisions simply barred corporate controllers from doing certain things. Legal capital rules, for instance, required that corporations maintain funds in an amount tied to the number and par

68. The degree to which corporations at this time enjoyed limited liability is debated. Angell and Ames took it as a given, but some historians have argued that it was not firmly established as a mark of all corporations until later in the century. *See generally* ANGELL & AMES, *supra* note 24. On capital lock-in, see generally Blair, *supra* note 54.

69. *See* BERLE & MEANS, *supra* note 2, at 4–5. On the degree to which non-owner managers actually controlled twentieth-century corporations, see generally Brian Cheffins & Steven Bank, *Is Berle and Means Really a Myth?*, 83 BUS. HIST. REV. 443 (2009).

70. And even Berle and Means acknowledged that there were many large corporations in which "control" was lodged not in a management group, but in a controlling or majority shareholder. BERLE & MEANS, *supra* note 2, at 117–18.

71. WRIGHT, *supra* note 34, at 123. So direct was the link between ownership and management that even individuals who were more akin to modern managers were encouraged to place much of their net worth in company stock. *Id*.

72. *See* Lamoreaux & Rosenthal, *supra* note 13, at 127–28.

73. *See id.* at 128.

74. These measures may have been originally intended to protect others, such as the corporation's creditors or customers. The U.S. Constitution also provided shareholders protection against state alteration of the corporate charter following *Dartmouth College v. Woodward*, 17 U.S. 518, 715 (1819).

value of issued shares.[75] Corporations were chartered with geographic and size limits, and for specific purposes; corporate acts exceeding the stated purpose—ultra vires, or beyond its power—were vulnerable to challenge by either the state or dissatisfied shareholders.[76] Corporations were also chartered for only a limited time, and the need eventually to seek legislative renewal for a charter may also have deterred managerial wrongdoing.[77] Legal rigidity also protected shareholders when a corporation was set to merge with another and gave shareholders some power over major transactions; unanimous shareholder approval was typically required for a merger or other fundamental transaction.[78] Under reasoning akin to that behind ultra vires, a corporation existed for a specific purpose, and forcing an unwilling shareholder to accede to a change in that purpose was like making the shareholder exchange one piece of property for another without his consent.[79] Shareholders also enjoyed preemptive rights that guaranteed them the right to purchase a pro rata share of any shares issued in the future, a development that ensured shareholders could not lose economic rights or political power in the corporation by issuance of shares to friends of the controllers.[80] These protections may well have not been intended to protect or empower minority shareholders, or at least did not have that as their primary concern; protection of shareholders never appeared as a significant goal before the twentieth century, and restrictions such as ultra vires can also be traced to lingering distrust of the corporate form and special privileges perceived to attach to it.[81]

Some aspects of corporate law and custom also made certain kinds of monitoring by stockholders relatively easy. In the nineteenth century, corporations were expected to pay profits out in regular dividends unless prevented by financial difficulty, which gave shareholders an ongoing,

75. *See* JONATHAN BARRON BASKIN & PAUL J. MIRANTI JR., A HISTORY OF CORPORATE FINANCE 179–82 (1997). This protection was intended to protect creditors, but by requiring the corporation to retain funds, it likely helped prevent controlling shareholders from simply looting the corporation.

76. *See* Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1664, 1670 (1988).

77. Ralph Gomory & Richard Sylla, *The American Corporation*, 142 DAEDALUS 102, 104 (2013). One suspects that the need for charter renewal also gave legislators another opportunity to extract favors from re-incorporators.

78. JAMES D. COX & THOMAS LEE HAZEN, BUSINESS ORGANIZATIONS LAW § 22.18, at 634–36 (3d ed. 2011).

79. *Id.*

80. *See* ANGELL & AMES, *supra* note 24, at 312–15.

81. *See* HURST, *supra* note 55, at 50 ("[E]arly nineteenth-century dealings with investor concerns are thus significant mainly because they highlight how far law waited upon the twentieth century to show broad attention to the investor interest."); WERNER & SMITH, *supra* note 57, at 109.

albeit rough, measure of the firm's economic health.[82] Many corporations were also deeply rooted in local communities; citing local banks, Wright points out that "[l]ocals were most likely to show up at stockholder meetings and could keep an eye on corporate affairs inexpensively by simply observing its condition and actions."[83]

But such limits on corporate action had, well, limits. After all, the very point of a corporation was to put the capital of many under the direction of a few, and majority rule was intended to enable the corporation to function in the face of dissent. A majority of shareholders usually elected the board, and a majority of the board could direct the corporation's affairs against minority opposition so long as the majority avoided acting fraudulently, illegally, or ultra vires. Had shareholders wished to invest in a business form promising them veto power over decisions and a ready exit, they could have chosen the partnership.[84] Yet a business form that discouraged all involvement from minority investors might have trouble attracting needed capital. What ways, then, did corporate law provide for minority shareholders to call the majority to account, or push back against majority overreach? How did corporate law give them power?

Lawsuits were one means by which shareholders could force a corporation's controllers to hew to the duties they owed the shareholders or the corporation itself. At the beginning of the century, it was not clear that those who ran a corporation had particular, legally enforceable obligations to shareholders or the corporation, or if they did, how shareholders could enforce those duties. Before 1830, as Merrick Dodd noted, there was no U.S. case "in which the principles of fiduciary law were applied to the directors or officers of business corporations."[85] That changed in 1832, in the wake of a series of corporate scandals in New York involving what modern observers would call self-dealing.[86] In *Robinson v. Smith*,[87] a case in which directors were alleged to have exceeded a corporation's charter and used its assets to speculate in stocks, New York's Chancery Court allowed shareholders to vindicate their rights in the first derivative suit.[88] Analogizing corporations to trusts, and

82. WRIGHT, *supra* note 34, at 146; BASKIN & MIRANTI, *supra* note 75, at 19.

83. WRIGHT, *supra* note 34, at 163.

84. *See* Naomi R. Lamoreaux, *Scylla or Charybdis? Historical Reflections on Two Basic Problems of Corporate Governance*, 83 BUS. HIST. REV. 9, 24–25 (2009) [hereinafter Lamoreaux, *Scylla or Charybdis?*].

85. DODD, *supra* note 37, at 70.

86. There is a detailed account of these scandals in Eric Hilt, *Wall Street's First Corporate Governance Crisis: The Panic of 1826*, at 29 (Nat'l. Bureau of Econ. Research, Working Paper No. 14892, 2009) [hereinafter Hilt, *Panic of 1826*].

87. 3 Paige Ch. 222 (N.Y. Ch. 1832).

88. *Id.* at 233. While *Robinson* is the first case allowing a derivative suit, its origins have been traced back to 1817 dictum by Chancellor Kent in *Attorney General v. Utica Insurance Co.*,

following earlier English precedents, the Court held that directors who "willfully abuse their trust or misapply the funds of the company . . . are personally liable as trustees to make good their loss,"[89] as trustees were liable for abuses to the cestui que trust.[90] By allowing the derivative suit, which empowers a shareholder to sue on behalf of the corporation when the corporation will not or is unable to do so, courts recognized that noncontrolling shareholders needed a legal recourse when defrauded or otherwise treated inequitably by those who did control the corporation.[91] Courts in other states soon adopted the derivative suit, and the U.S. Supreme Court recognized it in 1855's *Dodge v. Woolsey*,[92] which became the leading case.[93] Perhaps not coincidentally, as the derivative suit spread so did its counterpart, the business judgment rule: the legal presumption shielding directors from many legal challenges to their legitimate—non-fraudulent, nonnegligent—business decisions.[94] Courts were willing to offer a forum to minority shareholders with grievances, but not to become new venues for shareholders to challenge majority decisions they just disliked.

While some measures adopted to protect shareholders are still familiar, others have faded away. One innovation briefly adopted in the wake of New York's 1820s corporate scandals was, as Hilt reports, to provide legal officials with visitatorial powers over "moneyed incorporations"—a remedy still in existence for nonprofit corporations, which continue to be conceived as having a distinct public purpose and responsibility, but strange to present-day ideas of business corporation governance, which rest responsibility most often in shareholders themselves.[95] In still other instances, familiar tools appear in strange

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2 Johns. Ch. 371, 381–90 (N.Y. Ch. 1817), and scholars have also identified other early cases establishing a right to sue derivatively. *See, e.g.*, Mark J. Loewenstein, *Shareholder Derivative Litigation and Corporate Governance*, 24 DEL. J. CORP. L. 1, n.1 (1999) (referring to *Utica* and other early cases recognizing the shareholder derivative action)).

89. *Robinson*, 3 Paige Ch. at 231.

90. *See* Prunty, *supra* note 50, at 986–87.

91. On the spread of the derivative suit following *Robinson*, see Scarlett, *supra* note 50, at 875–82.

92. 59 U.S. (18 How.) 331 (1856).

93. *Id.* at 342. Interestingly, along with *Dodge* the other case frequently cited to set out the contours of derivative litigation was an English one, *Foss v. Harbottle*, (1843) 67 Eng. Rep. 189; 2 Hare 461. On *Foss*'s influence on U.S. derivative litigation, see L.C.B. Gower, *Some Contrasts Between British and American Corporate Law*, 69 HARV. L. REV. 1369, 1385 (1956).

94. *See* D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 309–10 (1998). Emphasizing the link between shareholder litigation and the business judgment rule, the same Louisiana case that is counted as one of the first derivative actions is also held to be the first to state the business judgment rule. *Percy v. Millaudon*, 3 La. 568, 569–73 (1832).

95. Hilt, *Panic of 1826*, *supra* note 86, at 25–26; *see also* Roscoe Pound, *Visitatorial Jurisdiction over Corporations in Equity*, 49 HARV. L. REV. 369, 382 (1936).

forms, as was the case with shareholder voting rights.

The default voting rule in present-day corporate law is one-share, one-vote, a voting scheme that obviously does little for minority shareholders as it gives a majority of voted shares the right to elect a majority of directors and to control the corporation.[96] Antebellum corporations, in contrast, had far more heterogeneous voting schemes.[97] The common law rule of shareholder voting was actually one shareholder, one vote.[98] In their charters, however, many antebellum corporations either simply capped the number of votes a single shareholder could cast or employed a formula that gradually limited the number of votes available to any shareholder. An early example of the latter comes from the Bank of North America, whose founder, Alexander Hamilton, dubbed his plan "prudent mean" voting.[99] A shareholder owning one or two shares got one vote per share; for every two additional shares between two and ten, one more vote; for every four shares between ten and thirty, another vote; and so on, with a continuing lessening of votes per share and an overall limit of thirty votes per shareholder.[100] Voting rules varied across industries, with prudent-mean voting most common with those corporations perceived to be providing a public service, such as bridges, turnpikes, and banking.[101] No voting scheme prevailed; in a sample of 1233 incorporations from 1825 to 1835, historian Colleen Dunlavy found 35% following one-share, one-vote, 27% with prudent-mean voting, and a surprising 38% giving each shareholder a single vote.[102]

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96. *See* STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 450–53 (2002). This is true even with corporations with cumulative voting, though cumulative voting makes it more likely that minority shareholders can secure some board representation. The origin of cumulative voting is discussed *infra* at text accompanying notes 150–156. Modern corporation law does allow departure from this norm, as shown by the situations at Google and Facebook where minority shareholders can, through special rights attached to their shares, exercise voting control. *See* Miriam Gottfried, *Investors Beware the Super Powers of Supervoting Shares*, WALL ST. J. (Dec. 31, 2012, 2:31 PM), http://www.wsj.com/articles/SB1000142412788732429 6604578179861900450542.

97. The pioneering historian of such voting schemes is Colleen Dunlavy. *See* Colleen A. Dunlavy, *Social Conceptions of the Corporation: Insights from the History of Shareholder Voting Rights*, 63 WASH. & LEE L. REV. 1347, 1355 n.23 (2006); Colleen A. Dunlavy, *From Citizens to Plutocrats: Nineteenth-Century Shareholder Voting Rights and Theories of the Corporation*, *in* CONSTRUCTING CORPORATE AMERICA: HISTORY, POLITICS, CULTURE 72 (Kenneth Lipartito & David B. Sicilia eds., 2003) [hereinafter Dunlavy, *From Citizens to Plutocrats*].

98. *See* Dunlavy, *From Citizens to Plutocrats*, *supra* note 97, at 73.

99. Howard Bodenhorn, *Voting Rights, Share Concentration, and Leverage at Nineteenth-Century U.S. Banks* 8 (Nat'l. Bureau of Econ. Research, Working Paper No. 17808, 2012).

100. *Id.* at 8–9.

101. *See id.* at 9–10 ("[I]n Massachusetts such rules persisted until 1906 for railroads, 1910 for banks and 1928 for insurance companies.").

102. Dunlavy, *From Citizens to Plutocrats*, *supra* note 97, at 77.

Scholars spar over the purpose of these rules. Dunlavy has argued that prudent-mean voting chiefly had a political purpose—it was intended to reduce the political power of corporations and make them more "democratic."[103] In a recent article, Henry Hansmann and Mariana Pargendler disagree, pointing out that prudent-mean voting was most common in industries where shareholders were also customers (with corporations thus resembling cooperatives), and they deduce from this that the purpose of capped or prudent-mean voting was to prevent shareholder-consumers from taking advantage of natural monopolies and price-gouging.[104] Evidence also suggests, though, that such voting schemes were designed to protect minority investors. The economic historian Howard Bodenhorn has argued that the purpose of prudent voting rules was to deter self-dealing and exploitive "tunneling" by controlling shareholder-managers.[105] He suggests that, in so doing, such rules likely also encouraged small investors to buy shares; Bodenhorn has found that banks operating in states where one-share, one-vote was the rule had fewer shareholders than did similar banks in jurisdictions requiring prudent-mean voting, suggesting a link between prudent-mean voting and small investors' willingness to purchase shares.[106] Similarly, in a study looking at New York corporations, Hilt has found that prudent-mean voting was imposed in industries whose corporations attracted relatively small investors.[107] These explanations are not necessarily contradictory; it is possible that prudent-mean voting, whatever its origins, performed all these roles. In practice, prudent-mean voting almost certainly gave minority shareholders greater influence in the corporation at the expense of controlling shareholders. In other words, whatever the original justification for the rules, their effect was to give minority shareholders greater power.

Prudent-mean voting faded from business corporations in the 1840s and 1850s for reasons that remain unclear.[108] When general incorporation

103. *Id.* at 74. She recognizes as well that prudent-mean voting served to limit controlling shareholders' ability to expropriate other shareholders. *See id.* at 75.

104. *See* Henry Hansmann & Mariana Pargendler, *The Evolution of Shareholder Voting Rights: Separation of Ownership and Consumption*, 123 YALE L.J., 948, 991–92 (2014) (putting forward a "consumer protection" theory of divergent voting rights).

105. Bodenhorn, *supra* note 99, at 14–15.

106. *Id.* at 18, 25.

107. WRIGHT, *supra* note 34, at 135.

108. Hansmann and Pargendler argue that its disappearance marked a shift from consumer to investor ownership of large corporations due to factors such as increased government provision of infrastructure, the development of competition law, and abandonment of the belief that corporate charters implied monopoly power. *See* Hansmann & Pargendler, *supra* note 104, at 992–93. It should be noted that capped/prudent-mean voting is still, it appears, allowed under modern corporation law. *See* Providence & Worcester Co. v. Baker, 378 A.2d 121 (Del. 1977)

laws appeared, they most often set one-share, one-vote as the default rule.[109] Prudent-mean schemes may have been too easy to game; instances certainly exist where large shareholders simply divided their shares among numerous "dummy" holders and so avoided the graduated caps.[110] Alternative voting schemes were not, apparently, greatly missed. Perhaps this was because their consumerist justification faded, because they impeded corporate governance in other ways, or because, while their disappearance decreased minority shareholder power, shareholders enjoyed other protections. At mid-century, the abovementioned formal mechanisms protecting minority shareholders remained robust: ultra vires still held sway, preemptive rights were still presumed, major corporate transactions still required unanimous shareholder approval, fiduciary duties were sufficiently recognized to give shareholders some recourse in the courts to challenge self-dealing amounting to fraud, and corporations were also limited by legal capital rules and time-limited charters. Exit was also a possibility for some dissatisfied shareholders during this period; some firms' shares were regularly traded, and share prices were even quoted in many newspapers.[111]

A difficult question remains: did all these measures actually give minority shareholders meaningful protections or offer them power? In other words, did they actually curb the actions of controlling shareholders? Very limited empirical evidence exists to answer the question.[112] The fact that there was an appreciable number of minority shareholders during this period—that corporate ownership stretched beyond tight-knit groups of men familiar with one another and involved in management—may show that shareholders believed they enjoyed meaningful protections, or it may just show that would-be shareholders thought the promised rewards from shareholding were great enough that

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(upholding the validity of voting restrictions in a corporate charter). My thanks to Ronald Gilson for this citation.

109. DANIEL STEPHEN HOLT, ACCEPTABLE RISK: LAW, REGULATION, AND THE POLITICS OF AMERICAN FINANCIAL MARKETS, 1878–1930, at 34–35 (Dec. 2008) (Ph.D. dissertation, University of Virginia).

110. *See* WRIGHT, *supra* note 34, at 135; WERNER & SMITH, *supra* note 57, at 123.

111. In 1840, for instance, 112 stock issues were publicly quoted in the New York City press, and estimated trading volume on the New York Stock & Exchange Board was over one million shares a year. WERNER & SMITH, *supra* note 57, 157–62 app A. For a broader history of securities trading and regulation in this period, see STUART BANNER, ANGLO-AMERICAN SECURITIES REGULATION: CULTURAL AND POLITICAL ROOTS, 1690–1860, at 222–49 (1998).

112. The outstanding exceptions being Bodenhorn's and Hilt's studies of voting schemes, which link prudent-mean voting and greater minority investing, suggesting that small shareholders certainly believed those voting schemes gave them a greater voice in the corporation. *See supra* notes 105–07.

they would hazard the risks of expropriation.[113] Even scholars who have immersed themselves in the study of the antebellum corporation cannot agree. Over twenty years ago, the corporate law scholar Warren Werner concluded, after a deep study of Wall Street in this period, that before the era of general incorporation, "comprehensive shareholder protections . . . really did not exist."[114] Wright and Sylla, in contrast, conclude in a recent study that "managerial fraud was an uncommon occurrence and that corporate governance was usually adequate" during this period.[115]

Whatever the answer, it is clear that things did not get better after the Civil War.

II. SHAREHOLDER POWER IN THE FIRST GILDED AGE

In the decades following the Civil War, struggles over shareholder power were waged on new economic and legal terrain.[116] The underlying framework—minority against controlling shareholder—remained the same. Top managers without a major ownership stake in their corporations were not yet a significant concern; while professional managers had begun to appear in a few corporations, notably railroads, senior executives were still closely tied to controlling shareholders who set ultimate corporate policy.[117] But corporations grew enormously

113. Recent studies have thrown into doubt the notion that greater investor protection is a necessary precondition for more investing. *See, e.g.*, Brian Cheffins, Steven A. Bank & Harwell Wells, *Questioning "Law and Finance": US Stock Market Development, 1930–70*, 55 BUS. HIST. 598, 611 (2013) [hereinafter Cheffins, Bank & Wells, *Questioning "Law and Finance"*].

114. WERNER & SMITH, *supra* note 57, at 111.

115. Robert E. Wright & Richard Sylla, *Corporate Governance and Stockholder/Stakeholder Activism in the United States, 1790–1860: New Data and Perspectives*, *in* ORIGINS OF SHAREHOLDER ADVOCACY 231, 234 (Jonathan GS Koppell ed., 2011). Wright and Sylla's view appears to be based on familiarity with the sources, rather than any empirical measure of fraud during this period, and other historical observers have questioned such a sunny account of shareholding during this period. *See, e.g.*, Allen D. Boyer, *Activist Shareholders, Corporate Directors, and Institutional Investment: Some Lessons from the Robber Barons*, 50 WASH. & LEE L. REV. 977, 997–98 (1993).

116. Despite the centrality of the Civil War to the development of the modern United States, almost no one has explored the war's influence on the corporation. For one exception, see Sean Patrick Adams, *Soulless Monsters and Iron Horses: The Civil War, Institutional Change, and American Capitalism*, *in* CAPITALISM TAKES COMMAND: THE SOCIAL TRANSFORMATION OF NINETEENTH-CENTURY AMERICA 249–76 (Michael Zakim & Gary Kornblith eds., 2012) (noting that corporations "emerg[ed] as they did from the war years with greater prerogative and more power than they had ever exercised in the antebellum era").

117. Thomas Cochran's account of nineteenth-century railroad management suggests that some railroad executives may have resembled modern executives, inasmuch as they were not large owners and wielded significant power in the railroads, but they shared responsibility for major decisions with "general entrepreneurs" and an active board, both representing significant ownership blocks. *See* THOMAS C. COCHRAN, RAILROAD LEADERS 1845–1890: THE BUSINESS MIND IN ACTION 77–78 (1953). Similarly, Alfred Chandler notes that in late nineteenth century

during this period. First railroads and then other businesses swelled to unprecedented size, raising for Americans a new fear of nation-spanning corporations using their power to advance themselves, giving birth to new movements attempting to tame corporate power.[118]

Paradoxically, in this time of corporate growth and anticorporate hostility, protections offered for minority shareholders actually decreased. As the economic historian Naomi Lamoreaux put it, "[o]ver the course of the nineteenth century, the legal conventions shaping corporate governance evolved in ways that actually made the predicament of minority shareholders worse rather than better."[119] A catalog of corporate law features that offered minority shareholders protection were gradually abandoned.[120] Special chartering of corporations was gradually overtaken by general incorporation laws, which removed one tool for state oversight of corporations.[121] Prudent-mean voting largely disappeared.[122] Ultra vires faded as a meaningful check on corporate power as corporations increasingly adopted multiple purposes in their charters and courts proved more willing to accept ancillary activities as falling within a corporation's implied powers.[123]

railroads, "[o]wnership and management soon separated." ALFRED D. CHANDLER JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 87 (1977). What he appears to mean by this is that "a single entrepreneur, family, or small group of associates was rarely able to own a railroad," or manage it directly. *See id.*

118. This began with railroad regulation, and toward the end of the century expanded into a broader "antitrust" movement aimed not only at trade restraints but at corporate bigness generally. *See generally* HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW 1836–1937 (1991) (describing the regulation of the growing railroad industry and the development of antitrust law that accompanied the rapidly expanding market); RICHARD WHITE, RAILROADED: THE TRANSCONTINENTALS AND THE MAKING OF MODERN AMERICA 109–18 (2011) (describing the postwar expansion of the railroad industry and the beginning of the postwar antimonopoly movement rooted in fear of corruption).

119. Naomi R. Lamoreaux, *Did Insecure Property Rights Slow Economic Development? Some Lessons from Economic History*, 18 J. POL'Y HIST. 146, 151 (2006).

120. *See id.*

121. *See id*; Hamill, *supra* note 47, at 85–86. While general incorporation took chartering out of the legislature and moved it from bespoke to standard-form, it should be noted that even special charters often followed a template and were more alike than one might expect from the process that produced them. *See* HURST, *supra* note 55, at 29 (special charters "fall quickly into stock patterns"); *see also* WRIGHT, *supra* note 34, at 82 (discussing standardization of special charters).

122. *See supra* text accompanying note 108.

123. *See, e.g.*, HOVENKAMP, *supra* note 118, at 59–64, 335–36. Ultra vires was largely dead in American law by the end of the nineteenth century, with the important exception of corporations trying to escape contracts they had entered into by contending they were ultra vires; there the doctrine lingered into the twentieth century. *See* Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (With Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279, 1302–14 (2001). It does survive, though, in the

Preemptive rights became riddled with exceptions.[124] Limits on corporate capitalization and duration were also relaxed.[125] Requirements for unanimous shareholder approval of certain major transactions similarly eroded, especially as many states, wary of minority shareholder "hold-up" of transactions, began providing the appraisal remedy as an alternative for shareholders dissatisfied with the merger or sale of a corporation's assets.[126] Private agreements among shareholders to operate the corporation in ways that violated the "statutory norms" by, for instance, giving minority shareholders veto powers were usually held unenforceable.[127]

The business judgment rule's protection of corporate managers also increased.[128] Its earliest version left directors responsible for negligent acts, imposing on them a duty of care similar to that in other areas of tort law, but as the century progressed, the rule expanded in many jurisdictions to protect directors for even gross negligence in performing their duties so long as there had been no bad faith, fraud, or self-dealing.[129] Even prohibitions against self-dealing were not absolute and may have weakened.[130] While scholars still debate the exact contours of rules governing contracts between directors and their corporations during this period, it appears that many courts would countenance such deals, albeit only after scrutiny to determine that the transaction had been fair to the corporation.[131] In all these ways, those who ran corporations during this period gained greater scope under the law for both legitimate and illegitimate decision-making.

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waste doctrine. *See* ERIC A. CHIAPPINELLI, CASES AND MATERIALS ON BUSINESS ENTITIES 373–75 (2d ed. 2010).

124. *See* BERLE & MEANS, *supra* note 2, at 144–46.

125. *See* Boyer, *supra* note 115, at 997.

126. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 88–89 (1992); Robert B. Thompson, *Exit, Liquidity, and Majority Rule: Appraisal's Role in Corporate Law*, 84 GEO. L.J. 1, 11–13 (1995).

127. *See* Harwell Wells, *The Rise of the Close Corporation and the Making of Corporation Law*, 5 BERKELEY BUS. L.J. 263, 287 (2008) [hereinafter Wells, *Rise of the Close Corporation*].

128. *See* HOVENKAMP, *supra* note 118, at 62–63.

129. *See id.*

130. *See* Douglas M. Branson, *The Rule That Isn't a Rule –The Business Judgment Rule*, 36 VAL. U. L. REV. 631, 635–36 & n.17 (2002).

131. The history is complicated and far from settled. The traditional account has been Harold Marsh's, who argued that fiduciary duties weakened in the decades around the turn of the century as earlier prohibitions against any directorial self-dealing were undermined. *See* Harold Marsh Jr., *Are Directors Trustees? Conflicts of Interest and Corporate Morality*, 22 BUS. LAW. 35, 39–40 (1966). More recent work, however, has cast doubt on Marsh's chronology and suggested that certain forms of directorial dealing with corporations were always allowed. *See* David Kershaw, *The Path of Corporate Fiduciary Law*, 8 N.Y.U. J.L. & BUS. 395, 443 (2012).

Paralleling the increasingly untrammeled power of the shareholder majority came a new conception of corporate power that moved ultimate authority within the corporation away from shareholders to the board itself. As late as 1886, Victor Morawetz, in his classic *Treatise on the Law of Private Corporations*, could speak of a corporation as "consist[ing] of the whole number of its members."[132] By the turn of the century, however, as Morton Horowitz has argued, the view of American courts and legal scholars became that "the powers of the board of directors . . . are identical with the powers of the corporation."[133] No longer were directors merely functionaries of the shareholders; they were the "primary possessors of all the powers which the charter confers."[134] While not as immediately disempowering as the specific developments discussed above, this move too served to erode minority shareholders' status within the corporation.

But minority shareholders were not completely powerless; they still, for instance, could file a derivative suit to challenge managers' acts as violations of their fiduciary duties, and courts remained willing to police fraudulent or constructively fraudulent behavior by corporate controllers.[135] Yet derivative suits themselves were being limited in the late nineteenth century. In particular, the U.S. Supreme Court's 1881 decision in *Hawes v. Oakland*[136] implemented the demand requirement in derivative litigation, which prohibited shareholders from suing in the corporation's name without showing that the board was somehow disqualified from controlling the litigation though fraud, self-interest, or a similar issue—a holding deliberately intended to rein in such suits.[137]

Battles for corporate control, and the constant expectation or suspicion that self-dealing and tunneling would follow, were a hallmark of the late nineteenth century, nowhere more than in the railroad industry that

132. VICTOR MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS § 474, at 447 (1886).

133. HORWITZ, *supra* note 126, at 98 (quoting HOWARD HILTON SPELLMAN, A TREATISE ON THE PRINCIPLES OF LAW GOVERNING CORPORATE DIRECTORS 357 (1931) (internal quotation marks omitted)).

134. *Id.* at 99 (quoting Manson v. Curtis, 119 N.E. 559, 562 (N.Y. 1918) (internal quotation marks omitted)). The changeover from the view of directors as being agents to possessing nondelegated powers was slow and probably not fixed until the 1920s. *See id*. at 98–100.

135. D. Gordon Smith notes that during this period courts showed themselves willing to use their equity powers to police controlling shareholders' fraudulent activities, "increasingly under the rubric of minority oppression." Smith, *supra* note 94, at 314.

136. 104 U.S. 450 (1882).

137. *Id*. at 460–61. With approval, the Court referenced *Foss v. Harbottle*, (1843) 67 Eng. Rep. 189; 2 Hare 46, and other English precedents that protected corporate decisions. *Id.* at 456. *Hawes* also acted to restrict plaintiff-shareholders' access to federal courts on diversity grounds. *Id.* at 452–53.

generated many of the nation's largest corporations.[138] This was the theme of the era's best-known account of a battle for corporate control, author Charles Francis Adams Jr.'s *A Chapter of Erie*.[139] Recounting the epic battle for control of New York's Erie Railway in 1868, Adams's tale is a squalid one of various manipulators each attempting to seize or keep control of the Erie through questionable corporate tactics, litigation battles, and flat-out corruption.[140] Legends of the era such as Daniel Drew, Jay Gould, and Cornelius Vanderbilt appear as "freebooters" and modern-day pirates, hoping to either profit from stock manipulation in connection with the railway (Drew, Gould, and company) or to benefit from a monopoly to be completed once the railway was under control (Vanderbilt).[141] Each thought of control as a way to reap personal benefit and thought little of minority shareholders.

Adams was well aware of the gap between corporate law and corporate reality. Under the law, Adams wrote, a corporate manager "occupies a fiduciary position. He is a trustee—a guardian. Vast interests are confided to his care; *every shareholder of the corporation* is his ward."[142] That was the theory. Adams continued:

> A directorship in certain great corporations has come to be regarded as a situation in which to make a fortune, the possession of which is no longer dishonorable. The method of accumulation is both simple and safe. It consists in giving contracts as a trustee to one's self as an individual, or in speculating in the property of one's *cestui que trust*, or in using the funds confided to one's charge . . . to gamble with the real owners of those funds for their own property, and that with cards packed in advance.[143]

Nor should shareholders be surprised at this; that minority shareholders were largely powerless in the face of controlling shareholders was well understood. As Adams put it, "[t]he wards themselves [i.e., shareholders] expect their guardians to throw the dice against them for their own property, and are surprised, as well as gratified, if the dice are not loaded."[144] The Erie Wars were not unique. The best-known scandal of the era, that of the Credit Mobilier, revolved around attempts by the controllers of the Union Pacific Railroad to direct favorable contracts to

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138. For a superb history of the transcontinental railroad emphasizing the self-dealing and incompetence that characterized many of these enterprises, see generally WHITE, *supra* note 118.

139. 109 N. AM. REV. 30 (1869).

140. *See id.* at 31.

141. *See id.* at 30, 32–35, 64–65.

142. *See id*. at 34 (emphasis added).

143. *Id*. at 34–35.

144. *Id*. at 35.

a construction company they owned.[145] As one historian has summarized the period, "Railroad insiders engaged in numerous forms of self-dealing or tunneling—including paying themselves exorbitant salaries, contracting with firms they controlled, borrowing their firm's securities for their own use, and issuing themselves shares of stock in exchange for worthless securities . . . ."[146]

Almost twenty years later, William Cook published the first corporate law treatise focusing specifically on shareholders, *Treatise on the Law of Stock and Stockholders*.[147] Its main theme echoed Adams's: the predations visited on shareholders by those controlling the corporation, and potential remedies.[148] Corporations, Cook wrote,

> have proved to be a temptation which corporate officers are too often unable to withstand. . . . In these latter days the robbery and spoliation of corporations and stockholders by the corporate directors and managers have been systematized into well-known methods of proceeding, and the carrying out of such plans has become a profession and an accomplishment. The skill, audacity, experience, and talent of the highest order of administrative ability have reduced to a certainty the methods of diverting profits, capital, and even the existence of the corporation itself, to the enrichment of the corporate managers and their co-conspirators. . . . Illegitimate gains are secured and enormous fortunes are amassed by the few at the expense of the defrauded but generally helpless stockholders.[149]

One attempt to provide some protection to minority shareholders was cumulative voting. While this also begins with one-share, one-vote, in contrast to "straight voting," in which voting is done for each open seat on a board of directors, cumulative voting allows shareholders to concentrate all of their votes for one or a few candidates for a board and thus raises the chance of minority representation on the board.[150] Cumulative voting was unknown before 1870.[151] That year, Illinois held

145. Nor was that the whole of it; the scandal also involved widespread bribery and an attempt to defraud the federal government. *See* WHITE, *supra* note 118, at 33–35, 63–66.

146. Hilt, *History of American Corporate Governance, supra* note 43, at 15.

147. WILLIAM W. COOK, A TREATISE ON THE LAW OF STOCK AND STOCKHOLDERS (1887).

148. *See generally id.* (discussing shareholders and their remedies). This work soon became the leading treatise on corporate law, succeeding ANGELL & AMES, *supra* note 24. *See* Alfred F. Conard, *Cook and the Corporate Shareholder: A Belated Review of William W. Cook's Publications on Corporations*, 93 MICH. L. REV. 1724, 1724 (1995).

149. *See* COOK, *supra* note 147, § 644, at 726.

150. *See* Paul Rose, *Shareholder Proposals in the Market for Corporate Influence*, 66 FLA. L. REV. 2179, 2211 & n.153 (2014) [hereinafter Rose, *Shareholder Proposals*].

151. *See* Whitney Campbell, *The Origin and Growth of Cumulative Voting for Directors*, 10

a constitutional convention to write a new state constitution, at which one of the most powerful voices—that of publisher Joseph Medill—initially advocated cumulative voting in *legislative* elections.[152] Almost as an afterthought, the new constitution also included a requirement for cumulative voting in corporate elections.[153] The justification was clear: cumulative voting would protect minority shareholders, whose plight had come to light following the Erie War. As Medill put it at the convention, the aim of the provision was to "protect the minority from being plundered and robbed out of house and home, their stock confiscated and lost for the want of some representative to look after their interest."[154] Several other states soon followed Illinois's lead. When Nebraska's constitutional convention adopted an identical provision the next year, speakers cited the Erie War as a reason for it and claimed that the then-dominant rule of "straight voting" allowed controlling shareholders to "bid defiance to all the stockholders in the minority."[155] By 1900, sixteen states had followed Illinois's lead in requiring corporate cumulative voting.[156]

Minority shareholders undoubtedly lost power in the late nineteenth century; why this occurred is less clear. One likely explanation is that as corporations grew larger, they could only operate effectively if managers' discretion was broadened and if dissident shareholders' ability to hold up business decisions was limited. For instance, large corporations would have found it difficult to expand in size and into related activities—to take advantage of economies of scale and scope—unless the ultra vires doctrine was narrowed and limits on corporate size and duration were relaxed.[157] Horizontal and vertical mergers would have been extremely difficult had shareholder unanimity remained the rule for such transformations. Further, derivative litigation not delimited by the demand requirement could well have entangled corporations in endless

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BUS. LAW. 3, 3–4 (1955).

152. *See id*.

153. *See id*. at 4.

154. CHARLES M. WILLIAMS, CUMULATIVE VOTING FOR DIRECTORS 24 (1951). Williams's account remains the most thorough account of the origins and early spread of cumulative voting.

155. *Id*. at 26.

156. *See id*. at 34. *See generally* Jeffrey N. Gordon, *Institutions as Relational Investors: A New Look at Cumulative Voting*, 94 COLUM. L. REV. 124 (1994) (discussing a careful account of the rise and fall of cumulative voting in the twentieth-century United States, including a fifty-state survey).

157. *See generally* ALFRED D. CHANDLER JR., SCALE AND SCOPE: THE DYNAMICS OF INDUSTRIAL CAPITALISM (1990) (discussing economies of scale and scope in this era); Blair, *supra* note 54 (discussing the ways that the corporate form allowed capital lock-in during the nineteenth century).

disputation, especially as the number of shareholders grew over the twentieth century.

One more key development likely accelerated the erosion of shareholder protections and power in this period: jurisdictional competition between states for incorporation (or, as it has since become known, the "race to the bottom" or "race to the top").[158] While shareholders were not terribly well protected at any point during the decades from the 1870s to the 1930s, the general incorporation laws prevalent in many states late in the nineteenth century still restricted corporations. For instance, they set minimum and maximum limits on capital, required minimum capital to be fully paid-in before the corporation could begin operations, required unanimous approval for a change in corporate purpose, and gave existing shareholders preemptive rights to purchase newly issued shares.[159] Such laws were ill-suited, however, to the continent-spanning corporations that developed at the end of the nineteenth century, firms that sought more flexible corporation law and a legal system less suspicious of "trusts," as they were called.[160]

In 1889, New Jersey altered its corporation law to make it easier for corporations to own stock in other corporations, a move that not only

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158. The literature on this subject is enormous. *See, e.g.*, Robert B. Ahdieh, *Trapped in a Metaphor: The Limited Implications of Federalism for Corporate Governance*, 77 GEO. WASH. L. REV. 255, 256 (2009) ("Rather than a race to the bottom in the quality of corporate governance, federalism in corporate law—and resulting state competition—fosters a 'race to the top.'"); William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 668 (1974) (stating that Delaware is setting the pace for corporate law and does not want to "surrender its lead . . . . [i]t likes to be number one"); Daniel J.H. Greenwood, *Democracy and Delaware: The Mysterious Race to the Bottom/Top*, 23 YALE L. & POL'Y REV. 381, 381 (2005) ("The standard story is that states compete to provide corporate law options for businesses, producing a race to the top or a race to the bottom in which corporate law is created by market rather than political processes."); Guhan Subramanian, *The Influence of Antitakeover Statutes on Incorporation Choice: Evidence on the "Race" Debate and Antitakeover Overreaching*, 150 U. PA. L. REV. 1795, 1797 (2002) ("One of the most important questions in U.S. corporate law is whether competition in the corporate charter market represents a 'race to the top' or a 'race to the bottom.'"); Ralph K. Winter, *The "Race for the Top" Revisited: A Comment on Eisenberg*, 89 COLUM. L. REV. 1526, 1528–29 (1989) (defending the position that state corporation law does not foster a "race to the bottom" but rather produces efficient corporate regulation and shareholder protection).

159. *See* E. Merrick Dodd Jr., *Statutory Developments in Business Corporation Law, 1886–1936*, 50 HARV. L. REV. 27, 32–33 (1936); *see also* Wiley B. Rutledge Jr., *Significant Trends in Modern Incorporation Statutes*, 22 WASH. U. L.Q. 305, 310–12, 331 (1937) (finding that the prevailing trend among states was less regulation and more autonomy for the corporation).

160. Many of them were trusts, but the term soon applied more generally to large industrial combinations. *See* Charles M. Yablon, *The Historical Race: Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880–1910*, 32 J. CORP. L. 323, 336 (2007). As should be clear, my account of the initial "race" is indebted to Charles Yablon's, which is an excellent account not only of the legal changes of 1889 and 1896 but the first corporate law race.

enabled holding companies but more generally served notice "that New Jersey legislators would do what they could to encourage and facilitate the new movement toward the rise of big business in the United States."[161] Over the next decade, the state further amended its laws to give incorporators and managers greater power over the firm, sharply limiting minority shareholders' powers in the process. The new acts removed unanimity requirements for a number of major corporate transactions including charter amendments, allowed New Jersey-chartered firms to issue new securities with the approval of only a majority of shareholders, removed "restrictions on anti-competitive and unfair labor practices," and removed limits on a corporation's duration.[162] More fundamentally, the new laws rested on the premise that a corporation was largely a result of agreement among the individuals who created it and "implicitly exclude[ed] the state from interfering in the formation or control of this relationship."[163] Corporations could take advantage of these provisions simply by reincorporating in New Jersey as allowed under corporation law's "internal affairs doctrine," which many proceeded to do.[164]

A number of other states soon sought to emulate New Jersey's laws and fiscal success, and launched the corporate law race, a race in which Delaware eventually pulled ahead and, by the 1920s, had won its still undisputed place as home of American public corporation law.[165] What is less well known is the effect this race had even in states that disdained the competition. In the 1920s and 1930s, many states that were not seeking out-of-state incorporators still adopted new corporation law statutes that, like those of the "chartermongering" states, undercut traditional restrictions on legal capital, limited preemptive rights, gave majorities the power to rewrite a corporation's charter and change its capital structure, and abandoned ultra vires.[166] These states' aims were simply to keep the incorporation business of firms already located in-

161. *Id.*; *see also* LAWRENCE E. MITCHELL, THE SPECULATION ECONOMY: HOW FINANCE TRIUMPHED OVER INDUSTRY 42 (2007) ("[T]he critically important change was the law that allowed corporations to buy shares in other corporations with their own stock, leaving the matter of price entirely within the discretion of corporate directors.").

162. Yablon, *supra* note 160, at 351–53 & nn.148–49.

163. *Id*. at 351–52.

164. On the internal affairs doctrine in the late nineteenth century, see generally Frederick Tung, *Before Competition: Origins of the Internal Affairs Doctrine*, 32 J. CORP. L. 33, 39 (2006) (discussing the origin and application of the internal affairs doctrine).

165. Today, for example, Delaware is home to more than 60% of the Fortune 500 companies. *Why Businesses Choose Delaware*, DELAWARE.GOV, http://corplaw.delaware.gov/eng/why_delaware.shtml (last visited May 1, 2015).

166. *See* Harwell Wells, *The Modernization of Corporation Law, 1920–1940*, 11 U. PA. J. BUS. L. 573, 574 (2009) (explaining how states had differing reasons for updating corporation laws).

state.[167] Jurisdictional competition thus contributed to a more flexible corporate law even in states that were not competing at all. Whether these developments ultimately benefited shareholders by increasing their overall wealth is still debated; that these changes shifted power to those who controlled the corporation is not.

While state competition was widely decried as unleashing the trusts, before the 1920s it was seldom attacked for harming minority shareholders. The reason appears to be that during the nineteenth century and well into the early twentieth, the plight of shareholders was simply not a matter of great concern.[168] True, the Erie War and similar tales of corporate malfeasance had produced, in a few states, some measures to protect or empower minority shareholders, notably cumulative voting.[169] Yet there was no general perception that there was a significant shareholder class, much less one deserving special consideration. James Willard Hurst noted this more than forty years ago when he wrote that it was only in the twentieth century that the law "show[ed] broad attention to the investor interest."[170] What concerned the public most was the threat corporations and their masters posed to workers, farmers, or consumers; minority shareholders were far down the list. Even in *A Chapter of Erie*, Adams's outrage is focused most tightly on the damage that the Erie War did to New York's political system, as its combatants freely bribed New York's judges and legislators.[171] As Warren Werner noted about the late nineteenth-century railroad era, "[t]he notion of government action to protect investors as a class appears to have been foreign to the thinking of the time."[172]

There may have been little outcry over the plight of minority shareholders in large corporations because there were not nearly as many of them as there would be a few decades later. To be clear, there were minority shareholders, but shareholding did not reach deep into what would be called the middle class. While there are no reliable measures of shareholding by the general population before 1900, stocks were not that

167. *See id.* at 591.

168. For the turn to concern about shareholders in the 1920s, see *infra* text accompanying notes 192–219.

169. *See supra* text accompanying notes 152–56.

170. HURST, *supra* note 55, at 50.

171. *See* STEVE FRASER, EVERY MAN A SPECULATOR: A HISTORY OF WALL STREET IN AMERICAN LIFE 125 (2005) ("Charles Francis [Adams] grew particularly exercised about the political implications" of the Erie War.).

172. WERNER & SMITH, *supra* note 57, at 145.

widely held.[173] Some railroads likely had thousands of shareholders,[174] but a public market for industrial securities would not develop until after the "great merger movement" at the end of the century.[175] By 1900, many large corporations did have several thousand stockholders each, and at least four—American Sugar, U.S. Steel, and the Pennsylvania and Union Pacific railways—each had over 10,000.[176] Yet the real growth in shareholding would only come after World War I,[177] and only in that decade did mass shareholding attract widespread attention. One can understand, in light of the weakness of minority shareholders and indifference to their plight, why many manufacturing firms in the nineteenth century were organized as partnerships, a business form guaranteeing minority owners exit and management rights, rather than corporations.[178]

Why then did anyone buy shares in this period if the law provided so little protection against majority overreach? As mentioned earlier, some individuals may have become stockholders simply because the rewards of ownership promised to be great, even after factoring in the likelihood of self-dealing by those controlling the corporation.[179] Private ordering may also have encouraged shareholding, as some corporations voluntarily submitted to regulatory schemes to assure investors that their

173. The most useful studies of early shareholding are Gardiner C. Means, *The Diffusion of Stock Ownership in the United States*, 44 Q. J. ECON. 561, 561 (1930), and H. T. Warshow, *The Distribution of Corporate Ownership in the United States*, 39 Q. J. ECON. 15, 15 (1924). But even these studies, which began in 1900, had significant limitations due to lack of data on the overlap of ownership and book versus beneficial ownership. These studies, and their limitations, are discussed in Marco Becht & J. Bradford DeLong, *Why Has There Been So Little Block Holding in America?*, *in* A HISTORY OF CORPORATE GOVERNANCE AROUND THE WORLD: FAMILY BUSINESS GROUPS TO PROFESSIONAL MANAGERS 613, 639–42 (Randall K. Morck ed., 2005).

174. The Pennsylvania Railroad, for example, had more than 13,000 shareholders in 1880. Means, *supra* note 173, at 593 app., tbl.I.

175. *See* NAOMI R. LAMOREAUX, THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS, 1895–1904, at 5, 7 (1985) [hereinafter LAMOREAUX, GREAT MERGER MOVEMENT]; Thomas R. Navin & Marion V. Sears, *The Rise of a Market for Industrial Securities, 1887–1902*, 29 BUS. HIST. REV. 105, 134 (1955).

176. Means, *supra* note 173, at 594 app., tbl.II. Means found that in 1900 American Sugar had 10,816 stockholders; U.S. Steel 54,016; the Pennsylvania Railway 51,543; and Union Pacific Railroad 14,256. AT&T, which would have the largest number of stockholders later in the century, had only 7535. *Id.*

177. *See* Mary O'Sullivan, *The Expansion of the U.S. Stock Market, 1885–1930: Historical Facts and Theoretical Fashions*, 8 ENTERPRISE & SOC'Y 489, 524 (2007). Mary O'Sullivan's study is of the stock market, rather than stock holdings, but it is still a useful illustration of this development.

178. *See* Lamoreaux, *Scylla or Charybdis?*, *supra* note 84, at 24.

179. Would-be shareholders do not always gravitate to the safest investment. *See* Cheffins, Bank & Wells, *Questioning "Law and Finance," supra* note 113, at 611 (documenting growth of the lightly regulated over-the-counter U.S. securities markets in the mid-1900s).

claim on a corporation's wealth would not be appropriated.[180] John Coffee has argued that prior to the 1930s the New York Stock Exchange (NYSE) effectively guaranteed the quality of stocks listed on it by requiring the firms to meet stringent listing requirements.[181] Another institution guaranteeing the relative probity of corporate management was the corporation's investment banker, or really in this period, one investment banker: J.P. Morgan & Co.[182] J.P. Morgan was the largest of a handful of banks that dominated public issuance of securities in this era, and it kept a watchful eye on the firms whose securities it handled, often installing J.P. Morgan partners on their boards—a practice that appeared to increase the firm's overall value.[183] Such involvement and oversight was one way to assure minority shareholders that their economic interests would not be expropriated.

If an observer stopped at the dawn of the twentieth century and reflected on "shareholder power"—admittedly an anachronistic exercise, as the term was not yet in circulation—it probably would have been taken to mean the power of minority *versus* controlling shareholders. At that time, most sizeable corporations were still dominated by one or a few large blockholders, either shareholders or occasionally financial intermediaries, and minority shareholders were protected from expropriation (to the extent they were protected at all) chiefly by legal prohibitions on fraud, residual restrictions built into corporation statutes, and more informal private mechanisms that provided investors some reassurance about investment in certain corporations. Looking forward, the observer might have predicted a corporate future much like that which developed elsewhere in the industrial world, with American capitalism dominated by a "personalized oligarchic financial capitalism of controlling blocks held by Rockefellers and other plutocrats."[184] That future, however, did not come to pass. Why?

Explanations have been offered emphasizing both politics and economics. Focusing on politics, Mark Roe has contended that in the 1910s, the predominance of the House of Morgan and a few other large financial institutions produced a backlash and a deep suspicion of the

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180. *See* John C. Coffee Jr., *The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control*, 111 YALE L.J. 1, 34–38 (2001).

181. *See id.*

182. *See* RON CHERNOW, THE HOUSE OF MORGAN 205 (1990).

183. *See* J. Bradford De Long, *Did J. P. Morgan's Men Add Value? An Economist's Perspective on Finance Capitalism*, *in* INSIDE THE BUSINESS ENTERPRISE: HISTORICAL PERSPECTIVES ON THE USE OF INFORMATION 205, 218–24 (Peter Temin ed., 1991).

184. I borrow this observation from Becht and DeLong. *See* Becht & DeLong, *supra* note 173, at 614–15.

"Money Trust" allegedly controlling American finance.[185] This hostility led to the enactment of a series of laws and regulations preventing financial intermediaries such as banks, insurance companies, and later, mutual and pension funds from amassing significant blockholdings in any single firm's stock.[186] Such regulation resulted in the dispersed ownership and relative shareholder powerlessness that distinguished twentieth-century American capitalism from other varieties around the world.[187] Other scholars have challenged this monocausal political explanation for the distinctive quality of U.S. corporate capitalism, arguing that economic factors—notably the availability of a large liquid market that could absorb control blocks more readily than other nations' markets—also produced the American pattern of corporate ownership.[188] Another group of scholars has claimed that the important factor was the relatively robust protections provided to small shareholders by the American legal system (robust at least compared to shareholder protections offered by other nations' legal systems).[189] Most recently, John Coffee has challenged many of these views. He argues that the dispersal of ownership in the United States was inextricably tied not with legal protections for small shareholders but with protections provided by private actors, notably investment banks and the NYSE, which "engender[ed] public confidence" in the markets from the turn of the century through the 1920s.[190] For purposes of this Article, most important is that the situation of the American shareholder would change radically in the decades after the turn of the twentieth century. As the small

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185. *See* Becht & DeLong, *supra* note 173, at 618–19; *see also* LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 5–27 (1914) ("Investment bankers, like J. P. Morgan & Co., dealers in bonds, stocks and notes, encroached upon the functions of the three other classes of corporations with which their business brought them into contact.").

186. *See* MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE 55 (1994) (providing a political account of modern American capitalism).

187. *See* Bernard S. Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520, 556 (1990) [hereinafter Black, *Shareholder Passivity Reexamined*] (noting disclosure and litigation risk burdens created by modern corporate law).

188. *See, e.g.*, Becht & DeLong, *supra* note 173, at 620–21. Becht and DeLong do not dispute Roe's basic tale but they argue that the availability of a liquid market was also important. *See id.*

189. *See, e.g.*, Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113, 1129–34 (1998). This Article largely avoids the huge debates and extensive literature resulting from *Law and Finance*. For other work of this author's that does engage this literature, *see* Cheffins, Bank & Wells, *Questioning "Law and Finance," supra* note 113, at 606–08.

190. John C. Coffee Jr., *Dispersed Ownership: The Theories, the Evidence, and the Enduring Tension Between "Lumpers" and "Splitters," in* THE OXFORD HANDBOOK OF CAPITALISM 463, 482 (Dennis C. Mueller ed., 2012). Coffee's account also provides an excellent overview of the debates over the causes of dispersed ownership in the United States.

shareholder stepped into the political light, and Berle and Means proclaimed the "separation of ownership and control," shareholder power was transformed—but not necessarily in a way that helped shareholders.[191]

III. The Twentieth-Century Shareholder and the Separation of Ownership and Control

The early twentieth century saw three interrelated developments that, taken together, would define the problem of shareholder power for the rest of the century. First was the spread of small shareholding in the publicly traded corporation. After 1900, and even more so after 1920, corporations found willing buyers for their shares in the middle class, and as millions of Americans became shareholders for the first time, their lack of power over the corporations whose shares they owned became a matter of public concern.[192] The second development was that this dispersal of ownership eventually produced a reorientation in corporate law. As Americans learned to live with the giant corporation[193] and as new fields such as antitrust grew up to regulate specific aspects of corporate power, the scope of corporate law narrowed.[194] Where once significant aspects of corporate law addressed the corporation's power over elements outside of it—its broader social, political, and economic effects—now the field of corporate law came to focus on power relations within the corporation, particularly the vexed relationship between a corporation's shareholders and those who controlled it.[195] A comment in the *New York Times* in 1925 captured this change in focus: "Precisely as the 'trust' of old menaced the consumer, closed management of corporations menaces the diffused

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191. Berle & Means, *supra* note 2, at 4–7.

192. *See supra* text accompanying notes 173–78.

193. *See, e.g.*, Morton Keller, Regulating a New Economy: Public Policy and Economic Change in America, 1900–1933, at 89 (1990) (noting that in the 1920s the "relationship of a company's stockholder owners to its management . . . became a matter of substantial concern in a number of Western nations").

194. *See* Hovenkamp, *supra* note 118, at 243–46; Keller, *supra* note 193, at 86–91.

195. There was one additional development, which was corporate law's growing focus on shareholders in *public* corporations. This led to comparative neglect of the "other" kind of corporation, the closely held corporation, and of the close corporation's distinctive problems, notably freeze-outs and minority oppression. Only slowly over the twentieth century did the law make room for special protections and guarantees for shareholders in closely held corporations; courts first began enforcing private agreements among close corporation shareholders and refined doctrines of "minority oppression," while legislatures adopted corporate codes to accommodate the special needs of close corporations. *See* Wells, *Rise of the Close Corporation*, *supra* note 127, at 286–87. *See generally* F. Hodge O'Neal & Robert B. Thompson, O'Neal and Thompson's Close Corporations and LLCs: Law and Practice § 1:1 (3d ed. 2014) ("[T]here are now substantial differences in the law applied to closely held and public enterprises and the trend is toward even more distinctive legal treatment.").

owner."[196] The third development was the appearance of autonomous senior managers—individuals who controlled the corporation but, in contrast to the last century, did not own a large stake in it. In 1932, Berle and Means identified this as the "separation of ownership and control" in *The Modern Corporation and Private Property*,[197] but this work only crystallized a particular view of shareholder power and its discontents already in the air.[198]

The foundations for mass shareholding were laid in the turn of the century's "great merger movement," when over a thousand fairly small and closely-held manufacturing firms combined into over a hundred larger industrial giants.[199] To fund the mergers, the new corporations sold shares to the public, and small investors who previously would have steered clear of common stock, or even all securities, began slowly purchasing securities.[200] Precise data is hard to come by, but stock ownership started rising sharply after 1900. One study found that between 1900 and 1917 the three largest American corporations each tripled their number of stockholders.[201] World War I accelerated the process as public campaigns for Liberty Bonds induced millions of Americans to purchase securities for the first time.[202] After the war, the networks built to sell bonds were repurposed to sell common stock.[203] The postwar rise in shareholding was sharp; one study has estimated that the number of stockholders during the 1920s increased from a few hundred thousand before World War I, about 3% of households, to almost eight million at decade's end, a quarter of all households.[204] The new shareholding came about not merely because shares were now available but also because of deliberate efforts to convince small investors that the securities markets were now safe and that even the small shareholder ran no special risk in investing in securities. Legal developments also helped make the stock

196. *The New Capitalist*, N.Y. TIMES, Nov. 1, 1925, at E8.

197. BERLE & MEANS, *supra* note 2, at 4.

198. Harwell Wells, *The Birth of Corporate Governance*, 33 SEATTLE U. L. REV. 1247, 1247–48 (2010) [hereinafter Wells, *The Birth of Corporate Governance*].

199. *See* LAMOREAUX, GREAT MERGER MOVEMENT, *supra* note 175, at 1–5.

200. *See* Navin & Sears, *supra* note 175, at 137–38.

201. *See* Means, *supra* note 173, at 594 app., tbl.I. Because it is difficult to measure overlapping ownership, this does not necessarily mean that the overall number of shareholders tripled.

202. Julia Ott engagingly tells the story of the rise in stockholding in the 1920s. JULIA C. OTT, WHEN WALL STREET MET MAIN STREET: THE QUEST FOR AN INVESTORS' DEMOCRACY 101–04 (2011).

203. *See id.* at 105–26.

204. *See id*. at 152; Wells, *The Birth of Corporate Governance*, *supra* note 198, at 1254 n.27. Mary O'Sullivan similarly concludes that, while ownership certainly spread in the 1910s, a broad-based stock market only came into existence in the 1920s, the product of "the impetus provided by World War I, plus the enthusiasm of the 1920s." O'Sullivan, *supra* note 177, at 489.

market appear safe. The suppression of bucket shops over the previous decades rehabilitated the reputation of securities markets,[205] while many states' "blue sky" laws and securities commissions reassured investors of issuers' probity by regulating offerings and, in some states, even providing de facto merit review of securities offered for public purchase.[206]

Shares sold not only because of economic or legal changes but also because people worked to sell them. The point is not as tautological as it sounds. The spread of shareholding in these decades was a triumph of marketing, and the different ways that corporations marketed shares illustrates the complicated relationship between the reality and rhetoric of shareholder power throughout not only the 1920s but much of the rest of the twentieth century. As the historian Julia Ott points out, during the 1920s publicists for wider stock ownership, particularly those pushing employee and consumer stock purchase plans, simultaneously emphasized and undercut shareholder power.[207] Advocates of mass shareholding repeatedly described the purchase of stock as a "vote" of confidence both in the particular corporation and in America's free enterprise system, casting stockholding as an empowering act.[208] Further, Ott notes that the economist Thomas Nixon Carver, a booster for stock ownership throughout the decade, insisted that participation in the securities markets would ultimately give small shareholders power to direct the economy: "'They who spend their money for securities, '" Carver wrote, "tended to 'control or influence business' by determining which corporations and industries received capital."[209]

The reality, however, was that widespread ownership did not so much empower small stockholders as weaken larger ones. In some instances, management encouraged dispersed shareholding among a corporation's employees and consumers to weaken the power of all shareholders. As Ott puts it when discussing consumer and employee purchase plans, "many corporate executives intentionally resolved to distribute their shares to as many investors as possible—in blocks as small as possible—in order to augment their power vis-à-vis financial intermediaries and large shareholders."[210] The spread of shareholding was accompanied by

205. *See* David Hochfelder, *"Where the Common People Could Speculate": The Ticker, Bucket Shops, and the Origins of Popular Participation in Financial Markets, 1880–1920*, 93 J. AM. HIST. 335, 337 (2006).

206. *See* HOLT, *supra* note 109, at 188–93; *see also* Jonathan R. Macey & Geoffrey P. Miller, *Origin of the Blue Sky Laws*, 70 TEX. L. REV. 347, 348–50 (1991) (arguing that the Blue Sky laws targeted highly speculative issuers as much as fraudulent issuers).

207. *See* OTT, *supra* note 202, at 162–66.

208. *See id*. at 159.

209. *Id*. at 132–34 (quoting Thomas Nixon Carver).

210. *Id*. at 166.

the rhetoric of power and the reality of powerlessness.

As this shows, any account of shareholder power in the twentieth century has to take into account not only the actual spread of shareholding but also public perceptions of it.[211] While shareholding spread in the 1920s, and would spread further later in the century, it was never universal or evenly distributed. Share ownership did increase through the century; at its high point, in the early 2000s, about 65% of Americans reported directly or indirectly owning some stock.[212] For most of the previous century, though, the percentage was lower—decreasing in the 1930s and 1940s—and throughout the century most Americans who owned stock did not own very much.[213] The shareholder class never equated with the middle class, much less the American population as a whole, and even today "the modal shareholder [in the data] is rich, old, and white."[214]

Beyond these straightforward measures of individual ownership, though, swirled debates over the shareholder's actual and potential roles in controlling the corporation. In an era when the giant corporation appeared the central institution of American society, such questions had profound political and economic implications. If the shareholding class mirrored the larger populace, and if small shareholders had power over their corporations, then other attempts to curb corporations' actions may have been unnecessary. One strand of commentary, stretching from the 1920s through most of the century, simply asserted that shareholding was presently widespread and that shareholders were presently powerful—witness Carver's assertion on the collective power of shareholders quoted above.[215] In the 1950s, the Advertising Council and the NYSE mounted an elaborate publicity campaign announcing that the nation had entered an era of "People's Capitalism," a phase that left "the impression that the

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211. Considering the importance of the image of the shareholder in the twentieth century, relatively little scholarship on the topic has appeared in the legal academy with a few notable exceptions. *See, e.g.*, Dalia Tsuk, *Corporations Without Labor: The Politics of Progressive Corporate Law*, 151 U. PA. L. REV. 1861, 1865 (2003); Dalia Tsuk Mitchell, *Shareholders as Proxies: The Contours of Shareholder Democracy*, 63 WASH. & LEE L. REV. 1503, 1504 (2006); *see also* William W. Bratton & Michael L. Wachter, *Shareholders and Social Welfare*, 36 SEATTLE U. L. REV. 489, 489 (2013) (addressing "how shareholders matter for social welfare, finding that different and contrasting answers have prevailed during different periods of recent history"); Jennifer Hill, *Visions and Revisions of the Shareholder*, 48 AM. J. COMP. L. 39, 41 (2000) ("This article traces a number of visions of the role of shareholder which can be discerned at various times in corporate law.").

212. Dennis Jacobe, *In U.S., 54% Have Stock Market Investments, Lowest Since 1999*, GALLUP (Apr. 20, 2011), http://www.gallup.com/poll/147206/Stock-Market-Investments-Lowest-1999.aspx.

213. *See* Cheffins, Bank & Wells, *Questioning "Law and Finance*,*" supra* note 113, at 601.

214. Bratton & Wachter, *supra* note 211, at 521.

215. *See supra* text accompanying notes 207–09.

relative importance of all persons who own stock is the same and that the benefits derived from owning stock accrue in equal measure to all stockholders."[216] That was not, of course, correct.

More common were various commentators who acknowledged that, while shareholding was not then universal or evenly distributed and shareholders were at that time weak, developments were unfolding which would soon change that.[217] One indication of this view was the coining at mid-century of the terms "corporate democracy" and "shareholder democracy," which served as a critique of contemporary corporate governance practices—after all, the phrases were used to demand more democracy—but also carried the normative message that greater shareholder participation in corporate governance was both possible and desirable.[218] The terms also linked shareholder participation in corporate governance, a contested concept, with political suffrage, an unquestioned good.[219]

Even more striking were prophecies that the spread of shareholding would usher in a capitalist utopia, turning ordinary Americans into the true owners of the means of production and erasing older divides between labor and capital. This idea lurked in Berle and Means's *The Modern Corporation and Private Property*, published in 1932,[220] but became even more popular in later decades. The NYSE's campaign announcing "People's Capitalism" implied that widespread stock ownership signaled both the transcendence of class divides and approval of the present American economic system, a point attractive to Cold War audiences (and to stock exchanges seeking to avoid further regulation).[221] After mid-century, the growth of workers' collective investment vehicles and

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216. EDWIN BURK COX, TRENDS IN THE DISTRIBUTION OF STOCK OWNERSHIP 8 (1963) (internal quotation marks omitted); *see* LIVINGSTON, *supra note* 23, at 17 (stating that the NYSE and the Advertising Council used the phrase "people's capitalism" (internal quotation marks omitted)); *see also* Victor Perlo, *"People's Capitalism" and Stock-Ownership*, 48 AM. ECON. ASS'N 333, 333 (1958) (examining critically the widespread "contention that ownership of American industry has become democratic in character through the dispersion of stockholdings among the population").

217. *See, e.g.*, THOMAS NIXON CARVER, THE PRESENT ECONOMIC REVOLUTION IN THE UNITED STATES 112 (1926); ROBERT S. BROOKINGS, INDUSTRIAL OWNERSHIP: ITS ECONOMIC AND SOCIAL SIGNIFICANCE 9 (1925).

218. "Corporate democracy" was apparently coined in the 1940s by shareholder rights activist Lewis Gilbert. *See* LIVINGSTON, *supra note* 23, at 68–69 (1958). "Shareholder democracy" first appears in Franklin C. Latcham & Frank D. Emerson, *Proxy Contest Expenses and Shareholder Democracy*, 4 W. RES. L. REV. 5, 7 (1952).

219. For one critique of this connection, see Usha Rodrigues, *The Seductive Comparison of Shareholder and Civic Democracy*, 63 WASH. & LEE L. REV. 1389, 1390 (2006).

220. *See, e.g.*, Tsuk, *supra* note 211, at 1884 (discussing how Berle and Means's account of the corporation erases labor and sees only two classes—managers and shareholders).

221. *See* LIVINGSTON, *supra note* 23, at 17; *see also* Perlo, *supra* note 216, at 333–35.

of union-controlled retirement funds produced theorists of "pension fund socialism," who insisted that workers would eventually come to control the means of production through these funds.[222] These dreams were never quite realized—the shareholding class, if there was one, never did come to self-awareness and seize control of the means of production—but they were one way of conceptualizing the possibilities of shareholder power in the twentieth century.

More often, though, the typical shareholder in the public corporation was depicted as powerless. It was a view at odds with that of the previous century; while in the nineteenth century it was the minority shareholder who was threatened with loss of power, in the twentieth century it became almost a commonplace that *all* shareholders would lack power as ownership became more dispersed.[223] This view was given its enduring form in *The Modern Corporation and Private Property*, which diagnosed the separation of ownership and control as the endemic condition of the large public corporation.[224] Berle and Means did not think this characterized all corporations in 1932, but they believed it was the irresistible trend.[225] Following them, most observers accepted that a growing dispersion of share ownership would negate whatever power shareholders had and that as shareholding continued to spread, power, or as they called it "control," would continue to flow to management.[226]

Berle and Means laid much of the responsibility for the separation of ownership and control on economic and technological developments; at

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222. *See* PETER F. DRUCKER, THE UNSEEN REVOLUTION: HOW PENSION FUND SOCIALISM CAME TO AMERICA 1 (1976) ("If 'socialism' is defined as 'ownership of the means of production by the workers' . . . then the United States is the first truly 'Socialist' country.").

223. Others commentators have noted the shift in concern over corporate power; Naomi Lamoreaux, for instance, has written that concerns about "internal . . . corporate governance" only became an issue as "small investors bought shares in corporations." *See* Lamoreaux, *Scylla or Charybdis?*, *supra* note 84, 22–23. Eric Hilt has differentiated between "Problem 1" corporate governance issues, which arise when "ownership is highly diffuse" and are a characteristic twentieth-century challenges, and "Problem 2" issues, which occur when "controlling shareholders [take] actions that benefit themselves at the expense of minority or outside investors" and were especially significant concerns in the nineteenth century. Hilt, *History of American Corporate Governance*, *supra* note 43, at 3.

224. *See* BERLE & MEANS, *supra* note 2, at 4–5.

225. *See id.* at 60.

226. *See* Clifford G. Holderness, *The Myth of Diffuse Ownership in the United States*, 22 REV. FIN. STUD. 1377, 1401 (2009) (describing Berle and Means as having the "reigning explanation of U.S. corporate ownership" (internal quotation marks omitted)). But there have always been dissenters to Berle and Means, from the 1939 Temporary National Economic Committee, see TEMPORARY NATIONAL ECONOMIC COMMITTEE, 76th CONG., THE DISTRIBUTION OF OWNERSHIP IN THE 200 LARGEST NONFINANCIAL CORPORATIONS 6 (Comm. Print 1940), which questioned whether shareholders really lacked such power, to contemporary critics who believed that blockholding in U.S corporations is far more frequent than Berle and Means foresaw. *See, e.g.*, Holderness, *supra*, at 1402.

moments in their book, it appeared as though corporate giganticism and shareholder powerlessness were simply the unavoidable results of economic development.[227] But they also spent a good deal of space discussing specific legal changes that, in just the last few decades, they believed further removed protections once afforded shareholders.[228] Berle and William Z. Ripley, the 1920s crusader against corporate management who summarized his criticisms in the best-selling *Main Street and Wall Street*,[229] each catalogued an array of shareholder-unfriendly changes in their works, but each took a particular change as a *bête noire*. Ripley originally came to attention in the 1920s for his campaign against nonvoting stock, which obviously removed the shareholder's power within the corporation.[230] *The Modern Corporation* runs through many legal changes that gave managers power over shareholders, but Berle focused special ire on the adoption of "blank check stock," which empowered management to rearrange a corporation's capital structure.[231] Note that Ripley laid much of the blame for these legal changes on jurisdictional competition, identifying Delaware as a particularly baleful influence,[232] while *The Modern Corporation* took a broader view of these developments, not pinning responsibility for such legal changes on the peculiarities of U.S. federalism.[233]

The diagnosis of shareholder enfeeblement, though, only raised other questions: Was shareholder weakness really so bad? And even if so, was the solution to reverse course and return power to shareholders? Discussions of shareholder power usually suggested that such power was a good thing and that lack of power was bad, as it left shareholders defenseless against rapacious managers or controlling shareholders.[234]

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227. BERLE & MEANS, *supra* note 2, at 47.

228. *See generally id.* at 127–220.

229. WILLIAM Z. RIPLEY, MAIN STREET AND WALL STREET (1929).

230. *See* Wells, *The Birth of Corporate Governance*, *supra* note 198, at 1269.

231. *See* BERLE & MEANS, *supra* note 2, at 186.

232. RIPLEY, *supra* note 229, at 28 ("The root of much of our trouble in maintaining decent standards of corporate practice arises . . . from . . . multiplicity and overlapping of jurisdictions.").

233. *See* Wells, *The Birth of Corporate Governance*, *supra* note 198, at 1289. Perhaps Berle did not pay a great deal of attention to a particular jurisdiction in *The Modern Corporation* because it would take away from his underlying thesis that such developments were inevitable and produced by the grand sweep of history.

234. Indeed, one recent article argues that in the United States overall legal protections for shareholders in U.S. public corporations did not decline significantly across the twentieth century but rather experienced a modest increase. *See* Cheffins, Bank & Wells, *Shareholder Protection Across Time*, *supra* note 22, at 7–8. This suggests that shareholder power, as discussed in the present Article, was not strongly correlated with shareholder protections; shareholders can lack power to influence corporate decisions even in a time when they enjoy significant protection against expropriation.

But perhaps shareholder weakness contained the seeds of its own solution. In the 1920s, even as Ripley was attacking legal schemes that stripped shareholders of power, other writers were arguing that the separation of ownership and control would prove beneficial because the knowledge that so many small shareholders depended on them—that so many shareholders lacked power—would impel corporate managers to new ethical heights.[235] For Berle and Means, while shareholder powerlessness was a problem, the solution was not to reverse course. They depicted shareholder powerlessness as inevitable and left little hope that shareholders could realistically wield any power in the modern corporation.[236] Berle's solution was instead to impose greater fiduciary duties on managers—a move that substituted shareholder protection for shareholder power.[237] In a noted exchange with Harvard professor Merrick Dodd, Berle suggested that the separation of ownership and control required that managers be held to strict fiduciary standards, lest they be easily able to plunder the corporations they controlled.[238] Yet elsewhere Berle wavered; *The Modern Corporation* closes with a more favorable vision of management evolving into a "neutral technocracy" no longer bound to shareholders but able to run the corporation for the benefit of all society.[239]

But perhaps if shareholders were individually weak, they could still act collectively. There were economic reasons why small shareholders in a public corporation would probably never organize themselves to exert power against its managers; the cost of organization would almost certainly outweigh any shareholder benefit. A permanent organization representing small shareholders, however, might be different. In *Main Street and Wall Street*, Ripley argued for the establishment of "permanent committees, representative exclusively of shareholders' interests," at least for "large concerns which have attained a clear status of widely diffused public ownership."[240] Such a committee would protect shareholders' interests chiefly through publicity, investigation, and

235. Wells, *The Birth of Corporate Governance*, *supra* note 198, at 1269; OTT, *supra* note 202, at 131.

236. BERLE & MEANS, *supra* note 2, at 47.

237. *See* Mitchell, *supra* note 211, at 1534–35.

238. A. A. Berle Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1367 (1932).

239. BERLE & MEANS, *supra* note 2, at 356.

240. RIPLEY, *supra* note 229, at 133; *see* Tsuk Mitchell, *supra* note 211, at 1530 (examining Ripley's proposal); *see also* Lawrence E. Mitchell, *The "Innocent Shareholder": An Essay on Compensation and Deterrence in Securities Class-Action Lawsuits*, 2009 WIS. L. REV. 243, 275–76 (examining William O. Douglas's proposal, which is introduced in this Article's next paragraph). For an updated version of these proposals, see generally Kelli A. Alces, *The Equity Trustee*, 42 ARIZ. ST. L. J. 717, 735–55 (2010).

regular independent audits.[241]

William O. Douglas, one of the era's best-known legal minds, made a similar but more ambitious proposal a few years later. In an article that appeared shortly before he became Chairman of the Securities and Exchange Commission (SEC), *Directors Who Do Not Direct*, Douglas began by excoriating boards of directors following "many different abuses and malpractices disclosed in recent years."[242] Citing both recent corporate scandals and *The Modern Corporation*, Douglas argued that boards had proven insufficient to guarantee good corporate behavior and, importantly, to protect small shareholders.[243] So he proposed new ways to "mobilize scattered and disorganized stockholders and other investors into an active and powerful group so that there may be a competent and respectable patrol of the field of finance."[244] Drawing on the model of bondholders' associations that had developed over the past decades, Douglas argued that a separate organization, apart from the board, was needed to protect shareholders.[245] Rather than a series of privately organized committees, as Ripley seemed to envision, Douglas urged the formation of a single quasi-public corporation to represent shareholders—"a permanent and competent organization . . . [that] must be organized and must function on a national basis."[246] Only such an organization, one with government backing, could sufficiently mobilize scattered shareholders and ensure their voices were heard at annual meetings.[247] A single organization would also, he wrote, overcome the costs of shareholder activism so that "the costs of moving for the protection of investors would be borne by a large rather than a small group."[248]

Neither Ripley's nor Douglas's visions came to pass; while isolated organizations sprang up claiming to represent shareholders, none gained much traction, much less posed a significant challenge to management. In the next few decades, stockholding continued to spread; while the number of stockholders remained flat for roughly twenty years following

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241. *See* RIPLEY, *supra* note 229, at 133.

242. William O. Douglas, *Directors Who Do Not Direct*, 47 HARV. L. REV. 1305, 1306 (1934).

243. *Id.* at 1306–07.

244. *Id*. at 1307. Douglas also proposed mandating independent directors on a corporation's board, anticipating developments later in the century. *Id.* at 1313–14; *see also* Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950–2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465, 1468 (2007) ("The move to independent directors . . . has become . . . a mandatory element of corporate law.").

245. Douglas, *supra* note 242, at 1331–32.

246. *Id.* at 1332.

247. *Id.* at 1333.

248. *Id*.

the beginning of the Great Depression, the booming economy of the 1950s, and aggressive marketing by the securities industry led to renewed growth in ownership.[249] The number of stockholders in the United States rose from 6.5 million in 1952 to 25 million in 1968.[250] Although not all studies found dispersed shareholding and consequent shareholder weakness in all corporations, many of the studies undertaken during this period documented the dispersal of ownership and lack of controlling or even significant shareholders in a great many public corporations, and further concluded that this was an accelerating trend across the twentieth century.[251] In the years following publication of the *The Modern Corporation*, Berle and Means's prophecy for the American corporation—the controlling manager and powerless shareholder—appeared to have been borne out.

In the face of all this, what is surprising is that shareholder power was not completely dead. Even in the middle of the American century, it would still find its champions, individuals who insisted that shareholders should, and could, exert power over the modern American corporation.

IV. SHAREHOLDER POWER IN AN ERA OF POWERLESSNESS

A. *The 1950s and the Gadflies*

In the world of the Berle–Means corporation, shareholder powerlessness was a given. A corporation's senior executives, it was widely assumed, called the shots, dominated a largely passive board of directors, and had such a firm grip on the proxy machinery that a meaningful shareholder challenge to their actions was near impossible.[252]

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249. *See* Cheffins, Bank & Wells, *Questioning "Law and Finance," supra* note 113, at 601 (discussing the growth of stock ownership in the twentieth century); *see also* JANICE M. TRAFLET, A NATION OF SMALL SHAREHOLDERS: MARKETING WALL STREET AFTER WORLD WAR II 40–67 (2013) (discussing post-World War II campaigns to encourage stock ownership).

250. Cheffins, Bank & Wells, *Questioning "Law and Finance," supra* note 113, at 601. It is something of a puzzle as to why shareholding expanded if shareholders lacked power. *See id.* at 610–11. It may be that shareholders believed themselves reasonably protected by other mechanisms. *See id*. Another possibility is that the rewards that shareholders gained from stockholding were sufficiently great to outweigh lack of power.

251. Cheffins & Bank, *supra* note 69, at 450. Several studies argued that blockholdings and even controlling shareholders were by no means absent from American corporations, but these did not really disprove Berle and Means's central assertion that there existed a separation of ownership and control at many large, American public corporations. *See id.* at 445, 467 (concluding after a review of the literature that "the Berle and Means orthodoxy remains a valid starting point for analysis of U.S. corporate governance").

252. There are several classic works on the supine corporate board. *See, e.g.*, MYLES L. MACE, DIRECTORS: MYTH AND REALITY 108 (1971); Douglas, *supra* note 242, at 1307, 1315. For a discussion on moves toward independent directors and a reconstituted and more powerful board, see generally Gordon, *supra* note 244.

Many observers defended this state of affairs. The 1950s were the heyday of the ideology of managerialism—the belief that, while managers owed duties to shareholders, they had duties to other constituencies as well, and they should be free to balance the needs of those various constituencies in running the corporation.[253] In 1951, *Fortune* magazine announced that corporate "management [was] no longer occupied exclusively with the interests of the stockholder, who often ha[d] become a kind of contingent bondholder rather than a part owner, and who rarely exert[ed] any direct influence on the affairs of the company."[254] As the shareholder's political power in the corporation waned, and as her economic role also diminished (as more firms financed themselves through retained earnings),[255] it no longer seemed sensible to give the shareholder a privileged place in the corporate hierarchy. The economist Peter Drucker, for instance, believed the concept of the "share" should be abolished, leaving a shareholder no voting rights but only a claim on corporate profits and assets upon liquidation.[256]

It is not as though shareholders were left utterly vulnerable to managerial overreach in this era; shareholder power may have waned, but other mechanisms functioned in its stead to protect shareholders. Shareholders in public corporations had been provided information and protection against certain forms of fraud and self-dealing following the adoption of the Securities Acts of 1933 and 1934, and proxy disclosure increased further in the early 1940s.[257] The 1950s also saw a rise in the number of hostile takeover attempts, which in a later day would be heralded as the beginning of a significant, manager-constraining market

253. *See* Edward S. Mason, *The Apologetics of "Managerialism,"* 31 J. BUS. 1, 3, 6 (1958); Harwell Wells, *"Corporation Law Is Dead": Heroic Managerialism, Legal Change, and the Puzzle of Corporation Law at the Height of the American Century*, 15 U. PA. J. BUS. L. 305, 309 (2013) [hereinafter Wells, *"Corporation Law Is Dead"*]. Managerialism may have been more rhetoric than reality. *See* David Millon, *Radical Shareholder Primacy*, 10 U. ST. THOMAS L.J. 1013, 1015, 1022 (2013) (claiming that a version of "shareholder primacy" was operating during much of the twentieth century).

254. EDITORS OF FORTUNE WITH RUSSELL W. DAVENPORT, U.S.A.: THE PERMANENT REVOLUTION 80 (1951).

255. It is actually not clear whether more firms did finance themselves through retained earnings, but it was widely believed that this was the case. In turn, this made corporate management appear even more autonomous, as they did not appear to need to access capital markets. *See* John Lintner, *The Financing of Corporations*, *in* THE CORPORATION IN MODERN SOCIETY 166, 168–71 (Edward S. Mason ed., 1959).

256. DRUCKER, *supra* note 222, at 339–42.

257. *See* JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE 269–70 (3d ed. 2003).

for corporate control.[258] At the time, though, the positive effects of such a market went largely unrecognized, and the "raiders" who attempted takeovers appeared as merely interested in looting the corporations they had targeted.[259] It may also be that shareholders enjoyed reasonable legal protections provided by both state and federal law, even if they lacked the power to make their voices heard in corporate boardrooms.[260] But this just returns focus to the issue of power within the corporation and shareholders' relative lack of it during most of the twentieth century.

Shareholders retained the basic legal rights they always had: the rights to vote, sell, and sue.[261] Of these rights, though, only selling appeared to be a reasonable course of action for the average shareholder. Filing a derivative suit became more difficult in this period at the same time that shields for managers' business decisions actually increased. Derivative actions, which had enjoyed some success in the 1920s and 1930s, were curtailed in many jurisdictions by the imposition of requirements for posting of sizeable bonds that would deter litigation by small shareholders.[262] Meanwhile, the courts in this period read even more broadly the business judgment rule, which already shielded managers from accusations of negligence.[263] These developments were part of a more general tilt against shareholder self-defense through litigation. As one historian noted in a passage illuminating shareholders' comparative status during the managerial era: "[S]hareholders and their lawyers became [seen as] the real threats to the integrity of the corporation and thereby the well-being of the communities they inhabited. Corporate managers, by contrast, became the defenders of the enterprise against the rapacious and self-interested shareholder."[264]

The story of shareholder voting, particularly for directors, is much the same. The basic facts are not in dispute: shareholders who attempted to

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258. The conventional wisdom—there was no market for corporate control before the 1950s—appears wrong, as unfriendly takeover bids can be found as early as 1901. John Armour & Brian Cheffins, *The Origins of the Market for Corporate Control*, 2014 U. ILL. L. REV. 1835, 1838–39. Hostile takeovers, however, were an intermittent phenomenon prior to 1950. *Id.* at 1848.

259. *See, e.g.*, Eugene V. Rostow, *To Whom and for What Ends Is Corporate Management Responsible?*, *in* THE CORPORATION IN MODERN SOCIETY, *supra* note 255, at 46, 47. The market for corporate control was first clearly addressed in Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 112–14 (1965).

260. *See* Cheffins, Bank & Wells, *Shareholder Protection Across Time*, *supra* note 22, at 7–8.

261. *See supra* note 23 and accompanying text.

262. Gregory A. Mark, *The Corporate Economy: Ideologies of Regulation and Antitrust, 1920–2000*, *in* 3 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 613, 636–37 (Michael Grossberg & Christopher Tomlins eds., 2008).

263. *See* Dalia Tsuk Mitchell, *Status Bound: The Twentieth Century Evolution of Directors' Liability*, 5 N.Y.U. J. L. & BUS. 63, 139–41 & n.295 (2009).

264. Mark, *supra* note 262, at 636–37.

use access to the proxy machinery to vote management out almost always failed.[265] Shareholders had the task of electing at least some and often all of the board of directors every year, but control of the nominating process lay in the hands of management, who nominated exactly as many candidates as there were open board seats.[266] Contested elections unconnected to a full-fledged takeover attempt were extraordinarily rare.[267] Insurgent shareholders who wished to contest an election had to bear the costs of nominating and publicizing their candidates, costs they could recoup only if they managed to win control of the target's board, rendering anything less than an all-out control fight worthless.[268] Out of three thousand publicly traded companies in the United States in 1956, only twenty-four faced a proxy contest; in 1957, only twelve.[269]

There were a few attempts to organize shareholders during this period. In the 1940s, the publisher B.C. Forbes founded the "Investors League," which billed itself as a forum for shareholders but, apparently, chiefly advocated for Forbes's conservative policies, notably the end of double taxation of dividends.[270] In 1950 a separate organization, "United Shareholders," split off from the Investors League, but again evidence that it engaged in any substantive activity is thin.[271]

But shareholder power was not completely abandoned. Even as shareholder democracy was moribund in practice, it thrived in theory. A cottage industry of academics and activists arose around mid-century to agitate for shareholder power exercised through voting, and in the mid-1950s, a small spate of works addressing corporate or shareholder democracy subsequently appeared.[272] More consequentially, a few activists, apparently immune to the general belief that shareholders should be passive and had no chance of being anything else, began to exploit a procedure that would become the most significant tool for

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265. *See* Daniel M. Friedman, *SEC Regulation of Corporate Proxies*, 63 HARV. L. REV. 796, 820 (1950).

266. *See* Anil Shivdasani & David Yermack, *CEO Involvement in the Selection of New Board Members: An Empirical Analysis*, 54 J. FIN. 1829, 1829 (1999).

267. *See* Irwin H. Warren & Kevin G. Abrams, *Evolving Standards of Judicial Review of Procedural Defenses in Proxy Contests*, 47 BUS. L. 647, 648–49 (1992).

268. During this period, case law made clear that in a proxy contest for control, incumbent management could use corporate funds to support its campaign for reelection while insurgents would first need to win and then seek shareholder reimbursement for expenses incurred in the fight. JAMES D. COX ET AL., CORPORATIONS §§ 13.21–13.22 (1997).

269. LIVINGSTON, *supra* note 23, at 47.

270. *See id*. at 120–22.

271. *See id*. at 123–25.

272. *See* Wells, *"Corporation Law Is Dead," supra* note 253, at 339; Thomas Ehrlich, Book Review, 74 HARV. L. REV. 1671, 1671 (1961); Bayless Manning, Book Review, 67 YALE L.J. 1477, 1486 (1958).

shareholder voice and power in the next few decades: the shareholder proposal.

In 1942, as part of a broader set of proxy reforms, the SEC adopted Rule X14a-7 (now Rule 14a-8), the so-called "town hall rule."[273] This rule required public corporations to include in their proxies, at their expense, a proposal that a shareholder intended to make at the corporation's annual meeting, together with a short supporting statement.[274] The justification for this new rule was that this would merely supplement a power shareholders already had, the power to make a proposal at the annual meeting. Corporations were free to include a statement opposing the shareholder's proposal.[275] As a means of forcing the corporation to do anything, the shareholder proposal was not much; the overwhelming majority of shareholders during this era voted with management (and thus against nonmanagement proposals), and even if a proposal won a majority vote—which they almost never did—the proposal was merely precatory.[276] Management was no more required to follow a successful proposal than any other suggestion from shareholders.[277] But this remarkably weak weapon galvanized a small group of shareholder activists who, during the 1940s and 1950s, saw it as a tool to make their dreams of shareholder power a reality.[278] Hence an oddity: the decades during which shareholder power was at its nadir in the United States were also those that produced some of its most passionate advocates.

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273. Wells, *"Corporation Law Is Dead," supra* note 253, at 340.

274. *See* General Rules and Regulations, Securities and Exchange Act of 1934, 17 C.F.R. § 240.14a-8 (2014).

275. Frank D. Emerson & Franklin C. Latcham, *The SEC Proxy Proposal Rule: The Corporate Gadfly*, 19 U. CHI. L. REV. 807, 807 (1952).

276. One survey of all shareholder proposals made from 1948 to 1951 found that 232 reached shareholder votes, and only two proposals at one company passed over management opposition. *See id.* at 828–29. Those proposals were at the Sparks-Withington Company, and their proponent was at the same time waging an ultimately successful proxy battle for control of the company. *Id.* at 829.

277. The reason being the same as it is today, that management of the corporation is lodged with the board, not shareholders, and shareholders should not in general be able to bypass the directors and initiate corporate decisions. *See, e.g.*, DEL. CODE. ANN. tit. 8, § 141(a) (West 2014) ("The business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors."). If shareholders are unhappy with the board, they can theoretically elect a different one.

278. Richard Marens, *Inventing Corporate Governance: The Mid-Century Emergence of Shareholder Activism*, 8 J. BUS. & MGMT. 365, 365–66 (2002).

At the time these shareholder activists were dismissed as "gadflies."[279] According to two observers, "[t]his small group, cheered on by a few, ridiculed by more, and dreaded by corporate management, really created the field of shareholder activism."[280] The most visible were the Gilbert Brothers, John and Lewis, who began agitating for corporate changes in the 1930s, and Wilma Soss—president of the Federation of Woman Shareholders in American Business, Inc.—who came to prominence in the 1950s.[281] The Gilberts were the first to get attention. Lewis Gilbert owned a few shares in a great many corporations, and with inherited wealth but no regular employment, he attended a great many annual meetings.[282] Beginning in the 1930s, he started appearing at until-then staid stockholders' meetings, peppering corporate executives with queries about the operation of the firms in which he owned shares.[283] His questions could be incisive. He was a scourge of high executive compensation at firms such as U.S. Steel and American Tobacco, and in 1941 he questioned the president of Standard Oil Co. about sales of oil to the Axis powers.[284] In the postwar years, Lewis Gilbert and his brother John, whom he drafted into his crusade, became a fixture at annual meetings, pushing corporate governance reforms such as holding shareholder meetings in accessible places, limits on executive compensation, and cumulative voting.[285] Gilbert was often treated as a slightly absurd figure, in part, because of his inflated self-importance and habit of referring to himself in the third person—"[Management] can't

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279. The best modern account of their careers, and a rare one that does not dismiss them, is by Richard Marens. *Id*; *see also* LIVINGSTON, *supra* note 23, at 81–99 (discussing how Lewis Gilbert became "America's No. 1 Militant Shareholder"); LAUREN TALNER, THE ORIGINS OF SHAREHOLDER ACTIVISM 1–5 (1983) (providing the history of shareholder activism and accrediting its birth to Lewis Gilbert).

280. ROBERT A. G. MONKS & NELL MINOW, CORPORATE GOVERNANCE 162 (3d ed. 2004).

281. For more information on the Gilberts, see generally LEWIS D. GILBERT, DIVIDENDS AND DEMOCRACY (1956) (accounting the independent shareholder movement), as well as John Bainbridge, *The Talking Stockholder—I*, NEW YORKER, Dec. 11, 1948, at 40, *available at* http://www.newyorker.com/magazine/1948/12/11/the-talking-stockholder-i (subscription required) [hereinafter Bainbridge, *The Talking Stockholder—I*] and John Bainbridge, *The Talking Stockholder—II*, NEW YORKER, Dec. 18, 1948, at 33, *available at* http://www.newyorker.com/magazine/1948/12/18/the-talking-stockholder-ii (subscription required) [hereinafter John Bainbridge, *The Talking Stockholder—II*]. For a discussion on Soss, see Logan, *supra* note 16. A third very public gadfly appeared later in the century: Evelyn Davis. *See* Joseph A. Giannone, *Investor Gadfly Davis Calls It Quits . . . for Now*, REUTERS (Apr. 19, 2012), http://www.reuters.com/article/2012/04/19/us-corporategovernance-davis-idUSBRE83I1CS20120419.

282. Bainbridge, *The Talking Stockholder I*, *supra* note 281.

283. *Id.*

284. *See* Bainbridge, *The Talking Stockholder II*, *supra* note 281; TALNER, *supra* note 279, at 3.

285. W. Covington Hardee, Book Review, 67 HARV. L. REV. 1100, 1101–02 (1954).

help taking a narrow view[;] Gilbert sees the whole complex picture[, he] is on Olympus."[286] But he kept the older vision of the stockholder-as-owner alive and also earned the grudging respect, or at least toleration, of corporate leaders.[287]

Indeed, Gilbert is an important reminder that, while share ownership had become in the eyes of many a very peculiar kind of "ownership" stripped of power over what one owned, older ideas that ownership entailed responsibility and thus demanded participation were by no means dead. As the political scientist Richard Marens points out, "[o]wnership to Gilbert meant responsibility as well as rights."[288] Gilbert ultimately thought the annual meeting should function as "a democratic forum in which each owner of stock contributed to . . . the formulation of corporate policy," and he hewed to an old-fashioned belief that shareholders really were the owners of a corporation and management were their employees.[289]

The other activist to gain comparable public attention was Wilma Soss. One feature of twentieth-century dispersal of ownership was the growth of female shareholding; while exaggerated by organizations such as the NYSE, which eagerly sought to show that the average American man and woman were shareholders, it was true that the number of women holding shares increased over the century.[290] Soss, a former publicist, seized on this trend in 1947 by founding the Federation of Women Shareholders in American Business, Inc.[291] By the early 1950s the organization had over a thousand dues-paying members, and Soss became another fixture at annual meetings, her trademark being the prescient proposal—which many observers at the time mocked—that a board of directors must have at least one female member.[292]

Although they submitted hundreds of proposals over the decades—as late as 1983, for instance, the Gilberts put forward 198 shareholder proposals—the gadflies rarely won, and much of the attention they

286. Bainbridge, *The Talking Stockholder II*, *supra* note 281, at 33.

287. *Id.*

288. Marens, *supra* note 278, at 373.

289. GILBERT, *supra* note 281, at 28.

290. The NYSE's 1952 survey of share ownership found the largest single numerical group of stockholders, 2,130,000, were "housewives—nonemployed," but this number almost certainly included many women who owned stock jointly with their husbands or families where the stock was "registered in the wife's name for tax purposes." LIVINGSTON, *supra* note 23, at 31–32.

291. Logan, *supra* note 16, at 34–36.

292. *Id.* at 44–46. Soss was ahead of her time. *See, e.g.*, Kenneth R. Ahern & Amy K. Dittmar, *The Changing of the Boards: The Impact on Firm Valuation of Mandated Female Board Representation*, 127 Q.J. ECON. 137, 138 (2012) (discussing mandatory representation requirements for women on Norwegian corporations' boards of directors).

garnered was derived from their sheer novelty.[293] As one journalist put it, they stood out because at that time most "[s]tockholders [were] known for their indifference to everything about the companies they own[ed] except dividends and the approximate price of the stock."[294] The gadflies, in contrast, took seriously both the notion that they were "owners" of the corporation and the possibility that the tools of corporate law would allow them to affect corporate practice. In other words, they believed that they at least had the possibility of wielding power inside the corporation.[295]

For the most part, these gadflies were pushing familiar good corporate government proposals in the belief that shareholder democracy, via shareholder proposals, would actually improve the operation of the corporation, and therefore make shareholders more money.[296] Gilbert even linked increased profits to shareholder participation in the title of his book, *Dividends and Democracy*.[297] The shareholder proposal, however, did not have to be limited to governance proposals, as shown by a remarkable shareholder's campaign conducted at the end of the 1940s.

In 1948, the "militant" pacifist James Peck and the civil rights pioneer Bayard Rustin each purchased one share of stock in the Greyhound Bus Company to target that company's operation of segregated buses in the American South.[298] When Peck rose to speak at the company's annual meeting, "the corporate secretary allowed him to speak but suggested that he was technically out-of-order and should have submitted a proxy resolution."[299] Peck did so a year later, submitting "A Recommendation that Management Consider the Advisability of Abolishing the Segregated Seating System in the South," only to have Greyhound reject it, arguing that it "was not a proper subject" for shareholder proposals.[300] While the SEC initially supported Peck's right to include the statement in Greyhound's proxy, it reversed itself in 1951, holding that the shareholder proposal was not intended to allow stockholders to communicate on "matters which are of a general economic, social, or

293. Douglas Martin, *John J. Gilbert is Dead at 88; Gadfly at Corporate Meetings*, N.Y. TIMES (July 17, 2002), http://www.nytimes.com/2002/07/17/business/john-j-gilbert-is-dead-at-88-gadfly-at-corporate-meetings.html.

294. LIVINGSTON, *supra* note 23, at 81.

295. *See* Marens, *supra* note 278, at 368, 384.

296. *See* Rose, *Shareholder Proposals*, *supra* note 150, at 2187, 2190–91.

297. *See* GILBERT, *supra* note 281, at 3 (stating that "more corporate democracy means more corporate dividends").

298. My account of Peck's activities against Greyhound draws heavily on Marens's account. Marens, *supra* note 278, at 371–72, 382.

299. *Id.* at 382.

300. Peck v. Greyhound Corp., 97 F. Supp. 679, 680 (S.D.N.Y. 1951).

political nature"—a ruling upheld by a federal court.[301] Peck's campaign failed but was a harbinger of social-issues proposals that would flourish in the next decade.

Gadflies may not have been powerful, but they were annoying. Corporations were soon pushing back against them and trying to limit use of the shareholder proposal. To corporations, power for shareholders enabled harassment by shareholders.[302] In 1952, in the wake of the fight over the Greyhound proposal, the SEC formalized its earlier stance that shareholder proposals were not proper if they were "primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes."[303] Two years later, the SEC broadened this further, holding that managers could exclude proposals if they related to the corporation's "ordinary business," or if shareholders had proposed them in the previous three years and the proposals had not received a certain percentage of votes when earlier proposed.[304]

Yet even as corporations sought to throttle shareholder dissent, they also sought to convince shareholders that they were important to the ongoing success of the company. Spurred not only by gadflies but also by proxy battles in the 1950s, corporations opened departments of shareholder relations to stir up stockholder interest by, for instance, offering discounted products to shareholders.[305] They began to encourage shareholders to attend annual meetings, perhaps as a way to take the spotlight away from the gadflies; in 1961, for instance, "more than 20,000 shareholders" attended AT&T's annual meeting.[306] One of the attractions was free gifts for attendees; General Foods put on a lavish spread for meeting attendees, while American Tobacco shareholders could receive cartons of Lucky Strike cigarettes.[307] In a twist, at least one corporation even organized its shareholders to lobby on its behalf; in the early 1950s, AT&T backed a "Committee of 100,000 shareholders" to lobby successfully for the Federal Communications Commission to lower rates.[308] Most shareholders may have been utterly passive in the 1950s,

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301. *Id.*

302. Mitchell, *supra* note 211, at 1555 ("No longer interested in encouraging the small individual shareholder to participate, the SEC aimed to protect management from its owners' presumed harassment.").

303. *Id.* (internal quotation marks omitted).

304. *Id.* at 1557–59.

305. Rutterford, *supra* note 33, at 134.

306. *Id*. For an excellent account of shareholder meetings in the mid-1960s, see John Brooks, *Stockholder Season*, NEW YORKER, Oct. 8, 1966, at 159, *available at* http://www.newyorker.com/magazine/1966/10/08/stockholder-season (subscription required).

307. *Industry Courts the Hand That Feeds It*, TIME, June 14, 1954, at 100, *available at* http://content.time.com/time/magazine/article/0,9171,935183,00.html (subscription required).

308. Rutterford, *supra* note 33, at 134.

and any hints at shareholder assertiveness were to be controlled or dismissed, but corporations still found uses for their shareholders.

B. *The 1960s and Social Issues Investing*

In the late 1960s, the gadflies would be joined by "social issues" activists, often church-managed funds and later funds specially organized to engage in socially responsible investing, that again aimed to use shareholder proposals for broader progressive ends.[309] Like the gadflies, the social-issues groups employed shareholder proposals to pressure corporations to change policies on a range of issues. But unlike the gadflies, these social-issues activists were not just out to improve the corporation's economic performance.[310] Their causes were issues ranging from support for consumer safety to investments in South Africa, which they opposed chiefly on moral grounds (though they may have argued that such investments also hurt the corporation's bottom line).[311] These new activist shareholders did not, it appears, necessarily expect to win a majority of shareholder votes on their proposals;[312] rather, social-issue proposals were linked to larger campaigns that publicized the targeted corporations' activities in an attempt to mobilize both shareholder and non-shareholder actions against the corporation.[313] The social-issue proposal was a means for shareholder groups to exert power over the corporation, but its true audience reached beyond shareholders and managers.[314]

Social-issues campaigns only became widespread after 1970; before then, SEC rules and court decisions discussed above allowed corporations to refuse to include proposals "of a general political, social, or economic nature" in their proxies.[315] In the late 1960s, though,

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309. The Methodist Church organized its Pax World Fund in 1971, and two years later, the Dreyfus funds launched its Third Century Fund, "grouping together stocks of companies noted for their sensitivity to the environment and their local communities." Michael S. Knoll, *Ethical Screening in Modern Financial Markets: The Conflicting Claims Underlying Socially Responsible Investments*, 57 BUS. LAW. 681, 684–85 (2002).

310. *See, e.g.*, *id.* (referencing various issues that the social issues groups pressured corporations to undertake).

311. *See* TALNER, *supra* note 279, at 31–33.

312. Indeed, the first "social issues" campaign that enjoyed success was a drawn-out shareholder campaign against Cracker Barrel's policy against employing gays and lesbians, which only succeeded in 2002 after the SEC reversed an earlier ruling allowing Cracker Barrel to exclude a shareholder proposal dealing with discrimination from its proxy. *See* Margaret V. Sachs, *Social Proposals Under Rule 14a-8: A Fall-Back Remedy in an Era of Congressional Inaction*, 2 U.C. IRVINE L. REV. 931, 938–39 (2012).

313. *See id.* at 933–34.

314. *Id.* at 933.

315. SELIGMAN, *supra* note 257, at 270–71 (citing Peck v. Greyhound Corp., 97 F. Supp. 679, 680 (S.D.N.Y. 1951)).

environmental, consumer, and antiwar activists challenged this ban, submitting several shareholder proposals relating to social issues. In 1970, they won a court decision that management could no longer exclude such proposals from a corporation's proxy.[316] That same year, a group of environmental and antiwar activists backed by consumer advocate Ralph Nader launched "Campaign GM," which put forward a series of shareholder proposals asking General Motors' managers to, among other things, take environmental and social issues into account when reaching business decisions.[317] The resulting vote made it clear that social-issue proposals had little chance of winning—Campaign GM's proposals received less than 3% of shareholders' votes—but it also illustrated that even a proposal that lost a vote could be a win for activists.[318] The campaign attracted enormous publicity, and within a few months of the vote, GM adopted several of the activists' more modest recommendations, including naming its first African-American director and forming committees to monitor its social and environmental actions.[319]

Campaign GM inspired other activists to attempt to influence corporations through shareholder proposals, as well as to engage in targeted "social investing." During the 1970s, social-issue proposals became a part of the corporate governance landscape. In 1973, a group of nonprofits founded the Investor Responsibility Research Center (IRRC) to advise nonprofits on social-issue proposals and social issues of concern to investors.[320] By the early 1980s, activist groups were filing over 100 socially responsible shareholder proposals a year, covering topics ranging from corporations' activities in South Africa to involvement with nuclear power.[321] It is difficult to measure, or even decide how to measure, the success of such proposals; while they almost never won, their proponents apparently did not expect them to.[322] The proposals did focus public attention on corporate activities their proponents opposed and perhaps forced some shareholders to grapple with the activities of the corporations whose shares they owned. More significant, they show shareholders

316. *See* Med. Comm. for Human Rights v. SEC, 432 F.2d 659, 662–63, 667 (D.C. Cir. 1970) (requiring Dow Chemical to include in its proxy a shareholder proposal related to the sale of napalm).

317. *See* Donald E. Schwartz, *The Public-Interest Proxy Contest: Reflections on Campaign GM*, 69 MICH. L. REV. 419, 425 (1971).

318. *Id.* at 430.

319. *See* TALNER, *supra* note 279, at 28; Schwartz, *supra* note 317, at 519 n.481.

320. TALNER, *supra* note 279, at 44–46. Institutional Shareholder Services (ISS) purchased the IRRC in 2006, and a successor organization, the IRRC Institute, was established. *See* INVESTOR RESPONSIBILITY RESEARCH CTR. INST., http://irrcinstitute.org/about.php?page=history&nav=3 (last visited May 1, 2015).

321. TALNER, *supra* note 279, at 46–48.

322. Sachs, *supra* note 312, at 933.

rejecting the passive role assigned to them in the Berle–Means corporation and, instead, using the tools at hand to push against corporate policies they disliked.

V. THE END OF THE CENTURY: INSTITUTIONAL INVESTORS AND THE NEW SHAREHOLDER ACTIVISM

A. *Institutional Investors and New Shareholder Power*

Despite the appearance of gadflies and social-issues activists, for the most part shareholders remained passive and managers dominant through the 1960s and 1970s. In retrospect, though, a few developments can be seen as undermining the status quo. Some occurred in the broader economy and culture. For one, the presumptions underlying the ideology of managerialism—the belief that managers were capable of running corporations for the benefit of several constituencies—began to fade.[323] Managerialism rested on the faith that a corporation's managers could successfully function as businessmen-statesmen and that their firms were dominant, stable, and long-lasting enough that those who ran them could afford to balance the interests of multiple stakeholders.[324] During the 1960s, however, Americans lost faith in the goodwill of the technocrats who ran their government, universities, and other major institutions, including business.[325]

At the same time, the corporate economy itself changed. The Berle–Means corporation had been presented as the end of (economic) history, growing consistently larger and continuing to draw in economic power, as rooted on the landscape as a mountain.[326] It was not seen as transitory or vulnerable to creative destruction. The appearance of conglomerates in the 1960s challenged this view. Conglomerates such as Internaional Telephone and Telegraph (ITT) bought and sold apparently unconnected business units in quick succession as dictated by evolving financial needs and judgments,[327] making conglomerates appear as fluid assemblages "in constant cyclical evolution" and making their managers appear less as businessmen-statesmen than slick financial jugglers.[328] A conglomerate did not appear to be a dominant social institution worthy of respect such

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323. *See* Wells, *"Corporation Law Is Dead," supra* note 253, at 310.

324. *See generally id.* at 309–12.

325. *Id.* at 354.

326. *See, e.g.*, ADOLF A. BERLE JR., THE TWENTIETH CENTURY CAPITALIST REVOLUTION, 25–27 (1954).

327. Jeffrey Cane, *ITT, the Ever-Shrinking Conglomerate*, NY TIMES (Jan. 12, 2011,9:35 AM), http://dealbook.nytimes.com/2011/01/12/itt-the-ever-shrinking-conglomerate/?_r=0 (providing background on ITT's history and trading practices).

328. *See* CHARLES MAIER, IN SEARCH OF STABILITY: EXPLORATIONS IN HISTORICAL POLITICAL ECONOMY 69 (1987).

as U.S. Steel, General Motors, or Ford had appeared to be in the 1950s. The collapse of conglomerates at the decade's end only furthered the general impression that something had changed and that corporate managers were no longer to be trusted.[329]

Changes in the public perception of corporate management would have mattered little, however, without a change in the nature of shareholding. The major development was the growth of a new kind of shareholder—the institutional investor. There was, of course, some institutional investing throughout the twentieth century; bank trust departments and insurance companies had long invested money to benefit policyholders and beneficiaries, as had trusts and private pension plans.[330] During and after World War II, though, more Americans were promised pensions as a part of their employment, leading to remarkable growth in union, corporate, and public pension funds.[331] Meanwhile individual investors wary of the securities markets after the Great Depression, but still seeking to benefit from stock ownership, turned to mutual funds beginning in the 1950s.[332] This, together with changes in investment rules that allowed trusts and other pooled investment vehicles to ramp up investments in securities, produced a rapid rise in institutional investment in the securities markets.[333] In 1950, institutions (pension funds, mutual funds, insurance companies, savings institutions, and foundations) held 6.1% of total outstanding equity; in 1960, 12.6%; in 1970, 19.4%; and in 1980, 28.4%.[334] A few commentators even foresaw a period when institutional investors would grow so large that they could supplant the passive shareholders of the Berle–Means corporation and reunite ownership and control.[335] In his 1958 book *The American Stockholder*, for instance, the journalist James Livingston looked to

329. For an insightful essay on the conglomerate trend, see Louis Hyman, *Rethinking the Postwar Corporation: Management, Monopolies, and Markets*, *in* WHAT'S GOOD FOR BUSINESS: BUSINESS AND AMERICAN POLITICS SINCE WORLD WAR II, at 195–209 (Kim Phillips-Fein & Julian E. Zelizer eds., 2012).

330. For an overview, see JOHN LANGBEIN, DAVID PRATT & SUSAN STABILE, PENSION AND EMPLOYEE BENEFIT LAW 7–17 (5th ed. 2010).

331. *See generally* STEVEN A. SASS, THE PROMISE OF PRIVATE PENSIONS: THE FIRST HUNDRED YEARS 1–3 (1997) (discussing the growth of private pensions); *see also* Martin Gelter, *The Pension System and the Rise of Shareholder Primacy*, 43 SETON HALL L. REV. 909, 915 (2013) (overviewing the growth of pension plans and their effect on corporate governance).

332. *See generally* MATTHEW P. FINK, THE RISE OF MUTUAL FUNDS: AN INSIDER'S VIEW 9–11, 16–17, 34, 54, 64 (2011) (showing the rise and fall of mutual funds in the 1920s, from early growth to collapse after the discovery of widespread self-dealing).

333. *See* John H. Langbein & Richard A. Posner, *Market Funds and Trust-Investment Law*, 1 AM. B. FOUND. RES. J. 1, 4–6 (1976).

334. MATTEO TONELLO & STEPHAN RABIMOV, THE 2010 INSTITUTIONAL INVESTMENT REPORT: TRENDS IN ASSET ALLOCATION AND PORTFOLIO COMPOSITION 22–23 (2010).

335. *See, e.g.*, DRUCKER, *supra* note 222, at 35–36.

institutional investors to take the lead in criticism of corporate management.[336]

A final major development—"shareholder value" and its rapid move to the center of economic and legal thought—entwined ideology and economics. Shareholders had been central to corporate law since its development as a separate field, and even at the height of managerialism, many insisted on the unique roles of shareholders,[337] but the 1970s saw a resurgence and reformulation of the view that shareholders should be the main concern of corporate management.[338] Even more specifically, the view took root that it was managers' sole task to maximize shareholder value.[339] One spur for this view was the development of agency theory in economics, beginning with Michael C. Jensen and William H. Meckling's classic 1976 article on the subject.[340] As Rakesh Khurana has described it, agency theory "essentially recast management as an agent of shareholders and shareholders as the principal authority to whom managers are responsible."[341] According to agency theory, the central challenge for organizations was the problem created by managerial discretion. Since management's incentives were never the same as shareholders', ensuring that managers did not abuse their discretion but served shareholders' interests became the major task of managerial economics and, soon thereafter, corporate law.[342] To some extent, this just updated and recast the problem of the separation of ownership and control that appeared in *The Modern Corporation and Private Property*, but Jensen and Meckling presented agency theory in a rigorous form attractive to theorists, while also giving readers an apparently simple

336. LIVINGSTON, *supra* note 23, at 247.

337. *See* Smith, *supra* note 94, at 291–304 (discussing the "shareholder-centric world view" of corporations that developed in the nineteenth century); Rostow, *supra* note 259, at 63 (discussing new developments in corporate responsibilities and their relation to managerialism in the 1950s).

338. LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 18 (2012).

339. *See id.* at 18–19; Millon, *supra* note 253, at 1025–29. The view that corporate managers' sole goal should be making money for shareholders received a boost from the growing popularity of the ideas of Milton Friedman. *See* JUSTIN FOX, THE MYTH OF THE RATIONAL MARKET: A HISTORY OF RISK, REWARD, AND DELUSION ON WALL STREET 159–62 (2009).

340. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

341. RAKESH KHURANA, FROM HIGHER AIMS TO HIRED HANDS: THE SOCIAL TRANSFORMATION OF AMERICAN BUSINESS SCHOOLS AND THE UNFULFILLED PROMISE OF MANAGEMENT AS A PROFESSION 316 (2007).

342. *See id.*; *see also* William W. Bratton Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1476–80 (1989) (discussing agency theory's triumphant entry into corporate-law scholarship).

takeaway: managers were agents of shareholders.[343]

Paralleling agency theory, and adding to the growth of shareholder value as the lodestar of corporate management, was the efficient-markets hypothesis. In its simplest form, this theory asserts that current securities prices should reflect all available information about a security.[344] As interpreted by corporate governance theorists and implemented in practice, however, it became the faith that a public corporation's successful operation could be measured by its share price and by the push to link managerial incentives to that price.[345]

Theoretical developments alone could not have made shareholder value the byword it became in the 1980s. The final element needed to spur renewed interest in shareholders and shareholder power was the dismal performance of the U.S. economy and U.S. corporations in the 1970s. A variety of factors, including "stagflation," the energy crisis of 1973–74, and the decline of the nation's industrial sector convinced many observers that managers had failed at their task of successfully running large corporations.[346] This general sense was corroborated by more specific instances of mismanagement and scandal, such as the collapse of the Penn Central railroad in 1970 and a wave of foreign bribery claims that hit U.S. corporations in the mid-1970s.[347] It was against this larger business-economic backdrop that the new theories taught in business and law schools won favor, as they gave practitioners new tools, vocabularies, and justifications for pursuing changes in the shareholder–manager balance of power.

Even after all these developments, at the beginning of the 1980s most shareholders still had little more power—little more ability to instigate change or sway corporate policies—than they had possessed at mid-century. Incumbent management still controlled the machinery for electing directors; the board still retained the power for initiating basic changes in the corporation; and shareholders unhappy with corporate performance were still best advised to sell their shares. There were, by this time, some activist shareholders, notably those pushing social-issues

343. This was a formulation that led to much confusion because it did not distinguish between the different ways "agent" and "principle" are used in economic and legal scholarship. *See* Millon, *supra* note 253, at 1032.

344. Lawrence A. Cunningham, *From Random Walks to Chaotic Crashes: The Linear Genealogy of the Efficient Capital Market Hypothesis*, 62 GEO. WASH. L. REV. 546, 560 (1994).

345. *See* GERALD F. DAVIS, MANAGED BY THE MARKETS: HOW FINANCE RESHAPED AMERICA 20–22 (2009).

346. For an overview of this period, see NITIN NOHRIA ET AL., CHANGING FORTUNES: REMAKING THE INDUSTRIAL CORPORATION 37, 39, 50 (2002).

347. Brian R. Cheffins, *Did Corporate Governance "Fail" During the 2008 Stock Market Meltdown?: The Case of the S&P 500*, 65 BUS. LAW. 1, 6–7 (2009); *see also* Gordon, *supra* note 244, at 1478–79, 1514–16.

campaigns. But those activists had never aimed to use their power as shareholders to *directly* influence management; rather, they used their role as shareholders as one tool among many to draw critical public attention to corporate policies and, therefore, change corporate behavior through larger societal responses.[348] The gadflies were also still active, but few took their attempts to sway management seriously.[349]

Around 1980, new opportunities for shareholders to exercise power began to emerge, starting with an upsurge in corporate takeovers.[350] There had been takeover waves before—at the turn of the century, in the 1920s, and most recently in the conglomerate wave at the end of the 1960s.[351] The takeover wave that appeared at the beginning of the 1980s was, however, on a far larger scale than those that had occurred previously.[352] Takeovers of unprecedented size became common, and Americans learned a new vocabulary of "LBOs," "raiders," "white knights," and "poison pills" as firms and individual investors maneuvered to take over companies that they judged current management was running poorly or simply would be more valuable if broken up and sold.[353] By the early 1980s, an unruly market for corporate control had sprung up and was targeting some of the largest public corporations in the United States.[354]

It was this market for corporate control, and the need for the contestants in it to win support from shareholders, that began to return power to shareholders.[355] Institutional investor shareholders were particularly important players in takeover attempts; many takeover artists actually targeted firms with significant institutional investor ownership, as those investors were easier to reach than small shareholders, controlled far larger blocks of shares, and in many instances felt pressured by their fiduciary duties to sell if offered a premium.[356] Institutional investors

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348. *See supra* Section IV.B.

349. *See supra* text accompanying notes 279–80.

350. For a discussion on the history of the market for corporate control earlier in the century, see generally Armour & Cheffins, *supra* note 258, at 1839–48.

351. *See id.* at 1841, 1859.

352. *See id*. at 1859 (attributing the comparative explosion of takeovers in the 1980s to the new availability of "junk bond[]" financing).

353. Good popular contemporary accounts of this wave of takeovers appear in JOHN BROOKS, THE TAKEOVER GAME (1987) and JAMES B. STEWART, DEN OF THIEVES (1991).

354. *See, e.g.*, BROOKS, *supra* note 353, at 20–23.

355. There were earlier instances of offensive shareholder activism with outside investors taking sizeable positions to agitate for change, usually accompanied by proxy contests, but they tended not to involve institutional investors. *See* John H. Armour & Brian R. Cheffins, *Origins of "Offensive" Shareholder Activism in the United States*, *in* ORIGINS OF SHAREHOLDER ADVOCACY 253, 269–72 (Jonathan GS Koppell ed., 2011).

356. *See* Jeffrey N. Gordon, *"Say on Pay": Cautionary Notes on the U.K. Experience and the Case for Shareholder Opt-In*, 46 HARV. J. LEGIS. 323, 328–29 (2009).

were also attractive because, unlike in previous decades, they were increasingly willing to listen to insurgents; many institutional investors even had investments in the new funds formed to undertake buyouts, bankrolling the challenges to entrenched management.[357] No longer would they reflexively support management in a battle. This led to takeover fights in which both bidder and incumbent management wooed institutional investors who found themselves in a novel position: these investors, long ignored by management, were now able to extract concessions from the rivals engaged in a bidding war. In 1985, for instance, Unocal's institutional investors agreed to support its management in a takeover fight with T. Boone Pickens, but only after management agreed to repurchase 30% of the firm's outstanding stock.[358]

While the takeover efforts themselves benefited shareholders of target companies, it was management's pushback against takeover attempts that really mobilized institutional investors and produced a wave of shareholder activism considerably more potent than that seen in previous decades. To ward off takeovers, many corporate managers adopted legal tactics including paying a bidder "greenmail" to go away, staggering a board of directors so a proxy fight could not immediately unseat a majority of directors, or adopting a "poison pill" that threatened to dilute a would-be acquirer's stake.[359] While these measures were sold as allowing a corporation's management to pursue long-term and presumably value-enhancing strategies, their more immediate impact was to prevent shareholders from benefitting from a bidding war.[360] A tipping point for many institutional investors occurred in 1984, when Texaco paid the Bass Brothers $137 million in greenmail to abandon a potential takeover, a step that helped Texaco's incumbent management and the Bass Brothers considerably more than other investors.[361] In response, twenty-one major public pension funds established the Council of Institutional Investors, which soon adopted a shareholders' "Bill of Rights" demanding shareholder approval of anti-takeover measures.[362] This council was what advocates had sought for decades—an effective organization coordinating shareholder activity. A year later, in 1985,

357. *See* Bengt Holmstrom & Steven N. Kaplan, *Corporate Governance and Merger Activity in the United States: Making Sense of the 1980s and 1990s*, 15 J. ECON. ASS'N 121, 122 (2001).

358. Richard M. Buxbaum, *The Internal Division of Powers in Corporate Governance*, 73 CALIF. L. REV. 1671, 1708, 1733 n.269 (1985).

359. COX & HAZEN, *supra* note 78, §§ 23.5–.6, at 660–61, 669, 675.

360. Management, of course, denied that these steps were taken for purposes of entrenchment and often argued that defensive measures were intended to protect the corporation in the long term. *See* COX & HAZEN, *supra* note 78, § 23.5, at 660–61.

361. MONKS & MINOW, *supra* note at 280, at 287–88 (5th ed. 2011).

362. *See id.*; *About Us: We're the Voice of Corporate Governance*, COUNCIL OF INSTITUTIONAL INVESTORS, http://www.cii.org/about_us (last visited May 1, 2015).

Robert Monks—a longtime shareholder activist and former Department of Labor official—founded Institutional Shareholder Services (ISS) to provide institutional-investor clients independent advice on how to vote their shares.[363] ISS proved to be an important resource for many s that had traditionally voted for management and lacked internal capacities to evaluate proposed takeovers, shareholder proposals, and other transactions.[364] By 1986, several large institutional investors had abandoned passivity; the California Public Employees' Retirement System (CalPERS) and TIAA-CREF were, for example, seeking proxies from shareholders in order to oppose anti-takeover measures.[365] Institutional investor activism had finally arrived.

While economic and intellectual changes encouraged the development of shareholder activism, so had the changing nature of institutional investing and shareholding. For one, a larger percentage of assets were under institutional management than had been the case in previous decades.[366] Institutional investors were also more likely to see an economic benefit from activism than small shareholders. When a small investor was unhappy with the management of a corporation, simply selling her shares was the economically rational thing to do, as the costs of activism would quickly swamp whatever particular benefits the shareholder could gain through her agitation.[367] For an institutional investor with a stake in a company worth tens or hundreds of millions of dollars, however, the costs of activism might well be repaid if the activity resulted in a significant rise in the company's stock price, and the possibility of reducing those costs by acting in concert with other investors made activism still more likely.[368] Selling an ownership stake in a particular corporation—the small shareholder's last resort—was also less attractive for institutional investors. Some indexed their investments, attempting to hold essentially the entire market, which made selling a

363. *See* John C. Coffee Jr., *Liquidity Versus Control: The Institutional Investor as Corporate Monitor*, 91 COLUM. L. REV. 1277, 1358 & n.314 (1991).

364. On ISS and the corporate governance industry, see Paul Rose, *The Corporate Governance Industry*, 32 J. CORP L. 887, 889–91, 899–903 (2007) [hereinafter Rose, *Corporate Governance Industry*].

365. *See* Martin Lipton, *Corporate Governance in the Age of Finance Corporatism*, 136 U. PA. L. REV. 1, 33–34 (1987).

366. *See* TONELLO & RABIMOV, *supra* note 334, at 22 (noting the rapid growth of the percentage of assets under institutional ownership in the 1980s and 1990s).

367. *See* Rose, *Corporate Governance Industry*, *supra* note 364, at 898 ("[S]hareholders generally will not make an effort to effect governance changes unless the benefits . . . equal or exceed the costs of such an effort.").

368. For example, a shareholder owning .0001% of a corporation would not rationally spend more than $1000 for a change that would increase the value of the corporation by $100 million; a shareholder owning 1% of that firm, in contrast, would rationally spend up to $1 million to ensure a similar change.

position unattractive or impossible.[369] Those that did not index, or were willing to get out of a bad position, still faced challenges. It was difficult for an investor that owned a large block of stock in a particular corporation to sell that stake without moving the market against the seller.[370] For an institutional investor in the 1980s, then, both the potential benefits of activism and the potential costs of exit were higher than they might have been a few decades before.

Finally, institutional investors were also under new legal pressures to vote their shares. In 1988, the Department of Labor issued the so-called "Avon Letter," which required trustees administering plans under the Employee Retirement Income Security Act (ERISA) to treat their plan's votes as a plan asset and, therefore, "vote [their] shares, instead of abstaining, and do so for the exclusive benefit of plan beneficiaries."[371] Much later, the SEC imposed a similar requirement on mutual funds, requiring them to inform shareholders how they voted proxies and to develop proxy voting policies and procedures, a measure intended to spur mutual funds to vote proxies in shareholders' interests.[372] Both rule changes made it more difficult for institutional investors to completely avoid involvement in shareholder battles.

To be clear, not all institutional investors were activist investors challenging corporate management and pushing for restructuring or sales. Many were hobbled by conflicts of interest. Mutual funds, insurance companies, and private pension funds all had reasons, ranging from fear of scaring off future customers to ideological affinities, for refusing to pressure corporate management.[373] Thus, in the 1980s and 1990s, one finds that many of the most active shareholders were those funds less likely to face such conflicts—public and union-controlled pension funds.[374]

The most visible weapon of the new activist shareholder was an old one, the shareholder proposal. Shareholder proposals were common in the 1970s and 1980s but, for the most part, they were made by social investors or the handful of well-known gadflies. That changed in 1986

369. *See* JAMES P. HAWLEY & ANDREW WILLIAMS, THE RISE OF FIDUCIARY CAPITALISM: HOW INSTITUTIONAL INVESTORS CAN MAKE CORPORATE AMERICA MORE DEMOCRATIC 7 (2000).

370. *See* Stuart L. Gillan & Laura T. Starks, *Corporate Governance Proposals and Shareholder Activism: The Role of Institutional Investors*, 57 J. FIN. ECON. 275, 278–79 (2000) [hereinafter Gillan & Starks, *Corporate Governance Proposals*].

371. Black, *Shareholder Passivity Reexamined*, *supra* note 187, at 554 & n.116.

372. 17 C.F.R. § 270.30b1-4 (2014). On the mixed record of this requirement, see Jennifer S. Taub, *Able but Not Willing: The Failure of Mutual Fund Advisers to Advocate for Shareholders' Rights*, 34 J. CORP. L. 843, 855 (2009).

373. *See* Bernard S. Black, *Agents Watching Agents: The Promise of Institutional Investor Voice*, 39 UCLA L. REV. 811, 825–27 (1992).

374. *See id.* at 827; Gelter, *supra* note 331, at 954–56.

when TIAA-CREF opposed a poison pill at International Paper—the the first time an established institutional investor filed a proposal challenging an anti-takeover measure.[375] The next year saw a surge in proposals, as institutional investors—almost all public pension funds—filed thirty-three proposals.[376] From 1987 to 1994, major institutional investors filed 463 shareholder proposals, with New York City's pension funds alone filing 158.[377] The vast majority of these were governance proposals, most challenging anti-takeover measures.[378] Almost half of the proposals filed by institutional investors and coordinated investor groups in this period sought to repeal anti-takeover devices, and most of the rest sought confidential proxy voting.[379] While very few proposals ever passed (and they remained advisory in any case), significant shareholder votes could both publicize an issue and pressure a board. In 1994, for instance, corporate governance proposals sponsored by institutions received on average almost 30% of the votes cast (30.6% mean/28.7% median).[380]

Nor were shareholder proposals the only way institutional investors could exert influence. Changes in the SEC's proxy solicitation rules in 1992 made it easier for large shareholders to communicate directly with each other, a development that turned "shareholder activism . . . from a proxy season (March–June) to a year-round phenomenon."[381] As institutional shareholders began to communicate more regularly with each other, they also began to communicate more regularly with corporate management, and meetings and other less formal and visible interactions—what Bernard Black calls "jawboning"—became important means for shareholders to pressure management.[382] Shareholder relations, long directed at the small shareholder, had to change dramatically. No longer was it enough to advertise to shareholders, provide them coupons, or send them a form letter thanking them for any suggestions they may have offered management. Instead, senior management was forced to engage with their largest investors on an

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375. MONKS & MINOW, *supra* note at 280, at 199.

376. *See* Gillan & Starks, *Corporate Governance Proposals*, *supra* note 370, at 278, 286.

377. *Id.* at 278, 283; *see also* Stuart L. Gillan & Laura T. Starks, *The Evolution of Shareholder Activism in the United States*, 19 J. APPLIED CORP. FIN. 55, 56 (2007) [hereinafter Gillan & Starks, *The Evolution of Shareholder Activism in the United States*].

378. Gillan & Starks, *Corporate Governance Proposals*, *supra* note 370, at 284.

379. *Id.*

380. *Id*. at 289.

381. *Id*. at 279.

382. Bernard S. Black, *Shareholder Activism and Corporate Governance in the United States*, *in* 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 459–60 (Peter Newman ed., 2002) [hereinafter Black, *Shareholder Activism*].

ongoing basis.[383] As early as 1992, CalPERS demanded meetings with a number of corporations it identified as particularly poor performers, and it threatened to make its grievances public if it did not get its chance to push senior management for reforms.[384] Of greater note, in early 1993, institutional investor dissatisfaction was credited with forcing the departures of several CEOs after ongoing poor performance, including those at General Motors, IBM, and Westinghouse.[385] A new dynamic for shareholder activism developed; "since the mid-1990s . . . institution[al investors] increasingly engaged in private negotiations to get boards to make governance changes voluntarily and . . . only resorted to formal proposals in some of the instances where boards failed to do so."[386]

Institutional investors continued to be active over the rest of the decade, though exactly which institutional investors were active changed. Public pension funds had been the main driver of shareholder proposals early in the decade, but later on union-controlled pension funds came to predominate.[387] Before the early 1990s, unions appeared to support corporate management in challenges for corporate control, as unions foresaw a successful takeover being followed by layoffs and other disruptions harmful to union members.[388] By the mid-1990s, however, union pension funds were often filing corporate governance proposals little different from those of public pension funds. In 1996, for instance, union funds' proposals frequently called for repeal of classified boards, redemption of a poison pill, or limits on executive compensation.[389] One can speculate that this resulted from the aging of a union workforce and unions newly concerned with having enough assets to pay pensions, but what is important is union funds' departure from traditional union concerns and their new concern with shareholder value. In short, they were not acting much like one would expect of *union* funds: "In many

383. *See* John C. Coffee Jr., *The Folklore of Investor Capitalism*, 95 MICH. L. REV. 1970, 1973 (1997).

384. *See* John Pound, *The Rise of the Political Model of Corporate Governance and Corporate Control*, 68 N.Y.U. L. REV. 1003, 1054–55 (1993).

385. Leslie Wayne, *Shareholder Advocate's New Target*, N.Y. TIMES (May 10, 1993), http://www.nytimes.com/1993/05/10/business/shareholderadvocatesnewtarget.html. For a discussion on whether institutional investors actually deserved credit for these job losses, see Coffee, *supra* note 383, at 1978–79 (crediting clamor from many constituencies for the dismissal of these executives).

386. Kahan & Rock, *Hedge Funds in Corporate Governance*, *supra* note 4, at 1042.

387. *See* Stewart J. Schwab & Randall S. Thomas, *Realigning Corporate Governance: Shareholder Activism by Labor Unions*, 96 MICH. L. REV. 1018, 1019 (1998).

388. Thus, unions were perceived to be supporters of "corporate constituency" statutes which gave management greater leeway in rejecting takeover attempts. *See* Brett H. McDonnell, *Shareholder Bylaws, Shareholder Nominations, and Poison Pills*, 3 BERKELEY BUS. L.J. 205, 250 (2005).

389. *See* Schwab & Thomas, *supra* note 387, at 1045–46.

cases, unions [were] trying to improve the financial performance of their pension funds, just like any other institutional investor."[390]

Clearly, at the end of the 1990s institutional investors were far more visible and active than they had been just fifteen years before. In the context of shareholder power, though, the question remains: had things really changed? Two stories can easily be told. In an optimistic account, the balance of power between shareholders and managers had shifted fundamentally. Shareholders, in the form of institutional investors, were now actively involved in corporate operations, interacting frequently with top executives, forcing (and sometimes winning) shareholder votes on issues like poison pills and classified boards, and on occasion forcing firms to change strategies or fire CEOs. Firms were now shying away from anti-takeover devices; they no longer tried to classify boards, and while many states adopted anti-takeover laws, some firms opted out of them to placate shareholders.[391] But a gloomier, or perhaps more clear-eyed, story about shareholder power could also be told. After all this activism, management was still in the saddle. SEC rule changes had made it marginally easier for institutional investors to communicate freely with one another, but most such investors were still leery of participating in coordinated campaigns against particular firms.[392] Institutional investors still had no way to nominate their own candidates to the board without launching an expensive proxy fight. Their proposals, even the ones most likely to benefit shareholders—those opposing anti-takeover measures—usually failed, and institutional opposition had not prevented many states from adopting those anti-takeover, "corporate constituency" laws.[393] Legal prohibitions still made institutional investors wary of amassing significant stakes in target companies; an institutional investor might own 1% or 2% of a company's shares but 5% or 10% ownership—the kind of ownership that resembles blockholdings common in other nations with truly powerful shareholders—would be legally risky and worth avoiding.[394] American corporate performance overall had certainly improved during the 1990s, but it was not clear this could be attributed to newly active investors. Two broad surveys of institutional investing made shortly after the turn of the century concluded that the evidence was

390. *Id*. at 1023.

391. *See, e.g.*, Black, *Shareholder Passivity Reexamined*, *supra* note 187, at 574 (noting that institutions lobbied Pennsylvania companies to opt out of antitakeover laws and many did so).

392. *See* Coffee, *supra* note 383, at 1979.

393. *See id*. at 1980–81.

394. Owning a 5% stake in a public corporation would require an investor to report the ownership stake under the Williams Act while owning a 10% stake would limit the shareholder's ability to move quickly out of the stake due to the SEC's short swing profit rule. *See* Black, *Shareholder Passivity Reexamined*, *supra* note 187, at 545, 552.

equivocal at best as to whether all this activism positively affected firm performance.[395]

B. *A Look Forward*

The twenty-first century brought ongoing debates, as new developments in institutional-investor activism—and thus shareholder power—arose, the full implications of which are still working themselves out. It is here, in a sense, that this Article ends, as history blends into the present day with current events whose impact has yet to play out, much less to be fully understood. Even with these caveats, though, it is clear that shareholder power is now more than a mirage, though the reasons for this change are complex. To simplify a bit, while political attempts to increase shareholder power have foundered, private actors have finally taken power for themselves.

On the political front, the federal government attempted to increase shareholder power in the years following the economic crisis of 2008, which many took as an indictment of basic elements of American capitalism. Those government efforts largely failed. In 2010, for instance, Congress, in the Dodd–Frank Act, sought to mobilize shareholder power to rein in what had become a major issue, high executive compensation.[396] The Act imposed a mandatory, albeit precatory, shareholder vote on executive compensation ("Say-on-Pay"), with the unstated hope that it would curb such compensation.[397] This did not happen. In subsequent votes, shareholders approved almost all executive pay packages; approximately 91% of such packages received majority shareholder approval in the first year of voting.[398] If Say-on-Pay worked at all, it did so only with the most egregious cases of high pay.[399] Other federal proposals did not make it past the courts. Also in 2010, the SEC attempted to give institutional investors new power by adopting Rule 14a-11, which would have required corporations, in limited circumstances, to include director nominees from certain large shareholders in the corporation's proxy; the U.S. Court of Appeals for the District of Columbia struck down the rule in 2010, a decision the SEC chose not to

395. *See, e.g.*, Black, *Shareholder Activism*, *supra* note 382, at 465 (discussing the "apparent failure of institutional activism to make much of a difference"); Gillan & Starks, *The Evolution of Shareholder Activism in the United States*, *supra* note 377, at 69 ("The evidence provided by empirical studies of the effects of shareholder activism is mixed.").

396. *See* James F. Cotter et al., *The First Year of Say-on-Pay Under Dodd–Frank: An Empirical Analysis and Look Forward*, 81 GEO. WASH. L. REV. 967, 978 (2013).

397. *See id.*

398. *See id.* at 979–80.

399. *See, e.g.*, Julie Jargon, *Chipotle Shareholders Vote down Executive Pay*, WALL ST. J., (May 15, 2014, 4:00 PM), http://www.marketwatch.com/story/chipotleshareholdersvotedown executivepay20140515).

appeal.[400] These two major federal attempts to impose greater shareholder power were largely a bust.

Even as federal efforts to promote shareholder power failed, however, shareholder power itself continued to grow in a new form: the hedge fund.[401] The rise of these lightly regulated investment vehicles is the most significant development in shareholder power in the twenty-first century. Taking larger stakes in publicly held firms than did the more traditional institutional investors and employing a wider array of strategies—shareholder proposals, proxy fights, and litigation for example—hedge funds pushed more aggressively for changes in corporate strategies and management than had investors of the previous decades.[402] The presence of a larger ecosystem of institutional investors worked to the hedge funds' advantage, as the funds were able to draw support from those traditional institutions, not to mention mobilize other hedge funds into so-called "wolf packs" to back them in their operations.[403] They were often successful, forcing many corporations in which they took stakes to increase dividends, seat hedge fund candidates on their boards, and, in a few cases, even break themselves up or sell themselves.[404] So successful was hedge-fund-led activism that a few astute observers even proclaimed the end of the twentieth century's management hegemony; in the twenty-first century, it appeared, managers were on the defensive and shareholder power had moved from ideal to real.[405] Yet their presence was not universally welcome; in particular, a frequent criticism was that hedge funds would only accelerate a short-term pursuit of share prices that already infected many managers.[406] Other observers emphatically disagreed.[407] As hedge fund power shows no sign of waning, it will soon be possible to further test these claims.

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400. *See* Jill E. Fisch, *The Long Road Back: Business Roundtable and the Future of SEC Rulemaking*, 36 SEATTLE U. L. REV. 695, 698–99, 701–02 (2013).

401. Hedge funds were active before the 2000s, but their activity has certainly seen a spike since 2000. *See generally* Brian R. Cheffins & John Armour, *The Past, Present, and Future of Shareholder Activism by Hedge Funds*, 37 J. CORP. L. 51, 75–82 (2011).

402. *See id*. at 81–82; Bratton, *supra* note 4, at 1379; Brav et al., *supra* note 4, at 1730; Kahan & Rock, *Embattled CEOs*, *supra* note 5, at 1029; *Shareholder Democracy: Battling for Corporate America*, ECONOMIST (Mar. 9, 2006), http://www.economist.com/node/5601741.

403. *See* Cheffins & Armour, *supra* note 401, at 71, 88; John C. Coffee Jr. & Darius Palia, The Impact of Hedge Fund Activism: Evidence and Implications 23–33 (Sept. 2014) (unpublished manuscript), *available at* http://www.valuewalk.com/wp-content/uploads/2014/10/SSRN-id2496518.pdf (discussing the "wolf pack" strategy for hedge funds).

404. *See* Cheffins & Armour, *supra* note 401, at 81, 87.

405. *See, e.g.*, Kahan & Rock, *Embattled CEOs*, *supra* note 5, at 989.

406. *See, e.g.*, Coffee & Palia, *supra* note 403, at 7 (analyzing subtly the effects on long-term corporate planning of activist hedge funds).

407. *See* Bebchuk, *The Myth*, *supra* note 15, at 1638; Lucian Bebchuk et al., *The Long-Term Effects of Hedge Fund Activism*, 114 COLUM. L. REV. (forthcoming June 2015).

CONCLUSION

The long view of shareholder power over the previous two centuries reveals that shareholder power has ebbed and flowed across the decades, with periods of relative shareholder power interspersed with long periods of shareholder weakness and passivity. What shareholder power means has also changed; shareholder power in the nineteenth century was shaped by battles between controlling and minority shareholders, whereas the concept in the twentieth century was framed by the paradigm of the separation of ownership and control, and a consequent struggle between dispersed shareholders and controlling managers. We now appear to have moved into a third era of shareholder power, where the struggle is between better-organized institutional investors and managers trying to stave them off. It may well be that what was long taken as the hallmark of American capitalism—the relative powerlessness of shareholders—was not only a distinctively American phenomenon but a distinctively twentieth-century one as well.