THE TRAJECTORY OF AMERICAN CORPORATE GOVERNANCE: SHAREHOLDER EMPOWERMENT AND PRIVATE ORDERING COMBAT

*Jennifer G. Hill**

Why are shareholder empowerment and activism such controversial issues in the United States today? Other common law jurisdictions, including the United Kingdom, have welcomed and encouraged greater shareholder participation and engagement in corporate governance. In the United States, however, this prospect has been met with widespread apprehension and resistance. U.S. corporate law has traditionally been much more focused on protecting shareholders than enabling shareholders to participate in corporate governance.

This Article discusses the trajectory of corporate governance in the United States, with particular attention to the regulatory distinction between shareholder protection versus participation in corporate governance. In doing so, the Article highlights evolving shareholder governance rights in the United States against the backdrop of the shareholder empowerment and proxy access debates. It also investigates recent U.S. developments, including the growing use by institutional investors of private ordering as a "self-help" mechanism to gain stronger participatory rights. These developments, including controversial bylaw amendments, have the potential to readjust the balance of power between shareholders and boards of directors in U.S. public corporations. They have also created a dynamic and shifting corporate governance terrain, where boards and shareholders are increasingly engaged in what the Article labels "private ordering combat."

* Professor of Corporate Law, The University of Sydney Law School, Australia, Research Member, ECGI. Much of the research for this Article was conducted while I was a Herbert Smith Freehills Visitor, Cambridge University Law School and Senior Global Research Fellow, Hauser Global Fellows Program, NYU Law School and thanks go to both universities for their support. I would also like to thank a number of people for helpful references and suggestions in relation to this Article. These include Ron Barusch, Margaret Blair, Elizabeth Boros, Tim Bowley, Joe Campbell, William Carney, Stephen Choi, Brian Cheffins, Deborah DeMott, Susan Emmeneger, Scott Hirst, Ron Masulis, Geoffrey Miller, Jonathan Nash, William Nelson, David Partlett, Frank Partnoy, Dan Puchniak, Tom Ostrander, Elizabeth Pollman, Julian Redeke, Paul Redmond, Randall Thomas, Bob Thompson, Harwell Wells, Susan Watson, Charles Yablon, and participants at a NYU Hauser Fellows seminar, a symposium at the University of Hong Kong Faculty of Law, and a workshop at Emory University School of Law. Special thanks go to Alan Ngo, Penina Su, Lily Schafer-Gardiner, and Mitheran Selvendran for excellent research assistance.

The Article explores the intriguing underlying question of why shareholder empowerment and participation in corporate governance are such fraught issues in the United States, compared to some other common law jurisdictions, such as the United Kingdom. To explain this puzzle, the Article looks to legal history and to the fundamentally different organizational origins of U.S. and U.K. corporate law. Organizational origins matter, and divergence in those origins can lead to fundamental differences in the structure of legal regimes. The Article argues that this insight is critical to understanding why shareholder empowerment and participation in corporate governance are, and are likely to remain, such contentious issues in the United States.

TABLE OF CONTENTS

I. INTRODUCTION 509
II. SHAREHOLDER POWER AND REGULATION: THE DISTINCTION BETWEEN SHAREHOLDER PROTECTION AND PARTICIPATION IN CORPORATE GOVERNANCE 510
III. SHAREHOLDER PROFILE: THE RISE OF "AGENCY CAPITALISM" AND ITS REGULATORY IMPLICATIONS 512
IV. COMPARATIVE CORPORATE GOVERNANCE: SHAREHOLDER PARTICIPATION AND ENGAGEMENT AROUND THE WORLD 514
V. THE U.S. SHAREHOLDER EMPOWERMENT DEBATE 517
VI. U.S. DEVELOPMENTS REGARDING SHAREHOLDER POWER 521
 A. Post-Crisis Developments Regarding Proxy Access Reform 521
 B. Recent U.S. Developments—Use of Private Ordering to Acquire Governance Rights 524
 C. The Whole Foods Saga: Private Ordering Combat and Impoverished Consent 530
 D. Proxy Access and Private Ordering—Some Concluding Comments 534
VII. HAS THERE BEEN A SEA-CHANGE IN U.S. CORPORATE GOVERNANCE? MARTIN LIPTON AS BELLWETHER 537
VIII. DIVERGENT APPROACHES TO SHAREHOLDER POWER AND THE ROLE OF LEGAL HISTORY 540
 A. The Organizational Origins of U.S. Corporate Law 541
 B. The Organizational Origins of U.K. Company Law 544
IX. THE TRAJECTORIES OF U.S. AND U.K. CORPORATE LAW—ORIGINS BACKLASH AND ITS IMPLICATIONS FOR SHAREHOLDER PARTICIPATION RIGHTS 547
 A. The United States 547
 B. The United Kingdom 553
X. CONCLUSION 561

I. Introduction

Why are shareholder empowerment and activism such controversial issues in the United States today? Other common law jurisdictions, including the United Kingdom, have welcomed and encouraged greater shareholder participation and engagement in corporate governance. In the United States, however, this prospect has been met with widespread apprehension and resistance.[1]

There is a paradox here. The United States is generally regarded as the birthplace of shareholder activism, yet U.S. shareholders have traditionally possessed far fewer corporate governance rights than shareholders in other common law jurisdictions, where such rights are often guaranteed by mandatory laws.[2] U.S. corporate law has been much more focused on protecting shareholders than enabling shareholders to participate in corporate governance, and thereby protect themselves.[3]

This Article examines the trajectory of corporate governance in the United States, with particular attention to the regulatory distinction between shareholder protection versus participation in corporate governance. The Article explores a topic of enormous current interest in the United States, namely the growing use by institutional investors of private ordering as a "self-help" mechanism to gain stronger participatory rights in corporate governance.[4] U.S. developments in this regard, including controversial bylaw amendments, have the potential to readjust the balance of power between shareholders and boards of directors in U.S. public corporations. They have also created a dynamic and shifting corporate governance terrain, where boards and shareholders are increasingly engaged in "private ordering combat."[5]

An intriguing underlying question is why the United States is such an outlier within common law jurisdictions when it comes to shareholder participation in corporate governance. The Article explores this question through the lens of legal history. It contrasts the distinctively different organizational origins of U.S. and U.K. corporate law, and backlash against those origins ("origins backlash"), which occurred in both jurisdictions from the late nineteenth century onwards, but was far more dramatic in the United States than in the United Kingdom.[6]

These crucial differences in organizational starting points, combined with origins backlash, significantly affected the trajectories of corporate law in the United States and the United Kingdom. They also had a profound influence on the complex interplay between law and private ordering, and between mandatory and optional rules, in both jurisdictions.

The Article concludes that organizational origins matter, and divergence in those origins can lead to fundamental differences in the structure and operation

1. *See infra* Parts V and VI.
2. *See infra* Part IV and Section IX.B.
3. *See infra* Part V.
4. *See infra* Part VI.
5. *See infra* Section VI.C.
6. *See infra* Part IX.

of legal regimes. It argues that this insight is critical to understanding why shareholder empowerment and participation in corporate governance are, and are likely to remain, such contentious issues in the United States compared to other common law jurisdictions.

II. Shareholder Power and Regulation: The Distinction Between Shareholder Protection and Participation in Corporate Governance

Power is deeply implicated in how we view shareholders and their role in the corporations. Various shareholder images have existed across time and jurisdictions.[7] Some of these images (such as shareholders as "dispossessed owners" or "beneficiaries under a trust") are constructed on the assumption that shareholders are powerless and need protection.[8] Others (such as shareholders as "participants in a political entity," "gatekeepers," or "stewards") presume that shareholders possess a certain level of power and ability, which can be used as a regulatory technique in its own right.[9]

Yet the concept of power generally, and shareholder power in particular, is elusive and by no means easy to define.[10] Power can be held individually or collectively; it can be used to influence both corporate controllers and lawmakers,[11] and is often most effective when invisible.[12] Although economic power and legal power are theoretically distinct, they are interrelated, since economic power can be used to lobby and leverage stronger legal rights, and to legitimize certain corporate actors. Shareholder empowerment through strong legal rights is closely connected to investor activism. The two are not, however, coterminous. Shareholder passivity can exist even when shareholders possess strong rights.[13]

Corporate regulation "occurs in many rooms,"[14] encompassing an array of techniques to control conflicts of interest and ensure corporate accountability.[15]

7. Jennifer G. Hill, *Images of the Shareholder—Shareholder Power and Shareholder Powerlessness*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER 53, 53–62 (Jennifer G. Hill & Randall S. Thomas eds., 2015) [hereinafter Hill, *Images of the Shareholder*]. *See generally* Wolfgang Schön, *The Concept of the Shareholder in European Company Law*, 1 EUR. BUS. ORG. L. REV. 3 (2000).

8. Jennifer Hill, *Visions and Revisions of the Shareholder*, 48 AM. J. COMP. L. 39, 44 (2000) [hereinafter Hill, *Visions and Revisions*].

9. *Id.* at 51.

10. MARC T. MOORE, CORPORATE GOVERNANCE IN THE SHADOW OF THE STATE 17–18 (2013); Harwell Wells, *Shareholder Power in America 1800–2000: A Short History*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER, *supra* note 7, at 13, 13.

11. Paul Davies, *Shareholders in the United Kingdom*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER, *supra* note 7, at 355, 355; Wells, *supra* note 10, at 13.

12. Marco Becht et al., *Hedge Fund Activism in Europe: Does Privacy Matter?*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER, *supra* note 7, at 116, 116.

13. Gen Goto, *Legally "Strong" Shareholders of Japan*, 3 MICH. J. PRIV. EQUITY & VENTURE CAP. L. 125, 139 (2014).

14. *See generally* Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering and Indigenous Law*, 19 J. LEGAL PLURALISM 1 (1981).

15. John Armour et al., *Agency Problems and Legal Strategies*, *in* THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 29, 29 (Reinier Kraakman et al. eds., 3d ed. 2017).

These techniques lie across a regulatory spectrum that is closely linked to shareholder power. At one end of the spectrum are "regulatory strategies," which are designed to safeguard shareholder interests and control agency problems, through use of prescriptive legal rules, such as fiduciary duties.[16] Regulatory strategies are protection-focused and premised on the assumption that shareholders are vulnerable and incapable of safeguarding their own interests. At the other end of this spectrum lie "governance strategies," which, in contrast, are generally focused on shareholder empowerment.[17] Governance strategies seek to address the inherent power disparity between shareholders and the board of directors,[18] by granting shareholders specific legal rights, such as "appointment rights" to control the composition of the board of directors and "decision rights" to intervene in certain firm decisions.[19] Governance strategies promote shareholder participation, as a form of self-protection, and as an accountability mechanism in its own right.[20]

The effectiveness of shareholder empowerment via governance strategies is context-specific and depends on corporate ownership structure. Where ownership is dispersed, shareholder empowerment represents a counterweight to centralized board power, and acts as a constraint on the board's discretion and autonomy.[21] Its effectiveness in these circumstances will also depend on the sophistication of shareholders.[22] But, in concentrated ownership settings, including state-owned enterprises, ultimate control will rest with the majority shareholders.[23] Here, shareholder empowerment will be irrelevant, or even counterproductive, as an accountability device.[24] In these circumstances, rather than providing a check and balance on another locus of power, governance strategies of this kind will merely bolster the power status quo.[25]

16. *Id.* at 31–32.

17. *Id.*

18. *Id.*

19. *See also id.* at 35–37.

20. *See generally id.*

21. *See id.*

22. *See id.*

23. Lucian A. Bebchuk & Assaf Hamdani, *The Elusive Quest for Global Governance Standards*, 157 U. PA. L. REV. 1263, 1282–83 (2009); Klaus J. Hopt, Response, *American Corporate Governance Indices as Seen from a European Perspective*, 158 U. PA. L. REV. PENNUMBRA 27, 35 (2009).

24. Kon Sik Kim, *Dynamics of Shareholder Power in Korea*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER, *supra* note 7, at 535, 535; Luh Luh Lan & Umakanth Varottil, *Shareholder Empowerment in Controlled Companies: The Case of Singapore*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER, *supra* note 7, at 572, 590.

25. *See* Lan & Varottil, *supra* note 24, at 573.

III. SHAREHOLDER PROFILE: THE RISE OF "AGENCY CAPITALISM" AND ITS REGULATORY IMPLICATIONS

If investor sophistication is a key factor in assessing the efficacy of shareholder empowerment, then shareholder profile is also important. Over the last century, there has been a major shift in the profile of shareholders of public corporations, which affects the use of regulatory strategies and governance strategies.[26] *The Modern Corporation and Private Property* famously portrayed shareholders as a dispersed and marginalized group, in need of legal protection due to their inability to act collectively.[27] By the 1990s, however, the rise of powerful institutional investors challenged that familiar picture of corporate law,[28] making shareholder participation and activism in corporate governance a real possibility.[29] This activist theme continued the following decade with the emergence of hedge funds, which experimented with new activist techniques and strategies.[30]

Today, the dominant shareholders of public companies in many, but by no means all, jurisdictions are financial institutions broadly defined. In the United States, institutional investor shareholding in the top 1,000 American companies has risen from less than 10% in the early 1950s to over 70%.[31] In the United Kingdom, where institutional ownership has long been high, individual investors now hold only around 10% of listed U.K. equities.[32] The remainder is in the hands of financial institutional investors, but significantly, approximately half of these institutions are now non-U.K.-based.[33] Financial intermediaries are increasingly important in jurisdictions, such as Australia, where the introduction of a mandatory private pension ("superannuation") system in the early 1990s led to massive growth of financial intermediation.[34]

26. *See infra* notes 27–34 and accompanying text.

27. *See generally* ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

28. Bernard S. Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520, 523 (1990).

29. Marco Becht et al., *Returns to Shareholder Activism: Evidence from a Clinical Study of the Hermes UK Focus Fund*, 22 REV. FIN. STUD. 3093, 3094 (2009); Bernard S. Black & John C. Coffee, Jr., *Hail Britannia?: Institutional Investor Behavior Under Limited Regulation*, 92 MICH. L. REV. 1997, 1999 (1994); Stuart L. Gillan & Laura T. Starks, *The Evolution of Shareholder Activism in the United States*, 19 J. APPLIED CORP. FIN. 55, 55 (2007).

30. William W. Bratton, *Hedge Funds and Governance Targets*, 95 GEO. L.J. 1375, 1380–81 (2007); Brian R. Cheffins & John Armour, *The Past, Present and Future of Shareholder Activism by Hedge Funds*, 37 J. CORP. L. 51, 53 (2011); Marcel Kahan & Edward B. Rock, *Hedge Funds in Corporate Governance and Corporate Control*, 155 U. PA. L. REV. 1021, 1024 (2007).

31. Robert B. Thompson, *The Power of Shareholders in the United States*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER, *supra* note 7, at 441, 447; *see also* Lucian A. Bebchuk et al., *The Agency Problems of Institutional Investors*, 31 J. ECON. PERSP. 89, 91–93 (2017) [hereinafter Bebchuk et. al., *The Agency Problems of Institutional Investors*]; Scott Hirst, *The Case for Investor Ordering*, 8 HARV. BUS. L. REV. 227, 241–43 (2018).

32. *Investment Statistics*, FINDER (May 29, 2018), https://www.finder.com/uk/investment-statistics.

33. Davies, *supra* note 11, at 356. For the changing nature of the U.K. shareholder structure generally, see HOUSE OF COMMONS BUSINESS, ENERGY AND INDUSTRIAL STRATEGY COMMITTEE, CORPORATE GOVERNANCE, 2016-7, HC 702, ¶¶ 13–16 (UK).

34. *See* WILLIS TOWERS WATSON, GLOBAL PENSION ASSETS STUDY 2017 6, 16, 22 (2017); Commonwealth of Austl., Financial Systems Inquiry, *Final Report*, at 89 (2014).

The dominance of financial institutions in the United States, coined by Professors Gilson and Gordon as "agency capitalism," has profound regulatory implications.[35] These institutions are fundamentally different from individual investors, in terms of their structure, incentives, and behavior. Economically powerful financial institutions can potentially use governance strategies, such as appointment rights and decision rights, to protect their own, and other shareholders', interests vis-à-vis the board of directors and corporate management.[36] Yet one aspect of contemporary agency capitalism is that such financial institutions are "sophisticated but reticent."[37] They are unlikely to be first movers, but have a deep understanding of underlying economic and financial issues, and can be prompted by other market players into supporting activism.[38] Agency capitalism provides a generally optimistic assessment of the potential role of institutional investors in contemporary corporate governance.

However, an alternative, and fundamentally contradictory, image of shareholders pervades much contemporary U.S. corporate law commentary. This is the idea that shareholders are predatory and/or disloyal to their ultimate beneficiaries, and contribute to destructive short-termism.[39] Another concern is that rational apathy can lead institutional investors to delegate voting decisions to proxy advisers, which may themselves be ill-informed, biased, or conflicted.[40] From the perspective of regulatory diagnosis and prescription, such an image of shareholders provides policy justifications for restricting, rather than expanding, their corporate governance rights.[41] It also potentially suggests a radical shift in corporate law, from a traditional focus of protecting shareholders to a new goal of protecting the corporation from its shareholders, and shareholders from each other.[42] This shift is encapsulated in a recommendation by Martin Lipton that any new legislation or regulation should include protection for companies against shareholder pressure.[43]

35. *See* Ronald J. Gilson & Jeffrey N. Gordon, *Agency Capitalism: Further Implications of Equity Intermediation*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER, *supra* note 7, at 32.

36. *See id.*

37. *Id.*

38. *See id.* at 38; *see also* Brian R. Cheffins, *The Team Production Model as a Paradigm*, 38 SEATTLE U. L. REV. 397, 430 (2015).

39. *See, e.g.*, Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 787–88 (2015); Lawrence Mitchell, *Protect Industry from Predatory Speculators*, FIN. TIMES (London), July 8, 2009. The idea that activist shareholders, such as hedge funds, are myopic and short-termist has exerted an increasingly powerful influence in U.S. corporate law literature. For a discussion of this literature, see Lucian A. Bebchuk et al., *The Long-Term Effects of Hedge Fund Activism*, 115 COLUM. L. REV. 1085, 1093–96 (2015). For a recent challenge to the widely held view that the ideal shareholder is, therefore, a long-term investor, see Elisabeth de Fontenay, *The Myth of the Ideal Investor*, 41 SEATTLE U. L. REV. 425 (2018).

40. Fontenay, *supra* note 39, at 437.

41. *Id.*

42. Hill, *Images of the Shareholder*, supra note 7, at 57.

43. Martin Lipton, *Will a New Paradigm for Corporate Governance Bring Peace?*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Oct. 5, 2015), https://corpgov.law.harvard.edu/2015/10/05/will-a-new-paradigm-for-corporate-governance-bring-peace/.

These competing narratives as to the role of shareholders in corporate governance have led to important policy and reform questions about shareholder rights, power, and activism, and are reflected in a range of recent corporate governance developments around the world.

IV. COMPARATIVE CORPORATE GOVERNANCE: SHAREHOLDER PARTICIPATION AND ENGAGEMENT AROUND THE WORLD

La Porta et al.'s influential "law matters" hypothesis stressed the differences between common law and civil jurisdictions in terms of shareholder protection,[44] while obscuring important differences within the common law world itself.[45] The competing regulatory narratives concerning shareholder participation in corporate governance represent a clear example of such divergence.

The increasing use of private ordering in the United States to expand shareholder participation rights (through, for example, majority voting; the ability to convene shareholder meetings; and the nomination and removal of directors) has provoked much controversy.[46] Yet these same rights are available to shareholders in numerous other common law jurisdictions, such as the United Kingdom, Australia, Singapore, and Hong Kong, where they are generally secured by mandatory rules.[47] In the United Kingdom and Australia, for example, investors have an absolute statutory right to convene shareholder meetings[48] and to remove directors of public corporations from office at any time without cause.[49] This latter right precludes the operation of U.S.-style staggered boards in the United Kingdom and Australia.[50] Indeed, when News Corporation relocated from Australia to the United States more than a decade ago, it was the absence of such participation rights under Delaware corporate law that caused a revolt by Australian institutional investors.[51] Analogous rights are also available in some civil law jurisdictions, such as Japan, which has not traditionally been regarded as particularly protective of shareholder interests.[52]

44. Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113, 1116 (1998); *see also* Rafael La Porta et al., *Corporate Ownership Around the World*, 54 J. FIN. 471, 491 (1999).

45. *See* Jennifer G. Hill, *Subverting Shareholder Rights: Lessons from News Corp.'s Migration to Delaware*, 63 VAND. L. REV. 1, 8–9 (2010) [hereinafter Hill, *Subverting Shareholder Rights*] (discussing key legal differences relating to shareholder rights within the common law world); *see also* BRIAN R. CHEFFINS, CORPORATE OWNERSHIP AND CONTROL: BRITISH BUSINESS TRANSFORMED 33–40 (2008) (discussing La Porta et al.'s studies); Ron Harris & Naomi R. Lamoreaux, *Contractual Flexibility Within the Common Law: Organizing Private Companies in Britain and the United States* 3 (Nov. 23, 2016), https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2874780 (critiquing, from a historical perspective, the practice of treating British and U.S. company law as indistinguishable).

46. *See generally* Lipton, *supra* note 43.

47. *See infra* Part IV and Section IX.B.

48. *See* Companies Act, 2006 c. 46 §§ 303-305 (UK); *Corporations Act 2001* (Cth) ss 249D & 249F (Austl.).

49. *See Corporations Act 2001* (Cth) s 203D(1) (Austl.); Companies Act, 2006 c. 46 § 168(1) (UK).

50. *See* DEL. CODE ANN. tit. 8, § 141(k)(1) (2018).

51. Hill, *Subverting Shareholder Rights*, *supra* note 45.

52. Goto, *supra* note 13.

In these various jurisdictions, shareholder participation rights are generally viewed in a positive light as fundamental to corporate accountability and are not controversial.[53] Such engagement has a long history there and is regarded as increasingly important from a regulatory policy perspective.[54]

In recent times, shareholder participation in corporate governance has also been bolstered in many jurisdictions by the adoption of nonbinding codes. In the United Kingdom, for example, the influential 2003 Higgs Report proposed a range of governance techniques, specifically designed to ensure open communication and engagement between boards, particularly nonexecutive directors, and institutional investors.[55] These recommendations were subsequently incorporated into the U.K. Combined Code on Corporate Governance ("U.K. Corporate Governance Code"), which adopts a principles-based "comply or explain" regulatory approach.[56]

Despite its nonbinding status, the U.K. Corporate Governance Code is a powerful means of disseminating corporate governance norms. Some corporate governance techniques that are controversial in the United States, such as whether to split the role of chairman and CEO,[57] are regarded as de rigueur in other common jurisdictions, even though they are not mandated, but merely recommended under nonbinding codes. In 2016, for example, 48% of S&P 500 companies in the United States split the role of chairman and CEO, but only 27% of S&P 500 companies had a chair that qualified as independent.[58] In the United Kingdom, on the other hand, 99% of FTSE 350 companies had a separate chair and CEO, and 93% of these companies had an independent chair, as recommended by the U.K. Corporate Governance Code.[59]

The United Kingdom also adopted a voluntary Shareholder Stewardship Code ("U.K. Stewardship Code") in 2010, following the global financial crisis, to encourage greater shareholder dialogue with management and activism.[60] One

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53. *See e.g.*, WALKER REVIEW, A REVIEW OF CORPORATE GOVERNANCE IN UK BANKS AND OTHER FINANCIAL INDUSTRY ENTITIES: FINAL RECOMMENDATIONS 70–71 (2009).

54. R.C. Nolan, *The Continuing Evolution of Shareholder Governance*, 65 CAMBRIDGE L.J. 92, 93 (2006) [hereinafter Nolan, *The Continuing Evolution*].

55. *See* Derek Higgs, DEP'T TRADE & INDUS., REVIEW OF THE ROLE AND EFFECTIVENESS OF NON-EXECUTIVE DIRECTORS 31 (2003).

56. *See* THE COMBINED CODE ON CORP. GOVERNANCE § E.1 (FIN. REPORTING COUNCIL 2003); THE U.K. CORP. GOVERNANCE CODE § E (FIN. REPORTING COUNCIL 2016).

57. *See generally* David F. Larcker & Brian Tayan, *Chairman and CEO: The Controversy over Board Leadership Structure*, STAN. CLOSER LOOK SERIES (June 14, 2016), https://www.gsb.stanford.edu/faculty-research/publications/chairman-ceo-controversy-over-board-leadership-structure.

58. SPENCER STUART BOARD SERVICES, 2016 SPENCER STUART BOARD INDEX: A PERSPECTIVE ON U.S. BOARDS 23 (2016); *see* SULLIVAN & CROMWELL LLP, 2017 PROXY SEASON REVIEW 11 (2017), https://www.sullcrom.com/siteFiles/Publications/SC_Publication_2017_Proxy_Season_Review.pdf [hereinafter SULLIVAN & CROMWELL LLP, 2017 PROXY SEASON REVIEW].

59. *See* FIN. REPORTING COUNCIL, DEVELOPMENTS IN CORPORATE GOVERNANCE AND STEWARDSHIP 2016 9–11 (2017); *see also* HOUSE OF COMMONS BUSINESS, ENERGY AND INDUSTRIAL STRATEGY COMMITTEE, *supra* note 33, at ¶ 17.

60. THE U.K. STEWARDSHIP CODE 1 (FIN. REPORTING COUNCIL 2012) [hereinafter FIN. REPORTING COUNCIL 2012]; THE U.K. STEWARDSHIP CODE 1 (FIN. REPORTING COUNCIL 2010) [hereinafter FIN. REPORTING COUNCIL 2010]. A revised version of the code, which, like the U.K. Corporate Governance Code, operates on a "comply or explain" basis, was released in 2012. *See generally* Jennifer G. Hill, *Good Activist/Bad Activist: The*

of the underlying premises of this code is that institutional shareholders have a nondelegable responsibility to engage with the companies in which they invest.[61] The U.K. Stewardship Code encourages institutional investors to exercise their power in numerous "hands-on ways"—by means of voting, monitoring, and engaging in "purposeful dialogue" with companies about matters such as strategy, performance, risk, and corporate governance (including corporate culture and executive pay).[62] High-level engagement of this kind is common in Scandinavian countries and has been encouraged under recent reforms in the broader European context.[63] It is also an increasingly important theme in Asian corporate governance. Japan adopted its own Stewardship Code, based on the U.K. model, in 2014, and many other Asian jurisdictions have now followed suit.[64] An analogous set of stewardship principles was adopted in the United States in early 2017, however, it is notable that the principles were initiated not, as in the United Kingdom and Japan, by a quasi-regulator, but rather by a group of institutional investors themselves.[65]

Rise of International Stewardship Codes, 41 SEATTLE. U. L. REV. 497 (2018) [hereinafter Hill, *Good Activist/Bad Activist*].

61. FIN. REPORTING COUNCIL 2012, *supra* note 60, at 2; *see also* Kate Burgess, *Myners Lashes Out at Landlord Shareholders*, FIN. TIMES (London), Apr. 21, 2009, https://www.ft.com/content/c0217c20-2eaf-11de-b7d3-00144feabdc0; Jennifer Hughes, *FSA Chief Lambasts Uncritical Investors*, FIN. TIMES (Mar. 12, 2009), https://www.ft.com/content/9edc7548-0e8d-11de-b099-0000779fd2ac?mhq5j=e6.

62. FIN. REPORTING COUNCIL 2012, *supra* note 60, at 1, 6. There is an increasing focus in the United Kingdom on dialogue and engagement about corporate culture. *See e.g.*, FIN. REPORTING COUNCIL, CORPORATE CULTURE AND THE ROLE OF BOARDS: REPORT OF OBSERVATIONS 7 (2016) https://www.frc.org.uk/getattachment/3851b9c5-92d3-4695-aeb2-87c9052dc8c1/Corporate-Culture-and-the-Role-of-Boards-Report-of-Observations.pdf.

63. Richard Milne, *Norway Oil Fund Chief Jettisons Passivity*, FIN. TIMES (London) (Aug. 10 2015), https://www.ft.com/content/4ea976d0-26d6-11e5-9c4e-a775d2b173ca?mhq5j=e6; Gretchen Morgenson, *At U.S. Companies, Time to Coax the Directors into Talking*, N.Y. TIMES, Mar. 28, 2015, https://www.nytimes.com/2015/03/29/business/time-to-coax-the-directors-into-talking.html; Ruth Sullivan, *Traditional Investors Adopt Activism*, FIN. TIMES (London), May 5, 2013, https://www.ft.com/content/62d5ea16-b253-11e2-a388-00144feabdc0. The Council of the EU recently adopted a directive designed to enhance shareholder engagement in listed European companies by reviewing the current Shareholders' Rights Directive (2007/36/EC). *See* Council of the EU Press Release 173/17, Shareholders' rights in EU companies: Council formal adoption (Apr. 3, 2017), https://www.consilium.europa.eu/en/press/press-releases/2017/04/03/shareholder-rights-eu-companies/.

64. *See* THE COUNCIL OF EXPERTS CONCERNING THE JAPANESE VERSION OF THE STEWARDSHIP CODE, PRINCIPLES FOR RESPONSIBLE INSTITUTIONAL INVESTORS: "JAPAN'S STEWARDSHIP CODE"—TO PROMOTE SUSTAINABLE GROWTH OF COMPANIES THROUGH INVESTMENT AND DIALOGUE (2014), http://www.fsa.go.jp/en/refer/councils/stewardship/01.pdf. The Japanese Stewardship Code was amended in May 2017 to address certain concerns about its effectiveness. *See* THE COUNCIL OF EXPERTS ON THE STEWARDSHIP CODE, PRINCIPLES FOR RESPONSIBLE INSTITUTIONAL INVESTORS: "JAPAN'S STEWARDSHIP CODE"—TO PROMOTE SUSTAINABLE GROWTH OF COMPANIES THROUGH INVESTMENT AND DIALOGUE (2017), http://www.fsa.go.jp/en/refer/councils/stewardship/20170529/01.pdf. Other Asian jurisdictions to introduce Stewardship Codes include Hong Kong, South Korea, Malaysia, Singapore, Taiwan, and Thailand. *See generally* Hill, *Good Activist/Bad Activist*, *supra* note 60; Alice Klettner, *The Impact of Stewardship Codes on Corporate Governance and Sustainability*, 23 N.Z. BUS. L.Q. 259, 260 (2017).

65. In January 2017, the Investor Stewardship Group ("ISG"), a collective of some of the largest U.S.-based and international asset owners and managers, released its Framework for Stewardship and Governance of U.S. Listed Companies. *See* ISG, THE PRINCIPLES: STEWARDSHIP FRAMEWORK FOR INSTITUTIONAL INVESTORS (2017), https://www.isgframework.org/stewardship-principles/ [hereinafter ISG, STEWARDSHIP PRINCIPLES]; ISG, CORPORATE GOVERNANCE PRINCIPLES FOR U.S. LISTED COMPANIES: CORPORATE GOVERNANCE

The U.K. Stewardship Code goes well beyond merely encouraging institutional shareholders to engage more with the companies in which they invest. It also provides a framework for more aggressive conduct by investors if the board of directors is unresponsive to their concerns.[66] In these circumstances, the U.K. Stewardship Code envisages escalation of conduct and states that institutional investors should establish guidelines as to "when and how" they will intensify their activism.[67] Principle 4 of the Code, for instance, specifies various forms of activist conduct, such as "intervening jointly with other institutions on particular issues" and requisitioning a shareholder meeting to remove directors from office.[68]

Recent reforms in Australia also address the issue of unresponsive boards, in the context of executive pay. In 2011, Australia enacted its so-called "two strikes rule,"[69] which greatly strengthened the position of shareholders in exercising their annual "say on pay" voting rights.[70] Under the two strikes rule, any listed Australian corporation that suffers two consecutive "strikes"—namely shareholder "no" votes of 25% or more on the annual directors' remuneration report—must then put a "spill resolution" to its shareholders.[71] If successful, the spill resolution requires all board members to submit to re-election by the company's shareholders within ninety days.[72]

These international regulatory developments are consistent with Gilson and Gordon's theory of agency capitalism[73] and adopt a positive narrative about the role of shareholders in corporate governance. They assume that institutional investors have a valuable role to play in corporate governance and that this role may, in appropriate circumstances, include activism.[74]

V. THE U.S. SHAREHOLDER EMPOWERMENT DEBATE

In contrast to these international regulatory trends, many contemporary U.S. developments reveal a fundamentally different narrative concerning shareholders. Nowhere is the tension between competing images of shareholders and

FRAMEWORK FOR U.S. LISTED COMPANIES (2017), https://www.isgframework.org/corporate-governance-principles/ [hereinafter ISG, CORPORATE GOVERNANCE PRINCIPLES]; ISG, *Corporate Governance and Stewardship Principles*, HARV. L. SCH. F. CORP. ON GOVERNANCE & FIN. REG. (Feb. 7, 2017), https://corpgov.law.harvard.edu/2017/02/07/corporate-governance-and-stewardship-principles/; Abe M. Friedman, *Investor Coalition Publishes U.S. Stewardship Code*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Feb. 9, 2017), https://corpgov.law.harvard.edu/2017/02/09/investor-coalition-publishes-u-s-stewardship-code/. *See generally* Hill, *Good Activist/Bad Activist*, *supra* note 60.

66. FIN. REPORTING COUNCIL 2012, *supra* note 60, at 8 (citing Principle 4).

67. *Id.* at 8.

68. *Id.*

69. The two strikes rule was enacted as part of the Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Act 2011 (Austl.). The rule is found in Corporations Act 2001 (Cth) ss 250U-250W (Austl.).

70. Australia adopted a "say on pay" provision in 2004. *Id.* at s 250R(2).

71. *Id.* at ss 250U-250V.

72. *Id.* at s250V.

73. Gilson & Gordon, *supra* note 35, at 32.

74. *Id.* at 33.

their role in corporate governance—including the dichotomy between shareholder protection and participation—more evident than in the shareholder empowerment debate.[75] This debate, which was essentially U.S.-specific, emerged just prior to the global financial crisis, although its roots arguably go back several decades earlier.[76]

The shareholder empowerment debate related to whether U.S. corporate law should make greater use of governance strategies involving appointment and decision rights, to bolster the position of investors vis-à-vis the board of directors.[77] On one side of the debate, Professor Bebchuk advocated enhanced use of governance strategies in several key areas of U.S. corporate law, including director elections and amendment of corporate constitutions.[78] In the director election context, Bebchuk proposed "proxy access" reforms, which were designed to give U.S. shareholders stronger rights in the director nomination process for contested board elections, via access to the corporation's own proxy material.[79] Like shareholder empowerment itself, proxy access was not a new debate in U.S. corporate law—it simmered beneath the surface for at least fifty years.[80] Bebchuk argued that, without proxy access reforms, shareholders' notional power to replace directors in the United States was, in fact, illusory.[81]

The issue of shareholder proxy access became linked to another contentious topic relating to director elections: majority voting. Under Delaware law, majority voting is the default standard that applies for all shareholder decisions except

75. William W. Bratton & Michael L. Wachter, *The Case Against Shareholder Empowerment*, 158 U. PA. L. REV. 653 (2010).

76. *E.g.*, William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 666 (1974).

77. *See* Jennifer G. Hill, *The Rising Tension Between Shareholder and Director Power in the Common Law World*, 18 CORP. GOVERNANCE: AN INT'L REV. 344, 344 (2010) [hereinafter Hill, *The Rising Tension*] (discussing competing arguments in the U.S. shareholder empowerment debate).

78. In relation to director elections, see Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 696–97 (2007) [hereinafter Bebchuk, *The Myth of the Shareholder Franchise*]. *See generally* Lucian Arye Bebchuk, *The Case for Shareholder Access to the Ballot*, 59 BUS. LAW. 43 (2003) [hereinafter Bebchuk, *The Case for Shareholder Access*]. In relation to amendment of the corporate constitution, see generally Lucian A. Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833 (2005) [hereinafter Bebchuk, *The Case for Increasing Shareholder Power*]; Lucian A. Bebchuk, *Letting Shareholders Set the Rules*, 119 HARV. L. REV. 1784 (2006) [hereinafter Bebchuk, *Letting Shareholders Set the Rules*].

79. *See generally* Lucian A. Bebchuk & Scott Hirst, *Private Ordering and the Proxy Access Debate*, 65 BUS. LAW. 329 (2010).

80. *Id.* at 330; Lewis J. Sundquist III, Comment, *Proposal to Allow Shareholder Nomination of Corporate Directors: Overreaction in Times of Corporate Scandal*, 30 WM. MITCHELL L. REV. 1471, 1471 (2004); *see also* Richard M. Buxbaum, *The Internal Division of Powers in Corporate Governance*, 73 CALIF. L. REV. 1671, 1682–83 (1985) (noting the SEC's "jawboning" on this issue over a long period of time).

81. *See* Bebchuk, *The Case for Shareholder Access*, *supra* note 78, at 44; Bebchuk, *The Myth of the Shareholder Franchise*, *supra* note 78, at 677; Leo E. Strine, Jr., *Towards a True Corporate Republic: A Traditionalist Response to Bebchuk's Solution for Improving Corporate America*, 119 HARV. L. REV. 1759, 1782 (2006) [hereinafter Strine, *Towards a True Corporate Republic*].

the election of directors,[82] which, in contrast, falls under a plurality voting default rule.[83] Combined with proxy access restrictions, plurality voting can significantly undermine shareholder influence and choice in director elections. Under a plurality voting system, board nominees that run unopposed can be elected, even if they receive far less than majority shareholder approval.[84] Indeed, in an uncontested board election, a single vote can be sufficient to ensure success.[85]

Bebchuk's pro-empowerment stance relied on both efficiency and accountability policy rationales.[86] It envisaged increased shareholder participation in corporate decision-making as an alternative, and less intrusive, governance mechanism to external intervention by legislators and regulators.[87] The 2006 Paulson Committee suggested that an independent justification for stronger shareholder rights was the fundamental power imbalance between management and shareholders under U.S. corporate law.[88] Another possible justification is the practical insignificance of the duty of care as a regulatory strategy in the United States. This duty, which constitutes a real liability risk to directors in some common law jurisdictions such as Australia,[89] poses virtually no such risk to U.S. directors in the absence of fraud or self-dealing.[90]

The shareholder empowerment reform agenda encountered intense opposition. Anti-empowerment commentators asserted that, far from improving U.S. economic competitiveness, reforms granting shareholders stronger legal powers would potentially destroy it.[91] Commentators, such as Professor Stephen Bainbridge, claimed that shareholder disempowerment was not a defect of U.S. corporate law, but rather its hallmark and a natural corollary of centralized board

82. DEL. CODE ANN. tit. 8, § 216(2) (2018).

83. *Id*. § 216(3).

84. *Id*. § 216.

85. Note, however, that where a shareholder-adopted bylaw amendment specifies that a majority vote is necessary for the election of directors, the bylaw cannot be amended or repealed by the board of directors. *See id.*

86. Bebchuk, *The Case for Increasing Shareholder Power*, *supra* note 78, at 838; Bebchuk, *The Myth of the Shareholder Franchise*, *supra* note 78, at 678–79.

87. COMM. ON CAPITAL MKTS. REGULATION, INTERIM REPORT OF THE COMMITTEE ON CAPITAL MARKETS REGULATIONS, xii-xiii, 93–114 (2006); Bebchuk, *The Case for Increasing Shareholder Power*, *supra* note 78, at 877; Bebchuk, *The Myth of the Shareholder Franchise*, *supra* note 78, at 678–79; Hal S. Scott, *What Is the United States Doing About the Competitiveness of Its Capital Markets?*, 22 J. INT'L BANKING L. & REG. 487, 489–90 (2007).

88. COMM. ON CAPITAL MKTS. REGULATION, *supra* note 87, at 103. This approach essentially ignored the pressures of the market for corporate control. *See, e.g.*, Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 113 (1965).

89. *See* Jennifer G. Hill & Matthew Conaglen, *Directors' Duties and Legal Safe Harbours: A Comparative Analysis*, *in* RESEARCH HANDBOOK ON FIDUCIARY LAW 305 (D. Gordon Smith & Andrew S. Gold eds., 2018); Michelle Welsh, *Realising the Public Potential of Corporate Law: Twenty Years of Civil Penalty Enforcement in Australia*, 42 FED. L. REV. 217, 223–34 (2014).

90. Bernard Black et al., *Outside Director Liability*, 58 STAN. L. REV. 1055, 1090 (2006); Holger Spamann, *Monetary Liability for Breach of the Duty of Care?*, 8 J. LEGAL ANALYSIS 337, 337 (2016).

91. *See generally* Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735 (2006).

authority.[92] They argued that shareholder protection was a more effective regulatory mechanism than participatory rights and that shareholders were already adequately protected by the market; the ability to exit and to diversify their holdings; and by modern governance measures, such as performance-based pay.[93]

A negative image of shareholders as predators or disloyal agents underpinned many anti-empowerment arguments. Justifications for restricting shareholder participation in corporate governance included, for example: the risk of balkanized, politicized and dysfunctional boards;[94] board blackmail; abuse of power and opportunistic conduct by sectional shareholder interests;[95] impulsive and reckless conduct by majority shareholders;[96] and a dangerous shareholder preference for short-termism.[97] Some commentators were sufficiently alarmed by the specter of stronger shareholder participation rights that they called for adoption of the "precautionary principle," commonly used in the environmental protection arena,[98] to assess any reforms that might shift the balance of power in shareholders' favor.[99]

An alternative strand of the anti-empowerment argument contended that shareholders themselves did not want stronger participatory rights in corporate governance.[100] According to this hypothesis, if shareholder empowerment were indeed a valuable corporate governance attribute, it would already have evolved in the United States.[101] Recent U.S. corporate governance developments, however, suggest otherwise. These developments show that, not only are institutional investors deeply interested in gaining stronger participation rights in corporate

92. *Id.*; Martin Lipton, *Twenty-Five Years After Takeover Bids in the Target's Boardroom: Old Battles, New Attacks and the Continuing War*, 60 BUS. LAW. 1369, 1377–78 (2005); Martin Lipton & William Savitt, *The Many Myths of Lucian Bebchuk*, 93 VA. L. REV. 733, 740 (2007); Strine, *Towards a True Corporate Republic*, *supra* note 81, at 1763.

93. Bainbridge, *Director Primacy and Shareholder Disempowerment*, *supra* note 91, at 1736.

94. Lipton & Savitt, *supra* note 92, at 748–49; Letter from Henry A. McKinnell, Chairman, Bus. Roundtable, to Jonathan G. Katz, Sec'y, SEC (Dec. 22, 2003), https://www.sec.gov/rules/proposed/s71903/s71903-381.pdf.

95. For example, unions and public employee pension funds. *See* Lipton, *Twenty-Five Years After Takeover Bids*, *supra* note 92, at 1377.

96. *See* Strine, *Towards a True Corporate Republic*, *supra* note 81, at 1763.

97. *See generally* Hill, *The Rising Tension*, *supra* note 77.

98. *See e.g.*, U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (Vol. 1), principle 15 (Aug. 12, 1992).

99. Lipton & Savitt, *supra* note 92, at 747.

100. Yair Listokin, *If You Give Shareholders Power, Do They Use It? An Empirical Analysis*, 166 J. INSTITUTIONAL & THEORETICAL ECON. 38, 38–39 (2010).

101. Bainbridge, *Director Primacy and Shareholder Disempowerment*, *supra* note 91, at 1736–37; Lipton & Savitt, *supra* note 92, at 742–44; Strine, *Towards a True Corporate Republic*, *supra* note 81, at 1774. This argument is closely related to the argument that charter competition between U.S. states tends toward optimal legal systems for regulation of capital markets. *See* Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 276–77, 290 (1977).

governance, but that, contrary to the claims of some anti-empowerment scholars,[102] they are also prepared to use those rights. Furthermore, institutional investors have become increasingly critical of restrictions on their legal rights effected by the adoption of certain governance structures, such as dual-class voting rights.[103]

VI. U.S. Developments Regarding Shareholder Power

A. Post-Crisis Developments Regarding Proxy Access Reform

The global financial crisis reactivated the issue of shareholder empowerment in the United States. The post-crisis goal of restoring investor trust provided new policy rationales for stronger shareholder rights and increased pressure for legislative change.[104]

In this novel setting, proxy access re-emerged as emblematic of the broader shareholder empowerment debate in the United States.[105] In 2009, the U.S. Securities and Exchange Commission ("SEC"), after vacillating on the issue for several years,[106] finally decided to propose a rule implementing proxy access.[107] Several other crisis-related reform proposals involving enhanced shareholder power surfaced during this period. These included a 2009 Shareholder Bill of Rights, which, according to its preamble, sought to "provide shareholders with enhanced authority over the nomination, election and compensation of public company executives."[108] The Shareholder Bill of Rights put forward numerous governance strategies designed to shift the balance of power within U.S. public

102. Bainbridge, *Director Primacy and Shareholder Disempowerment*, *supra* note 91, at 1751–53; Listokin, *supra* note 100, at 38 n.1. Even some pro-empowerment commentators, however, accept that investment managers, particularly index fund managers, may have limited economic incentives to engage in governance stewardship by exercising their participatory rights. *See* Bebchuk et. al., *The Agency Problems of Institutional Investors*, *supra* note 31, at 101.

103. Nonetheless, 19% of initial public offerings ("IPOs") in 2017 involved dual, or multiple, classes of stock, although 26% of these firms included sunset clauses relating to supermajority stock. *See* ALLIANCE ADVISORS, 2018 PROXY SEASON PREVIEW 3–4 (2018), https://allianceadvisorsllc.com/wp-content/uploads/2018/03/Alliance-Advisors-Newsletter-March-2018-2018-Proxy-Season-Preview.pdf [hereinafter ALLIANCE ADVISORS, 2018 PROXY SEASON PREVIEW]. Dual class voting rights tend to be common in the media and technology sectors. *See* Stephen Foley & Matthew Garrahan, *Investors Challenge Murdoch Voting Rights*, FIN. TIMES (Nov. 17, 2014), https://www.ft.com/content/09f209b0-6e91-11e4-a65a-00144feabdc0.

104. Bratton & Wachter, *supra* note 75, at 656–57, 716.

105. *See* David A. Skeel, Jr., *The Bylaw Puzzle in Delaware Corporate Law*, 72 BUS. LAW. 1, 5–7 (2017).

106. SEC. EXCH. COMM'N DIV. OF CORP. FIN., STAFF REPORT: REVIEW OF THE PROXY PROCESS REGARDING THE NOMINATION AND ELECTION OF DIRECTORS (Jul. 15, 2003), https://www.sec.gov/news/studies/proxyrpt.htm; Strine, *Towards a True Corporate Republic*, *supra* note 81, at 1776–77; Press Release, Sec. Exch. Comm'n, Commission to Review Current Proxy Rules and Regulations to Improve Corporate Democracy (Apr. 14, 2003), https://www.sec.gov/news/press/2003-46.htm.

107. Press Release, Sec. Exch. Comm'n, SEC Votes to Propose Rule Amendments to Facilitate Rights of Shareholders to Nominate Directors (May 20, 2009), https://www.sec.gov/news/press/2009/2009-116.htm; *see also* Hill, *The Rising Tension*, *supra* note 77, at 347.

108. *See* Shareholder Bill of Rights Act of 2009, S. 1074, 111th Cong. (2009).

corporations in favor of shareholders.[109] These proposals elicited fierce opposition and intense political lobbying by corporations.

A range of corporate governance reforms were introduced under the Dodd-Frank Act of 2010 ("Dodd-Frank Act"), the future of which is somewhat uncertain since the 2016 Presidential election.[110] These reforms, although extremely controversial at the time, were, in fact, far more modest than the Shareholder Bill of Rights proposals, which the Act superseded.[111] Some of the most contentious provisions of the Shareholder Bill of Rights, such as those relating to staggered boards and majority voting, disappeared completely during the legislative reform process.[112] Others were included in the Dodd-Frank Act, but in diluted form. Although Bainbridge has argued that the post-crisis legislative process in the United States was "hijacked" by powerful institutional investor coalitions,[113] the weakening of shareholder governance rights during the reform process is more consistent with Professor Coffee's "regulatory sine curve" hypothesis[114] and shows that reform attrition due to political lobbying often begins prior to legislative enactment.[115]

One apparently significant corporate governance provision of the Dodd-Frank Act was section 971.[116] This section laid the administrative groundwork for a federal right of proxy access, by recognizing the SEC's authority to make rules granting shareholders the right to nominate directors via the company's own proxy materials.[117] Like many other provisions of the Act, section 971 was

109. *See id.* §§ 3–5.

110. *See* Joseph A. Hall, *Predictions on Dodd-Frank's Executive Compensation Provisions*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Dec. 14, 2016), https://corpgov.law.harvard.edu/2016/12/14/predictions-on-dodd-franks-executive-compensation-provisions/; Ben Protess & Julie Hirschfeld Davis, *Trump Moves to Roll Back Obama-Era Financial Regulations*, N.Y. TIMES: DEALBOOK (Feb. 3, 2017), https://www.nytimes.com/2017/02/03/business/dealbook/trump-congress-financial-regulations.html.

111. A recurring criticism of the Dodd-Frank Act related to its status as federal legislation. Critics argued that its corporate governance provisions encroached on traditional U.S. state-based corporate law. *See* Stephen M. Bainbridge, *Dodd-Frank: Quack Federal Corporate Governance Round II*, 95 MINN. L. REV. 1779 (2011) [hereinafter Bainbridge, *Dodd-Frank: Quack Federal*]; E. Norman Veasey, *What Would Madison Think? The Irony of the Twists and Turns of Federalism*, 34 DEL. J. CORP. L. 35 (2009); Troy Paredes, Commissioner, Sec. & Exch. Comm'n, Remarks at the Center for Capital Markets Competitiveness (June 23, 2009), https://corpgov.law.harvard.edu/2009/06/30/the-proper-limits-of-shareholder-proxy-access/). According to Martin Lipton, a central battle in the corporate governance "war" has been resistance to the "fast-marching federalization of corporate governance at the expense of traditional state law." *See* Lipton, *supra* note 43.

112. *See, e.g.*, Bainbridge, *Dodd-Frank: Quack Federal*, *supra* note 111, at 1796.

113. STEPHEN M. BAINBRIDGE, CORPORATE GOVERNANCE AFTER THE FINANCIAL CRISIS 15 (2012).

114. *See generally* John C. Coffee, Jr., *The Political Economy of Dodd-Frank: Why Financial Reform Tends to Be Frustrated and Systemic Risk Perpetuated*, 97 CORNELL L. REV. 1019 (2012) (discussing the "regulatory sine curve" hypothesis).

115. *Id.*

116. *Cf.* Marcel Kahan & Edward Rock, *The Insignificance of Proxy Access*, 97 VA. L. REV. 1347 (2011) (descibing proxy access as insignificant, on the basis that mutual and pension funds are passive investors, and would therefore be unlikely to make use of the right).

117. Delaware had in fact undertaken a preemptive strike in this regard in 2009, when it introduced a new provision, DEL. CODE ANN. tit. 8, § 112 (2018), which expressly permitted Delaware corporations to adopt bylaws granting shareholders proxy access rights. *See* Lisa M. Fairfax, *Delaware's New Proxy Access: Much Ado About Nothing?*, 11 TRANSACTIONS: THE TENN. J. BUS. L. 87 (2009); Skeel, *supra* note 105, at 7, 17–18. On its

weaker than the Shareholder Bill of Rights proposals in several ways. First, although section 971 merely authorized the SEC to make proxy access rules, the analogous provision in the Shareholder Bill of Rights *required* the regulator to make such rules.[118] Secondly, whereas section 971 only provided the SEC with general rulemaking authority, the Shareholder Bill of Rights included specific preconditions for proxy access, which were quite generous to shareholders.[119] Section 4 of the Shareholder Bill of Rights, for example, granted proxy access to a shareholder, or group of shareholders, beneficially owning not less than 1% of voting shares for a continuous period of at least two years before the next scheduled annual meeting.[120]

Following the passage of the Dodd-Frank Act, the SEC adopted Rule 14a-11 under the Securities Exchange Act of 1934, granting shareholders proxy access in limited circumstances.[121] These circumstances were more restrictive than the preconditions in section 4 of the Shareholder Bill of Rights. Rule 14a-11 adopted a 3%/3-year/25% rule, which granted proxy access to a shareholder, or group of shareholders, holding at least 3% of the company's shares for the previous three years, with nominations restricted to 25% of the board of directors.[122] The inclusion of a three-year holding period requirement responded directly to ongoing concern about possible investor short-termism.[123]

It has been said that the adoption of Rule 14a-11 caused financial institutions to rejoice, "but only briefly."[124] In 2011, soon after its adoption, but before becoming operational, there was a successful challenge to the rule in *Business Roundtable v SEC*.[125] In that case, the Court of Appeals for the D.C. Circuit vacated Rule 14a-11 and reproached the SEC for acting arbitrarily and capriciously by failing to make an adequate assessment of the rule's economic effects prior to its adoption.[126]

Nonetheless, many global institutional investors, including CalPERS, regarded proxy access as "unfinished business"[127] and, in the aftermath of the *Business Roundtable* case, lobbied the SEC to revive its proxy access rulemaking efforts. These lobbying attempts were, however, unsuccessful and highlighted

face, DEL. CODE ANN. tit. 8, § 112, in combination with DEL. CODE ANN. tit. 8, § 109, appeared to enable shareholders to adopt proxy access bylaws. This was, however, a mere phantom right, because under federal law, only the board of directors had the ability to adopt this type of bylaw. *See* Fairfax, *supra*, at 101–03.

118. Shareholder Bill of Rights Act of 2009, S. 1074, 111th Cong. § 4(d)(1) (2009); BAINBRIDGE, *supra* note 113, at 14.

119. Shareholder Bill of Rights Act of 2009, S. 1074, 111th Cong. § 4(d)(2) (2009).

120. *Id.*

121. Press Release, Sec. Exch. Comm'n, SEC Adopts New Measures to Facilitate Director Nominations by Shareholders (Aug. 25, 2010), https://www.sec.gov/news/press/2010/2010-155.htm.

122. *Id.*

123. *Id.*

124. James D. Cox & Benjamin J. C. Baucom, *The Emperor Has No Clothes: Confronting the D.C. Circuit's Usurpation of SEC Rulemaking Authority*, 90 TEX. L. REV. 1811, 1812 (2012).

125. 647 F.3d 1144 (D.C. Cir. 2011); *see* Hirst, *supra* note 31, at 264–65.

126. *Bus. Roundtable*, 647 F.3d at 1148.

127. *Institutional Investors Call on SEC to Implement Financial Market Reforms*, INSTITUTIONAL ASSET MANAGER (Feb. 14, 2012), http://www.institutionalassetmanager.co.uk/2012/02/14/162178/institutional-investors-call-sec-implement-financial-market-reforms.

the difference in wording between the Shareholder Bill of Rights and the Dodd-Frank Act. Section 971 of the Dodd-Frank Act, unlike the Shareholder Bill of Rights, merely authorized, but did not oblige, the SEC to make proxy access rules, and the SEC, once bitten, was twice shy.[128]

B. Recent U.S. Developments—Use of Private Ordering to Acquire Governance Rights

The *Business Roundtable* case did not ultimately prove to be a corporate governance showstopper. Although the decision obstructed the SEC's proposed proxy access rule, it left the door open to corporate governance change through private ordering by shareholders.[129] In spite of restrictions on shareholders' participatory rights under U.S. corporate law, shareholders in public corporations have had considerable success with this strategy.[130]

Private ordering can be used to change the allocation of power between the board of directors and shareholders through either amendment to the corporate charter or the bylaws. The ability of shareholders to alter the charter is extremely limited in the United States.[131] Under Delaware law, only the board of directors can initiate charter amendments.[132] This contrasts sharply with U.K. and Australian company laws, which permit shareholders to initiate and effect changes to the corporate constitution without board approval.[133] Despite the restrictions on charter amendment under U.S. law, the number of governance-related charter amendments in public corporations rose steeply during the last decade, with shareholder pressure as an important contributing factor.[134] Nonetheless, the board's strategic superiority as gatekeeper of charter amendments necessarily affects the contents of such amendments.[135]

Bylaw amendment appears on its face to offer shareholders greater private ordering autonomy. Most U.S. states permit either the board of directors or the shareholders to alter the bylaws independently of each other.[136] Section 109(b)

128. BAINBRIDGE, *supra* note 113, at 14.

129. Some definitions of "corporate governance" explicitly include private ordering within their compass. *See*, *e.g.*, Henry N. Butler, *The Contractual Theory of the Corporation*, 11 GEO. MASON L. REV. 99, 101 (1989).

130. *See* Geeyoung Min, *Shareholder Voice in Corporate Charter Amendments*, 43 J. CORP. L. 289, 292 (2018).

131. *See generally* Robert B. Thompson & Paul H. Edelman, *Corporate Voting*, 62 VAND. L. REV. 129 (2009).

132. *See* DEL. CODE ANN. tit. 8, § 242(b)(1) (2018); *see also* MODEL BUS. CORP. ACT § 10.03 (2010).

133. *See* Hill, *The Rising Tension*, *supra* note 77, at 347. For example, *Corporations Act 2001* (Cth) s 136(2) (Austl.) permits the shareholders in a general meeting to alter or repeal the company's constitution by means of a special resolution. A special resolution is one that has been "passed by at least 75% of the votes cast by members entitled to vote on the resolution." *Corporations Act 2001* (Cth) s 9 (Austl.); *see also* Companies Act, 2006 c. 46 § 21(1) (UK).

134. *See* Min, *supra* note 130, at 291.

135. *Id.*

136. Jill E. Fisch, *The New Governance and the Challenge of Litigation Bylaws*, 81 BROOK. L. REV. 1637, 1653 (2016) [hereinafter Fisch, *The New Governance*]; Skeel, *supra* note 105, at 5, 12. Under Delaware law, although shareholders have a statutory right to alter the bylaws, the board of directors will only have that power if it is explicitly conferred by the charter. *See* DEL. CODE ANN. tit. 8, § 109(a) (2018). Publicly traded Delaware

of the Delaware General Corporation Law ("DGCL") seems to give shareholders broad latitude to amend the bylaws,[137] however, this power is limited by a qualification that the bylaws cannot be "inconsistent with law or with the certificate of incorporation."[138] This creates a Catch-22 situation between sections 109(b) and 141(a) of the DGCL,[139] which vests management power in the board of directors unless otherwise provided by the statute or the charter,[140] and renders the bylaws subservient to the charter in terms of power allocation.

Although the *Business Roundtable* case vacated Rule 14a-11, it left intact an earlier SEC amendment to Rule 14a-8, which made it possible for shareholders to put forward their own proposals to adopt proxy access bylaws.[141] The introduction of DGCL section 112 in 2009 also explicitly authorized the inclusion of proxy access-style rules, although the default rule was one of no proxy access.[142] In the wake of the SEC's failure to issue mandatory federal rules, institutional investors relied on this private ordering ability to acquire proxy access rights on a company-by-company basis.[143]

Shareholder proposals relating to general corporate governance issues have been in the spotlight in recent years. During the 2015 proxy season, for example, there were 462 such proposals submitted (a 5.5% increase from 2014) and shareholders voted on 333 of those proposals (a 34% increase from 2014).[144] In the 2016 proxy season, there was a decline in the overall number of corporate gov-

corporations invariably grant directors this power from the time of incorporation. *See* Ann M. Lipton, *Manufactured Consent: The Problem of Arbitration Clauses in Corporate Charters and Bylaws*, 104 GEO. L.J. 583, 589 n.25 (2016) [hereinafter Lipton, *Manufactured Consent*].

137. *E.g.*, DEL. CODE ANN. tit. 8, § 109(b) (2018) (permitting the bylaws to contain provisions relating, inter alia, to the business of the corporation, the conduct of its affairs, and the rights and powers of its stockholders and directors).

138. *Id.*

139. *See* Lawrence A. Hamermesh, *Corporate Democracy and Stockholder-Adopted By-Laws: Taking Back the Street*, 73 TUL. L. REV. 409, 428–33 (1998).

140. The effect of this Catch-22 situation is that shareholder power to adopt and alter bylaws is narrower than the board's parallel power. *See,* e.g., C.A. Inc. v. AFSCME Emps. Pension Plan, 953 A.2d 227, 239 (Del. 2008); Gorman v. Salamone, No. 10183-VCN, 2015 LEXIS 202 (Del. Ch. July 31, 2015). *See generally* Fisch, *The New Governance*, *supra* note 136, at 1658–61; Hill, *The Rising Tension*, *supra* note 77, at 347; Hill, *Subverting Shareholder Rights*, *supra* note 45, at 47; D. Gordon Smith et al., *Private Ordering with Shareholder Bylaws*, 80 FORDHAM L. REV. 125, 140 (2011). Shareholders are also "legally hobbled" by various other factors, when seeking to exercise their notional right to adopt and alter bylaws without board approval. *See* Lipton, *Manufactured Consent*, *supra* note 136, at 607. *See generally* Jill E. Fisch, *Governance by Contract: The Implications for Corporate Bylaws*, 106 CALIF. L. REV. 373 (2018).

141. *See* Fisch, *The New Governance*, *supra* note 136, at 1649; Jill E. Fisch, *The Destructive Ambiguity of Federal Proxy Access*, 61 EMORY L.J. 435, 451–52 (2012).

142. *See* Skeel, *supra* note 105, at 7–8.

143. *See* Bebchuk & Hirst, *supra* note 79, at 329 (criticizing a private ordering approach, against the backdrop of a no-access default rule, compared to a mandatory proxy access solution); *see also* Michal Barzuza, *Insufficient Tailoring: The Private Ordering Paradox in Corporate Law*, 8 HARV. BUS. L. REV. 131 (critiquing the widely-held view that private ordering promotes efficiency, by allowing firms to tailor corporate governance rules to their particular needs).

144. *See* RAJEEV KUMAR, GEORGESON 2015 ANNUAL CORPORATE GOVERNANCE REVIEW 4 (2015), http://www.georgeson.com/us/Documents/acgr/acgr2015.pdf [hereinafter KUMAR, GEORGESON 2015].

ernance shareholder proposals submitted (418 proposals) and voted on by shareholders (266 proposals), yet this was partially explained by increased board responsiveness to shareholder demands.[145]

Shareholder proposals during this period focused on an array of corporate governance matters, including director qualifications, separation of the roles of chair and CEO,[146] and tenure reforms.[147] However, the clear stand out issue was proxy access.[148]

Shareholder proposals relating to proxy access rose from only 17 in 2014, to over 100 at U.S. public corporations in the 2015 proxy season.[149] This was largely due to the efforts of New York City Comptroller, Scott Stringer, who filed seventy-five proposals on behalf of New York pension funds as part of the first phase of the Boardroom Accountability Project.[150] The Comptroller's proposals adopted a standardized 3%/3-year/25% proxy access matrix, in accordance with the SEC's vacated rule.[151] In 2016, approximately 200 shareholder

145. *See* RAJEEV KUMAR, GEORGESON 2016 ANNUAL CORPORATE GOVERNANCE REVIEW 4–5 (2016) [hereinafter KUMAR, GEORGESON 2016]; SULLIVAN & CROMWELL LLP, 2017 PROXY SEASON REVIEW, *supra* note 58, at 1–2, 6–7; Shirley Westcott, *2017 Proxy Season Preview*, ADVISOR (All. Advisors), Apr. 2017, at 1, http://allianceadvisorsllc.com/wp-content/uploads/2017/03/Alliance-Advisors-Newsletter-Apr.-2017-2017-Proxy-Season-Preview.pdf.

146. *See* KUMAR, GEORGESON 2015, *supra* note 144, at 4–9; KUMAR, GEORGESON 2016, *supra* note 145, at 4–7; Fisch, *The New Governance*, *supra* note 136, at 1651–52. The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) § 972 requires an issuer to disclose why it has, or has not, decided to split the role of chair and CEO. In general, shareholders tend to have had less success in pushing for separation between the chair and CEO than for other types of corporate governance reform, such as majority voting and declassification of staggered boards. Also, a number of U.S. companies, such as The Walt Disney Co. and Bank of America, have at times split the roles of chair and CEO under pressure from shareholders, only to recombine them several years later. *See* Larcker & Tayan, *supra* note 57, at 1–3.

147. *See* KUMAR, GEORGESON 2015, *supra* note 144, at 4–9.

148. KUMAR, GEORGESON 2016, *supra* note 145, at 4–7.

149. *See* KUMAR, GEORGESON 2015, *supra* note 144, at 5–6.

150. The Boardroom Accountability Project was launched in November 2014. The Comptroller continued this campaign, with analogous proposal levels in 2016 and 2017. *See* SULLIVAN & CROMWELL LLP, 2017 PROXY SEASON REVIEW, *supra* note 58, at 6–7. The second phase of the Boardroom Accountability Project was launched in September 2017 and increases pressure on major U.S. corporations to ensure board diversity, independence, and climate expertise. *See* Michael Garland and Rhonda Brauer, New York City Office of the Comptroller, *Boardroom Accountability*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Mar. 1, 2018), https://corpgov.law.harvard.edu/2018/03/01/boardroom-accountability/#more-105376; Scott M. Stringer, *Boardroom Accountability Project 2.0*, N.Y.C. COMPTROLLER, https://comptroller.nyc.gov/services/financial-matters/boardroom-accountability-project/boardroom-accountability-project-2-0/ (last visited Jan. 15, 2019).

151. All proxy access proposals submitted to a vote in the first half of 2015 contained 3%/3-year thresholds, and 98% of these also capped nominees at 25% of the board. *See* Avrohom J. Kess, *Proxy Access Proposals*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Aug. 10, 2015), https://corpgov.law.harvard.edu/2015/08/10/proxy-access-proposals/. In a small number of proposals, that percentage was 20%. There was generally no restriction on aggregation to meet the ownership threshold. *See* SULLIVAN & CROMWELL LLP, 2015 PROXY SEASON REVIEW 5 (2015), https://www.sullcrom.com/siteFiles/Publications/SC_Publication_2015_Proxy_Season_Review.pdf. Of the seventy-five proposals submitted by Scott Stringer, sixty-six ultimately went to a vote, receiving an average of 56% of votes cast. *See* Yuka Hayashi & Joann S. Lublin, *Shareholders Notch Gain in SEC's New Ballot Guidelines*, WALL ST. J. (Oct. 22, 2015, 6:12 PM), https://www.wsj.com/articles/shareholders-notch-gain-in-secs-new-ballot-guidelines-1445551924.

proxy access proposals were submitted,[152] constituting almost half of the total number of shareholder proposals for that year.

Some boards, including those at Bank of America, Citigroup, and General Electric ("GE"), voluntarily adopted, or agreed to support, shareholder proxy access.[153] In February 2015, the GE board, voluntarily (or at least preemptively)[154] adopted 3%/3-year/20% bylaw, without submitting it to a shareholder vote.[155] GE's board-adopted bylaw, however, also included an aggregation limit of twenty shareholders.[156]

By late 2015, a total of eighty U.S. corporations had adopted proxy access bylaws.[157] By mid-2016, this figure had risen to over 240.[158] It peaked in 2017 at over 425, and proxy access has now laid the groundwork for an emerging set of investor priorities concerning, for example, board diversity, environmental sustainability, and corporate culture.[159]

Although most of the adopted bylaws on proxy access followed the broad contours of the SEC's vacated Rule 14a-11 and the New York City Comptroller's proposals,[160] 95% of these bylaws introduced an aggregation limit of twenty

152. *See* KUMAR, GEORGESON 2016, *supra* note 145, at 4.

153. *Id*. at 5.

154. *See* Letter from David R. Fredrickson, Chief Counsel, U.S. Sec. and Exch. Comm'n, to Ronald O. Mueller, Chief Counsel, Gen. Elec. Co. (Mar. 3, 2015), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2015/kevinmaharrecon030315-14a8.pdf; *see also Proxy Access Proprosals*, MEMO SERIES: THE 2015 PROXY SEASON (Simpson Thacher & Bartlett LLP), Jul. 30, 2015, at 1, 5–8 (discussing other substantive grounds on which companies have based no-action requests in relation to proxy access.).

155. Ted Mann & Joann S. Lublin, *GE to Allow Proxy Access for Big Investors*, WALL ST. J. (Feb. 11, 2015, 6:40 PM), https://www.wsj.com/articles/ge-amends-bylaws-to-allow-proxy-access-for-big-investors-1423698010.

156. *See* General Electric, *By-Laws of General Electric Company*, GEN. ELECTRIC COMPANY, https://www.ge.com/sites/default/files/GE_by_laws_06_09_17.pdf (last visited Jan. 15, 2019).

157. SULLIVAN & CROMWELL LLP, PROXY ACCESS 2016: MARKET TRENDS AND SHAREHOLDER PROPOSAL DEVELOPMENTS 1 (2015), https://www.sullcrom.com/siteFiles/Publications/SC_Publication_Proxy_Access_2016_Market_Trends_and_Shareholder_Proposal_Developments.pdf [hereinafter SULLIVAN & CROMWELL LLP, PROXY ACCESS 2016].

158. *See* Cam C. Hoang, *SEC Denial of H&R Block's Request to Exclude Proxy Access Proposal*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Aug. 23, 2016), https://corpgov.law.harvard.edu/2016/08/23/hr-block-no-action-letter/; Peter Kimball & Alexandra Higgins, *The Finer Points of Proxy Access Bylaws Come Under the Microscope*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Sept. 12, 2016), https://corpgov.law.harvard.edu/2016/09/12/the-finer-points-of-proxy-access-bylaws-come-under-the-microscope/.

159. *See* Westcott, *supra* note 145, at 1–3. As of 2018, 66% of the S&P 500 Index had adopted some form of proxy access. *See* ALLIANCE ADVISORS, 2018 PROXY SEASON PREVIEW, *supra* note 103, at 2. For discussion of emerging forms of shareholder proposal involving board diversity, corporate culture, and environmental, social, and governance ("ESG") issues, see generally *id.* at 7–11. For discussion of the link between proxy access and other shareholder demands concerning, for example, board diversity, see Scott M. Stringer, *supra* note 150 ("When we launched our Boardroom Accountability Project back in 2014, we set out to give investors a true voice in who sits on corporate boards. Now that we have that power, it's time to raise our voice and demand change at some of the biggest companies in the world. . . . Diversity isn't a box to be checked—it's a strategy for economic success. Today, we're doubling down and demanding companies embrace accountability and transparency.").

160. *See* SULLIVAN & CROMWELL LLP, PROXY ACCESS 2016, *supra* note 157, at 2–3.

shareholders,[161] similar to the bylaw adopted by GE.[162] Aggregation limits pose particular problems for the nomination of board members. The Council of Institutional Investors ("CII") has explicitly stated that it does not endorse such limits or caps.[163] In keeping with the implications of agency capitalism, even though investment companies like Vanguard may vote for proxy access candidates, they are unlikely to nominate them initially.[164] Therefore, aggregation limits make it far more difficult for shareholders to reach the proxy access ownership threshold in the first place.[165]

The stance of proxy advisory firms and institutional investors vis-à-vis proxy access proposals varies, and is still evolving.[166] Although Glass Lewis and institutional investors, such as BlackRock and State Street Global Advisers, have typically adopted a case-by-case approach to these proposals, ISS departed from this policy, by substituting a standard positive position for proposals that replicate the SEC's vacated Rule 14a-11.[167] In 2016, Vanguard, which initially expressed a preference for a more demanding 5%/3-year threshold, shifted to a lower 3% standard,[168] and in 2017, Fidelity, which previously tended to oppose proxy access proposals, announced that it would in future assess all proposals on a case-by-case basis and generally support those with standard market restrictions.[169]

161. *Id.*

162. *See* Kimball & Higgins, *supra* note 158 (suggesting that a 3/3/20/20 structure has now become the standard currency for proxy access bylaws). In the lead-up to the 2017 annual meeting season, 77% of the 420 companies with proxy access rights followed this 3/3/20/20 blueprint. *See* ALLIANCE ADVISORS, 2018 PROXY SEASON PREVIEW, *supra* note 103, at 2; *see also* Lyuba Goltser & Ellen Odoner, *Heads Up for the 2017 Proxy Season*, WEIL, GOTSHAL & MANGES LLP 2 (Nov. 11, 2016), https://www.weil.com/~/media/publications/sec-disclosure-corporate-governance/2016/pcag_alert_nov_11_2016.pdf; SULLIVAN & CROMWELL LLP, 2017 PROXY SEASON REVIEW, *supra* note 58, at 8–10.

163. *See Proxy Access: Best Practices 2017*, COUNCIL INSTITUTIONAL INV. 7 (July 2017), https://www.cii.org/files/publications/misc/Proxy_Access_2017_FINAL.pdf. This position accords with the 2010 SEC proxy access rule. At the same time, CII has recognized that aggregation limits have now become the market norm. *See id*; Kimball & Higgins, *supra* note 158.

164. Gilson & Gordon, *supra* note 35, at 42–43.

165. James McRitchie has noted, for example, that public pension funds will be the most likely institutions to initiate the nomination process under proxy access. Yet the aggregation of the six largest public pension funds in Whole Foods amounts to only 1.2% of stock. *See* James McRitchie, *Fixing Proxy Access Lite*, CORPGOV.NET (Sept. 24, 2015), http://www.corpgov.net/2015/09/fixing-proxy-access-lite/. It is not surprising that the 2017 proxy access proposals of several activists, including Mr. McRitchie, focused predominantly on aggregation limits, and included proposals to raise the nominating group size to forty or fifty shareholders. *See* Westcott, *supra* note 145, at 2–3.

166. Westcott, *supra* note 145, at 2–3; ALLIANCE ADVISORS, 2015 PROXY SEASON PREVIEW 2–3 (2015), http://allianceadvisorsllc.com/wp-content/uploads/2015/04/Alliance-Advisors-Newsletter-Apr.-2015-2015-Proxy-Season-Preview.pdf [hereinafter ALLIANCE ADVISORS, 2015 PROXY SEASON PREVIEW].

167. *See* ALLIANCE ADVISORS, 2015 PROXY SEASON PREVIEW, *supra* note 166, at 3.

168. *See* Shirley Westcott, *supra* note 145, at 3; Ross Kerber, *Exclusive: Vanguard Offers Fresh Backing for 'Proxy Access' Reforms*, REUTERS (Feb. 19, 2016, 3:31 PM), https://www.reuters.com/article/us-vanguard-group-directors-exclusive/exclusive-vanguard-offers-fresh-backing-for-proxy-access-reforms-idUSKCN0VS2P8.

169. *See* Kess, *supra* note 151; Wescott, *supra* note 145, at 1; *Fidelity Funds' Proxy Voting Guidelines*, FIDELITY FUNDS (Jan. 2018), at 4, https://www.fidelity.com/bin-public/060_www_fidelity_com/documents/Full-Proxy-Voting-Guidelines-for-Fidelity-Funds-Advised-by-FMRCo-and-SelectCo.pdf.

While shareholder proxy access proposals have burgeoned, there has been a decline in the number of proposals relating to familiar corporate governance concerns, such as majority voting, the right of shareholders to convene special meetings, and declassification of staggered boards.[170] This decline, however, is itself a testament to shareholders' overall success in rewriting corporate governance rules through private ordering. They are no longer flashpoint issues because these battles have now been largely won.

In recent times, for example, there has been a dramatic shift from plurality to majority voting. Between 2006 and 2014, the percentage of S&P 500 companies with some form of majority voting rose from 16% to 90%,[171] and the percentage of S&P 100 companies with majority voting in the 2016 proxy season was 95%.[172] Shareholders have no right to convene a special meeting under Delaware law unless they are so authorized by the charter or bylaws.[173] Yet as a result of shareholder bylaw amendment proposals, almost two thirds of S&P 500 companies now grant shareholders this right.[174] Also, in the decade prior to 2014, the percentage of S&P 500 companies with declassified, or nonstaggered, boards rose from 55% to 93%.[175] As at 2016, staggered boards were present in only 4% of S&P 100 companies,[176] although they remained popular in the technology sector.[177]

170. *See* KUMAR, GEORGESON 2016, *supra* note 145 at 16.

171. Stephen J. Choi et al., *Does Majority Voting Improve Board Accountability*, 83 U. CHI. L. REV. 1119, 1127 (2016).

172. *See* David A. Bell, *Corporate Governance: A Comparison of Large Public Companies and Silicon Valley Companies*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Nov. 28, 2016), https://corpgov.law.harvard.edu/2016/11/28/corporate-governance-a-comparison-of-large-public-companies-and-silicon-valley-companies/.

173. *See* DEL. CODE ANN. tit. 8, § 211(d) (2018).

174. As of June 30, 2016, 295 companies out of the S&P 500 granted their shareholders the right to call a special meeting. *See* SULLIVAN & CROMWELL LLP, 2017 PROXY SEASON REVIEW, *supra* note 58, at 12–13; Yafit Cohn, *Special Meeting Proposals*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Sept. 2, 2016), https://corpgov.law.harvard.edu/2016/09/02/special-meeting-proposals-2/.

175. Spencer Stuart, *2014 Spencer Stuart Board Index*, SPENCER STUART BOARD SERV. 7 (2014), https://www.spencerstuart.com/~/media/pdf%20files/research%20and%20insight%20pdfs/ssbi2014web14nov2014.pdf. Between 2012 and 2014, the boards of ninety-eight S&P 500 and Fortune 500 companies were declassified, largely it seems, as a result of work undertaken by the Shareholder Rights Project at Harvard Law School. *See Shareholder Rights Project*, HARV. L. SCH. PROGRAM ON INST. INV. (2017), http://www.srp.law.harvard.edu/index.shtml. The number of S&P 500 companies with declassified boards remained stable during 2015-2016, standing at 92%. *See* SPENCER STUART BOARD SERVICES, *supra* note 58, at 14.

176. Bell, *supra* note 172; Fisch *The New Governance*, *supra* note 136, at 1647.

177. For example, approximately 50% of companies in the Silicon Valley (SV) 150 index have a staggered board. Bell, *supra* note 172.

C. The Whole Foods Saga: Private Ordering Combat and Impoverished Consent

Not all U.S. public corporations, faced with shareholder proxy access proposals, voluntarily adopted, or agreed to support, them.[178] Predictably, many engaged in pushback by, for example, issuing an opposition statement to the proposal.[179] Some corporations went further by attempting to preempt a shareholder vote on the proposal altogether. Events at Whole Foods Market, Inc. ("Whole Foods") during 2014–2015 provide a good case study of contemporary corporate governance dynamics regarding bylaw amendments and exemplify what might be termed "private ordering combat" between boards and shareholders.[180]

The facts of the Whole Foods saga were as follows. Whole Foods claimed that it could rely on Exchange Act Rule 14a-8(i)(9) to exclude a standard 3%/3-year/20% shareholder proposal submitted by James McRitchie, on the basis that it conflicted with the company's own proxy access bylaw provision proposal.[181] Yet the Whole Foods' bylaw proposal was far less generous to shareholders than McRitchie's.[182] The company's proposal introduced a stringent 9%/5-year/10% condition.[183] It also restricted proxy access to a single shareholder and prohibited any shareholder aggregation or coordination to reach the already high 9% stock ownership threshold.[184] Indeed, the Whole Foods proposal provided a classic contemporary example of Professor Eisenberg's concept of "impoverished consent," whereby shareholders are forced to vote for a management-proposed rule, in spite of preferring a different rule.[185]

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178. *See generally* Stringer, *supra* note 150 (indicating twenty-four companies targeted by the New York City Comptroller for proxy access failed to appoint women or nonwhite directors).

179. *See* Kess, *supra* note 151.

180. *See* Jennifer G. Hill, *The Trajectory of American Corporate Governance: Shareholder Empowerment and Private Ordering Combat*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (Mar. 6, 2017), https://corpgov.law.harvard.edu/2017/03/06/the-trajectory-of-american-corporate-governance-shareholder-empowerment-and-private-ordering-combat/.

181. Gretchen Morgenson, *Whole Foods' High Hurdle for Investors*, N.Y. TIMES (Jan. 3, 2015), https://www.nytimes.com/2015/01/04/business/whole-foods-high-hurdle-for-investors-.html.

182. *Compare* WHOLE FOODS MARKET INC., AMENDED AND RESTATED BYLAWS OF WHOLE FOODS MARKET, INC. (A TEXAS CORPORATION) 12–19, https://www.wholefoodsmarket.com/sites/default/files/media/Global/Company%20Info/PDFs/Whole%20Foods%20Market%20Bylaws.pdf, *with* Paul Hodgson, *At Whole Foods, Chipotle, and Others, Shareholders Prepare for Battle*, FORTUNE (Feb. 3, 2015), http://fortune.com/2015/02/03/whole-foods-chipotle-proxy-access/.

183. *See* Morgenson, *supra* note 181.

184. *See* Letter from A. J. Ericksen, Baker Botts LLP, to Office of Chief Counsel, Division of Corporation Finance, SEC (Oct. 23, 2014), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2014/jamesmcritchie120114.pdf; Letter from Matt S. McNair, Special Counsel, SEC, to A.J. Ericksen, Baker Botts LLP (Dec. 1, 2014), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2014/jamesmcritchie120114.pdf; Morgenson, *supra* note 181. Whole Foods subsequently reduced the stock threshold from 9% to 5%. *Id.* Even that lower threshold would amount to approximately U.S. $1 billion in stock. *See* Hodgson, *supra* note 182.

185. Melvin Aron Eisenberg, *The Structure of Corporate Law*, 89 COLUM. L. REV. 1461, 1477 (1989); *see also* Letter from James McRitchie, to Office of Chief Counsel, Division of Corporation Finance, SEC (Nov. 2, 2014), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2014/jamesmcritchie120114.pdf (arguing, in relation to Whole Foods' competing proxy access bylaw proposal, that boards should not be permitted "to game the system with proposals simply meant to thwart the will of shareowners").

Initially, SEC staff legitimized the Whole Foods' exclusion of McRitchie's proposal, by granting the company no-action relief.[186] However, in January 2015, following a request by the CII for reconsideration of that decision,[187] the SEC retreated from the original position taken by its staff. Then-Chair, Mary Jo White, announced that the SEC would conduct a review of the Rule 14a-8(i)(9) exemption in the light of questions concerning its "proper scope and application."[188] In a parallel move, SEC staff announced that they would "express no views on the application of Rule 14a-8(i)(9)" during the 2015 proxy season.[189] This meant that corporations, like Whole Foods, which sought to substitute company proposals for shareholder proxy access proposals, now did so at their peril and without the comfort of a no-action letter from the regulator.[190] This announcement by SEC staff extended well beyond the narrow issue of proxy access.[191] It also potentially obstructed a common mechanism used by corporations to exclude a variety of shareholder proposals, including those relating to special meeting rights; removal of supermajority provisions; and clawback proposals.[192]

In October 2015, SEC staff effectively reversed the original grant of "no action" relief to Whole Foods, with the release of new guidelines relating to shareholder proposals.[193] These guidelines narrowed the scope of legitimate exclusion to shareholder proposals that "directly conflict" with a management proposal, in the sense of being mutually exclusive, such that "a reasonable shareholder could not logically vote in favor of both proposals."[194] According to the SEC staff guidelines, proposals like those at Whole Foods, which "seek a similar objective," would not meet the high standard of direct conflict needed to justify exclusion of the shareholder proposal.[195] This potentially destroyed the value of Rule 14a-8(i)(9) as a managerial weapon in private ordering combat.

186. Letter from Matt S. McNair, *supra* note 184.

187. *See* Letter from Ann Yerger, Executive Director, Council of Institutional Investors, to Keith F. Higgins, Dir., Div. of Corp. Fin., SEC (Jan. 9, 2015), http://www.cii.org/files/issues_and_advocacy/correspondence/2015/01_09_15_CII_to_SEC_re_Whole_foods.pdf.; *see also* Letter from Ann Yerger, Executive Director, Council of Inst. Inv., to Dr. John Elstrott, Chair, Whole Foods Markets, Inc. (Jan. 8, 2015), http://www.cii.org/files/issues_and_advocacy/correspondence/2015/01_08_15_CII_to_%20WFM.pdf.

188. Public Statement, SEC, *Statement from Chair White Directing Staff to Review Commission Rule for Excluding Conflicting Proxy Proposals* (Jan. 16, 2015), https://www.sec.gov/news/statement/statement-on-conflicting-proxy-proposals.html.

189. Announcement, SEC, *Division of Corporation Finance Will Express No Views Under Exchange Act Rule 14a-8(i)(9) for Current Proxy Season* (Jan. 16, 2015), https://www.sec.gov/corpfin/announcement/cf-announcement---rule-14a-8i9-no-views.html; Keith F. Higgins, Dir., Div. of Corp. Fin., SEC, Speech at the Practising Law Institute Program on Corporate Governance: Rule 14a-8: Conflicting Proposals, Conflicting Views (Feb. 10, 2015), https://www.sec.gov/news/speech/rule-14a-8-conflicting-proposals-conflicting-views.html.

190. Hodgson, *supra* note 182; *cf.* the Business Roundtable's view that the SEC's announcement did not affect a company's ability to rely on Rule 14a-(8)(i)(8). Letter from John Engler, President, Bus. Roundtable, to Gary Retelny, President & CEO, Inst. S'holder Serv. Inc. & Katherine Rabin, CEO, Glass, Lewis & Co., http://businessroundtable.org/resources/brt-letter-response-recent-sec-announcements-conflicting-proposals.

191. *See* ALLIANCE ADVISORS, 2015 PROXY SEASON PREVIEW, *supra* note 166, at 3–4.

192. *Id.*

193. Hayashi & Lublin, *supra* note 151; DIV. OF CORP. FIN., SEC, STAFF LEGAL BULLETIN NO. 14H (CF) (Oct. 22, 2015), https://www.sec.gov/interps/legal/cfslb14h.htm.

194. DIV. OF CORP. FIN., SEC, STAFF LEGAL BULLETIN *supra* note 193.

195. *See id.*

Ultimately, the Whole Foods board itself adopted a proxy access bylaw, which became effective in mid-2015.[196] This bylaw was in the standard 3%/3-year/20% form but contained various restrictions.[197] These restrictions, which were contrary to CII's stated best practices for proxy access,[198] included, for example, an aggregation limit of twenty shareholders;[199] a requirement that loaned shares must be recalled in order to be counted towards the ownership threshold;[200] and a ban on any compensation arrangement (or "golden leash")[201] between a nominee director and a third party.[202] In September 2015, McRitchie announced that he had filed a proposal to be considered at Whole Foods' next annual meeting, seeking less onerous proxy access conditions.[203] In the lead-up to Whole Foods' annual meeting in March 2016, his new proposal received support from several large funds, as well as from ISS and Glass Lewis.[204]

Private ordering combat continues apace in U.S. public corporations, although it is evolving into new forms since the Whole Foods saga. From 2016 on, many companies attempted to exclude shareholder proposals to amend previously adopted proxy access bylaws, by relying on SEC Rule 14a-8(i)(10), which permits exclusion of shareholder proposals where the company has already "substantially implemented" a proposal.[205] Between February and March 2016, SEC staff granted approximately thirty companies no-action relief,[206] but signaled that there were limits to this relief, when they refused a request by H&R Block to authorize its intended exclusion of a bylaw amendment proposal by James McRitchie.[207] McRitchie's proposal sought to amend H&R Block's existing bylaws to be more shareholder-friendly in relation to, for example, the number of

196. *See Amended and Restated Bylaws of Whole Foods Market, Inc. (A Texas Corporation)*, *supra* note 182, at 12–19.

197. *Id.*

198. COUNCIL OF INST. INV., PROXY ACCESS: BEST PRACTICES 3–5 (2015).

199. *Amended and Restated Bylaws of Whole Foods Market*, *supra* note 182, at 12.

200. *Id.* at 15.

201. Matthew D. Cain et al., *How Corporate Governance Is Made: The Case of the Golden Leash*, 164 U. PA. L. REV. 649, 651 (2016) (discussing corporate governance developments regarding golden leashes).

202. SULLIVAN & CROMWELL LLP, PROXY ACCESS 2016, *supra* note 157, at 3.

203. The new proposal permitted an unlimited number of eligible shareholders to aggregate their shares to appoint up to 25% of the board or two directors, whichever is greater. *See* McRitchie, *supra* note 165.

204. Barry B. Burr, *Pension Funds Line Up in Favour of Proxy-Access Bylaw Change at Whole Foods*, PENSIONS & INV. (Mar. 4, 2016, 3:18 PM), http://www.pionline.com/article/20160304/ONLINE/160309922/pension-funds-line-up-in-favor-of-proxy-access-bylaw-change-at-whole-foods. McRitchie's proxy access proposal at Whole Foods' March 2016 shareholders' meeting received a 40% vote. *See* James McRitchie, *McRitchie Interview by Rafat: Whole Foods—Corporate Governance*, CORP. GOV. (Mar. 15, 2016), https://www.corpgov.net/2016/03/mcritchie-interview-by-rafat-whole-foods/.

205. *See* KUMAR, GEORGESON 2016, *supra* note 145, at 5.

206. *Id.* (noting that around forty companies were able to exclude a proposal in 2016 on the basis of "substantial implementation").

207. *See* Letter from Matt S. McNair, Senior Special Counsel, SEC, to John A. Granda, Stinson Leonard Street LLP (July 21, 2016), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2016/mcritchieyoung072116-14a8.pdf. Mr. McRitchie withdrew a proposal in 2015 to adopt proxy access after H&R Block agreed to adopt proxy access bylaws, but then lodged a proposal to amend those bylaws in 2016. *See* Hoang, *supra* note 158.

permitted nominee directors; limits on director re-nomination; shareholder aggregation prohibition; and the relevant ownership threshold.[208] His proposal reflected a growing trend from 2016 on towards "fix-it" proposals, involving more fine-tuned assessment by shareholders of restrictive secondary features of proxy bylaws.[209]

In refusing to issue a no-action letter for the benefit of H&R Block, SEC staff stated that they were unable to conclude that the company had met its burden of demonstrating that it was entitled to omit McRitchie's proposal under Rule 14a-8(i)(10) because there was insufficient evidence to show that H&R Block's proxy access bylaw "compared favorably" with the shareholder proposal.[210] SEC staff came to a similar conclusion in denying no-action relief to several other companies, including Microsoft, Apple, Walgreens, and Disney, but tension as to the scope of no-action relief shows no sign of abating.[211]

208. Hoang, *supra* note 158.

209. *See* Goltser & Odoner, *supra* note 162, at 1; Kimball & Higgins, *supra* note 158. In 2017, almost 50% of proxy access proposals sought, usually unsuccessfully, to amend previously adopted proxy access bylaws by, for example, removing restrictive features, such as aggregation limits. *See* SULLIVAN & CROMWELL LLP, 2017 PROXY SEASON REVIEW, *supra* note 58, at 8–9.

210. Letter from Matt S. McNair, *supra* note 207. The SEC has previously stated that "a determination that the Company has substantially implemented the proposal depends upon whether [the company's] particular policies, practices and procedures compare favorably with the guidelines of the proposal." Texaco, Inc. SEC No-Action Letter (Mar. 28, 1991). *See generally* Amy L. Goodman et al., *§12.08 Substantial Implementation*, *in* A PRACTICAL GUIDE TO SEC PROXY AND COMPENSATION RULES § 12.08 (5th ed. Supp. 2016) (outlining the purpose and operation of Rule 14a-8(i)(10)).

211. In relation to the no-action relief denied to Microsoft, Apple, Walgreens, and Disney during the 2016 proxy season, see Letter from Matt S. McNair, Senior Special Counsel, SEC, to Ronald O. Mueller, Gibson, Dunn & Crutcher LLP (Sept. 27, 2016), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2016/jamesmcritchie092716-14a8.pdf; Letter from Matt S. McNair, Senior Special Counsel, SEC, to Gene D. Levoff, Apple Inc. (Oct. 27, 2016), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2016/jamesmcritchieapple102716-14a8.pdf; Letter from Matt S. McNair, Senior Special Counsel, SEC, to Martin P. Dunn, Morrison & Foerster LLP (Nov. 3, 2016), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2016/johnchevedden walgreens110316-14a8.pdf; Letter from Matt S. McNair, Senior Special Counsel, SEC, to Lillian Brown, Wilmer Cutler Pickering Hale and Dorr LLP (Nov. 3, 2016), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2016/jamesmcritchiewalt110316-14a8.pdf. *See generally* Goltser & Odoner, *supra* note 162, at 3. Continuing tension concerning the scope of no-action relief is evident in a new SEC guidance note, Staff Legal Bulletin No. 141 (SLB 141), which was released in late 2017. SBL 141 invited board analysis of no-action requests and potentially provided companies with more latitude to omit shareholder proposals under the ordinary business exclusion and the economic relevance exclusion in Exchange Act Rules, 17 C.F.R. § 240.14a-8(i)(5), (7) (2018), respectively. To date, however, companies have had little success in their attempted use of SLB 141 to ground no-action relief. For example, SEC staff denied no-action relief, sought on the basis of SLB 141, to Apple, AmerisourceBergen, Citigroup, and Eli Lilly. *See* ALLIANCE ADVISORS, 2018 PROXY SEASON PREVIEW, *supra* note 103, at 4. *See generally* SEC. AND EXCH. COMM'N, DIV. OF CORP. FIN. STAFF LEGAL BULLETIN NO. 141 (CF) (Nov. 1, 2017), https://www.sec.gov/interps/legal/cfslb14i.htm; Marc Gerber et al., *Impact of SEC Guidance on Shareholder Proposals in the 2018 Proxy Season*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Jul. 4, 2018), https://corpgov.law.harvard.edu/2018/07/04/impact-of-sec-guidance-on-shareholder-proposals-in-the-2018-proxy-season/.

D. Proxy Access and Private Ordering—Some Concluding Comments

Proxy access has become the litmus test for shifts in the corporate governance balance of power within U.S. corporations.

Some of the dire predictions that marked the original shareholder empowerment debate resurfaced in this new context. For example, consistent with the growing fear of investor short-termism, Chief Justice Strine has stated that recent corporate governance developments leave boards increasingly subject to the "immediate whims of stockholders."[212] The reality of shareholder proxy access has also prompted concern about board dysfunction, including "the risk of creating factions and a poisonous atmosphere."[213]

The Business Roundtable sought to depict the developments relating to private ordering by shareholders as fundamentally inconsistent with centralized board authority.[214] After the SEC's volte-face in relation to Whole Foods in January 2015, the Business Roundtable wrote to Glass Lewis and ISS, requesting that they refrain from making proxy voting recommendations if companies chose, without SEC staff authorization, to exclude shareholder proposals under Rule 14a-8(i)(9).[215] The Business Roundtable justified its request on the basis that "it would be inappropriate for ISS and Glass Lewis to apply their voting policies in a way that substitutes their own judgment as to the appropriate course of action in place of the Board's judgment."[216] Proxy advisers and institutional investors, such as BlackRock, TIAA-CREF, and CalPERS, did not accede to this request, instead announcing that they would oppose the election of any directors, who were responsible for omitting shareholder proxy access resolutions without proper SEC staff authorization.[217]

Proxy access is merely the tip of the iceberg in relation to current U.S. developments concerning allocation of power in corporate governance and shows that private ordering through bylaw amendment is definitely a two-way street.[218] As noted, many boards have engaged in private ordering combat, using their own

212. Strine, *supra* note 39, at 792. According to Chief Justice Strine, recent corporate governance developments, such as the trend to declassification of boards of directors, have resulted in the rapid erosion of mechanisms that traditionally operated as "checks on direct stockholder democracy." *Id*.

213. Yvan Allaire & François Dauphin, *Who Should Pick Board Members?*, CLS BLUE SKY BLOG (Nov. 30, 2015), http://clsbluesky.law.columbia.edu/2015/11/30/who-should-pick-board-members/.

214. *See generally* Letter from John Engler, *supra* note 190.

215. *Id.*

216. *Id.*

217. ALLIANCE ADVISORS, 2015 PROXY SEASON PREVIEW, *supra* note 166, at 2; ISS, 2015 BENCHMARK U.S. PROXY VOTING POLICIES: FREQUENTLY ASKED QUESTIONS 5 (Feb. 19, 2015), https://www.issgovernance.com/file/policy/2015faqspoliciesonselectedtopics.pdf. More recently, BlackRock has warned that it may vote against the election of certain directors in a wide range of circumstances, including where BlackRock does not consider: that certain directors are independent; that the board has substantially addressed shareholder concerns; that the composition of the board meets diversity standards; or that the company has dealt with environmental and social issues appropriately. *See* BLACKROCK, PROXY VOTING GUIDELINES FOR US SECURITIES 6 (2018), https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf.

218. *See generally* Fisch, *supra* note 136 (describing private ordering governance innovations by both shareholders and boards as a form of "new governance").

bylaw amendment powers to dilute the efficacy of shareholder proxy access by adding stringent preconditions, such as aggregation limits and prohibitions on golden leashes.[219] The skirmishes at companies such as Whole Foods, H&R Block, and Microsoft all raised the issue of "impoverished consent," which continues to resonate in the context of shareholder proposals.[220]

Private ordering combat has also been evident in the context of shareholder litigation,[221] where directors adopted "exclusive forum" bylaw provisions as an antidote to multi-forum shareholder suits.[222] Following the 2013 *Boilermakers* decision,[223] which upheld exclusive forum bylaws that are unilaterally adopted by the directors, such provisions proliferated in U.S. public companies,[224] particularly in the highly litigious context of M&A deals.[225] Finally, some boards at-

219. *See supra* notes 199–202.

220. In December 2017, for example, SEC staff issued a no-action letter to The AES Corporation ("AES"), permitting the company to exclude a shareholder "fix-it" proposal, which requested the company to amend the bylaws to reduce the ownership threshold for convening special meetings from 25% to 10%, based on Exchange Act Rule 14a-8(i)(9). Although CII wrote to the SEC, claiming that AES was "gaming the system to exclude a vote on a legitimate proposal that receives substantial shareholder support when it is voted on at other companies," SEC staff subsequently issued no-action letters permitting several other companies, including ITT, JPMorgan Chase, and Capital One Financial, to exclude shareholder proposals on this basis, provided certain disclosure requirements were met. *See* Letter from Evan S. Jacobson, Special Counsel, SEC, to Brian A. Miller, The AES Corporation (Dec. 19, 2017), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2016/jamesmcritchie092716-14a8.pdf; Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors, to William H. Hinman, Director, Division of Corporation Finance, SEC (Jan. 31, 2018), https://www.cii.org/files/issues_and_advocacy/correspondence/2018/January%202018%2014a-8(i)(9)%20FINAL.pdf; ALLIANCE ADVISORS, 2018 PROXY SEASON PREVIEW, *supra* note 103, at 4–5. Another potential problem is that of "fragmented consent." A 2013 clash at Allergan highlighted this issue. Although Allergan shareholders voted in favor of a charter amendment authorizing the holders of 25% of the company's shares to convene a special meeting, the Allergan board unilaterally adopted extremely broad bylaws, which interacted with, and effectively subverted, that right. *See* Fisch, *supra* note 136, at 1655–56; Steven Davidoff Solomon, *In Botox Maker Fight, Focus on Clever Strategy Overshadows the Goal*, N.Y. TIMES: DEALBOOK (Aug. 12, 2014), https://dealbook.nytimes.com/2014/08/12/in-allergan-fight-a-focus-on-clever-strategy-overshadows-the-goal/; Steven Davidoff Solomon, *Allergan-Valeant Fight Holds Lessons for All Corporate Shareholders*, N.Y. TIMES: DEALBOOK (Sept. 18, 2014), https://dealbook.nytimes.com/2014/09/18/allergan-valeant-fight-holds-lessons-for-all-corporate-shareholders/. In November 2014, the Allergan board announced it was amending the bylaws to reduce the restrictions on shareholders convening a special meeting. *See Allergan Board of Directors Announces Approval of Amendments to Company's Bylaws*, BUSINESS WIRE (Nov. 12, 2014), http://www.businesswire.com/news/home/20141112005381/en/Allergan-Board-Directors-Announces-Approval-Amendments-Company%E2%80%99s.

221. James D. Cox, *Whose Law Is It? Battling Over Turf in Shareholder Litigation*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER, *supra* note 7, at 333, 333–37; Fisch, *supra* note 136, at 1665–67; Skeel, *supra* note 105, at 8–11.

222. Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 959 (Del. Ch. 2013); John Armour et al., *Is Delaware Losing Its Cases?*, 9 J. EMPIRICAL LEGAL STUD. 605, 609 (2012); Skeel, *supra* note 105, at 8–9; *see also* Roberta Romano & Sarath Sanga, *The Private Ordering Solution to Multiforum Shareholder Litigation*, 14 J. EMPIRICAL LEGAL STUD. 31, 32–33 (2017).

223. *Boilermakers*, 73 A.3d at 963.

224. For example, by August 2014, within a year of the *Boilermakers* decision, 746 U.S. public companies had adopted exclusive forum bylaws. Sixty percent of these were adopted without a shareholder vote. *See* Fisch, *supra* note 136, at 1667. *See generally* Romano & Sanga, *supra* note 222.

225. Robert B. Little, *"Exclusive Forum" Bylaws Fast Becoming an Item in M&A Deals*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (May 13, 2015), https://corpgov.law.harvard.edu/2015/05/13/exclusive-forum-bylaws-fast-becoming-an-item-in-ma-deals/.

tempted to introduce U.K.-style "loser pays" rules by means of fee-shifting bylaws, which would have potentially inhibited shareholder litigation. Following the 2014 *ATP Tour* decision,[226] where the Delaware Supreme Court upheld the prima facie validity of fee-shifting bylaws, over seventy U.S. public companies adopted such provisions.[227] A conception of the bylaws as a contract between the company and its shareholders (even though that contract had been drafted and adopted by the directors) was fundamental to the analysis of the courts in both the *Boilermakers*[228] and the *ATP Tour*[229] decisions.[230]

The board of directors and shareholders have not, however, been the only combatants in recent bylaw disputes. There have also been tussles between Delaware's courts and its legislature regarding bylaw validity, and these clashes have sometimes resulted in different outcomes.[231] For example, the Delaware legislature responded to the litigation bylaw developments by explicitly permitting the inclusion of forum-selection provisions in the charter or bylaws,[232] but prohibiting the inclusion of fee-shifting provisions in either the charter or bylaws.[233] These recent interventions of the Delaware legislature, though not unprecedented, are unusual.[234]

Proxy advisers have themselves recognized the broader corporate governance implications of the proxy access debate and private ordering. ISS has confirmed, for example, that it will recommend its clients oppose directors who adopt charter or bylaw provisions that "materially diminish shareholder rights" without shareholder consent.[235] This is no idle threat today, given the changes

226. ATP Tour, Inc. v. Deutscher Tennis Bund, 91 A.3d 554 (Del. 2014).

227. Laura D. Richman & Andrew J. Noreuil, *DGCL Amendments Authorize Exclusive Forum Provision & Prohibit Fee-Shifting Provisions*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (July 6, 2015), https://corpgov.law.harvard.edu/2015/07/06/dgcl-amendments-authorize-exclusive-forum-provisions-and-prohibit-fee-shifting-provisions/. It appears that thirty of these companies were Delaware corporations. *See* Fisch, *supra* note 136, at 1674–75.

228. *See Boilermakers*, 73 A.3d at 955–56.

229. *ATP Tour, Inc.*, 91 A.3d at 554.

230. *See generally* Skeel, *supra* note 105, at 9. For criticism of this staunchly contractual approach, and its premise of implied consent by shareholders, see Cox, *supra* note 221, at 333; Deborah A. DeMott, *Forum Selection Bylaws Refracted Through an Agency Lens*, 57 ARIZ. L. REV. 269, 276 (2015); Fisch, *supra* note 140, at 377; Lipton, *Manufactured Consent*, *supra* note 136, at 58.

231. Skeel, *supra* note 105, at 7–11.

232. The legislature mandated, however, that Delaware must be one of the selected forums. DEL. CODE ANN. tit. 8, § 115 (2018) (prohibiting Delaware corporations from adopting charter or bylaw provisions that exclude Delaware as a forum for internal corporate claims); *see also* Skeel, *supra* note 105, at 10 (describing this section as a "rather remarkable new provision").

233. DEL. CODE ANN. tit. 8, §§ 102(f), 109(b) (2018). *See* Fisch, *The New Governance*, *supra* note 136, at 1669–71; Richman & Noreuil, *supra* note 227; Skeel, *supra* note 105, at 9–11; *see also* Stephen M. Bainbridge, *Fee-Shifting: Delaware's Self-Inflicted Wound*, 40 DEL. J. CORP. L. 851, 868–69 (2016) (describing fee-shifting bylaws as a private ordering solution to the U.S. "litigation crisis," and arguing that the legislative intervention into this process results in a sub-optimal outcome for Delaware corporations).

234. *See* Skeel, *supra* note 105, at 10, 13–14.

235. ISS, *supra* note 217, at 5–6. This approach is also consistent with the policy goals of the 2017 ISG Stewardship Principles and ISG Corporate Governance Principles. *See* ISG STEWARDSHIP PRINCIPLES, *supra* note 65; ISG CORPORATE GOVERNANCE PRINCIPLES, *supra* note 65.

that have occurred to U.S. share ownership and the corporate governance landscape—changes that have left directors increasingly vulnerable to shareholder discontent.

VII. HAS THERE BEEN A SEA-CHANGE IN U.S. CORPORATE GOVERNANCE? MARTIN LIPTON AS BELLWETHER

Until recently, many anti-empowerment proponents adopted arguments presenting both institutional investors and activists in a negative light. In 2013, for example, Martin Lipton, who has been described as "one of the leading warriors against activists,"[236] spoke scathingly of institutional investors. He warned that their voting power was being "harnessed by a gaggle of activist hedge funds who troll through SEC filings," seeking short-term profit at the expense of both the company and the economy.[237] This analysis depicted institutional investors as unfaithful servants that collaborate with predatory hedge funds.

Nonetheless, the corporate governance developments discussed above, together with high profile proxy battles, such as the activist campaign of Trian Management Fund ("Trian") against DuPont,[238] had an interesting effect on anti-empowerment rhetoric. Only two weeks before DuPont's annual shareholder meeting in May 2015—and, perhaps more significantly, only two days after the

236. Ronald Barusch, *Dealpolitik: How Activism Is Reshaping Directors' Roles*, WALL ST. J. (Apr. 30, 2015, 4:03 PM), http://blogs.wsj.com/moneybeat/2015/04/30/dealpolitik-whats-next-for-activism/.

237. Martin Lipton, *Bite the Apple; Poison the Apple; Paralyze the Company; Wreck the Economy*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Feb. 26, 2013), https://corpgov.law.harvard.edu/2013/02/26/bite-the-apple-poison-the-apple-paralyze-the-company-wreck-the-economy/.

238. Antoine Gara, *Trian Concedes Defeat in Proxy War with DuPont's Ellen Kullman*, FORBES (May 13, 2015, 9:27 AM), http://www.forbes.com/sites/antoinegara/2015/05/13/trian-dupont-ellen-kullman-nelson-peltz/#26a990672a0d; Steven Davidoff Solomon, *DuPont's Battle with Nelson Peltz May Confound Shareholders*, N.Y. TIMES: DEALBOOK (May 1, 2015), https://www.nytimes.com/2015/05/02/business/duponts-battle-with-nelson-peltz-may-confound-shareholders.html. In its long-running activist campaign against DuPont, Trian sought to place four nominees, including founder Nelson Peltz, on DuPont's board of directors, with an eye to breaking up the company. Although, in the lead-up to DuPont's annual shareholder meeting in May 2015, the outcome was regarded as too close to call, DuPont's then-CEO, Ellen Kullman, appeared to win a major victory when the company's shareholders elected all twelve of DuPont's own nominees. *See DuPont Shareholders Elect All 12 DuPont Nominees at 2015 Annual Meeting. Based on Preliminary Results*, DUPONT (May 13, 2015), http://www.dupont.com.au/corporate-functions/media/press-releases/-dupont-shareholders-elect-all-12-dupont-nominees-at-2015-annual.html. DuPont's victory was by a narrow margin (*i.e.* a majority of 52%). Central to that victory was the fact that indexed investors, such as the Vanguard Group, BlackRock and State Street, which collectively held 16.7% of shares, and CalPERS sided with DuPont's management. *See* John C. Coffee, Jr., *Lessons of DuPont: Corporate Governance for Dummies; Corporate Securities*, 253 N.Y.L.J. 5 (2015). Ultimately, however, Ellen Kullman's victory at DuPont's 2015 annual shareholder meeting was Pyrrhic only, when, in the following quarter, she was removed from office by DuPont's board of directors. *See* Jeff Mordock, *A Wildly Different DuPont a Year After Peltz Defeat*, DEL. ONLINE (Apr. 29, 2016, 10:35 AM), http://www.delawareonline.com/story/money/2016/04/29/duponts-wild-ride/83650956/; Jeffrey Sonnenfeld, *Another Suicidal Board? How DuPont's Directors Failed Ellen Kullman*, FORTUNE (Oct. 13, 2015), http://fortune.com/2015/10/13/dupont-board-ellen-kullman/. In December 2015, DuPont and The Dow Chemical Co. announced a proposed "merger of equals" to create a $156 billion conglomerate, which would subsequently be split into three separate companies. The merger was completed in August 2017; however, the break-up plan was revised due to further pressure from activist investment funds, including Trian. *See* Ed Crooks, *DowDuPont Revises Its Break-Up Plan*, FIN. TIMES (London) (Sept. 12, 2017), https://www.ft.com/content/f1c87204-97b2-11e7-a652-cde3f882dd7b.

announcement that ISS would recommend that shareholders vote in favor of two of Trian's board nominees[239]—Mr. Lipton departed from his familiar "take no prisoners" rhetorical style.

Adopting a new, more conciliatory tone, he stated that "Trian Fund Management and its founder, Nelson Peltz, have clearly established credibility and acceptability . . . [and t]hey have become respected members of the financial community."[240] Deviating even further from his customary stance, Mr. Lipton suggested that corporations facing activist campaigns would be "well advised to meet with the activist and discuss the activist's criticisms and proposals, which are frequently presented in the form of a well-researched whitepaper."[241] Finally, he commented that "[m]ajor institutional investors like BlackRock and Vanguard want direct contact with the independent directors of corporations."[242]

Coming from Martin Lipton, observations of this kind—which he echoed in relation to Trian's 2017 proxy battle against Procter & Gamble Co. ("P&G")[243]—bear the hallmark of a sea-change in the balance of power between U.S. boards, activists, and institutional investors. They constitute recognition of

239. *See Leading Proxy Advisory Firm ISS Recommends DuPont Stockholders Vote on Trian's Gold Card for Trian Nominees Nelson Peltz and John Myers*, BUSINESS WIRE (Apr. 27, 2015, 1:03 PM), http://www.businesswire.com/news/home/20150427006078/en/Leading-Proxy-Advisory-Firm-ISS-Recommends-DuPont; *see also* David Benoit, *Glass Lewis Backs Trian's Nelson Peltz for DuPont Board*, WALL ST. J. (Apr. 30, 2015, 9:38 AM), https://www.wsj.com/articles/glass-lewis-recommends-dupont-shareholders-elect-trians-nelson-peltz-1430365548.

240. Martin Lipton, *Wachtell Lipton Explains Some Lessons from DuPont-Trian*, CLS BLUE SKY BLOG (Apr. 29, 2015), http://clsbluesky.law.columbia.edu/2015/04/29/wachtell-lipton-explains-some-lessons-from-dupont-trian/.

241. *Id.*

242. *Id.*

243. *See* Martin Lipton, *Further Lessons from the P&G/Trian Proxy Fight*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Oct. 11, 2017), https://corpgov.law.harvard.edu/2017/10/12/further-lessons-from-the-pgtrian-proxy-fight/. Mr. Lipton cited equally civil comments by Procter & Gamble's ("P&G") CEO, David Taylor, who stated that "[w]e will continue to respectfully engage with Nelson Peltz, whose input we value." *Id.* Trian's proxy battle against P&G was the largest and most expensive in U.S. history. Although Mr. Peltz narrowly lost his bid to gain a board seat at a shareholders' meeting in early October 2017, he declared that P&G's victory was at best Pyrrhic, suggesting that he expected DuPont history to repeat itself with respect to P&G. *See* David Benoit & Sharon Terlep, *P&G Says Nelson Peltz Lost Bid for Board Seat by About* 0.2% *of Share Count*, WALL ST. J. (Oct. 16, 2017, 6:41 PM), https://www.wsj.com/articles/p-g-says-nelson-peltz-lost-bid-for-board-seat-by-about-0-2-of-share-count-1508190889; Sharon Terlep & David Benoit, *P&G Says Nelson Peltz Has Lost Bid for Board Seat: He Disagrees*, WALL ST. J. (Oct. 10, 2017, 8:57 PM), https://www.wsj.com/articles/p-g-board-vote-comes-down-to-the-wire-1507629601. Mr. Peltz's prediction proved correct. P&G subsequently acknowledged that the vote was "extremely close" and agreed to add Mr. Peltz to an expanded board of directors. In announcing P&G's decision, David Taylor stated "[w]e respect Nelson Peltz as a highly engaged shareowner and investor, and look forward to his contribution as a member of P&G's board." *See* Mamta Badkar, *Nelson Peltz Secures Board Seat at P&G*, FIN. TIMES (London) (Dec. 16, 2017, 12:36 AM), https://www.ft.com/content/e56def72-e1ed-11e7-8f9f-de1c2175f5ce. Trian had an easier path to success with GE, which succumbed to pressure to give Trian a GE board seat one day before the P&G shareholder vote. *See* Thomas Gryta et al., *GE Gives Activist Trian a Seat on the Board*, WALL ST. J. (Oct. 9, 2017, 7:14 PM), https://www.wsj.com/articles/trian-takes-board-seat-at-general-electric-1507549221. *See generally* Anna L. Christie, *The New Hedge Fund Activism: Activist Directors and the Market for Corporate Quasi-Control*, 19 J. CORP. L. STUD. 1 (2019), https://doi.org/10.
1080/14735970.2018.1463672 (discussing board nomination as an emerging form of hedge fund activism).

the implications of agency capitalism, whereby "sophisticated but reticent institutional investors" can, nonetheless, be prompted into supporting activism by other market players.[244]

Comments by the CEO of BlackRock, Larry Fink, also reflect this trend. Although previously critical of some activists for short-term goals,[245] Mr. Fink confirmed in 2016 that BlackRock has supported a significant number of large proxy contests in recent times.[246]

Martin Lipton's comments, combined with the rise of agency capitalism, suggest that U.S. institutional investors have become the corporate equivalent of

244. This position is reinforced by the adoption in January 2017 of the ISG Stewardship Principles. ISG, STEWARDSHIP PRINCIPLES, *supra* note 65. Interestingly, the signatories to these Principles include, not only institutional investors, but also some activist hedge funds, such as ValueAct Capital and Trian. Index funds, however, typically devote significantly less resources to stewardship than hedge funds do. *See* Bebchuk et al., *supra* note 31, at 100, 105 ("Vanguard employs about 15 staff for voting and stewardship at its 13,000 portfolio companies; BlackRock employs 24 staff for voting and stewardship at 14,000 portfolio companies; and State Street Global Advisors employs fewer than 10 staff for voting and stewardship at 9,000 portfolio companies . . . . Pershing Square Capital Management has an investment team of eight, plus several other employees, that oversee a portfolio of about 12 corporations[.]"). Institutional investors are not the only ones who can be prompted into supporting activism. As the fall-out from the campaign at DuPont shows, the board of directors of a targeted company can also be persuaded to support activist goals in some circumstances. *See* Mordock, *supra* note 238; Lucian A. Bebchuk et al., *Dancing with Activists* 9–13 (Colum. Bus. Sch. Res. Paper No. 17-44, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2948869 [hereinafter Bebchuk et al., *Dancing with Activists*] (discussing the rise in settlement agreements between the activist and target boards in recent times); *see also* ALLIANCE ADVISORS, 2018 PROXY SEASON PREVIEW, *supra* note 103, at 7 (noting that some hedge funds, including Trian Partners and Blue Harbor Capital, have now adopted ESG principles into their investment strategies, which may strengthen ties with traditional institutional investors, including pension and index funds, and create greater leverage for their activist campaigns).

245. Larry Fink, *BlackRock CEO Larry Fink Tells the World's Biggest Business Leaders to Stop Worrying About Short-Term Results*, BUS. INSIDER: THE BLACKROCK BLOG (Apr. 14, 2015, 11:18 AM), http://www.businessinsider.com/larry-fink-letter-to-ceos-2015-4?IR=T.

246. Mr. Fink stated that BlackRock had supported activists in 39% of the largest proxy contests the previous year. *See* Matt Turner, *The World's Largest Investor Just Sent This Letter to CEOs Everywhere*, BUS. INSIDER (Austl.) (Feb. 3, 2016, 5:15 AM), http://www.businessinsider.com.au/blackrock-ceo-larry-fink-letter-to-sp-500-ceos-2016-2. BlackRock has taken an increasingly active role in corporate governance issues internationally. In January 2017, BlackRock wrote to the chairmen of over 300 U.K. companies to announce that it would vote against executive pay increases unless they were linked to strong and sustainable long-term corporate performance. BlackRock argued that executives should not be rewarded for short-term rises in share price, and should only be granted increases in pay that were commensurate with increases received by rank-and-file employees. *See* Aimee Donnellan & Simon Duke, *BlackRock Lays Down the Law to Chairmen*, SUNDAY TIMES (Jan. 15, 2017, 12:01 AM), https://www.thetimes.co.uk/article/blackrock-lays-down-the-law-to-chairmen-78cssq2lj; Angela Monaghan, *World's Largest Fund Manager Demands Cuts to Executive Pay and Bonuses*, GUARDIAN (Jan. 16, 2017, 3:50 PM), https://www.theguardian.com/business/2017/jan/15/blackrock-demands-cuts-to-executive-pay-and-bonuses. BlackRock has also increased its focus on social and environmental issues, designating climate change as one of its major engagement priorities. *See* BLACKROCK, *How BlackRock Investment Stewardship Engages on Climate Risk* (2017), https://www.blackrock.com/corporate/en-gb/literature/market-commentary/how-blackrock-investment-stewardship-engages-on-climate-risk-march2017.pdf; BLACKROCK, *supra* note 217, at 12–13. Martin Lipton has acknowledged that sustainability, climate change and other environmental risks are increasingly important themes in contemporary corporate governance. *See* Martin Lipton, *Some Thoughts for Boards of Directors in 2018*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Nov. 30, 2017), https://corpgov.law.harvard.edu/2017/11/30/some-thoughts-for-boards-of-directors-in-2018/.

swing voters in politics—it seems all sides are now out to woo them in an increasingly globalized investment world.[247] Indeed, Mr. Lipton has even presented institutional investors as the best hope for corporate governance peace and "taming the activists."[248]

VIII. Divergent Approaches to Shareholder Power and the Role of Legal History

The level of controversy generated in the United States by the shareholder empowerment debate and recent corporate governance developments is puzzling to foreign eyes. Is it even appropriate to regard the current trend towards private ordering by shareholders in U.S. corporations as "activism"?[249] After all, before the decision in *Business Roundtable v. SEC*,[250] private ordering was the preferred regulatory solution of those who opposed mandatory federal proxy access rules. To describe private ordering as "activism" once it becomes a reality suggests that its initial appeal to some opponents of mandatory proxy access may have been the likelihood of failure in practice. Terminology matters, and "activism" tends to have negative connotations in the United States.[251] It is worth considering why private ordering by shareholders is described as "activism," when private ordering by the board, through, for example, unilateral bylaw amendments, is not.

As previously noted, in many common law jurisdictions outside the United States, shareholder participation rights are viewed favorably, as fundamental to corporate accountability, and are therefore protected by mandatory legislative rules.[252] The kind of engagement with corporate boards that, according to Martin

247. *See, e.g.*, Sarah Krouse et al., *Meet the New Corporate Power Brokers: Passive Investors*, WALL ST. J. (Oct. 25, 2016, 10:41 AM), https://www.wsj.com/articles/the-new-corporate-power-brokers-passive-investors-1477320101. Indeed, Vanguard's founder, John Bogle, has gone so far as to claim that index funds have today become "the invisible hand of the marketplace." *Id.*; *see also* Fisch, *supra* note 136, at 1644 (noting the connection between agency capitalism and increased issuer responsiveness to shareholder interests generally); Bebchuk et al., *Dancing with Activists*, *supra* note 244, at 4 (arguing that the increase in settlement agreements between activists and target boards is attributable to greater willingness by institutional investors and proxy advisors to support activist campaigns).

248. Lipton, *supra* note 43; *see also* Lipton, *supra* note 246 (discussing the need to forge "relationships of trust and credibility" with major institutional investors to guard against the impact of "activist attacks"). In a January 2018 letter to CEOs, Mr. Fink suggested that in order to woo investors, such as BlackRock, and tame the activists, companies must adopt "a new model of shareholder engagement," articulate their strategy for long-term growth, and "benefit all of their stakeholders . . . and the communities in which they operate." *See* Larry Fink, *Larry Fink's Annual Letter to CEOs: A Sense of Purpose*, BLACKROCK, https://www.blackrock.com/corporate/en-us/investor-relations/larry-fink-ceo-letter?cid=twitter:larryslettertoceos::blackrock (last visited Jan. 16, 2019); Peter Horst, *BlackRock CEO Tells Companies to Contribute to Society. Here's Where to Start*, FORBES (Jan. 16, 2018, 12:02 PM), https://www.forbes.com/sites/peterhorst/2018/01/16/blackrock-ceo-tells-companies-to-contribute-to-society-heres-where-to-start/.

249. *See, e.g.*, Min, *supra* note 130, at 311 n.90 (arguing that institutional investor voting on shareholder proposals constitutes "shareholder activism in a broader sense").

250. 647 F.3d 1144 (D.C. Cir. 2011).

251. Then-SEC Chair, Mary Jo White, criticized this tendency, stating that "[r]eflexively painting all activism negatively is, in my view, using too broad a brush and indeed is counterproductive." Mary Jo White, Chair, SEC, Speech Tulane University Law School 27th Annual Corporate Law Institute: A Few Observations on Shareholders in 2015 (Mar. 19, 2015), https://www.sec.gov/news/speech/observations-on-shareholders-2015.html.

252. *See, e.g.*, WALKER REVIEW, *supra* note 53, at 70–72.

Lipton, major U.S. institutional investors now seek,[253] is not contentious, for example, in the United Kingdom.

It seems that, in an era of globalized investment, U.S. institutional investors are now becoming increasingly aware of the rights held by their counterparts in other jurisdictions, and that this at least partly explains current developments in the United States, which have seen increasing use by investors of private ordering techniques to acquire shareholder rights that are common in many other jurisdictions.[254] These developments arguably reflect a new form of legal transplantation, whereby the United States has become an importer, rather than an exporter, of corporate governance norms.[255]

Why is the current attitude to changes in the allocation of power and shareholder participation rights so different in the United States to many other jurisdictions, including the United Kingdom? Legal history provides some clues.

A. The Organizational Origins of U.S. Corporate Law

Despite a similar common law heritage, there are major historical differences between U.S. and U.K. corporate law.[256] Each had a fundamentally different organizational starting point, which later prompted different forms of regulatory backlash. These divergent legal trajectories affected the internal allocation of power in companies and the interplay between mandatory and optional rules in corporate regulation in each jurisdiction. They also arguably contributed to what has been described as U.S. corporate law's "exceptionalism."[257]

U.S. corporate law originated from early U.K. royal chartered corporations and therefore had quasi-public roots.[258] English chartered corporations included ecclesiastical bodies, guilds, municipal bodies, and some trading companies.[259] Famous examples were the East India Company, which was chartered in 1600, and the Bank of England, which received its initial charter in 1694.[260] Prior to

253. Lipton, *supra* note 43. Further evidence of the pursuit of this kind of engagement by institutional investors is found in ISG, STEWARDSHIP PRINCIPLES, *supra* note 65.

254. *See* Hill, *Subverting Shareholder Rights*, *supra* note 45.

255. *Id.*

256. In comparing and contrasting the U.S. and U.K. legal systems, Professor L.C.B. Gower once stated that "if there are sufficient basic similarities to make a comparison possible, there are, equally, sufficient differences to make it fruitful." L.C.B. Gower, *Some Contrasts Between British and American Corporation Law*, 69 HARV. L. REV. 1369, 1370 (1956) [hereinafter Gower, *Some Contrasts*].

257. Naomi R. Lamoreaux, *Revisiting American Exceptionalism: Democracy and the Regulation of Corporate Governance: The Case of Nineteenth-Century Pennsylvania in Comparative Context*, *in* ENTERPRISING AMERICA: BUSINESSES, BANKS, AND CREDIT MARKETS IN HISTORICAL PERSPECTIVE 25 (William J. Collins & Robert A. Margo eds., 2015).

258. Gower, *Some Contrasts*, *supra* note 256, at 1370–72; *see also* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 129–134 (3d ed. 2005); PAUL REDMOND AM, CORPORATIONS AND FINANCIAL MARKETS LAW §§ 2.30–2.35 (7th ed. 2017).

259. *See* Samuel Williston, *History of the Law of Business Corporations Before 1800: Part I*, 2 HARV. L. REV. 105, 105 (1888).

260. *See id.* at 105–06, 111. In early chartered corporations, members traded with their own stock and at their own risk. Some chartered corporations, such as the East India Company, later moved to a permanent joint stock fund. *See* C. A. COOKE, CORPORATION TRUST AND COMPANY: AN ESSAY IN LEGAL HISTORY 49–50 (1950);

1844, when the first U.K. general incorporation statute was passed,[261] the only legitimate methods of acquiring corporate personality were by special Act of Parliament or by royal charter.[262]

This need for a charter from the monarch or Parliament reflected the idea that incorporation depended on "the supreme power of the State,"[263] and contributed to the then-prevailing theory that the corporate form was a body, approved by the State to act in "the national interest."[264] Chartered corporations received delegated government authority and exerted authority through their bylaws.[265] The bylaws could be enforced by various means, such as the imposition of fines and even, in early corporate law history, imprisonment.[266] However, these bylaws were firmly under the control of the state—they were fixed by, and subservient to, the original charter.[267]

In the U.S. context, virtually all chartered corporations prior to the American Revolution were "bodies politic," such as towns, districts, and religious and educational institutions.[268] From the late 1780s on, however, this picture changed. Chartered business corporations grew exponentially, ultimately dwarfing the number of bodies politic.[269]

Williston, supra note 259, at 109–10. It was not until 1693, however, that the East India Company prohibited private trading by members. *See* REDMOND, *supra* note 258, § 2.30.

261. Joint Stock Companies Act 1844, 7 & 8 Vict. c. 110 (Eng.); *see* Harris & Lamoreaux, *supra* note 45, at 6 (discussing early U.K. company legislation from the 1844 Joint Stock Companies Act onwards); *see also* Frank Evans, *The Evolution of the English Joint Stock Limited Trading Company*, 8 COLUM. L. REV. 339, 360 (1908).

262. L.C.B. Gower, *The English Private Company*, 18 LAW & CONTEMP. PROBS 535, 535 (1953) [hereinafter Gower, *The English Private Company*]. Prior to 1855, special Act of Parliament or royal charter constituted the only means of obtaining limited liability, though this privilege was not included in all English charters. *See* Oscar Handlin & Mary F. Handlin, *Origins of the American Business Corporation*, 5 J. ECON. HIST. 1, 9 (1945). In 1855, however, following heated public debate between proponents of limited liability and those who regarded it as inherently dangerous and immoral, the British Parliament passed the Limited Liability Act, 1855, 18 & 19 Vict. c. 133 (Eng.), which, for the first time, conferred limited liability on companies registered under the 1844 Joint Stock Companies Act. *See* Gower, *The English Private Company*, *supra*, at 536. For discussion of the adoption of limited liability in the United Kingdom, see generally Paddy Ireland, *The Rise of the Limited Liability Company*, 12 INT. J. SOC. L. 239 (1984) [hereinafter Ireland, *The Rise of the Limited*]; Rob McQueen, *Life Without* Salomon, 27 FED. L. REV. 181 (1999).

263. Williston, *supra* note 259, at 113–14; *see also* John Morley, *The Common Law Corporation: The Power of the Trust in Anglo-American Business History*, 116 COLUM. L. REV. 2145, 2157 (2016) (discussing the shift from Crown-conferred charters to Parliament-conferred charters).

264. COOKE, *supra* note 260, at 78.

265. Williston, *supra* note 259, at 121.

266. *Id.* at 121–22.

267. *See* Harris & Lamoreaux, *supra* note 45, at 8.

268. Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 WM. & MARY Q. 51, 53 (1993); Samuel Williston, *History of the Law of Business Corporations Before 1800: PART II*, 2 HARV. L. REV. 149, 165–66 (1888).

269. Although prior to the American Revolution, there were a mere handful of chartered business corporations, numbers steadily rose thereafter. *See* Wells, *supra* note 10, at 14. Between 1790 and 1829, a total of 4,137 special charters were granted and from 1830–1860, the number of special charters granted rose to 18,282. *See* ROBERT E. WRIGHT, CORPORATION NATION 62–63 (providing a detailed breakdown of the number of charters granted according to business type from 1790–1860). Early American corporation law did not distinguish between business corporations and bodies politic. *See* Williston, *supra* note 259, at 105–06; Joel Seligman, *A Brief History of Delaware's General Corporation Law of 1899*, 1 DEL. J. CORP. L. 249, 254 (1976).

The majority of early business charter grants effectively involved private ownership of public utilities, such as mills, banks, bridges, toll roads, and later, railroads.[270] True to their British roots and to their function in the early U.S. business era, all such corporations, including those for profit, were regarded as "public agencies" required to serve a public purpose.[271] The charters themselves, which were treated as analogous to political constitutions and contracts with the state,[272] often included detailed specification of the grantee's obligations.[273] The bylaws were the equivalent of "private statutes," and it was the ability of corporations as "arms of the state"[274] to enforce these private statutes that distinguished them from an unincorporated association.[275] Like their British predecessors, early American colonial corporations were essentially "chips off the block of sovereignty"[276] and, as a result, heavily restricted in their actions.[277]

The transplantation of the U.K. chartered corporation model onto U.S. soil came, however, with some distinctively American twists. First, a critical feature of modern U.S. corporate law emerged during this early period—U.S. states, rather than the federal government, were empowered to charter corporations.[278] Secondly, there was populist backlash in the United States because these charters were originally granted selectively and usually involved monopoly privileges, which were viewed as anti-egalitarian and contrary to the ideals of the American republic.[279]

270. William J. Carney, *Fundamental Corporate Changes, Minority Shareholders, and Business Purposes*, 5 AM. B. FOUND. RES. J. 69, 82 (1980).

271. Handlin & Handlin, *supra* note 262, at 22; Maier, *supra* note 268, at 55–57; Williston, *supra* note 259, at 105, 110–11.

272. Maier, *supra* note 268, at 79–80; *see, e.g.*, Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518 (1819) (holding that a corporate charter was a contract, which could not be unilaterally altered by the state); Charles River Bridge v. Warren Bridge, 36 U.S. (9 Pet.) 420 (1837) (concerning the nature and scope of sovereign charters in the United States).

273. *See* Carney, *supra* note 270, at 83.

274. Seligman, *supra* note 269, at 254.

275. *Id.*

276. *Id.* at 255 (citing Thomas Hobbes' phrase from LEVIATHAN).

277. Early American corporations have been described as "puny institutions," due to their localism and restrictions in their charters regarding permissible business activities. Seligman, *supra* note 269, at 254 (citing Euegene Rostow, *To Whom and for What End Is Corporate Management Responsible?*, *in* THE CORPORATION IN MODERN SOCIETY 50 (Edward S. Mason ed., 1959)); *see also* Leo E. Strine, Jr. & Nicholas Walter, *Originalist or Original: The Difficulties of Reconciling Citizens United with Corporate Law History*, 91 NOTRE DAME L. REV. 877, 897–99 (2016).

278. Maier, *supra* note 268, at 52; Strine & Walter, *supra* note 277, at 894–95. Although U.S. corporate law was state-based and the political matrix varied across different states, parallel general patterns can be discerned in the law's early development. *See* Lamoreaux, *supra* note 257, at 28. State-based corporate legislation was not necessarily a foregone conclusion in the United States. There were several unsuccessful attempts to introduce federal incorporation. *See* Elizabeth Pollman, *Constitutionalizing Corporate Law*, 69 VAND. L. REV. 639, 646, 649–50 (2016) (discussing various attempts to introduce federal incorporation, including James Madison's failed proposal for U.S. federal incorporation in the Constitutional Convention of 1787); *see also* Robert B. Thompson, *Why New Corporate Law Arises: Implications for the 21st Century*, *in* THE CORPORATE CONTRACT IN CHANGING TIMES: IS LAW KEEPING UP? 3 (Steven Davidoff Solomon, William Savitt & Randall S. Thomas eds., 2019) [hereinafter Thompson, *Why New Corporate Law Arises*] (discussing three high profile attempts to federalize U.S. corporate law during the twentieth century).

279. *See generally* Maier, *supra* note 268, at 66–68, 71–72; Eric Hilt, *Early American Corporations and the State*, *in* CORPORATIONS AND AMERICAN DEMOCRACY 37 (Naomi R. Lamoreaux & William J. Novak eds.,

The problem of the "monopolistic and scandalous" charter system was eventually solved by legislative means.[280] From the early nineteenth century onwards, U.S. states began to make charters freely available under general incorporation statutes.[281] Even after the adoption of these statutes, however, the view persisted throughout the nineteenth century that corporations owed their existence to the state and involved public purposes.[282] It has been argued that restricted voting practices during this period reflected the fact that many U.S. corporations essentially operated as public-regarding "consumer cooperatives."[283]

B. The Organizational Origins of U.K. Company Law

U.K. company law has fundamentally different organizational origins to U.S. corporate law. By the time of their American ascent, chartered corporations were "all-but-moribund" in Britain.[284] They had been eclipsed by unincorporated joint stock companies ("deed of settlement companies"), and it was these companies that ultimately provided the organizational blueprint for modern U.K. company law.[285]

Deed of settlement companies developed in a parallel universe to chartered corporations. Deed of settlement companies were unchartered associations "on

2017). Thomas Cooper, for example, was damning in his 1830 assessment of special charters as "founded on the right claimed by government, to confer privileges and immunities on one class of citizens, not only not enjoyed by the rest, but at the expense of the rest." Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L. J. 1593, 1634 (1988) (citing THOMAS COOPER, LECTURES ON THE ELEMENTS OF POLITICAL ECONOMY 246 (2d ed. 1830)).

280. *See* Cary, *supra* note 76, at 663–64; Hilt, *supra* note 279, at 38; Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 387–88 (2010). Some states made early attempts to solve the problem by issuing charters to business rivals, and courts refused to imply monopolistic privileges into special charter grants. *See* Lamoreaux, *supra* note 257, at 31. *See generally* Charles River Bridge v. Warren Bridge, 36 U.S. 420, 544–46 (1837).

281. *See* COOKE, *supra* note 260, at 93–94; Eric Hilt, *Corporation Law and the Shift Toward Open Access in the Antebellum United States*, *in* ORGANIZATIONS, CIVIL SOCIETY, AND THE ROOTS OF DEVELOPMENT (Naomi R. Lamoreaux & John Joseph Wallis eds., 2017); Lamoreaux, *supra* note 257, at 31; Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 181 (1985); Strine & Walter, *supra* note 277, at 907–10. New York was at the forefront of this trend. *See generally* Hilt, *supra* note 279, at 39–51 (discussing the special role of New York as America's foremost trading and financial center in the development of early U.S. corporate law). The first general incorporation law for manufacturing was passed in New York in 1811. Connecticut adopted what is regarded as the first general incorporation statute in 1837. *See* JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780–1970 132 (1970); Lamoreaux, *supra* note 257, at 31, 38; Carney, *supra* note 270, at 84. By 1860, twenty-seven out of thirty-two U.S. states and territories had adopted general incorporation statutes for manufacturing. Lamoreaux, *supra* note 257, at 31.

282. David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 206–07.

283. Henry Hansmann & Mariana Pargendler, *The Evolution of Shareholder Voting Rights: Separation of Ownership and Consumption*, 123 YALE L.J. 948, 951 (2014); *see also* FRIEDMAN, *supra* note 258, at 131.

284. Maier, *supra* note 268, at 83.

285. Nonetheless, chartered corporations were not completely without influence on the development of U.K. company law. After all, deed of settlement companies were trying to emulate certain aspects of chartered corporations. The legacy of chartered corporations is apparent, for example, in (i) the principle of voting according to the number of shares held, rather than on a "one person, one vote basis"; (ii) the treatment of directors as fiduciaries; and (iii) recognition of the company as a separate legal entity. *See* REDMOND, *supra* note 258, § 2.35; *see also* COOKE, *supra* note 260, at 85.

which the sun of royal or legislative favour did not shine."[286] They were effectively large partnerships, which, although lacking limited liability, made creative use of the trust concept to replicate certain other features of chartered corporations, such as the ability to hold property and perpetual succession.[287] Deed of settlement companies had strong contractual elements, albeit combined with important fiduciary duty constraints.[288] They did not have a charter or Act of incorporation; rather, their governing rules were found in articles of association in the form of a deed of settlement. All investors ("members") were required to sign the deed of settlement,[289] which constituted the central feature of the establishment and governance structure of these organizations.[290]

Management of deed of settlement companies was almost invariably vested in trustees or a small managerial group.[291] Nonetheless, the articles of association represented the constitution of these companies, and it was clearly recognized in the eighteenth century that members could hold the company's management to account if it deviated from the provisions of the articles of association.[292] The deed of settlement could also provide members with specific supervisory and control powers, although in practice, members of these large unincorporated associations tended to remain passive.[293]

The famous Bubble Act of 1720[294] epitomized the differences and tensions between chartered corporations and deed of settlement companies in England. The main purpose of the "wordy and obscure" Bubble Act was to outlaw "presuming to act as a corporation" without legal authority.[295] It was clear that this prohibition was designed to eradicate the growing number of unincorporated

286. *See* COOKE, *supra* note 260, at 85 (citing Re Agriculturalist Cattle Insurance Company (Baird's Case) (1870), 5 Ch. App. 725, 734 (per Lord Justice James)). Charters were difficult and expensive to procure, and often denial of legislative favor was due to the ease with which parliamentary chartering Acts could be blocked by interested coalitions. These hurdles to obtaining a charter led to a surge in the formation of unincorporated deed of settlement companies, in spite of the fact that they still represented "an inferior substitute" for chartered corporations. Timothy W. Guinnane et al., *Contractual Freedom and Corporate Governance in Britain in the Late Nineteenth and Early Twentieth Centuries*, 91 BUS. HIST. REV. 227, 231 (2017).

287. *See* COOKE, *supra* note 260, at 85–87; Gower, *The English Private Company*, *supra* note 262, at 535. For a recent discussion of the important role that trust law played in the development of U.K. deed of settlement companies, see Morley, *supra* note 263, at 2157–66.

288. *See* Gower, *Some Contrasts*, *supra* note 256, at 1371–72, 1376; Hill & Conaglen, *supra* note 89, at 305–12.

289. COOKE, *supra* note 260, at 101; REDMOND, *supra* note 258, § 2.45.

290. *See* COOKE, *supra* note 260, at 86–87.

291. John Austin, *Joint Stock Companies*, *in* PARLIAMENTARY HISTORY AND REVIEW 709, 711 (1826); COOKE, *supra* note 260, at 95.

292. *See* REDMOND, *supra* note 258, § 2.45 (citing ARMAND BUDINGTON DUBOIS, THE ENGLISH BUSINESS COMPANY AFTER THE BUBBLE ACT 1720–1800 217 (1938)).

293. Austin, *supra* note 291, at 711.

294. Bubble Act 1720, 6 Geo. I, c. 18 (1719). The Bubble Act derives its colloquial name from the South Sea Company Bubble in the early eighteenth century, a period of "wild speculation and a great catastrophe." COOKE, *supra* note 260, at 80. The Bubble Act was extended to the American colonies from 1741. *See* Bubble Schemes, Colonies Act of 1740, 14 Geo. 2, c. 37; Handlin & Handlin, *supra* note 262, at 5; Kenneth K. Luce, *Trends in Modern Corporation Legislation*, 50 MICH. L. REV. 1291, 1293 n.14 (1952). Nonetheless, the Act appears to have been largely ignored there. Gower, *Some Contrasts*, *supra* note 256, at 1372.

295. Gower, *Some Contrasts*, *supra* note 256, at 1370.

deed of settlement companies[296] from the trading arena, leaving it the exclusive domain of government-approved chartered corporations.[297]

The Bubble Act failed spectacularly in its attempt to reassert governmental control over British business organizations and was a classic early example of the gap between "law on the books" and "law in action."[298] The legislation was largely unenforced[299] between its enactment in 1720 and repeal in 1825,[300] and could, in any case, be circumvented by skillful drafting of deeds of settlement.[301] The result was that unincorporated deed of settlement companies flourished, albeit in a legislative grey zone, during the period when they were ostensibly banned.[302] This species of company ultimately provided the blueprint for the U.K.'s first general incorporation statute, the 1844 Joint Stock Companies Act.[303]

The close connection between U.K. company law and partnership law is reflected in legal history, terminology, and doctrine. The 1844 Joint Stock Companies Act, which was intended to differentiate between partnerships and companies, actually used the former to define the latter.[304] Under this Act, a "joint stock company" was described as a partnership with particular characteristics in terms of size and transferability of shares.[305] U.K. partnerships often included the term "& Co," and a particular company law doctrine, the "just and equitable" shareholder remedy, is a direct transplant from partnership law.[306]

296. Of the more than 200 companies that were formed around 1720, most were not incorporated by charter. Williston, *supra* note 259, at 111–12; *see also* Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and an* Observation, 60 WASH. U. L.Q. 393, 398–99 (1982).

297. COOKE, *supra* note 260, at 84; REDMOND, *supra* note 258, § 2.40. The Bubble Act also targeted chartered corporations operating beyond the purposes of charters or under expired charters. *See* Margaret Patterson & David Reiffen, *The Effect of the Bubble Act on the Market for Joint Stock Shares*, 50 J. ECON. HIST. 163, 170–71 (1990).

298. *See, e.g.*, John C. Coffee, Jr., *Law and the Market: The Impact of* Enforcement, 156 U. PENN. L. REV. 229, 243–45 (2007); David A. Skeel, Jr., *Book Review: Corporate Anatomy Lessons*, 113 YALE L.J. 1519, 1543 (2004).

299. There was only one prosecution in the eighteenth century and a smattering of cases in the early nineteenth century before Bubble Act's repeal in 1825. *See* COOKE, *supra* note 260, at 84, 97–99, 105; REDMOND, *supra* note 258, § 2.45.

300. 12 Parl Deb HC (2d ser.) (1825) col. 1279–85 (UK).

301. COOKE, *supra* note 260, at 99; REDMOND, *supra* note 258, § 2.45.

302. REDMOND, *supra* note 258, §§ 2.40–2.45; Guinnane et al., *supra* note 286, at 230.

303. 7 & 8 Vict. c. 110 (UK). The Act, which was driven by William Gladstone, President of the U.K. Board of Trade from 1843–1845, enabled companies to incorporate by registering their deeds of settlement with the Board of Trade. *See generally* COOKE, *supra* note 260, at 136–39; Gower, *The English Private Company*, *supra* note 262, at 536; Harris & Lamoreaux, *supra* note 45, at 6–7.

304. *See* Gower, *The English Private Company*, *supra* note 262, at 536.

305. The 1844 Joint Stock Companies Act defined the term "joint stock company" to encompass partnerships with shares that were transferable without the express consent of the co-partners, and also partnerships with more than twenty-five members. Joint Stock Companies Act 1844, 7 & 8 Vict. c. 110, § II (Eng.). This threshold was subsequently reduced to twenty members under the 1856 Joint Stock Companies Act. *See* 19 & 20 Vict. c. 47, § IV. The 1844 Act constituted the first legislative attempt to differentiate between companies and partnerships, by making certain outsized partnerships unlawful, unless they were either registered under the Act or formed by charter or statute. *See* Gower, *The English Private Company*, *supra* note 262, at 536.

306. *See* COOKE, *supra* note 260, at 94 (noting the difference between U.S. corporations and English companies); Gower, *Some Contrasts*, *supra* note 256, at 1386; *cf.* Ireland, *The Rise of the Limited*, *supra* note 262, at 239–40 (noting that for much of the eighteenth and nineteenth centuries, unincorporated deed of settlement companies and partnerships were regarded as identical from a legal, though not an economic, perspective); Paddy

The divergent origins of U.K. company law (from unincorporated deed of settlement companies) and U.S. corporate law (from chartered corporations) explains many differences in legal terminology between the two jurisdictions. These include use of the terms "companies" and "articles of association" in the United Kingdom, as opposed to "corporations," "charters," "incorporated," and "bylaws" in the United States.[307]

IX. THE TRAJECTORIES OF U.S. AND U.K. CORPORATE LAW—ORIGINS BACKLASH AND ITS IMPLICATIONS FOR SHAREHOLDER PARTICIPATION RIGHTS

By the close of the nineteenth century, there were striking differences between U.S. and U.K. corporate regulation and governance. These differences reflected the contrasting organizational origins of corporate law in the two jurisdictions and laid the groundwork for future divergence due to backlash against those origins.

Many substantive legal differences between corporate law in the United Kingdom and the United States today can also be traced back to these different organizational origins, and the regulatory backlash they elicited. Whereas the starting point for U.S. corporate law was one of intense state control and regulation,[308] the starting point for U.K. company law was a "free contracting" model of corporate governance, tempered only by strong fiduciary duties.[309]

U.S. and U.K. corporate law developments from the late nineteenth century onwards involved backlash against these starting points, which resulted in a complex interplay between mandatory and optional rules in each jurisdiction.[310] Although both jurisdictions shifted away from their regulatory starting points, this did not mean that they ended up in the same place.

A. The United States

Historically, variation of governance structures of U.S. corporations was, like U.K. chartered corporations, severely limited. A core feature of the American corporation was the need to accumulate capital from many small investors and then place it under "firm central direction."[311] Although the anti-egalitarian aspects of the early charter system had been obviated by general incorporation statutes,[312] a Jeffersonian fear of unbridled power of corporations vis-à-vis the government persisted.[313] Early U.S. general incorporation statutes therefore

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Ireland, *Capitalism Without the Capitalist: The Joint Stock Company Share and the Emergence of the Modern Doctrine of Separate Corporate Personality*, 17 LEGAL HIST. 41, 42–45 (1996) (discussing the changing meaning of the term "company" over time).

307. *See* COOKE, *supra* note 260, at 94; Gower, *Some Contrasts*, *supra* note 256, at 1386.

308. *See* Lamoreaux, *supra* note 257, at 32 tbl.1.

309. *See generally* Hill & Conaglen, *supra* note 89; Nolan, *The Continuing Evolution*, *supra* note 54.

310. *See infra* Sections IX.A–B.

311. HURST, *supra* note 281, at 47; *see also* Maier, *supra* note 268, at 58.

312. Seligman, *supra* note 269, at 257–58.

313. FRIEDMAN, *supra* note 258, at 132, 134; *see also* Louis K. Liggett Co. v. Lee, 288 U.S. 517, 549 (1933).

vested managerial power in the board of directors but, at the same time, straightjacketed the board through a myriad of constraints, which mimicked, and often exceeded, the restrictions found in special charters.[314] These statutes, it has been said, fairly "bristled with mandatory rules."[315] The constraints were designed to ensure that the legislature retained ultimate control.[316]

Even if power could have been allocated differently between participants in early U.S. corporations, the prerequisites for charter alteration would have made this difficult. The 1819 decision in *Trustees of Dartmouth College v. Woodward* ("*Dartmouth College*")[317] interpreted a corporation's charter as a contract between its original parties, namely "the donors, the trustees, and the crown,"[318] which meant that prima facie alteration required the consent of all groups.[319] In addition, shareholder approval during this early period entailed unanimous consent.[320] The *Dartmouth College* decision shifted the corporation at least partly from the public to the private realm by protecting corporate charters from unilateral alteration by the state.[321] Yet Justice Story's famous concurring opinion in the case provided a means by which the state could assert such a right—namely if the power to alter the corporation's charter unilaterally were reserved to the state in the original grant.[322] Reserved state powers of this kind became commonplace in the post-*Dartmouth College* era.[323] They provided desirable flexibility to industries undergoing great technological change, by enabling vital charter amendments (such as to enable consolidation of railroads) to be made via state approval alone.[324]

Nonetheless, it appears that strong shareholder participation rights were embedded in both special charters and in the early American general corporate law statutes. A charter granted in 1791 by New Jersey to the Society for Establishing Useful Manufactures ("the S.U.M."), which was the state's first major industrial business corporation and a favorite enterprise of Alexander Hamilton,

314. It has been said that statutes during this period showed "active concern that the corporate instrument would allow a dangerous scale of private power." HURST, *supra* note 281, at 152.

315. Morley, *supra* note 263, at 2163; *see also* Lamoreaux, *supra* note 257, at 32 tbl.1 (providing details of the limitations in the early general incorporation statutes of Massachusetts, New York, New Jersey, Pennsylvania, Ohio, Illinois, and California); Millon, *supra* note 282, at 208–10; Pollman, *supra* note 278, at 649; Seligman, *supra* note 269, at 258.

316. *See* Seligman, *supra* note 269, at 258.

317. 17 U.S. (4 Wheat.) 518 (1819).

318. *Id.* at 643–44.

319. *Id.*

320. *See, e.g.*, Carney, *supra* note 270, at 85; E. Merrick Dodd, Jr., *Statutory Developments in Business Corporations Law*, *1886–1936*, 50 HARV. L. REV. 27, 33 (1936); Horwitz, *supra* note 281, at 200; Pollman, *supra* note 278, at 649.

321. Lamoreaux, *supra* note 257, at 34; Seligman, *supra* note 269, at 256. Prior to the decision in the *Dartmouth College* case, the corporation could not be said to provide freedom from interference by the state. *See Woodward*, 17 U.S. at 518; Handlin & Handlin, *supra* note 262, at 17–19.

322. *See Woodward*, 17 U.S. at 675, 680 (Story, J., concurring).

323. Indeed, such reservations of power occurred even before Mr. Justice Story's dictum. *Id.* at 675; *see* Carney, *supra* note 270, at 83. These reservations still appear in the MODEL BUS. CORP. ACT § 1.02 (AM. BAR ASS'N 2010).

324. Carney, *supra* note 270, at 84–85.

provides an interesting example of this phenomenon.[325] The S.U.M.'s charter, which was extremely liberal for that time, nonetheless provided shareholders with significant powers over management—indeed, it has been said that the S.U.M. was "subject to practically no control beyond that of its stockholders."[326]

Early general U.S. corporate law statutes also emphasized the power of shareholders to direct corporate policy and control the actions of the board.[327] Although these statutes vested general management powers in the directors and officers, their powers were constrained by strong shareholder participatory rights.[328] The courts during this period also recognized the shareholders' meeting as representing the corporation's ultimate power center and "critical decision-making forum."[329] Any significant corporate changes required unanimous shareholder consent, and shareholders had the right to select directors annually by majority vote and remove them at will.[330] There were also early attempts to limit management's ability to use proxies to control the shareholders' meeting.[331] During this period, U.S. law conceived of the corporation as "democratically controlled, in theory at least."[332]

By the late nineteenth century, however, the wind was blowing in a very different direction with regard to state control of corporations and shareholder rights. U.S. corporate law was in the throes of an irrevocable shift, in the form of the well-documented rise of state competition for incorporation charters[333] that would reshape it for modern times. Such competition had not been possible in an earlier era, when enterprises had no right to carry on business outside their state

325. An Act to incorporate the contributors to the society for establishing useful manufactures, and for the further encouragement of the said society. Society for Establishing Useful Manufactures (S.U.M.) Act, 1791 N.J. Laws 730–31, 741. *See* Joseph Stancliffe Davis, *The "S.U.M.": The First New Jersey Corporation*, *in* ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS 349, 378 (1917); *see also* Edward Q. Keasbey, *New Jersey and the Great Corporations*, 13 HARV. L. REV. 198, 203 (1899).

326. DAVIS, *supra* note 325, at 387; *see also id.* at 349, 380–83, 386 (describing liberal aspects of the S.U.M.'s charter and shareholder rights under the charter); Strine & Walter, *supra* note 277, at 898 n.134 (noting that the S.U.M.'s charter provided it with unusually broad powers according to the standards of the day).

327. *See* WRIGHT, *supra* note 269, at 118–20.

328. *Id.* (describing the ability of stockholder resolutions to constrain management).

329. *See* Seligman, *supra* note 269, at 258; *see also* BERLE & MEANS, *supra* note 27, at 123–24 (noting that shareholders had "a considerable degree of control over the policies of the corporation," as a result of the fact that no fundamental organizational change could be effected without unanimous shareholder approval); WRIGHT, *supra* note 269, at 119 (describing U.S. stockholders throughout the antebellum period as "residual decision makers" and "final arbiters of disputes within management"); Horwitz, *supra* note 281, at 214 ("The law . . . recognizes the stockholders as the ultimate controlling power in the corporation . . . ." (quoting Cass v. Manchester Iron & Steel Co., 9 F. 640, 642 (W.D. Pa. 1881))).

330. Seligman, *supra* note 269, at 258.

331. *See* Dodd, *supra* note 320, at 33.

332. *Id.*

333. *See generally* Charles M. Yablon, *The Historical Race Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880–1910*, 32 J. CORP. L. 323 (2007) (discussing in detail the beginnings of the historical race for corporate charters).

of incorporation.[334] As localism[335] and state control over corporations receded, however, the community-based aspirations of corporations gave way to private organizational profit-seeking on a grand, and previously unimaginable, scale.[336]

State competition for corporate charters represented a massive backlash against U.S. corporate law's restrictive past. New Jersey was an early leader in this race. The General Corporation Act of New Jersey (Revision Act of 1896) ("1896 New Jersey Act") introduced corporate law revisions,[337] which conferred what have been described as "breathtaking privileges"[338] on corporations and were far more permissive than comparable legislation in other states at the time. The Act affected not only powers of the corporation itself but also the balance of power within the corporation.[339] Specifically, it enhanced the role of directors and diminished that of shareholders.[340] It has been claimed that the 1896 New Jersey Act represented the beginnings of a new "absolutism," under which the powers of the board came to be regarded as identical to those of the corporation itself.[341]

Yet some remnants of the shareholder control remained, although these would diminish over time. In relation to bylaw amendment, for example, a new provision of the 1896 New Jersey Act, section 11, authorized any corporation in

334. *See* Horwitz, *supra* note 281, at 188–90 (holding that corporations had no constitutional right to carry on business outside the particular state that authorized their existence (citing Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 587–88 (1839))). *See generally* GERARD C. HENDERSON, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW (1918).

335. *See generally* James W. Moore & Donald T. Weckstein, *Corporations and Diversity of Citizenship Jurisdiction: A Supreme Court Fiction Revisited*, 77 HARV. L. REV. 1426, 1427–29 (1964).

336. Maier, *supra* note 268, at 81.

337. *See* Pollman, *supra* note 278, at 649–51. Although many commentators date New Jersey's early dominance in the market for corporate charters as beginning with the 1896 amendments to its corporation law, Professor Yablon argues that New Jersey's lead had already begun at least fifteen years earlier, but was extended in 1888–89, when New Jersey passed legislation permitting a corporation to hold shares in another corporation. *See* Yablon, *supra* note 333, at 326–27. This view accords with the opinion of one contemporary commentator, who described legislative reforms to corporation law under New Jersey law from 1875 onwards as reflecting a "consistent, definite, and progressive policy" regarding the organization and regulation of corporations. *See* Keasbey, *supra* note 325, at 209. New Jersey amended its corporate law repeatedly throughout the 1890s, with changes in 1893, 1896, 1897, and 1898. Yablon, *supra* note 333, at 349.

338. Seligman, *supra* note 269, at 265; *see, e.g.*, General Corporation Act, 1896 N.J. Laws 279 § 6 (authorizing the formation of corporations for any lawful purpose); *id.* § 7 (authorizing corporations to carry on business in other states or foreign countries); *id.* §§ 104–05 (authorizing mergers); *see also* Seligman, *supra* note 269, at 269–70 ("By 1912, New Jersey had reshaped the corporate law of virtually every state in its own image."). *See generally* JAMES B. DILL, THE STATUTORY AND CASE LAW APPLICABLE TO PRIVATE COMPANIES UNDER THE GENERAL CORPORATION ACT OF NEW JERSEY AND CORPORATION PRECEDENTS (2d ed., 1899).

339. *See* Seligman, *supra* note 269, at 266.

340. *Id.*

341. Horwitz, *supra* note 281, at 214; *see also* Seligman, *supra* note 269, at 266; Thompson, *Why New Corporate Law Arises*, *supra* note 278, at 4, 9–11 (describing the 1890s as a "key inflection point" for U.S. corporate law as a result of the director-centric governance changes introduced by the 1896 New Jersey Act). According to Horwitz, by the early twentieth century, a common view of legal writers was that modern stockholders were investors only, not proprietors, and "a negligible factor" in the management of the corporation. Horwitz, *supra* note 281, at 207. *But see* Buxbaum, *supra* note 80, at 1683 (discussing the reconceptualization of shareholders and their relegation to the "questionable role of bystanders"); Hill, *Visions and Revisions*, *supra* note 8, at 47–51 (discussing the shareholder as bystander).

its certificate of incorporation to confer power to alter the bylaws on the directors.[342] Under section 11, however, plenary power to alter the bylaws was accorded to the stockholders, who were also given express power to alter or repeal bylaws made by the directors.[343]

New Jersey's early dominance was cemented by another set of reforms in the 1880s, which permitted corporations to act as holding companies for the first time.[344] These reforms legitimized economic concentration and facilitated the first great wave of mergers in American history.[345] New Jersey became a major beneficiary when, unlike many other states, it adopted a policy of "encouraging rather than discouraging the aggregation of capital."[346] It has been estimated that, by 1900, 95% of major U.S. companies were incorporated in New Jersey.[347] The chartering business proved so rewarding for New Jersey that, by 1902, fees associated with it were sufficient to pay off the entire state debt.[348]

It was hardly surprising that other states jumped on the lucrative corporate chartering bandwagon. Soon, states such as New York, West Virginia, Maine, Maryland, and Kentucky, as well as Delaware, were trying to emulate New Jersey's winning formula.[349] As the race for state charters gained momentum, a major selling point[350] was the promise by each state that it could provide more liberal incorporation laws than its competitors, in terms of expanded corporate powers and shareholder immunity.[351]

New Jersey's early success was, however, short-lived. In 1913, the state handicapped itself in the race for corporate charters by adopting the restrictive "Seven Sisters Acts," which were designed to control monopolies by reinstating

342. General Corporation Act of New Jersey, 1896 N.J. Laws 25.

343. *Id.*

344. Seligman, *supra* note 269, at 265; Yablon, *supra* note 333, at 326–27. By legalizing the concept of a holding company, New Jersey's reforms obviated the need for the trust device. *See* Horwitz, *supra* note 281, at 194–95 (explaining how the ability to own stock in other corporations provided a solution to judicial resistance during the 1880s to John D. Rockefeller's attempted use of the trust device to enable Standard Oil to expand and carry on business across state lines).

345. *See* Keasbey, *supra* note 325, at 200–01; Seligman, *supra* note 269, at 268 ("Shaw Livermore calculated that 328 combinations, effected between 1888–1905, controlled roughly two-fifths of the manufacturing capital of [America] as of 1904." (citing Shaw Livermore, *The Success of Industrial Mergers*, 50 Q.J. ECON. 68 (1935))); *see also* Alfred D. Chandler, Jr., *The Beginning of "Big Business" in American Industry*, 33 BUS. HIST. REV. 1, 10–14 (1959); Horwitz, *supra* note 281, at 190–97 (discussing the "inevitability" of industrial concentration, and the obstacle to corporate consolidation posed by the early unanimous shareholder consent requirement). According to Horwitz, it was the shift to majority shareholder voting that made the merger movement legally feasible. Horwitz, *supra* note 281, at 202 ("The shift to majority rule in fact made the merger movement legally possible."). See Bayless Manning, *The Shareholder's Appraisal Remedy: An Essay for Frank Coker*, 72 YALE. L.J. 223, 249 (1962), for the view that unanimity requirements were the relic of a "homely small enterprise" era and were not fit for purpose in the era of massive economic expansion.

346. Keasbey, *supra* note 325, at 209; *see also* Yablon, *supra* note 333, at 324.

347. Seligman, *supra* note 269, at 267; *see also* Keasbey, *supra* note 325, at 201.

348. Seligman, *supra* note 269, at 268.

349. *Id*. at 269; Yablon, *supra* note note 333, at 327; Harris & Lamoreaux, *supra* note 45, at 26–27.

350. *See, e.g.*, Liggett Co. v. Lee, 288 U.S. 517, 558–59 (1933) (discussing the competition for charters, in which "[t]he states joined in advertising their wares").

351. Yablon, *supra* note 333, at 324–25.

restrictions on trusts and holding companies.[352] Although New Jersey repealed most of these Acts in 1917, the damage was done. The state never regained its ascendency over corporate charters;[353] Delaware took its place. Even though, for the most part, Delaware's 1899 General Corporation Law ("1899 Delaware Act") merely replicated the New Jersey legislation,[354] by 1915 the Delaware Act had acquired cachet as quintessentially modern and "liberal."[355] Major corporations, such as DuPont and General Motors reincorporated in Delaware in 1916,[356] and the rest is history.[357]

The powerful image of Delaware corporate law as "enabling," rather than mandatory, dates from this period and explains modern resistance to federal laws, such as the Dodd-Frank Act, which include mandatory provisions that impinge on corporate law.[358] The "enabling law" label signifies U.S. corporate law's path-dependence, reflecting the fact that from the late nineteenth century onwards, U.S. state laws began to permit what had previously been forbidden under the strict rules associated with chartered corporations.[359]

This shift towards greater legislative flexibility in the race for corporate charters had a significant effect on shareholder participation rights in U.S. public corporations. Although there was a strong emphasis on shareholder protection in early twentieth-century Delaware case law, which frequently referred to directors as trustees for the stockholders,[360] Delaware's "revolutionary general corporation law"[361] laid the groundwork for diminishing participation rights for shareholders.

352. *See* Seligman, *supra* note 269, at 270.

353. *Id*. According to Professor Yablon, however, the 1899 Delaware Act contained a "few improvements from a promoter's standpoint." Yablon, *supra* note 333, at 359. Perhaps the most significant difference was cost—Delaware's incorporation fees were 25% less than those of New Jersey and its annual franchise tax rates were 50% less. *Id*. at 360.

354. Yablon, *supra* note 333, at 327.

355. *Id.*; Cary, *supra* note 76, at 664–65.

356. *See* Yablon, *supra* note 333, at 325 n.10.

357. Delaware is still the dominant state in corporate law today. Approximately 60% of the largest U.S. public corporations are incorporated in Delaware, as well as 80% of reincorporations. *See* Skeel*, supra* note 105, at 2.

358. The idea that corporate law was "enabling" was an important feature of the nexus of contracts theory of the corporation. *See generally* Lucian A. Bebchuk, *The Debate on Contractual Freedom in Corporate Law*, 89 COLUM. L. REV. 1395 (1989) (discussing in detail the mandatory/enabling debate in U.S. corporate law); *see also* Pollman, *supra* note 278, at 651; Thompson, *Why New Corporate Law Arises*, *supra* note 278, at 9–11 (discussing the interplay between mandatory and permissive rules under U.S. corporate law and noting the fact that after the shift to permissive state laws, U.S. federal law assumed the "mantle of regulation"). For a recent discussion of the link between the largely enabling structure of U.S. corporate law and private ordering, see Barzuza, *supra* note 143.

359. *See* Seligman, *supra* note 269, at 265–66.

360. *See* S. Samuel Arsht, *A History of Delaware Corporation Law*, 1 DEL. J. CORP. L. 1, 9 (1976).

361. *Id*.; Seligman, *supra* note 269, at 271 (discussing the 1899 Delaware Act).

Like the 1896 New Jersey Act, on which it was based, the 1899 Delaware Act provided greater flexibility in the contents of the corporate charter and by-laws.[362] Under the 1899 Delaware Act and important amendments in 1901,[363] Delaware delegated its right to determine the intra-corporate structure and distribution of power to the incorporators themselves.[364] This "self-determination provision" essentially flipped U.S. corporate law history on its head, designating the corporation, rather than the state, as primary "law-maker."[365] Yet because the Act, as originally passed, vested power to manage the business of the corporation in the board of directors,[366] this new-found flexibility, in fact, advantaged management and the board, rather than the shareholders.[367] The move to liberal statutes, which Delaware's new legislation exemplified, introduced default rules that shifted the balance of corporate governance power in favor of the board of directors.[368] According to one commentator, it was during the 1920s that promoters and managers of Delaware corporations used the self-determination provision to launch an assault on "the last vestiges of shareholder control."[369] These developments in U.S. corporate law history laid the groundwork for many contentious examples of private ordering combat today.

B. The United Kingdom

Whereas the original backdrop for U.S. corporate law was one of strict state control and mandatory laws, the opposite was true for U.K. company law due to its different organizational starting point.

From the mid-nineteenth century onwards, U.K. company law developed from a baseline of remarkable flexibility regarding allocation of power and participation rights for shareholders.[370] Unlike in the United States, the board's powers were derived, not from statute, but from the company's own constitution ("articles of association" or "articles").[371] These board powers could be "as broad

362. *See* An Act to Provide a General Corporation Law for the State of Delaware, approved March 10, 1899, §§ 3, 7, 8, 22. *See* HURST, *supra* note 281, at 70–71, 120–21, 152; Pollman, *supra* note 278, at 651.

363. Arsht, *supra* note 360, at 9 (noting that in 1901, amendments were made to 48 of the 139 sections of the 1899 Delaware Act).

364. *Id*.

365. Seligman, *supra* note 269, at 273 (noting that this "self-determination" provision was the diametric opposite of the legal position during the first 100 years of U.S. company law history, which was based on the rule that the only powers of the business corporation were those expressly or impliedly provided in its charter with the State).

366. Act of March 10, 1899, ch. 273, § 20, 21 DEL. LAWS 451–52.

367. *See* Seligman, *supra* note 269, at 251–52; William L. Cary, *A Proposed Federal Corporate Minimum Standards Act*, 29 BUS. LAW. 1101, 1101–02; Arsht, *supra* note 360, at 9–10.

368. Harris & Lamoreaux, *supra* note 45, at 28.

369. Seligman, *supra* note 269, at 273. These developments coincided with the rise of managerial capitalism in the United States. *See* Brian R. Cheffins, *Corporate Governance Since the Managerial Capitalism Era*, 89 BUS. HIST. REV. 717, 719 –24 (2015).

370. Although the 1844 Joint Stock Companies Act, 7 & 8 Vict., c. 110 and the 1856 Joint Stock Companies Act, 19 & 20 Vict., c. 47 use the term "shareholder," the 1862 Companies Act, 25 & 26 Vict., c. 89 and subsequent U.K. legislation, including the current Companies Act 2006, c. 46, use the term "member."

371. *Cf.* Susan Watson, *The Significance of the Source of the Powers of Boards of Directors in U.K. Company Law*, 6 J. BUS. L. 1, 1–2 (2011) (questioning the significance of the fact that directors in the U.K. obtained

or as narrow . . . as desired."[372] Significantly, decisions as to the breadth or narrowness of the board's powers were matters for the shareholders, who could alter the contents of the articles of association by special resolution, requiring a 75% majority.[373] Although some nineteenth-century U.K. company cases interpreted shareholders' power in this regard to mean that directors were merely agents of shareholders,[374] this paradigm was overturned in 1906 in *Cuninghame*'s case.[375] This watershed decision made it clear that the articles created separate and autonomous spheres of authority for both directors and shareholders.[376] Under the division of powers doctrine elucidated in *Cuninghame*'s case, where the articles vested managerial power in the board, the board would be immune from interference by shareholders in its decision-making.[377] However, it was the shareholders, due to their unilateral control over the contents of the articles of association, that had power to determine this allocation of power.[378] It was therefore possible for shareholders to give directions and advice to the board of directors of U.K. companies, if this power were specifically allocated to shareholders by the articles, which was commonly the case.[379]

their powers from the articles of association, rather than statute, given that the articles invariably vested managerial power in the board). For the historical importance of statutory law in defining the basic structure of U.S. corporate law, however, see Strine & Walter, *supra* note 277, at 903–04. For discussion of the transition that occurred under U.S. corporate law towards a director-centred corporate model, see Horwitz, *supra* note 281, at 214–16.

372. ROBERT R. PENNINGTON, COMPANY LAW 572 (6th ed., 1990). This was not always the case under U.K. companies legislation. The original 1844 Joint Stock Companies Act required a company to have directors (§ 7), vested management power in those directors (§ 27(1)), and stated that shareholders could not act "in the ordinary Management of the Concerns of the Company otherwise than by means of Directors" (§ 27). Nonetheless, even under the 1844 Joint Stock Companies Act, the shareholders had significant powers in, for example, their ability to make bylaws (§ 25(11)), to which the directors were subject (§§ 25(11); 27(1)). From 1856 on, however, the allocation of power in U.K. companies was a matter for the model articles. *See* 1856 Joint Stock Companies Act, 19 & 20 Vict., c. 47, Table B, Art. 46.

373. *See, e.g.,* 1862 Companies Act, 25 & 26 Vict., c. 89, § 50.

374. Isle of Wight Rly v. Tahourdin (1883) Ch. D. 320.

375. Automatic Self-Cleansing Filter Syndicate Co. Ltd. v. Cuninghame [1906] 2 Ch 34.

376. *Id.*; *see also* John Shaw & Sons (Salford) Ltd. v. Shaw [1935] 2 K.B. 113, 134; Howard Smith Ltd. v. Ampol Petroleum Ltd. [1974] A.C. 821, 837.

377. For a recent Australian example of the scope and operation of the division of powers doctrine, see Australasian Ctr. for Corp. Responsibility v. Commonwealth Bank of Austl. [2016] FCR 80 (Austl.).

378. PAUL L. DAVIES & SARAH WORTHINGTON, GOWER PRINCIPLES OF MODERN COMPANY LAW [3-31]–[3-32] (10th ed., 2016).

379. *See* Elizabeth Boros, *How Does the Division of Power Between the Board and the General Meeting Operate?*, 31 ADELAIDE. L. REV. 169, 170–72 (2006); DAVIES & WORTHINGTON, *supra* note 378, at [14-7]–[14-8]. The power of shareholders to give directions to the board by special resolution is still found today in the U.K. model articles for both private and public companies. *See, e.g.*, The Companies (Model Articles) Regulations 2008, No. 3229, Schedule 1, Model Articles for Private Companies Limited by Shares, Articles 3 and 4 (as amended by the Mental Health Discrimination Act 2013); The Companies (Model Articles) Regulations 2008, No. 3229, Schedule 3, Model Articles for Public Companies, Articles 3 and 4 (as amended by the Mental Health Discrimination Act 2013). *See generally* Companies House, *Model Articles of Association for Limited Companies,* GOV. UK, https://www.gov.uk/guidance/model-articles-of-association-for-limited-companies (last updated Oct. 10, 2017).

The ability of shareholders to alter the articles of association was a mandatory feature of U.K. company law, conferred by statute.[380] Any provision attempting to contract out of, or deprive shareholders of, this inherent power would be invalid, as contrary to statute.[381] In contrast to modern Delaware law regarding amendments to the corporate charter,[382] U.K. shareholders could also initiate such constitutional changes without the need for board approval.[383]

The articles of association therefore represented a contractual bargain between shareholders about how their company should be governed. This bargain, which explicitly bound the shareholders and the company (though not the directors), was given statutory recognition.[384] It has been suggested that this inherent power of the shareholders to alter the articles according to their own wishes is the cornerstone of shareholder rights in the United Kingdom.[385]

Although the United Kingdom had company law Acts from 1844 onwards, such statutes initially offered minimal statutory protection for outside investors and reflected a strongly laissez-faire paradigm.[386] Unlike the liberalization of U.S. corporate law statutes from the late nineteenth century onwards, which strengthened the role of directors, shareholders were pivotal under the U.K. version of company law—it was assumed that these shareholders could write their

380. *See, e.g.*, Walker v. London Tramways Co. (1879) 12 Ch. D. 705; Allen v. Gold Reefs of W. Afr. Ltd. [1900] 1 Ch. 656; Peters' Am. Delicacy Co. Ltd. v. Heath [1939] 61 CLR 457, 479. *See also* 1862 Companies Act, 25 & 26 Vict., c. 89, §§ 50–51(U.K.). Free alterability of the articles of association is today found in Companies Act 2006, c. 46, § 21 (U.K.).

381. *See* Allen v. Gold Reefs of W. Afr. Ltd. [1900] 1 Ch. 656, 671; Peters' Am. Delicacy Co. Ltd. v. Heath [1939] 61 CLR 457, 479. In limited circumstances, however, a company's articles may contain a "provision of entrenchment" requiring more restrictive conditions to be met, or procedures complied with, in order to alter the articles. *See* Companies Act, 2006, c. 46, § 22 (U.K.).

382. DEL. CODE ANN. tit. 8, § 242(b) (2018).

383. DAVIES & WORTHINGTON, *supra* note 378, [3-31]–[3-32].

384. Gower, *Some Contrasts*, *supra* note 256, at 1376. Individual shareholders could enforce their membership rights under the contractual bargain represented by the articles of association, thereby avoiding the restrictive standing requirements of the famous Rule in *Foss v. Harbottle*. *See* 1862 Companies Act, 25 & 26 Vict., c. 89, § 16 (U.K.); Companies Act 2006, c. 46, § 33(1) (U.K.); *cf.* Corporations Act 2001 (Cth), § 140(1)(b) (Austl.) (providing that a company's constitution also embodies a contract between directors and company, though not between directors and members).

385. R.C. Nolan, *Shareholder Rights in Britain*, 7 EUR. BUS. ORG. L. REV. 549, 554–56 (2006); *cf.* Watson, *supra* note 371.

386. *See* CHEFFINS, *supra* note 45, at 35, 194, 273. This laissez-faire approach did not, however, come into full bloom until 1856. The first Joint Stock Companies Act, 1844 in fact constituted a regulatory response to concerns about fraudulent company promotions in the early nineteenth century. One of its goals being "to regulate, not to encourage, speculation," the 1844 Act, therefore, included some specific shareholder protection provisions, particularly relating to publicity and disclosure. *See* Gower, *The English Private Company*, *supra* note 262, at 536; Ireland, *The Rise of the Limited*, *supra* note 262, at 241–42; Harris & Lamoreaux, *supra* note 45, at 7 (describing 1844 as a "highpoint in terms of disclosure."). These shareholder safeguards were, however, effectively abolished by the 1856 Joint Stock Companies Act, 19 & 20 VICT., c. 47, which included limited liability, but negligible disclosure requirements. *See* Harris & Lamoreaux, *supra* note 45, at 7–8. The 1856 legislation was quintessionally permissive, and definitively charted a laissez-faire course for U.K. company law. *See* Gower, *The English Private Company*, *supra* note 262, at 536–37; Ireland, *The Rise of the Limited*, *supra* note 262, at 242; McQueen, *supra* note 262, at 185–87, 192–95; *Hansard*, 3d series, vol. 140, Feb. 1, 1856, col. 129, http://hansard.millbanksystems.com/commons/1856/feb/01/law-of-partnership-and-joint-stock#column_129.

own bargain via the articles of association.[387] Indeed, this "free contracting" aspect of the articles meant that, at the turn of the twentieth century, U.K. corporate governance was not dissimilar to some jurisdictions, such as Norway, which had no statutory corporate law whatsoever.[388]

U.K. companies were not required to devise their own constitutions or articles of association from scratch. They could rely instead on model articles,[389] which were attached to the company legislation and subject to amendment by the Board of Trade.[390] These model articles represented a set of default rules that companies could adopt in whole, in part, or not at all.[391]

It is interesting to note that, from the mid-nineteenth century onwards, the model articles in the United Kingdom contained robust participatory rights for shareholders. The model articles in the 1856 Joint Stock Companies Act, for example, included provisions to the following effect: any number of shareholders with an aggregate of not less than 20% of shares could requisition the directors to convene an extraordinary general meeting;[392] any shareholder could submit resolutions by giving at least three days prior notice;[393] and shareholders could at any time remove a director from office by special resolution and appoint a replacement.[394] Form C of the 1856 Joint Stock Companies Act contained a provision, which enabled any two shareholders to summon an extraordinary general meeting at any time.[395]

Similar shareholder participatory rights were found in the model articles of the 1862 Companies Act, which many regard as the first truly modern U.K. company law.[396] These "Table A 1862" articles vested managerial power in the board of directors, though subject to any powers that the Act or articles conferred on the shareholders in the general meeting.[397] Specific powers granted to shareholders by these articles included the ability to schedule "ordinary" or annual general

387. *See* Nolan, *Shareholder Rights*, *supra* note 385, at 554–56.

388. Mike Burkart et al., *Why Do Boards Exist? Governance Design in the Absence of Corporate Law* (Jan. 23, 2017), https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2902617; *see also* Guinnane et al., *supra* note 286, at 230 (stressing the contractual flexibility of British general incorporation law that operated from the second half of the nineteenth century); Harris & Lamoreaux, *supra* note 45, at 6 (contrasting the high level of contractual freedom in small and medium size enterprises ("SMEs") under British company law during the nineteenth century with the far more restrictive approach under U.S. corporate law).

389. *See generally* Companies House, *supra* note 379. The earliest model articles of association for U.K. registered companies were found in the 1856 Joint Stock Companies Act, 19 & 20 Vict., c. 47, Table B. The model articles were renamed "Table A" in the 1862 Companies Act, 25 & 26 Vict. c. 89, and this terminology continued up to and including the Companies Act 1985, c. 6. Under the Companies Act 2006, c. 46, § 19 (U.K.), the U.K. Secretary of State has power to prescribe, by regulations, "model articles of association," which a company may adopt.

390. *See, e.g.*, 1862 Companies Act, 25 & 26 Vict. c. 89, § 71 (U.K.).

391. *Id.* §§ 14–15; *see* Harris & Lamoreaux, *supra* note 45, at 9–12 (discussing the structure and operation of these model articles).

392. 1856 Joint Stock Companies Act, 19 & 20 Vict., c. 47, Table B, Art. 25.

393. *Id.* at Table B, Art. 29.

394. *Id.* at Table B, Art. 62.

395. *Id.* at § Form C, Memorandum of Association, 7th.

396. Nolan, *The Continuing Evolution*, *supra* note 54, at 98.

397. 1862 Companies Act, 25 & 26 Vict., c. 89, Art. 71; *id.* at Table A, Art. 55.

meetings[398] and the ability of 20% of members to requisition directors to convene an extraordinary general meeting.[399] Where the directors failed to comply with this requisition within twenty-one days, the same number of shareholders could convene an extraordinary general meeting themselves.[400] The 1862 Act provided a default rule permitting five members to summon meetings, in the absence of any articles dealing with the issue.[401] Several provisions of Table A 1862 limited directors' discretion by making their power to act conditional on shareholder approval. Shareholder consent was a necessary precondition to board action to increase capital[402] or declare a dividend.[403]

Table A 1862 provided for staggered board terms.[404] Staggered boards have acquired a poor reputation in modern U.S. corporate governance literature due to their alleged ability to insulate directors,[405] because shareholders can only remove directors of staggered boards "for cause" under Delaware law.[406] However, the staggered term in Table A 1862 would not operate in the same way, since shareholders could, under Article 65, remove any director from office by special resolution.[407] Later iterations of Table A articles would provide shareholders with even stronger rights, by granting them an explicit power to remove the managing director from office.[408]

The 1862 Companies Act sent mixed messages regarding shareholder voting.[409] The Act itself established a per capita voting blueprint—it provided that, absent a specific provision in the articles, "every Member shall have One Vote."[410] Yet a different voting regime applied under the model articles. Article 44 of Table A 1862 adopted a graduated voting model.[411] The Companies (Con-

398. *Id.* at Table A, Art. 30.

399. *Id.* at Table A, Art. 32.

400. *Id.* at Table A, Art. 34.

401. *Id.* at § 52.

402. *Id.* at Table A, Art. 26.

403. *Id.* at Table A, Art. 72.

404. *Id*. at Table A, Art. 58.

405. Lucian Arye Bebchuk et al., *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy*, 54 STAN. L. REV. 887, 891 (2002); *cf.* K.J. Martijn Cremers & Simone M. Sepe, *The Shareholder Value of Empowered Boards*, 68 STAN. L. REV. 67 (2016) (challenging this contemporary U.S. corporate governance orthodoxy).

406. Under Delaware corporate law, shareholders can only remove directors of staggered boards "for cause." *See* DEL. CODE ANN. tit. 8, § 141(k)(1) (2018).

407. Today, the removal right is a statutory right, under both U.K. and Australian corporate law that cannot be altered in the constitution or by agreement. *See* Companies Act, 2006 c. 46 § 168(1) (U.K.); Corporations Act 2001 (Cth), § 203D(1) (Austl.).

408. *See, e.g.*, Companies (Consolidation) Act 1908, 8 EDW. 7, c. 69, Art. 72.

409. *See also* Hansmann & Pargendler, *supra* note 283 (analyzing in detail early voting rights in the United States).

410. 1862 Companies Act, 25 & 26 Vict. c. 89, § 52.

411. *Id*. at Table A, Art. 44 (adopting a tiered voting model, which conferred one vote per share for the first ten shares held; with one vote for every five shares thereafter up to 100 shares; and beyond that, one vote for every ten shares); *see also* Hansmann & Pargendler, *supra* note 283, at 951–52 (describing the use of "graduated voting" in the United States).

solidation) Act 1908 brought more consistency to shareholder voting, by establishing a one share/one vote default rule for a poll under both the Act[412] and the model articles.[413]

Of course, these U.K. model articles were default rules only. A fundamental question therefore arises—did U.K. public companies actually adopt them, thereby including strong shareholder participation rights in their own constitutions? There is mixed, and at times conflicting, recent scholarship on this issue.[414] One study, by Professors Foreman-Peck and Hannah, suggests that in the early twentieth century, many registered companies quoted on the London Stock Exchange voluntarily adopted robust shareholder rights in their articles as a means of signaling propriety to would-be investors.[415] This story has strong parallels with the current developments in the United States concerning private ordering of corporate governance.

Another study, by Professor Guinnane, Harris, and Lamoreaux, suggests, to the contrary, that the contractual freedom given to U.K. shareholders under the articles of association in early company law was appropriated over time by the directors, who then used it to dilute shareholder rights and shift the balance of power in their own favor.[416]

Unlike the current U.S. phenomenon of private ordering combat, the study by Guinnane et al. is essentially a story of private ordering capture.[417] Private ordering capture was certainly possible in the United Kingdom during the early decades of the twentieth century.[418] Shareholder resolutions were usually determined by proxy voting prior to the actual shareholders' meeting and the directors had strategic superiority in this process.[419] As stated in the 1934 case, *Re Dorman*

412. *See* Companies (Consolidation) Act 1908, 8 EDW. 7, c. 69, § 67(iv).

413. *Id.* at Table A, Art. 60; *see also* James Foreman-Peck & Leslie Hannah, *U.K. Corporate Law and Corporate Governance Before 1914: A Re-Interpretation*, *in* COMPLEXITY AND CRISIS IN THE FINANCIAL SYSTEM: CRITICAL PERSPECTIVES ON THE EVOLUTION OF AMERICAN AND BRITISH BANKING 183, 196 (Matthew Hollow, Folarin Akinbami & Ranald Michie eds., 2016) (stating that after 1900, it was unusual for large registered quoted companies to adopt anything other than the one share/one vote principle).

414. *See generally* Foreman-Peck & Hannah, *supra* note 413; Guinnane et al., *supra* note 286.

415. Foreman-Peck & Hannah, *supra* note 413, at 184. Professors Foreman-Peck and Hannah also highlight the fact that analogous investor protections were mandatory under the 1845 Company Clauses Consolidation Act, which applied to statutory companies, authorized by private Parliamentary Acts. Statutory companies falling within the aegis of this Act included public utilities, such as railway and canal companies. *Id*. at 186–88, 191–92; 1845 Company Clauses Consolidation Act, 8 Vict., c. XVI. Foreman-Peck and Hannah note that, until the end of the nineteenth century, these statutory companies were the dominant form of company quoted on U.K. stock exchanges, but were later eclipsed by registered companies. Foreman-Peck & Hannah, *supra* note 413, at 187, 197. This study provides a striking contrast with the widely held view that U.K. shareholders were largely unprotected at the beginning of the twentieth century. *See, e.g.*, Julian Franks, Colin Mayer & Stefano Rossi, *Ownership: Evolution and Regulation*, 22 REV. FIN. STUD. 4009, 4010 (2009).

416. Guinnane et al., *supra* note 286, at 227.

417. *Id*. at 229–30. Professor Cheffins cites an 1899 complaint, which supports the existence of private ordering capture during this period: "[T]he shareholder is absolutely defenceless. Provided you do not commit downright larceny or embezzlement you can do anything under suitable Articles of Association." CHEFFINS, *supra* note 45, at 195.

418. *See generally infra* notes 419–20.

419. *See In re* Dorman Long & Co. Ltd; *In re* South Durham Steel & Iron Co. Ltd [1934] Ch. 635.

Long & Co Ltd, "[i]n a sense, in all these cases, the dice are loaded in favour of the views of the directors."[420]

It is difficult to assess these competing claims because the studies are based on different sample groups of U.K. companies. Nonetheless, both studies provide interesting and revealing insights. Even the study by Guinnane et al. suggests that, at least for some rights, a high proportion of companies adopted Table A articles.[421] This study finds, for example, that a large majority (76%) of companies in two of its sample groups followed the Table A article, Article 65, granting shareholders power to remove directors by special resolution, and most companies also permitted shareholders to convene general meetings fairly easily.[422]

Further incentives to comply with the model articles were created by revisions to 1908 U.K. Companies Act Table A articles, which created a link between the model articles and London Stock Exchange Listing Rules.[423] It has been suggested that the burgeoning influence of the London Stock Exchange, which required companies seeking quotation to have articles of association of which the Committee of the Stock Exchange approved, provided indirect incentives for companies to adopt Table A-style good corporate governance practices.[424] The model articles therefore arguably served as an important benchmark against which individual companies' articles could be assessed and evaluated. Table A effectively operated as a norm creator.

Still, it is also likely that there is at least some truth in Guinnane et al.'s allegation of private ordering capture during this period of U.K. company law. The authors cite an 1894 investment guide, which warned potential investors to review a company's articles of association carefully in advance to ensure that they did not deprive the shareholders of "their just rights" by "unrestrictedly vesting in the directors all the powers of the company."[425] What is noteworthy about this investor warning is that it treated dilution of shareholder rights not as an appropriate allocation of power but rather as a perversion of good governance.[426]

420. *Id*. at 657–58; *see also* CHEFFINS, *supra* note 45, at 40 (citing a 1935 article by Cole, which states: "[I]n the ceaseless buying and selling of stocks and shares, and above all in the flotation and disposal of new capital issues, the insiders are obviously at an enormous advantage over the general investing public."); G.D.H. Cole, *The Evolution of Joint Stock Enterprise*, *in* STUDIES IN CAPITAL & INVESTMENT 51, 64 (G.D.H Cole ed., 1935).

421. Guinnane et al., *supra* note 286, at 244–45.

422. *See id.* Most of the sample companies adopted Article 32 of Table A (or an approximation of it), requiring directors to call such a meeting if requested by at least one-fifth of the members. *See id.* at 245. In addition, twelve out of fifty-four sample companies had no articles of association on file, which might suggest wholesale adoption of the model articles, although Guinnane et al. acknowledge that it is also possible that the missing articles could simply have been lost. *Id.* at 238–39.

423. *See* CHEFFINS, *supra* note 45, at 40 (stating that U.K. stock exchange listing rules were often more protective than company law); *see also id*. at 196–97 (noting, however, that the level of protection prior to 1914 was "generally meagre").

424. *See, e.g.*, Foreman-Peck & Hannah, *supra* note 413, at 185, 193–94; CHEFFINS, *supra* note 45, at 197; *cf*. Guinnane et al., *supra* note 286, at 229–30.

425. Guinnane et al., *supra* note 286, at 257.

426. *Id.*

Furthermore, because Guinnane et al.'s study is primarily an examination of the articles of association, it pays less attention to the broader U.K. company law context, in which there were important developments relating to the interplay of voluntary and mandatory rules.[427] From the early twentieth century onwards, there was a shift towards "juridification" in U.K. company law.[428] This involved a series of reforms, which introduced mandatory statutory rules that either prohibited certain practices or guaranteed shareholders specific participation rights. These mandatory rules were often introduced in response to market crises, and on the recommendation of influential U.K. reform committees, which provided regular status reports on U.K. company law throughout the twentieth century.[429] Many of the reforms adopted in response to the Greene Committee Report in 1926,[430] the Cohen Committee Report in 1945,[431] and the Jenkins Committee Report in 1962,[432] were mandatory rules designed to give shareholders a greater degree of control over the board of directors.

These mandatory statutory rules operated against the traditional "free contracting" backdrop of U.K. company law.[433] The statutory provisions both complemented and trumped the articles of association. The 1900 U.K. Companies Act, for example, introduced a mandatory statutory rule granting shareholders with 10% or more of the company's issued capital the right to convene a general meeting.[434] This suggests that a significant number of companies failed to include analogous Table A rights in their articles of association,[435] thereby prompting the legislature to intervene and introduce them as mandatory rules. These legislative gap fillers provided one-way flexibility—the articles of association could increase, but not decrease, the shareholder protection and participatory rights provided by the statutory rules.[436]

Another clear example of the impact of the divergent origins of U.K. and U.S. corporate law relates to exculpation clauses.[437] Express legislative authorization was required before U.S. corporate charters could include exculpatory clauses protecting directors from claims of breach of the duty of care, including

427. *See generally* Nolan, *The Continuing Evolution*, *supra* note 54.

428. *See* John W. Cioffi, *Adversarialism versus Legalism: Juridification and Litigation in Corporate Governance* Reform, 3 REG. & GOV. 235 (2009) (on the concept of juridification).

429. *See id*. at 328–31.

430. BOARD OF TRADE, COMPANY LAW AMENDMENT COMMITTEE 1925–26, 1926, Cmd. 2657 (UK).

431. BOARD OF TRADE, REPORT OF THE COMMITTEE ON COMPANY LAW AMENDMENT, 1945, Cmd. 6659 (UK).

432. BOARD OF TRADE, REPORT OF THE COMPANY LAW COMMITTEE, 1962, Cmd. 1749 (UK).

433. Nolan, *The Continuing Evolution*, *supra* note 54, at 103–05.

434. *See* Companies Act 1900, 63 & 64 Vict. c. 48, § 13 (UK).

435. Nolan, *The Continuing Evolution*, *supra* note 54, at 103.

436. For example, under the 1947 Companies Act, rules regarding the length of notice for general meetings, which were previously default rules only, became mandatory minimum rules, which could be increased, but not decreased in the company's articles. *See* Companies Act 1947, 10 & 11 Geo. 6 c. 47, § 2 (UK). *See generally* Nolan, *The Continuing Evolution*, *supra* note 54, at 103–05. The 1947 Companies Act also, for the first time, granted shareholders an inalienable statutory right to remove directors from office. *See* Companies Act 1947, 10 & 11 Geo. 6 c. 47, § 29 (UK).

437. Hill & Conaglen, *supra* note 89, at 318–20, 327–29.

gross negligence.[438] That "enabling" legislation appeared only in 1986, when Delaware enacted DGCL section 102(b)(7) as a rapid regulatory response to *Smith v. Van Gorkom*.[439]

In the United Kingdom, on the other hand, exculpation (or exoneration) clauses were common in the articles of public companies from the early twentieth century on because of the "free contracting" background. Their widespread use accords with a private ordering capture hypothesis. However, contrary to the approach of many U.S. states in explicitly authorizing such clauses,[440] the United Kingdom introduced reforms in 1928 that prohibited and invalidated any provision exempting directors from liability for breach of duty, including negligence.[441] These reforms, which still operate today, were based on the recommendations of the Greene Committee, which was scathing in its assessment of this type of article, stating that, in its view, it gave directors "a quite unjustifiable protection."[442]

X. CONCLUSION

This Article explores a range of contemporary U.S. corporate governance developments, including shareholder empowerment and private ordering combat. It seeks to understand certain legal and attitudinal differences relating to shareholder participation in corporate governance between the United States and other common law jurisdictions, such as the United Kingdom.

The Article examines these issues from comparative and historical perspectives. It highlights the fact that U.S. and U.K. corporate law have different organizational origins and, as a result of these dissimilar starting points, combined with origins backlash, have followed quite different paths from the late nineteenth century onwards.[443] U.S. law shifted from a rigid corporate law system, which evolved from chartered corporations, to a far more liberal and flexible system, but a system in which directors and corporate managers held the reins of corporate power and where the participatory role of shareholders in U.S. corporate governance was diminished.[444] The United Kingdom, on the other hand, shifted from a "free contracting" position, which evolved from unincorporated deed of settlement companies, to a system where shareholders received stronger

438. James J. Hanks, Jr., *Evaluating Recent State Legislation on Director and Officer Liability Limitation and Indemnification*, 43 BUS. LAW. 1207, 1210–11 (1988).

439. *See generally id.* at 1208–09; Randy J. Holland, *Delaware Directors' Fiduciary Duties: The Focus on Loyalty*, 11 U. PA. J. BUS. L. 675, 691 (2009).

440. *See generally* Michal Barzuza, *Market Segmentation: The Rise of Nevada as a Liability-Free Jurisdiction*, 98 VA. L. REV. 935 (2012).

441. This reform was based on recommendation of the U.K. Greene Committee. *See* BOARD OF TRADE, *supra* note 432, at §§ 46–47.

442. *Id.* § 46 (further noting the Greene Committee continued by saying that under this type of article, "a director may with impunity be guilty of the grossest negligence provided that he does not consciously do anything which he recognises to be improper"). *See generally* Hill & Conaglen, *supra* note 89.

443. *See supra* Parts VIII and IX and accompanying text.

444. *See supra* Section IX.A and accompanying text.

rights as a result of mandatory participatory rights and various statutory protections.[445]

The distinctive trajectory of U.S. corporate governance goes some way to explaining why activism first developed in the United States, why it continues to be such a controversial issue today, and why institutional investors are increasingly using private ordering remedies to acquire governance rights that are already available to shareholders in other common law jurisdictions.[446] These U.S. developments also reflect the increasing globalization of capital markets and corporate governance.

445. *See supra* Section IX.B and accompanying text.

446. *See generally* Hill, *Subverting Shareholder Rights*, *supra* note 45 (highlighting fundamental legal differences between Delaware and Australian corporate law at the time of News Corp.'s reincorporation in Delaware).