

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.

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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 well-being. 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 the United States. 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.

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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), which collectively constitute the largest shareholders in almost all S&P 500 companies. This institutional dominance is compounded by the outsourcing of voting decisions to proxy advisory firms such as Institutional Shareholder Services (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 the United States. This mischaracterization has significant implications beyond corporate law because 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.

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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, it is 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.

1. See, e.g., Betsy Atkins, *Musk Comp Overturned: Is Shareholder Democracy at Risk?*, FORBES (Feb. 2, 2024, at 09:27 ET), <https://www.forbes.com/sites/betsyatkins/2024/02/02/is-shareholder-democracy-at-risk/> [<https://perma.cc/T9BT-HEZX>] (arguing that the Delaware Court of Chancery’s striking down of an executive compensation plan authorized by an 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, at 12:57 ET), <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/GF3F-LEFU>] (quoting a shareholder activist as 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*, BL (May 29, 2024, at 14:25 ET), <https://news.bloomberglaw.com/esg/exxon-shareholders-vote-with-board-on-all-proxy-proposals> [<https://perma.cc/NT4H-QPEJ>] (“For 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), <https://www.nytimes.com/2024/02/23/business/vanguard-blackrock-state-street-investing-voting.html> [<https://perma.cc/6QXW-6QHB>] (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”); Danielle Gurrieri, *Pass-Through Voting*, BROADRIDGE, <https://www.broadridge.com/article/wealth-management/pass-through-voting> [<https://perma.cc/3ZTM-SCP4>] (arguing that “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. FINANCE 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*, FORTUNE (June 12, 2024), <https://finance.yahoo.com/news/elon-musk-larry-fink-ideological-095224799.html> [<https://perma.cc/VCN9-UCC2>].

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 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 a 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 the corporate sector.

The *pars destruens* (critical discussion) that analytically debunks false rhetoric is too often overlooked. Comfortably familiar but wrong concepts diffuse theoretical misunderstandings, with lasting ramifications in academic debates, policymaking, and the common understanding of essential legal institutions. Recognizing the essential importance of a careful *pars destruens* for sound legal, theoretical, and political arguments, this Article builds the foundation of 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

3. Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 677 (2007); Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 836 (2005). *But see* Lynn A. Stout, *Bad and Not-so-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1192 (2002); Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. REV. 561, 577 (2006) (warning about the risk of rent-seeking). Professor Lynn Stout coauthored an article and a book calling for the inclusion of virtually all individuals in shareholding and corporate governance. *See* LYNN STOUT, SERGIO GRAMITTO & TAMARA BELINFANTI, *CITIZEN CAPITALISM: HOW A UNIVERSAL FUND CAN PROVIDE INFLUENCE AND INCOME TO ALL* 4–5 (2019); Lynn Stout & Sergio Gramitto, *Corporate Governance as Privately-Ordered Public Policy: A Proposal*, 41 SEATTLE U. L. REV. 551, 555 (2018).

4. *See* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 569–71 (2003).

inevitable in the United States.⁵ Beginning with the colonists “incorporat[ing] themselves” even before receiving royal charters,⁶ he described self-organized institutions where Americans made decisions together as equals.⁷

Today, few would describe American society as broadly participatory, nonhierarchical, or 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 increasingly 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, at work, and even in the services they purchase.⁸

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 because shareholders, unlike voters in the federal system and many

5. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 4 (Eduardo Nolla ed., James T. Schaefer trans., 2012) (1835) (observing “equality of conditions, the generating fact from which each particular fact seemed to derive” in American society); *cf. id.* at 108 (contending that Americans reject hierarchy, believe that each individual is an equal member of the sovereign and “universally” accept the liberal principal that “society has the right to direct [an individual’s] actions only when it feels harmed by them, or when it needs to call for his support”).

6. *Id.* at 282.

7. 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 106 (Phillips Bradley ed., Henry Reeve & Francis Bowen trans., 1990) (1840) (discussing the “immense assemblage of associations” that Americans used for multifarious purposes); *id.* at 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”); *id.* at 119 (contending that in civil and commercial associations, people learn the “notions” they then bring to politics, taming “dangers of freedom”). While the United States had both rich and poor, the distinctions were smaller than in Europe, and critically, “wealth circulate[d] there with incredible rapidity,” so “the rich d[id] not form a class apart.” 1 DE TOCQUEVILLE, *supra* note 5, at 85, 87, 356 (noting the mutability of American class structure).

8. See, e.g., CHRISTOPHER LASCH, *THE REVOLT OF THE ELITES AND THE BETRAYAL OF DEMOCRACY* 27–29 (1996) (describing upper-class self-segregation).

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 decisionmaking, 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 twentieth century led to lack of access to share ownership via employee stock ownership plans (ESOPs), thus contributing 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.¹⁴ Corporations

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

10. Sergio Alberto Gramitto Ricci & Daniel Greenwood, *Total Governance*, 50 J. CORP. L. 353, 363, 366–67 (2025).

11. See Cary Coglianese, *Democracy and Its Critics*, 88 MICH. L. REV. 1662, 1662–65 (1990) (reviewing ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* (1989)) (observing that democracy is best protected when each individual person judges their own needs and contributes to society's decisionmaking process, and "anything short of full participation," including barriers to entry, stunts full consideration in the decisionmaking process).

12. See *infra* Part III.

13. See *infra* Sections III.B–C.

14. According to the Federal Reserve, only about 21% of American households own stock. Adity Aladangady et al., *Changes in U.S. Family Finances from 2019 to 2022: Evidence from the Survey of Consumer Finances*, BD. GOVERNORS FED. RESRV. SYS. 15 (2023), <https://www.federalreserve.gov/publications/changes-in-us-family-finances-from-2019-to-2022.htm> [<https://perma.cc/U44A-27RC>]. Many more are

supply us with necessities such as 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, which results in lasting effects on our laws and regulations.¹⁵ Corporations pollute our environment but also have the power to ameliorate past harms done to the environment over time.¹⁶ They partner with our federal, state, and local governments to provide critical infrastructure and security.¹⁷ In short, corporations—and their governance—are inextricably woven into our society, economy, and politics. Consequently, 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.¹⁸ Thus, the wealthy get more votes than the rest of us, and billionaires can buy as many votes as they wish.

Even within the limited scope of share-based voting, institutionalization of share ownership moves electoral power from the actual financial investors to funds, other financial

invested in the stock market indirectly (and with no voting rights) through mutual funds or retirement plans. However, in most cases, the amounts are small: median total household financial assets (including savings accounts) were only \$39,000 in 2022. *Id.*

15. 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> [<https://perma.cc/A3CT-6YP6>] (detailing lobbying and corporate political donations to influence regulations); see SUSAN R. HOLMBERG, ROOSEVELT INST., WHO ARE THE SHAREHOLDERS? 5 (2018), <https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI-Who-Are-the-Shareholders-201806.pdf> [<https://perma.cc/2JXV-P4Z8>]. In the 1950s, independent shareholder Lewis Gilbert stated, “[W]e cannot have good political government unless we have good corporate government.” LEWIS D. GILBERT, DIVIDENDS AND DEMOCRACY 35 (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.* at 229.

16. Kishanthi Parella, *International Law in the Boardroom*, 108 CORNELL L. REV. 839, 848–50 (2023); see also STOUT, GRAMITTO & BELINFANTI, *supra* note 3, at 18–19 (discussing the role of corporations in global warming).

17. Deirdre White, *Business Collaboration with Government: Does Reward Outweigh Risks?*, STAN SOC. INNOVATION REV. (Nov. 14, 2016), https://ssir.org/articles/entry/business_collaboration_with_government_does_reward_outweigh_risk [<https://perma.cc/3QYS-PGN7>].

18. 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.”).

institutions, and advisory firms.¹⁹ Middle-class shareholding is typically via institutions such as mutual funds;²⁰ when the institution is the legal owner of the shares, it controls the votes. Institutional owner-managers such as BlackRock, Vanguard, and State Street own and vote the bulk of company shares.²¹ 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.²² So, shareholder governance is hijacked by institutional investors, which, in turn, have abdicated to proxy advisory firms that exert highly consequential voting power but have no stake in the issuers or answerability to the demos.²³ As a result, the ultimate human investors have virtually no voting rights.²⁴

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,²⁵ 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.”²⁶ The true function

19. See *infra* Section IV.A.

20. *100 Years Later: Mutual Funds Driver of Wealth for Middle-Class Americans*, INV. CO. INST.: NEWS RELEASE (Oct. 31, 2024), <https://www.ici.org/news-release/24-news-mfowners> [<https://perma.cc/JU7H-RUY8>].

21. See, e.g., Zohar Goshen & Doron Levit, *Agents of Inequality: Common Ownership and the Decline of the American Worker*, 72 DUKE L.J. 1, 5 (2022).

22. See *infra* Section IV.B; see also Goshen & Levit, *supra* note 21, at 65 (detailing the influence of proxy advisors on the labor market).

23. See sources cited *supra* note 22.

24. See *infra* Part IV; see also Paul Rose, *How Financial Institutions Disenfranchise Everyday Investors*, NAT’L REV. (May 12, 2021, at 06:30 ET), <https://www.nationalreview.com/2021/05/how-financial-institutions-disenfranchise-everyday-investors/> [<https://perma.cc/T4XX-3QDU>] (explaining that most shareholders “lack contractual protection of their interests”).

25. 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 twentieth century. See, e.g., Andrew Ross Sorkin, *How Shareholder Democracy Failed the People*, N.Y. TIMES (Aug. 21, 2019), <https://www.nytimes.com/2019/08/20/business/dealbook/business-roundtable-corporate-responsibility.html> [<https://perma.cc/BXP5-4QV9>] (incorrectly implying that shareholder democracy dates back to the 1970s).

26. See OTT, *supra* note 25, at 5 (explaining that shareholder democracy was first perpetuated by the New York Stock Exchange (NYSE), large companies, and

of shareholder democracy slogans was to limit calls for the radical reform of corporate law into a more representative or answerable form by encouraging investment by the masses.²⁷ The related term “corporate democracy” has an analogous history and has been used similarly to shareholder democracy since at least the 1930s to refer to shareholder participation in corporate governance.²⁸

Debunking the shareholder democracy lie is critical to protecting democratic values in our society and economy, because the corporate sector is inextricably tied to political and societal institutions. The modern American republic heavily relies on the corporate sector. Thus, undemocratic influence over the corporate sector 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 and inescapable conflicts of any democratic system. Part II explores the development of proxy voting dating back to early modern English corporations in the seventeenth and eighteenth 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.

financial firms to meet their own goals but was quickly adopted by others seeking to “bring corporations in line with democratic political traditions”).

27. *See id.* (describing how Wall Street adopted shareholder democracy to fight government regulation and interference in corporate law).

28. Franklin A. Gevurtz, *The Complex Dualisms of Corporations and Democracy*, 14 NE. U. L. REV. 365, 372–73, 385 (2022) (recognizing that shareholder democracy and corporate democracy are used interchangeably).

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.²⁹ Wall Street investment firms and the NYSE used it to attract financial investment by everyday individuals.³⁰ 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.³¹ Advocates of so-called shareholder democracy argued that acquiring corporate shares in “*unregulated* securities markets could accomplish key social goals—individual security and opportunity, macroeconomic prosperity and stability—in a far more efficient and democratic manner” than the government could accomplish with regulations.³² As Professor Julia Ott has detailed, proponents of shareholder democracy argued that mass investment would provide “class harmony” without disrupting the status quo of “economic wealth and power” or its holders.³³

Others found alternative 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.”³⁴

Still others used shareholder democracy language as a way of garnering support for regulations to protect third party investors.³⁵ In the 1950s, shareholder democracy proponents such as Professors 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.³⁶ Emerson and Latcham praised the Securities and Exchange Commission’s (SEC) adoption of Rule 14a-8 for providing a formal mechanism for shareholder voices to be heard.³⁷ As this Article later details,

29. OTT, *supra* note 25, at 5.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. FRANK D. EMERSON & FRANKLIN C. LATCHAM, SHAREHOLDER DEMOCRACY: A BROADER OUTLOOK FOR CORPORATIONS 9 (1954).

37. *Id.* at 7–8.

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 advocates for shareholder (or speculator) power that prompted the adoption of Rule 14a-8 continues today. The remainder of this Section briefly examines some recent uses of the shareholder democracy rhetoric to demonstrate its fallacy.

In recent years, issuers and activist investors have competed at bending shareholder democracy rhetoric to best serve their conflicting arguments and purposes. In a striking example of the indeterminacy of legal rhetoric, all sides, as well as mass media and industry titans, use shareholder democracy rhetoric to push their disparate agendas. Theories of corporations as “natural entit[ies],” mere “aggregate[s],” or derogations of state sovereignty served both sides of regulatory debates in the nineteenth and early twentieth centuries.³⁸ Shareholder democracy rhetoric works the same way. Parties on opposite sides of proxy fights or corporate arena battles use it to justify their actions or seek more credibility. Shareholder democracy has been used as a rhetorical cheat code with an amorphous meaning.

For example, in early 2024, Arjuna Capital, a wealth management firm focused on sustainable investing,³⁹ and Follow This, a Dutch climate activist group, sought to include a shareholder proposal relating to climate change on the 2024 ExxonMobil Corporation shareholder meeting agenda.⁴⁰ 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.”⁴¹ After a federal district court dismissed a case brought by Exxon against

38. See, e.g., Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 179, 182 (1985); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 810 (1935).

39. ARJUNA CAPITAL, <https://arjuna-capital.com/> [https://perma.cc/GNZ5-54WV] (describing itself as a “boutique wealth management firm” focused on sustainable investing).

40. 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> [https://perma.cc/W7EE-H552].

41. BLOOMBERG, *Exxon Vows to Be ‘Forceful Advocate’ for Shareholder Democracy*, ENERGY CONNECTS (May 29, 2024), <https://www.energyconnects.com/news/gas-lng/2024/may/exxon-vows-to-be-forceful-advocate-for-shareholder-democracy/> [https://perma.cc/9BBL-4UCS].

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.”⁴² But shareholder democracy language was embraced by both sides: Arjuna also invoked shareholder democracy in a letter to Exxon, 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.”⁴³

Exxon’s embrace of shareholder democracy rhetoric did not stop there. In September 2025, Exxon announced a new “Retail Voting Program” allowing retail shareholders to provide standing voting instructions authorizing the company’s board to vote their shares in perpetuity on nearly all matters.⁴⁴ The SEC blessed the program via a no-action letter, stating that it would not recommend enforcement under any proxy rules.⁴⁵ In promoting the program, Exxon characterized it as “an

42. Darren Woods, *Message from Darren Woods, ExxonMobil Chairman and CEO*, EXXONMOBIL: NEWSROOM (June 18, 2024), <https://corporate.exxonmobil.com/news/corporate-news/message-from-the-chairman> [https://perma.cc/TY5U-HJ6G]. Contrary to Exxon’s position, in ordinary republican politics, we generally assume that discussion of even minority positions—let alone positions with broad public support such as Arjuna Capital and Follow This’s environmentalism—is of enormous public benefit. See, e.g., JOHN STUART MILL, *ON LIBERTY* 64, 79, 92–93 (Edward Alexander ed., Broadview Press, 1999) (1859) (“[If debate is permitted], we may hope that if there be a better truth, it will be found when the human mind is capable of receiving it This is the amount of certainty attainable by a fallible being, and this the sole way of attaining it. . . . [And that debate enables one to] learn[] the grounds of one’s own opinions.”).

43. Arjuna Cap., LLC’s Notice to Ct. of Letter to Exxon Mobil Corp. at 3, *Exxon Mobil Corp. v. Arjuna Cap., LLC*, 737 F. Supp. 3d 444 (N.D. Tex. 2024) (No. 4:24-cv-00069-P). On the negative externalities on the corporate governance machinery of Exxon suing its shareholders, see Colleen Honigsberg & Robert Jackson, *Exxon’s Suit Against Its Own Shareholders Threatens Valuable Bargaining*, PROMARKET (July 16, 2024), <https://www.promarket.org/2024/07/16/exxons-suit-against-its-own-shareholders-threatens-valuable-bargaining/> [https://perma.cc/W3Q8-EVD3].

44. *Your Shares, Your Say: Ensuring Retail Investors Are Heard*, EXXONMOBIL: NEWSROOM (Sep. 15, 2025), https://corporate.exxonmobil.com/news/news-releases/2025/0915_ensuring-retail-investors-are-heard [https://perma.cc/LP6X-34RW].

45. Exxon Mobil Corp., SEC Staff No-Action Letter, Off. of Mergers & Acquisitions, Div. of Corp. Fin. (Sep. 15, 2025), <https://www.sec.gov/rules-regulations/no-action-interpretive-exemptive-letters/division-corporation-finance-no-action/exxon-mobile-091525> [https://perma.cc/BB4J-NTNZ]. Rule 14a-4(d)(2) prohibits a proxy from conferring authority to vote at any annual meeting other than the next one, and Rule 14a-4(d)(3) prohibits a proxy from conferring authority to vote at more than one meeting. 17 C.F.R. § 240.14a-4(d) (2025).

important step forward for American shareholder democracy,” arguing that retail investors deserve a voice and that activist groups had exploited low retail participation rates to advance political agendas at shareholders’ expense.⁴⁶ Yet a program that invites retail investors to pre-authorize the board to vote their shares is more accurately understood as a mechanism to concentrate voting power in management’s hands.⁴⁷ This is precisely the opposite of democratic participation.⁴⁸

In another instance, during Tesla’s quest to have shareholders re-ratify Elon Musk’s unprecedentedly 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.”⁴⁹ Tesla again 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.”⁵⁰

Shareholder democracy rhetoric also was invoked in a 2024 proxy battle between Nelson Peltz of Trian Partners and the

46. *Your Shares, Your Say*, *supra* note 44.

47. Sergio Alberto Gramitto Ricci & Christina M. Sautter, *Corporate Disenfranchisement*, 17 U.C. IRVINE L. REV. 28–29 (forthcoming 2027), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6280419 (detailing motivations behind the voting program and arguing that the program assists Exxon management to combat shareholder proposals and activist investors); Christina Sautter, *Exxon Texas Move Should Prompt Shareholders to Read Fine Print*, BL (Mar. 20, 2026, at 04:30 ET), <https://news.bloomberglaw.com/legal-exchange-insights-and-commentary/exxon-texas-move-should-prompt-shareholders-to-read-fine-print> [<https://perma.cc/FAG7-X5PZ>] (arguing “ExxonMobil’s largest shareholder bloc can become a permanent management ally”).

48. See Christina M. Sautter, *The Texas Reincorporation Trap—What the ExxonMobil Vote Reveals About Board Power*, TEX. LAWBOOK (Mar. 31, 2026), <https://texaslawbook.net/the-texas-reincorporation-trap-what-the-exxonmobil-vote-reveals-about-board-power/> [<https://perma.cc/4BS7-SXCF>] (observing that the program’s “practical architecture” runs contrary to its democratic framing).

49. Letter from Robyn M. Denholm, Tesla Chairperson of the Board, to Tesla Stockholders (Apr. 17, 2024), <https://www.votetesla.com/wp-content/uploads/2024/05/Tesla-Letter-to-Stockholders-April-17-2024-1.pdf> [<https://perma.cc/UQ5G-64CG>].

50. *Tesla Investor Presentation*, VOTETESLA, at 19 (May 2024), <https://www.votetesla.com/wp-content/uploads/2024/05/Tesla-Investor-Presentation-May-2024.pdf> [<https://perma.cc/G574-GA76>]; Tesla, Inc., Proxy Statement (Form 14A) (Apr. 29, 2024), https://www.sec.gov/ix?doc=/Archives/edgar/data/1318605/000110465924053333/tm2326076d15_def14a.htm [<https://perma.cc/M5VE-6K3E>].

Walt Disney Company.⁵¹ As Peltz fought an ultimately losing battle for two Disney board seats, Disney launched a defense.⁵² Trián responded, “To suggest that Nelson Peltz is an ‘infiltrator’ (he has been elected overwhelmingly by shareholders in 48 elections) is offensive and highly dismissive of shareholder democracy.”⁵³ 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.”⁵⁴ 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 invoked the same concept to defend the power of activist investors to reorient Disney in the activist investors’ preferred direction. Notably, none of Tesla’s management, Trián Partners, or Ackman make any claim in favor of traditional democratic values of popular control, egalitarianism, public service, or rotation of office. Rather, these are competing elites, both sides controlling vast wealth and neither side interested in sharing power with those affected by their corporate decisions.⁵⁵

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, its CEO 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 arguing that “if widely adopted, [pass-through voting] can enhance corporate governance by injecting important new voices into

51. 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 (Mar. 11, 2024, at 09:58 PT), <https://variety.com/2024/biz/news/disney-attacks-nelson-peltz-disruptive-destructive-vanity-1235938192/> [https://perma.cc/9HNV-L9PT].

52. *Id.*

53. *Id.*

54. Bill Ackman (@BillAckman), X (Apr. 2, 2024, at 18:14 ET), <https://x.com/BillAckman/status/1775285586078707789?lang=en> [https://perma.cc/PK7Q-KNPX].

55. Gramitto Ricci & Sautter, *supra* note 47, at 11–12 (arguing that competing elites contest one another’s dominance while preserving the shared governance framework that excludes ordinary shareholders).

shareholder democracy.”⁵⁶ He concluded: “This 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.”⁵⁷

Shareholder democracy rhetoric has also been deployed to support state legislation that restricts shareholder rights. In 2025, Texas Policy Research, a nonprofit that describes itself as “committed to advancing liberty-based solutions” by publishing vote recommendations for Texas legislators, recommended a “yes” vote on SB 1057.⁵⁸ SB 1057 amended the Texas Business Organizations Code to add a new section 21.373 that dramatically raised ownership thresholds required for shareholders to submit proposals at certain publicly traded Texas corporations and required those shareholders to solicit holders of at least 67% of voting shares before a proposal could be placed on the agenda.⁵⁹ The organization framed these heightened thresholds not as restrictions on shareholder participation, but as safeguards for it. In its telling, filtering out proposals from shareholders with minimal financial stakes

56. Larry Fink, *The Transformative Power of Choice in Proxy Voting*, BLACKROCK (Nov. 2, 2022), <https://www.blackrock.com/corporate/about-us/investment-stewardship/blackrock-voting-choice/proxy-voting-power-of-choice> [https://perma.cc/BG7H-SHCK]. 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, by contrast, BlackRock agreed to vote the shares it held pro rata, according to its own investors’ instructions. See, e.g., Danielle Gurrieri & Chuck Callan, *Pass-Through Voting: Giving Individual Investors a Voice in Corporate Governance*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 17, 2024), <https://corpgov.law.harvard.edu/2024/04/17/pass-through-voting-giving-individual-investors-a-voice-in-corporate-governance/> [https://perma.cc/BK6R-S9MJ].

57. Fink, *supra* note 56. The pass-through voting archetype is described in Stout & Gramitto, *supra* note 3, at 557–58, 571–73, and in STOUT, GRAMITTO & BELINFANTI, *supra* note 3, at 58–60. 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. 113, 114 n.2 (2024) (explaining the issues that pass-through voting causes for beneficiaries and for issuers alike). For a critique of the current pass-through voting architecture, see Caleb N. Griffin, *Open Proxy*, 99 TUL. L. REV. 247, 282–85 (2024).

58. *What We Do*, TEX. POL’Y RSCH., <https://www.texaspolicyresearch.com/what-we-do/> [https://perma.cc/GJ87-FDMH]; Tan Parker, *SB 1057*, TEX. POL’Y RSCH., <https://www.texaspolicyresearch.com/bills/89th-legislature-sb-1057/> [https://perma.cc/48S7-3582].

59. TEX. BUS. ORGS. CODE ANN § 21.373 (West 2025).

protects the interests of the broader shareholder base and thereby “enhances the integrity of shareholder democracy.”⁶⁰

The same rhetoric was used to defend Texas SB 29, a companion amendment that enacted a suite of changes curtailing shareholder rights, including a 3% ownership threshold to bring derivative suits.⁶¹ The Alliance for Corporate Excellence, an advocacy group formed specifically to lobby for the Texas amendments, argued that SB 29 proves “shareholder democracy is thriving” in Texas.⁶² It does not. The amendments systematically restrict the mechanisms through which shareholders exercise meaningful oversight of corporate management.⁶³

Mass media also uses shareholder democracy to push their storylines. 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.⁶⁴ The story explained that 45% of Vanguard shareholders chose to defer to Vanguard’s default policy in how their shares would be voted.⁶⁵ 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 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

60. Parker, *supra* note 58.

61. Sautter, *supra* note 48 (detailing how amendments made pursuant to SB 29 restrict shareholder rights); Christopher Babcock, *Texas Business Reforms Show Shareholder Democracy Is Thriving*, BL (Dec. 11, 2025, at 04:30 ET), <https://news.bloomberglaw.com/legal-exchange-insights-and-commentary/texas-business-reforms-show-shareholder-democracy-is-thriving> [<https://perma.cc/U3M8-HBS7>].

62. Babcock, *supra* note 61.

63. Christina Sautter, *Texas Corporate Reforms Silence Retail Shareholders—By Design*, BL (Jan. 6, 2026, at 04:30 ET), <https://news.bloomberglaw.com/legal-exchange-insights-and-commentary/texas-corporate-reforms-silence-retail-shareholders-by-design> [<https://perma.cc/CH3R-QNZ9>].

64. Madison Darbyshire, *Vanguard Experiment in Shareholder Democracy Finds Investors Prefer to Defer*, FIN. TIMES (Sep. 17, 2024), <https://www.ft.com/content/da59775c-c7f4-44c6-a625-2004ae9baeed> [<https://perma.cc/PK5M-BKC4>].

65. *Id.*

vote.⁶⁶ The op-ed notes that for most of the Vanguard shareholders who actively sought to vote differently from Vanguard, it was likely the first time they had ever made any voting decisions with respect to their stock.⁶⁷ As it says, “The push for democratised voting closely mirrors current trends towards transparency and accountability.”⁶⁸

With or without pass-through voting, one should not be lulled into believing that corporations are democracies, or even herren-democracies with voting restricted to a single constituency (shares) of the many affected by corporate governance. 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 that of 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. Elected corporate board members are barred from representing those who elect them or deferring to the will of the majority of shares; they must, instead, act in the interests of the corporation according to their own judgment.⁶⁹ It does not guarantee, except to the extent that outside forces require it to do so, antidiscrimination principles or positions open to

66. Georgia Stewart, *Letter: Vanguard Pilot Shows Investors Want Say in Voting Their Shares*, FIN. TIMES (Oct. 16, 2024), <https://www.ft.com/content/1ed14a04-5584-4f3b-a69c-0b51b022f1c5> [<https://perma.cc/UJR3-KUYT>].

67. *Id.*

68. *Id.* The author of the op-ed is Georgia Stewart, the CEO of Tumelo, a British pass-through voting firm. *Id.*

69. DEL. CODE ANN. tit. 8, § 141(a) (2020) (vesting management of the business and affairs of the corporation in the board of directors); see *Paramount Commc'ns, Inc. v. Time Inc.*, 571 A.2d 1140, 1154 (Del. 1989) (holding that directors are not obligated to abandon a corporate strategy simply because shareholders prefer an alternative); see also *Smith v. Van Gorkom*, 488 A.2d 858, 893 (Del. 1985) (holding that directors breached their fiduciary duty by allowing shareholders to vote on a sale proposal without first adequately considering its merits at the board level).

talent.⁷⁰ 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.⁷¹ This, of course, is precisely the opposite of standard democratic theory, which contends that a state exists to serve its citizens,⁷² not the reverse.⁷³

1. Shareholder “Non-crazy”: Shareholders Do Not Rule

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.⁷⁴ Whether a board chooses to implement a shareholder proposal is another matter.⁷⁵ To be sure, shareholders have the power to enact corporate bylaws, although the board often does as well.⁷⁶ Additionally, a limited number of board decisions are binding on the company only

70. Max Weber, *Bureaucracy*, in *ESSAYS IN SOCIOLOGY* 196, 241–42 (H.H. Gerth & C. Wright Mills eds. & trans., 2009).

71. Günter Franke, *Shareholders as Insurers of the Firm*, 152 J. INST. & THEORETICAL ECON. 113, 117 (1996) (analogizing shareholders to insurers).

72. See, e.g., THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 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 . . .”).

73. The idea that citizens, or subjects, exist to serve the state is generally understood to characterize antidemocratic fascist or totalitarian regimes. Democracies, by 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, President, United States, Inaugural Address (Jan. 20, 1961) (“[A]sk not what your country can do for you—ask what you can do for your country.”).

74. See James D. Cox & Randall S. Thomas, *The SEC’s Shareholder Proposal Rule: Creating a Corporate Public Square*, 2021 COLUM. BUS. L. REV. 1147, 1185 (recognizing the precatory nature of proposals).

75. See *id.* (“Even though shareholder proposals are often technically advisory, boards often implement proposals that garner a majority of shareholder votes.”); Yonca Ertimur, 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).

76. See DEL. CODE ANN. tit. 8, § 109(a) (2025) (describing the power of shareholders to amend bylaws).

after shareholder approval: decisions to sell, merge, or otherwise end the corporation's independent existence;⁷⁷ amendments to the corporation's articles of incorporation;⁷⁸ and a few similarly fundamental changes.

The corporate board, the ultimate decisionmaker for the corporation, is elected by the shareholders. However, corporate law is clear that the board is not a representative body.⁷⁹ Instead, directors are barred from deferring to the views, or even the interests, of the actual voters, let alone other corporate constituencies.⁸⁰ This is contrary to the democratic notion that legislators should voice the views of their electors. Rather than representatives of the shares or shareholders, directors are fiduciaries of the corporation: They must act in the best interests of the corporation as the directors, in good faith, perceive those interests.⁸¹

Similarly, shareholders have no right to control the lobbying or political interventions funded by their investments as allocated by management.⁸² 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

77. See, e.g., *id.* § 251(c) (requiring shareholders of constituent corporations to hold a merger vote on the proposed merger); *id.* § 271(a) (requiring a shareholder vote for a sale of all or substantially all of a corporation's assets).

78. See *id.* § 242(b) (detailing certain amendments to the certificate of incorporation requiring a shareholder vote).

79. See *Klaassen v. Allegro Dev. Corp.*, No. 8626, 2013 WL 5967028, at *11 (Del. Ch. Nov. 7, 2013) (citing *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985)).

80. *Gramitto Ricci & Greenwood*, *supra* note 10, at 366–67.

81. See *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 745, 751 (Del. Ch. 2005) (citing *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993)) (finding the fiduciary duty of loyalty owed by a corporate director to a corporation includes a mandate to act in “the best interest of the corporation and its shareholders” rather than “any interest possessed by a director, officer or controlling shareholder and not shared by the stockholders generally”).

82. See James Kwak, *Corporate Law Constraints on Political Spending*, 18 N.C. BANKING INST. 251, 252–53 (2013) (arguing that shareholders' primary recourse for a corporation's political contributions is a derivative lawsuit “challenging political spending that is allegedly harmful to the corporation”); Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 1051 (1998) (arguing that corporate managers are compelled by law to spend corporate money to promote corporate financial interests even when those conflict with the actual values of managers or corporate participants).

willing to challenge the board.⁸³ 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).⁸⁴ 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, by some estimates, the most expensive proxy fight in history.⁸⁵

More generally, in the corporate sphere, there is no concept of a loyal opposition. Instead, ordinarily directors 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.⁸⁶

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, by wealth.⁸⁷

83. Melvin Aron Eisenberg, *Access to the Corporate Proxy Machinery*, 83 HARV. L. REV. 1489, 1496 (1970).

84. *Id.*

85. See Brooks Barnes & Lauren Hirsch, *For Disney, Small Shareholders Loom Large in Boardroom Fight*, N.Y. TIMES (Apr. 1, 2024), <https://www.nytimes.com/2024/03/30/business/media/disney-shareholders-proxy-battle.html> [https://perma.cc/RPX5-T6ZE] (citing the costs of the Disney–Peltz proxy fight); Kim Masters, *Bob Iger Bruised, But Not Broken, After Disney Fight*, HOLLYWOOD REP. (Apr. 10, 2024, at 06:45 ET), <https://www.hollywoodreporter.com/business/business-news/bob-iger-nelson-peltz-disney-proxy-board-1235870436/> [https://perma.cc/X57U-79RN] (stating the Disney–Peltz proxy battle was likely the most expensive in history).

86. See Sean Weathersby, *Strategic Investigations Provide an Edge in Proxy Fights*, MINTZ GRP.: DEEP BACKGROUND BLOG (Apr. 10, 2025), <https://mintzgroup.com/strategic-investigations-provide-an-edge-in-proxy-fights/> [https://perma.cc/3EA2-DWCR] (referring to dissident director nominees as “insurgent nominees”); cf., Spangler, *supra* note 51 (noting an instance when management referred to dissenting shareholder as an “infiltrator”).

87. 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 drops. See DEL. CODE ANN. tit. 8, § 212(a) (2025) (permitting corporations to deviate from one share, one vote); *Dual-Class Stock*, COUNCIL INSTITUTIONAL INVS.,

Shareholders are not “the people” in any meaningful sense. Indeed, the largest shareholders are not even “people”: most shares are held and voted by institutions, not by individuals.⁸⁸

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”⁸⁹ than to adopt a policy of preferring some ruling minority over others.⁹⁰

Corporate governance, by contrast, allocates control according to shareholding size. Shareholders vote per share, not per person.⁹¹ Contrary to the basic democratic-republican notion that votes should not be for sale,⁹² 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 that determines the price of the shares, their votes, and thus elections.

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.⁹³ American income is quite skewed toward the top,

https://www.cii.org/dualclass_stock [<https://perma.cc/MX6Q-BR7G>] (describing the increasingly common corporate practice of granting founding members stock with a disproportionate share of votes). 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 M. Fairfax, *Shareholder Democracy on Trial: International Perspective on the Effectiveness of Increased Shareholder Power*, 3 VA. L. & BUS. REV. 1, 16–17 (2008); see also Grant M. Hayden & Matthew T. Bodie, *One Share, One Vote and the False Promise of Shareholder Homogeneity*, 30 CARDOZO L. REV. 445, 447–49 (2008).

88. See *infra* note 311 and accompanying text.

89. 1 DE TOCQUEVILLE, *supra* note 5, at 238.

90. *Id.* at 241.

91. See DEL. CODE ANN. tit. 8, § 212(a) (2025) (“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.”).

92. See Richard L. Hasen, *Vote Buying*, 88 CALIF. L. REV. 1323, 1324 n.1 (2000) (collecting examples of all fifty states prohibiting political vote buying).

93. Robert Frank, *The Wealth of the 1% Just Hit a Record \$44 Trillion*, CNBC (Mar. 28, 2024, at 13:07 ET), <https://www.cnbc.com/2024/03/28/wealth-of-the-1percent-hits-a-record-44-trillion.html> [<https://perma.cc/NH7U-RERE>] (citing a Federal Reserve report and stating “[t]he top 1% own half of all individually held stocks”).

wealth is far more unequally distributed than income,⁹⁴ and stockholding—direct or indirect—is more unequal than wealth.⁹⁵ 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.⁹⁶ But few actual human beings are so blinded by greed as to have no values other than shareholder profit.⁹⁷ In fact, although the majority of beneficial shareholders are human beings, their values and concerns are typically overlooked because their voting power and influence are not passed through or cannot counter that 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

94. See Zia Qureshi, *Rising Inequality: A Major Issue of Our Time*, BROOKINGS (May 16, 2023), <https://www.brookings.edu/articles/rising-inequality-a-major-issue-of-our-time/> [<https://perma.cc/XZ6F-KWG7>] (explaining that wealth distribution is significantly less equal than income distribution).

95. See Frank, *supra* note 93 (observing half of all individually held stocks are held by the top 1%). As of the 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.*

96. See Robert G. Eccles & Jill E. Fisch, *The Politics of Values-Based Investing*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sep. 7, 2022), <https://corpgov.law.harvard.edu/2022/09/07/the-politics-of-values-based-investing/> [<https://perma.cc/W9AV-RRBS>] (discussing the principles of values-based investing); Sergio Alberto Gramitto Ricci & Christina M. Sautter, *The Wireless Investors Movement*, U. CHI. BUS. L. REV. ONLINE (2022), <https://businesslawreview.uchicago.edu/online-archive/wireless-investors-movement> [<https://perma.cc/EHJ3-7B79>] (arguing that new generations of investors use online communication to coordinate collective action aimed at steering corporations according to investors’ generational values).

97. Carliss N. Chatman & Sergio Alberto Gramitto Ricci, *Values Primacy & Total Governance Through Activism*, 67 B.C. L. REV. 1679, 1684, 1727–29 (2026) (introducing “values primacy” as an innovative model of corporate governance); Andreas Kokkinis & Konstantinos Sergakis, *Investor Personhood: The Case Against Paternalism and Welfarism in Corporate Law*, 24 J. CORP. L. STUDS. 97, 103–04 (2024) (explaining that individuals exercise both financial and nonfinancial values in their investing and voting decisions); Gramitto Ricci & Greenwood, *supra* note 10, at 353–54 (arguing that nobody would consistently choose maximization of profit over any other values); Gramitto Ricci, *supra* note 57, at 117 (arguing that 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).

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. It shares few of the liberal restraints on winner-take-all norms or protections of individual liberty that are so central to political democracy. Despite this, the concept of shareholder 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-twentieth century sought to replicate the corporate voting rights that existed and evolved beginning at least in the 1600s and 1700s with English corporations. This Part explores stock ownership and voting in early modern English companies that shaped American corporations. It also details the development of proxy voting regulations, which govern in corporate America today. This background is crucial in dissecting shareholder democracy because it reveals some of the parallels and ties between government and corporations upon which shareholder democracy rhetoric draws.

A. *History of Proxy Voting in Corporations*

In the 1700s, English shareholders were typically known as proprietors.⁹⁸ General meetings of the proprietors were most often referred to as “general court[s].”⁹⁹ The general courts “corresponded to the legislative branch of the government of the kingdom.”¹⁰⁰ The general courts elected the directors, who met in courts of directors functionally analogous to board meetings.¹⁰¹ A so-called governor and sub-governor (sometimes referred to as a president and vice president) presided over the court of directors.¹⁰² The directors summoned the general courts, typically multiple times a year, with a minimum number set forth in the company’s charter or articles of

98. ARMAND BUDINGTON DUBOIS, *THE ENGLISH BUSINESS COMPANY AFTER THE BUBBLE ACT 1720–1800*, at 314 n.38 (Julius Goebel, Jr. ed., 1971) (1938).

99. *Id.* at 314 n.39. The terms “general assembly” and “general meeting” also were occasionally used. *Id.*

100. *Id.* at 287.

101. *Id.*

102. *Id.* at 287, 314 n.40.

association.¹⁰³ For some companies, courts “resemble[d] public gatherings.”¹⁰⁴ According to Armand Budington DuBois, “[c]asual 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.”¹⁰⁵ 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.¹⁰⁶

Generally, the ability to vote during a general court was based on a proprietor’s holdings, but not on the one share, one vote system (sometimes with extra votes for founders and their heirs) that is considered normative today.¹⁰⁷ Instead, corporations typically included a low cap on the total number of votes any individual proprietor was able to cast.¹⁰⁸ 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.¹⁰⁹ 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 to vote.¹¹⁰

Interestingly, rates of female ownership of company shares in England were higher prior to 1750 than they were from the

103. *Id.* at 288.

104. *Id.*

105. *Id.*

106. *Id.* at 289.

107. *Id.* at 288.

108. *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* 66, 67–68 (Kenneth Lipartito & David B. Sicilia eds., 2004) and Sarah C. Haan, *Voting Rights in Corporate Governance: History and Political Economy*, 96 *S. CAL. L. REV.* 881, 904 (2023).

109. DUBOIS, *supra* note 98, at 316 n.47. Votes were also capped at three votes no matter how many shares above twenty a proprietor owned. *Id.* Other companies, such as the Scotch Mining Company in 1729, empowered even those with just one share to vote (one vote). *Id.* It also had a voting range where thirty shares had five votes, the maximum allowed. *Id.* Moreover, 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 stock two votes, and £ 10,000 or more of stock three votes. *Id.*

110. AMY M. FROIDE, *SILENT PARTNERS: WOMEN AS PUBLIC INVESTORS DURING BRITAIN’S FINANCIAL REVOLUTION, 1690–1750*, at 198 (2017).

1780s to the 1820s.¹¹¹ In the 1730s and 1740s, women represented a quarter to a third of investors in the Bank of England, the South Sea Company, the East India Company, and the Mine Adventurers Company.¹¹² Professor Amy Froide notes that this was “twice the rate of female shareholding [than] in the 1780s.”¹¹³ A review of the records of early modern English companies shows no gender-based distinction on the ability to vote or hold office.¹¹⁴ Hence, women were eligible to vote in company elections, long before England extended the political franchise to women.¹¹⁵ However, whether shareholders who were eligible to vote (either male or female) actually exercised their right to vote is unclear.¹¹⁶ For example, between 1766 and 1773, only approximately 8–10% of shareholders entitled to attend general courts of the East India Company attended those meetings.¹¹⁷

Under early English and American common law, proxy voting was not permitted without special authorization.¹¹⁸ The background rule disfavoring proxy voting likely arose due to the historical political roots of the English corporate form.¹¹⁹ More specifically, the English Crown issued charters pursuant to which individuals were designated as corporations and granted “sovereign power to exercise appropriate privileges.”¹²⁰ Over time, the power to grant corporate charters passed from the Crown to Parliament.¹²¹ Parliament passed special legislation

111. *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 Professor Barbara Todd estimated a much higher number of thirteen percent in 1688. *Id.*

112. *Id.* at 210.

113. *Id.*

114. *Id.* at 198.

115. *Id.* at 198–99. The First Reform Act (1832) extended the right to vote for Parliament to certain property-owning men but excluded the few women who had previously met the prior property requirements. Great Reform Act 1832, 2 & 3 Will. 4 c. 45, §§ 19–20 (UK). Property requirements for men, but not women, were eliminated by the Representation of the People Act (1918), which also extended the franchise to property-owning women over the age of 30. Representation of the People Act 1918, 7 & 8 Geo. 5 c. 64, § 4 (UK). Some women were allowed to vote in municipal elections earlier. Municipal Franchise Act 1869, 32 & 33 Vict. c. 55, §§ 1, 9 (Eng.).

116. FROIDE, *supra* note 110, at 199.

117. *Id.*

118. Leonard H. Axe, *Corporate Proxies*, 41 MICH. L. REV. 38, 38–40 (1942).

119. *Id.* at 39.

120. *Id.*

121. John Morley, *The Common Law Corporation: The Power of The Trust in Anglo-American Business History*, 116 COLUM. L. REV. 2145, 2157 (2016).

establishing corporations on a company-by-company basis until 1844, at which point they were formed by registering with the Registrar of Joint-Stock Companies.¹²²

Early English corporations were “considered a part of the government” and followed political norms.¹²³ In the context of political elections, the right to vote was considered “so personal that it could not be delegated.”¹²⁴ Because voting by proxy was prohibited in political voting, voting by proxy also was prohibited in corporate voting.¹²⁵ To vote via proxy, special authorization was required, which took various forms, including express charter or bylaw provisions.¹²⁶

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.¹²⁷ Typically, to act as another’s proxy during a court, the proxy holder also had to be a proprietor.¹²⁸ 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.¹²⁹ A couple of English companies required female shareholders to vote via proxy and did not allow them to attend shareholder meetings.¹³⁰ But those companies appear to

122. *Id.* at 2157, 2160; Janette Rutterford, *The Forgotten Investors: Women Investors in England and Wales 1870 to 1935*, in 56 QUADERNI STORICI [QUAD. STOR.] 166 13, 15 (2021) (It.).

123. Axe, *supra* note 118, at 39. For a discussion of the evolution of the one vote per shareholder rule to one vote per share, see Dunlavy, *supra* note 108, and Haan, *supra* note 108.

124. EMERSON & LATCHAM, *supra* note 36, at 4–5. Emerson and Latcham also noted that “[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.* at 4.

125. Axe, *supra* note 118, 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 36, at 5. Yet, under English common law, the prohibition against corporate proxy voting continued. *Id.*

126. Axe, *supra* note 118, at 41–46.

127. *Id.* at 41 n.10 (quoting DUBOIS, *supra* note 98, at 288).

128. DUBOIS, *supra* note 98, at 288.

129. Mark Freeman, Robin Pearson & James Taylor, ‘A Doe in the City’: Women Shareholders in Eighteenth- and Early Nineteenth-century Britain, 16 ACCT., BUS. & FIN. HIST. 265, 284 (2006).

130. *Id.* DuBois notes the same, pointing to two companies in the 1700s that 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 98, at 319 n.55.

have been in the minority, and most allowed female shareholders to both attend shareholder meetings and to vote via proxy.¹³¹ Moreover, female shareholders were permitted to act as another shareholder's proxy.¹³²

As in England, after independence, American corporations were created by special state legislation.¹³³ 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.¹³⁴ Like the English system, early American law presumed that proxy voting was barred unless there was an express legislative, charter, or bylaw provision providing otherwise.¹³⁵ This preference apparently echoed a public policy in favor of a "democratic-style exchange of ideas" among shareholders.¹³⁶

However, both special charters and the presumption against proxy voting fell into disfavor over the nineteenth 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.¹³⁷ In 1811, New York became the first state to enact general legislation permitting the formation of manufacturing corporations via registration rather than by special legislative act.¹³⁸ This legislation specifically provided that corporations formed pursuant to the

131. Freeman, Pearson & Taylor, *supra* note 129, at 284.

132. *Id.* at 285.

133. Axe, *supra* note 118, at 46; *see also* Susan Pace Hamill, *From Special Privilege to General Utility: A Continuation of Willard Hurst's Study of Corporations*, 49 AM. U. L. REV. 81, 89 (1999) ("Once America achieved independence, the legislatures of the newly born states . . . probably assumed that they would continue to issue corporate charters.").

134. Hamill, *supra* note 133, at 84.

135. Axe, *supra* note 118, at 38 n.1.

136. Haan, *supra* note 108, at 888.

137. 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 that only in 1821 did states begin to repeal laws requiring prison sentences for debtors). Most nineteenth-century businesses were organized as sole proprietorships or partnerships. Robert A. 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 215, 220 (William J. Collins & Robert A. Margo eds., 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, by contrast, protects personal assets from business failure.

138. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 134 (3d ed. 2005).

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 bylaws by stockholders attending “either in person or by proxy.”¹³⁹

Over time, other states adopted similar general incorporation statutes allowing for incorporation by registration, generally including at least some proxy voting. Pennsylvania’s 1849 statute permitting the incorporation of manufacturing companies may best reflect the public policy for proxy voting at the time.¹⁴⁰ 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 ten miles from the location of the annual meeting or were female.¹⁴¹ By 1942, every state, except for Iowa and Texas, had statutes authorizing shareholders to vote via proxy.¹⁴² Although Iowa and Texas did not have statutory authorization for corporate proxy voting, Iowa common law provided the right to vote via proxy if it was set forth within the charter or bylaws, while Texas had a long-held custom of allowing shareholders to vote via proxy.¹⁴³

Implicit in the statutes, common law, and customs in favor of proxy voting was a policy toward supporting shareholder participation. Although 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. Professor 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.¹⁴⁴ 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.¹⁴⁵ As the Court of Chancery of New Jersey stated in 1931, “It would be stupid indeed to assume that the 80,000 shareholders [of Bethlehem Steel Corporation] may possibly

139. Act of March 22, 1811, ch. 47, 1811 N.Y. Laws 111, 111–12.

140. Axe, *supra* note 118, at 48.

141. *Id.*

142. *Id.* at 46 & n.27.

143. *Id.*

144. Haan, *supra* note 108, at 890–91 (detailing the benefits of proxy voting in the nineteenth and early twentieth centuries).

145. *Id.* at 892.

attend the meeting in person to hear the chairman account for his administration before voting, and thus remove the vice of the proxy vote.”¹⁴⁶ While lowering the costs associated with voting, proxy voting also created a fictitious perception of participation in the governance of public companies.¹⁴⁷ The growth of large companies with large numbers of widely dispersed shareholders effectively doomed the in-person stockholder meeting as a practical form of corporate governance.¹⁴⁸ However, the proxy system, as it developed in the nineteenth century effectively numbed shareholders, making them a marginal spring in the governance mechanics of a large public corporation.¹⁴⁹

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.¹⁵⁰ During the nineteenth and early twentieth centuries, corporate management often would solicit proxies to vote for their own purposes.¹⁵¹ The general lack of information made available to absentee shareholders complicated the situation for shareholders who did not attend shareholder meetings. Corporate statutes did not require the provision of information generally, nor did they require information to be provided prior to soliciting proxies.¹⁵² Accordingly, the only venue for shareholders to obtain information regarding the corporation was via the shareholder meeting.¹⁵³ Thus, if one did not attend the shareholder meeting, one did not have access to information regarding the corporation’s performance.¹⁵⁴ Also, as Sarah Haan has described, corporate management would leverage their status as well-respected and influential community members when soliciting proxies.¹⁵⁵ Additionally, management had total control over the form of the proxy. If management

146. *Berendt v. Bethlehem Steel Corp.*, 154 A. 321, 322 (N.J. Ch. 1931).

147. Haan, *supra* note 108, at 892–95.

148. Gramitto Ricci & Sautter, *supra* note 47, at 39–41 (detailing the transformation of American corporations following the Civil War which led to the separation of ownership and control and an inability of shareholders to meaningfully participate in corporate governance).

149. Haan, *supra* note 108, at 892–95.

150. *Id.* at 892.

151. *Id.* at 892–93.

152. *Id.* at 893.

153. *Id.*

154. *Id.*

155. *Id.* at 894.

wanted a certain action to pass, it would make “the proxy as simple as possible, merely requesting that the [shareholder’s] signature be affixed.”¹⁵⁶ Conversely, if management wanted an action voted down, it would make completing the proxy complicated, including requiring “insertion of the number of shares and other details together with witness by a notary.”¹⁵⁷ Moreover, in some instances, proxies were drafted so that they would be effective for several years.¹⁵⁸

This widespread, unchecked proxy abuse caused Professor Adolf Berle and economist 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.”¹⁵⁹ Five years earlier, the economist Professor William Ripley, Berle’s mentor, had observed that shareholder meetings were “routine” affairs and largely “a matter of form.”¹⁶⁰ Ripley noted that “[t]he presence and participation of shareholders directly in such corporations has of course become a thing of the past.”¹⁶¹ 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.¹⁶² 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.¹⁶³

A competing viewpoint to that of Berle, Means, and Ripley focused not on using shareholders as a check on management but rather on the shareholders’ position as part of the overall corporate hierarchy.¹⁶⁴ This view of shareholders led observers to inquire as to how corporations could be internally structured so that shareholder voices could be heard.¹⁶⁵ But at the same

156. WILLIAM Z. RIPLEY, *MAIN STREET AND WALL STREET* 147 (1927).

157. *Id.*

158. EMERSON & LATCHAM, *supra* note 36, at 17.

159. ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 139 (1933).

160. RIPLEY, *supra* note 156, at 145.

161. *Id.*

162. See Dalia Tsuk Mitchell, *Shareholders as Proxies: The Contours of Shareholder Democracy*, 63 WASH. & LEE L. REV. 1503, 1531–34 (2006).

163. *Id.* at 1535.

164. *Id.*

165. *Id.* at 1509–10, 1535.

time, those holding this view were also concerned with whether shareholders would participate and, if they did, what decisions they would make.¹⁶⁶ Professor Dalia Tsuk Mitchell summarized these different early twentieth-century viewpoints regarding the role of shareholders, writing that “[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 protected.”¹⁶⁷

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 “institution[s]’ infused with all of the connotations of civic beneficence characteristic of other non-market entities, including hospitals, universities, foundations, and even government agencies.”¹⁶⁸ For example, in 1936, the Chair of General Electric said that because the company was a “great public institution,” it “had to accept ‘more and more obligations for public discourse and public activities.’”¹⁶⁹ Similarly, the NYSE and AT&T “declared themselves the harbingers of a new era of shareholder democracy.”¹⁷⁰ 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.¹⁷¹ In particular, AT&T advertised itself as “a Democracy—of the people, by the people, for the people,” as well as “a democratic instrument of democracy.”¹⁷²

Despite this rhetoric, as Sarah Haan has written, large companies such as AT&T employed “none of the mechanisms of real democracy.”¹⁷³ As the federal securities acts were being drafted against this backdrop, the primary concern for

166. *Id.* at 1510.

167. *Id.* at 1535.

168. Nelson Lichtenstein, *Two Cheers for Vertical Integration: Corporate Governance in a World of Global Supply Chain*, in *CORPORATIONS AND AMERICAN DEMOCRACY* 329, 335 (Naomi R. Lamoreaux & William J. Novak eds., 2017).

169. *Id.*

170. *Id.*

171. OTT, *supra* note 25, at 153.

172. *Id.* at 153–54.

173. Sarah C. Haan, *The Corporation’s Political Purpose*, in *RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD* 299, 313 (Elizabeth Pollman & Robert B. Thompson eds., 2021).

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 such as 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 Professor Tom Tyler have argued that the right to speak and to be heard by decisionmakers is as important to a psychological sense of freedom as representation or fair decisionmaking itself—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.”¹⁷⁴ This contrasts with much of the rhetoric during the adoption of the federal securities laws—the Securities Act of 1933 (the 1933 Act) and 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 participation in the corporate governance regime.¹⁷⁵ 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.¹⁷⁶ Here, too, shareholder democracy is a rhetorical device to prettify a fundamentally antidemocratic practice, not an example of Tocquevillian self-government through voluntary associations.

174. Company management developed the term “gadfly” to refer to individual shareholders who attended shareholder meetings and challenged management. See Nancy Fraser, *Queen of Corporate Gadflies: Wilma Soss, Stockholder with a Mission*, LIFE, Mar. 18, 1966, at 115, 115. 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).

175. Mitchell, *supra* note 162, at 1512.

176. *Id.* at 1548.

Originally, the 1933 Act was enforced by the Federal Trade Commission (FTC).¹⁷⁷ As Congress considered the bill that would ultimately become the 1934 Act, a provision of the bill empowered the FTC to require corporations to hold corporate elections using mailed proxies that complied with FTC regulations.¹⁷⁸ As it was described at the time, the rationale behind regulating proxies was that “proxies, as solicitations are made now, are a joke. The persons who control the 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.”¹⁷⁹ 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 Emerson and Latham, proponents of increased shareholder power, wrote in 1954, it had become clear that for shareholders to be able to “express adequately [their] desires as a legal owner, the proxy machinery [had to] more[] nearly approximate the early common law, individually attended, shareholders’ meeting.”¹⁸⁰ This meant shareholders would need to become informed of the meeting agenda items and the company’s finances, and 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.¹⁸¹ 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.”¹⁸² These goals and the regulation of proxies were ultimately embodied in Section 14 of the 1934 Act.¹⁸³ Among

177. JOEL SELIGMAN, *THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE* 57, 79 (3d. ed. 2003) (stating that 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).

178. *Id.* at 85, 87.

179. *Id.* (original quotations omitted).

180. EMERSON & LATHAM, *supra* note 36, at 19.

181. *Id.*

182. *Id.*

183. *Id.*

other things, the 1934 Act also created the SEC to enforce the federal securities acts, including Section 14.¹⁸⁴

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.¹⁸⁵ In response to its broad grant of power, the SEC promulgated Rules LA1 through LA7 in 1935, which required, among other things, that those soliciting proxies provide a “brief description” of the matters intended to be voted upon by the exercise of the shareholder’s proxy,” as well as a statement indicating how the solicitor would vote.¹⁸⁶ These rules also required that management mail the shareholders relevant materials and prohibited materially false or misleading statements in the solicitation of proxies.¹⁸⁷ Although relatively barebones, the principles contained in Rules LA1 through LA7 laid the foundation guiding the SEC’s rulemaking and are still reflected in present-day proxy rules.¹⁸⁸ 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.”¹⁸⁹ Notably, Regulation X-14 introduced a “proxy statement,” which was required to be mailed to shareholders in the context of director elections.¹⁹⁰ The SEC adopted multiple groups of amendments to Regulation X-14 over the succeeding years.¹⁹¹

This early rulemaking reflected the SEC’s perception of its role at the time. More specifically, as Professor Jill Fisch has detailed, the SEC’s initial understanding of its role was to tackle the issues raised by substituting proxy solicitations for

184. *Id.*; Robert B. von Mehren & John C. McCarroll, *The Proxy Rules: A Case Study in the Administrative Process*, 29 LAW & CONTEMP. PROBS. 728, 728 (1964) (discussing the 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).

185. EMERSON & LATCHAM, *supra* note 36, at 19. Congress, when delegating power to the SEC to regulate proxy solicitation, expressed the concern that “[t]oo 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).

186. EMERSON & LATCHAM, *supra* note 36, at 20–21.

187. von Mehren & McCarroll, *supra* note 184, at 736.

188. EMERSON & LATCHAM, *supra* note 36, at 20–21.

189. von Mehren & McCarroll, *supra* note 184, at 736.

190. EMERSON & LATCHAM, *supra* note 36, at 21.

191. *See id.* at 21–22 (describing amendments adopted in 1940, 1942, 1947, 1948, 1953, and 1954).

in-person attendance at shareholder meetings.¹⁹² 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.¹⁹³

The SEC's relatively hands-off position might have worked better had many companies not refused to incorporate shareholder-proposed actions into shareholder meeting proxy materials.¹⁹⁴ 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.¹⁹⁵ This ultimately prompted the SEC to amend Regulation X-14 in 1942 to require that shareholder proposals be included in proxy materials.¹⁹⁶ 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 of a security holder that it oppose[d]."¹⁹⁷ Rule X-14a-7 was not without limits, however. In particular, the subject matter of the proposal had to be a proper one for shareholder action.¹⁹⁸ 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.¹⁹⁹

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

192. Jill E. Fisch, *From Legitimacy to Logic: Reconstructing Proxy Regulation*, 46 VAND. L. REV. 1129, 1142–43 (1993).

193. Mitchell, *supra* note 162, at 1548.

194. *Id.*

195. See GILBERT, *supra* note 15, at 41 (describing proposals and management's refusal to incorporate them); Mitchell, *supra* note 162, at 1506 (stating that Bethlehem Steel's refusal to incorporate Gilbert's proposals led the SEC to reconsider the SEC proxy rules).

196. MARC I. STEINBERG, *THE FEDERALIZATION OF CORPORATE GOVERNANCE* 158 (2018); Mitchell, *supra* note 162, at 1548–49.

197. 4 LOUIS LOSS & JOEL SELIGMAN, *SECURITIES REGULATION* 1939 (3d. ed. 1990); see Securities Exchange Act of 1935: Annual Report Forms, 7 Fed. Reg. 10653, 10656 (Dec. 22, 1942) (current version at 17 C.F.R. § 240.14a-8).

198. Securities Exchange Act of 1935: Annual Report Forms, 7 Fed. Reg. at 10656.

199. See Harwell Wells, *Shareholder Meetings and Freedom Rides: The Story of Peck v. Greyhound*, 45 SEATTLE L. REV. 1, 21 (2021).

meetings in person.²⁰⁰ Supporters of Rule 14a-8 heralded it as “the shareholders’ Bill of Rights,” while in many cases, company managements’ reactions were significantly less welcoming, to say the least, with many favoring repeal.²⁰¹ The proxy rules, generally, and Rule 14a-8, in particular, were influenced greatly by President Franklin D. Roosevelt’s New Deal and his desire for both political and economic democracy as “America’s ideal.”²⁰² As Mitchell wrote, “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.”²⁰³ At the same time, Mitchell noted that New Dealers’ “ideal of shareholder democracy was also meant to substantiate the absolute power of management to run the corporation.”²⁰⁴

Emerson and Latcham favored the proposal rule as a way of enhancing shareholder democracy.²⁰⁵ They were unperturbed by the fact that, like the majority of shareholder proposals today, most proposals in the 1940s and 1950s did not garner a positive vote.²⁰⁶ Instead, Emerson and Latcham focused on the ability of shareholders to exchange ideas by putting forth proposals.²⁰⁷ 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.²⁰⁸

Emerson and Latcham’s reference to a “crack-pot variety” responds to a fear expressed during congressional hearings on

200. Fisch, *supra* note 192, at 1142.

201. GILBERT, *supra* note 15, at 102–04.

202. Joseph L. Weiner, *The New Deal and the Corporation*, 19 U. CHI. L. REV. 724, 729 (1952).

203. Mitchell, *supra* note 162, at 1552.

204. Dalia Tsuk Mitchell, *The End of Corporate Law*, 44 WAKE FOREST L. REV. 703, 718 (2009).

205. Frank D. Emerson & Franklin C. Latcham, *The SEC Proxy Proposal Rule: The Corporate Gadfly*, 19 U. CHI. L. REV. 807, 835 (1952).

206. *Id.*

207. *Id.*

208. *Id.*

the proposal rule that it would result in a “field day for crackpots.”²⁰⁹ 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.²¹⁰ They feared that the proposal rule would be a way for independent shareholders to “harass management”²¹¹—apparently viewing public disagreement as a form of harassment, even with no coercive power beyond public opinion. Conversely, Emerson and Latham believed that shareholder participation was crucial and benefited management by providing a “diversity of opinion and criticism so necessary for healthy growth.”²¹² Neither side straightforwardly acknowledged the real use of shareholder debate as a form of political debate meant to influence not only internal corporate governance but also the wider regulation of corporate behavior.

For there to be shareholder participation leading to the type of diversity of opinion that Emerson and Latham 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 that 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 decisionmaking 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.²¹³ Moreover,

209. *Id.* at 835 n.153.

210. Phil Nicolas, Jr., *The Agency That Kept on Going: The Late New Deal SEC and Shareholder Democracy*, 16 J. POL'Y HIST. 212, 225 (2004). Even more recently, corporations have continued to resist shareholder democracy efforts, as detailed by Professor Lisa Fairfax. See Lisa M. Fairfax, *Making the Corporation Safe for Shareholder Democracy*, 69 OHIO ST. L.J. 53, 68–69 (2008).

211. Nicholas, *supra* note 210, at 225.

212. EMERSON & LATHAM, *supra* note 36, at 144.

213. See Gramitto Ricci, *supra* note 57, at 114 (explaining that only one in five American households owns shares directly, so 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*

the makeup of share owners does not reflect the demographics of the increasingly diverse American population.²¹⁴ Share owners are disproportionately White, older, male, and, especially, rich.²¹⁵

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.²¹⁶ By its nature, a true shareholder democracy would require that

Consumer Finances (SCF)] (Nov. 2, 2023), https://www.federalreserve.gov/econres/scf/dataviz/scf/table/#series:Directly_Held_Stocks;demographic:all;population:1;units:median [<https://perma.cc/C8KL-D78G>] (showing in the table that only 21% of U.S. families own shares directly as of 2022); Alon Brav, Matthew Cain & Jonathan Zytznick, *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).

214. See Jonathan Vespa, Lauren Medina & David M. Armstrong, *Demographic Turning Points for the United States: Population Projections for 2020 to 2060*, U.S. CENSUS BUREAU, at 8 (2020), <https://www.census.gov/content/dam/Census/library/publications/2020/demo/p25-1144.pdf> [<https://perma.cc/H34C-WVQ6>] (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.”).

215. 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 & WORLD REP. (Mar. 15, 2021, at 10:58 ET), <https://www.usnews.com/news/national-news/articles/2021-03-15/who-owns-stocks-in-america-mostly-its-the-wealthy-and-white> [<https://perma.cc/4XAA-SM7G>] (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 RSCH. 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/> [<https://perma.cc/C8AG-RKH5>] (explaining that 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> [<https://perma.cc/EZV3-ATVP>] (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).

216. See *infra* Part III; 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, 207 (2022) (advocating for financial literacy and corporate governance education to facilitate corporate inclusion).

individuals own shares, that shares be distributed relatively equitably, and that shareholders exercise the right to vote that accompanies those shares. This has never been the case.²¹⁷

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.²¹⁸ Moreover, unrepresentative shareholding replicates itself, becoming a material factor in our growing racial wealth divide.²¹⁹

A. Share Ownership Inequality

As previously stated, most of the shares owned by human investors are held by White men, typically older.²²⁰ Moreover, most of these shares are, or were, held in retirement funds, so holdings are closely correlated with well-paying jobs²²¹—reflecting and exacerbating socioeconomic 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.²²²

After slavery ended in the United States in the 1860s, African Americans remained economically oppressed through Jim Crow laws that recreated many of the conditions of slavery. Even where Jim Crow did not apply, discrimination stifled their ability to access equal jobs that could have provided them with a higher income and facilitated access to the stock market.²²³ Today, more than half a century after the Civil Rights Acts, Black households have lower median household income than

217. See *infra* Parts II & III.

218. See LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 44–45 (2002) (arguing that minorities are overburdened by externalities).

219. Rajashri Chakrabarti, Natalia Emanuel & Ben Lahey, *Racial and Ethnic Inequalities in Household Wealth Persist*, FED. RES. BANK OF N.Y.: LIBERTY ST. ECON. (June 28, 2024), <https://libertystreeteconomics.newyorkfed.org/2024/06/racial-and-ethnic-inequalities-in-household-wealth-persist/> [<https://perma.cc/VHV7-WBBR>].

220. Cf. Jones, *supra* note 215 (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).

221. *Id.*

222. 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/> [<https://perma.cc/DDW3-B8KG>]; see *infra* Section III.E.

223. Singletary, *supra* note 222.

whites or even other minorities. For example, in 2023, the U.S. Census Bureau estimated that the median household income for Black households was \$56,490, Hispanic households had a median household income of \$65,540,²²⁴ and the overall median household income of \$80,610.²²⁵ Moreover, Black Americans face a higher unemployment rate at every level of education.²²⁶

Over time, these unequal opportunities compound, so that the detrimental effects of the past continue to expand even absent ongoing discrimination. As the saying goes, “it takes wealth to make wealth,” but many Black Americans have been excluded from intergenerational access to capital.²²⁷ This has limited access to opportunity with ramifications that extend to savings, investing, and building trust in the financial markets. In fact, as of 2022, only 48% of Black individuals surveyed believe the stock market “offer[ed] a fair opportunity for all to profit,” and of Black Americans who have either never invested or stopped investing, 36% “cite a lack of trust in the stock market” while 25% “cite a lack of trust in financial institutions.”²²⁸

Uneven access to employment opportunities also has deprived Black citizens of a chance to receive shares as part of their remuneration. Since World War II and especially since the enactment of the Employee Retirement Income Security Act of 1974 (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.²²⁹ The 1959 NYSE census that surveyed investors who acquired

224. Gloria Guzman, *Median Household Income Increased in 2023 for First Time Since 2019*, U.S. CENSUS BUREAU (Sep. 10, 2024), <https://www.census.gov/library/stories/2024/09/household-income-race-hispanic.html> [https://perma.cc/FLW3-KNUM].

225. *Id.*

226. WILLIAM DARITY JR. ET AL., SAMUEL DUBOISE COOK CTR. ON SOCIAL EQUITY, 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> [https://perma.cc/H784-SUZM].

227. *Id.* at 27.

228. ARIEL INVS. & CHARLES SCHWAB, 2022 BLACK INVESTOR SURVEY: REPORT OF FINDINGS 15 (2022), https://content.schwab.com/web/retail/public/about-schwab/Ariel-Schwab_Black_Investor_Survey_2022_findings.pdf [https://perma.cc/TN5F-XQ62].

229. TRANSAMERICA CTR. FOR RET. STUDS., THE RETIREMENT OUTLOOK OF THE AMERICAN MIDDLE CLASS: 24TH ANNUAL TRANSAMERICA RETIREMENT SURVEY 18 (2024), <https://www.transamericainstitute.org/docs/research/household-income/retirement-outlook-of-american-middle-class-survey-report-2024.pdf> [https://perma.cc/M8J9-QD9V].

shares for the first time between 1956 and 1959 reported that a quarter of women who became share owners acquired the shares from their employers.²³⁰ 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.²³¹ 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.²³²

Discriminatory employment practices have had profound repercussions on minorities' access to the securities markets, even in later generations.²³³ Importantly, those who owned shares from the beginning of the great stock market boom in the 1980s to date grew wealthy, while those who did not were left behind.²³⁴ Accordingly, discriminatory hiring practices that deprived minorities of access to the stock market have had intergenerational consequences.

If your parents or grandparents obtained shares of stock as part of their pay packages, you benefit from their wealth directly, while perhaps learning about their experiences with equities, what a share of stock is, and what financial and economic rights it provides. In wealthier families, you may also be introduced to a family broker or private banker who can guide you along your initiation to financial markets. While the financial industry expends vast resources seeking to interest newcomers in financial investing and speculation, if nobody in your family or community has ever owned shares of stock, equities could seem like obscure intangible financial

230. N.Y. STOCK EXCH., *SHARE OWNERSHIP IN AMERICA: 1959*, at 9 (1959); Sarah C. Haan, *Corporate Governance and the Feminization of Capital*, 74 *STAN. L. REV.* 515, 560 (2022).

231. N.Y. STOCK EXCH., *supra* note 230.

232. VICTOR PERLO, *ECONOMICS OF RACISM U.S.A.: ROOTS OF BLACK INEQUALITY* 133–34 (1975); Haan, *supra* note 230, at 569.

233. Haan, *supra* note 230, at 567–68 (“[D]iscrimination 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.

234. See Wade Zhou, *How Has U.S. Wealth Evolved Since the 1980s?*, WEALTH ENHANCEMENT (Feb. 22, 2024), <https://www.wealthenhancement.com/blog/how-has-u-s-wealth-evolved-since-the-1980s> [<https://perma.cc/9ST3-S3QN>] (“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%.”).

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.²³⁵ For example, in his 2024 Letter to Investors, BlackRock's Larry Fink credited his father's investing habits and encouragement to invest in the markets as a primary motivation for his own investing.²³⁶

B. ESOPs and Access to Shares

Employee stock ownership plans have played a key role in including everyday citizens in the stock market. Employee stock ownership became popular in the 1920s.²³⁷ By 1927, roughly 400 major American corporations had employee stock purchase plans, providing employees—nearly all white—the ability to purchase stock at a discount and financing terms to facilitate the purchase.²³⁸ The Great Depression, however, severely impacted employee investors: stock prices declined rapidly, and corporations cut wages amid widespread layoffs.²³⁹ ESOPs rebounded in the 1950s.²⁴⁰ Louis O. Kelso's economic

235. Crystal Hudson, John Young, Sophia Anong, Elania Hudson & Edward Davis, *Investment Behavior: Factors that Limit African Americans' Investment Behavior*, 9 J. FIN. THERAPY 21, 25 (2018).

236. Laurence Fink, *Larry Fink's 2024 Annual Chairman's Letter to Investors*, BLACKROCK (2024), <https://www.blackrock.com/corporate/investor-relations/2024-larry-fink-annual-chairmans-letter> [<https://perma.cc/W96D-4MY3>]. 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.

237. Steven Marc Bloom, *Employee Ownership and Firm Performance* 11 (1986) (Ph.D. thesis, Harvard University) (on file with authors).

238. *Id.*

239. *Id.* at 13.

240. 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*, 62 TAX LAW. 419, 419 (2009); Bloom, *supra* note 237, at 13. 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. GEN. ELEC., 1955 ANNUAL REPORT 25 (1955), <https://dn720001.ca.archive.org/0/items/general-electriccompanyannualreports/generalelectric1955.pdf> [<https://perma.cc/9E3V-WLNN>]. Under the Incentive Compensation Plan, compensation was awarded by a

theory and lobbying played a critical role in nurturing their success.²⁴¹

In 1958, Kelso coauthored *The Capitalist Manifesto*, which promoted binary economics and referred to ESOPs as “Second Income Plans.”²⁴² Kelso wrote that capital ownership was concentrated in too few hands and that working people could not support themselves on labor income alone and therefore should have a second income from capital.²⁴³ He argued that ESOPs could provide employees with an opportunity to own equity in their corporate employer to supplement the provisions of their incomplete employment contract.²⁴⁴

By the 1970s, the other advanced economies had recovered from the destruction of World War II. American firms found themselves competing against foreign companies with more modern plants. Importantly, foreign competitors often had far lower pension and health care obligations because most rich countries other than the United States provided those services through taxes rather than as employer-funded benefits. American firms, which had adopted defined benefit retirement plans to attract employees in the tight labor markets of the war and postwar years without funding them, suddenly found that fulfilling their pension promises would put them at a serious competitive disadvantage.

In 1973, U.S. Senator Russell B. Long secured the inclusion of a provision in the Railroad Reorganization Act that sponsored a study of employee share ownership.²⁴⁵ Then, 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. Simultaneously, ERISA authorized ESOPs.²⁴⁶ Then, the Tax Reduction Act of

compensation committee to individually selected positions that supposedly determined the company's success. *Id.* With the Stock Option Plan, “key employees” were granted restricted stock options. *Id.*

241. Stumpff, *supra* note 240, at 419; Bloom, *supra* note 237, 13–14.

242. Stumpff, *supra* note 240, at 419, 421–23.

243. *Id.* at 422–23.

244. *Id.* at 419.

245. *Id.* at 425–26.

246. See 29 U.S.C. § 1002(1)–(2) (2018) (defining employee benefit); see also 29 U.S.C. § 1107(6) (2018) (defining employee stock option plan).

1975 gave a tax credit for company contributions of stock to a qualifying ESOP, known as a TRASOP.²⁴⁷

Kelso's ideas had a new lease on life. Or perhaps the resulting transformation of American retirement plans was driven by less ideological concerns. Many companies saw ESOPs and 401(k)-style defined contribution plans as cheaper alternatives to traditional defined benefit plans.²⁴⁸

The hostile takeover movement of the 1980s gave managers an additional impetus: ESOPs were attractive because they place large blocks of stock in employees' hands, and employees were generally thought to be less likely to vote in favor of financially driven hostile takeovers.²⁴⁹ 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 plan's shares, rather than passing votes through to employee beneficiaries.²⁵⁰

Meanwhile, defined contribution pension plans grew to be the main source of investment wealth for middle-class Americans. In a defined contribution pension plan, each employee (and eventually retiree) owns his or her own investment portfolio. Typically, the plan requires the employee to invest via a limited number of mutual fund options; employees, thus, benefit from financial market returns. However, the employee gets no vote as a shareholder, because the mutual funds are the legal share owners. For those who sought to convince American workers that they have a stake in capitalism, this must have seemed like a perfect solution. Every employee with a retirement plan now understands that his or

247. Stumpff, *supra* note 240, at 426. 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.* at 427. ESOPs could be, and often were, structured to give corporate managers control over the votes associated with employee stock. Anne Bushman, *Who Controls an ESOP-Owned Company?: An ESOP's Effect on Corporate Governance*, RSM (July 2018), <https://rsmus.com/insights/services/business-tax/who-controls-an-esop-owned-company.html> [https://perma.cc/2VLQ-8YTM].

248. *Employee Stock Ownership Plans (ESOP's): Hearing Before the Joint Econ. Comm.*, 94th Cong. 614–17 (1975) (statement of Neil A. Wassner, Partner, Main Lafrentz, New York, N.Y.).

249. Joseph P. Yonadi, Jr., *ESOPs, Stock-Drop Litigation and Jander*, OHIO BAR (July 20, 2020), <https://www.ohiobar.org/member-tools-benefits/practice-resources/practice-library-search/practice-library/section-newsletters/2020/esopss-stock-drop-litigation-jander/> [https://perma.cc/E5V6-H4SS].

250. Bushman, *supra* note 247.

her future is tied to the success of the stock market. But that dependence, and perhaps loyalty, comes with no power and no ability to trade stock market gains against other values, or even employee gains. The new employee stock investing class has no votes at all.

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 access to employer-sponsored ESOPs and defined contribution pension plans, the main ways that middle-class Americans became shareholders. This minorities' double jeopardy has enduring ramifications on future generations' stock market activity and more generally on socioeconomic inequality.²⁵¹

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 will have enduring effects on the ability of minorities to participate in the stock market for as long as past wealth makes it easier to accumulate future wealth.

As one example from after the Civil Rights Acts, between 1975 and 1979, General Motors granted stock ownership opportunities under its ESOP to salaried (but not hourly) employees.²⁵² 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.²⁵³ Joe Stewart, as the spokesperson for the Concerned Black Workers at General Motors Parts Division, stated that General Motors denied Black employees opportunities for advancement to salaried positions.²⁵⁴ When Black employees sought promotion to a salaried position, General Motors denied that any were available.²⁵⁵ When salaried positions were available, General

251. See *infra* Section III.D.

252. *GM Workers Get ESOP Payments: General Motors . . .*, L.A. TIMES (June 3, 1989, at 12:00 PT), <https://www.latimes.com/archives/la-xpm-1989-06-03-fi-965-story.html> [<https://perma.cc/6EY7-N9EH>].

253. *Smith v. Gen. Motors Corp.*, Nos. 83-1528, 84-1322, 1986 WL 17459 (6th Cir. Aug. 8, 1986) (per curiam); see also Jovina Erwin, *Assail Bias at GM*, CHI. DEF., 1 (June 13, 1973) (discussing lawsuit).

254. Erwin, *supra* note 253, at 2.

255. *Id.*

Motors allegedly ignored Black employee applications for the positions and even advised a Black employee to remain as a laborer or leave the company.²⁵⁶ In addition to racial discrimination, it appears that General Motors discriminated against women as well.²⁵⁷

General Motors was not alone in discriminating in ways that 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.”²⁵⁸ A year later, in 1978, the U.S. Supreme Court “let stand” “the largest and most impressive civil rights settlement in the history of this nation.”²⁵⁹ 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.²⁶⁰ Indeed, as of 1970, 7% of the Equal Employment Opportunity Commission’s (EEOC) entire workload involved AT&T cases.²⁶¹ The EEOC stated that “the lingering effects of ‘deliberate racial discrimination are readily apparent in both small numbers and types of jobs blacks hold.’”²⁶²

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.²⁶³ Even in 1944, when Boeing employed 1,600 African American workers, it required African American workers to use segregated lunchrooms and

256. *Id.*

257. *DeGraffenreid v. Gen. Motors Assembly Div.*, 558 F.2d 480, 482, 484 (8th Cir. 1977) (noting that, 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.

258. Elizabeth M. Fowler, *A.T.&T. Joins Plan for Free Stock to Employees*, N.Y. TIMES, May 7, 1977, at L12, <https://www.nytimes.com/1977/05/07/archives/att-joins-plan-for-free-stock-to-employees.html> [<https://perma.cc/8SJM-BSEZ>].

259. Philip Shabecoff, *A.T.&T. Case Began with Appeal on Rate*, N.Y. TIMES, July 4, 1978, at L7, <https://www.nytimes.com/1978/07/04/archives/att-case-began-with-appeal-on-rate-plan-for-intervention-back-pay.html> [<https://perma.cc/HJX5-4ZGQ>] (quoting *Equal Emp. Opportunity Comm’n v. Am. Tel. & Tel. Co.*, 365 F. Supp. 1105, 1108 (E.D. Pa. 1973), *aff’d*, 506 F.2d 735 (3d Cir. 1974)).

260. *Id.*

261. *Id.*

262. *Id.*

263. Sarah Davenport, *Battle at Boeing: African Americans and the Campaign for Jobs, 1939-1942*, SEATTLE CIV. RTS. & LAB. HIST. PROJECT (2006), https://depts.washington.edu/civilr/boeing_battle.htm [<https://perma.cc/47NC-XYCB>].

bathrooms.²⁶⁴ Boeing often denied African American workers promotions or laid them off as retaliation “for protesting discrimination.”²⁶⁵ Starting in 1996, Boeing provided all employees with a stock ownership plan.²⁶⁶ But there is evidence that Boeing continued discriminating against minorities and women in its compensation, and therefore in its ESOP participation as well.²⁶⁷

Discriminatory hiring practices, such as those described in this Section, have undoubtedly had an impact on share ownership via ESOPs even long after formal legal discrimination ended. Thus, an analysis of the 2002 to 2018 survey of U.S. ESOPs revealed that 22.9% of all adult men working in the United States participated in an ESOP, while only 16.4% of adult women did the same.²⁶⁸ 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% of Black workers and 17.3% of Latinx workers participating.²⁶⁹

D. Minorities and Unfriendly Financial Systems

The U.S. and the larger global banking and insurance system were long tied to slavery.²⁷⁰ 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

264. *Id.*

265. *Id.*

266. Jeff Cole, *Boeing to Form Stock Trust Plan for Most of Its 108,000 Workers*, WALL ST. J. (July 12, 1996, at 00:01 ET), <https://www.wsj.com/articles/SB837130164338804000> [<https://perma.cc/96SV-KAX2>].

267. Laurence Zuckerman, *Boeing Agrees to Settle Case Charging Bias in Salaries*, N.Y. TIMES, Nov. 19, 1999, at C2, <https://www.nytimes.com/1999/11/19/business/boeing-agrees-to-settle-case-charging-bias-in-salaries.html> [<https://perma.cc/YC5G-444Y>].

268. Jenny Weissbourd et al., *Race and Gender Wealth Equity and the Role of Employee Share Ownership*, ASPEN INST. (2021), <https://www.aspeninstitute.org/wp-content/uploads/2023/05/Race-and-Gender-Wealth-Equity-and-the-Role-of-Employee-Share-Ownership.pdf> [<https://perma.cc/M954-E2WG>].

269. *Id.*

270. 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 that 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> [<https://perma.cc/CET6-8ZAZ>] (detailing the popularity of insurance policies on slaves).

the value of a slave upon untimely death.²⁷¹ 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, and Wells Fargo has made a similar admission.²⁷² Obtaining mortgages and other loans from banks facilitated the growth of sugar and cotton plantations, which in turn continued to grow the slave trade.²⁷³ In the event of foreclosure, slaves who had been put up as collateral were sold, still furthering slavery.²⁷⁴ 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, the international shipping that underpinned it, the sugar, cotton and tobacco trades that slavery made possible, and the Industrial Revolution that began in the textile industries and profited from unpaid slave labor.²⁷⁵ Even the financial industry itself grew, to a material extent, to meet the needs of slave traders and drivers to sell their products and supply their needs and desires. New York City was not only the site of the nation's largest cotton market but also Wall Street was home to one of the nation's largest slave markets.²⁷⁶ Ironically enough, Wall Street was once a physical wall built during the mid-1600s by slaves owned by the Dutch West India Company.²⁷⁷ In the

271. Swarns, *supra* note 270.

272. *J.P. Morgan Says Two Precursor Banks Held Slaves*, L.A. TIMES (Jan. 21, 2005, at 00:00 PT), <https://www.latimes.com/archives/la-xpm-2005-jan-21-na-slavery21-story.html> [<https://perma.cc/SFM7-2GXZ>]; Swarns, *supra* note 270. *See generally* MURPHY, *supra* note 270, at 8–11 (detailing the involvement of banking in financing and supporting the slave trade).

273. MURPHY, *supra* note 270, at 13.

274. *Id.*

275. *See generally* HOWARD W. FRENCH, *BORN IN BLACKNESS: AFRICA, AFRICANS, AND THE MAKING OF THE MODERN WORLD, 1471 TO THE SECOND WORLD WAR* (2021) (describing importance of slave trade and slavery to many aspects of early capitalist development).

276. Gavin Wright, *Slavery and the Rise of the Nineteenth-Century American Economy*, 36 J. ECON. PERSPS. 123, 140 (2022); Zoe Thomas, *The Hidden Links Between Slavery and Wall Street*, BBC (Aug. 28, 2019), <https://www.bbc.com/news/business-49476247> [<https://perma.cc/6ZWX-VPHR>].

277. Slavery in N.Y., N.Y. HIST. SOC'Y, *White New Yorkers in Slave Times*, N.Y. 1, https://www.slaveryinnewyork.org/PDFs/White_New_Yorkers.pdf [<https://perma.cc/7CYK-CGDK>].

1850s, New York City was also an epicenter for illegal slave trade after slavery had been abolished.²⁷⁸

The founding of American capitalism on the backs of slaves is surely part of why the American Black population still shows deep-rooted distrust of the American financial system.²⁷⁹ 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.”²⁸⁰ “[S]laves were exploited twice” by having “their freedom and labour stolen from them” and “their captured ‘economic value’ leveraged by cutting edge financial instruments.”²⁸¹

As Professor Mehrsa Baradaran details in *The Color of Money: Black Banks and the Racial Wealth Gap*, free Black Americans created their own financial system in the mid-to-late 1800s because they were essentially excluded from the mainstream, White financial system.²⁸² In 1865, the federal government created the Freedman’s Savings Bank and Trust Company (often called Freedman’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.”²⁸³ In just ten years following its formation, Freedman’s Bank had more than 75,000 depositors and handled more than \$75 million in deposits.²⁸⁴ However, as W. E. B. Du Bois once stated, Freedman’s Bank “not only ruine[d] thousands of

278. Sylviane A. Diouf, *New York City’s Slave Market*, N.Y. PUB. LIBR. (June 29, 2015), <https://www.nypl.org/blog/2015/06/29/slave-market> [https://perma.cc/8XCA-W2GX].

279. See Sven Beckert & Seth Rockman, *Introduction* to SLAVERY’S CAPITALISM: A NEW HISTORY OF AMERICAN ECONOMIC DEVELOPMENT 3, 3 (Sven Beckert & Seth Rockman eds., 2016) (“American slavery is necessarily imprinted on the DNA of American capitalism.”).

280. 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/> [https://perma.cc/P9TJ-XJFW].

281. Phillip Roscoe, *How the Shadow of Slavery Still Hangs Over Global Finance*, CONVERSATION (Aug. 21, 2020, at 09:26 ET), <https://theconversation.com/how-the-shadow-of-slavery-still-hangs-over-global-finance-144826> [https://perma.cc/N97R-XHNJ].

282. MEHRSA BARADARAN, *THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP* 12–13 (2017).

283. *The Freedman’s Savings Bank: Good Intentions Were Not Enough; A Noble Experiment Goes Awry*, OFF. OF THE COMPTROLLER OF THE CURRENCY, <https://www.occ.treas.gov/about/who-we-are/history/1863-1865/1863-1865-freedmans-savings-bank.html> [https://perma.cc/L4VA-Q4HM].

284. BARADARAN, *supra* note 282, at 25.

colored men, but taught to thousands more a lesson of distrust which it will take them years to unlearn.”²⁸⁵

Without any depositors’ consent, deposits in the Freedman’s Bank were used to fund the first post-Civil-War asset bubble, including railroads.²⁸⁶ After the railroad investments failed in the Panic of 1873, the Freedman’s Bank lost more than \$2 million of deposits.²⁸⁷ Congress soon shut down the Freedman’s Bank and left 61,144 depositors with no access to almost \$3 million.²⁸⁸ More than half of Black wealth in the United States disappeared with the Freedman’s Bank closure.²⁸⁹ For more than thirty years, depositors and their descendants petitioned Congress to be reimbursed for losses.²⁹⁰ This historical event led Black people to lose faith in the banking system and created financial trauma that has lasted generations.²⁹¹ A hundred years later, the mid-century trauma of urban decay was caused, in large part, by redlining—that is, the banks’ refusal to extend home loans (and the federal authorities’ refusal to insure those loans) to African Americans and to homeowners of every race in neighborhoods with African American inhabitants.

Distrust of the financial system is not limited to African Americans. After all, Americans of many races and classes suffered from the repeated bank runs of the nineteenth century and, in more recent memory, from the block busting and disinvestment of redlining, the frauds and near-frauds of the dot-com and housing bubbles at the beginning of this century, the ups and downs of day-trading, the temptations of treating the financial markets as casinos, bad timing in the stock market, and incompetent or corrupt financial advisors. Latinos may distrust the financial system because several U.S. banks tend to deny Latinos loans at a disproportionately low rate.²⁹² This suspicion of financial systems can be compounded by

285. *Id.* at 23.

286. *Id.* at 27.

287. *Id.* at 29.

288. OFF. OF THE COMPTROLLER OF THE CURRENCY, *supra* note 283.

289. BARADARAN, *supra* note 282, at 29–30.

290. Reginald Washington, *The Freedman’s Savings and Trust Company and African American Genealogical Research*, 29 FED. REC. & AFR. AM. HIST. (1997), <https://www.archives.gov/publications/prologue/1997/summer/freedmans-savings-and-trust.html> [<https://perma.cc/YS8X-3T7Z>].

291. *Id.*

292. Beatriz Acevedo & Jacqueline Martinez Garcel, *How Previous Financial Trauma Keeps Latinos in the U.S. From Investing*, L.A. TIMES (June 3, 2022, at 03:05 PT), <https://www.latimes.com/opinion/story/2022-06-03/latino-investing-financial-trauma> [<https://perma.cc/4SUE-VQM5>].

memories of negative experiences in Latin America.²⁹³ 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-1980s when their peso was devalued by more than 300%.²⁹⁴ These negative experiences resulted 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 investing in the stock market.²⁹⁵

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.²⁹⁶ In a 2020 *Washington Post* article, a young Black journalist described 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.”²⁹⁷ Fear drove her grandmother to save, but it also kept her from growing her money in the stock market, viewing the stock market, including 401(k)s, as gambling.²⁹⁸ She needed to see and touch her wealth to know wholeheartedly it would not easily disappear from her grasp.²⁹⁹ This grandmother ultimately opened a savings account—saving \$20,000—but eschewed even a short-term certificate of deposit for her savings.³⁰⁰

293. *Id.*

294. *Id.*

295. *Id.* Black Americans tend to have more investments in homeownership. DORITY JR. ET AL., *supra* note 226. 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*, 78 AM. ECON. REV. 151, 152 (1988).

296. Brimmer, *supra* note 295, at 154.

297. Singletary, *supra* note 222.

298. *Id.*

299. *Id.*

300. *Id.*

According to statistics, this journalist's grandmother is not alone. In 2021, 13% of Black adults were unbanked, and 27% were underbanked.³⁰¹ Hispanic adults came in second with 11% unbanked and 18% underbanked.³⁰² In comparison, among U.S. adults, only 6% were unbanked, and 16% were underbanked, with 77% being fully banked.³⁰³

There are numerous reasons for the large number of unbanked or underbanked Americans. Most importantly, a majority of banks find small accounts relatively unprofitable and thus charge them high fees, making it unduly expensive for people with modest incomes to maintain accounts, while the United States, unlike most other rich countries, does not offer a postal bank or other low-cost public banking alternative.³⁰⁴ Additionally, academics often point to a lack of trust in the financial system.³⁰⁵ Further, like the journalist's grandmother, some Black Americans are concerned that using a bank can put their money or privacy at risk.³⁰⁶ Like Black Americans, some Latinos are distrustful of banks regardless of their income status.³⁰⁷ For example, the term *colchón de emergencia* means "[m]oney under the mattress for emergencies," highlighting distrust of institutional means of saving through banks.³⁰⁸ Some communities also use informal peer lending and saving

301. BD. OF GOVERNORS OF THE FED. RSRV. SYS., ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2021, at 44 (May 2022), <https://www.federalreserve.gov/publications/files/2021-report-economic-well-being-us-households-202205.pdf> [https://perma.cc/2AUX-DA2L].

302. *Id.*

303. BD. OF GOVERNORS OF THE FED. RSRV. SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2018, at 25 (May 2019), <https://www.federalreserve.gov/publications/files/2018-report-economic-well-being-us-households-201905.pdf> [https://perma.cc/C8GG-6GHL].

304. EMILY DiVITO, ROOSEVELT INST., THE BUSINESS OF BANK FEES: HOW PUBLIC ALTERNATIVES CAN ENSURE EQUITABLE ECONOMIC PARTICIPATION 5, 13 (2024), https://rooseveltinstitute.org/wp-content/uploads/2024/06/RI_Business-of-Bank-Fees-Economic-Participation_Brief_202406.pdf [https://perma.cc/Z33R-XV9R].

305. Daryl A. Carter, *Black and Brown Americans are Chronically Underbanked and Unbanked.*, EMANCIPATOR (Sep. 11, 2023), <https://theemancipator.org/2023/09/11/topics/money/black-brown-americans-are-chronically-underbanked-unbanked-heres-why-that-matters/> [https://perma.cc/5Z8R-46WC].

306. *Id.*

307. 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, Jan.–Mar. 2015, 1, 8, <https://journals.sagepub.com/doi/epdf/10.1177/2158244014562388> [https://perma.cc/9NSX-J8R2].

308. Acevedo & Garcel, *supra* note 292.

clubs known as *tandas* that circulate money throughout Latino communities, paying interest to the lead organizer.³⁰⁹

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.³¹⁰

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, AND THE NAIL IN THE COFFIN OF THE SHAREHOLDER DEMOCRACY MIRAGE

Institutional investors own between 70–80% of the shares in U.S. public companies³¹¹ and thus control enough voting power to govern them.³¹² Among these institutions, BlackRock, Vanguard, and State Street,³¹³ which are referred to as the Big

309. *Id.*

310. Louis Barajas, *Voices: Many Latinos Lack Investment Accounts. They Need Money Mentors.*, NBC NEWS (May 13, 2019, at 12:59 ET), <https://www.nbcnews.com/news/latino/https-www-cnbc-com-2019-05-10-barajas-unbanked-latinos-n1004966> [<https://perma.cc/Y4HS-V7H3>]; Acevedo & Garcel, *supra* note 292.

311. José Azar, Martin C. Schmalz & Isabel Tecu, *Anticompetitive Effects of Common Ownership*, 73 J. FIN. 1513, 1514 (2018).

312. JOHN C. COATES, *THE PROBLEM OF TWELVE: WHEN A FEW FINANCIAL INSTITUTIONS CONTROL EVERYTHING* 42 (2023). The scale of, and the risk associated with, the concentration of share ownership and the power of passive investors have been investigated extensively. John C. Coates, *The Future of Corporate Governance Part I: The Problem of Twelve* 2 (Harv. Pub. Law Working Paper, Paper No. 19-07, 2018); Jill 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 21, at 5.

313. For an overview of the debate on common ownership, see Robert J. Jackson Jr., *Common Ownership: The Investor Protection Challenge of the 21st Century*, SEC (Dec. 6, 2018), <https://www.sec.gov/newsroom/speeches-statements/jackson-testimony-ftc-120618> [<https://perma.cc/JN95-K7C5>].

Three,³¹⁴ “have hung an ‘Under New Management’ sign over publicly traded corporations.”³¹⁵ In fact, the Big Three alone cast about one-fourth of all the votes at S&P 500 companies’ shareholder meetings.³¹⁶

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.³¹⁷ Voting is essentially a transaction cost for most funds.³¹⁸ Passive investment managers such as the Big Three largely compete on cost³¹⁹ (i.e., lower advertised expenses). The Big Three vote shares in thousands of companies, any money spent on voting is a cost,

314. 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 \$15.3 trillion. Blackrock, Inc. Quarterly Report (Form 10-Q) 39 (Aug. 6, 2026) (reporting total as of Aug. 2026). The value of Vanguard’s assets under management amounts to approximately \$10.1 trillion. *Assets Under Management (AUM) of Vanguard in Selected Years from 1975 to April 30, 2025 (in Billion U.S. Dollars)*, STATISTA, <https://www.statista.com/statistics/1260855/vanguard-aum/> [<https://perma.cc/AAL3-5ADA>] (reporting total as of Apr. 30, 2025). The value of Fidelity’s assets under administration amounts to approximately \$19.9 trillion. *Q2 2026 Business Update: By the Numbers*, FIDELITY, <https://about.fidelity.com/data-and-insights/q2-2026-business-update> [<https://perma.cc/58CV-46T6>] (reporting total as of June 30, 2026). The value of State Street’s assets under management amounts to approximately \$6.3 trillion. Press Release, State Street Corp., State Street Corporation (NYSE: STT) Reports Second-Quarter 2026 Financial Results (July 16, 2026), <https://investors.statestreet.com/investor-news-events/press-releases/news-details/2026/State-Street-Corporation-NYSE-STT-Reports-Second-Quarter-2026-Financial-Results/default.aspx> [<https://perma.cc/EZ5P-3GBX>] (reporting total as of June 30, 2026).

315. Goshen & Levit, *supra* note 21, at 5.

316. 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 Professors Zohar Goshen and Doron Levit, the concerns raised by the Big Three’s *uber* power justify the breakup of these common owners when they are excessive in size. Goshen & Levit, *supra* note 21, at 59–60.

317. See Choi, Fisch & Kahan, *supra* note 314, at 37 (describing the Department of Labor release stating pension funds must vote to comply with fiduciary duties and the SEC rule requiring disclosure of mutual funds’ voting records and policies).

318. Dorothy S. Lund, *The Case Against Passive Shareholder Voting*, 43 J. CORP. L. 493, 510–11 (2018).

319. Fisch, Hamdani & Solomon, *supra* note 312, at 29; Aneil Kovvali, *Countercyclical Corporate Governance*, 101 N.C. L. REV. 141, 173 (2022).

and their business model is designed around restraining costs.³²⁰

The rise of environmental, social, and governance frameworks, with the flourishing of related shareholder proposals; the 2010 Dodd–Frank Wall Street Reform; and the Consumer Protection Act have increased costs associated with voting because 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 public-spirited fund that paid for the work. But any benefits derived from careful voting are shared with competitors.³²¹ 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 a quandary on their hands: satisfying regulatory requirements without expanding or overburdening their small stewardship teams.³²² The solution has been to outsource voting to a new type of corporate governance player, namely 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.³²³ 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.

Importantly, proxy advisory firms are neither shareholders nor residual claimants.³²⁴ To the extent that democratic theory prizes participation, not merely results, the advisory firms are peculiar pseudo-voters: they are neither shareholders nor

320. Dorothy S. Lund, *Asset Managers as Regulators*, 171 U. PA. L. REV. 77, 94–95 (2022).

321. Lucian Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 COLUM. L. REV. 2029, 2056 (2019); Lund, *supra* note 318, at 511.

322. The Big Three have small stewardship groups. Lund, *supra* note 320, at 94–95.

323. 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 Requirements*, 86 TENN. L. REV. 691, 712–13 (2019).

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

corporate constituents. Proxy advisory firms have no financial or other interest in the corporations for which they advise.³²⁵ 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 do they owe fiduciary duties to the funds' investees.³²⁶

Additionally, proxy advisory services do not limit themselves to the low-margin business of recommending votes.³²⁷ ISS, for example, also offers corporate governance consulting services—i.e., advising managers on good governance practices.³²⁸ 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.³²⁹

Hence, proxy advisors' and institutional owners' incentives are not necessarily aligned with those of the human beings who have their economic interests intermediated through funds³³⁰ 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.³³¹ The etymology of the word de-

325. *Id.*

326. *Id.*

327. Dan Daskal, Note, *ISS and Other Proxy Advisory Firms' Conflicts of Interest: Analyzing the Insufficiency of New Securities and Exchange Commission Rules and Guidance*, 3 COLUM. BUS. L. REV. 1487, 1492–93 (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).

328. Daskal, *supra* note 327, at 1504–05.

329. *Id.* at 1507–09. See generally Tao Li, *Outsourcing Corporate Governance: Conflicts of Interest within the Proxy Advisory Industry*, 64 MGMT. SCI. 2951 (2018) (suggesting that increasing competition could alleviate favoritism toward management by incumbent advisors that serve both corporations and investors).

330. Jill Fisch, *Promoting Corporate Diversity: The Uncertain Role of Institutional Investors*, 46 SEATTLE U. L. REV. 367, 383 (2023).

331. Brian G. Cartwright, General Counsel, Sec. & Exch. Comm'n, Speech at the University of Pennsylvania Law School Institute for Law and Economics: The Future of Securities Regulation (Oct. 24, 2007); Donald C. Langevoort, *The SEC, Retail Investors, and the Institutionalization of Securities Markets*, 95 VA. L. REV. 1025,

retailization emphasizes that individuals have gradually lost relevance in share ownership, extending Berle and Means's century-old point about their limited role in corporate governance. De-retailization can also be described as "institutionalization."³³² 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.³³³ In 1965, institutional investors collectively held less than 15% of the shares of U.S.-listed companies.³³⁴ Starting in the 1980s, institutional investors' concentration of ownership rapidly increased.³³⁵ Institutional investors held 25.6% of the shares of listed public U.S. companies in 1980.³³⁶ But that number increased to 67% by 2010.³³⁷ Today, institutional investors hold between 70% and 80% of U.S. public company shares.³³⁸

The reasons for de-retailization and concomitant institutionalization are complex. Some reasons can be traced to labor regulation and market forces.³³⁹ But the development and

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).

332. Cartwright, *supra* note 331 (discussing institutionalization as a consequence of deregulation); Langevoort, *supra* note 331, at 1026–27.

333. 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 331; Langevoort, *supra* note 331, at 1026; Davidoff, *supra* note 331, at 340; *see also* Edward B. Rock, *Adapting to the New Shareholder-Centric Reality*, 161 U. PA. L. REV. 1907, 1922–23 (2013) (discussing how the changing composition of institutional holdings combined with regulatory changes led to the concentration of share ownership).

334. *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. OF GOVERNORS FED. RESRV. SYS., FINANCIAL ACCOUNTS OF THE UNITED STATES: HISTORICAL ANNUAL TABLES 1965–1974, at 95 tbl. L.213 (2014), <https://www.federalreserve.gov/RELEASES/z1/20140605/annuals/a1965-1974.pdf> [<https://perma.cc/J82N-C7DF>].

335. *See* Edward B. Rock, *Institutional Investors in Corporate Governance*, in THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 363, 365–66 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018).

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

337. Luis A. Aguilar, Comm'r, SEC, Keynote Speech at Georgia State University: Institutional Investors: Power and Responsibility (Apr. 19, 2013), <https://www.sec.gov/newsroom/speeches-statements/2013-spch041913laahtm> [<https://perma.cc/ZLD4-LUX9>].

338. Azar, Schmalz & Tecu, *supra* note 311, at 1514.

339. Rock, *supra* note 335, at 365–67.

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.³⁴⁰ 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.³⁴¹

The financial industry began to take on its current form with Vanguard's introduction of the passive index mutual fund, taking portfolio theory to its logical limit, in 1976.³⁴² This change rapidly accelerated after the enactment of ERISA, which encouraged employers to abandon defined benefit pensions in favor of defined contribution plans³⁴³ consisting of individual employee accounts invested in centrally managed diversified funds,³⁴⁴ thereby creating a large new market of middle-class investors.³⁴⁵ Today, most employees in the upper half of the income distribution are invested in the stock market via employer-sponsored defined contribution retirement plans.³⁴⁶

Over the past two decades, the Big Three have quadrupled their stake in S&P 500 companies.³⁴⁷ Today, collectively, the Big Three are the largest shareholders in almost all the S&P

340. See James McRitchie, *More Beta: 21st Century Portfolio Theory*, CORPGOV.NET (Aug. 13, 2019), <https://www.corpgov.net/2019/08/more-beta-modernizing-modern-portfolio-theory/> [<https://perma.cc/8N9G-73QB>].

341. See Barry P. Barbash, Dir., Div. of Inv. Mgmt., SEC, Speech at ICI Securities Law Procedures Conference: Remembering the Past: Mutual Funds and the Lessons of the Wonder Years (Dec. 4, 1997), <https://www.sec.gov/news/speech/speecharchive/1997/spch199.txt> [<https://perma.cc/LHH9-M344>] (referring to the 1960s as the “Wonder Years” for mutual funds because assets of stock mutual funds doubled from 1960 to 1965 and doubled again from 1965 to 1970).

342. See GLOBAL VANGUARD, VANGUARD IN A NUTSHELL 1 (2022), https://www.ch.vanguard/content/dam/intl/europe/documents/en/vanguard-in-a-nutshell_eu-en.pdf [<https://perma.cc/M2YH-YQC8>].

343. 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, 879–80 (2013).

344. *Id.* at 881.

345. See *id.* at 879–80.

346. See Michael T. Owyang, Julie Benett & Brooke Hathhorn, *Pension or 401(k)? Retirement Plan Trends in the U.S. Workplace*, FED. RSRV. BANK OF ST. LOUIS: ON THE ECON. BLOG (Mar. 20, 2025), <https://www.stlouisfed.org/on-the-economy/2025/mar/pension-401k-retirement-plan-trends-us-workplace> [<https://perma.cc/D5L9-2YVF>].

347. Lucian Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B.U. L. REV. 721, 724 (2019).

500 corporations.³⁴⁸ In fact, Professors Lucian Bebchuk and Scott Hirst have warned that with the continued growth of institutional investors, the Big Three will soon become the “Giant Three.”³⁴⁹

Institutional investors, including common owners like the Big Three, buy and vote equities using money obtained from their own investees.³⁵⁰ 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.³⁵¹ Although the Big Three have most recently adopted pass-through voting devices that allow investees to select among a very limited array of thematic voting models,³⁵² traditionally the funds’ employees

348. 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 shareholders in 88% of the S&P 500 companies).

349. Bebchuk & Hirst, *supra* note 347, 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* 25–26 (Eur. Corp. Governance Inst. L. Working Paper, Paper No. 749, 2024), http://ssrn.com/abstract_id=4693837 [<https://perma.cc/WES6-YFTG>].

350. Fisch, *supra* note 330, at 383.

351. Molk & Partnoy, *supra* note 333, at 846; COATES, *supra* note 312, at 42.

352. Griffin, *supra* note 57, at 287–93 (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. *Empowering Investors Through BlackRock Voting Choice*, BLACKROCK, <https://www.blackrock.com/corporate/about-us/investment-stewardship/blackrock-voting-choice> [<https://perma.cc/M3CG-A57V>]. Vanguard and State Street soon followed suit by adopting pass-through voting for various funds. Lindsey Stewart, MORNINGSTAR MANAGER RSCH., PROXY-VOTING INSIGHTS: BLACKROCK, VANGUARD, STATE STREET: HOW DIFFERENTLY DO THE BIG THREE VOTE ON ESG RESOLUTIONS? 3 (2023), <https://corpgov.law.harvard.edu/wp-content/uploads/2023/06/blackrock-vanguard-state-street-esg-proxy-voting-FINAL061223.pdf> [<https://perma.cc/9Z3J-49QJ>] (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 Lund & Adriana Z. Robertson, *Giant Asset Managers, the Big Three, and Index Investing*, in BOARD-SHAREHOLDER DIALOGUE: POLICY DEBATE, LEGAL CONSTRAINTS AND BEST PRACTICES 158, 184 (Luca Enriques & Giovanni Strampelli eds., 2024).

vote the shares held in the portfolio without any effective accountability to the investees in the funds.³⁵³ Because over 90% of the shares held by institutional investors are voted,³⁵⁴ the vast majority of share votes in U.S. public companies are determined by institutional investors' employees who are not answerable to the funds' investees.

The Big Three have stewardship groups tasked to vote the shares in their portfolios.³⁵⁵ But the stewardship groups of the Big Three are surprisingly small.³⁵⁶ All in all, a few dozen people are in charge of voting the largest blocs of shares in nine out of ten S&P 500 companies and many other U.S. public companies.³⁵⁷ These people are also demographically homogeneous³⁵⁸: Most of the fund managers are White men.³⁵⁹ Almost eight out of ten fund managers are men, and seven out of ten fund managers are White.³⁶⁰

Stewardship group employees' identities fail to reflect the demographics and cultures of the investees; this is particularly troublesome because, according to the literature, the funds' votes diverge from how the human investees would vote their

353. Lund & Robertson, *supra* note 352, at 183–84. Professor John Coates warns against the risks associated with excessive power concentrated in the control of a handful of people. COATES, *supra* note 312, at 42; Coates, *supra* note 312, at 13.

354. Kate Dore, *Few Individual Investors Participate in Shareholder Voting. Here's How That May Be Changing*, CNBC (Oct. 12, 2021, at 15:51 ET), <https://www.cnbc.com/2021/10/12/few-individuals-participate-in-shareholder-voting-but-that-may-change.html> [<https://perma.cc/BT7X-H6E2>] (reporting that 92% of shares held by institutional investors were voted in 2020).

355. Bebchuk & Hirst, *supra* note 347, at 741.

356. *Id.* at 725; see Lund, *supra* note 320, at 94–95.

357. Fichtner, Heemskerk & Garcia-Bernardo, *supra* note 348, at 313; Bebchuk & Hirst, *supra* note 347, at 724–25.

358. See *Investment Fund Manager Demographics and Statistics in the US*, ZIPPIA, <https://www.zippia.com/investment-fund-manager-jobs/demographics/> [<https://perma.cc/Q4VC-RWY2>]; Amrutha Alladi & Neelotpal Shukla, *The Percentage of Female Fund Managers Is Exactly Where It Was 20 Years Ago*, MORNINGSTAR: FUNDS (Mar. 9, 2023), <https://www.morningstar.com/funds/percentage-female-fund-managers-is-almost-exactly-where-it-was-20-years-ago> [<https://perma.cc/UE9W-K4KP>].

359. *Investment Fund Manager Demographics and Statistics in the US*, *supra* note 358; Alladi & Shukla, *supra* note 358; Bridget B. Hughes & Alyssa Stankiewicz, *Key Takeaways from Our First Diversity in Asset Management Report*, MORNINGSTAR: FUNDS (Nov. 19, 2024), <https://www.morningstar.com/funds/women-perform-well-men-asset-management-report-shows> [<https://perma.cc/UA23-F3VS>].

360. See *Investment Fund Manager Demographics and Statistics in the US*, *supra* note 358; Alladi & Shukla, *supra* note 358.

shares.³⁶¹ In fact, fund employees have incentives to pursue the interests of the funds rather than the interests of the investees.³⁶² Most fund managers profit from increasing the value of their assets under management rather than pursuing environmental or social goals.³⁶³ The pay structure of many fund employees incentivizes them to commit as little time and resources as possible to informing themselves about shareholder meeting agenda items and, instead, to rely heavily on the work of the two relevant proxy advisory services, ISS and Glass Lewis.³⁶⁴ As a result, shares in our corporations—the mammoths of our economy—are increasingly voted by a small circle of individuals.³⁶⁵

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.³⁶⁶ 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

361. Jonathon Zytnick, *Do Mutual Funds Represent Individual Investors?* 26 (NYU Law & Econ., Rsch., Paper No. 21-04, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3803690 [<https://perma.cc/2SX8-8A2Z>]; see also Robert J. Jackson, Jr. & Jonathon Zytnick, *Individual Investor Ideology* (Eur. Corp. Governance Inst. L. Working Paper, Paper No. 1097, 2025) (explaining that voter-specific ideology differs among individuals, not proposals), <https://ssrn.com/abstract=5054952> [<https://perma.cc/FH68-N5KQ>].

362. Fisch, *supra* note 330, at 384; Sean J. Griffith, *Opt-in Stewardship: Toward an Optimal Delegation of Mutual Fund Voting Authority*, 98 TEX. L. REV. 983, 988 (2020).

363. See STOUT, GRAMITTO & BELINFANTI, *supra* note 3, at 3; see also Alessio M. Paces, *Sustainable Corporate Governance: The Role of the Law*, in SUSTAINABLE FINANCE IN EUROPE: CORPORATE GOVERNANCE, FINANCIAL STABILITY AND FINANCIAL MARKETS 151, 156–58 (D. Busch, G. Ferrarini & S. Grünwald eds., 2021) (explaining that most investors attempt to offer attractive performance combined with a prosocial goal supported by beneficiaries, while hedge funds do not align with this trend).

364. 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 352.

365. On the issues regarding the concentration of power in the hands of a small group of people, see Coates, *supra* note 312, at 13; see also STOUT, GRAMITTO & BELINFANTI, *supra* note 3, at 13–27.

366. Jill Fisch & Jeff Schwartz, *Corporate Democracy and the Intermediary Voting Dilemma*, 102 TEX. L. REV. 1, 14 (2023).

institutional investors, to adopt written policies and procedures assuring that institutional investors vote proxies in the fund investees' best interest.³⁶⁷ The accompanying adopting release made hiring an unconflicted proxy advisory firm a desirable practice in discharging the voting duties.³⁶⁸ Thus, regulations have encouraged the reliance on proxy advisory firms. The SEC's assumption in 2003 that proxy advisory firms will be unconflicted appears to be far from obviously correct.

In fact, critics have pointed to several conflicts of interest. Institutional investors pay proxy advisory firms for their voting advice.³⁶⁹ But both ISS and Glass Lewis each have consulting services.³⁷⁰ For example, the ISS's business unit, branded ISS Corporate Solutions, Inc., provides consulting services to public companies aimed at, among other things, managing investor expectations.³⁷¹ Thus, ISS is paid by institutional investors for voting advice while at the same time rendering advice to public companies on potentially the same voting topics.³⁷² This double exposure raises the concern that issuers' management hires ISS Corporate Solutions, Inc. to secure favorable voting recommendations to institutional investors. On its part, ISS maintains that a firewall separates its voting advisory services and its consulting services.³⁷³

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.³⁷⁴ This was followed by Glass Lewis's launch of a

367. Proxy Voting by Investment Advisors, 17 C.F.R. § 275.206(4)-6 (2003).

368. *Id.*

369. Harald Halbhuber, Erika Kent & Katya Bogdanov, *Regulation of Proxy Advisors Rides the Roller Coaster*, in A&O SHEARMAN, CORPORATE GOVERNANCE AND EXECUTIVE COMPENSATION SURVEY 6, 7 (2024).

370. *Id.*

371. JUN FRANK & PINAK PARIKH, ISS-CORPORATE, 2026 U.S. PROXY SEASON PREVIEW: PROXIES IN UNCHARTED WATERS 11–12 (2026).

372. 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." *Cracking the Proxy Advisory Duopoly*, WALL ST. J. (July 12, 2023, at 18:24 ET), <https://www.wsj.com/articles/proxy-advisory-firms-glass-lewis-institutional-shareholder-services-esg-investing-761e044f> [<https://perma.cc/XV2C-7MWZ>].

373. Letter from Gary Retelny, President & Chief Exec. Officer, Inst. Shareholder Servs. to Brent J. Fields, Sec'y, SEC 13 (Nov. 7, 2018), <https://www.sec.gov/comments/4-725/4725-4629940-176410.pdf> [<https://perma.cc/MD88-ZKVX>].

374. Press Release, Glass Lewis, Glass Lewis Launches Engagement Solution (Sep. 13, 2021), <https://web.archive.org/web/20250205035419/https://www.glass>

related management platform.³⁷⁵ These programs allow institutional investors to leverage Glass Lewis's relationship with public companies to permit "institutional investors to significantly strengthen their stewardship commitment,"³⁷⁶ and the programs allow Glass Lewis "to perform and manage engagement campaigns on [an investor's] behalf."³⁷⁷ Critics contend that these campaigns can influence Glass Lewis's voting recommendations.³⁷⁸

As long ago as 2010, the SEC expressed concerns about the power and risks associated with proxy advisory firms.³⁷⁹ 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."³⁸⁰ Since then, the power of proxy advisory firms has grown even further, to the point that they can be

lewis.com/press-release-engagement-solution/ [https://perma.cc/Y9GL-66UZ]. This archived copy of the press release is accessible via the Wayback Machine and presents the page as it existed on February 5, 2025. *Id.*

375. News Release, 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/> [https://perma.cc/MD99-FZTD].

376. Glass Lewis, *supra* note 374.

377. *Stewardship Solutions*, GLASS LEWIS, <https://www.glasslewis.com/stewardship-solutions/> [https://perma.cc/H2Y8-3ALQ].

378. *Cracking the Proxy Advisory Duopoly*, *supra* note 372.

379. Press Release, SEC, SEC Votes to Seek Public Comment on U.S. Proxy System (July 14, 2010), <https://www.sec.gov/news/press/2010/2010-122.htm> [https://perma.cc/PPE2-WM5W].

380. *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 & Bogdnov, *supra* note 369, 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 D.C. District Court ruling that the SEC lacked statutory authority to regulate proxy advisory firms, while the Fifth Circuit found that 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 D.C. District Court ruling. *Id.* at 10. The regulatory landscape remains unsettled. Executive Order 14366 directs the SEC to review and to consider revising or rescinding its rules and guidance governing proxy advisors. Exec. Order No. 14366, 90 Fed. Reg. 58503, 58503 (Dec. 11, 2025), <https://www.whitehouse.gov/presidential-actions/2025/12/protecting-american-investors-from-foreign-owned-and-politically-motivated-proxy-advisors/> [https://perma.cc/99EP-3SGB]. As of this writing, the SEC has not proposed a rule.

considered “quasi-regulators.” Entities that have no skin in the game, no equity interest in issuers, and no obligation to consider the public interest sway a significant number of votes, not by persuasive or rational argument but simply by virtue of market dynamics favoring simplistic outsourcing.

To be sure, that power is now under sustained legal and political attack. Texas enacted a statute in 2025 requiring proxy advisors to disclose when their recommendations rest on nonfinancial factors, and a federal court preliminarily enjoined its enforcement against ISS and Glass Lewis.³⁸¹ In 2026, the Texas attorney general filed suits in Texas state court alleging that ISS and Glass Lewis are violating the Texas Deceptive Trade Practices Act by marketing their advice as independent while allowing climate, ESG, and DEI metrics to shape their decisions.³⁸² Texas is not alone in its opposition. In 2025, Florida filed similar suits against ISS and Glass Lewis, while in 2026, the attorneys general of Nebraska, Iowa, and West Virginia filed suit against ISS.³⁸³ In December 2025, the President issued an executive order directing the SEC, the Federal Trade Commission, and the Department of Labor to

381. Tex. S.B. 2337, 89th Leg., R.S. (2025). The statute requires proxy advisors to disclose that their advice is not provided solely in the financial interest of shareholders when the advice rests wholly or partly on nonfinancial factors, including environmental, social, and governance factors. *Id.* A federal district court preliminarily enjoined enforcement of the statute against ISS and Glass Lewis, holding that both firms were likely to succeed on their First Amendment, vagueness, and ERISA preemption claims. *Institutional S'holder Servs. Inc. v. Paxton*, No. 1:25-cv-01160 (W.D. Tex. Aug. 29, 2025); *Glass, Lewis & Co. v. Paxton*, No. 1:25-cv-01153 (W.D. Tex. Aug. 29, 2025). The Attorney General initially appealed the injunctions but then withdrew the appeal. Andrew Ramonas, *Texas Drops Court Bids to Revive ESG Curbs for Proxy Firms*, BL (Nov. 24, 2025, at 15:32 ET), <https://news.bloomberglaw.com/esg/texas-drops-court-bids-to-revive-esg-curbs-for-proxy-firms> [<https://perma.cc/V22S-F6U2>]. In 2026, ISS and Glass Lewis won preliminary injunctions against similar statutes in Kansas and Indiana. Dominic Webb & Paul Verney, *Regulatory round-up: ISS and Glass Lewis Score Legal Wins in Two States*, RESPONSIBLE INV. (July 3, 2026), <https://www.responsible-investor.com/regulatory-round-up-iss-and-glass-lewis-score-legal-wins-in-two-states/> [<https://perma.cc/U68R-KAYP>].

382. See Natalie Bannerman, *Texas Files New Lawsuit Against Glass Lewis Over Proxy Voting Advice*, GOVERNANCE INTEL. (Aug. 5, 2026), <https://www.governance-intelligence.com/shareholders-activism/texas-files-new-lawsuit-against-glass-lewis-over-proxy-voting-advice> [<https://perma.cc/9JQY-7R7B>] (discussing 2026 state court suits against ISS and Glass Lewis).

383. Mark Segal, *Four States Launch Lawsuits Against Proxy Advisor ISS Over ESG Policies*, ESG TODAY (May 21, 2026), <https://www.esgtoday.com/four-states-launch-lawsuits-against-proxy-advisor-iss-over-esg-policies/> [<https://perma.cc/J6FP-W73Y>].

curtail the influence of the two firms, which the order describes as foreign-owned and politically motivated.³⁸⁴

Both ISS and Glass Lewis have changed how they operate. ISS has abandoned its general practice of recommending votes in favor of environmental and social shareholder proposals and now evaluates those proposals one by one.³⁸⁵ Meanwhile, Glass Lewis stated it will move away from research and recommendations based on its house policy and, beginning in 2027, will give clients a range of perspectives and voting frameworks built on their own policies.³⁸⁶ JPMorgan Chase stopped using both firms in January 2026.³⁸⁷ Notwithstanding the close scrutiny, the influence of the proxy advisors is real.

To understand the power of proxy advisors, it is important to have a picture against which these state and federal initiatives were launched. One study has shown that some of the largest asset managers follow ISS recommendations between 95% and 99% of the time.³⁸⁸ Moreover, when proxy advisory firms make a negative recommendation, the number of favorable votes typically decreases by 10% to 30%.³⁸⁹

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

384. Exec. Order No. 14366, *supra* note 380. The order directs the SEC to review and to consider revising or rescinding its rules, guidance, and staff memoranda governing proxy advisors and shareholder proposals, directs the Federal Trade Commission to consider whether the firms' practices violate the antitrust laws, and directs the Department of Labor to revisit the fiduciary standards governing proxy voting by retirement plans. *Id.* As of this writing, the Commission has not proposed a rule.

385. INSTITUTIONAL S'HOLDER SERVS., *Benchmark Policy Changes for 2026: U.S., Brazil, Canada, and Americas Regional* (Nov. 25, 2025), <https://www.issgovernance.com/file/policy/latest/updates/Americas-Policy-Updates.pdf> [<https://perma.cc/T6F3-3VB3>].

386. Glass Lewis, *Glass Lewis Leads Change in Proxy Voting Practices* (Oct. 15, 2025), <https://www.glasslewis.com/news-release/glass-lewis-leads-change-in-proxy-voting-practices> [<https://perma.cc/GU5X-YYA8>].

387. Jack Pitcher, *JPMorgan Cuts All Ties with Proxy Advisors in Industry First*, WALL ST. J. (Jan. 7, 2026, at 07:00 ET), https://www.wsj.com/finance/banking/jpmorgan-cuts-all-ties-with-proxy-advisers-in-industry-first-78c43d5f?eafs_enabled=false [<https://perma.cc/85N8-XHZM>].

388. Frank M. Placenti, *Are Proxy Advisors Really a Problem?*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 7, 2018), <https://corpgov.law.harvard.edu/2018/11/07/are-proxy-advisors-really-a-problem/> [<https://perma.cc/MRT2-XUKN>].

389. James R. Copland, David F. Larcker & Brian Tayan, *The Big Thumb on the Scale: An Overview of the Proxy Advisory Industry*, STAN. CLOSER LOOK SERIES 4 (May 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3188174 [<https://perma.cc/N7J7-G5K3>].

issuers.³⁹⁰ Second, it hands voting power to entities whose margins highly depend on keeping labor costs low.³⁹¹ This is particularly troublesome considering the short time frame available to analyze and process information before a vote. Third, economies of scale and business models based on cost incentivize institutional investors to minimize the resources committed to voting and associated expenses rather than guaranteeing that the actual preferences of the human beings whose money is at stake are upheld.³⁹² 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 that have no skin in the game.

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.³⁹³ Thus, 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 beneficial owners are human beings, most shares are held and voted by institutions. Institutions (not individuals) have hegemonic voting power and influence over business corporations. Separation of ownership from ownership³⁹⁴—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

390. Eckstein, *supra* note 324, at 231.

391. Sharfman, *supra* note 323, at 473–74.

392. Fisch, Hamdani & Solomon, *supra* note 312, at 29; Kovvali, *supra* note 319, at 173.

393. Gramitto Ricci, *supra* note 57, at 114.

394. The concept was coined by Judge Leo E. Strine Jr. in 2009. Leo E. Strine Jr., *Why Excessive Risk-Taking Is Not Unexpected*, N.Y. TIMES: DEALBOOK (Oct. 5, 2009, at 13:30 ET), <http://dealbook.nytimes.com/2009/10/05/dealbook-dialogue-leo-strine/> [<https://perma.cc/EPW7-BM3L>]. 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) (discussing a fundamental problem in modern corporate governance: the misalignment of incentives between the ultimate owners of a public company and those who control the voting power).

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.

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 light of the power that share voting has over the corporate sector: Share votes elect corporate directors and must approve corporate sale of all or substantially all assets, mergers, acquisitions, and changes to the articles of incorporation. Consequently, corporate managers, despite their considerable autonomy, tend to rule with at least one eye carefully tracking the views and votes of their ultimate controllers.

The role of proxy advisory firms, and their potential conflicts of interest, further undermines the role of shareholders. Some shareholders—individuals and institutions—may be willing to exercise their votes based on serious due diligence. Proxy firms do not appear to fill that function. Overreliance on proxy firms' voting recommendations hands Corporate America to decisionmakers that do not have stakes (or skin in the game) in the issuers.³⁹⁵ This is the nail in the coffin of the shareholder democracy mirage.

The current share ownership model, combined with the mechanisms that control corporate governance, insulates corporations from the needs and concerns of everyday people. 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 contrasting with soaring income for top corporate managers and wealthy investors—that has characterized most of the period since the 1980s.³⁹⁶ The consequence is too many Americans disaffected 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 is allowed to use corporate resources

395. Goshen & Levit, *supra* note 21.

396. *Id.*

to perpetuate its power. Shareholders often exit rather than engage; this is both a consequence and a cause of the lack of democracy, further empowering institutions and hegemonic forces.

As brought to the forefront in this Article, there is hardly anything democratic in shareholding. 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 the American economic and political system, 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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