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The Shareholder Democracy Lie

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Abstract

This Article critically examines the fallacious nature of “shareholder democracy” rhetoric and its implications for corporate governance, political democracy, and societal wellbeing. While corporations and activists frequently invoke shareholder democracy to advance their agendas, this concept fundamentally misrepresents the reality of corporate governance and share ownership in America. We systematically debunk the shareholder democracy myth by analyzing historical developments in shareholding, examining barriers to share ownership, and investigating the current state of corporate voting. The term shareholder democracy first gained popularity in the 1920s, when Wall Street firms and the NYSE used it to attract retail investors while simultaneously helping management resist government regulation and labor organizing. We trace the historical development of proxy voting from early English corporations through American securities regulation, revealing how the proxy system, despite being presented as a pathway to shareholder democracy, facilitates management control and institutional investors’ influence, while limiting human shareholder participation. A detailed examination of share ownership inequality demonstrates how centuries of discrimination, including slavery, Jim Crow laws, and employment discrimination, have created enduring barriers to share ownership for minorities and women. We document how discriminatory practices in employment particularly affected access to employee stock ownership plans (ESOPs), creating what we dub a “double jeopardy,” which describes how minorities were excluded both from employment opportunities and the accompanying share ownership benefits. This historical exclusion continues to impact contemporary patterns of share ownership and wealth accumulation. Currently, institutional investors and proxy advisory firms dominate corporate governance. So-called “de-retailization” of share ownership has concentrated voting power in the hands of the “Big Three” (BlackRock, Vanguard, and State Street), who collectively constitute the largest shareholder in almost all S&P 500 companies. This institutional dominance is compounded by the outsourcing of voting decisions to proxy advisory firms like ISS and Glass Lewis, which exercise enormous influence despite having no direct stake in the companies they evaluate. Shareholder democracy is a dangerous myth that obscures the fundamentally undemocratic nature of corporate governance and share ownership in America. This mischaracterization has significant implications beyond corporate law, as corporate power significantly influences political and social institutions. Acknowledging the fallacy of shareholder democracy rhetoric is essential for developing more accurate and effective approaches to corporate governance reform and addressing broader societal inequalities. Through this comprehensive analysis, this Article contributes to both corporate governance scholarship and broader discussions about economic inequality, demonstrating how the myth of shareholder democracy has helped perpetuate and legitimize fundamentally undemocratic corporate power structures.

Keywords: shareholder democracy, political democracy, retail investors, institutional investors, proxy voting, pension funds, democracy, corporate governance, proxy advisory services, mutual funds, Big Three, shareholder meetings, shareholder proposals, 14a-8, share ownership, employment discrimination, inequality, stock market, financial markets, women investors, non-White investors, access to opportunity, history of corporations, Securities Exchange Act of 1934, 34 Act, hedge funds, undemocratic shareholding, Arjuna Capital, ExxonMobil, pass-through voting, BlackRock, rhetoric, public companies

JEL Classifications: K2, K20, K22, G3, G30

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This Article critically examines the fallacious nature of "shareholder democracy" rhetoric and its implications for corporate governance, political democracy, and societal wellbeing. While corporations and activists frequently invoke shareholder democracy to advance their agendas, this concept fundamentally misrepresents the reality of corporate governance and share ownership in America. We systematically debunk the shareholder democracy myth by analyzing historical developments in shareholding, examining barriers to share ownership, and investigating the current state of corporate voting.

The term shareholder democracy first gained popularity in the 1920s, when Wall Street firms and the NYSE used it to attract retail investors while simultaneously helping management resist government regulation and labor organizing. We trace the historical development of proxy voting from early English corporations through American securities regulation, revealing how the proxy system, despite being presented as a pathway to shareholder democracy, facilitates management control and institutional investors' influence, while limiting human shareholder participation.

A detailed examination of share ownership inequality demonstrates how centuries of discrimination, including slavery, Jim Crow laws, and employment discrimination, have created enduring barriers to share ownership for minorities and women. We document how discriminatory practices in employment particularly affected access to employee stock ownership plans (ESOPs),

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creating what we dub a "double jeopardy," which describes how minorities were excluded both from employment opportunities and the accompanying share ownership benefits. This historical exclusion continues to impact contemporary patterns of share ownership and wealth accumulation. Currently, institutional investors and proxy advisory firms dominate corporate governance. So-called "de-retailization" of share ownership has concentrated voting power in the hands of the "Big Three" (BlackRock, Vanguard, and State Street), who collectively constitute the largest shareholder in almost all S&P 500 companies. This institutional dominance is compounded by the outsourcing of voting decisions to proxy advisory firms like ISS and Glass Lewis, which exercise enormous influence despite having no direct stake in the companies they evaluate.

Shareholder democracy is a dangerous myth that obscures the fundamentally undemocratic nature of corporate governance and share ownership in America. This mischaracterization has significant implications beyond corporate law, as corporate power significantly influences political and social institutions. Acknowledging the fallacy of shareholder democracy rhetoric is essential for developing more accurate and effective approaches to corporate governance reform and addressing broader societal inequalities.

Through this comprehensive analysis, this Article contributes to both corporate governance scholarship and broader discussions about economic inequality, demonstrating how the myth of shareholder democracy has helped perpetuate and legitimize fundamentally undemocratic corporate power structures.

INTRODUCTION

Shareholder democracy is in fashion again. Companies, activists, industry titans, and mass media all leverage the term "shareholder democracy" to promote their own interests.[1] Some have even claimed it as a consensus point between shareholder primacy and stakeholderism.[2] But shareholder democracy rhetoric is, at best, mythical propaganda; at worst, a lie. The shareholder democracy rhetoric implies that shareholders control corporations in a democratic fashion, including by voting, rights to expression and dissent, and minority protections to prevent incumbents from using their power to entrench themselves or to impose winner-take-all norms. Moreover, shareholder control, if it is to merit the description "democratic," inherently requires widespread popular access to and ownership of shares because only shareholders have voice in corporate elections. None of these standard aspects of democracy are present in corporate law. This Article carefully debunks shareholder democracy rhetoric by analyzing the historical development of shareholder participation and the evolution of shareholding in the United States.

First, this Article exposes how the structure of a corporation profoundly diverges from that of a political democracy. Second, this Article analyzes how shareholder governance as it has developed over centuries and currently functions today is not democratic. Third, this Article brings to the forefront that share ownership is not democratic. This Article refrains from engaging in a normative analysis of whether shareholders should have more power.[3] Nor does it investigate

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[1] *See, e.g.*, Betsy Atkins, *Musk Comp Overturned: Is Shareholder Democracy at Risk?*, FORBES (Feb. 2, 2024), https://www.forbes.com/sites/betsyatkins/2024/02/02/is-shareholder-democracy-at-risk/ [https://perma.cc/MRA3-LVB4] (arguing Delaware Court of Chancery's striking down of executive compensation plan authorized by overwhelming majority of shareholders "overturns the notion of shareholder democracy"); Meg James, *Disney slams proxy fight rival Nelson Peltz in political-style ad*, L.A. TIMES (Mar. 11, 2024), https://www.latimes.com/entertainment-arts/business/story/2024-03-11/disney-slams-proxy-fight-rival-nelson-peltz-in-political-styled-ad [https://perma.cc/7EVF-U8NW] (quoting shareholder activist stating that classifying the activist as an "infiltrator" is "offensive and highly dismissive of shareholder democracy"); Kevin Crowley, *Exxon Vows to be 'Forceful Advocate' for Shareholder Democracy*, BLOOMBERG (May 29, 2024), https://news.bloomberglaw.com/esg/exxon-shareholders-vote-with-board-on-all-proxy-proposals [https://perma.cc/T7SK-P5CH] (quoting Exxon Mobil CEO as stating, "[f]or shareholder democracy to thrive, abuses of the process must be addressed. You can count on us to do our part"); Jeff Sommer, *Millions of Fund Investors Are Getting a Voice*, N.Y. TIMES (Feb. 23, 2024) (stating "the growth of index funds has had the unintended consequence of diminishing shareholder democracy" and pass-through voting is "not true shareholder democracy, but it's progress."); Broadridge, *Pass-Through Voting* (last visited July 14, 2024), https://www.broadridge.com/article/wealth-management/pass-through-voting (arguing "advocates for shareholder democracy say that pass-through voting could be a great way to bring [retail] investors into the process"); *see also* Doron Levit, Nadya Malenko, & Ernst Maug, *Trading and Shareholder Democracy*, 79 J. FIN. 257, 262 (2024) (recognizing a "general movement to shareholder democracy").

[2] Peter Vanham & Nicholas Gordon, *Elon Musk and Larry Fink—ideological opposites—find common ground: the pursuit of shareholder democracy*, YAHOO!FINANCE (June 12, 2024), https://finance.yahoo.com/news/elon-musk-larry-fink-ideological-095224799.html [https://perma.cc/VCN9-UCC2].

[3] Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675 (2007); Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power,* 118 HARV. L. REV. 833 (2005). *But see* Lynn A. Stout, *Bad and Not-so-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189 (2002); Iman Anabtawi*, Some Skepticism About Increasing Shareholder Power,* 53 UCLA L. REV. 561, 577 (2006) (warning about risk of rent-seeking). Lynn Stout co-authored an article and a book calling for the inclusion of virtually all individuals in shareholding and corporate

whether shareholders are best off with more power or whether corporate governance should allow people to vote more granularly on political matters.[4] Rather, this Article exposes the mythological nature of shareholder democracy and sheds light on the perils of assuming that shareholding is democratic when arguing legal, social, political, and economic matters. Debunking the shareholder democracy myth is not sheer theoretical exercise. Rather, it is an essential endeavor to protect our society and political democracy from the unaccountable influence that powerful individuals and institutions can exert by leveraging on the corporate sector.

The *pars destruens* that analytically debunks false rhetoric is often-times overlooked by literature. However, comfortably familiar but wrong concepts further diffuse theoretical misunderstandings, with lasting ramifications in academic debates, policymaking, and the common understanding of essential legal institutions. This Article recognizes the essential importance of a careful *pars destruens* for sound legal, theoretical, and political arguments. It lays out the foundation for an accurate understanding of shareholding, its features, and its structural failures.

In the early days of the American republic, Alexis de Tocqueville famously argued that political democracy was inevitable in the United States.[5] Beginning with what he refers to as the colonists "incorporating themselves" even before receiving royal charters,[6] he saw voluntary and governmental institutions where Americans made decisions together as equals.[7] Today, few would describe American society as broadly participatory, non-hierarchal, and socially egalitarian. Most of us live our lives deeply enmeshed in bureaucracies in which we have little say and no illusions of equal authority. Our schools, employers, governments, and the companies that sell us necessities and luxuries alike are all run by top-down direction. Most employees take orders from someone higher up and customers have little or no say or influence in increasing oligopolistic markets. Meanwhile, social hierarchies are back as well. The gaps between the hyper-rich and the rest have increased dramatically while the wealthy increasingly self-segregate at home, work, and even in the services they purchase.[8]

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governance. LYNN STOUT, SERGIO GRAMITTO, & TAMARA BELINFANTI, CITIZEN CAPITALISM: HOW A UNIVERSAL FUND CAN PROVIDE INFLUENCE AND INCOME TO ALL (2019); Lynn Stout & Sergio Gramitto, *Corporate Governance as Privately-Ordered Public Policy: A Proposal*, 41 SEATTLE U.L. REV. 551, 556-57 (2018).

[4] *See* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NORTHWESTERN U. L. REV. 547 (2003).

[5] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Eduardo Nolla, ed.; James T. Schaefer, trans.) (intro p xx) ("This equality of condition is the fundamental fact from which all others seem to be derived") (2009); *cf.* id. at 108.

[6] *Id.* at 61.

[7] ALEXIS DE TOCQUEVILLE, II DEMOCRACY IN AMERICA 106 (ED PHILIPS BRADLEY; TRANS HENRY REEVE, FRANCIS BOWEN) (1946) (discussing "immense assemblage of associations" that Americans used for multifarious purposes); 116 (noting that civil associations such as businesses are "large free schools where all the members of the community go to learn the general theory of association"); 119 (contending that in civil and commercial associations, people learn the "notions" they then bring to politics, taming "dangers" of freedom). While America had both rich and poor, the distinctions were smaller than in Europe, and, critically, "wealth circulate[d] incredibly rapidly," so that "the rich d[id] not form a class apart." *Id.* at 85, 87, 356 (noting mutability of American class structure).

[8] *See, e.g.*, CHRISTOPHER LASCH, THE REVOLT OF THE ELITES (1994) (describing upper-class self-segregation).

Shareholder democracy is not the participatory democracy de Tocqueville observed in the early American republic. But, at first glance, it looks like it at least fits the representative model of American political elections: We (or at least those of us who own shares) elect those who govern us through the corporate sector. Indeed, participation is perhaps even greater, since shareholders, unlike voters in the Federal system and many states, have the right to initiate precatory proposals.[9] Moreover, some board proposals to make fundamental changes, including sale of the corporation or changes to its Articles of Incorporation (analogous to state constitutional amendments), are not effective unless approved by shareholders. But analogizing shareholding to democracy is misleading.

In sharp contrast to a political democracy, corporate governance has little commitment to collective self-government, limits on the powers of incumbents, protections against incumbents' use of office to maintain power, freedom of criticism, or other basic liberal protections.[10] 'Democratic' participation is a farce when the infrastructure in place excludes people from taking part in decision-making, and barriers to entry limit participation to categories of people and undermine democratic endeavors at their core.[11] Centuries of discrimination with respect to who has the wealth, or the legal right to use their wealth, to invest in company shares, means that share ownership reflects both past and present inequities, to the detriment of minorities and, indeed, individuals with ordinary or less wealth generally.[12] Discrimination in employment opportunities in the 20th Century with a corresponding lack of access to share ownership via employee stock ownership plans ("ESOPs") have contributed to keeping historically underrepresented groups out of the stock market.[13]

Millions of Americans do not own stock and therefore are excluded from even the minimal shareholder voice in governing the corporations that dominate our society. Corporations supply us with necessities like food, clothing, shelter and medicine, as well as with luxury goods to make life easier and more enjoyable. Corporations donate to our politicians and actively lobby our representatives, having lasting effects on our laws and regulations.[14] Corporations pollute our environment but also have the power to ameliorate past harms done to the environment over time.[15]

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[9] *See infra*, Part II.B; Geeyoung Min, *Shareholder Direct Democracy*, 74 EMORY L.J. 381, 389-90 (2024) (discussing how "corporate management is increasingly taking voting outcomes [of nonbinding proposals] seriously").

[10] Sergio Alberto Gramitto Ricci & Daniel J.H. Greenwood, *Total Governance*, 50 J. CORP. L. 353 (2025).

[11] *See* Cary Coglianese, *Democracy and Its Critics*, 88 MICH. L. REV. 1662, 1662-65 (1990) (observing that democracy is best protected by each individual person judges their own needs, and contributes to society's decision-making process, and "anything short of full participation," including berries to entry, stunts full consideration in the decision-making process).

[12] *See infra*, Part III.

[13] *See infra,* Parts III.B.-C.

[14] Dorothy S. Lund & Leo E. Strine, Jr., *Corporate Political Spending is Bad Business*, Harv. Bus. Rev. (Jan.-Feb. 2022), https://hbr.org/2022/01/corporate-political-spending-is-bad-business (detailing lobbying and corporate political donations to influence regulations). In the 1950s, independent shareholder Lewis Gilbert stated, "we cannot have good political government unless we have good corporate governments." LEWIS D. GILBERT, DIVIDENDS AND DEMOCRACY 41 (1956). He elaborated that "[p]articipation in the nation's business is the only real democracy in a modern world where it is indisputable that industry and finance are primary even in the field of political decision." *Id.*

[15] Kish Parella, *International Law in the Boardroom*, 108 CORNELL L. REV. 839, 848-50 (2023); *see also* STOUT, GRAMITTO, & BELINFANTI, *supra* note 3, at 18 (discussing the role of corporations in global warming).

They partner with our federal, state, and local governments to provide critical infrastructure and security. Corporations are inextricably woven within our society, economy, and politics. Ultimately, the lack of shareholder democracy impacts not just corporations but our society, economy, and greater democracy.

Corporate governance is not democratic at all. Shareholder voting is per share, not per person.[16] Thus, the wealthy get more votes than the rest of us and billionaires can buy as many votes as they wish. Over institutionalization of share ownership concentrates governance power in the hands of managers of a few funds and other institutions.[17] Middle-class shareholding is typically via institutions such as mutual funds; when the institution is the legal owner of the shares, it controls the votes. Institutional owner-managers like BlackRock, Vanguard, and State Street own and vote the bulk of company shares.[18] Most institutions, in turn, vote according to the recommendation of one of the two dominant proxy advisory firms, Institutional Shareholder Services ("ISS") or Glass Lewis, which, thus, control a majority of share votes even without owning, formally or beneficially, any shares at all.[19] So, shareholder governance is hijacked by institutional investors, which are, in turn, captured by proxy advisory firms that exert highly consequential voting power but have no stakes in the issuers or answerability to the demos.[20] As a result, the ultimate human investors have virtually no voting rights.[21]

The historical roots of the term shareholder democracy reveal that from the beginning it has been rhetoric with little connection to the meaning of the words. First popularized in the 1920s,[22] the term shareholder democracy attempts to legitimize a form of governance that defies ordinary democratic norms, by giving it a name diametrically contrary to its actual content, like calling margarine "better than butter."[23] The true function of shareholder democracy slogans was to limit calls for the radical reform of corporate law into a more representative or answerable form

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[16] *See* DEL. CODE ANN. TIT. 8, § 212 (2020) ("Unless otherwise provided in the certificate of incorporation . . . each stockholder shall be entitled to 1 vote for each share of capital stock held by such stockholder.").
[17] *See infra*, Part IV.A.
[18] Zohar Goshen & Doron Levit, *Agents of Inequality: Common Ownership and the Decline of the American Worker*, 72 DUKE L. J. 1, 5 (2022).
[19] *See infra*, Part IV.B; *see also* Goshen & Levit, *supra* note 18, at 65.
[20] *See infra*, Part IV.B; *see also* Goshen & Levit, *supra* note 18, at 65.
[21] *See infra*, Part IV; *see also* Paul Rose, *How Financial Institutions Disenfranchise Everyday Investors* (May 12, 2021), MANHATTAN INST., https://manhattan.institute/article/how-financial-institutions-disenfranchise-everyday-investors [https://perma.cc/C4FL-733B].
[22] JULIA C. OTT, WHEN WALL STREET MET MAIN STREET: THE QUEST FOR AN INVESTORS' DEMOCRACY 5 (2011) ("By the end of the 1920s, one particular set of answers—an ideology of *shareholder democracy*—reigned supreme."). Some mistakenly place the rise of the term "shareholder democracy" later in the 20th Century. *See, e.g.*, Andrew Ross Sorkin, *How Shareholder Democracy Failed the People*, N.Y. TIMES (Aug. 20, 2019), https://www.nytimes.com/2019/08/20/business/dealbook/business-roundtable-corporate-responsibility.html (incorrectly implying that 'shareholder democracy' dates to the 1970s).
[23] *See* OTT*, supra* note 22, at 5 (explaining that shareholder democracy was first perpetuated by the NYSE, large companies, and financial firms to meet their own goals but was quickly adopted by others seeking to "bring corporations in line with democratic political traditions").

by encouraging investment by the masses.[24] The related term "corporate democracy" has a similar history and has been used similarly to shareholder democracy since at least the 1930s to refer to shareholder participation in corporate governance.[25]

But debunking the shareholder democracy lie is not only essential to setting the record straight. Debunking the shareholder democracy rhetoric is critical to protect democratic values in our society and economy, since corporate sector and political and societal institutions are inextricably tied. The modern American republic heavily relies on the corporate sector for critical aspects of its existence and its citizens' happiness. Undemocratic influence over the corporate sector trickles down into our lives. So undemocratic shareholding is not only an issue in the corporate governance arena. It also permeates every aspect of our existence on this planet and in this society, with ramifications that extend to future generations. Investigating the fallacious rhetoric that attains shareholder governance is not an otiose exercise. Rather, it is a vital endeavor for an informed corporate governance debate and healthy policymaking.

This Article proceeds in five parts. Part I explores the development of the term shareholder democracy in the 1920s and then provides examples of recent uses of shareholder democracy rhetoric. It also summarizes some of the fundamental, inescapable, conflicts of any democratic system. Part II explores the development of proxy voting dating back to early modern English joint stock corporations in the 17th and 18th Centuries. It further details the debate regarding shareholder power underlying the adoption of the U.S. federal proxy voting regulations with an emphasis on the use of the term "shareholder democracy." The Article then proceeds by breaking down the misconception that shareholding is democratic both in access and in the power to exercise one's voice and vote. More specifically, Part III examines some of the origins of shareholder ownership inequality. Part IV details the de-retailization of company shares, the growth of institutional investors, and their reliance on proxy advisory services. Part V concludes.

I. THE CORPORATE AND SHAREHOLDER DEMOCRACY RHETORIC AND ITS LACK OF THEORETICAL JUSTIFICATION

A. Recent Use of Shareholder Democracy Rhetoric

The term shareholder democracy became popular in the late 1920s. Wall Street investment firms and the New York Stock Exchange used it to attract financial investment by everyday individuals.[26] Managers of large corporations and their political allies used the same rhetoric to push back against government regulation restricting business behavior, social welfare proposals, and labor union organizing.[27] Advocates of so-called shareholder democracy argued that acquiring corporate shares in an "*unregulated* securities markets could accomplish key social goals—

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[24] *See id.* (describing how Wall Street adopted shareholder democracy to fight government regulation and interference in corporate law).
[25] Franklin A. Gevurtz, *The Complex Dualisms of Corporations and Democracy*, 14 NORTHEAST. U. L. REV. 365, 372 (2022) (recognizing how shareholder democracy and corporate democracy is used interchangeably).
[26] OTT, *supra* note 22, at 5.
[27] *Id.*

individual security and opportunity, macroeconomic prosperity and stability—in a far more efficient and democratic manner" than the government could accomplish with regulations.[28] As Julia Ott has detailed, proponents of shareholder democracy argued that mass investment would provide "class harmony" without disrupting the status quo "economic wealth and power" and who holds it.[29] Then others found other uses for shareholder democracy rhetoric. For example, labor and consumer advocates seeking reform contended that "universal investment could bring corporations in line with democratic political traditions."[30] Still others used shareholder democracy language as a way of garnering support for regulations to protect third party investors.[31] In the 1950s, shareholder democracy proponents like Frank Emerson and Franklin Latcham stressed the importance of individualism, the opportunity to exercise one's judgment, and a "rekindling" of "free discussion" among investors in corporations.[32]

Emerson and Latcham praised the Securities and Exchange Commission's (the "SEC") adoption of Rule 14a-8 for providing a formal mechanism for shareholder voices to be heard. As will be detailed later in this Article, proponents of Rule 14a-8 lauded its adoption as the epitome of shareholder democracy while the management of many companies fought its adoption. The struggle between management and shareholders that prompted the adoption of Rule 14a-8 continues today. Both sides utilize shareholder democracy rhetoric to push their own agenda. Mass media and industry titans also rely on this rhetoric to push their own agendas. The remainder of this section briefly examines some recent uses of the shareholder democracy rhetoric to demonstrate the fallacy of the rhetoric.

In recent years, issuers and activist investors have competed at bending shareholder democracy rhetoric to best serve their conflicting arguments and purposes. Much as theories of corporations as "natural entities," mere "aggregates," or derogations of state sovereignty served both sides of regulatory debates in the nineteenth and early twentieth centuries,[33] so too parties on the opposite sides of proxy fights or corporate arena battles have resorted to the shareholder democracy rhetoric to justify their actions or seek more credibility. The shareholder democracy rhetoric has been used as a rhetorical cheat code with an amorphous meaning.

In early 2024, Arjuna Capital, a wealth management firm focused on sustainable investing,[34] and Follow This, a Dutch climate activist group, sought to include a shareholder proposal relating to climate change on the 2024 Exxon Mobil Corporation shareholder meeting

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[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] FRANK D. EMERSON & FRANKLIN C. LATCHAM, SHAREHOLDER DEMOCRACY: A BROADER OUTLOOK FOR CORPORATIONS 9 (1954).
[33] *See, e.g.*, Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. (1986); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).
[34] Arjuna Capital Homepage, https://arjuna-capital.com/ (describing itself as a "boutique wealth management firm" focused on sustainable investing).

agenda.[35] In resisting the proposal, Exxon CEO Darren Woods argued that the proxy system was being hijacked and "abused by a coalition of activists masquerading as shareholders."[36] After a federal district court dismissed a case brought by Exxon against Arjuna, Exxon issued a press release stating in part, "We've heard a lot about shareholder rights, and our suit has always been about preserving those rights because shareholder democracy is only as strong as the rules that govern it. Making repeated proposals that garner a small minority of support doesn't serve anyone's interest, except the proponent's."[37] But shareholder democracy language was embraced by both sides: Arjuna also invoked shareholder democracy in a letter to ExxonMobil stating that Exxon's lawsuit "represent[ed] an assault on the system of shareholder democracy which has served both investors and companies well for decades."[38]

In another instance, during Tesla's quest to have shareholders re-ratify Elon Musk's unprecedently rich compensation plan, which the Delaware Court of Chancery had struck down due to conflicts of interest, Tesla wrote in a letter to shareholders: "We don't agree with what the Delaware Court decided. So, we are giving stockholders the chance to make their voices heard. We believe in stockholder democracy. This important decision should be made by the owners of the Company: that's you."[39] It also leaned into the rhetoric in a shareholder presentation arguing that ratification of the compensation plan "protects stockholder democracy" and in its proxy statement it argued "ratification will restore Tesla's stockholder democracy."[40] Democracy, apparently, required accepting the demand of the company's most powerful individual – its CEO and largest shareholder – to pay him extraordinary sums to do the job which had already helped to make him one of the richest men in the world.

Shareholder democracy rhetoric also was invoked in a 2024 proxy battle between Nelson Peltz of Trian Partners and Disney. As Peltz fought an ultimately losing battle for two Disney board seats, Disney launched a defense. Trian responded, "To suggest that Nelson Peltz is an 'infiltrator' (he has been elected overwhelmingly by shareholders in 48 elections) is offensive and

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[35] Sydney Ember, *Exxon Suit Over Activist Investor's Climate Proposal Is Dismissed*, N.Y. TIMES (June 17, 2024), https://www.nytimes.com/2024/06/17/business/exxon-arjuna-lawsuit-dismissed.html.
[36] Bloomberg, *Exxon Vows to Be 'Forceful Advocate' for Shareholder Democracy*, ENERGYCONNECTS (May 29, 2024), https://www.energyconnects.com/news/gas-lng/2024/may/exxon-vows-to-be-forceful-advocate-for-shareholder-democracy/.
[37] *Message from Darren Woods, ExxonMobil Chairman and CEO* (June 18, 2024), https://corporate.exxonmobil.com/news/corporate-news/message-from-the-chairman.
[38] *Exxon Mobil Corporation v. Arjuna Capital, LLC and Follow This*, No. 4:24-cv-00069-P, (N. TX), Arjuna Capital, LLC's Notice to Court of Letter to Exxon Mobil Corporation, (filed May 27, 2024), https://climatecasechart.com/wp-content/uploads/case-documents/2024/20240527_docket-424-cv-00069_notice.pdf. On the negative externalities on the corporate governance machinery of Exxon suing its shareholders, *see* Colleen Honigsberg and Robert J. Jackson, *Jr.Exxon's Suit Against Its Own Shareholders Threatens Valuable Bargaining*, Promarket (Jul. 16, 2024), https://www.promarket.org/2024/07/16/exxons-suit-against-its-own-shareholders-threatens-valuable-bargaining/
[39] Tesla, Tesla Letter to Stockholders (Apr. 17, 2024), https://www.votetesla.com/wp-content/uploads/2024/05/Tesla-Letter-to-Stockholders-April-17-2024-1.pdf.
[40] Tesla Investor Presentation (May 2024), https://www.votetesla.com/wp-content/uploads/2024/05/Tesla-Investor-Presentation-May-2024.pdf; Tesla, Inc., Proxy Statement on Schedule 14A (Apr. 17, 2024), https://www.sec.gov/ix?doc=/Archives/edgar/data/1318605/000110465924053333/tm2326076d15_def14a.htm

highly dismissive of shareholder democracy."[41] After Disney released the results of the shareholder vote early, prior to the shareholder meeting, Bill Ackman, an activist hedge fund manager, criticized the release on X (formerly Twitter) stating, "It is time that we make an example of Disney here so that this bad practice does not continue to poison shareholder democracy."[42] In contrast to Tesla's use of shareholder democracy rhetoric to defend an insider's attempt to seize an extreme proportion of company wealth, Peltz and Ackman invoked the same concepts to defend the power of activist investors to reorient Disney in the activist investors' preferred direction.

Reliance on shareholder democracy language has not been limited to companies and activist investors. A year after BlackRock introduced pass-through voting for its funds, Larry Fink wrote to BlackRock clients and corporate CEOs heralding pass-through voting as creating "[t]he potential for a new era of shareholder democracy" and argued that "if widely adopted, [pass-through voting] can enhance corporate governance by injecting new voices into shareholder democracy."[43] He concluded by saying, "[t]his revolution in shareholder democracy will take years to be fully realized, but it is one that, if executed correctly, can strengthen the very foundations of capitalism."[44]

Mass media also uses shareholder democracy to push their story lines. In September 2024, *The Financial Times* ran a story titled "*Vanguard experiment in shareholder democracy finds investors prefer to defer*" which described Vanguard's pass-through voting program.[45] The story explained that 45 percent of Vanguard shareholders chose to defer to Vanguard's default policy in how their shares would be voted.[46] But the headline relying on shareholder democracy did not actually reflect the majority of Vanguard's shareholders and their desires. As an Op-Ed in response to *The Financial Times* article points out, these numbers mean that more than half of Vanguard

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[41] Todd Spangler, *Disney Slams Activist Investor Peltz as 'Disruptive and Destructive,' Says His Proxy Fight 'Seems More About Vanity Than a Belief' in Company*, VARIETY (March 11, 2024), https://variety.com/2024/biz/news/disney-attacks-nelson-peltz-disruptive-destructive-vanity-1235938192/.

[42] Bill Ackman @BillAckman, X (Apr. 3, 2024, 12:14 AM), https://x.com/BillAckman/status/1775285586078707789?lang=en.

[43] Larry Fink, *The transformative power of choice in proxy voting*, BLACKROCK, https://www.blackrock.com/corporate/about-us/investment-stewardship/blackrock-voting-choice/proxy-voting-power-of-choice. Blackrock's investment vehicles are the owners of record of the shares they hold on behalf of their own investors. Until recently, the universal practice was for the investment fund's managers to vote the shares it managed without regard to (or even knowledge of) the views of the fund's own investors. Under pass-through voting, in contrast, Blackrock agreed to vote the shares it held pro rata, according to its own investors' instructions.

[44] *Id.* The pass-through voting archetype is described in Lynn Stout & Sergio Gramitto, *Corporate Governance as Privately-Ordered Public Policy: A Proposal*, 41 SEATTLE U. L. REV. 551, 557–58, 571–73 (2018), and in Lynn Stout et al., CITIZEN CAPITALISM: HOW A UNIVERSAL FUND CAN PROVIDE INFLUENCE AND INCOME TO ALL 58–60 (2019). For a critique of the pass-through voting as a shareholder democracy device, *see* Sergio Alberto Gramitto Ricci, *The Vitruvian Shareholder*, 75 FLA. L. REV. F. 114 n.2 (2024) (explaining the issues that pass-through voting for beneficiaries and for issuers alike). For a critique of the current pass-through voting architecture, *see also* Caleb N. Griffin, *Open Proxy* (July 12, 2024) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4887974 (criticizing the current pass-through voting model).

[45] Madison Darbyshire, *Vanguard experiment in shareholder democracy finds investors prefer to defer*, FIN. TIMES (Sept. 17, 2024), https://www.ft.com/content/da59775c-c7f4-44c6-a625-2004ae9baeed.

[46] *Id.*

shareholders preferred to decide how to vote on their own – despite their deference to Vanguard's expertise in managing their investments and, presumably, Vanguard's parallel expertise in determining the shareholder-profit maximizing vote.[47] The Op-Ed notes that for most of the Vanguard shareholders who actively sought to vote differently than Vanguard, it was likely the first time they had ever made any voting decisions with respect to their stock.[48] As it says, "[t]he push for democratized voting closely mirrors current trends toward transparency and accountability."[49]

With or without pass-through voting, one should not be lulled into believing that corporations are democracies. Contrary to the rhetoric, shareholders do not possess rights like those of citizens in a democratic political system. As the next section details, corporations are far from democratic entities.

B. *Corporations are Not Democracies*

Corporate law as we know it does not create a government dedicated to the good of the governed, especially if the governed include all corporate participants and not merely imaginary undiversified stock investors. It has no mechanism for corporate managers to determine the actual will of shareholders, let alone employees, customers, creditors and other corporate participants or dependents. It lacks the basic political rights of equal votes, bicameralism, an independent internal judiciary, or any concept of due process. It does not guarantee, except to the extent that outside forces require it to do so, anti-discrimination principles or positions open to talent.[50] Indeed, standard corporate law still allows the purchase of office (achieved by the purchase of shares), two centuries after the French revolution. Shareholders are effectively insurers rather than members, citizens, or owners.[51] This, of course, is precisely the opposite of standard democratic theory, which contends that a state exists to serve its citizens,[52] not the reverse.[53]

1. Shareholder "Non-cracy": Shareholders Do Not Rule

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[47] Georgia Stewart, *Letter: Vanguard pilot shows investors want say in voting their shares*, Op-Ed, FIN. TIMES (Oct. 16, 2024), https://www.ft.com/content/1ed14a04-5584-4f3b-a69c-0b51b022f1c5.
[48] *Id.*
[49] *Id.* The author of the Op-Ed is Georgia Stewart, the CEO of Tumelo, a British pass-through voting firm. *Id.*
[50] Max Weber, *Bureaucrac*y, *in* MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION (Talcott Parsons, ed.).
[51] Günter Franke, *Shareholders as Insurers of Their Firm*, 152 J. INST. & THEORETICAL ECON. 113, 117 (1996) (analogizing shareholders to insurers).
[52] *See, e.g.*, Declaration of Independence, July 4, 1776 ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . .").
[53] The idea that citizens, or subjects, exist to serve the state is generally understood to characterize anti-democratic fascist or totalitarian regimes. Democracies, in contrast, typically contend that the state ultimately exists to serve the citizens, while citizens ought to, as patriots, serve the country as well. *See, e.g.*, John F. Kennedy, Jr., Inaugural Address (January 20, 1961) ("Ask not what your country can do for you – ask what you can do for your country.").

Shareholder democracy is not "rule" at all. Beyond board elections and veto power over organic changes shareholders have limited governance rights. Precatory shareholder resolutions and say-on-pay votes on executive compensation plans are merely advisory.[54] Whether a board chooses to implement a shareholder proposal is another matter.[55] To be sure, shareholders have the power to enact corporate bylaws, although the board often does as well.[56] Additionally, a limited number of board decisions are binding on the company only after shareholder approval: decisions to sell, merge or otherwise end the corporation's independent existence,[57] amendments to the corporation's articles of incorporation,[58] and a few similarly fundamental changes.

The corporate board is the ultimate decisionmaker for the corporation; while directors are elected by share votes, they are barred from deferring to the views, or even interests, of the actual voters, let alone other corporate constituencies.[59] This is contrary to the general notion that representatives should represent the views of their electors. In fact, corporate law is clear that corporate directors are not representatives of their electors. Rather, they are fiduciaries of the corporation: They must act in the best interests of the corporation as the directors in good faith perceive those interests.

Similarly, shareholders have no right to control the lobbying or political interventions funded by their investments as allocated by management. Rather, incumbent corporate officers have virtually unlimited access to corporate funds and virtually unlimited power to direct corporate personnel to pursue their own views of the corporate good—even if others disagree. Indeed, corporate incumbents even are permitted to use corporate resources to counter the efforts of shareholders willing to challenge the board.[60] Thus, incumbent officeholders may use the full power of their office to defend their positions in contested elections, including financing their reelection campaigns with corporate funds (so long as they insist, even implausibly, that power struggles are over proposed policy rather than solely about who will hold office).[61] For example, in the Disney-Peltz proxy battle mentioned above, Disney is estimated to have spent $40 million defending the incumbent board seats while Peltz is estimated to have spent $25 million, making it

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[54] James C. Cox & Randall S. Thomas, *The SEC's Shareholder Proposal Rule: Creating A Corporate Public Square*, 2021 COLUM. BUS. L. REV. 1147, 1185 (2021) (recognizing the precatory nature of proposals).
[55] *Id.* ("Even though shareholder proposals are often technically advisory, boards often implement proposals that garner a majority of shareholder votes."); *c.f.* Yonca Ertimu, Fabrizio Ferri & Stephen R. Stubben, *Board of Directors' Responsiveness to Shareholders: Evidence from Shareholder Proposals*, 16 J. CORP. FIN. 53, 54 (2010) (detailing a 2004 study in which 40% of proposals receiving a majority vote were not implemented). *See also* Min, *supra* note 9, at 415-18 (discussing increasing pressure on management to be responsive to shareholder proposals, including those that did not gain majority support).
[56] *See* Del. Code Ann. tit. 8, § 109 (2015) (describing power of shareholders to amend bylaws).
[57] *See, e.g.*, DEL. CODE ANN. TIT. 8, § 251(c) (2020) (requiring shareholders of constituent corporations to a merger vote on the proposed merger); DEL. CODE ANN. TIT. 8, § 271(c) (2010) (requiring a shareholder vote for a sale of all or substantially all of the assets of a corporation).
[58] *See* DEL. CODE ANN. TIT. 8, § 242(b) (2023) (detailing amendments to the certificate of incorporation requiring a shareholder vote).
[59] Gramitto Ricci & Greenwood, *supra* note 10.
[60] Melvin Aron Eisenberg, *Access to the Corporate Proxy Machinery*, 83 HARV. L. REV. 1489, 1496 (1970).
[61] *Id.*

by some estimates the most expensive proxy fight in history.[62] More generally, in the corporate sphere, we have no concept of a loyal opposition. Instead, directors ordinarily are expected to support incumbent officials or resign, and common corporate governance parlance refers to dissident shareholders as "insurgents" or "barbarians at the gate" as if they were foreign invaders rather than legitimate participants in a democratic debate.

2. Wealth Supremacy and the Limits of Shareholder Voting

Far from being "rule by the people" (or in the ancient Greek parlance, the demos), the corporate governance system is based on voting by investment, and therefore wealth.[63] Shareholders are not the "people" in any meaningful sense. In fact, most shares are held and voted by institutions, not by individuals.[64] In real democracies, ultimate control is in the majority of the population. Consequently, governments are more likely to adopt a goal of "promot[ing] the welfare of the greatest possible number"[65] than to adopt a policy of preferring some ruling minority over others.[66]

Corporate governance, in contrast, allocates control according to shareholding size. Shareholders vote per share, not per person.[67] Contrary to the basic notion that votes should not be for sale,[68] shares (along with the votes they carry) are freely bought and sold. Combined, these two principles mean that the corporate system is far closer to a plutocracy than democracy; elections are for sale and the wealthy can buy them. Ultimate control of corporate governance, therefore, resides in the stock market as a whole—shareholders and non-shareholders alike—because it is the marginal buyer or seller which determines the price of the shares, their votes and thus elections.

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[62] *See* Brooks Barnes and Lauren Hirsch, *For Disney, Small Shareholders Loom Large in Boardroom Fight*, N.Y. TIMES (April 1, 2024), https://www.nytimes.com/2024/03/30/business/media/disney-shareholders-proxy-battle.html (citing costs of proxy fight); Kim Masters, *Bob Iger Bruised, But Not Broken, After Disney Fight*, THE HOLLYWOOD REPORTER (April 10, 2024), https://www.hollywoodreporter.com/business/business-news/bob-iger-nelson-peltz-disney-proxy-board-1235870436/ (stating the Disney-Peltz proxy battle was the most expensive in history).

[63] One share one vote is not legally required, and many corporations have shares with more than one vote, typically issued to founders to allow them to retain voting control after going public even as their percentage ownership of the shares drop. For a discussion of the merits of one share one vote from the perspective of maximizing long run returns to shareholders, *see, e.g.*, Lisa Fairfax, *Shareholder Democracy on Trial: International Perspective on the Effectiveness of Increased Shareholder Power*, 3 VA. L. & BUS. REV. 1, 16 (2008).

[64] *See infra* Part IV.

[65] ALEXIS DE TOCQUEVILLE, II DEMOCRACY IN AMERICA 238 (ED PHILIPS BRADLEY; TRANS HENRY REEVE, FRANCIS BOWEN) (1946).

[66] *Id.* at 241.

[67] *See* DEL. CODE ANN. TIT. 8, § 212 (2020) ("Unless otherwise provided in the certificate of incorporation . . . each stockholder shall be entitled to 1 vote for each share of capital stock held by such stockholder.").

[68] *See* Richard L. Hasen, *Vote Buying*, 88 CAL. L. REV. 1323, n.1 (2000) (setting forth the laws of all 50 states prohibiting vote buying).

Our publicly traded stocks—and their votes—are dominated by a handful of wealthy institutions. Even individually held stocks are disproportionately in the hands of the ultra-wealthy.[69] American income is quite skewed towards the top, wealth is far more unequally distributed than income,[70] and stock holding–direct or indirect–is far more unequal than wealth.[71] The same logic that tells us that democratic rule is likely to promote the greatest good of the greatest number, suggests that shareholder voting will promote the interests of the wealthiest and most powerful.

The existing system effectively assures that publicly traded corporations remain subservient to the goal of shareholder profit maximization—regardless of the actual values and priorities of corporate participants, including human shareholders.[72] But few actual human beings are so blinded by greed as to have no values other than shareholder profit.[73] In fact, although the majority of holders of beneficial shares are human beings, their values and concerns are typically overlooked, because their voting power and influence cannot counter the voting power and influence of institutional investors and proxy advisory firms.

From a Tocquevillian perspective, the point is clear: so-called shareholder democracy is not practice for or education in the norms of political democracy, because it has little to do with those norms. It is not participatory, democratic, or egalitarian. Instead, it reifies and strengthens the existing wealth distribution, enabling the rich to get richer while the middle and poor are left behind. And it shares few of the liberal restraints on winner-take-all or protections of individual liberty that are so central to political democracy. Despite this, the concept of shareholder

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[69] Robert Frank, *The Wealth of the 1% Just Hit a Record $44 Trillion*, CNBC (Mar. 28, 2024), https://www.cnbc.com/2024/03/28/wealth-of-the-1percent-hits-a-record-44-trillion.html#:~:text=The%20top%201%25%20own%20half,and%20home%20values%20than%20stocks (citing a Federal Reserve report and stating "[t]he top 1% own half of all individually held stocks").

[70] *See* Zia Qureshi, *Rising Inequality: A Major Issue of Our Time*, BROOKINGS (May 16, 2023) (explaining wealth inequality is generally significantly higher than income inequality).

[71] *See* Frank, *supra* note 69 (observing half of all individually held stocks are held by the top 1%). As of end of the fourth quarter of 2023, "[t]he top 1% accounted for 30% of the nation's wealth . . . while the top 10% accounted for 67% of all wealth." *Id.*

[72] Robert G. Eccles & Jill E. Fisch, *The Politics of Values-Based Investing,* HARV. L. SCH. FORUM ON CORP. GOV., Sept. 7, 2022, https://corpgov.law.harvard.edu/2022/09/07/the-politics-of-values-based-investing/ (discussing the principles of values-based investing); Sergio Alberto Gramitto Ricci & Christina M. Sautter, *The Wireless Investor Movement*, U. CHI. BUS. L. REV.: ONLINE EDITION (2022). (arguing that new generations of investors use online communication to coordinate collective action aimed at steering corporations according to investors' generational values).

[73] Andreas Kokkinis & Konstantinos Sergakis, *Investor Personhood: The Case Against Paternalism and Welfarism in Corporate Law*, J. CORP. L. STUDS. 38 (July 18, 2024) (explaining individuals exercise both financial and non-financial values in their investing and voting decisions), Sergio Alberto Gramitto Ricci & Daniel J.H. Greenwood, *Total Governance*, 50 J. CORP. L. 353, 353-54 (2025) (arguing that nobody would consitently choose maximization of profit over any other values); Sergio Alberto Gramitto Ricci, *The Vitruvian Shareholder*, 75 FLA. L. REV. F. 113, 114 (2024) (describing as the double nature of human shareholders as investors and as human beings who cohabit a shared planet and live in society brings retail investors to balance interests associated with both natures).

democracy has appealed to some who have endeavored to expand or just maintain shareholder voting rights.

II. ORIGINS AND APPEAL OF THE CORPORATE AND SHAREHOLDER DEMOCRACY RHETORIC

Some proponents of shareholder democracy in the early to mid-20th Century sought to replicate the corporate voting rights that existed and evolved beginning at least in the 1600s and 1700s with English joint-stock corporations. This section explores stock ownership and voting in early modern English companies which shaped American corporations. It also details the development of proxy voting regulations which now govern in Corporate America today. This background is crucial in dissecting shareholder democracy as it reveals some of the parallels and ties between government and corporations upon shareholder democracy rhetoric draws.

A. History of Proxy Voting in Corporations

In the 1700s, English shareholders were typically known as proprietors.[74] General meetings of the proprietors were most often referred to as "general courts."[75] The general courts "corresponded to the legislative branch of the government of the kingdom."[76] The general courts elected the directors, who met in courts of directors functionally analogous to board meetings.[77] A so-called governor and sub-governor (sometimes referred to as a president and vice president) presided over the court of directors.[78] The directors summoned the general courts but typically occur multiple times a year with a minimum number set forth in the company's charter or articles of association.[79] For some companies courts "resemble[d] public gatherings."[80] According to Armand Budington Dubois, "[c]ausal spectators would wander into the meetings of the large companies of London, and would cheer for favorite directors as if the meeting were for entertainment instead of for business."[81] As one can imagine, not all companies and their directors welcomed such a public spectacle, and some companies took measures to limit attendance to only proprietors or proprietors capable of voting during a court.[82]

Generally, the ability to vote during a court in the 1700s in England was based on a proprietor's holdings, but not on the one-share, one-vote (sometimes with extra votes for founders and their heirs) considered normative today.[83] Instead, corporations typically included a low cap

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[74] ARMAND BUDINGTON DUBOIS, THE ENGLISH BUSINESS COMPANY AFTER THE BUBBLE ACT 1720-1800 314 n.38. (1938).
[75] *Id.* at 314 n.39. The terms "general assembly" and "general meeting" also were occasionally used. *Id.*
[76] *Id.* at 287.
[77] *Id.*
[78] *Id.* at 287, 314 n.40.
[79] *Id.* at 287.
[80] *Id.*
[81] *Id.*
[82] *Id.* at 289.
[83] *Id.* at 288.

on the total number of votes any individual proprietor was able to cast.[84] For example, in 1723, the Chelsea Water Company had a tiered system in which proprietors with five shares had one vote, those with ten shares had two votes, and all those with twenty or more shares had three votes.[85] Notably, women represented a sizeable portion of investors in early modern English corporations and all indications are that women were permitted to exercise voting rights if they held the requisite number of shares needed to be able to vote.[86]

Interestingly, rates of female ownership of company shares in England were higher prior to 1750 than they were from the 1780s to the 1820s.[87] In the 1730s and 1740s, women represented a quarter to a third of investors in the Bank of England, the South Sea Company, East India Company, and the Mine Adventurers Company.[88] Froide notes that this was "twice the rate of female shareholding [than] in the 1780s."[89] A review of the records of early modern English companies shows no gender-based distinction on the ability to vote or hold office.[90] Hence, women were eligible to vote in company elections.[91] However, whether shareholders who were eligible to vote (either male or female) actually exercised their right to vote is unclear.[92] For example, between 1766 and 1773, only approximately eight to ten percent of shareholders entitled to attend general courts of the East India Company attended those meetings.[93]

Under early English and American common law, proxy voting was not permitted without a special authorization.[94] The background rule disfavoring proxy voting likely arose due to the historical political roots of the English corporate form.[95] More specifically, the English Crown

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[84] *Id.* For a discussion of the evolution of the one vote per shareholder rule to one vote per share in the United States, *see* Colleen A. Dunlavy, *From Citizens to Plutocrats: Nineteenth-century Shareholder Voting Rights and Theories of the Corporation*, *in* CONSTRUCTING CORPORATE AMERICA: HISTORY, POLITICS, CULTURE (Kenneth Lipartito & David B. Sicilia, eds. 2004), and Sarah C. Haan, *Voting Rights in Corporate Governance: History and Political Economy*, 95 S. CAL. L. REV. 881 (2023).

[85] DUBOIS, *supra* note 74, at 316 n.47. Votes were also capped at three votes no matter how many shares above twenty a proprietor owned. *Id.* Other companies like the Scotch Mining Company in 1729 empowered even those with just one share the right to vote (one vote). *Id.* It also had a voting range with thirty shares having five votes and five votes being the maximum. *Id.* Other companies like the Warmley Copper Company in 1767 based its voting on the monetary value of stock owned. *Id.* Warmley permitted proprietors with £ 1,000 of stock one vote, £ 5,000 of company stock two votes, and £ 10,000 or more three votes. *Id.*

[86] AMY M. FROIDE, SILENT PARTNERS: WOMEN AS PUBLIC INVESTORS DURING BRITAIN'S FINANCIAL REVOLUTION, 1690-1750 198 (2017).

[87] *Id.* at 210. Looking back further to the 1600s and shareholding of the East India Company, scholars vary in their estimates of female share ownership. *Id.* at 8. For example, K.G. Davies estimated that women accounted for the ownership of between two and four percent of the company's shares in 1685 while Barbara Todd estimates a much higher number at thirteen percent in 1688. *Id.*

[88] *Id.* at 210.

[89] *Id.* at 210.

[90] *Id.* at 198.

[91] *Id.* at 198-99.

[92] *Id.* at 199.

[93] *Id.*

[94] Leonard H. Axe, *Corporate Proxies*, 41 MICH. L. REV. 38, 38-40 (1942).

[95] *Id.* at 39.

issued charters pursuant to which individuals were designated as corporations, known as a joint stock companies, and granted "sovereign power to exercise appropriate privileges."[96] Over time, the power to grant corporate charters passed from the Crown to Parliament.[97] Parliament passed special legislation establishing joint stock companies on a company-by-company basis until 1844, at which point they were formed by registering with the Registrar of Joint Stock Companies.[98]

Early English corporations were "considered a part of the government" and followed political norms.[99] In the context of political elections, the right to vote was considered "so personal that it could not be delegated."[100] Because voting by proxy was prohibited in political voting, voting by proxy also was prohibited in corporate voting.[101] To vote via proxy, special authorization was required, which took various forms, including express charter or by-law provisions.[102]

Notwithstanding the background rule, proxy voting was routinely adopted in English company charters as early as the beginning of the 1700s -- proxy voting was considered a "usual feature" of general courts during this time.[103] Typically, to act as another's proxy during a court, the proxy holder also had to be a proprietor.[104] English companies commonly allowed proxy voting for female shareholders as well as other categories of shareholders including those living a certain distance from the meeting location.[105] A couple of English companies required female shareholders to vote via proxy and did not allow them to attend shareholder meetings.[106] But those companies appear to have been in the minority and most allowed female shareholders to both attend shareholder meetings and to vote via proxy.[107] Moreover, female shareholders were permitted to act as another shareholder's proxy.[108]

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[96] *Id.* at 39.
[97] John Morley, *The Common Law Corporation: The Power of The Trust in Anglo-American Business History*, 116 COLUM. L. REV. 2145, 2157 (2016).
[98] *Id.*; Janette Rutterford, *The Forgotten Investors: Women Investors in England and Wales 1870 to 1935*, a. LVI QUADERNI STORICI 166 13, 15 (April 2021).
[99] Axe, *supra* note 94, at 39. For a discussion of the evolution of the one vote per shareholder rule to one vote per share, see Dunlavy, *supra* note 84 and Haan, *supra* note 84.
[100] EMERSON & LATCHAM, *supra* note 32, at 5. Frank Emerson and Franklin Latcham also noted, "[s]ometimes it is also explained that the English common law rule against voting by proxy at stockholder meetings was grounded on a similar ban applied in England under its common law to religious and municipal corporations." *Id.*
[101] Axe, *supra* note 94, at 39. However, as Emerson and Latcham pointed out in their 1954 book "Shareholder Democracy: A Broader Outlook for Corporations," citizens had the right to vote via absentee ballots in early modern England, which is like proxy voting. EMERSON & LATCHAM, *supra* note 32, at 5. Yet, under English common law, the prohibition against corporate proxy voting continued. *Id.* at 5.
[102] Axe, *supra* note 94, at 41-46.
[103] *Id.* at 41; DUBOIS, *supra* note 74, at 288.
[104] DUBOIS, *supra* note 74, at 288.
[105] Mark Freeman, Robin Pearson, & James Taylor, *'A doe in the city': Women shareholders in eighteenth-and early nineteenth-century Britain*, 16 ACCTG., BUS. FIN. HISTORY 265, 284 (2006).
[106] *Id.* DuBois notes the same pointing to two companies in the 1700s which did not permit women to attend general courts and stating that "most of the companies of the period drew no such distinction of sex." DUBOIS, *supra* note 78, at 319 n.55.
[107] Freeman, Pearson, & Taylor, *supra* note 105, at 284.
[108] *Id.*

As in England, after independence, American corporations were created by special state legislation.[109] To obtain a corporate charter, early incorporators had to petition a state legislature and a special bill had to be passed on a company-by-company basis.[110] Like the English system, early American law presumed that proxy voting was barred unless there was an express legislative, charter, or by-law provision providing otherwise.[111] This preference apparently echoed a public policy in favor of a "democratic-style exchange of ideas" among shareholders.[112]

However, both special charters and the presumption against proxy voting fell into disfavor over the 19th Century. Jacksonian populists sought to reform corporate law to enable more men, not just those with connections to the legislature, to take advantage of its special privileges.[113] In 1811, New York became the first state to enact general legislation permitting the formation of manufacturing corporations via registration as opposed to requiring a special legislative act.[114] This legislation specifically provided that corporations formed pursuant to the statute would be managed by trustees who would be elected on a yearly basis "at such time and place" as set forth in the corporate by-laws by stockholders attending "either in person or by proxy."[115]

Over time, other states adopted similar general incorporation statutes allowing for incorporation by registration, generally including at least some proxy voting. Pennsylvania's 1842 statute permitting the incorporation of manufacturing companies may best reflect the public policy for proxy voting at the time.[116] That statute was specifically enacted to "encourage manufacturing operations in [the] commonwealth" and allowed for stockholders to vote via proxy if they lived greater than 10 miles from the location of the annual meeting or were female.[117] By 1942, every state, except for Iowa and Texas, had statutes authorizing shareholders to vote via proxy.[118] Although Iowa and Texas did not have statutory authorization for corporate proxy voting, Iowa

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[109] Axe, *supra* note 94, at 46; *see also* Susan Pace Hamill, *From Special Privilege to General Utility: A Continuation of Willard Hurt's Study of Corporations*, 49 AM. U. L. REV. 81, 89 (1999).
[110] Hamill, *supra* note 109, at 89.
[111] Axe, *supra* note 94, at 38 n.1.
[112] Haan, *supra* note 84, at 888.
[113] In the days when insolvency led to debtors' prison, corporate entity liability rules were even more valuable than they are today. *See* Rhett Frimet, *The Birth of Bankruptcy in the United States*, 96 COM. L.J. 160, 175 (1991) (explaining how it was not until 1821 that states began to repeal laws requiring prison sentences for debtors). Most nineteenth century businesses were organized as sole proprietorships or partnerships. Robert Margo, *Economies of Scale in Nineteenth Century American Manufacturing Revisited: A Resolution of the Entrepreneurial Labor Input Problem*, *in* ENTERPRISING AMERICA: BUSINESS, BANKS, AND CREDIT MARKETS IN HISTORICAL PERSPECTIVE (WILLIAM J. COLLINS & ROBERT A. MARGO) (2015) (detailing how in 1880 "tiny establishments" such as sole proprietorships dominated the market). Then as now, in those forms, the principals are personally responsible for business debts and therefore likely to go bankrupt if the firm does; corporate status, in contrast, protects personal assets from business failure.
[114] LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 134 (3D ED. 2005).
[115] N.Y. Laws (1811), c. 67, p. 111, esp. sec. 3.
[116] Axe, *supra* note 94, at 48.
[117] *Id.* (internal quotations excluded).
[118] *Id.* at 46 & n.27.

common law provided the right to vote via proxy if it was set forth within the charter or by-laws while Texas had a long-held custom of allowing shareholders to vote via proxy.[119]

Implicit in the statutes, common law, and customs in favor of proxy voting was a policy toward supporting shareholder participation. Even though shareholding was largely limited to the upper classes, even within the relatively well-off the distinction between smallholders and the towering heights of the economy was massive. Sarah Haan explains that proxy voting facilitated voting by small shareholders who otherwise would be unable to participate in shareholder meetings due to work obligations, family obligations, or their inability to travel.[120] She further notes that the growth of corporations and the related diversification and widespread dispersion of shareholders essentially necessitated proxy voting for corporations to meet quorum requirements for annual meetings.[121] As the Court of Chancery of New Jersey stated in 1931, "[i]t would be stupid indeed to assume that the 80,000 shareholders [of Bethlehem Steel Corporation] may possibly attend the meeting in person to hear the chairman account for his administration before voting, and thus remove the vice of the proxy vote."[122] While lowering the costs associated with voting, proxy voting also created a fictitious perception of participation in the governance of public companies. It effectively numbed shareholders, making them a marginal spring in the governance mechanics of a large public corporation.

Although proxy voting enabled at least some shareholders who otherwise would have been disenfranchised to exercise their voting privileges, the proxy mechanism was exploited by others, particularly by corporate management.[123] During the 19th and early 20th Centuries, corporate management often would solicit proxies to vote for their own purposes.[124] Complicating the situation for shareholders who did not attend shareholder meetings was the general lack of information made available to absentee shareholders. Corporate statutes did not require the provision of information generally nor did they require information to be provided prior to soliciting proxies.[125] Accordingly, the only venue for shareholders to obtain information regarding the corporation was via the shareholder meeting.[126] Thus, if one did not attend the shareholder meeting, one did not have access to information regarding the corporation's performance.[127] Also, as Sarah Haan has described, corporate management would leverage their status as well-respected and influential community members when soliciting proxies.[128] Additionally, management had total control over the form of the proxy. If management wanted a certain action to pass, they would make the "proxy as simple as possible, merely requesting that the [shareholder's] signature be affixed."[129] Conversely, if management wanted an action voted down, they would make

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[119] *Id.* at 46 n.27.
[120] Haan, *supra* note 84, 890-91 (detailing the benefits of proxy voting in the 19th and early 20th Centuries).
[121] *Id.* at 892.
[122] Berendt et al. v. Bethlehem Steel Corporation et al., 154 A. 321, 322 (N.J. Chancery 1931).
[123] Haan, *supra* note 84, at 892.
[124] *Id.* at 892-93.
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] WILLIAM ZEBINA RIPLEY, MAIN STREET AND WALL STREET 147 (1927).

completing the proxy complicated, including requiring "insertion of the number of shares and other details together with witness by a notary."[130] Moreover, in some instances, proxies were drafted so that they would be effective for several years.[131]

This widespread, unchecked proxy abuse caused Adolf Berle and Gardiner Means to famously write in 1932 that "[t]he proxy machinery has . . . become one of the principal instruments not by which a stockholder exercises power over the management of the enterprise, but by which his power is separated from him."[132] Five years earlier, Berle's mentor the economist William Ripley had observed that shareholder meetings were "routine" affairs and largely a matter of "form."[133] Ripley noted that "[t]he presence and participation of shareholders directly in such corporations has of course become a thing of the past."[134] Despite observing that shareholders were not participating in meetings and criticizing the proxy system, Berle, Means, and Ripley advocated *not* for methods to empower individual shareholder engagement but rather for individual shareholders to act as a check on corporate management.[135] Berle and Ripley in particular were concerned with protecting minority shareholders so that shareholders in turn would be able to limit the power of corporate management.[136]

A competing viewpoint to Berle, Means, and Ripley was focused not on using shareholders as a check on management but rather focused on the shareholder's position as part of the overall corporate hierarchy.[137] This view of shareholders led observers to inquire as to how corporations could be internally structured so that shareholder voices could be heard.[138] But at the same time, those holding this view were also concerned with whether shareholders would participate and, if they participated, what decisions they would make.[139] Dalia Tsuk Mitchell summarized these different early 20th Century viewpoints regarding the role of shareholders, writing, "[t]hose viewing the shareholder as investor wanted to guarantee that the individual shareholder was informed, while those describing the shareholder as participant wanted to ensure that her (individual) voice was heard."[140]

This debate regarding the role of shareholders occurred as corporations had been heavily relying on democratic rhetoric to further goals ranging from building their shareholder and customer base, to resisting government regulation, to opposing labor unions. Corporations sought to portray themselves as akin to "'institutions' infused with all of the connotations of civic

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[130] *Id.*
[131] EMERSON & LATCHAM, *supra* note 32, at 17.
[132] ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION & PRIVATE PROPERTY 129 (1932).
[133] RIPLEY, *supra* note 129, at 145.
[134] *Id.*
[135] Dalia Tusk Mitchell, *Shareholders as Proxies: The Contours of Shareholder Democracy*, 63 WASH. & LEE L. REV. 1503, 1531, 1532, 1534 (2006).
[136] *Id.* at 1535.
[137] *Id.*
[138] *Id.* at 1509-10.
[139] *Id.* at 1510.
[140] *Id.* at 1535.

beneficence characteristic of other non-market entities, including hospitals, universities, foundations, and even government agencies."[141] For example, in 1936, the Chair of GE said that because the company was a "great public institution," it "had to accept 'more and more obligations for public discourse and public activities."[142] Similarly, the New York Stock Exchange and AT&T "declared themselves to be harbingers of a new era of shareholder democracy."[143] In 1919, AT&T leaned heavily into this rhetoric in an effort both to counteract arguments that the phone system should be nationalized and to deal with a defiant unionized employee base.[144] In particular, AT&T advertised itself as "a Democracy–of the people, by the people, for the people" and also a "democratic instrument of democracy."[145]

Despite this rhetoric, as Sarah Haan has written, large companies like AT&T employed "none of the mechanisms of real democracy."[146] As the federal securities acts were being drafted against this backdrop, the primary concern for Congress was not the democratic voice of shareholders but rather the manipulation of proxies by corporate management. Accordingly, Berle, Means, and Ripley's ultimate concern that shareholders would act as a check on management seemed to be the more favored approach. But, given the degree to which our corporate system is interwoven with the U.S. economic and political system, the failure to incorporate any semblance of democratic voices in large companies like AT&T negatively affects the broader society as well.

B. *The Problem of the Proxy Paradigm*

In considering democratic voice, we must look again to political democracy. The right to participate in political debate, including by criticizing incumbent officeholders, is a core value of nearly every version of democracy. Indeed, thinkers as varied as Voltaire and Tom Tyler have argued that the right to speak and to be heard by decisionmakers is as important for a psychological sense of freedom as representation or even fair decision-making – even if voice does not lead to actual justice. Within our large bureaucratic corporations, this core democratic value is strikingly absent: The norm, instead, is that critics are viewed as insubordinate or disruptive, "barbarians at the gate" or "insurgents".[147] This is in contrast with much of the rhetoric during the adoption of the federal securities laws—the Securities Act of 1933 (the "1933 Act") and became the Securities Exchange Act of 1934 (the "1934 Act"). The federal corporate proxy framework (stemming from the 1934 Act) was presented as a pathway to foster individual shareholder engagement and

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[141] Nelson Lichtenstein, *Two Cheers for Vertical Integration: Corporate Governance in a World of Global Supply Chain*, *in* CORPORATIONS AND AMERICAN DEMOCRACY 335 (NAOMI R. LAMOREAUX & WILLIAM J. NOVAK, EDS. 2017).
[142] *Id.* at 335.
[143] *Id.*
[144] OTT, *supra* note 22, at 153.
[145] *Id.* at 154.
[146] Sarah C. Haan, *The Corporation's Political Purpose*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 313 (ELIZABETH POLLMAN & ROBERT B. THOMPSON, EDS. 2021).
[147] Company management developed the term "gadfly" to refer to individual shareholders who attended shareholder meetings and challenged management. *See Queen of Corporate Gadflies*: *Wilma Soss, stockholder with a mission*, LIFE 21 (1966) (describing the term gadfly); *see generally* Kobi Kastiel & Yaron Nili, *The Giant Shadow of Corporate Gadflies*, 94 S. CAL. L. REV. 569 (2021) (examining the role of gadflies in corporate governance).

participation in the corporate governance regime.[148] But a deeper examination of the development and implementation of the proxy system, as currently structured, reveals that the rhetoric of enabling the individual shareholder voice is a façade.[149] Here, too, shareholder "democracy" is a rhetorical device to prettify an fundamentally anti-democratic practice, not an example of Tocquevillian self-government through voluntary associations.

Originally, the 1933 Act was enforced by the Federal Trade Commission (the "FTC").[150] As Congress considered the bill which would ultimately became the 1934 Act, a provision of the bill empowered the FTC to require corporations to hold corporate elections using mailed proxies which would comply with FTC regulations.[151] As it was described at the time, the rationale behind regulating proxies was because "proxies, as solicitations are made now, are a joke. The persons who control the proxy machinery for sending out the proxies, with practically no interest in the corporation, can simply keep other people from organizing [and] get enough proxies to run the Company."[152] Thus, from the start, the goal of proxy regulation was to prevent the rampant abuse of the proxy process; the goal was *not* to necessarily foster shareholder engagement.

As Frank Emerson and Franklin Latcham, proponents of increased shareholder power, wrote in 1954, it had become clear that for shareholders to be able to "express [their] desires as a legal owner, the proxy machinery [had to] more nearly approximate the early common law, individually attended, shareholders' meeting."[153] This meant that shareholders would need to become informed of the meeting agenda items and the company's finances and that there would need to be a mechanism pursuant to which shareholders would be able to provide clear instructions on how their votes should be cast.[154] Furthermore, shareholders other than management should have the ability to nominate individuals for directorships, to raise issues to be considered at shareholder meetings, and to have the "opportunity to communicate with other shareholders via the proxy device."[155] These goals and the regulation of proxies were ultimately embodied in Section 14 of the 1934 Act. Among other things, the 1934 Act also created the SEC to enforce the Securities Acts, including Section 14.[156]

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[148] Mitchell, *supra* note 135, at 1506.
[149] *Id.*
[150] JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE 57, 79 (3d. 2003) (noting the FTC enforced the 1933 Act during the first year of its existence and noting the FTC's request to create a special division within the FTC to enforce the 1933 Act).
[151] *Id.* at 87.
[152] *Id.* (original quotations omitted).
[153] EMERSON & LATCHAM, *supra* note 32, at 19.
[154] *Id.*
[155] *Id.*
[156] *Id.*; Robert B. Von Mehren and John C. McCarroll, *The Proxy Rules: A Case Study in the Administrative Process*, 29 LAW & CONTEMP. PROBS. 728, 728 (1964) (discussing formation of the SEC). For more information on the formation of the SEC, see MICHAEL E. PARRISH, SECURITIES REGULATION AND THE NEW DEAL 108-33 (1970).

Section 14 authorized the SEC to promulgate rules relating to the solicitation of proxies of securities that were listed and registered on a national securities exchange.[157] In response to its broad grant of power, the SEC promulgated Rules LA1 through LA7 in 1935, which among other things required those soliciting proxies to provide a "'brief description' of the matters intended to be voted upon by the exercise of the shareholder's proxy" along with a statement indicating how the solicitor would vote.[158] They also required that management mail the shareholders relevant materials and prohibited materially false or misleading statements in the solicitation of proxies.[159] Although relatively barebones, the principles contained in Rules LA1 through LA7 laid the foundation guiding the SEC in its rule-making and continue to be reflected in present-day proxy rules. With the 1935 rules in place, the SEC then worked toward drafting a more complete set of rules which were released in 1938 and were known as "Regulation X-14."[160] Notably, Regulation X-14 introduced a "proxy statement" which was required to be mailed to shareholders in the context of director elections.[161] The SEC adopted multiple groups of amendments to Regulation X-14 over the succeeding years.[162] This early rulemaking reflected the SEC's perception of its role at the time. More specifically, as Jill Fisch has detailed, the SEC's initial understanding of its role was to tackle the issues raised by substituting proxy solicitations for in person attendance at shareholder meetings.[163] Hence, the SEC's early rulemaking was aimed at encouraging disclosure from management to shareholders and, to a lesser extent, communication among shareholders and from shareholders to management.[164]

This relatively hands-off position by the SEC might have worked better had many companies not refused to incorporate shareholder proposed actions into shareholder meeting proxy materials.[165] This came to a head in 1939, when independent shareholder Lewis Gilbert made two proposals to Bethlehem Steel, which company management refused to include in the company's proxy materials: 1) that shareholders have the right to elect auditors and 2) that the annual meeting be held in New York City as opposed to Wilmington, Delaware.[166] This ultimately prompted the SEC to amend Regulation X-14 in 1942 to require that shareholder proposals be included in proxy materials.[167] More specifically, under Rule X-14a-7 (now known as Rule 14a-8), management was required to include within its proxy statement a "100-word statement in support of any proposal

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[157] EMERSON & LATCHAM, *supra* note 38, at 19. Congress, when delegating power to the SEC to regulate proxy solicitation, expressed the concern that "too often proxies are solicited without explanation to the stockholder of the real nature of the matters for which authority to cast his vote is sought." S. REP. NO. 73-1455, at 74 (1934).
[158] EMERSON & LATCHAM, *supra* note 38, at 20-21.
[159] Von Mehren & McCarroll, *supra* note 156, at 736.
[160] *Id.*
[161] EMERSON & LATCHAM, *supra* note 38, at 21.
[162] *See id. at* 21-22 (1954) (describing amendments adopted in 1940, 1942, 1947, 1948, 1953, and 1954).
[163] Jill E. Fisch, *From Legitimacy to Logic: Reconstructing Proxy Regulation*, 46 VAND. L. REV. 1129, 1142-43 (1993).
[164] Mitchell, *supra* note 135, at 1548.
[165] *Id.* at 1548.
[166] *See* GILBERT, *supra* note 14, at 41 (describing proposals and management's refusal to incorporate them); Mitchell, *supra* note 135, at 1506 (stating that Bethlehem Steel's refusal to incorporate Gilbert's proposals led the SEC to reconsider the SEC proxy rules).
[167] MARC I. STEINBERG, FEDERALIZATION OF CORPORATE GOVERNANCE 158 (2018).

of a security holder that it oppose[d]."[168] The rule was not without limits, however. In particular, the subject matter of the proposal had to be a proper one for shareholder action.[169] What was a proper action for shareholders was left undefined and was developed over time as shareholders began to use the proposal framework to address social issues of the day.[170]

The proposal rule was meant to restore to shareholders a right they nominally had under state and common law corporate governance law if they attended shareholder meetings in person.[171] Supporters of Rule 14a-8 heralded it as the "the shareholders' Bill of Rights" while, in many cases, company managements' reactions were significantly less welcoming, to say the least, with many favoring repeal.[172] The proxy rules, generally, and Rule 14a-8, in particular, had been influenced greatly by President Franklin D. Roosevelt's New Deal and Roosevelt's desire for both political and economic democracy as "America's ideal."[173] As Dalia Tsuk Mitchell has written, "New Dealers wanted to recreate the traditional annual meeting, reminiscent, perhaps, of the democratic town meeting. They wanted to create a solid corporate foundation for the ideal of American democracy."[174] At the same time, Mitchell notes that New Dealers' "ideal of shareholder democracy was also meant to substantiate the absolute power of management to run the corporation."[175]

Emerson and Latcham favored the proposal rule as a way of enhancing shareholder democracy.[176] They discounted the fact that, like the majority of shareholder proposals today, most proposals in the 1940s and '50s did not garner a positive vote.[177] Instead, Emerson and Latcham focused on the ability of shareholders to exchange ideas by putting forth proposals.[178] They argued,

> The ideas contained in the proposals though controversial, far from being of the crack-pot variety, are at the least most stimulating, and, in fact, almost invariably had intrinsic substance. There is, therefore, no reason for immobilizing the gadfly. What is involved is basically the right of a minority to express itself and have an exchange of ideas-all in a business corporate context-but closely related to a fundamental freedom.[179]

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[168] LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 1939 (3d. 1990); *see* Securities Act Release No. 33-2887, Exchange Act Release No. 34-3347, Investment Company Act Release No. 35-3988, 1942 WL 34864 (Dec. 18, 1942).
[169] Securities Act Release No. 33-2887, Exchange Act Release No. 34-3347, Investment Company Act Release No. 35-3988, 1942 WL 34864 (Dec. 18, 1942).
[170] *See* Harwell Wells, *Shareholder Meetings and Freedom Rides: The Story of* Peck v. Greyhound, 45 SEATTLE L. REV. 1, 21 (2021).
[171] Fisch, *supra* note 163, at 1142.
[172] GILBERT, *supra* note 14, at 102-03.
[173] Joseph L. Weiner, *The New Deal and the Corporation*, 19 CHICAGO L. REV. 724, 729 (1952).
[174] Mitchell, *supra* note 135, at 1552.
[175] Dalia Tsuk Mitchell, *The End of Corporate Law*, 43 WAKE FOREST L. REV. 703, 718 (2009).
[176] Frank D. Emerson & Franklin C. Latcham, *The SEC Proxy Proposal Rule: The Corporate Gadfly*, 19 U. CHICAGO L. REV. 807, 835 (1952).
[177] *Id.* at 835.
[178] *Id.*
[179] *Id.*

Emerson and Latcham's reference to a "crack-pot variety" responds to a fear expressed during congressional hearings on the proposal rule that it would result in a "field day for crackpots."[180] Despite the fact that many corporations used democracy as a marketing tool, they largely opposed the proxy framework, including the shareholder proposal rule, preferring to maintain the status quo of minimal shareholder participation.[181] They feared that the proposal rule would be a way for independent shareholders to "harass management"[182]—apparently viewing public disagreement, even with no coercive power, as a form of harassment. Conversely, Emerson and Latcham believed that shareholder participation was crucial and actually benefited management by providing a "diversity of opinion and criticism so necessary for healthy growth."[183]

For there to be shareholder participation leading to the type of diversity of opinion that Emerson and Latcham desired, individuals must own shares to be able to participate in the governance process. The next Part of this Article details some of the barriers to owning shares which have led to a lack of diversity in shareholding. These barriers to shareholding are significant because they ultimately affect the representation of everyday citizens in the corporate governance decision-making process. In turn, this impacts the greater society in which corporations operate and over which corporations dominate.

III. SHARE OWNERSHIP IS NOT DEMOCRATIC

Shareholding is not democratic: only a fraction of the American population holds company shares directly, and only a minority of human share owners vote their shares.[184] Moreover, the make-up of share owners does not reflect the demographics of the increasingly diverse American

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[180] *Id.* at 835 n.153.

[181] Phil Nicolas Jr., *The Agency That Kept on Going: The Late New Deal SEC and Shareholder Democracy*, 16 J. OF POLICY HIS. 212, 225 (2004). Even more recently, corporations have continued to resist shareholder democracy efforts as detailed by Lisa Fairfax. *See* Lisa M. Fairfax, *Making the Corporation Safe for Shareholder Democracy*, 69 OHIO ST. L. J. 53 (2008).

[182] Nicholas, *supra* note 181, at 225.

[183] EMERSON & LATCHAM, *supra* note 32, at 144.

[184] *See* Sergio Alberto Gramitto Ricci, *The Vitruvian Shareholder*, 75 FLA. L. REV. F. 113, 114 (2024) (explaining only one in five American households owns shares directly so that only one in five households can vote corporate shares directly); *Survey of Consumer Finances (SCF): Directly Held Stocks by All Families*, THE BD. OF GOVERNORS OF THE FED. RSRV. SYS. [hereinafter *Survey of Consumer Finances (SCF)*], https://www.federalreserve.gov/econres/scf/dataviz/scf/table/#series:Directly_Held_Stocks;demographic:all;population:1;units:median (last visited July 9, 2024) (table showing only 21% of U.S. families own shares directly as of 2022); Alon Brav, Matthew Cain, & Jonathan Zytnick, *Retail Shareholder Participation in the Proxy Process: Monitoring, Engagement, and Voting*, 144 J. FIN. ECON. 492, 500 (2022) (finding that only 32% of retail shares are voted representing 11% of retail accounts).

population.[185] Share owners are disproportionately White, older, male, and especially rich.[186] The uneven distribution of share ownership is rooted in centuries of inequality, racial and gender discrimination, slavery, a lack of access to education, and financial crises.[187] By its nature, a true shareholder democracy would require that individuals own shares; that shares be distributed relatively equitably; and that shareholders exercise the right to vote which accompany those shares. This has never been the case.[188]

Individual disenfranchisement from investing and corporate voting both reflects and amplifies general inequality. The underprivileged, women, and minorities are disproportionately unlikely to own shares, so shareholder-centered debate necessarily fails to represent the diverse cultures and values in Corporate America.[189] Moreover, unrepresentative shareholding replicates itself, becoming a material factor in our growing racial wealth divide.[190]

A. *Share Ownership Inequality*

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[185] *See* Jonathan Vespa, Lauren Medina, & David M. Armstrong, *Demographic Turning Points for the United States: Population Projections for 2020 to 20260*, CENSUS.GOV, 8 (Feb. 2020), https://www.census.gov/content/dam/Census/library/publications/2020/demo/p25-1144.pdf (projecting a decrease from 2016 to 2060 in non-Hispanic White children from one-half to one-third); Howard Hogan, Jennifer M. Ortman, & Sandra Colby, *Projecting Diversity: The Methods, Results, Assumptions and Limitations of the U.S. Census Bureau's Population Projections*, 117 W. VA. L. REV. 1047, 1079 (2015) ("By 2044, the United States is projected to become a plurality nation, with no single race or ethnic group projected to have greater than a 50 percent share of the nation's total.").

[186] Jill E. Fisch, *GameStop and the Reemergence of the Retail Investor*, 102 B.U. L. REV. 1799, 1827 (2022) (observing that the bulk of directly held stock is held by "rich white men"); Tim Smart, *Who Owns Stocks in America? Mostly, It's the Wealthy and White*, U.S. News (Mar. 15, 2021), https://www.usnews.com/news/national-news/articles/2021-03-15/who-owns-stocks-in-america-mostly-its-the-wealthy-and-white (explaining that "92% of those in the top 10% of the income ladder owned stock in 2019 compared to 56% of those considered middle class" while investors aged 65 and older owned 43% of the stock market in 2019); Drew Desilver, *A booming U.S. stock market doesn't benefit all racial and ethnic groups equally*, PEW RESEARCH CTR. (Mar. 6, 2024), https://www.pewresearch.org/short-reads/2024/03/06/a-booming-us-stock-market-doesnt-benefit-all-racial-and-ethnic-groups-equally/ (explaining White families are more likely to own stock directly or indirectly with 66% of White families owning stock compared to 39% of Black families and 28% of Hispanic families); Jeffrey M. Jones, U.S. *Stock Ownership Down Among All but Older, Higher-Income*, Gallup (May 24, 2017), https://news.gallup.com/poll/211052/stock-ownership-down-among-older-higher-income.aspx (detailing results of a survey from 2008 to 2017 in which 56% of men and 52% of women said they owned stock either directly or indirectly).

[187] *See infra* this Part. *See also* Sergio Alberto Gramitto Ricci & Christina M. Sautter, *The Educated Retail Investor: A Response to "Regulating Democratized Investing,"* 83 OHIO ST. L.J. ONLINE 205 (2022) (advocating for financial literacy and corporate governance education to facilitate corporate inclusion).

[188] *See infra* Parts II & III.

[189] LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY (2003) (arguing that minorities are overburdened by externalities).

[190] Rajashri Chakrabarti, Natalia Emanuel, & Ben Lahey, *Racial and Ethnic Inequalities in Household Wealth Persist*, FED. RES. BANK OF N.Y.: LIBERTY STREET ECON. (June 28, 2024), https://libertystreeteconomics.newyorkfed.org/2024/06/racial-and-ethnic-inequalities-in-household-wealth-persist/.

As previously stated, most of the shares held by human investors are held by White men, typically older.[191] Most of these shares are or were held in retirement funds, so holdings are closely correlated with well-paying jobs – exacerbating socio-economic inequality and uneven access to opportunity. Deep roots of share ownership inequity tracing back to colonialism and slavery have markedly hindered access to opportunity to this day.[192]

After slavery ended in the United States in the 1860's, African Americans remained economically oppressed through laws that stifled their ability to access equal jobs which could have provided them with a higher income and facilitated access to the stock market.[193] In the United States, Black households generally rank last with respect to median household income. For example, in 2023, the U.S. Census Bureau estimated that the median household income for Black households was $56,490 with the next lowest being Hispanic households who had a median of $65,540.[194] Black household income was significantly lower than the overall median household income of $80,610.[195] Lower income itself hindered Black Americans' ability to invest in equities as has unemployment.[196] To this day, Black Americans face a higher unemployment rate at every level of education.[197]

Uneven access to employment opportunities has deprived Black individuals also of a chance to receive shares as part of their remuneration. As the saying goes, "it takes wealth to make wealth," but many Black Americans have been excluded from intergenerational access to capital.[198] This has limited access to opportunity with ramifications that extend to savings, investing, and building trust in the financial markets. In fact, nearly 60 percent of Black individuals surveyed feel that racism impacts fair investing opportunities which is a direct result of this exclusion from wealth accumulation over time.[199]

Since the Second World War and especially since the enactment of the Employee Retirement Income Security Act of 1974 (or "ERISA") and the rise of the defined contribution pension plan, most middle-class shareholders have entered the stock market through employer-based plans open to employees. The 1959 NYSE census that surveyed investors who acquired shares for the first time between 1956 and 1959 reported that a quarter of women who became

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[191] *See infra* n.58; Stout & Gramitto, *supra* note 3, at 556-57.
[192] Michelle Singletary, *The Legacy of Slavery Made My Grandmother Fear Investing*, WASH. POST (Oct. 9, 2020), https://www.washingtonpost.com/business/2020/10/09/black-slavery-investment-stock-market/; *see also* Part III.E.
[193] Singletary, *supra* note 192.
[194] Gloria Guzman, *Median Household Income Increased in 2023 for First Time Since 2019*, United States Census (Sept. 10, 2024), https://www.census.gov/library/stories/2024/09/household-income-race-hispanic.html#:~:text=The%202023%20median%20incomes%20of,all%20race%20and%20ethnic%20groups.
[195] *Id.*
[196] Singletary, *supra* note 192.
[197] Samuel DuBois Cook Center on Social Equity Insight Center for Community Economic Development, *What We Get Wrong About Closing the Racial Wealth Gap*, 7 (2018), https://socialequity.duke.edu/wp-content/uploads/2019/10/what-we-get-wrong.pdf.
[198] *Id.* at 27.
[199] ARIEL INVESTMENTS 2015 BLACK INVESTOR SURVEY: SAVING AND INVESTING AMONG HIGHER INCOME AFRICAN-AMERICAN AND WHITE AMERICANS 7, 11 (2016).

share owners in that timeframe acquired the shares from their employers.[200] There was a clear correlation between becoming share owners and being employed by the share-issuing company. Thus, employment policies or practices that discriminated against people of color secondarily hindered minorities' access to share ownership.[201] Prior to the Civil Rights Acts, numerous corporations only employed White people, depriving people of color of the possibility of becoming employee-shareholders in these companies.[202]

Discriminatory employment practices have had profound repercussions on minorities' access to the securities markets, even in later generations.[203] Importantly, those who owned shares at the beginning of the great stock market boom from the 1980s to date grew wealthy, while those who did not were left behind.[204] Accordingly, discriminatory hiring practices that deprived minorities of access to the stock market have intergenerational consequences. If your parents or grandparents obtained shares of stock as part of their pay packages, you benefit from their wealth directly, while also perhaps learning about their experiences with equities, what a share of stock is and what financial and economic rights it provides. In wealthier families, later generations may also be introduced to a family broker or private banker who can guide you along your initiation to financial markets. However, if nobody in your family-or-community has ever owned shares of stock, equities could seem like obscure intangible financial instruments. This is not merely anecdotal. Studies have shown parents are the primary financial socialization agent and have a direct impact on their children's willingness to invest.[205] For example, in his 2024 Letter to Investors, BlackRock's Larry Fink credited his father's investing habits and encouragement of Fink to invest in the markets as a primary motivation for his own investing.[206]

B. ESOPs and Access to Shares

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[200] N.Y. STOCK EXCH., SHARE OWNERSHIP IN AMERICA: 1959, at 9 (1960); Sarah Haan, *Corporate Governance and the Feminization of Capital*, 74 STAN. L. REV. 515, 560 (2022).
[201] N.Y. STOCK EXCH., *supra* note 200, at 9.
[202] VICTOR PERLO, ECONOMICS OF RACISM U.S.A.: ROOTS OF BLACK INEQUALITY 134 (1975); Haan, *supra* note 200, at 569.
[203] Haan, *supra* note 200, at 567-68 ("Discrimination and related disparities significantly reduced the financial resources of nonwhite Americans to invest in securities."). For example, women shareholders were often customer-stockholders, rather than employee stockholders. *Id.* at 555.
[204] *See* Wade Zhou, *How Has U.S. Wealth Evolved Since the 1980s?*, Wealth Enhancement (Feb. 22, 2024), https://www.wealthenhancement.com/s/blog/how-has-u-s-wealth-evolved-since-the-1980s-MCWM5FT3TSFVGB3KH4EWOMEJHEGQ ("Between 1989 and 2023, the value of public stocks held by American households grew by nearly 1,700% . . . . This trend, coupled with the fact that shares in companies are held disproportionately by the rich, has caused the share of American household assets held by the top 0.1% to increase from 8% to 12%.").
[205] Crystal Hudson, John Young, & Sophia Anong, *Investment Behavior: Factors that Limit African Americans' Investment Behavior*, 9 J. FIN. THERAPY 21, 25 (2018).
[206] Larry Fink's 2024 Annual Chairman's Letter to Investors, https://www.blackrock.com/corporate/investor-relations/larry-fink-annual-chairmans-letter (last visited July 9, 2024). Specifically, he wrote:

> My dad had always been an enthusiastic investor. He encouraged me to buy my first stock (the DuPont chemical company) as a teenager. My dad invested because he knew that whatever money he put in the bond or stock markets would likely grow faster than in the bank. And he was right.

Id.

Employee stock ownership has played a key role in including everyday citizens in the stock market. Employee stock ownership became popular in the 1920s.[207] By 1927, roughly 400 American corporations had employee stock purchase plans, providing the ability to purchase stock at a discount and financing terms to facilitate the purchase.[208] The Great Depression, however, severely impacted employee investors—stock prices declined rapidly, wages decreased, and widespread layoffs occurred.[209] Employee stock ownership rebounded in the 1950s.[210] Louis O. Kelso's economic theory and lobbying played a critical role in nurturing their success.[211] The rationale of Kelso's ESOPs consisted of providing employees with an opportunity to own equity in their corporate employer to supplement the provisions of their incomplete employment contract.[212]

In 1958, Kelso co-authored the book *The Capitalist Manifesto*, which promoted binary economics and referred to ESOPs as "Second Income Plans."[213] Kelso wrote that capital ownership was concentrated in too few hands, and that working people could not support themselves with just labor income and should have a second income from capital.[214] Kelso's ideas were largely not adopted by legislators and policymakers until 1973 when U.S. Senator Russell B. Long secured the inclusion of a provision sponsoring a study of employee share ownership in the Railroad Reorganization Act.[215]

The tide changed when, in 1974, ERISA required that courts recognize conventional defined benefit plans as contractual obligations and enacted minimal solvency requirements, making those plans more expensive and less attractive to employers, while simultaneously authorizing ESOPs.[216] Then the Tax Reduction Act of 1975 gave a tax credit to company contributions of stock to a qualifying ESOP, known as a TRASOP.[217] The possibly unintended

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[207] STEVEN M. BLOOM, EMPLOYEE OWNERSHIP AND FIRM PERFORMANCE 11 (1986).
[208] *Id.*
[209] *Id.* at 13.
[210] ANDREW W. STUMPFF, FIFTY YEARS OF UTOPIA: A HALF CENTURY AFTER LOUIS KELSO'S THE CAPITALIST MANIFESTO, A LOOK BACK AT THE WEIRD HISTORY OF THE ESOP 419 (2009); BLOOM, *supra* note 207, at 13-14. For example, in the 1950s, General Electric had two different employee compensation programs involving its own stock: the Incentive Compensation Plan and the Stock Option Plan. Internet Archive, General Electric Company Annual Reports 1892-2009, https://archive.org/details/generalelectriccompanyannualreports/generalelectric1955/page/n21/mode/2up. Under the Incentive Compensation Plan, compensation was awarded by a compensation committee to individually select positions supposedly determining the company's success. *Id.* With the Stock Option Plan, "key" employees were granted restricted stock options. *Id.*
[211] STUMPFF, *supra* note 210, at 419; BLOOM, *supra* note 207, 13-14.
[212] STUMPFF, *supra* note 210, at 419.
[213] *Id.* at 419-20.
[214] *Id.* at 422.
[215] *Id.* at 423-26.
[216] *Id.* at 426.
[217] *Id.* Shortly after ERISA, with the rise of hostile takeovers, many company managers determined that ESOPs could be a useful takeover defense, by placing large blocks of stock in the hands of employees (who often preferred known managers to newcomers). *Id.* ESOPs could be, and often were, structured to give corporate managers control over the votes associated with employee stock. *Id.*

consequence was a great migration as many companies saw ESOPs and 401(k) styled defined contribution plans as a cheaper alternative to traditional defined benefit plans.

The hostile takeover movement of the 1980s gave managers an additional impetus: ESOPs were attractive because they place large blocks of stock in employee hands, and employees were generally thought to be less likely to vote in favor of financially driven hostile takeovers. Managers, however, quickly discovered that they did not need to rely on the support of employees; they could instead structure ESOPs to grant the plan's trustee (appointed by the company board of directors) the right to vote the plans' shares, rather than passing votes through to employee beneficiaries.[218]

C. Minorities' Double Jeopardy

When employment practices and policies discriminated against minorities, minorities were deprived of a double opportunity: not only the employment opportunity, but also an opportunity to become shareholders. This minorities' double jeopardy has enduring ramifications on future generations' access to the stock market and more generally on socioeconomic inequality.[219]

Discriminatory practices were widely diffused, so the instances listed in this Article should not be considered isolated cases or examples of worst behaviors. Rather, they reflect relatively common practices in the past century, which still have enduring effects on the ability of minorities to participate in the stock market.

Between 1975 and 1979, General Motors granted stock ownership opportunities under its ESOP to salaried (but not hourly) employees.[220] However, General Motors apparently discriminated with respect to who could hold salaried positions. In 1975, General Motors was sued in a class action based on racial discrimination in employment.[221] Joe Stewart, as the spokesperson for the Concerned Black Workers at General Motors Parts Division, stated that GM denied Black employees opportunities for advancement to salaried positions.[222] When Black employees sought promotion to a salaried position, General Motors denied that any were available.[223] When salaried positions were available, General Motors allegedly ignored Black employee applications for the positions and even advised a Black employee to remain as a laborer or leave the company.[224] In

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[218] Anne Bushman, *Who controls an ESOP-owned company?: An ESOP's effect on corporate governance*, RSM (Updated July 2018), https://rsmus.com/insights/services/business-tax/who-controls-an-esop-owned-company.html#:~:text=The%20trustee%20also%20has%20a,board)%20appoints%20the%20ESOP%20trustee.
[219] *See infra* Part III.D.
[220] *GM Workers Get ESOP Payments: General Motors*, L.A. TIMES (June 3, 1989), https://www.latimes.com/archives/la-xpm-1989-06-03-fi-965-story.html.
[221] Jojina Erwin, *Assail Bias at GM*, CHICAGO DEFENDER, 1 (June 13, 1973).
[222] *Id.* at 2.
[223] *Id.*
[224] *Id.*

addition to racial discrimination, it appears that General Motors discriminated against women as well.[225]

General Motors was not alone in discriminating in ways which potentially affected share ownership via ESOPs. For example, in 1977, AT&T announced the adoption of an ESOP pursuant to which each of its "927,000 employees would receive . . . an average of 1.6 shares of A.T.&T. stock free."[226] A year later, in 1978, the United States Supreme Court upheld "the largest and most impressive civil rights settlement in the history of this nation."[227] The settlement agreement, originally reached in 1973, ended a "long litigation" over many years of gender and racial discrimination both in hiring and in promotions.[228] Indeed, as of 1970, 7 percent of the EEOC's entire workload involved AT&T cases.[229] The EEOC stated that "the lingering effects of 'deliberate racial discrimination are readily apparent in both small numbers and types of jobs blacks hold.'"[230]

Boeing is yet another example. From its inception in 1917 through the beginning of World War II, Boeing did not hire African Americans at all.[231] Even in 1944, when Boeing employed 1,600 African American workers, it required African American workers to use segregated lunchrooms and bathrooms.[232] African American workers were often denied promotions or fired as retaliation for protesting discrimination.[233] Starting in 1996, Boeing provided all its employees with a stock ownership plan.[234] But there is evidence that Boeing was still discriminating against minorities and women in their compensation, and therefore in their ESOP participation as well.[235]

Discriminatory hiring practices like those described in this section have undoubtedly had an impact on share ownership via ESOPs. Even long after formal legal discrimination ended, an

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225 *DeGraffenreid v. Gen. Motors Assembly Div., St. Louis*, 558 F.2d 480, 482, 484 (8th Cir. 1977) (for example, until May 1, 1970, women were not allowed to work in the assembly line in St. Louis except when they could be sent home after nine hours without disrupting production). While assembly line workers presumably were hourly and therefore ineligible for the ESOP, this documented discrimination suggests that the company was discriminating elsewhere as well.

226 Elizabeth M. Fowler, *A.T.&T. Joins Plan for Free Stock to Employees*, N.Y. TIMES (May 7, 1977), https://www.nytimes.com/1977/05/07/archives/att-joins-plan-for-free-stock-to-employees.html.

227 Philip Shabecoff, *A.T.&T. Case Bekan With Appeal on Rate*, N.Y. TIMES (July 4, 1978), https://www.nytimes.com/1978/07/04/archives/att-case-began-with-appeal-on-rate-plan-for-intervention-back-pay.html (internal citations omitted).

228 *Id.*

229 *Id.*

230 *Id.*

231 Sarah Davenport, *Battle at Boeing African Americans and the Campaign for Jobs 1939-1942*, THE SEATTLE CIVIL RIGHTS & LABOR HISTORY PROJECT, https://depts.washington.edu/civilr/boeing_battle.htm (last visited May 26, 2024).

232 *Id.*

233 *Id.*

234 Jeff Cole, Boeing Announces Stock Trust Plan for its Employees, WALL ST. J. (July 12, 1996), https://www.proquest.com/docview/398606034?parentSessionId=vkEzVb4%2FH7zYaTb2Ua%2FeD2HtnrVlWAbUEHbOBqYfcnA%3D&pq-origsite=primo&accountid=6667&sourcetype=Newspapers.

235 Laurence Zuckerman, *Boeing Agrees to Settle Case Charging Bias in Salaries*, N.Y. TIMES (Nov. 19, 1999), https://www.nytimes.com/1999/11/19/business/boeing-agrees-to-settle-case-charging-bias-in-salaries.html.

analysis of the 2002 to 2018 survey of U.S. employment stock ownership plans revealed that 22.9% of all adult men working in the U.S. participate in an ESOP while only 16.4% of adult women did the same.[236] The same analysis revealed that a total of 22.4% of White adult workers participated in an ESOP but the numbers were much lower for Black and Latinx adult workers, with only 14.3% Black workers and 17.3% of Latinx workers participating.[237]

D. Minorities and Unfriendly Financial Systems

The United States' and larger global banking and insurance system was long tied to slavery.[238] New York Life, Aetna, and US Life (now a subsidiary of AIG) sold insurance policies to slave owners which permitted them to recoup three-quarters of the value of a slave upon their untimely death.[239] In 2005, J.P. Morgan Chase & Co. admitted that Citizens' Bank and Canal Bank in Louisiana, two of its predecessor banks, had accepted slaves as collateral for loans to slave owners while Wells Fargo has made a similar admission.[240] Obtaining mortgages and other loans from banks facilitated the growth of sugar and cotton plantations, which in turn continued to grow the slave trade.[241] In the event of foreclosure, slaves who had been put up as collateral were sold, still furthering slavery.[242] The connection between slavery and the broader U.S. financial system was not confined to the American South.

New York City, today's epicenter of the U.S. financial system, similarly had a deep connection with slavery; it grew into a powerhouse in part by financing slavery and the cotton trade. It not only was the site of the nation's largest cotton market, but Wall Street was home to one of the nation's largest slave markets.[243] Ironically enough, Wall Street was once a physical

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[236] Democracy at Work Institute (US Federation of Worker Cooperatives), Economic Opportunities Program (The Aspen Institute), Rutgers School of Management and Labor Relations, *Race and Gender Wealth Equity and the Role of Employee Share Ownership*, THE ASPEN INSTITUTE (2021), https://www.aspeninstitute.org/wp-content/uploads/2021/03/Race-and-Gender-Wealth-Equity-and-the-Role-of-Employee-Share-Ownership.pdf

[237] *Id.*

[238] SHARON ANN MURPHY, BANKING ON SLAVERY: FINANCING SOUTHERN EXPANSION IN THE ANTEBELLUM UNITED STATES 21, 25 (2023) (stating that insurance policies on slaves were common and banking tied slavery to the U.S. financial system); Rachel L. Swarns, *Insurance Policies on Slaves: New York Life's Complicated Past*, N.Y. TIMES (Dec. 18, 2016), https://www.nytimes.com/2016/12/18/us/insurance-policies-on-slaves-new-york-lifes-complicated-past.html (detailing popularity of insurance policies on slaves).

[239] Swarns, *supra* note 238.

[240] L.A. Times Archives, *J.P. Morgan Says Two Precursor Banks Held Slaves*, L.A. TIMES (Jan. 21, 2005), https://www.latimes.com/archives/la-xpm-2005-jan-21-na-slavery21-story.html#:~:text=The%20bank%20estimated%20that%20the,March%201933%20during%20the%20Depression; Swarns, *supra* note 238; *see also generally* MURPHY, *supra* note 238 (detailing the involvement of banking in financing and supporting the slave trade).

[241] MURPHY, *supra* note 238, at 13.

[242] *Id.*

[243] Gavin Wright, *Slavery and the Rise of the Nineteenth-Century American Economy*, 36 J. ECON. PERSPECTIVES 123, 140 (2022); Zoe Thomas, *The Hidden Links Between Slavery and Wall Street*, BBC (Aug. 29, 2019), https://www.bbc.com/news/business-49476247.

wall built during the mid-1600's by slaves owned by the Dutch West India Company.[244] In the 1850s, New York City was also an epicenter for illegal slave trade after slavery had been abolished.[245]

The founding of American capitalism on the backs of slaves is surely a part of why the American Black population still shows a deep-rooted distrust of the American financial system.[246] Fifty-nine percent of Black adults in a Pew Research Center survey say the legacy of slavery still "affects the situation of [B]lack people a great deal."[247] Slaves were "exploited twice" by having their freedom and labor stolen and their "captured 'economic value' leveraged by cutting edge financial instruments."[248]

As Mehrsa Baradaran details in her book *The Color of Money: Black Banks and the Racial Wealth Gap*, free Black Americans created their own financial system in the mid-to-late 1800's because they were essentially excluded from the mainstream, White financial system.[249] In 1865, the federal government created the Freedmen's Savings Bank and Trust Company (often called Freedmen's Bank) to teach former slaves, in the words of Frederick Douglass, "lessons of sobriety, wisdom, and economy, and to show them how to rise in the world."[250] In just ten years following its formation, Freedman's Bank had more than 75,000 depositors and handled more than $75 million in deposits.[251] However, as W. E. B. Du Bois once stated, Freedmen's Bank "not only ruine[d] thousands of colored men, but taught to thousands more a lesson of distrust which it will take them years to unlearn."[252]

Without any depositors' consent, deposits in the Freedmen's Bank were used to fund the first postwar asset bubble, including railroads.[253] After the railroad investments failed in the Panic of 1873, the bank lost more than $2 million of deposits.[254] Congress soon shut down the bank and left 61,144 depositors with no access to almost $3 million.[255] More than half of Black wealth in

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[244] *White New Yorkers in Slave Times*, N.Y. HIS. SOC., 1, https://www.slaveryinnewyork.org/PDFs/White_New_Yorkers.pdf (last visited July 10, 2024).
[245] Sylviane A. Diouf, *New York City's Slave Market*, N.Y. PUBLIC LIBRARY (June 29, 2015), https://www.nypl.org/blog/2015/06/29/slave-market.
[246] *See* Sven Beckert & Seth Rockman, *Introduction: Slavery's Capitalism*, *in* SLAVERY'S CAPITALISM: A NEW HISTORY OF AMERICAN ECONOMIC DEVELOPMENT 3 (SVEN BECKERT & SETH ROCKMAN, EDS., 2016) ("American slavery is necessarily imprinted on the DNA of American capitalism.").
[247] Juliana Menasce Horowitz, *Most Americans Say the Legacy of Slavery Still Affects Black People in the U.S. Today*, PEW RSCH. CTR. (June 17, 2019), https://www.pewresearch.org/short-reads/2019/06/17/most-americans-say-the-legacy-of-slavery-still-affects-black-people-in-the-u-s-today/.
[248] Phillip Roscoe, *How the Shadow of Slavery Still Hangs Over Global Finance*, THE CONVERSATION, (Aug. 21, 2020), https://theconversation.com/how-the-shadow-of-slavery-still-hangs-over-global-finance-144826.
[249] MEHRSA BARADARAN, THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP, 12 (2017).
[250] Office of the Comptroller of the Currency, *The Freedman's Savings Bank: Good Intentions Were Not Enough; A Noble Experiment Goes Awry*, https://www.occ.treas.gov/about/who-we-are/history/1863-1865/1863-1865-freedmans-savings-bank.html (last visited July 14, 2024).
[251] BARADARAN, *supra* note 249, at 26.
[252] *Id.*
[253] *Id.* at 27.
[254] *Id.* at 29.
[255] Office of the Comptroller of the Currency, *supra* note 250.

the United States disappeared with the Freedman's Bank closure.[256] For more than thirty years, depositors and their descendants petitioned Congress to be reimbursed for losses.[257] This historical event led Black people to lose faith in the banking system and created financial trauma that has lasted generations.[258]

The distrust of the financial system is not limited to African Americans. Latinos tend to distrust the financial system because of several U.S. banks' tendencies to deny Latinos loans at a disproportionate rate.[259] Their suspicion of financial systems is compounded by the negative experiences their families have had in Latin America.[260] For example, inflation skyrocketed in Mexico after the peso was devalued in 1976, and political unrest plagued towns in the Dominican Republic in the mid 1980's when their peso was devalued by more than 300%.[261] These negative experiences result in suspicion not just of the banking system but of Wall Street as a whole.

E. The Lasting Consequences of Discrimination on Minorities and Access to the Stock Market

Slavery, Jim Crow laws in the wake of the abolition of slavery, employment and housing discrimination, redlining – which excluded most Black Americans from the Federally promoted wealth-creation machine of homeownership in the new car-oriented suburbs – and, more recently predatory payday loans, have had an enduring impact on Black wealth accumulation. Less wealth means less in investing in the stock market.[262]

Cultural impact of this history is real as well: Studies have shown that Black Americans are generally less likely to get into contact with brokers and are generally less active in the stock market.[263] A young Black journalist described in a 2020 *Washington Post* article how her grandmother taught her and other grandchildren to fear the stock market saying that the stock market was for "White folks . . . who can afford to lose money."[264] Fear drove her grandmother to save, but it also kept her from growing her money in the stock market viewing the stock market,

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[256] BARADARAN, *supra* note 249, at 26.
[257] Reginald Washington, *The Freedman's Savings and Trust Company and African American Genealogical Research*, 29 FED. REC. AFR. AM. HIS. (1997), https://www.archives.gov/publications/prologue/1997/summer/freedmans-savings-and-trust.html.
[258] *Id.*
[259] Beatriz Acevedo & Jacqueline Martinez Garcel, *Op-Ed: How Previous Financial Trauma Keeps Latinos in the U.S. From Investing*, L.A. TIMES (June 3, 2022, 3:05 AM), https://www.latimes.com/opinion/story/2022-06-03/latino-investing-financial-trauma.
[260] *Id.*
[261] *Id.*
[262] *Id.* Black Americans tend to have more investments in homeownership. Samuel DuBois Cook Center on Social Equity Insight Center for Community Economic Development, *What We Get Wrong About Closing the Racial Wealth Gap*, 11 (2018), https://socialequity.duke.edu/wp-content/uploads/2019/10/what-we-get-wrong.pdf. Accordingly, the predominant form of wealth for Black Americans has been the equity accumulated in their homes. Andrew F. Brimmer, *Income, Wealth, and Investment Behavior in the Black Community*, AM. ECON. REV. 152, 152 (1988).
[263] Andrew F. Brimmer, *Income, Wealth, and Investment Behavior in the Black Community*, AM. ECON. REV. 152, 154 (1988).
[264] Singletary, *supra* note 192.

including 401(k)'s, as gambling.[265] She needed to see and touch her wealth to know wholeheartedly it would not easily disappear from her grasp.[266] This grandmother ultimately opened a savings account saving $20,000 but eschewed even a short-term certificate of deposit for her savings.[267]

According to statistics, this journalist's grandmother is not alone. In 2021, 13% of Black adults were unbanked and 27% were underbanked.[268] Hispanic adults come in second with 11% being unbanked and 18% being underbanked.[269] In comparison, looking at U.S. adults, only 6% were unbanked and 16% were underbanked with 77% being fully banked.[270]

There are numerous reasons for the large number of unbanked or underbanked Americans. Probably most important is that most banks find small accounts relatively unprofitable and so charge them high fees, making it unduly expensive for people with modest incomes to maintain accounts, while the US, unlike most other rich countries, does not offer a postal bank or other low-cost public banking alternative. In addition, academics often point to a lack of trust in the financial system.[271] Further, like the journalist's grandmother, some Black Americans are concerned that using a bank can put their money or privacy at risk.[272] Like Black Americans, some Latinos are distrustful of banks regardless of their income status.[273] For example, the term *colchón de emergencia* means "emergency money under the mattress," highlighting distrust of institutional means of saving through banks.[274] Some communities also use informal peer lending and saving clubs known as *tandas* that circulate money throughout Latino communities, paying interest to the lead organizer.[275]

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[265] *Id.*
[266] *Id.*
[267] *Id.*
[268] USAFacts Team, *Who is the least likely to have a bank account in the US?*, USAFacts (Sept, 20, 2022), https://usafacts.org/articles/who-is-the-least-likely-to-have-a-bank-account-in-the-us/#:~:text=race%20or%20ethnicity.-,Black%20adults%20have%20the%20highest%20unbanked%20and,of%20any%20race%20or%20ethnicity.&text=Source%3A,among%20those%20with%20more%20education.
[269] USAFacts Team, *supra* note 268.
[270] *Report on the Economic Well-Being of U.S. Households in 2018-May 2019*, Fed. Res. (last visited Oct. 26, 2024), https://www.federalreserve.gov/publications/2019-economic-well-being-of-us-households-in-2018-banking-and-credit.htm#:~:text=In%20addition%2C%2016%20percent%20of,service%20product%20(figure%2014).&text=The%20remaining%2077%20percent%20of,use%20of%20alternative%20financial%20products.
[271] Daryl A. Carter, *Black and Brown Americans are chronically underbanked and unbanked.*, The Emancipator (Sept. 11, 2023), https://theemancipator.org/2023/09/11/topics/money/black-brown-americans-are-chronically-underbanked-unbanked-heres-why-that-matters/.
[272] *Id.*
[273] Luisa R. Blanco, Maria Ponce, Arturo Gongora, & O. Kenrik Duru, *A Qualitative Analysis of the Use of Financial Services and Saving Behavior Among Older African Americans and Latinos in the Los Angeles Area*, SAGE OPEN, 1, 8 (2015).
[274] Beatriz Acevedo & Jacqueline Martinez Garcel, *Op-Ed: How Previous Financial Trauma Keeps Latinos in the U.S. From Investing*, L.A. TIMES (June 3, 2022, 3:05 AM), https://www.latimes.com/opinion/story/2022-06-03/latino-investing-financial-trauma.
[275] *Id.*

Standard investment advice, of course, points out that stocks can be quite risky, and no one should make material investments in the financial markets unless they already have a solid emergency fund in safer investments such as Federally insured bank accounts. However, for some individuals, generalized communal distrust of banks and other financial institutions leads them to avoid investing in stocks, mutual funds, exchange traded funds, or bonds even if they have the surplus funds necessary to make such investments rational.[276]

The significant growth of institutional investors and their control over American corporations likely compounds the distrust of banks and financial institutions for many. As the next section details, institutional investors have only grown in recent years. They now are the dominant shareholders in most American companies in turn controlling the voting rights in those companies.

IV. OVER INSTITUTIONALIZATION, PROXY ADVISORY SERVICE, & THE NAIL IN THE COFFIN OF THE SHAREHOLDER DEMOCRACY MIRAGE

Institutional investors own about 70 percent of the shares in US public companies[277] and thus control enough voting power to govern them.[278] Among these institutions, BlackRock, Vanguard, and State Street,[279] which are referred to as the Big Three,[280] "have hung an 'Under

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[276] Louis Barajas, *Voices: Many Latinos Lack Investment Accounts. They Need Money Mentors.*, NBC NEWS (May 13, 2019 11:59 AM), https://www.nbcnews.com/news/latino/https-www-cnbc-com-2019-05-10-barajas-unbanked-latinos-.

[277] José Azar, Martin C. Schmalz & Isabel Tecu, *Anticompetitive Effects of Common Ownership*, 73 J. FIN. 1513, 1514 (2018); Germán Gutiérrez & Thomas Philippon, *Investment-less Growth: An Empirical Investigation* 15 fig.9 (Nat'l Bureau of Econ. Rsch., Working Paper No. 22897, 2016), https://www.nber.org/papers/w22897

[278] JOHN COATES, THE PROBLEM OF TWELVE: WHEN A FEW FINANCIAL INSTITUTIONS CONTROL EVERYTHING 32 (2023). The scale of and the risk associated with the concentration of share ownership and power of passive investors has been investigated extensively. John C. Coates, *The Future of Corporate Governance Part I: The Problem of Twelve* 2 (Harvard Pub. Law Working Paper, Paper No. 19-07, 2018); Jill E. Fisch, Assaf Hamdani, & Steven Davidoff Solomon, *The New Titans of Wall Street: A Theoretical Framework for Passive Investors*, 168 U. PA. L. REV. 17, 65 (2019); Goshen & Levit, *supra* note 18, at 5.

[279] For an overview of the debate on common ownership, *see* Robert J. Jackson Jr., *Common Ownership: The Investor Protection Challenge of the 21st Century*, Testimony available at https://www.sec.gov/news/testimony/36ackson-testimony-ftc-120618#_ftn29

[280] *See* Stephen Choi, Jill Fisch, & Marcel Kahan, *Who Calls the Shots? How Mutual Funds Vote on Director Elections*, 3 HARV. BUS. L. REV. 35, 55 (2013) (discussing how the assets under management of BlackRock, Vanguard, and State Street outsize those of other mutual funds). The value of BlackRock's assets under management amounts to approximately $8.68 trillion. About BlackRock, BLACKROCK, https://www.blackrock.com/sg/en/about-us (reporting total as of Dec. 20, 2020). The value of Vanguard's assets under management amounts to approximately $8.1 trillion. Vanguard at a Glance: Facts and Figures, VANGUARD, https://corporate.vanguard.com/content/corporatesite/us/en/corp/who-we-are/sets-us-apart/facts-and-figures.html (reporting total as of Mar. 31, 2022). The value of Fidelity's assets under management amounts to approximately $4.28 trillion. Fidelity by the Numbers: Asset Management, FIDELITY, https://www.fidelity.com/about-fidelity/our-company/asset-management (reporting total as of Mar. 31, 2022). The value of State Street's assets under management amounts to approximately $4.02 trillion. Who We Are, STATE ST. GLOBAL ADVISORS, https://www.ssga.com/us/en/individual/mf/about-us/who-we-are (reporting total as of Mar. 31, 2022).

New Management' sign over publicly traded corporations."[281] In fact, the Big Three alone cast about one fourth of all the votes typically cast at S&P 500 companies' shareholder meetings.[282]

But the Big Three do not vote shares because voting is strategically important for their business model. Rather, they vote because mutual funds are required by law to vote the shares held in their portfolios.[283] Voting is essentially a transaction cost for most funds.[284] Passive investors largely compete on cost[285] (i.e., lower advertised expenses), and any money spent on voting is a cost. The Big Three, for instance, vote shares in thousands of companies and their business model is designed around restraining costs, including costs associated with voting shares.[286]

The rise of ESG, with the flourishing of related shareholder proposals, and the 2010 Dodd-Frank Wall Street Reform and the Consumer Protection Act have exacerbated transaction costs associated with voting, since shareholder votes are both more common and more likely to be controversial. Researching proposals and items on a shareholder meeting agenda is an expense borne by the fund that does it. But any benefits derived from careful voting are shared with competitors.[287] Moreover, benefits derived from careful voting are speculative, especially if other funds, perhaps with larger investments in the stock of the same issuer, are not likely to vote similarly.

Against this backdrop, passive fund managers have had a quandary on their hands: satisfying regulatory requirements without expanding or overburdening their small stewardship teams.[288] The solution was to outsource voting to a new type of corporate governance player, specialized proxy advisory services. Proxy advisory firms help institutional investors, and their managers comply with their duty to vote shares held in the funds' portfolios. But proxy advisory services are also under intense market pressure to keep their prices, and therefore costs, down.[289] Taking unexpected or complex positions would result in higher costs for proxy advisory firms. They could also expose their clients to pushback by corporate executives, lobbyists, politicians, public opinion, and, of course, the funds' own investees.

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[281] Goshen & Levit, *supra* note 18, at 5.
[282] Lucian Bebchuk & Scott Hirst, *Big Three Power, and Why It Matters*, 102 B.U. L. REV. 1547, 1599 (2022). Importantly, the voting power of the Big Three moves the needle in controversial matters. Caleb N. Griffin, *Margins: Estimating the Influence of the Big Three on Shareholder Proposals*, 73 SMU L. REV. 409, 442–43 (2020). According to Goshen and Levit, the concerns that the Big Three's *uber* power raise justify the breakup of these common owner when they exceed in size. Goshen & Levit, *supra* note 18, at 2.
[283] *See* Choi, Fisch, & Kahn, *supra* note 280, at 37 (describing Department of Labor release stating pension funds must vote to comply with fiduciary duties and SEC rule requiring disclosure of mutual funds' voting records and policies).
[284] Dorothy S. Lund, *The Case Against Passive Shareholder Voting*, 43 J. CORP. L. 493, 510–11 (2018).
[285] Fisch, Hamdani, & Davidoff Solomon, *supra* note 278, at 29; Aneil Kovvali, *Countercyclical Corporate Governance*, 101 N.C. L. REV. 141, 173 (2022).
[286] Dorothy S. Lund, *Asset Managers as Regulators*, 171 U. PA. L. REV. 77, 94–95 (2022).
[287] Lucian Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 COLUM. L. REV. 2029, 2056 (2019).
[288] The Big Three have small stewardship groups. Lund, *supra* note 286, at 94–95.
[289] Bernard S. Sharfman, *Opportunism in the Shareholder Voting and Engagement of the "Big Three" Investment Advisers to Index Funds*, 48 J. CORP. L. 463, 473–74 (2023); Bernard S. Sharfman, *Enhancing the Value of Shareholder Voting Recommendations*, 86 TENN. L. REV. 691, 712-14 (2019).

Importantly, proxy advisory firms are not shareholders nor residual claimants.[290] To the extent that democratic theory prizes participation, not merely results, the advisory firms are peculiar pseudo-voters: they are neither shareholders nor corporate constituents. Proxy advisory firms have no financial or other interest in the corporations for which they advise.[291] Further, while they effectively act as agents of the funds (which are themselves agents of their investees), proxy advisory firms are not under the control of the investees nor they owe fiduciary duties to funds' investees.[292]

In addition, proxy advisory services do not limit themselves to the low-margin business of recommending votes.[293] ISS, for example, also offers corporate governance consultancy services – advising managers on good governance practices.[294] To win lucrative consulting contracts, proxy advisory firms that provide governance advice must deal with incumbent management. Incumbent managers want shareholders to vote with management, and proxy advisory firms want lucrative jobs.[295]

So, proxy advisors' and institutional owners' incentives are not necessarily aligned with those of the human being who have their economic interests intermediated through funds[296] and their governance rights outsourced twice, first to funds and then to proxy advisory firms. As a result, increasing voting power governed by proxy advisory services equals increasing shareholder disenfranchisement.

A. Over-Institutionalization

The neologism *de-retailization*, introduced by Brian Cartwright, encapsulates the shift from individual to institutional share ownership.[297] The etymology of the word de-retailization emphasizes that individuals have gradually lost relevance in share ownership, extending Berle and

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[290] Asaf Eckstein, *Skin in the Game for Credit Rating Agencies and Proxy Advisors: Reality Meets Theory*, 7 HARV. BUS. L. REV. 221, 231 (2017).
[291] *Id.*
[292] *Id.*
[293] Dan Daskal, *ISS and Other Proxy Advisory Firms' Conflicts of Interest: Analyzing the Insufficiency of New Securities and Exchange Commission Rules and Guidance*, 3 COLUM. BUS. REV. 1487 (2021); Tamara C. Belinfanti, *The Proxy Advisory and Corporate Governance Industry: The Case for Increased Oversight and Control*, 14 STAN. J. L. BUS. & FIN. 384, 406 (2009).
[294] Daskal, *supra* note 293, at 1507-09.
[295] *Id*; Tao Li, *Outsourcing Corporate Governance: Conflicts of Interest within the Proxy Advisory Industry,* 64 MGMT. SCI. 2951 (2018).
[296] Jill Fisch, *Promoting Corporate Diversity: The Uncertain Role of Institutional Investors*, 46 SEATTLE U. L. REV. 367, 383 (2023).
[297] Brian G. Cartwright, General Counsel, Sec. & Exch. Comm'n, The Future of Securities Regulation, Speech at the University Law School Institute for Law and Economics (Oct. 24, 2007); Donald Langevoort, *The SEC, Retail Investors, and the Institutionalization of Securities Markets*, VA. L. REV. 1025, 1026-27 (2009); Steven M. Davidoff, *Paradigm Shift: Federal Securities, Regulation in the New Millennium*, 2 BROOK. J. CORP. FIN. & COM. L. 339, 340 (2008).

Means's century-old point about their limited role in corporate governance. De-retailization can also be described as *institutionalization*.[298] The term institutionalization emphasizes that institutional investors such as the Big Three as well as pension funds, insurance companies, and hedge funds have increasingly achieved a hegemonic position with respect to both share ownership and corporate governance.[299] In 1965, institutional investors collectively held less than 15 percent of the shares of US listed companies.[300] Starting in the 1980s, institutional investors' concentration of ownership has rapidly increased.[301] Institutional investors held 20 percent of the shares of listed public US companies in 1980.[302] But that number increased to 50 percent in 2015.[303] Today, as anticipated, institutional investors hold on more than 70 percent of US public company shares.[304]

The reasons for de-retailization and concomitant institutionalization are complex. Some reasons can be traced to labor regulation and market forces.[305] But the development and slow acceptance of portfolio theory beginning in the 1950s, which warns investors that chances of beating the market by stock picking are thin, also played a role. Beginning in the 1960s, financial intermediaries began to offer mutual funds as a relatively low-cost way for investors with modest portfolios to obtain the benefits of diversification.[306]

The financial industry began to take on its current form with Vanguard's introduction of the passive indexed mutual fund, taking portfolio theory to its logical limit, in 1976.[307] This change rapidly accelerated after the enactment of ERISA, which encouraged employers to abandon defined benefit pensions in favor of defined contribution plans[308] consisting of individual

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[298] Cartwright, *supra* note 297; Langevoort, *supra* note 297, at 1026-27.

[299] On the various species of institutional investors *see* Peter Molk & Frank Partnoy, *Institutional Investors as Short Sellers*, 99 B.U. L. REV. 837, 844 (2019). On the use of the term *institutionalization*, *see* Cartwright, *supra* note 297; Langevoort, *supra* note 297, at 1026-27; Davidoff, *supra* note 297, at 340. *See also* Edward B. Rock, *Adapting to the New Shareholder-Centric Reality*, 161 U. PA. L. REV. 1907, 1922–23 (2013).

[300] See John C. Coates IV, *Measuring the Domain of Mediating Hierarchy: How Contestable Are U.S. Public Corporations?*, 24 J. CORP. L. 837, 848 (1999); see also BD. GOVERNORS FED. RSRV. SYS., FINANCIAL ACCOUNTS OF THE UNITED STATES: HISTORICAL ANNUAL TABLES 1965–1974, at 95 tbl.L.213 (2014), http://www.federalreserve.gov/ releases/z1/20140306/annuals/a1965-1974.pdf.

[301] Edward B. Rock, *Institutional Investors in Corporate Governance*, in THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 363, 365–67 (JEFFREY N. GORDON & WOLF-GEORG RINGE EDS., 2018).

[302] James M. Poterba & Andrew A. Samwick, *Stock Ownership Patterns, Stock Market Fluctuations, and Consumption*, 1995 BROOKINGS PAPERS ON ECON. ACTIVITY 295, 313 tbl.5.

[303] Germán Gutiérrez & Thomas Philippon, *supra* note 277, at 15 fig.9.

[304] José Azar, Martin C. Schmalz & Isabel Tecu, *Anticompetitive Effects of Common Ownership*, 73 J. FIN. 1513, 1514 (2018); Gutiérrez & Philippon, *supra* note 277, at 15 fig.9.

[305] Rock, *supra* note 301, at 363, 365–67.

[306] Barry P. Barbash, Speech at 1997 ICI Securities Law Procedures Conference, *Remembering the Past: Mutual Funds and the Lessons of the Wonder Years*, (19970, https://www.sec.gov/news/speech/speecharchive/1997/spch199.txt#:~:text=The%201960s%20were%20indeed%20the,Woeful%20Years%20of%20the%201970s (referring to the 1960s as the "Wonder Years" for mutual funds as assets of stock mutual funds doubled from 1960 to 1965 and doubled again from 1965 to 1970).

[307] Vanguard, *Vanguard in a nutshell* (2022), https://www.ch.vanguard/content/dam/intl/europe/documents/en/vanguard-in-a-nutshell_eu-en.pdf.

[308] Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 879 (2013).

employee accounts centrally managed diversified funds,[309] creating a large new market of middle class investors.[310] Today, most employees in the upper half of the income distribution are invested in the stock market via employer sponsored defined contribution retirement plans.

Over the past two decades, The Big Three have quadrupled their stake in the S&P 500 companies.[311] Today, collectively the Big Three are the largest shareholder in almost all the S&P 500 corporations.[312] In fact, Lucian Bebchuk and Scott Hirst have warned that with the continued growth of institutional investors, the Big Three will soon become the "Giant Three."[313]

Institutional investors, including common owners like the Big Three, buy and vote equities using money obtained from their own investees.[314] When a person invests in a fund, the person receives shares in the fund in exchange for money. Institutional investors use that money to buy, hold, and trade assets that are held in their portfolios. When these assets are equities, institutional investors get to exercise the voting rights that the equities carry. As a result, institutional investors command an immense number of votes.[315] Although most recently the Big Three have adopted pass-through voting devices that allow investees to select among a very limited array of thematic voting models,[316] traditionally funds' employees vote the shares held the portfolio without any effective accountability to the investees in the funds.[317] Since over 90 percent of the shares held

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[309] *Id.* at 880-81.
[310] *Id.* at 879-80.
[311] Lucian Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B. U. L. REV. 721, 723-24.
[312] Jan Fichtner, Eelke M. Heemskerk & Javier Garcia-Bernardo, HIDDEN POWER OF THE BIG THREE? PASSIVE INDEX FUNDS, RE-CONCENTRATION OF CORPORATE OWNERSHIP, AND NEW FINANCIAL RISK, 19 BUS. & POL. 298, 313 (2017) (finding that cumulatively the Big Three constitute the largest shareholder in 88 of the S&P 500 companies).
[313] Bebchuk & Hirst, *supra* note 311, at 723. More recently, growth rates at the big three have slowed; however, the overall percentage of publicly traded shares held institutionally continues to increase. Alon Brav, Dorothy S. Lund, & Lin Zhao, *Flows, Financing Decisions, and Institutional Ownership of the U.S. Equity Market*, (Jan. 13, 2024), http://ssrn.com/abstract_id=4693837.
[314] Fisch, *supra* note 296, at 383.
[315] Molk & Partnoy, *supra* note 299, at 846; COATES, *supra* note 278, at 32.
[316] Caleb Griffin, *Open Proxy*, (on file with Authors) (warning that pass-through voting practices could be temporary devices to appease regulators, politicians, and investees). In 2022, BlackRock instituted a new practice of pass-through voting called Voting Choice to allow some investees to express their voting preferences. BlackRock, *Empowering Investors Through BlackRock Voting Choice*, https://www.blackrock.com/corporate/about-us/investment-stewardship/blackrock-voting-choice (last visited July 9, 2024). Vanguard and State Street soon followed suit adopting pass-through voting for various of their funds. Morningstar, *Proxy-Voting Insights: BlackRock, Vanguard, State Street: How differently do the Big Three vote on ESG resolutions?* (June 13, 2023), https://corpgov.law.harvard.edu/wp-content/uploads/2023/06/blackrock-vanguard-state-street-esg-proxy-voting-FINAL061223.pdf (discussing the roll-out of pass-through voting by the Big Three). Paradoxically, BlackRock and Vanguard have a relatively high proportion of institutional investees—so the pass through may do no more than shift the vote from one set of executives to another. Dorothy S. Lund & Adriana Robertson, *Giant Asset Managers, the Big Three, and Index Investing*, *in* BOARD SHAREHOLDER DIALOGUE: POLICY DEBATE, LEGAL CONSTRAINTS AND BEST PRACTICES (LUCA ENRIQUES & GIOVANNI STRAMPELLI EDS., *forthcoming*), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4406204.
[317] Lund & Robertson, *supra* note 316. John Coates warns against the risks associated with excessive power concentrated in the hands of a handful of people. COATES, *supra* note 278, at 32. FINANCIAL INSTITUTIONS CONTROL

by institutional investors are voted,[318] the vast majority of shares in US public companies are voted by institutional investors' employees, who are not answerable to funds' investees.

The Big Three have stewardship groups tasked to vote the shares in their portfolios.[319] But the stewardship groups of the Big Three are surprisingly small.[320] So, a few dozen people are in charge of voting the largest blocs of the shares in nine out of ten S&P500 companies and many other US public companies.[321] These people are also demographically homogeneous.[322] Most of the fund managers are White men.[323] Almost eight fund managers out of ten are men and seven fund managers out of ten are White.[324]

Stewardship group employees' identities fail to reflect the demographics and cultures of the investees; this is particularly troublesome because, according to the literature, funds' votes diverge from how the human investees would vote their shares.[325] In fact, fund employees have incentives to pursue the interest of the funds, rather than the interests of the investees.[326] Most fund managers profit from increasing value of their assets under management rather than pursuing environmental or social goals.[327] The pay structure of many fund employees incentivizes them to commit as little time and resources as possible informing themselves about the items on shareholder meeting agendas and to heavily rely on the work of the two relevant proxy advisory

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EVERYTHING 32 (2023); John C. Coates, *The Future of Corporate Governance Part I: The Problem of Twelve 2* (Harvard Pub. Law Working Paper, Paper No. 19-07, 2018).

318 Kate Dore, *Few individual investors participate in shareholder voting. Here's how that may be changing*, CNBC (Oct. 12, 2021), https://www.cnbc.com/2021/10/12/few-individuals-participate-in-shareholder-voting-but-that-may-change.html (reporting that 92% of shares held by institutional investors were voted in 2020).

319 Bebchuk & Hirst, *supra* note 311, at 2077.

320 *Id.* at 2076-77; Lund, *supra* note 286, at 94–95.

321 Fichtner, Heemskerk & Garcia-Bernardo, *supra* note 312, at 313; Bebchuk & Hirst, *supra* note 311, at 2076-77.

322 *Investment Fund Manager Demographics and Statistics in the US*, ZIPPIA THE CAREER EXPERT, https://www.zippia.com/investment-fund-manager-jobs/demographics/ (last visited July 14, 2024); Amrutha Alladi & Gabrielle Dibenedetto, *The Percentage of U.S. Female Fund Managers Is Exactly Where It Was in 2000*, MORNINGSTAR (Mar. 15, 2021), https://www.morningstar.com/funds/percentage-female-fund-managers-is-almost-exactly-where-it-was-20-years-ago.

323 *Investment Fund Manager Demographics and Statistics in the US*, *supra* note 322; Alladi & Dibenedetto, *supra* note 322.

324 *Investment Fund Manager Demographics and Statistics in the US*, *supra* note 322; Alladi & Dibenedetto, *supra* note 322.

325 Jonathan Zytnick, *Do Mutual Funds Represent Individual Investors*?, (last revised Jun. 6, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3803690. *See also* Robert J. Jackson, Jr. & Jonathan Zytnick, *Individual Investor Ideology* (on file with Authors).

326 Fisch, *supra* note 296, at 384; Sean J. Griffith, *Opt-in Stewardship: Toward an Optimal Delegation of Mutual Fund Voting Authority*, 98 TEX. L. REV. 983 (2020).

327 *See* STOUT, GRAMITTO, & BELINFANTI, *supra* note 3; *see also* Alessio M. Pacces, *Sustainable Corporate Governance: The Role of the Law*, *in* SUSTAINABLE FINANCE IN EUROPE: CORPORATE GOVERNANCE, FINANCIAL STABILITY AND FINANCIAL MARKETS 156-160 (D. BUSCH, G. FERRARINI, & S. GRÜNEWALD, EDS., 2021).

services, ISS and Glass Lewis.[328] As a result, shares in our corporations, the mammoths of our economy, increasingly are voted by a small circle of individuals.[329]

B. Proxy Advisory Firms Vote without Stocks

Regulations have inadvertently nurtured the development of proxy advisory services. For example, in 1988, the Department of Labor issued a no action letter setting out its position that pension and health funds' fiduciary duties to their beneficiaries included voting shares held in the portfolios in accordance with loyalty and care.[330] In 2003, the SEC solidified the regulatory requirement to vote shares in compliance with fiduciary duties by Rule 206(4)-6, which requires investment advisors, or institutional investors, to adopt written policies and procedures assuring that institutional investors vote proxies in the fund investees' best interest.[331] The accompanying adopting release made hiring an unconflicted proxy advisory firm a desirable practice in discharging the voting duties.[332] Thus, regulations have encouraged the reliance on proxy advisory firms but proxy advisory firms appear to be far from unconflicted.

In fact, critics have pointed to several conflicts of interest. Institutional investors pay proxy advisory firms for their voting advice.[333] But both ISS and Glass Lewis each have consulting services.[334] For example, the ISS's business unit branded ISS Corporate Solutions, Inc. provides consulting services to public companies aimed at, among other things, "manag[ing] investor expectations."[335] So ISS is being paid by institutional investors for voting advice but at the same time rendering advice to public companies potentially on the same voting topics.[336] The double exposure raises the concern that issuers' management hire ISS Corporate Solutions, Inc. to secure

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328 STOUT, GRAMITTO, & BELINFANTI, *supra* note 3; Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563, 2594-97 (2021); Lund & Robertson, *supra* note 316.

329 On the issues that the concentration of power in the hands of a small group of people, *see* John C. Coates*, The Future of Corporate Governance Part I: The Problem of Twelve, supra* note 322; *see also* STOUT, GRAMITTO, & BELINFANTI, *supra* note 3.

330 Jill E. Fisch & Jeff Schwartz, *Corporate Democracy and the Intermediary Voting Dilemma*, 102 TEX. L. REV. 1 (2023),

331 SEC, *Proxy Voting by Investment Advisors*, Release No. IA-2106; File No. S7-38-02 (March 10, 2003), https://www.sec.gov/rules-regulations/2003/01/proxy-voting-investment-advisers.

332 *Id.*

333 Harald Halbhuber, Erika Kent, & Katya Bogdanov, *Regulation of proxy advisors rides the roller coaster*, *in Corporate governance and executive compensation survey*, A&O Shearman 7 (2024), https://edge.sitecorecloud.io/allenoveryllp1-aoshearmanwe0db-production-ecf3/media/project/aoshearman/pdf-downloads/insights/2024/11/2024-corporate-governance--executive-compensation-survey.pdf.

334 *Id.*

335 ISS-Corporate Homepage, *About Us* (last visited Jan. 13, 2024), https://www.iss-corporate.com/about-us/.

336 In the words of the *Wall Street Journal* editorial staff, "This [is] like Harvard flogging services to parents on how to get junior into Harvard." The Editorial Board, *Cracking the Proxy Advisory Duopoly*, WSJ (July 12, 2023), https://www.wsj.com/articles/proxy-advisory-firms-glass-lewis-institutional-shareholder-services-esg-investing-761e044f.

favorable voting recommendations to institutional investors. On its part, ISS maintains that a firewall separates its voting advisory services and its consulting services.[337]

Unlike ISS, Glass Lewis does not provide consulting services to public companies. However, in 2021, Glass Lewis launched a line of services branded Active Ownership – Engagement Solution.[338] This was followed by Glass Lewis's launch of a related management platform.[339] These programs allows institutional investors to leverage Glass Lewis's relationship with public companies to allow "institutional investors to significantly strengthen their stewardship commitment"[340] and allows Glass Lewis to "perform and manage engagement campaigns on [an investor's] behalf.[341] Critics contend that these campaigns can influence Glass Lewis' voting recommendations.[342]

Dating back to at least 2010, the SEC has expressed concerns about the power and risks associated with proxy advisory firms.[343] In seeking public comment on the proxy system, the SEC stated that "proxy advisory firms may…fail to conduct adequate research and base [their] recommendations on erroneous or incomplete facts."[344] Since then, the power of proxy advisory firms has grown even further, to the point that they can be considered "quasi-regulators." Entities that have no-skin in the game and no equity interest in the issuers are able to sway a significant number of votes. In fact, a study has shown that some of the largest asset managers follow ISS recommendations between 95 and 99% of the time.[345] Moreover, empirical research has shown

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337 ISS Letter to the SEC, SEC Staff Roundtable on the Proxy Process, (Nov. 7, 2018), https://www.sec.gov/comments/4-725/4725-4629940-176410.pdf.

338 Glass Lewis, Press Release, *Glass Lewis Launches Engagement Solution* (Sept. 13, 2021), https://www.glasslewis.com/press-release-engagement-solution/.

339 Glass Lewis, *Glass Lewis Launches SaaS Engagement Management Platform Enabling Investors to Centralize Active Ownership Engagement Data* (Oct. 25, 2022), https://www.glasslewis.com/press-release-glass-lewis-engagement-management-platform/.

340 Glass Lewis, Press Release, *Glass Lewis Launches Engagement Solution* (Sept. 13, 2021), https://www.glasslewis.com/press-release-engagement-solution/.

341 Glass Lewis, *Stewardship Solutions* (last visited Jan.14, 2025), https://www.glasslewis.com/stewardship-solutions/.

342 The Editorial Board, *supra* note 336.

343 *SEC Votes to Seek Public Comment on U.S. Proxy System*, SEC.GOV (July 14, 2010), https://www.sec.gov/news/press/2010/2010-122.htm.

344 *Id.* In 2020, the SEC made clear that when firms provide proxy advice for a fee, it is considered a solicitation under proxy rules. Halbhuber, Kent, & Bogdanov, *supra* note 333, at 8. It also required proxy advisory firms to disclose conflicts of interest and implement "notice and awareness" conditions that would allow companies to review and respond to recommendations before shareholder meetings. *Id.* In 2022, the SEC reversed most of these requirements, retaining only the classification of proxy advice as solicitation and conflict disclosure requirements. *Id.* A series of conflicting court decisions in 2024 created uncertainty, with the DC District Court ruling the SEC lacked statutory authority to regulate proxy advisory firms at all, while the Fifth Circuit found the SEC's 2022 reversal was inadequately justified (though the Sixth Circuit disagreed). *Id.* at 9. The SEC did not seek U.S. Supreme Court review of the Fifth Circuit's decision, and it did not appeal the DC District Court ruling. *Id.* at 10. The future regulatory landscape for proxy advisory firms remains uncertain, potentially influenced by the 2024 presidential election and possible new legislative initiatives under the Trump administration. *Id.*

345 Frank M. Placenti, *Are Proxy Advisors Really a Problem?*, HARV. L. SCH. F. CORP. GOV. (Nov. 7, 2018), https://corpgov.law.harvard.edu/2018/11/07/are-proxy-advisors-really-a-problem/.

that when a proxy advisory firms make a negative recommendation, the number of favorable votes typically decreases by 10-30%.[346] The power of proxy advisory firms is real.

The shift in power from shareholders to non-shareholder proxy advisory firms raises several issues. First, it hands critical voting power to entities that do not hold a stake in the issuers.[347] Second, it hands voting power to entities whose margins highly depend on keeping labor costs low.[348] This is particularly troublesome in consideration of the short time frame available to analyze and process information before the vote. Third, economies of scale and business models based on cost incentivize institutional investors to minimize the resources committed to voting and associated expenses.[349] In essence, the ideal of shareholder democracy has been gutted and control of some of the largest, most powerful corporations in the world has been handed over to for profit corporations who have no skin in the game.

V. CONCLUSION

The distribution of share ownership is not democratic. Rather, it is the uneven result of partially unjust laws and practices. Only one household out of five owns company shares directly, while a high percentage of shares (and their votes) are held by a tiny number of uber-wealthy families. So, only one household out of five has its voice heard in Corporate America, with the voices of a few families far louder than all the others.

Shareholder governance is not democratic either: Although most beneficiary owners are human beings, most shares are held and voted by institutions. Institutions (not individuals) have hegemonic voting powers and influence on business corporations. Separation of ownership from ownership[350]—in other words, the agency problem that arises when fund managers and fund employees vote shares acquired with the money of the investees—has progressively insulated corporations from natural people. This phenomenon is made even more problematic by the mechanics of current corporate governance, which largely relies on the voting recommendations provided by ISS and Glass Lewis and by the persuasive power of hedge funds.

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[346] James R. Copland, David F. Larcker, & Brian Tayan, *The Big Thumb on the Scale: An Overview of the Proxy Advisory Industry*, STANFORD CLOSER LOOK SERIES 4 (May 30, 2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3188174.

[347] Asaf Eckstein, *Skin in the Game for Credit Rating Agencies and Proxy Advisors: Reality Meets Theory*, 7 HARV. BUS. L. REV. 221, 231 (2017).

[348] Bernard S. Sharfman, *Opportunism in the Shareholder Voting and Engagement of the "Big Three" Investment Advisers to Index Funds*, 48 J. CORP. L. 463, 473–74 (2023).

[349] Fisch, Hamdani, & Davidoff Solomon, *supra* note 278, at 29; Kovvali, *supra* note 285, at 173.

[350] The concept was coined by Leo Strine in 2009, Leo E. Strine Jr., *Why Excessive Risk-Taking Is Not Unexpected*, N.Y. TIMES DEALBOOK (Oct. 5, 2009, 1:30 PM), http://dealbook.nytimes.com/2009/10/05/dealbook-dialogue-leo-strine/. For an analysis of the ramifications of the separation of ownership from ownership in corporate governance, *see generally,* Usha Rodrigues, *Corporate Governance in an Age of Separation of Ownership from Ownership*, 95 MINN. L. REV. 1822 (2011).

Moreover, homogeneous demographics of fund managers exacerbate the divide between society and the corporate sector by skewing representation of ethnicities, cultures, races, genders, life experiences, and weltanschauungs. This is particularly troublesome in consideration of the leverage on the corporate sector that voting shares grants. The role of proxy advisory firms, which raises concerns for potential conflicts of interests, further undermines the role of shareholders—individuals and institutions—willing to exercise their votes based on a serious due diligence. Over reliance on proxy firms' voting recommendations hands Corporate America to decision makers that do not have stakes (or skin in the game) in the issuers.[351] This is the nail in the coffin of the shareholder democracy mirage.

The current share ownership model combined with the mechanics that control corporate governance have insulated corporations from the needs and concerns of the everyday person. Moreover, our undemocratic corporate governance and shareholding distribution have amplified the upward redistribution of wealth and income, with stagnating salaries for much of the population, that has characterized most of the period since the 1980s.[352] The consequence has been disaffection of too many Americans from the corporate sector and mixed market capitalism.

The structure and power-dynamics of business corporations are markedly different from those of political democracies. There is no space for loyal opposition in corporate law, and incumbent management are allowed to use corporate resources to perpetuate their power. Shareholders often resort to exit rather than engagement; this is both a consequence and cause of the lack of democracy, further empowering institutions and hegemonic forces.

As brought to the forefront in this Article, there hardly is anything democratic in shareholding. So, relying on, accepting, or embracing shareholder democracy rhetoric steers the conversation about corporate governance away from a productive debate based on true premises. Instead, shareholder democracy rhetoric, starting from fallacious premises, inevitably leads to fallacious reasoning, conclusions, and policies. This is particularly dangerous in an economic and political system like the United States of America, in which corporate power – and the power of those who control corporations – trickles down onto the very political and societal fabric that governs our lives.

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[351] Tamara C. Belinfanti, *The Proxy Advisory and Corporate Governance Industry: The Case for Increased Oversight and Control,* 14 STAN. J. L. BUS. & FIN. 384, 406 (2009).
[352] Goshen & Levit, *supra* note 18.

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