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Symbolic Corporate Governance Politics

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SYMBOLIC CORPORATE GOVERNANCE POLITICS

MARCEL KAHAN* & EDWARD ROCK**

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We thank Emiliano Catan, Claire Hill, Isaac Corre, Jack Jacobs, Jacques deLisle, Louis Kaplow, Leo Katz, Michael Klausner, Travis Laster, Rick Pildes, Mark Roe, Holger Spamann, Daniel Wolfenzon, and participants in seminars at Harvard Law School, at the Annual Penn-NYU Law and Finance Conference, and at Wachtell, Lipton, Rosen & Katz for helpful comments, and Shannon Morris for her excellent research assistance. Marcel Kahan’s research was supported by the Milton and Miriam Handler Foundation.

INTRODUCTION

Poison pills. Proxy access. Separation of the Chair and CEO positions. Staggered boards. Majority voting. Secret ballots. Independent directors. Say-on-pay. How many battles have been fought over corporate governance reform? How much ink has been spilled over what the partisans present as burning issues? Each controversy is claimed to be important. Yet, in retrospect, or even from a contemporary disinterested perspective, the stakes hardly seem to justify the intensity of the contest. What could be going on?

This is hardly an unusual situation. The material stakes in political disputes are often unrelated to the vigor of those contests. Often, even after high-profile, bitterly fought battles over policy, nothing changes. How is this phenomenon—a gap between rhetoric and reality, combined with minimal material stakes—to be understood, especially when it is so common as to be predictable?

In this Article, we consider the possibility that corporate governance politics, like politics more generally, may have a significant “symbolic” element. When the stakes and the intensity are largely divorced from the specific issue being debated, one should ask whether politics is serving other functions, including a “mythological” or “ritual” function. In Part I, we review a selection of corporate governance controversies and show that they typically display a striking gap between rhetoric and reality, with small or zero material stakes. In Part II, we consider a variety of explanations for this gap. In doing so, we start with the familiar “public interest” and “public choice” analyses, and then introduce Thurman Arnold’s “symbolic” view of politics as developed in *The Folklore of Capitalism*. In Part III, we consider the implications of the symbolic aspects of corporate governance politics. We close with a brief conclusion.

I. SOME ILLUSTRATIVE CORPORATE GOVERNANCE CONTROVERSIES

An interesting feature of corporate governance politics is that there seem to be new controversies every year. Although there is a certain degree of uncertainty regarding the high-profile issues, there is significantly less uncertainty as to the prominent protagonists. The one sure thing is that we will never have a year without any controversies. It is almost enough to make one believe there is a corporate governance reform “industry” that demands activity to keep itself going.

In this Part, we analyze four issues over which intense corporate governance disputes have recently arisen: poison pill proposals, proxy access, majority voting, and supermajority requirements. For each issue, we review the sharp rhetoric employed by the partisans and then explain why the actual stakes were small or trivial. We then consider, as a fifth issue, mandatory bylaw amendments, that—curiously—have *not* become a focus for activists even though such amendments could generate tangible changes. That shareholder activists and managerialists wage battles over issues of little import, while ignoring more meaningful issues, suggests that activism has a significant

“symbolic” element and cannot be fully explained by the material stakes at issue in a given controversy.

A. *Poison Pill Proposals*

1. The Issue

One of the most common shareholder proposals asks boards to redeem a poison pill or to submit it to a shareholder vote. A 2000 shareholder proposal at Baxter International is typical:

RESOLVED: The shareholders of Baxter International Inc. (“Company”) request that the Board of Directors redeem the stock purchase rights issued December 9, 1998, unless said issuance is approved by the affirmative vote of a majority of the outstanding shares at a meeting of shareholders held as soon as practicable.¹

According to Georgeson, which compiles data on shareholder proposals filed in S&P 1500 firms, poison pill proposals were the most common type of governance proposal filed in the 1987 to 2004 period.² These proposals also tend to garner substantial support from shareholders. During the 2000 proxy season, for example, the average poison pill rescission proposal was supported by 55% of the shares voted, with 39% voting against and 6% abstaining.³

2. The Rhetoric

Poison pills are widely regarded as the most formidable takeover defense. As long as a modern poison pill is in place, a company is virtually takeover-proof.⁴ As explained by Marty Lipton, “[The poison pill] is an absolute bar to a

¹ Baxter Int’l Inc., Definitive Proxy Statement (Schedule 14A), at 30 (Mar. 23, 2000), archived at <http://perma.cc/DEV2-6LSE>.

² See GEORGESON, ANNUAL CORPORATE GOVERNANCE REVIEW 2 fig.3 (2004), available at <http://www.computershare-na.com/sharedweb/georgeson/acgr/acgr2004.pdf>, archived at <http://perma.cc/A5VZ-FNEJ> [hereinafter GEORGESON 2004] (data from 2001-2004); GEORGESON, ANNUAL CORPORATE GOVERNANCE REVIEW 3 fig.2 (2000), available at <http://www.computershare-na.com/sharedweb/georgeson/acgr/acgr2000.pdf>, archived at <http://perma.cc/Z6J6-FTBY> [hereinafter GEORGESON 2000] (data from 1987-2000). Poison pill proposals started to decline as shareholder activism caused a reduction in outstanding pills. See GEORGESON, ANNUAL CORPORATE GOVERNANCE REVIEW 4, 6 (2007), available at <http://www.computershare-na.com/sharedweb/georgeson/acgr/acgr2007.pdf>, archived at <http://perma.cc/R3KG-BXGN> [hereinafter GEORGESON 2007].

³ See GEORGESON 2000, *supra* note 2, at 6 (documenting shareholder proposal voting results for the 2000 year). Additionally, in 2004, such proposals were supported by 60% of the shares that voted on the proposal, with 37% voting against and 3% abstaining. GEORGESON 2004, *supra* note 2, at 6 (documenting shareholder proposal election results for the 2004 year).

⁴ See John C. Coates, *Takeover Defenses in the Shadow of the Pill: A Critique of the Scientific Evidence*, 79 TEX. L. REV. 271, 321 n.195 (2000) (stating that poison pills prevent bidders who cannot win a proxy contest for the target from acquiring more than a small

raider acquiring control . . . without the approval of the company's board of directors."⁵

Because of this potency, governance professionals at major institutional investors view pills as illegitimate unless approved by shareholders. The State of Wisconsin Investment Board, for example, has a policy to "support shareholder proposals asking a company to submit its poison pill for shareholder ratification."⁶ Vanguard's proxy voting guidelines state that "[i]n general, shareholders should be afforded the opportunity to approve shareholder rights plans within a year of their adoption."⁷ T. Rowe Price notes that "[w]e routinely vote against directors of any company that adopts a poison pill without subjecting it to shareholder approval, and we support shareholder proposals calling for companies to offer shareholders an opportunity to ratify their poison pills."⁸

Unsurprisingly, less-mainstream shareholder activists pick up on these themes. Thus, union activist UNITE HERE!,⁹ the shareholder proponent of the Baxter proposal (and holder of 10,400 of the company's shares), argued that "shareholders should have the right to vote on the necessity of such a powerful tool that could be used to entrench existing management" and that "we do not believe that our Company should maintain its management and board-entrenching poison pill Rights Agreement without shareholder approval."¹⁰ It concluded that "in light of . . . the undeniably undemocratic way in which they were assigned to shareholders, we believe these rights should lapse and not be extended, renewed or issued again without a shareholder vote."¹¹

Boards take shareholder proposals to redeem poison pills seriously. Once such proposals received majority support, several companies let their poison pills expire.¹² Without a poison pill, a company's ability to resist a hostile takeover is substantially weakened. By inducing companies to let their poison

percentage of target stock because they will be unable to redeem the pill).

⁵ Joseph A. Grundfest, *Just Vote No: A Minimalist Strategy for Dealing with Barbarians Inside the Gates*, 45 STAN. L. REV. 857, 859 n.4 (1993) (quoting Memorandum from Martin Lipton, Wachtell, Lipton, Rosen & Katz to Clients (Jan. 15, 1993)).

⁶ STATE OF WIS. INV. BD., CORPORATE GOVERNANCE GUIDELINES 17 (2014).

⁷ *Vanguard's Proxy Voting Guidelines*, VANGUARD, archived at <http://perma.cc/4GDP-QXK9> (last visited Sept. 25, 2014).

⁸ 2013 *Aggregate Proxy Voting Summary*, T. ROWE PRICE, archived at <http://perma.cc/85TG-48MJ> (last visited Sept. 10, 2014).

⁹ See generally UNITE HERE!, archived at <http://perma.cc/SDR4-WVU4> (last visited Oct. 16, 2014).

¹⁰ Baxter Int'l Inc., *supra* note 1, at 31.

¹¹ *Id.* at 32.

¹² See Memorandum from David A. Katz & Laura A. McIntosh, Wachtell, Lipton, Rosen & Katz, Corporate Governance Update: Poison Pills – Maintain Flexibility in Takeover Defense 2-3 (2006) (stating that after a majority of affirmative votes to rescind poison pills, "[a] number of companies have simply allowed their rights plans to expire on schedule without renewing them").

pills expire, it would seem that activists scored a major victory.

3. The Reality

The reality is that poison pill proposals, including proposals that induce companies to terminate or not to renew existing pills, have no impact on the company's ability to resist a hostile bid. As any corporate lawyer worth her salt can tell you, it is both legally and practically irrelevant whether a company has a poison pill in place when a hostile bid is made. Poison pills are adopted unilaterally by a board and do not require any shareholder approval.¹³ If needed, a reasonably competent lawyer can implement a "rights plan"—the formal name for a pill—within a day.¹⁴ Hostile bids, by contrast, take time to consummate. The Williams Act¹⁵ requires that tender offers be left open for a period of at least twenty business days¹⁶ and mandates that any shareholder who acquires more than five percent of the company's stock make a disclosure within ten days.¹⁷ This affords potential targets plenty of time to adopt a pill once a pill is needed.¹⁸ Raiders, of course, are just as aware of this fact as are the boards of potential targets.

Terminating or failing to renew a pill does not represent an explicit or implicit commitment by the board not to adopt a pill in the future. In fact, even an announced board policy to forego a pill would not preclude a future board from adopting a pill if the future board believed that it was in the company's best interest to do so.¹⁹ To properly bind a future board, the current board would have to add a charter provision limiting the board's power to adopt a pill. But shareholder proposals on pills do not ask for such a provision. So why do shareholder activists push so hard for companies to remove the current pills but ignore the real issue that pills can be reinstated at any time?

¹³ Coates, *supra* note 4, at 287 n.62 ("Technically, pill adoption is a dividend of rights to purchase stock. Dividends . . . are within the authority of the board and do not require shareholder approval.").

¹⁴ See KATZ & MCINTOSH, *supra* note 12, at 3 ("One great advantage of the poison pill . . . is that a board can adopt a pill very quickly – sometimes within 24 hours, and generally within a few days – if necessary.").

¹⁵ Williams Act, Pub. L. No. 90-439, 82 Stat. 454 (1968).

¹⁶ Securities Exchange Act of 1934, 17 C.F.R. § 240.14e-1(a) (2014).

¹⁷ *Id.* at § 240.13d-1(a) (imposing filing requirement).

¹⁸ KATZ & MCINTOSH, *supra* note 12, at 3 (stating that in 2005, 20% of pills were adopted in response to specific threat).

¹⁹ See *Quickturn Design Sys., Inc. v. Shapiro*, 721 A.2d 1281, 1291-93 (Del. 1998) (holding that dead-hand pill violated Section 141(a) of the Delaware General Corporation Law by depriving future board of responsibility for managing corporation).

B. *Proxy Access*

1. The Issue

Up to 2011, one of the most sought-after—and most fought-over—corporate governance reforms was proxy access. In 2003, the SEC released a proposal to grant shareholders access to a corporation’s proxy statement following a triggering event—either a thirty-five percent or more “withhold” vote in a director election or a majority vote by shareholders electing to make the company subject to proxy access.²⁰ Under that proposal, after a trigger, shareholders of any publicly traded company who held at least five percent of the company’s stock for a minimum of two years would have been able to make nominations for some of the board seats.²¹

Despite strong backing by shareholder activists and many institutional investors, the proposal was not adopted.²² Instead, in 2007, the SEC restricted

²⁰ See Security Holder Director Nominations, 68 Fed. Reg. 60,784, 60,789 (proposed Oct. 23, 2003) (to be codified at 17 C.F.R. pts. 240, 249, 274) (proposal not adopted) (proposing to mandate shareholder access to the proxy statement when 35% or more votes during a direction election are withheld, or when a majority votes for such access).

²¹ *Id.*

²² The comments to Security Holder Director Nominations provide further information and show the breadth and vigor of the support for proxy access. See E-mail from Gabriel P. Caprio, Chief Exec. Officer, Amalgamated Bank, to Jonathan Katz, Sec’y, SEC (Dec. 22, 2003), *archived at* <http://perma.cc/8ST6-TYV7> (stating the proposal “represents an important step toward meaningful reform of shareholder access rules”); Letter from Peter C. Clapman, Senior Vice President and Chief Counsel, Teachers Ins. and Annuity Ass’n of Am., to Jonathan Katz, Sec’y, SEC (Dec. 17, 2003), *archived at* <http://perma.cc/M4XZ-3BP3> (stating that the rule “would provide security holders with the ability to play a more direct and effective role in nominating and electing directors”); Letter from Gary Findlay, Exec. Dir., Mo. State Emps.’s Ret. Sys., et al., to Jonathan Katz, Sec’y, SEC (Dec. 22, 2003), *archived at* <http://perma.cc/X2ZX-TCZK> (stating that the proposed rules would give shareholders “the ability to participate meaningfully in board elections” for the first time); E-mail from Peter M. Gilbert, Chief Inv. Officer, Commonwealth of Pa. State Emps.’s Ret. Sys., to Jonathan Katz, Sec’y, SEC (Dec. 22, 2003), *archived at* <http://perma.cc/K2WY-EEYH> (stating that the rules will “enable the shareholders, the true owners of the corporation, to hold boards of directors . . . more responsive”); Letter from Laurie Fiori Hacking, Exec. Dir., Ohio Pub. Emps. Ret. Sys., to William H. Donaldson, Chair, SEC (Dec. 10, 2004), *available at* <http://www.sec.gov/rules/proposed/s71903/lfhacking121004.pdf>, *archived at* <http://perma.cc/UX58-WHCD> (calling the proposal “one of the most significant and important investor reforms adopted by the SEC since it adopted Rule 14a-8”); Letter from Sean Harrigan, President, Cal. Pub. Emps. Ret. Sys., to Jonathan Katz, Sec’y, SEC (Dec. 5, 2003), *available at* <http://www.sec.gov/rules/proposed/s71903/s71903-257.pdf>, *archived at* <http://perma.cc/4P43-HY2Z> (stating the proposal “is perhaps the most significant reform to come as a result of the financial market crisis in the U.S.”); Letter from Alan G. Hevesi, Comptroller, N.Y., to Jonathan Katz, Sec’y, SEC (Dec. 19, 2010), *available at* <http://www.sec.gov/rules/proposed/s71903/s7-19-03-432.pdf>, *archived at*

the ability of shareholders to seek proxy access on a company-by-company basis through a shareholder proposal under Rule 14a-8.²³

After the election of President Obama, the SEC's composition—and its view on proxy access—changed again. In 2010, with the continued support of many

<http://perma.cc/E7EB-2NN7> (stating proxy access is of “critical importance” especially when considering recent corporate scandals); Letter from James P. Hoffa, Gen. President, Int'l Bhd. of Teamsters, to Jonathan Katz, Sec'y, SEC (Dec. 22, 2003), *available at* <http://www.sec.gov/rules/proposed/s71903/s71903-487.pdf>, *archived at* <http://perma.cc/LVW3-AUD3> (stating that the proposal “is perhaps the single most important issue currently before the Commission and has the potential to produce true and lasting reform”); Letter from Henry H. Hopkins, Chief Legal Counsel, T. Rowe Price Assocs., Inc., to Jonathan Katz, Sec'y, SEC (Dec. 24, 2003), *available at* <http://www.sec.gov/rules/proposed/s71903/s71903-385.pdf>, *archived at* <http://perma.cc/P9KV-2GX4> (suggesting modifications but asserting that overall, “the rule proposal strikes an appropriate balance between . . . right of shareholders to participate . . . and the potential for disruption”); E-mail from Keith Johnson, Chief Legal Counsel, State of Wis. Inv. Bd., to Jonathan Katz, Sec'y, SEC (Dec. 22, 2003), *archived at* <http://perma.cc/LP4X-9ECF> (stating that the proposal will “improve the quality of director candidates through greater competition and attention to credentials”); Letter from Amy B.R. Lancellotta, Senior Counsel, Inv. Co. Inst., to Jonathan Katz, Sec'y, SEC (Dec. 22, 2003), *archived at* <http://perma.cc/3Q36-MKE3> (providing commentary but “generally support[ing] the proposal”); Letter from Gerald W. McEntee, Int'l President, Am. Fed'n of State, Cnty. and Mun. Emps., AFL-CIO, to Jonathan Katz, Sec'y, SEC 2 (Dec. 19, 2003), *available at* <http://www.sec.gov/rules/proposed/s71903/s71903-396.pdf>, *archived at* <http://perma.cc/U8KM-3DX7> (stating that the proposal would “restor[e] accountability to our system of corporate governance”); Letter from Andrew G. Murphy, Vice President and Counsel, Alliance Capital Mgmt., L.P., to Jonathan Katz, Sec'y, SEC (Dec. 15, 2003), *available at* <http://www.sec.gov/rules/proposed/s71903/s71903-364.pdf>, *archived at* <http://perma.cc/SBJ9-5UTE> (supporting the proposal “as a means of improving corporate governance, increased director accountability, independence, and performance”); Letter from Marsha D. Richter, Chief Exec. Officer, L.A. Cnty. Emps. Ret. Ass'n, to William H. Donaldson, Chair, SEC (Dec. 20, 2004), *available at* <http://www.sec.gov/rules/proposed/s71903/s71903-1016.pdf>, *archived at* <http://perma.cc/5CZN-D67N> (asserting that “improving shareholder access to the proxy process is the most important corporate governance issue facing investors today”); Letter from William C. Thompson Jr., N.Y.C. Comptroller, to Jonathan Katz, Sec'y, SEC (Dec. 16, 2003), *archived at* <http://perma.cc/DN35-R3QZ> (calling the proposal “one of the most significant actions taken to reform corporate governance and restore investor confidence”); Letter from Richard L. Trumka, Sec'y-Treasurer, Am. Fed'n of Labor and Cong. of Indus. Org., to Jonathan Katz, Sec'y, SEC (Dec. 19, 2003), *archived at* <http://perma.cc/XA2Y-UCLC> (“[G]ranting long-term shareholders a meaningful say in picking directors is the most important investor reform to be considered by the Commission in decades.”).

²³ See 17 C.F.R. § 240.14a-8(i)(8) (2014); Shareholder Proposals Relating to the Election of Directors, Exchange Act Release No. 34-56914 (Dec. 6, 2007), 72 Fed. Reg. 70,450 (Dec. 11, 2007); Shareholder Proposals, Exchange Act Release No. 34-56160 (July 27, 2007), 72 Fed. Reg. 43,466 (Aug. 3, 2007).

activists and institutional shareholders,²⁴ it adopted a proxy access rule that

²⁴ The comments to the proposal provide further information and again demonstrate the breadth and intensity of the support expressed. *See* E-mail from Joseph A. Dear, Chief Inv. Officer, Cal. Pub. Emps. Ret. Sys., to Elizabeth Murphy, Sec’y, SEC (Aug. 14, 2009) *available at* <http://www.sec.gov/comments/s7-10-09/s71009-259.pdf>, *archived at* <http://perma.cc/ZV8D-Z3LZ> (calling the new rule “historically significant reform that will enable investor to hold corporate boards accountable and restore investor confidence in the capital markets”); Letter from Chris DeRose, Chief Exec. Officer, Ohio Pub. Emps. Ret. Sys. to Elizabeth Murphy, Sec’y, SEC (Jan. 19, 2010), *available at* <http://www.sec.gov/comments/s7-10-09/s71009-601.pdf>, *archived at* <http://perma.cc/SR67-SGTB> (commending the SEC for “fulfilling its role as the investor’s advocate by developing reforms to allow shareowner access to company-prepared proxy materials relating to the nomination and election of directors”); Letter from Jack Ehnes, Chief Exec. Officer, Cal. State Teachers Ret. Sys., to Elizabeth Murphy, Sec’y, SEC 2 (Jan. 19, 2010), *available at* <http://www.sec.gov/comments/s7-10-09/s71009-623.pdf>, *archived at* <http://perma.cc/8HH5-GFMF> (stating that “[p]roxy access will finally provide shareholders a meaningful voice in the nomination process and will be the greatest advancement of shareholder rights in decades”); Letter from Cornish F. Hitchcock, Counsel, Amalgamated Bank, to Elizabeth Murphy, Sec’y, SEC 2 (Aug. 17, 2009), *available at* <http://www.sec.gov/comments/s7-10-09/s71009-220.pdf>, *archived at* <http://perma.cc/8BM4-NVYJ> (“[T]he current economic crisis has only underscored the need for shareholders to be able to hold directors accountable . . . by nominating candidates whose merits can be considered by all shareholders when they review the company-prepared proxy materials.”); Letter from James P. Hoffa, Gen. President, Int’l Bhd. of Teamsters, to Elizabeth Murphy, Sec’y, SEC 2 (Aug. 17, 2009), *available at* <http://www.sec.gov/comments/s7-10-09/s71009-204.pdf>, *archived at* <http://perma.cc/7JC2-ZBBE> (calling rules allowing shareholders to nominate board candidates “the most meaningful way to empower shareholders”); Letter from Mark R. Manley, Senior Vice President and Deputy Gen. Counsel, AllianceBernstein L.P., to Elizabeth Murphy, Sec’y, SEC 2 (Aug. 14, 2009), *available at* <http://www.sec.gov/comments/s7-10-09/s71009-176.pdf>, *archived at* <http://perma.cc/S82K-GNFA> (supporting “the central problem that needs to be solved — shareholders’ limited ability to exercise their rights to nominate directors and have the nominations disclosed to and considered by shareholders”); Letter from Gerald W. McEntee, Int’l President, Am. Fed’n of State, Cnty. and Mun. Emps., to Elizabeth Murphy, Sec’y, SEC 3 (Jan. 19, 2010), *available at* <http://www.sec.gov/comments/s7-10-09/s71009-613.pdf>, *archived at* <http://perma.cc/6K7A-88GE> (“Shareholders need a uniform federal proxy access rule to facilitate their key state-law right to nominate and elect directors who will robustly represent their interests.”); Letter from Denise L. Nappier, Treasurer, Conn., to Elizabeth Murphy, Sec’y, SEC 1 (Jan. 19, 2010), *available at* <http://www.sec.gov/comments/s7-10-09/s71009-607.pdf>, *archived at* <http://perma.cc/JVW7-6HBY> (calling the proposal “an effective means of enhancing corporate boards’ accountability to shareholders and increasing investor confidence in our markets”); Letter from Theresa J. Whitmarsh, Exec. Officer, Wash. State Inv. Bd., to Elizabeth Murphy, Sec’y, SEC 1 (Jan. 14, 2010), *available at* <http://www.sec.gov/comments/s7-10-09/s71009-594.pdf>, *archived at* <http://perma.cc/Y47G-WJBV> (stating that “[r]arely has the need for the type of regulatory reform proposed by the SEC been more urgent”); Letter from Meredith Williams, Exec. Officer, Colo. Pub. Emps. Ret. Ass’n, to Elizabeth Murphy, Sec’y, SEC 2 (Jan. 19, 2010), *available at* <http://www.sec.gov/comments/s7-10-09/s71009-612.pdf>, *archived at* <http://perma.cc/8Y47-GWJBV>

went beyond the 2003 proposal: it removed the triggering event requirement and reduced the threshold for nominations to three percent held for three years.²⁵ But even though Congress, as part of the Dodd-Frank Act, specifically authorized the SEC to regulate proxy access, the proxy access rule was struck down by the Court of Appeals for the D.C. Circuit in *Business Roundtable v. Securities and Exchange Commission*.²⁶ The court, however, left in place a companion rule that reversed the 2007 rule and specifically permitted shareholders to seek proxy access on a company-by-company basis through a shareholder proposal under Rule 14a-8.²⁷

2. The Rhetoric

From the SEC's original proposal in 2003 through the invalidation of the SEC's revised proxy access rule in 2011, proxy access elicited great controversy. To opponents, proxy access posed a clear and present danger to American prosperity. The Chamber of Commerce included killing proxy access among its top five priorities;²⁸ SEC Commissioner Casey thought it was "fatally flawed";²⁹ two Wachtell lawyers feared it would "wreak havoc with American business";³⁰ and Willkie Farr & Gallagher thought it would have a "profound effect on the election of corporate directors."³¹

Proponents adopted equally strong rhetoric in the other direction.³² CtW

<http://perma.cc/N5HN-5GSL> (stating that "[a]mending proxy access rules will provide for the exercise of shareowners' fundamental rights to nominate and elect directors").

²⁵ Facilitating Shareholder Director Nominations, 75 Fed. Reg. 56,668, 56,680, 56,688 (Sept. 16, 2010) (to be codified at 17 C.F.R. pts. 200, 232, 240, 249) (vacated before publication).

²⁶ 647 F.3d 1144, 1149-51 (D.C. Cir. 2011) (holding that because the SEC did not adequately address the rule's economic effects, the rule was "arbitrary and capricious").

²⁷ See *id.* at 1153 & n.** (explaining that rule 14a-8 is "not challenged here").

²⁸ See Kara Scannell, *Proxy Plan Roils Talks on Finance Rules*, WALL ST. J., Mar. 17, 2010, at A2 ("Now, the Chamber is mobilizing forces to lobby lawmakers to kill the provision.").

²⁹ Kathleen Casey, Comm'r, SEC, Statement at Open Meeting to Adopt Amendments Regarding Facilitating Shareholder Director Nominations (Aug. 25, 2014), *archived at* <http://perma.cc/4HQT-44QK>.

³⁰ David A. Katz & Laura A. McIntosh, *Senate Bill Adversely Affects the Landscape*, 243 N.Y. L.J., May 27, 2010, at 5; see also Martin Lipton, Briefly, AEI Legal Center for the Public Interest, *Some Thoughts for Boards of Directors in 2008*, at 6 (2008) (calling proxy access "a serious mistake with far-reaching consequences").

³¹ Memorandum from Wilkie Farr & Gallagher, LLP, SEC Proposes "Proxy Access" Rules to Facilitate Director Nominations by Shareholders (Aug. 26, 2009), *available at* http://www.willkie.com/~media/Files/Publications/2010/08/SEC%20Adopts%20Proxy%20Access%20Rules%20To%20Facilitate%20Dire_/Files/SECAdoptsProxyAccessRulespdf/FileAttachment/SEC-Adopts-Proxy-Access-Rules.pdf, *archived at* <http://perma.cc/4TQ3-TGM8>.

³² See *supra* note 24.

Investment Group, a proxy advisory firm, called proxy access a “new and powerful tool”;³³ the Council of Institutional Investors thought it was “groundbreaking for U.S. shareowners”;³⁴ SEC Commissioner Walters felt it would “restore investor confidence”;³⁵ Commissioner Goldschmid worried that, without proxy access, shareholders would remain “marginalized in choosing the direction of boards”;³⁶ and the California Public Employees’ Retirement System regarded “[p]roxy access [as] one of our top priorities.”³⁷

3. The Reality

The 2012 proxy season was the first time that shareholder activists had a clear opportunity to seek implementation of proxy access through a shareholder proposal. The SEC rules that had been unclear—prior to 2007—or had been clear in *not* permitting such proposals—between 2007 and 2011—had been revised.³⁸ Moreover, in the meantime, Delaware modified its law to clarify that proxy access could be validly implemented via a bylaw amendment.³⁹ This presented the possibility of passing a “mandatory” Rule 14a-8 proposal that directly amends the bylaws to grant proxy access (rather than merely requesting that the board take steps to implement proxy access). Finally, by 2012, it was clear that the SEC would not take up “proxy access” in the near future.⁴⁰

Viewed from this perspective, when the SEC’s proxy access rule was invalidated in *Business Roundtable*, shareholder activists had merely lost a battle, not the war. To be sure, the battleground had shifted to the ballot box,

³³ Joann S. Lublin, *New Rule on Proxies Puts Heat on Firms*, WALL ST. J., Aug. 23, 2010, at B1.

³⁴ Walter Hamilton, *SEC Expands Access to ‘Proxy’ Process; Major Stockholders Will be Able to Place Board Nominees Directly on the Ballot*, L.A. TIMES, Aug. 26, 2010, at B1.

³⁵ *Walter Calls for Action on Proxy Access, Disclosure, Other Governance Topics*, BLOOMBERG BNA CORP. LAW DAILY, Feb. 19, 2009 (attributing phrase to SEC Commissioner Elisse Walter).

³⁶ Richard Hill, *Goldschmid Says Shareholders Need Voice In Choosing Direction of Company’s Board*, BLOOMBERG BNA SEC. REG. & L. REP., Mar. 15, 2004, available at 36 SRLR 483.

³⁷ Press Release, Cal. Pub. Emps. Ret. Sys., CalPERS Responds to Appeals Court Decision in Proxy Access Case (July 22, 2011), archived at <http://perma.cc/YPH9-X7R2>.

³⁸ See 17 C.F.R. § 240.14a-8 (2014) (clarifying when a company must include a shareholder proposal and listing specific circumstances when company can exclude proposal).

³⁹ See DEL. CODE ANN. tit. 8, § 112 (2011) (establishing that companies “may be required, to the extent and subject to such procedures or conditions as may be provided in the bylaws, to include in its proxy solicitation materials . . . 1 or more individuals nominated by a stockholder”).

⁴⁰ Press Release, Mary L. Schapiro, Chairman, SEC, Statement on Proxy Access Litigation (Sept. 6, 2011), archived at <http://perma.cc/9S6H-VLEJ> (stating that the SEC would not appeal the D.C. Circuit’s decision to vacate Rule 14a-11).

but the investor community had been sensitized to, and had given significant support to some version of, proxy access. Thus, activists had reason to be optimistic over how a proxy access shareholder proposal would fare. Surely they would avail themselves of the opportunity to pressure companies to implement proxy access—their long-sought and critically important governance reform—through actual or threatened 14a-8 proposals.

So what happened on the proxy access front in 2012? Not much. U.S.-based institutional investors, many of which had been strong advocates of the SEC proposal, submitted a total of three proxy access proposals: at Hewlett-Packard (submitted by Amalgamated Bank), at Chesapeake Energy (by New York City pension funds), and at Nabors Industries (by a group of pension funds).⁴¹ Several individual shareholders and the Norway-based Norges Bank submitted another twenty proposals.⁴² Of these, however, eight were omitted because they failed to comply with SEC rules, and one was not presented at the meeting.⁴³ As tabulated by Georgeson, proxy access was only the tenth most common type of shareholder proposal (with six entries among the S&P 1500) and only about half as common as the ninth (cumulative voting, with eleven entries).⁴⁴

Perhaps activists feared that the overall shareholder support for proxy access was not, in fact, high. So once they lost the political battle to obtain proxy access through a SEC rule, they did not even bother to fight the battle to obtain proxy access through the ballot.

We do not think so. In the few companies where proxy access shareholder proposals came to a vote, they did reasonably well. Of the twelve proposals for which we could obtain data, six were supported by ISS, the most influential proxy advisor.⁴⁵ Although the proposals made by individual shareholders, which tended to grant proxy access to a very wide group of shareholders, fared poorly, the four proposals by Norges Bank garnered twenty-five to thirty percent of the votes including abstentions (thirty to thirty-nine percent of the votes excluding abstentions), a reasonably successful result for 14a-8 proposals.⁴⁶ Importantly, the Norges Bank proposal went substantially beyond the SEC rule by granting proxy access to holders who held a minimum of one

⁴¹ See SULLIVAN & CROMWELL LLP, *PROXY ACCESS PROPOSALS – REVIEW OF 2012 RESULTS AND OUTLOOK FOR 2013*, at 2 (2012) (summarizing all 2012 proxy access proposals).

⁴² *Id.* (detailing the proponent and specifics of each proposal).

⁴³ *Id.* (stating the reasons for each exclusion).

⁴⁴ See GEORGESON, *ANNUAL CORPORATE GOVERNANCE REVIEW 18* (2012), available at <http://www.computershare-na.com/sharedweb/georgeson/acgr/acgr2012.pdf>, archived at <http://perma.cc/A2N5-7CJV> [hereinafter GEORGESON 2012] (listing corporate governance proposals for selected proposals from 2012, including for the “Cumulative Voting” and “Adopt Proxy Access” proposal types).

⁴⁵ *Id.* at 7 (stating that ISS recommended six of the proposals).

⁴⁶ See SULLIVAN & CROMWELL LLP, *supra* note 41, at 2, 7 (listing voting figures for proxy access proposals and discussing why they failed).

percent of the company's stock for a one-year period (as opposed to three percent for three years).⁴⁷

Most importantly, however, the three proposals made by U.S.-based institutional investors, which resembled the SEC rule, did extraordinarily well. The two proposals that came up for a vote were adopted by a majority of the shareholder vote.⁴⁸ The third proposal, at Hewlett-Packard, was withdrawn after the company agreed to recommend a proxy access proposal that would be submitted for a vote by shareholders at the 2013 annual meeting,⁴⁹ where it was approved by an overwhelming majority.⁵⁰

The success of the 2012 proposals did not embolden institutions to propose proxy access in the 2013 season. According to Georgeson, only eleven shareholder proposals on proxy access came up for a vote in 2013.⁵¹ Other than Norges Bank (which submitted three proposals), institutional investors remained largely on the sidelines.⁵² As in 2012, the proposals that resembled the SEC rule fared well.⁵³ Three of five such proposals received more "for" than "against" votes,⁵⁴ and a fourth received forty percent support.⁵⁵ In addition to Hewlett-Packard, Chesapeake Energy also submitted its own proposal on proxy access, which was supported by over ninety-five percent of the shares voted.⁵⁶

⁴⁷ See *id.* at 1-2.

⁴⁸ See *id.* at 1 (showing that the Chesapeake Energy proposal received 59% of the vote and the Nabors Industries proposal received 56% of the vote).

⁴⁹ See Joann S. Lublin & Ben Worthen, *H-P Activist Investors Score a Major Victory*, WALL ST. J., Feb. 6, 2012, at B4.

⁵⁰ See Hewlett-Packard Co., Definitive Proxy Statement (Schedule 14A), at 42 (Feb. 1, 2013), archived at <http://perma.cc/3LR5-PGVD> (detailing the specifics of the proposal); Hewlett-Packard Co., Current Report (Form 8-K), at 3 (Mar. 20, 2013), archived at <http://perma.cc/CU8M-VR9F> (detailing that the proposal received over 1,331 million votes for, and only 40 million votes against).

⁵¹ See GEORGESON, CORPORATE GOVERNANCE REVIEW 22 (2013) [hereinafter GEORGESON 2013], available at <http://www.computershare-na.com/sharedweb/georgeson/acgr/acgr2013.pdf>, archived at <http://perma.cc/QC8H-GCX3>.

⁵² See *id.* at 30 (showing that primarily non-institutional investors submitted proposals).

⁵³ See *id.* at 11 (stating proxy access proposals that mirrored the SEC approach averaged 53% of votes cast).

⁵⁴ The proposals were made at Verizon, CenturyLink, and Nabors. See *id.* at 10-11, 30 fig.14 (showing the specific voting percentages for each proposal). The total number of proposals that resembled the SEC rule—five—is compiled using both Georgeson Report figures (reflecting four such proposals) and the 2013 SEC filing for Microwave Filter (the fifth proposal). See Microwave Filter, Definitive Proxy Statement (Schedule 14A) (March 4, 2013), archived at <http://perma.cc/6GU3-X26Y>.

⁵⁵ The proposal was made at Walt Disney. See GEORGESON 2013, *supra* note 51, at 30 fig.14 (showing that the proposal also received votes of 30% of outstanding stock).

⁵⁶ The proposal nevertheless was not adopted because adoption required the support of two-thirds of the shares entitled to vote. See *id.* at 11. As in 2012, none of the seven 2013

What explains, then, why shareholder activists made such a strong push to get proxy access adopted by the SEC, but then failed to lift a finger to get it adopted through shareholder resolutions? In an earlier article, we argued that proxy access would have had only a trivial impact on corporate governance.⁵⁷ Most importantly, we argued that proxy access would result in only small cost savings for challengers while creating substantial strategic disadvantages. Any challenger serious about obtaining board representation would thus be unlikely to use proxy access instead of waging a traditional contest.

Conceivably, activists read our article and realized that they had, for the prior decade, focused their energy on the wrong reform. As much as we would like to believe that, we doubt it is true. Why, then, did they suddenly lose interest in proxy access?

C. *Majority Voting*

1. The Issue

The traditional voting standard, which applies as a default rule in Delaware and most other states, is that directors are elected by a plurality of the votes cast.⁵⁸ The problem with the traditional plurality standard is that it has little meaning in uncontested elections, as most board elections are. If the number of nominees to the board is equal to the number of board seats to be filled, any nominee who receives even one vote is elected.⁵⁹ As a result, a nominee can be elected even if the vast majority of shareholders are opposed.

In response, beginning in 2005 (and continuing to the present), shareholder activists began to push for changes in the voting standard. Initially, the plurality standard was often supplemented by a board policy requiring each member or board nominee to submit a conditional offer to resign if the director did not receive a majority of the votes cast at the next election.⁶⁰ As activists

proposals that had more liberal thresholds for nominations garnered a majority, though those submitted by Norges obtained approximately one-third of the affirmative votes. *See id.* at 10-11, 30 (showing that outside of the Norges proposals, these proposals averaged 8.8% of votes cast). The seven proposals were made at Bank of America, iRobot, Goldman Sachs, Staples, Netflix, Charles Schwab, and CME Group. *See id.* at 30 fig.14 (listing the voting numbers both as a percent of votes cast and as a percent of outstanding shares).

⁵⁷ *See* Marcel Kahan & Edward Rock, *The Insignificance of Proxy Access*, 97 VA. L. REV. 1347, 1347-48 (2011) [hereinafter *Insignificance*] (discussing the authors' view that proxy access would likely entail significant disadvantages while giving only modest benefits).

⁵⁸ *See* DEL. CODE ANN. tit. 8, § 216(3) (2011) (stating that in the absence of specification, "[d]irectors shall be elected by a plurality of the votes of the shares . . .").

⁵⁹ *See* CLAUDIA H. ALLEN, STUDY OF MAJORITY VOTING IN DIRECTOR ELECTIONS, at ii (2007), *available at* <http://www.ngelaw.com/files/uploads/documents/majoritystudy111207.pdf>, *archived at* <http://perma.cc/H936-Z7N2>.

⁶⁰ *See id.* (discussing how in 2005 and 2006, many companies kept plurality voting in

were still not satisfied, many companies amended their bylaws or their certificates of incorporation to adopt a majority standard for election.⁶¹ The Council of Institutional Investors identifies majority voting as a priority and has recently pushed Delaware, the NYSE and NASDAQ to adopt it as either a mandatory rule or default rule for uncontested elections.⁶²

2. The Rhetoric

For shareholder activists, majority voting is a dream issue. The traditional plurality system, in which it is theoretically possible for a director to be elected by a single vote against the overwhelming opposition of shareholders, offends basic notions of “shareholder democracy.” Elections with plurality voting were described as “rubber stamp elections . . . [that] are unlikely to shape director behavior in favor of long-term shareholders.”⁶³ Though plurality voting is commonly employed in the United States, including in Congressional races, arguments against it were filled with references to elections in the old Soviet Union:

Investors may think they live in the United States of America, but when it comes to electing corporate directors—shareholders’ intended watchdogs in the boardrooms—they are definitely back in the U.S.S.R. Even sadder to say, some of the nation’s biggest mutual funds are helping to keep them there.⁶⁴

Activists also promised that a shift to majority voting would genuinely empower shareholders:

“Director accountability is the hallmark of good governance,” said Dr. Martha Carter, ISS’ director of U.S. Research. “The board election process must ensure that shareholders’ expressions of dissatisfaction with the performance of directors have meaningful consequences. A majority vote standard transforms the director election process from a symbolic

place but adopted detailed resignation policies for when directors did not get a majority).

⁶¹ Malina Manickavasagam, *Updated Study Shows More Companies Shifting to Binding Majority Vote Standard*, BLOOMBERG BNA CORP. LAW DAILY, Nov. 30, 2007 (“[F]or the first time . . . more large public companies are adopting binding provisions, not merely policies, to base their director election standard on a majority rather than plurality vote. . .”).

⁶² See *Majority Voting for Directors*, COUNCIL OF INSTITUTIONAL INVESTORS, <http://perma.cc/8BXY-AQTY> (last visited Sept. 13, 2014) (providing correspondences of the Council of Institutional Investors petitions to NYSE, NASDAQ, and the DE Bar Association).

⁶³ E-mail from Jeff Mahoney, Gen. Counsel, Council of Institutional Investors, to John Carey, Vice President – Legal, NYSE (June 20, 2013) (on file with Boston University Law Review).

⁶⁴ Gretchen Morgenson, *Who’s Afraid of Shareholder Democracy?*, N.Y. TIMES, Oct. 2, 2005, § 3, at 1. The real parallel between board elections and the Soviet Union is not plurality voting, but instead, the lack of competitive races.

gesture to a meaningful voice for shareholders.”⁶⁵

Opponents were equally engaged and argued that a shift from plurality to majority voting would threaten significant negative consequences:

Majority voting would give special-interest shareholder activists increased opportunity to pursue their particular objectives, in many cases to the detriment of other shareholders and the company as a whole. Activists would gain leverage from the ability to defeat a director nominee even if withheld votes constituted substantially less than a majority of the outstanding shares. Moreover, the functioning of the board would be disrupted if a key director did not win re-election; if the board had to function for a period of time without a full complement of members; or if top director candidates were deterred from participation by the potential embarrassment and reputational effects of “losing” an election.⁶⁶

3. The Reality

Once shareholder activists highlighted the undemocratic features of the plurality election system, the system began to collapse. Large companies quickly moved to change the voting rules governing the election of directors. Within less than two years, between February 2006 and November 2007, half of the S&P 500 companies moved from plurality voting to some form of majority voting.⁶⁷ For smaller companies, however, the pace of change has been slower; by 2012, only fifty-two percent of midcap and nineteen percent of small-cap companies had adopted majority voting.⁶⁸

⁶⁵ *Institutional Shareholder Services Takes Stand on Majority Vote Standard*, PRN NEWSWIRE US, Mar. 11, 2005, *archived at* <http://perma.cc/M7AX-R49X>. See also STEPHEN DEANE, THE ISS INST. FOR CORP. GOVERNANCE, MAJORITY VOTING IN DIRECTOR ELECTIONS: FROM THE SYMBOLIC TO THE DEMOCRATIC 2 (2005), *available at* http://maga.econ.msu.ru/Work/%D0%A1%D0%A8%D0%90%20-%20Presentations/Majority_Voting_White_Paper.pdf, *archived at* <http://perma.cc/5RSZ-6Z5W> (explaining path forward regarding for majority voting). The Council of Institutional Investors proposed amending the Delaware General Corporate Law to make majority voting the default setting and sounded similar themes: “The benefits of a majority vote standard are many: it democratizes the corporate electoral process; it puts real voting power in the hands of investors with minimal disruption to corporate affairs; and it makes boards’ more representative of, and accountable to, shareowners.” Letter from Council of Institutional Investors to the Del. Bar Assoc. Section on Corporate Law (Aug. 11, 2011) (on file with the Boston University Law Review).

⁶⁶ David A. Katz & Laura A. McIntosh, *Corporate Governance: Majority Election of Directors*, N.Y. L.J. ONLINE, Mar. 24, 2005.

⁶⁷ See Allen, *supra* note 59, at i (finding that from February 2006 to November 2007, the percentage of S&P 500 companies with majority voting increased from 16% to 66%).

⁶⁸ See E-mail from Jeff Mahoney, *supra* note 63, at 3 (stating that from 2007 to 2012, the small-cap percentage grew from 7% to 17% and the mid-cap percentage grew from 18% to 52%).

We do not claim that a move from a plurality standard to a majority regime is meaningless. We do claim, however, that the “problem” of powerless shareholders under the plurality standard is not so big; that the solutions generated by the offer-to-resign policy and the majority standard do not empower shareholders all that much; and that the plurality standard has certain advantages over a majority regime. The net effect of a move from one standard to another is, in our assessment, small.

Consider first the “problem” generated by the plurality standard. To keep the problem in perspective, it is important to note that the vast majority of director nominees in uncontested elections are elected with a majority—in fact, usually well over a majority—of the votes cast. For example, in the 2009 proxy season, only eighty-two director nominees for a Russell 3000 company failed to receive more “for” than “withhold” or “against” votes; in the 2008 season, the respective number was thirty-one.⁶⁹ Thus, the difference in voting standards affects only a small number of nominees each year.

Second, significant withhold votes—even if far short of a majority—are regarded as an embarrassment and often result in some corporate response. For example, after Disney CEO Michael Eisner received a substantial—but less than majority—withhold vote, he was immediately ousted as Chairman of the Board and terminated as CEO the following year.⁷⁰

Third, responses are usually forthcoming for nominees that receive a majority of withhold votes even if the company at issue subscribes to the traditional plurality standard for election. In an earlier study, we found that for about seventy percent of directors who received majority withhold votes, the company’s response—usually within one year of the vote—was deemed satisfactory by shareholders.⁷¹ For example, when the high withhold vote is due to the board adopting a poison pill or to a director not being sufficiently independent due to business relations with the company, the company may then repeal the pill or the director may terminate the business relationship. When this occurs, the director will typically be re-elected the following year with a clear majority. In most of these cases, however, the company’s response does not take the form of pressuring the director to resign or not re-nominating her.⁷²

In sum, majority withhold votes are rare events. If they happen, they usually result in change in policy even under a plurality standard; but, for companies with a plurality standard, they rarely result in a change in the board.

⁶⁹ See *Insignificance*, *supra* note 57, at 1420 (reporting number of directors who failed to receive majority “for” votes).

⁷⁰ See *id.* at 1359.

⁷¹ *Id.* at 1421 (finding that a satisfactory company response occurred in 67 of the 98 majority withhold votes from 2008 and 2009 where the nominee did not leave within a year and where the company was not acquired or about to be acquired by the next annual meeting).

⁷² See *id.* at 1423 (detailing company responses to majority withhold votes).

To see how a majority regime affects this “problem,” we start by examining the direct effect of the different standards for a nominee who failed to receive majority support. Under the plurality standard, the nominee is elected. Under the offer-to-resign policy, the nominee is also elected, but the other board members can accept (or not accept) her offer to resign. In other words, it is up to the other board members to decide whether or not the nominee retains her board seat.

Under the majority standard, the nominee is not elected. However, under the law of Delaware and other states, a director serves until her successor is elected or until she resigns or is removed.⁷³ If the nominee is already a board member, she will thus retain her seat for the time being until she either resigns or the board elects someone else to the quasi-vacant seat. The board, of course, may not act at all or could appoint the very nominee who failed to receive a majority shareholder vote to fill the vacancy generated by her non-election. In other words, just as in the offer-to-resign policy, it is up to the other board members whether the nominee retains her board seat. From this vantage point, the offer-to-resign policy and the majority standard are equivalent, and different from the plurality standard.

But the plurality standard is not as different as it appears. Though the other board members cannot *force* a nominee who is validly elected to resign, they can put significant pressure on her and, of course, they can refuse to renominate her when her term is up. As a practical matter, even under the plurality standard, the other board members have significant influence over whether the nominee retains her board seat and ultimately control over how long she does so.

To be sure, the description of the direct legal effect of the different standards does not do full justice to the actual differences. A board will likely be more reluctant to appoint a nominee who failed to receive a majority vote under a majority standard to the vacancy created by her non-election than to reject the offer to resign of a nominee who failed to receive a majority vote under an offer-to-resign policy. Similarly, boards will likely be more reluctant to reject an offer to resign than to fail to pressure a nominee to resign on her own accord. Thus, as a practical matter, a majority withhold vote is more likely to result in a change in board composition under a majority voting regime than under plurality voting.

But the different reaction of a board to a majority withhold vote may reflect the fact that withhold votes send a different message depending on the applicable voting standard. On one hand, a majority withhold vote, when a company subscribes to a plurality standard, asks the company to fix some problem but conveys the message that it is alright to keep the director on the board if the problem is fixed. In our study, we found that when the board fixed

⁷³ *E.g.*, Del. CODE ANN. tit. 8, § 141(b) (2011) (“Each director shall hold office until such director’s successor is elected and qualified or until such director’s earlier resignation or removal.”).

the problem that accounted for the majority withhold vote under plurality voting, the director who received the majority withhold vote gained large shareholder support at the next election.⁷⁴ Shareholders, in other words, did not mind the fact that the director did not resign as long as the problems were fixed. On the other hand, a majority withhold vote, when a company subscribes to a majority standard, sends the board a stronger message to get rid of the director. It would thus be wrong to look at the consequences of a majority withhold vote under a plurality standard and conclude that the plurality standard is deficient because most directors who receive a majority withhold vote retain their seats.

Any individual company, of course, can only have one voting standard for the election of directors. From a governance perspective, therefore, there is a choice of which type of message shareholders want to be able to send. It would be reasonable for shareholders to prefer a plurality standard because they think that being able to send the message to fix a problem is more important—because they care more about fixing the underlying problem than changing the board composition; because the issue may arise more frequently; or because it may be easier to garner a majority withhold vote under a plurality standard than under a majority standard. It would also be reasonable for shareholders to prefer a majority standard because it is more likely to result in the actual ouster of a director or to deter directors from taking actions that may result in high withhold votes.

One possible interpretation of the push by shareholder activists for a majority standard, and the quick and widespread success they have attained, is that it reflects a comparison of the advantages and disadvantages of both regimes and a conscious choice that the advantages of majority voting outweigh the disadvantages. This is possible, though the differences between messages sent under the different voting standards would not seem to warrant either the highly charged rhetoric summarized above or the speed of the change in standards. Are there more plausible explanations for why activists push for a majority voting standard, why boards have overwhelmingly given in without a fight, and why a pillar of Delaware corporate law like former Chief Justice Norman Veasey proposed a version of majority voting?⁷⁵

D. *Supermajority Shareholder Proposals*

1. The Issue

Under state law, certificates of incorporation can generally be amended if the board recommends an amendment and the amendment is approved by the

⁷⁴ See *Insignificance*, *supra* note 57, at 1420-21 (examining the ISS voting recommendations, which state the reason for the withhold recommendation, and finding the directors were easily re-elected if the company took actions to address the relevant concern).

⁷⁵ A description of Chief Judge Veasey's role and views are available in Deane, *supra* note 65, at 6-7, 9-10, 18, vii n.20, vii n.25, viii n.29, & viii n.31.

vote of a majority of the shares entitled to vote.⁷⁶ Likewise, mergers generally require a board recommendation and approval by a majority of the shares entitled to vote.⁷⁷ As noted above, bylaws can be amended by a vote of a majority of shares.⁷⁸ State law, however, permits companies to impose higher voting thresholds for shareholder approval.⁷⁹ Some companies have availed themselves of this opportunity and provided that some provisions in the charter or the bylaws can be changed only with the vote of a supermajority of shares.

Shareholder activists have recently started to focus on these supermajority provisions. Lately, Standard and Poor 1500 companies have voted on between ten to twenty such proposals a year, making elimination of the supermajority voting requirement one of the most common corporate governance proposals.⁸⁰ Proposals to eliminate supermajority voting are also amongst the ones that obtain the highest level of shareholder support.⁸¹

⁷⁶ See, e.g., DEL. CODE ANN. tit. 8, § 242(b)(1) (2011) (stating amendments are approved if a majority of the outstanding stock in each class entitled to vote votes in favor of the amendment); Model Bus. Corp. Act § 10.03(e) (2002) (stating amendments are approved upon “approval of the shareholders at a meeting at which a quorum consisting of at least a majority of the votes entitled to be cast on the amendment exists”).

⁷⁷ See, e.g., tit. 8, § 251(b), (c) (stating in subsection (b) the procedures for board recommendation and in subsection (c) the procedures for shareholder approval); Model Bus. Corp. Act § 11.04(e) (stating the procedures for shareholder approval of a merger, requiring a majority of the shares entitled to vote).

⁷⁸ See, e.g., tit. 8, § 109(a) (stating simply that bylaws may be amended, adopted, or repealed by the stockholders); *id.* § 216(1) (“In all matters other than the election of directors, the affirmative vote of the majority of shares present in person or represented by proxy . . . shall be the act of the stockholders. . . .”); Model Bus. Corp. Act § 7.25(c) (“If a quorum exists, action on a matter . . . by a voting group is approved if the votes cast within the voting group favoring the action exceed the votes cast opposing the action . . .”).

⁷⁹ See, e.g., tit. 8, § 102(b)(4) (stating the certificate of incorporation may contain provisions requiring a vote of a larger portion of the stock or of any class or series for any corporate action); Model Bus. Corp. Act § 7.27 (“The articles of incorporation may provide for a greater quorum or voting requirement for shareholders . . . than is provided for by this Act.”).

⁸⁰ See GEORGESON, ANNUAL CORPORATE GOVERNANCE REVIEW 14 (2008), available at <http://www.computershare-na.com/sharedweb/georgeson/acgr/acgr2008.pdf>, archived at <http://perma.cc/P58V-GVYG> [hereinafter GEORGESON 2008] (showing that eleven proposals related to supermajority provisions were voted on in 2008). Elimination or reduction of supermajority voting provisions has been one of the ten most common corporate governance proposals voted on over the five-year period 2008-2012. GEORGESON 2012, *supra* note 44, at 12 (showing that supermajority provisions ranged between 3.2% and 8.5% of all corporate governance proposals voted on in these years). In 2012, it was the sixth most common proposal. *Id.* (showing that fourteen supermajority-related proposals were voted on in that year). Since many companies do not have any supermajority requirements that can be eliminated, the incidence of such proposals on the relevant subset of companies with such requirements is much higher.

⁸¹ See GEORGESON 2012, *supra* note 44, at 18-19 (showing that these proposals received

2. The Rhetoric

Shareholder activists view elimination of supermajority provisions as highly important. As recently argued in a supporting statement,

Corporate governance procedures and practices, and the level of accountability they impose, are closely related to financial performance. Shareowners are willing to pay a premium for shares of corporations that have excellent corporate governance. Supermajority voting requirements have been found to be one of six entrenching mechanisms that are negatively related with company performance. . . . If our Company were to remove required supermajority, it would be a strong statement that our Company is committed to good corporate governance and its long-term financial performance.⁸²

Supporters of such provisions, including companies faced with such proposals, are equally certain that supermajority provisions are necessary to protect minority shareholders against coercion and oppression by the majority. Google, for example, justified its supermajority requirements as ensuring that “fundamental changes to the organizational document of the company only occur with a broader consensus than a simple majority.”⁸³

3. The Reality

Whether supermajority voting requirements matter depends on what substantive provisions are entrenched by these requirements. Some charters impose supermajority requirements on shareholders’ ability to remove directors without cause or to amend the bylaws or entrench staggered boards. These provisions could have a plausible impact on corporate governance because staggered boards can impede hostile takeovers and shareholders may seek bylaw amendments to, for example, establish proxy access or separate the positions of Chairman of the Board and CEO.

In other cases, however, some or all of the substantive provisions protected

62-73% of the votes on average between 2008 and 2012). In the five-year period 2008-2012, proposals to eliminate or reduce supermajority voting provisions were within the top three most supported proposal types tracked by Georgeson. *Id.* For example, in 2012, these proposals, on average, received 69% of votes cast. *Id.* at 18.

⁸² Netflix, Inc., Definitive Proxy Statement (Schedule 14A), at 22 (Apr. 20, 2011) (citation omitted), *archived at* <http://perma.cc/XZ75-T6QQ>.

⁸³ Google Inc., Definitive Proxy Statement (Schedule 14A), at 68 (Apr. 20, 2011), *archived at* <http://perma.cc/5GBW-KYMF>. As another example, in recommending shareholders vote against a proposal to eliminate supermajority voting, the Kellogg Board stated that supermajority votes “[give] minority shareowners a greater voice in corporate structure and governance.” Kellogg Company, Definitive Proxy Statement (Schedule 14A), at 69 (Mar. 5, 2012), *archived at* <http://perma.cc/7LWG-GG8D>; *see also* PACCAR Inc., Definitive Proxy Statement (Schedule 14A), at 41 (Mar. 10, 2011) (“The . . . supermajority vote provisions are designed to protect all PACCAR shareholders against coercive takeover tactics . . .”).

by a supermajority vote against amendment are of extremely remote relevance. Consider, for example, Eastman Chemical Company, which received a shareholder proposal to eliminate supermajority vote requirements in the 2011 proxy season.⁸⁴ At the time, the company's charter required a supermajority for shareholders to remove directors for cause and to amend the bylaws.⁸⁵ For-cause removals at public companies are virtually unheard of, and the likelihood that anyone would seek to remove a director for cause and receive a majority but less than two-thirds shareholder support is very low.

Perhaps the Eastman Chemical proposal was really aimed at the supermajority requirement for bylaw amendments and just painted with a broad brush. But then consider Ecolab Inc., which also received a shareholder proposal to eliminate supermajority vote requirements in the 2011 proxy season. The substantive provision at issue was a "fair price" anti-takeover charter provision that required supermajority shareholder approval for certain "business combinations" with an "interested shareholder" unless the transaction was approved by a majority of the directors not affiliated with the interested shareholder or met certain "fair price" and procedural requirements.⁸⁶ Today, this sort of "fair price" provision is irrelevant because boards can use poison pills to ward off any unwanted bidders. In the end, the shareholder resolution was approved, the board proposed the requisite amendment the following year, and the charter was amended to eliminate the fair price provision.⁸⁷

A similar proposal the same year called for Sprint Nextel to remove any supermajority voting requirements in its charter and bylaws and opt out of any such requirements imposed by state law (without specifying whether state law imposed such requirements).⁸⁸ As in the case of Ecolab, the only supermajority voting requirements at issue appeared to be a "fair price" anti-takeover charter provision.⁸⁹ The proposal passed and, the following year, the board recommended removing the fair price provision from the charter and, for good measure, opting out of the Kansas anti-takeover statute.⁹⁰ Again, none of this mattered as Sprint Nextel has access to a poison pill. Since Sprint Nextel does

⁸⁴ Eastman Chem. Co., Definitive Proxy Statement (Schedule 14A), at 55 (Mar. 18, 2011).

⁸⁵ *Id.* at 56.

⁸⁶ Ecolab Inc., Definitive Proxy Statement (Schedule 14A), at 77 (Mar. 21, 2011), *archived at* <http://perma.cc/RR7H-ABGB> (stating that the board unanimously disapproved of the proposal).

⁸⁷ Ecolab Inc., Current Report (Form 8-K), at 2 (May 4, 2012) (stating that the shareholders approved the amendment).

⁸⁸ Sprint Nextel Corp., Definitive Proxy Statement (Schedule 14A), at 68 (Mar. 28, 2011), *archived at* <http://perma.cc/E79A-XGFX> (stating the board believed this proposal to be unnecessary and against the company's best interests).

⁸⁹ *Id.* at 69.

⁹⁰ Sprint Nextel Corp., Definitive Proxy Statement (Schedule 14A), at 52 (Apr. 5, 2012) (stating the board was proposing to establish majority voting for all matters).

not have a staggered board, any of these defenses—the pill, the anti-takeover statute, and the fair price charter provision—could be overcome by the simple (and, in hostile bids, common) ploy of seeking to replace the board while a hostile tender offer is pending.

Given the irrelevance of supermajority provisions and of shareholder proposals to eliminate those provisions, why do shareholders bring such proposals and why do managers resist?

E. *The Scarcity of Mandatory Proposals*

One of the shareholder proposals that received the most attention during the 2013 proxy season was the resolution, introduced by the AFSCME Employees Pension Plan, to separate the role of CEO and Chairman of the Board at JPMorgan Chase.⁹¹ The target of the proposal was JPMorgan's high-profile CEO and Chairman Jamie Dimon.⁹² Dimon had received plaudits for steering his company relatively unscathed through the financial crisis,⁹³ but more recently had been criticized for his handling of the "London Whale," who accumulated over \$6 billion in trading losses for the bank.⁹⁴ In the closing days of the voting period, with several institutional investors still making up their minds on how to vote, Dimon suggested that he might resign if the proposal were adopted, a comment interpreted by some as a threat.⁹⁵

Proposals like AFSCME's can be introduced either as precatory resolutions or as mandatory bylaw amendments. Precatory proposals, of course, are non-binding. Boards are at liberty to ignore them. Although boards pay much more attention to precatory resolutions than they used to, a significant percentage are not implemented.⁹⁶ Other types of proposals that can usually be introduced as mandatory bylaw amendments⁹⁷ are proposals on confidential voting;

⁹¹ See Christine Harper et al., *JPMorgan Holders Led by Chairmen-CEOs to Vote on Dimon*, BLOOMBERG (May 20, 2013, 12:00 AM), archived at <http://perma.cc/W57V-5ACA> (observing that most of the company's biggest shareholders were run by officers with the same dual role).

⁹² See *id.*

⁹³ See, e.g., Halah Touryalai, *JPMorgan Directors to Shareholders: Don't Fire Us, Let Dimon Keep Chairman Job*, FORBES (May 10, 2013, 3:00 PM), archived at <http://perma.cc/DE6W-2VDJ> (stating that under Mr. Dimon's leadership the bank did not have a single quarterly loss during the financial crisis).

⁹⁴ See Jake Zamansky, *JPMorgan Fails to Turn Its "London Whale" Into Scapegoat*, FORBES (Mar. 15, 2013, 11:45 AM), archived at <http://perma.cc/K8ML-BRKG>.

⁹⁵ See Eleanor Bloxham, *J.P. Morgan's Doubtful Dimon Defense*, FORTUNE (May 16, 2013, 5:23 PM), archived at <http://perma.cc/9PHJ-F6X4>; Touryalai, *supra* note 93.

⁹⁶ See *id.* at 1012-13 (stating that although the share of precatory resolutions implemented by boards rose from 12% in 2001 to 50% in 2008, boards still did not implement 50% of all precatory proposals supported by a majority of their shareholders).

⁹⁷ Some resolutions involve a subject matter so complex that it cannot be squeezed into the 500-word limit imposed by Rule 14a-8. See 17 C.F.R. § 240.14a-8(d) (2014) ("The proposal . . . may not exceed 500 words."). For those, a precatory resolution setting forth a

proposals on director qualifications; proposals to staff certain committees with independent directors; proposals to allow shareholders to recover costs from proxy contests; proposals to repeal exclusive forum bylaws; proposals on majority voting for directors⁹⁸ and proposals to grant shareholders the right to call a special meeting of shareholders.⁹⁹

One might expect that shareholders would not rely on the good will of boards, which by definition are opposed to the precatory resolution as a substantive matter, if they do not have to.¹⁰⁰ Moreover, the right to amend

broad goal and leaving it to the board to work out the detail may be the best realistic alternative. The resolutions mentioned below, with the possible exception of the resolution on proxy contest costs, involve straightforward subject matters.

⁹⁸ Of the twenty-two proposals for confidential voting between 1998 and 2002, all were precatory. See GEORGESON, ANNUAL CORPORATE GOVERNANCE REVIEW 8 (2002), available at <http://www.computershare-na.com/sharedweb/georgeson/acgr/acgr2002.pdf>, archived at <http://perma.cc/NX5N-R2FN>; GEORGESON, ANNUAL CORPORATE GOVERNANCE REVIEW 8 (2001), available at <http://www.computershare-na.com/sharedweb/georgeson/acgr/acgr2001.pdf>, archived at <http://perma.cc/VM3X-ARFV> [hereinafter GEORGESON 2001]; GEORGESON 2000, *supra* note 2, at 8; GEORGESON, ANNUAL CORPORATE GOVERNANCE REVIEW 8 (1999), available at <http://www.computershare-na.com/sharedweb/georgeson/acgr/acgr1999.pdf>, archived at <http://perma.cc/D7AG-LCEN>; GEORGESON, ANNUAL CORPORATE GOVERNANCE REVIEW 9 (1998), available at <http://www.computershare-na.com/sharedweb/georgeson/acgr/acgr1998.pdf>, archived at <http://perma.cc/8Q2F-68T6>.

Of the fourteen proposals regarding director qualifications from 2010 to 2012, all were precatory. See GEORGESON 2012, *supra* note 44, at 20, 27; GEORGESON, ANNUAL CORPORATE GOVERNANCE REVIEW 22, 27 (2011), available at <http://www.computershare-na.com/sharedweb/georgeson/acgr/acgr2011.pdf>, archived at <http://perma.cc/NM6K-U2K7> [hereinafter GEORGESON 2011]; GEORGESON, ANNUAL CORPORATE GOVERNANCE REVIEW 26, 33-34 (2010), available at <http://www.computershare-na.com/sharedweb/georgeson/acgr/acgr2010.pdf>, archived at <http://perma.cc/82Y-RZHT> [hereinafter GEORGESON 2010].

Of the 151 shareholder proposals regarding majority voting for directors over the five-year period 2008-2012, all but two were precatory. See GEORGESON, 2012, *supra* note 44, 18, 20; GEORGESON 2011, *supra*, at 20, 22; GEORGESON 2010, *supra* at 24, 26; GEORGESON, ANNUAL CORPORATE GOVERNANCE REVIEW 20, 22 (2009), available at <http://www.computershare-na.com/sharedweb/georgeson/acgr/acgr2009.pdf>, archived at <http://perma.cc/N89Z-YEMM> [hereinafter GEORGESON 2009]; GEORGESON 2008, *supra* note 80, at 20, 22.

Of the seventeen proposals from 1998 to 2008 to staff certain committees with independent directors, only one was not precatory. See GEORGESON 2001, *supra*, at 8, 13.

⁹⁹ In Delaware, the bylaws may grant shareholders the right to call a special meeting. DEL. CODE ANN. tit. 8, § 211(d) (2011) (“Special meetings of the stockholders may be called . . . by such person or persons as may be authorized by the certificate of incorporation or by the bylaws.”). However, some companies have charter provisions specifying who may (and may not) call a special meeting. For those companies, shareholder meeting proposals require a charter amendment and could only be made via a precatory resolution.

¹⁰⁰ Shareholder activists, of course, complain when boards ignore precatory resolutions

bylaws is, next to the right to elect directors, one of the few rights that shareholders can exercise unilaterally. It is currently the only way for shareholders to change the governance rules without going through the board.¹⁰¹ So, from the perspective of shareholder rights advocates, bylaw amendments present a unique opportunity to be grasped,¹⁰² while, from the perspective of managerialists, they present a chink in the armor of board-centered governance. Bylaw amendments, one might think, are thus the battleground on which shareholders can assert their limited unilateral governance powers.

Yet, AFSCME's proposal was merely a recommendation for the board to separate the CEO and Chairman positions.¹⁰³ The AFSCME proposal is not

that receive majority shareholder support. See *Shareholder Democracy: Battling for Corporate America*, ECONOMIST, Mar. 11, 2006 ("Shareholder activists . . . are unimpressed . . . [E]ven if shareholders vote overwhelmingly for these resolutions, the board can ignore them. Most of the shareholder resolutions on the proxy are 'precatory'—that is, advisory only. Boards have a long record of ignoring such advice. For example . . . in 1997-2003, 131 resolutions to abolish staggered boards received a majority of the shareholder votes cast. By late 2004, less than a third of those resolutions had been acted on."); J. Robert Brown, *Shareholder Participation in Governance and Precatory Proposals*, RACE TO THE BOTTOM (Nov. 11, 2008, 6:41 AM), archived at <http://perma.cc/6J3T-4HAZ> (emphasizing that precatory resolutions weaken shareholder leverage because "companies can and often do ignore them. Thus, they falsely create the appearance of shareholder involvement in the governance process"); Glyn A. Holton, *SEC Enforcement: Will They or Won't They?*, NEW CAPITALIST (Mar. 31, 2011), archived at <http://perma.cc/G6A6-L58J> (remarking that although boards are generally responsive to precatory resolutions, there are many exceptions where they ignore resolutions with majority support).

¹⁰¹ See *Insignificance*, *supra* note 57, at 1412 n.194 ("It also deserves mention that, under the law of Delaware and some other states, shareholders can adopt a majority bylaw which could not then be amended by the board.").

¹⁰² For example, Harvard Law professor Lucian Bebchuk has complained that, "U.S. corporate law has long denied shareholders the power to change the company's basic rules of the game." Lucian A. Bebchuk, *Letting Shareholders Set the Rules*, 119 HARV. L. REV. 1784, 1785 (2006) [hereinafter Bebchuk, *Letting Shareholders Set the Rules*]. He likewise argued that shareholders should be given the power to adopt changes in the certificate of incorporation and to effect reincorporations "unilaterally," without the approval of the board of directors. See Lucian A. Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 845-46 (2005); see also Bebchuk, *Letting Shareholders Set the Rules*, *supra*, at 1812-13 ("[B]oards' control over changes in the rules of the game regulating their own power is highly problematic. Moving to a regime with shareholder power to make such decisions would improve governance arrangements across a wide range of corporate issues.").

¹⁰³ JPMorgan does not impose any supermajority voting requirements for shareholder bylaw amendments, which could also have been a reason to opt for a precatory resolution over a mandatory bylaw amendment. See JPMorgan Chase & Co., Current Report (Form 8-K), at 2 (Jan. 25, 2010) (requiring that the "[b]y-laws may be added to, amended, altered or repealed at any meeting of the Board by vote of a majority of the entire Board, provided that written notice of any such proposed action shall be given to each director prior to such

unusual. Almost all shareholder proposals dealing with the separation of CEO and Chairman—the single most popular governance proposal in the 2012 season¹⁰⁴—are introduced as precatory resolutions.¹⁰⁵ In fact, Rule 14a-8 proposals for mandatory bylaw amendments of any sort are extraordinarily rare.¹⁰⁶ Why, given all the rhetoric about shareholders’ rights and the need to strengthen them, don’t shareholders exercise the rights that they already have?

II. UNDERSTANDING THE PHENOMENON

With so much shareholder activism unrelated to any material benefit, why do shareholder activists engage in it and why do corporations and their defenders often resist it? And why do shareholder activists not pursue options, like mandatory bylaw amendments or charter amendments constraining pills, which would matter more? In this Part, we will suggest several possible answers to this conundrum.

A. *False Perceptions*

One possible reason for symbolic activism is that the partisans wrongly believe that their activism has a direct substantive impact. Here we need to distinguish between leaders and foot soldiers.

Activists and their managerialist antagonists come in a range of sophistication, from individual investors and managers, to governance professionals at institutional investors, to hedge fund managers, shareholder advisory firms, law firms, and other sophisticated actors lobbying for and against various initiatives. Some of these actors may not have the legal sophistication to see—or may not want to expend the effort to determine—whether implementation of a proposal would matter. Thus, for example, some

meeting, or that notice of such addition, amendment, alteration or repeal shall have been given at the preceding meeting of the Board”); JPMorgan Chase & Co., Current Report (Form 8-K), at 3-4 (Apr. 7, 2006) (necessitating for bylaw amendment only “the affirmative vote of the holders of capital stock representing not less than a majority of the voting power represented by the outstanding shares of capital stock of the Corporation entitled to vote”).

¹⁰⁴ See GEORGESON 2012, *supra* note 44, at 18 (finding that 46 out of 88 board-related proposals from the 2012 annual meeting season were proposals related to creating an independent board chairman or separating the positions of chair and CEO).

¹⁰⁵ Over the five-year period 2008-2012, of the 151 shareholder proposals to have an independent board chairman or to separate the roles of CEO and chairman, all but eight (94.7%) of these proposals were precatory. See GEORGESON 2012, *supra* note 44; GEORGESON 2011, *supra* note 98; GEORGESON 2010, *supra* note 98; GEORGESON 2009, *supra* note 98; GEORGESON 2008, *supra* note 80 (data compiled from the preceding sources for the period 2008-2012).

¹⁰⁶ Out of the 1561 shareholder proposals tracked by Georgeson and voted on over the five-year period 2008-2012, only 46 proposals (2.95% of all proposals) were binding bylaw amendments. See GEORGESON 2012, *supra* note 44, GEORGESON 2011, *supra* note 98; GEORGESON 2010, *supra* note 98; GEORGESON 2009, *supra* note 105; GEORGESON 2008, *supra* note 80 (data compiled from the preceding sources for the period 2008-2012).

activists may believe that proxy access would have enabled shareholders to get board representation at little effort and expense. Or they may not have bothered to check the details of a company's charter provision to determine whether a supermajority vote requirement relates to any provision that was significant.

Rank-and-file individual investors and smaller institutional investors presented with proposals made by others may well be confused about the importance and effects of issues like poison pill proposals, proxy access, majority voting, and so forth. Like ordinary voters in any election, the rank-and-file shareholders have limited knowledge and minimal incentives to delve deeply into issues or to hire sophisticated advisors. It is not implausible to imagine that small institutional investors who received an ISS recommendation to oppose poison pills not approved by shareholders might have thought that doing so would preclude companies from adopting a poison pill in response to a hostile bid.

Consistent with this possibility, companies that have access to sophisticated legal advice and that take the time to check the facts sometimes choose not to resist activist campaigns. For instance, many companies do not bother to renew a poison pill because they realize that there is little point in doing so and because they avoid the activists' wrath by letting a pill expire.¹⁰⁷ Similarly, many companies do not strongly resist the campaign to move from plurality to majority voting.¹⁰⁸

While it is possible that some activists are simply uninformed, this is unlikely to be the full story. The key actors who determine the outcome of most campaigns are sophisticated and have access to well-informed advisors. It is inconceivable that large institutional investors, hedge funds, and proxy advisors are simply confused about, for example, the legal impact of a company not renewing its poison pill.¹⁰⁹ Thus, when ISS instituted a policy to

¹⁰⁷ See Katz & McIntosh, *supra* note 12, at 3 (“[W]hen confronted with shareholder pressure, there is no need for a board to incur negative publicity by renewing an unpopular poison pill. . . . A company is better served when the board eschews a fight on this issue and simply retains the flexibility to adopt an effective rights plan in response to a takeover threat.”); Emiliano M. Catan, *The Irrelevance of Active Poison Pills: Evidence from a Natural Experiment* 20-22 (May 30, 2014) (unpublished manuscript), available at https://files.nyu.edu/emc436/public/Papers/MarambioCatan_PoisonPills.pdf, archived at <http://perma.cc/EM7D-WSF6> (illustrating that unless there is little threat from activists, most companies feel they should use an “on-the-shelf strategy” where they refrain “from renewing the pill, but drafting a document that would enable them to adopt a pill immediately in case that was deemed necessary”).

¹⁰⁸ See, e.g., Memorandum from David A. Katz & Laura A. McIntosh, Wachtell, Lipton, Rosen & Katz, *Corporate Governance Update: Director Elections and Majority Voting* 4 (Dec. 29, 2005) (on file with author) (recommending that boards accommodate proposals to institute majority voting).

¹⁰⁹ But see Steven M. Davidoff & Claire A. Hill, *Limits of Disclosure*, 36 SEATTLE U. L. REV. 599, 599-604 (2013) (arguing that even sophisticated investors make important decisions without availing themselves of easily obtainable information).

oppose most poison pills that were not approved by shareholders,¹¹⁰ or when Fidelity developed its proxy guidelines opposing most such pills,¹¹¹ it is unlikely that ISS and Fidelity believed that the company would be barred from implementing a pill if it became subject to the hostile bid. Something more must be going on.

B. “Public Interest” Explanations

1. Low Gain, Low Pain

Many partisans may well understand that the contested governance issues we discussed have at most a trivial effect on company value. But then, much of this activism is not very expensive either. The marginal cost of voting in favor, or against, a proposal is close to nil. Further, the costs of preparing and submitting a proposal, requesting a no-action letter, commenting on a proposed SEC rule, or issuing a press release are a miniscule fraction of the value of a publicly traded company or of the holdings of an institutional investor.¹¹² It would thus be entirely rational for a partisan to believe that incurring these expenses is justified, even if an issue has a trivial effect, as long as one is reasonably confident about the direction of the effect.

But this cost-benefit based explanation still leaves several questions unanswered. For one, what explains the heated rhetoric? Is it merely harmless campaign hyperbole or is more going on? And why do some institutional investors not just talk the talk, but also walk the walk, by, for example, voting against directors who supported the adoption of a poison pill? Furthermore, what explains the selection of largely symbolic issues that are being pursued? If these issues are (wrongly) depicted as important, won't they divert energy from other issues that are more consequential?

2. Principles Matter

Suppose that everyone understands the gap between rhetoric and reality in

¹¹⁰ See WEIL, GOTSHAL & MANGES, *RISKMATRICS/ISS ISSUES POLICY UPDATES FOR 2010 PROXY SEASON 2* (2009), available at www.weil.com/files/upload/briefing_sec_cg_2009_nov.pdf, archived at <http://perma.cc/AS67-PBZY> (stating that ISS will “recommend a negative vote with respect to all continuing directors” where the board has adopted, renewed, changed or maintained a pill “without shareholder approval”).

¹¹¹ See *Fidelity Funds’ Proxy Voting Guidelines: November 2013* III.A.1 FIDELITY (last visited Oct. 16, 2014), archived at <http://perma.cc/3B3L-ABJL> (stating Fidelity will “generally withhold authority for the election of all directors or directors on responsible committees” if a poison pill was introduced, extended or adopted “without shareholder approval”).

¹¹² See generally Nickolay Gantchev, *The Costs of Shareholder Activism: Evidence from a Sequential Decision Model*, 107 J. FIN. ECON. 610, 623-29 (2013) (discussing how best to calculate costs of shareholder activism in light of the costs an activist bears and the potential returns the activist may receive).

shareholder activism. It is still possible that the partisans nevertheless choose to wage a battle as a matter of “principle.” In fact, many of the proxy guidelines published by mutual funds sound as if principles matter. Fidelity, for example, will generally withhold its vote on all incumbent directors—regardless of other factors—if the board adopts a poison pill without shareholder approval, unless the pill meets certain narrow criteria.¹¹³ Likewise, the New York State Common Retirement Fund will support proposals to eliminate supermajority requirements—without apparent regard to what they pertain to—because supermajority provisions “can be used to defeat corporate democracy.”¹¹⁴

How might principles matter? High profile battles over principles may have significant educational value. In the shift in U.S. boardrooms from a managerial conception of the board to a more “shareholder-centric” view, these battles almost certainly were important in reorienting directors’ understanding of their roles. Moreover, for those directors who believe that their role is to further shareholder interests, evidence from activist battles may inform their decision-making.

3. Proxy Battles

A further possibility is that these battles are actually a fight about a *different* issue. Perhaps battles over principles, even when they make no practical difference, matter—at least when both sides agree that they do. There are several ways in which this may work.

First, prevailing on a matter of “principle” may nevertheless have implications for the future. For one, it can demonstrate the activist’s ability (or the activists’ abilities) to mobilize shareholder support, garner votes, and obtain public support. It signals to the people on the other side, mostly executives and outside directors, but perhaps also politicians and regulators: “Do not cross me, or else.” By the same token, once a battle has commenced, lack of success signals to the other side that the activist can be safely ignored. The outcome of the contest may be interpreted to mean “shareholder forces are ascendant” or “management is still in control.”

This is clearly how the press reports on the results. For example, the D.C. Circuit Court of Appeals’ ruling invalidating proxy access was described as

¹¹³ See *Fidelity Funds’ Proxy Voting Guidelines: November 2013*, *supra* note 111, at III.A.1 (stating that authority will be withheld generally for anti-takeover provisions extended or adopted without shareholder approval unless specific criteria are met). The guidelines provide several examples of these narrow criteria: if the poison pill includes a “Sunset Provision of less than five years” or a “Permitted Bid Feature,” if the pill is “linked to a business strategy that will result in greater value for the shareholders,” or if “[s]hareholder approval is required to reinstate the Poison Pill upon expiration.” *Id.*

¹¹⁴ N.Y. STATE COMMON RET. FUND, PROXY VOTING GUIDELINES 1 (2011), available at <http://www.osc.state.ny.us/pension/proxyvotingguidelines.pdf>, archived at <http://perma.cc/N4SD-VNRC> (explaining that supermajority provisions can be used “to defeat corporate democracy, entrench status quo and diminish shareholder rights”).

“[s]triking a blow to the ‘shareholder rights’ movement.”¹¹⁵ Likewise, the failure to separate the CEO and Chairman position at JPMorgan induced *Business Week* to predict “[n]ow that they’ve picked the fight with the biggest kid on the block—i.e., JPMorgan and Jamie—and lost it, other people are going to say, ‘How powerful are you guys?’”¹¹⁶

Indeed, from this perspective, the partisans may be aware that the direct stakes are low and may even see an advantage in waging battles over issues that do *not* inherently matter. Battles without a tangible effect mean that the collateral damage inflicted is low. What better way, for example, to show one’s power than to push companies not to renew their poison pills or to remove essentially meaningless provisions for supermajority voting? Since the impact is symbolic, success can do little direct harm.

Moreover, the risks to activists from being wrong are much reduced in battles over principle. In 2007, shareholders rejected Carl Icahn’s \$37.25 per share offer for Lear Corporation, an automobile parts manufacturer, after ISS and Glass Lewis both recommended voting against.¹¹⁷ Two years later, Lear Corporation filed for bankruptcy.¹¹⁸ A few more recommendations like this could lead investors to stop following ISS and Glass Lewis.¹¹⁹

The ultimate objective, according to this explanation, goes beyond the explicit issue over which the battle is waged. Rather, the battles exert pressure on directors to pay more attention to shareholder concerns more broadly. If activists can prevail on a shareholder proposal, they are more likely to be able to prevail in other battles that matter more. For larger shareholders, being taken seriously when it matters is extremely important. It assures that senior management will at least listen to you when you have doubts over the company’s business strategy. It induces the lead director to take the telephone call from the institutional investor when the company is facing an actual hostile bid, when the board is deliberating whether to fire the CEO, when the board is looking to add some independent directors, or when management has made a buyout offer. It gets you access to the head of the compensation committee when you want to push for greater performance sensitivity in the CEO’s pay.

More generally, the battles may be part of a broader public policy initiative to change law and regulations in a direction that gives shareholders more power. Having prevailed in these symbolic battles, activists can more credibly

¹¹⁵ Jessica Holzer, *Court Deals Blow to SEC, Activists*, WALL ST. J., July 23, 2011, at B3.

¹¹⁶ Nick Summers, *Jamie Dimon Wins Big in JPMorgan Shareholder Vote*, BUS. WK., May 21, 2013.

¹¹⁷ See *Lear Shareholders Reject \$2.9 B Icahn Deal*, USA TODAY, July 16, 2007.

¹¹⁸ See *Auto Parts Maker Lear Corp. Files for Bankruptcy*, REUTERS, July 7, 2009.

¹¹⁹ Given this risk, it should be unsurprising that, after raising questions about the controversial Dell going-private offer but failing to attract competing bids, ISS, Egan-Jones, and Glass Lewis all ultimately recommended shareholder approval. See generally Shira Ovide, *ISS, Two Others Recommend Dell Buyout*, WALL ST. J., July 9, 2013.

lobby the SEC and Congress to increase shareholder power further. “The shareholders overwhelmingly support increasing shareholder power,” activists can argue, “look at the support for these shareholder proposals relating to X, Y and Z.”

4. The Slippery Slope

Another possibility is that partisans view corporate governance politics as a multi-year, multi-engagement process, so that the first battle in a campaign may take on outside importance. Consider, for example, the battle over the SEC’s “proxy access” initiative. As we have argued elsewhere, the three percent/three year threshold for access to the corporate proxy statement meant that the SEC’s initiative would likely have had minimal effects: shareholders who might have used proxy access would not have qualified, while shareholders who would have qualified would likely not have been interested or would have been unwilling to accept the limitations that accompanied it.¹²⁰

So why was there a hard-fought battle? One plausible explanation is that partisans on both sides hoped (or feared) that the proposed proxy access rules would be just the first step. If adopted and held valid, and not used, activists could have returned to the SEC to argue that the thresholds should be lowered, the limitations relaxed, and so forth. Better and easier to fight it at the outset, defenders of management might have thought, than to have to fight constant battles against incremental expansion.

C. “Public Choice” Explanations: *It’s the Activists, Stupid*

Another, not mutually exclusive, possibility is that professional activists, at least those who are governance professionals, are aware of the large gap between rhetoric and reality in their campaigns but pursue activism for its own (or rather their own) sake. What keeps activists busy—and employed—is activism.

Take, for example, ISS, the leading proxy advisor. As part of its business, ISS provides voting advice to its clients on all issues that shareholders are asked to vote on. It may not be conducive to ISS’s business were its advice on shareholder proposals to redeem a pill a dismissive, “This issue is of no practical significance. It really does not matter how you vote.” Nor would it behoove ISS to proclaim that the voting rules on the most common ballot question for shareholders—whether to vote for nominees to the board or to withhold authority—is not very important. If none of this matters, why pay for voting advice? Surely, the price ISS can charge for its advice and analysis is higher if shareholders vote on issues that matter. Governance professionals working directly for large institutional investors face similar incentives.¹²¹

¹²⁰ See *Insignificance*, *supra* note 57, at 1382 (“In sum, judging from their past actions, the set of shareholders that have shown both an interest in activism and have some potential to be eligible for proxy access is fairly limited.”).

¹²¹ Governance professionals may also prefer to pursue forms of activism that are

Corporate lawyers advising boards may likewise have an incentive to overstate the importance of some of the issues. They can enhance their business by privately advising companies on how to respond to activist campaigns—and advice to do something tends to generate more business than advice to do nothing. They can also enhance their reputations as fervent defenders of managerial power by publicly opposing the activists' efforts. Leading corporate lawyers may well have been aware that the SEC's proposals on proxy access were unlikely to pose a serious threat, but they may still have opposed it in editorials and comment letters to impress their clients.

But the “public choice” explanation is, at best, partial.¹²² Generally, the “public choice” approach views the political process as a contest among interest groups over “rents” with public-spirited justifications used to disguise interest group rent-seeking.¹²³ Trucking regulation, classically, is explained as the result of incumbent truckers and organized labor securing barriers to entry, and monopoly rents, at the expense of consumers.¹²⁴ Thus, while it predicts a gap between rhetoric (public-spirited) and reality (rent-seeking), it posits that there *are* rents to be divided—that controversies have material stakes—while it provides no explanation for vigorous contests over issues with no material consequences.

D. Symbols and Myths

The indirect “public interest” explanations, combined with the “public choice” perspective and the possibility that some actors have false perceptions, go some way towards explaining why these battles continue even when the direct stakes seem trivial to a dispassionate observer. But more seems to be at stake than appears in any of these explanations. These battles can feel like they involve issues that are genuinely important matters of national import. What social function might the “corporate governance industry” be serving? To

justifiable, even if they are not necessarily the best ones. Cf. Claire Hill, *Justification Norms Under Uncertainty: A Preliminary Inquiry*, 17 CONN. INS. L.J. 27, 28-29 (2010) (arguing that, where a decision involves uncertainty, decision-makers may make justifiable choices, rather than the best choice).

¹²² For a useful overview of “public choice” approaches and the contrast with “public interest” approaches, see DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 12-33 (1991).

¹²³ See *id.* at 14-15 (describing that “[p]ublic choice models often treat the legislative process as a microeconomic system” based upon individuals and groups who “rent-seek,” by seeking their own independent interests).

¹²⁴ See generally Thomas Moore, *The Beneficiaries of Trucking Regulation*, 21 J.L. & ECON. 327, 330 (1978) (elaborating that both organized labor and owners of operating rights benefit from regulation that “has raised rents and prevented new firms from competing away the monopoly rent”); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 239 (1976) (“Competitively determined, cost-based price differentials create an opportunity for political gain through entry and/or price regulation designed to suppress the effects of cost differences.”).

answer this question, we introduce Thurman Arnold, one of the great figures in American law, into the conversation.

1. Politics as Folklore and Myth

Born in Wyoming in 1891 and educated at Princeton and Harvard Law School, Thurman Arnold started teaching law at the University of Wyoming in 1921, moved to the college of law at West Virginia University as dean in 1927, and then moved on to Yale in 1930, where he remained until 1938.¹²⁵ Arnold published two interrelated books that present his perspective on politics and law: *The Symbols of Government* (1935)¹²⁶ and *The Folklore of Capitalism* (1937).¹²⁷ During the early years of the Roosevelt administration, Arnold became part of the New Deal “brain trust” and worked part-time in a variety of positions.¹²⁸ When Robert Jackson left the Antitrust Division in 1938 to join the Supreme Court, Arnold was appointed his successor.¹²⁹ There, Arnold pursued an aggressive enforcement strategy and built the Division into the large operation that it remains.¹³⁰ After leaving the Antitrust Division in 1943, Arnold served on the U.S. Court of Appeals for the D.C. Circuit.¹³¹ In 1945, Arnold resigned to found a law firm with Paul Porter and Abe Fortas that survives today as Arnold and Porter.¹³²

Thurman Arnold provides an additional and quite distinctive perspective. In his view, law and politics serve entirely different functions than they claim, functions that, unless recognized, will subvert reform efforts: they are the “semi-sacred” ceremonies through which we make peace with the inherent but necessary contradictions between our ideals and reality.¹³³ Although rooted in

¹²⁵ See SPENCER WEBER WALLER, THURMAN ARNOLD 10-18, 39-44 (2005).

¹²⁶ THURMAN W. ARNOLD, SYMBOLS OF GOVERNMENT (1st ed. 1935).

¹²⁷ THURMAN W. ARNOLD, THE FOLKLORE OF CAPITALISM (1st ed. 1937).

¹²⁸ See WALLER, *supra* note 125, at 78-110 (discussing Arnold’s role in the Roosevelt administration and as part of Roosevelt’s group of advisors known as the “brain trust”).

¹²⁹ See *id.* at 78.

¹³⁰ See *id.* at 83-110 (exploring the major litigation and actions taken by Arnold while he led the Antitrust Division for five years).

¹³¹ See *id.* at 108-10.

¹³² See *id.* at 124-30.

¹³³ An alternative approach, now largely ignored in corporate governance analysis, finds its roots in Marx. See ALLEN E. BUCHANAN, MARX AND JUSTICE: THE RADICAL CRITIQUE OF LIBERALISM 50-85 (1982) (evaluating Marx’s criticisms of justice, capitalism, and economics). On this view, competitive political battles—indeed all of law, politics, culture, and ideology—are viewed as largely epiphenomenal, with material economic relations (the base) “conditioning” or “determining” law, politics, and ideology (the superstructure). See *id.* at 53-56 (articulating the connection between a given economic viewpoint, like the connection between wage and laborer in capitalism, and “the ideals of freedom and equality”). Analytically, the problem with this approach is that the precise links between economic relations and the development of law, politics, and ideology have never been spelled out with sufficient clarity to be analytically useful, at least in an area like corporate

the Legal Realism that surrounded him at Yale in the 1930s, Arnold rejected its reformist anti-formalism as blind “to the pervasiveness of symbols in the discourse of law and governance generally.”¹³⁴ What distinguishes Arnold’s view from standard Legal Realism is this “anthropological turn,” evident in his choice of the terms “folklore” and “symbols.”¹³⁵ Arnold’s embrace of this anthropological approach allowed for the possibility that the spectacle itself may be the point of the activity and not just an incidental byproduct.

An impatient New Dealer, Arnold was annoyed with the extent to which legal and economic concepts interfered with what he took to be sensible, necessary and practical responses. To make progress on social problems (i.e., to advance the New Deal agenda), Arnold thought, one must grapple with the hold that these concepts have on people: “We cannot be practical about social problems if we are under the illusion that we can solve them without complying with the taboos and customs of the tribe.”¹³⁶ It is this combination—a legal realist’s skepticism about legal concepts combined with a practical politician’s understanding of the critical role of ritual and taboos in effecting change—that is most distinctive about Arnold’s view.

Arnold paid particular attention to the ways in which myths and ceremonies of various sorts are used to reconcile imbalances in power, including imbalances in power between individuals and large firms, thereby protecting these organizations against threats.

law. While it is easy enough to argue that the entire structure of corporate law and governance serves to legitimate the economic relations that constitute a market economy (indeed, it is indisputably true!), deploying this approach to analyze more fine-grained issues is not easy. In what follows, we largely ignore these approaches except insofar as we examine the “legitimation” function of corporate governance politics.

¹³⁴ For a detailed and very insightful analysis of Arnold and the context in which he was writing, see Mark Fenster, *The Symbols of Governance: Thurman Arnold and Post-Realist Legal Theory*, 51 *BUFF. L. REV.* 1053, 1070 (2003) [hereinafter Fenster, *The Symbols of Governance*], which discusses Arnold’s shift away from Legal Realism as he began “an inquiry into the deeper spiritual, symbolic forms and practices that shape ‘Law’ as a field of governance.” In what follows, we rely heavily on his description.

¹³⁵ See *id.* at 1084-85 (“Although he cited no anthropologists in either of his mid-1930s monographs, the words *folklore* and *symbols* in his titles clearly evoke the anthropological approach.”). In this regard, Arnold shared a view with others who had made the ideology of politics a topic for study, such as Harold Lasswell, Walter Lippman, and Vilfredo Pareto. Murray Edelman picked up the theme decades later. See MURRAY EDELMAN, *THE SYMBOLIC USES OF POLITICS* 22-43, 188-94 (1964). These themes have been addressed more recently as well. See generally Mark Fenster, *Murray Edelman, Polemicist of Public Ignorance*, 17 *CRITICAL REV.* 367, 367-74, 378-84 (2005) (discussing the theoretical and methodological questions raised by Murray Edelman’s work about the symbolic nature of politics); Fenster, *The Symbols of Governance*, *supra* note 134, at 1079-84 (exploring the relation between Arnold and relevant political theories available at the time). Although others focused on the symbolic aspect of politics, Arnold is useful for our purposes because he focused his critique, *inter alia*, on business law.

¹³⁶ ARNOLD, *supra* note 127 at 205.

For corporate law, Arnold's analysis of corporate personality and antitrust are the most directly relevant. In what follows, we quote liberally from Arnold's work in order to give a sense of his distinctive voice and perspective.

For Arnold, legal personality, the "personification of the corporation," was all about identifying large concentrations of economic power with the autonomous entrepreneur who figures prominently in nineteenth-century rugged individualism.¹³⁷ Our pioneer civilization, which formed the bedrock of American conceptions of legitimacy, was one

in which the prevailing ideal was that of the freedom and dignity of the individual engaged in the accumulation of wealth. The independence of the free man from central authority was the slogan for which men fought and died. This free man was a trader who got ahead by accumulating money.¹³⁸

But this ideal of rugged individualism clashed with the reality of large industrial organizations. As Arnold wrote, "[i]ndeed, the great organization in which most men were employees, and a few at the top were dictators, was a contradiction of that philosophy."¹³⁹

On the other hand, technological change and the emergence of specialized techniques made large-scale operations essential to realizing economies of scale and scope, "to producing goods in large enough quantities and at a price low enough so that they could be made part of the American standard of living."¹⁴⁰

How have we dealt with this tension? For Arnold, the key to understanding the doctrine of "corporate personality" is that it mediated this gap: "[I]n order to tolerate [large corporations], men had to pretend that corporations were individuals."¹⁴¹ Moreover, by identifying the great industrial organizations with the "dignities, freedom, and general ethics of the individual,"¹⁴² any move to break them up wholesale could be deflected into far less threatening piecemeal prosecutions of bad actors. Indeed, "[s]ince individuals are supposed to do better if let alone, . . . [t]he *laissez faire* religion, based on a conception of a society composed of competing individuals, was transferred automatically to industrial organizations with nation-wide power and dictatorial forms of government."¹⁴³

¹³⁷ See *id.* at 185-206 (exploring the "curious ceremonies" that allow organizations to be treated as individuals).

¹³⁸ *Id.* at 185-86.

¹³⁹ *Id.* at 187.

¹⁴⁰ *Id.* at 207.

¹⁴¹ *Id.* at 187.

¹⁴² *Id.* at 188.

¹⁴³ *Id.* at 189. Arnold provides a wonderful 1936 quote from John W. Davis attacking the regulation of holding companies. What struck Arnold as notable was Davis's attempt "to rouse his audience to a high pitch of indignation against an act regulating holding companies" by arguing as follows:

Arnold was not suggesting that these myths should be dispensed with, but that we should not let them confuse us:

[This book] does not attack the use of the corporate personality in folklore. The results have been the creation of one of the greatest productive machines that the world has ever known, and this perhaps is justification enough if anyone is interested in justifying what has happened. This book is concerned only with diagnosing the present difficulties which have come upon us now that the industrial feudalism is no longer protecting large groups of our citizens who demand security, and with trying to explain the ideological difficulties which prevent the creating of organizations which will give that protection. We cannot be practical about social problems if we are under the illusion that we can solve them without complying with the taboos and customs of the tribe. The corporate personality is part of our present religion. . . . Since, however, we must use the words and ceremonies, it becomes important that we be able to use them intelligently.¹⁴⁴

Arnold's classic analysis of antitrust takes a similar approach, viewing it as one of the "most important ceremonies which have dramatized the rugged individualism of business organizations."¹⁴⁵ The battle against monopoly is like campaigns against prostitution:

We celebrate our ideals of chastity by constantly engaging in wars on vice. We permit prostitution to flourish by treating it as a somewhat minor crime and never taking the militant measures which would actually stamp it out. The result is a *sub rosa* institution which organizes the prostitutes after a fashion, at least to the extent that there never seems to be any shortage in our large cities. . . .¹⁴⁶

Further:

Thus in those days anyone who attacked the "Trusts" could achieve the same public worship as a minister of the gospel who had the energy to attack vice. It was this that made Theodore Roosevelt a great man.

There is something in this act that arouses me far beyond the scope and tenor of the act itself. In one respect it is unique in the history of our legislation; in one respect it constitutes the gravest threat to the liberties of American citizens that has emanated from the halls of Congress in my lifetime. This is strong language. But I mean to make it so.

Id. at 190 (quoting John W. Davis in the *New York Times*, Aug. 26, 1936). While the regulation of public utility holding companies was a reasonably important issue from both an Antitrust and securities law perspective (with regard to the Public Utility Holding Act of 1935, see SEC DIV. OF INV. MGMT., *THE REGULATION OF PUBLIC-UTILITY HOLDING COMPANIES* 13-19, 36-40, 58-60, 117-19 (1995)), the claim that the 1935 Act constituted "the gravest threat to the liberties of American citizens" was absurd hyperbole.

¹⁴⁴ ARNOLD, *supra* note 127, at 205.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 208.

Historians now point out that Theodore Roosevelt never accomplished anything with his trust busting. Of course he didn't. The crusade was not a practical one. It was part of a moral conflict and no preacher ever succeeded in abolishing any form of sin.¹⁴⁷

For a civic religion officially dedicated to the preservation of competition among individuals (or small businesses identifiable with their owners), "[b]igness" was regarded as a curse because it led to monopoly" and market power.¹⁴⁸ But because large enterprises remained economically essential, "it was inevitable that a ceremony should be evolved which reconciled current mental pictures of what men thought society ought to be with reality."¹⁴⁹

This social reality required development of a procedure that attacked bigness on rational legal and economic ground, but still permitted large enterprises to flourish. Such pressures gave rise to the antitrust laws. The Sherman Act proclaimed grandly that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."¹⁵⁰ But these words were never taken literally. The bold statement of the ideal and its lack of actual enforcement was designed to convince reformers and the public either that large combinations did not actually exist, or else that if they did exist, they were about to be done away with just as soon as right-thinking men were elected to office. Trust-busting "became one of the great moral issues of the day, while at the same time great combinations thrived and escaped regulation."¹⁵¹

As Arnold saw it:

The antitrust laws remained as a most important symbol. Whenever anyone demanded practical regulation, they formed an effective moral obstacle, since all the liberals would answer with a demand that the antitrust laws be enforced. Men like Senator Borah founded political careers on the continuance of such crusades, which were entirely futile but enormously picturesque, and which paid big dividends in terms of personal prestige.¹⁵²

Effective regulation of large organizations would have been easy, but not practical:

[H]ad society been able to operate in an era of growing specialization without these organizations – it would have been easy enough to kill them by practical means. A few well-directed provisions putting a discriminatory tax on large organizations would have done the trick,

¹⁴⁷ *Id.* at 211.

¹⁴⁸ *Id.* at 207.

¹⁴⁹ *Id.*

¹⁵⁰ Sherman Act, 15 U.S.C. § 1 (2012).

¹⁵¹ ARNOLD, *supra* note 127, at 207-08.

¹⁵² *Id.* at 217.

provided some other form of organization was growing at the same time to fill the practical need. Since the organizations were demanded, attempts to stop their growth necessarily became purely ceremonial.¹⁵³

This from the man who would soon build the Antitrust Division into a high-profile agency that, for all its enforcement efforts, had the good sense to focus on behavioral rather than structural remedies.¹⁵⁴

Arnold seems to have saved his most savage (and sincere) condemnation for those poor well-meaning fools who would have us live up to our articulated principles because doing so would destroy necessary institutions and cause serious social harm. Our institutional creeds, he emphasized, “must be false in order to function effectively. . . . Love of consistency and devotion to realism will wreck any institutional creed. When consistency is emphasized, conflicting ideals which may be very important in retaining loyalties have to be abandoned.”¹⁵⁵ As with campaigns against prostitution, appeals to live up to our ideals should not be taken seriously:

The confusion accompanying most liberal reform movements is due to the fact that they are generally attempts to make the institution practice what it preaches in a situation where, if the ideal were followed, the function of the institution could not be performed. . . . The history of human organization is strewn with the wreckage caused by people who tried honestly and sincerely to follow the logical implications of accepted doctrine.¹⁵⁶

¹⁵³ *Id.* at 211. It is difficult to know how seriously to take Arnold’s “complimentary” description of Roosevelt’s accomplishment:

Theodore Roosevelt, with his big stick that never hit anybody, accomplished two things. First, he convinced the public that if we would only drive politics out of the Department of Justice the laws were sufficient to make these big individuals really compete. Second, he convinced corporate executives that it was a good thing to hire public-relations counsel and show that they also were followers of the true religion.

Id. at 217.

¹⁵⁴ The connection between Arnold’s ideas regarding antitrust in *Folklore* and his views as an enforcer at the time of his confirmation hearings and at the Antitrust Division is complex. See WALLER, *supra* note 125, at 78-110.

¹⁵⁵ ARNOLD, *supra* note 127, at 356-57.

¹⁵⁶ *Id.* at 375, 378. As with any ironist, especially in print, it is not always clear when Arnold’s language is sarcastic in criticizing benighted practices or when it is serious in his approbation. In particular, Arnold’s critique of Antitrust, when juxtaposed with his aggressive enforcement stance as head of the Antitrust Division, might well suggest that his critique was directed at a particular era of lax antitrust enforcement—one that was hobbled by undue respect for myth and folklore—rather than a rejection of Antitrust more generally. On the other hand, as head of the Antitrust Division, he never tried to restructure concentrated industry or enact any other fundamental changes. See WALLER, *supra* note 125, at 78-110. For our purposes, which are generally descriptive, the normative point of his armchair anthropology can be set aside in favor of the analytic insight that it provides. With all the high-sounding rhetoric deployed in battles over corporate governance reform, a

2. What is the Folklore of Corporate Governance?

How might a Thurman Arnold describe our current “Folklore of Corporate Governance”? What is the conflict to which corporate governance reform might provide a “ritual” response? A moment’s reflection suggests that our myths have not changed appreciably since the nineteenth century rise of the great industrial corporations. Now, as then, we need to believe that in even—and especially—the largest corporations, there are individual shareholders who collectively own and control those corporations. Because shareholders exercise control over managers, perhaps mediated through markets, it is acceptable that a small group of managers control huge concentrations of capital for which they are paid princely sums.

We confront just the sort of gaping hole that Arnold found so obvious. A Thurman Arnold would find it laughable to claim that this picture accurately describes the large, publicly held corporations that are the focus of corporate governance reform. First, as scholarship on institutional investors shows, shares are held by intermediaries and managed by agents whose incentives at best roughly track those of the ultimate beneficiaries.¹⁵⁷ Further, over the last forty years, ownership by institutional investors has steadily increased from fifteen percent in 1965 to around fifty percent.¹⁵⁸ There are essentially no shareholders of the sort that the myth hypothesizes. While various sorts of intermediaries have some direct and indirect influence over managers of large firms,¹⁵⁹ that influence does not remotely approach the degree of control posited by the mythical picture of a limited number of actual individual shareholders who elect directors to manage their property. Finally, when economic actors actually emerge who might play the role laid out for

cynicism corrosive enough to dissolve can be a useful tool.

Murray Edelman, some thirty years later in his seminal work, *The Symbolic Uses of Politics*, carried a very similar approach into the political turmoil of the 1960s. Like Arnold, Edelman viewed politics as symbolic and spectacular; it was an effort to reassure the masses, induce quiescence, and preserve the status quo: “Political forms thus come to symbolize what large masses of men need to believe about the state to reassure themselves. It is the needs, the hopes, and the anxieties of men that determine the meanings.” EDELMAN, *supra* note 135, at 2. At the same time, of course, political decisions also allocate goods, services, and power: “There is accordingly no reason to expect that the meanings will be limited to the instrumental functions the political forms serve. The capacity of political forms both to serve as a powerful means of expression for mass publics and to convey benefits to particular groups is a central theme of this book.” *Id.* Symbolic politics, then, can be, but need not be, accompanied by interest group rent-seeking.

¹⁵⁷ See Edward B. Rock, *The Logic and (Uncertain) Significance of Institutional Shareholder Activism*, 79 GEO. L.J. 445, 464-78 (1991) (describing the factors that interfere with alignment of the interests of money managers and beneficiaries).

¹⁵⁸ Marcel Kahan & Edward Rock, *Embattled CEOs*, TEX L. REV., 987, 995-97 (2010) [hereinafter *Embattled CEOs*] (illustrating the steady rise in institutional investors).

¹⁵⁹ See *id.* at 1037-40 (providing examples of the ways in which shareholders can influence a CEO’s decision-making).

shareholders—think of hedge funds—a reaction against them is usually immediate.¹⁶⁰

Yet, as Arnold would be quick to point out, because the myth of American corporate governance conflicts with the reality of large publicly owned corporations, and because large concentrations of capital are necessary for many business entities operating in world product and capital markets, “it was inevitable that a ceremony should be evolved which reconciled current mental pictures of what men thought society ought to be with reality.”¹⁶¹ Just as “it became necessary to develop a procedure which constantly attacked bigness on rational legal and economic grounds, and at the same time never really interfered with combinations,”¹⁶² so, too, it became necessary to develop a procedure which constantly attacked “managerial agency costs” or the “separation of ownership and control” on rational legal and economic grounds, but at the same time never really interfered with a separation that became a practical necessity when economies of scale required massive concentrations of capital.¹⁶³

Like the “curse of bigness,” the beauty of viewing “the agency cost problem” as the core problem of corporate governance is that every time there is a crisis and a call for regulation, there is a ready response that avoids confronting the underlying “contradiction” or considering fundamental change: “if only managers’ interests were better aligned with those of the shareholders . . .” This diagnosis implies a straightforward solution: enact measures that claim to improve that alignment. After the dot-com bubble burst, we had the Sarbanes-Oxley Act.¹⁶⁴ After the crash of 2008, we had “say-on-pay.”¹⁶⁵ The SEC even managed to justify the rules on proxy access by

¹⁶⁰ See Martin Lipton, *Bite the Apple; Poison the Apple; Paralyze the Company; Wreck the Economy*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (Feb. 26, 2013 9:22 AM), archived at <http://perma.cc/RZ2N-736R> (stating that shareholder voting power is being “harnessed by a gaggle of activist hedge funds who troll through SEC filings looking for . . . short-term profit without regard to . . . the company’s long-term prospects.”); *Activist Investors: Let’s Do It My Way*, ECONOMIST, May 25, 2013 (stating that hedge fund activists “pester firms for a quick return of cash to shareholders”).

¹⁶¹ ARNOLD, *supra* note 127, at 207.

¹⁶² *Id.*

¹⁶³ The history of the battle for “shareholder democracy,” recounted in Dalia Tsuk Mitchell, *Shareholders as Proxies: The Contours of Shareholder Democracy*, 63 WASH. & LEE L. REV. 1503, 1509 (2006), provides additional detail on the almost endless variations on this theme (“[N]one of these mechanisms is likely to change the century-long suspicion of the individual shareholder-participant and the corresponding empty rhetoric about shareholder democracy that helped bring, shape, and sustain today’s reality.”).

¹⁶⁴ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, 745 (2002) (“To protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws . . .”).

¹⁶⁵ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 951, 124 Stat. 1376, 1899 (2010) (“Not less frequently than once every 3 years, a proxy or

reference to the financial crisis.¹⁶⁶

Although an Arnold would find the claims of corporate accountability laughable, he would save particularly sharp criticism for those reformers who would have us live up to our institutional creed by actually empowering individual shareholders to control managers! Indeed, from an Arnold perspective, what we need most, and have of course already developed, is a ritual that allows us to live with the contradictions, while practical non-ideological people figure out how to make institutions serve social needs.

Arnold's analysis provides insight into an aspect of corporate governance politics that other explanations struggle with: What explains the choice of issues that activists pursue? Why not pursue reforms that are potentially more consequential? Why the heated rhetoric?

The battle against managerial agency costs, an Arnold would say, is a *moral* crusade, not a practical one. The best issues to fight about are those that invoke core commitments. It hardly seems coincidental that the hardest fought battles involve issues that revolve around "shareholder democracy": proxy access, poison pills adopted by boards without shareholder ratification, voting rules for electing directors, and elimination of supermajority voting requirements. These issues immediately tap into broader themes and commitments, regardless of the vast differences between political voting and shareholder voting.¹⁶⁷ More generally, proposals to control "managerial agency costs," like the moral crusades Arnold discussed, are a reliable crowd pleaser, especially when identified with actual (overpaid) managers: say-on-pay, shareholder approval

consent or authorization for an annual or other meeting of the shareholders for which the proxy solicitation rules of the Commission require compensation disclosure shall include a separate resolution subject to shareholder vote to approve the compensation of executives . . .").

¹⁶⁶ See Facilitating Shareholder Director Nominations, 75 Fed. Reg. 56,668, 56,669 (Sept. 16, 2010) (to be codified at 17 C.F.R. pts. 200, 232, 240, 249) ("We recognized at that time that the financial crisis that the nation and markets had experienced heightened the serious concerns of many shareholders about the accountability and responsiveness of some companies and boards of directors to shareholder interests, and that these concerns had resulted in a loss of investor confidence. These concerns also led to questions about whether boards were exercising appropriate oversight of management, whether boards were appropriately focused on shareholder interests, and whether boards need to be more accountable for their decisions regarding issues such as compensation structures and risk management.").

¹⁶⁷ For nice summaries of the various ways in which "shareholder democracy" and "political democracy" differ, see Usha Rodrigues, *The Seductive Comparison of Shareholder and Civic Democracy*, 63 WASH. & LEE L. REV. 1389, 1389-94 (2006) ("[C]omparisons between the corporate and civic polities . . . ultimately falter because participation in a corporation fundamentally differs from participation in a nation."); A. Gilchrist Sparks, *Corporate Democracy: What It Is, What It Isn't, and What It Should Be*, INSIGHTS, Mar. 2006, at 20, 20-21 (comparing the key elements of political and corporate democracy); Bayless Manning, Book Review, 67 YALE L.J. 1477 (1958) (reviewing J.A. LIVINGSTON, *THE AMERICAN STOCKHOLDER* (1958)).

of incentive compensation, and anti-golden parachute proposals, to name a few. With these sorts of issues, it is immediately obvious which side is which, an absolute necessity in any Kabuki play.¹⁶⁸ And because the battle lines are clear, strong language is justified.

But to serve the ceremonial function of asserting shareholder control, shareholder activists must also pick issues where the chances of success are reasonably high. Introducing shareholder proposals on issues like reimbursement of proxy expenses—a more meaningful reform proposal that is likely to engender more managerial resistance for the very reason that it is more meaningful—and seeing the proposal defeated would not be a show of shareholder power, real or symbolic.

To be clear, we are not suggesting that shareholder activists and management supporters are engaged in some conspiracy to divert the public from real reform. It is rather that symbolic activism happens to serve everyone's interests. From the managerialist perspective, losing is acceptable and actual (as opposed to rhetorical) resistance is not too high. Most activists and shareholder rights advocates—public pension funds, union pension funds, ISS, proxy voting departments at institutional investors, academics—lack strong monetary incentives that directly reward them for increasing share values (and the few that do, such as hedge funds managers, tend not to engage in these symbolic battles). They know that issues related to shareholder democracy strike a chord with other shareholders and that they themselves are not immune to the allure of symbolic affirmations of shareholder power. That activism keeps the activists busy, that various arguments can be put forth for how shareholders benefit, and that the costs are low may not be the principal motivating factors. But these features at least assure that there is no internal opposition to symbolic activism.

III. IMPLICATIONS

Our account of the gap between rhetoric and reality in shareholder activism has several implications for the corporate governance debate.

A. *Chicken Little*

The most direct implication is to take the rhetoric used by activists on all sides with a large pinch of salt. Despite protestations to the contrary, many issues at the forefront of shareholder activist campaigns and managerialists' counter-campaigns do not have such weighty implications. Fundamental precepts of shareholder democracy are not, in fact, at stake, and it generally is not very likely that any reform movement will generate "profound effects,"¹⁶⁹

¹⁶⁸ However, the common description of politics as nothing more than a "Kabuki play" may be unfair to Kabuki theater. Jon Lackman, *It's Time to Retire Kabuki*, SLATE (Apr. 14, 2010, 7:03 AM), archived at <http://perma.cc/924K-VVNN> ("[T]here's nothing 'kabuki' about the real Kabuki. . . . [I]t's far from empty and monotonous.").

¹⁶⁹ Wilkie, Farr & Gallagher, *supra* note 31, at 7.

be “groundbreaking,”¹⁷⁰ or “wreak havoc.”¹⁷¹ Whether activist campaigns succeed or fail, the sky will not fall. Chicken Little can relax.

B. Activists Just Want to Have Fun

The focus by shareholder activists on core commitments to shareholder democracy and on issues capable of rallying mass support has costs. First, that focus can divert attention away from more significant changes that would provoke more significant opposition. Second, it can divert attention away from important technical issues that are hard to fit into the standard shareholders versus managers frame.

Consider, for example, the multi-year battle on proxy access that claimed to be about reducing the costs of running a competing slate of candidates. Put aside the fact that after multiple SEC proposals and years of analysis, the SEC was not able to draft a cost-benefit analysis that satisfied the D.C. Circuit.¹⁷² Even if the SEC rule had been upheld, it would have had a minimal impact on corporate governance: few shareholders would have qualified and most of those have shown no appetite for more forceful forms of governance activism.¹⁷³ More importantly, however, the proxy access proposal would have failed to achieve the basic goal of substantially reducing the costs of proxy contests. While the rule would have made it easier to get a nominee on the ballot and would have reduced the costs of collecting ballots, the bulk of expenditures incurred in actual proxy contest—campaign expenses—would not have been affected by the rule.¹⁷⁴

While activists were preoccupied with proxy access, they were oddly silent on two other issues that actually can have significant effects. The first is discretionary broker voting in director elections. Historically, the NYSE regarded uncontested director elections—elections with only one slate of nominees—as routine, even when some shareholders waged an active campaign to convince other shareholders to “withhold” their votes from certain nominees. On routine issues, brokers are permitted to cast the votes of uninstructed shares. As a result, brokers could vote shares for which no specific instructions were received in favor of the board nominees.¹⁷⁵ According to some estimates, uninstructed shares may account for nineteen

¹⁷⁰ Hamilton, *supra* note 34, at 1.

¹⁷¹ Katz & McIntosh, *supra* note 30, at 2.

¹⁷² *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1146 (D.C. Cir. 2011) (“[T]he Commission failed adequately to consider the rule’s effect upon efficiency, competition, and capital formation . . .”).

¹⁷³ See *Insignificance*, *supra* note 57, at 1375-83 (“[M]ost proposals were submitted by individual investors with trivial stakes in the respective companies.”).

¹⁷⁴ See *id.* at 1383-94 (describing the pros and cons of proxy access).

¹⁷⁵ See *Embattled CEOs*, *supra* note 158, at 1016 (“Brokers, however, were permitted to cast the votes of uninstructed shares . . .”).

percent of the votes cast at annual meetings.¹⁷⁶

With the rise of “withhold” votes, the margin of votes in uncontested elections began to matter. Thus, in October 2006, the NYSE proposed amending Rule 452 governing broker votes to redefine all director elections as non-routine.¹⁷⁷ The proposed change required SEC approval to become effective. If there was ever an easy decision, one would have thought this was it. What reason could the SEC possibly assert for *blocking* the NYSE from adopting a rule that takes voting authority away from brokers who lack any economic interest in the underlying shares? Yet, it took the SEC over two years to solicit comments on the NYSE proposal and almost three years to approve it.¹⁷⁸ Activists, for the most part, did not exert significant pressure on the SEC to move faster.¹⁷⁹

The second issue is reimbursement of proxy contest expenses. At the same time Delaware clarified that a proxy access regime could be adopted through bylaws, it also clarified that bylaws could require that a company reimburse reasonable expenses incurred by proxy challengers, either outright or subject to conditions (such as achieving a certain threshold of success).¹⁸⁰ Expense reimbursement could potentially have a much stronger impact on corporate contests than proxy access because it would cover a much greater portion of the relevant proxy contest expenses. Yet activists have done virtually nothing on the expense reimbursement front: they have not developed model provisions for companies to enact or shareholders to propose, they have not rallied support for an expense reimbursement regime, they have not submitted precatory resolutions or mandatory proposals in meaningful numbers,¹⁸¹ and,

¹⁷⁶ See *id.* at 1016-17 (“[I]t is estimated that broker nonvotes amount on average to 19% of the votes cast at an annual meeting.”). This may be an overestimate.

¹⁷⁷ REPORT AND RECOMMENDATIONS OF THE PROXY WORKING GROUP TO THE NEW YORK STOCK EXCHANGE 3 (2006), available at http://www.nyse.com/pdfs/PWG_REPORT.pdf, archived at <http://perma.cc/DC9R-C8BR> (“[T]he election of directors can no longer be considered a ‘routine’ event in the life of a corporation.”).

¹⁷⁸ See *Embattled CEOs*, *supra* note 158, at 1017 (“On July 1, 2009, the SEC finally approved the amendments, effectively ending discretionary broker voting in director elections . . .”).

¹⁷⁹ See JAY W. EISENHOFER & MICHAEL J. BARRY, SHAREHOLDER ACTIVISM HANDBOOK § 9.02[G] (2005) (stating that “[y]ears passed without the SEC acting on the proposed NYSE rule change” but not mentioning any activist activity to push this along).

¹⁸⁰ DEL. CODE ANN. tit. 8, § 113 (2011) (“The bylaws may provide for the reimbursement by the corporation of expenses incurred by a stockholder in soliciting proxies in connection with an election of directors, subject to such procedures or conditions as the bylaws may prescribe . . .”).

¹⁸¹ Geogeson lists no single proposal on reimbursement of expenses in its overview of 2012 proposals. See GEORGESON 2012, *supra* note 44. Between 2003 and 2012 there were only 12 proposals to allow shareholders to recover proxy contest costs. See *id.*; GEORGESON 2011, *supra* note 98; GEORGESON 2010, *supra* note 98; GEORGESON 2009, *supra* note 105; GEORGESON 2008, *supra* note 80; GEORGESON 2007, *supra* note 2; GEORGESON, ANNUAL

to our knowledge, they have not pushed for any legislative or regulatory actions.¹⁸²

More technical issues that cannot be neatly cast as “pro-management” or “pro-shareholder” and do not serve this symbolic function receive even less attention. The activist community has largely ignored the SEC’s “proxy plumbing” concept release,¹⁸³ even though it addresses fundamental flaws in the infrastructure of shareholder voting. It is pretty difficult to rouse an “audience to a high pitch of indignation”¹⁸⁴ over complications created by a proxy voting system combined with multiple layers of custodial ownership arising out of an old decision to immobilize shares rather than dematerializing them.¹⁸⁵ Even technical issues like streamlining the share voting process, although more tightly aligned with hot button issues like “shareholder democracy,” fail to generate much attention.

C. *Shades of Grey*

A proper understanding of the nature of the governance debates and its exaggerated rhetoric should also generate some skepticism about who are the “good guys” and the “bad guys.” Shareholder activists, managers, and their defenders all have more complex motivations than maximizing firm value or protecting privileges. To be sure, managers are agents and are subject to agency costs; their interests are not perfectly aligned with the interests of shareholders. But shareholder activists—whether they are governance professionals at mutual funds, union funds or public employee pension funds, individual shareholders who specialize in submitting 14a-8 proposals, or

CORPORATE GOVERNANCE REVIEW (2006), available at <http://www.computershare-na.com/sharedweb/georgeson/acgr/acgr2006.pdf>, archived at <http://perma.cc/3TK2-KPY3>; GEORGESON, ANNUAL CORPORATE GOVERNANCE REVIEW (2005), available at <http://www.computershare-na.com/sharedweb/georgeson/acgr/acgr2005.pdf>, archived at <http://perma.cc/J2LJ-3QWZ>; GEORGESON 2004, *supra* note 2; GEORGESON, ANNUAL CORPORATE GOVERNANCE REVIEW (2003), available at <http://www.computershare-na.com/sharedweb/georgeson/acgr/acgr2003.pdf>, archived at <http://perma.cc/7JD3-ZM7D> (data compiled from the preceding sources for the period 2003-2012).

¹⁸² In some ways, the fact that activists ignored discretionary broker voting and expense reimbursement is odd. These issues, like others that became the focus of activist attention, relate to shareholder democracy. Perhaps activists viewed these issues as less sexy than the issue of proxy access. Perhaps they worried that success would be elusive because managers would spare no expense in opposition. Or, perhaps they were just too busy with the campaign du jour to take on another issue at the same time.

¹⁸³ See Concept Release on the U.S. Proxy System, 75 Fed. Reg. 42,982 (proposed July 22, 2010) (to be codified at 17 C.F.R. pts. 240, 270, 274, 275) (seeking comment on the proxy system in order to update the rules to enhance the integrity of the shareholder vote).

¹⁸⁴ ARNOLD, *supra* note 127, at 190.

¹⁸⁵ See, e.g., Marcel Kahan & Edward Rock, *The Hanging Chads of Corporate Voting*, 96 GEO. L.J. 1227, 1274 (2008) (“A more-fundamental reform would entail a ‘dematerialization,’ rather than a mere ‘immobilization,’ of securities.”).

academics advocating greater shareholder powers—are often imperfect agents as well. They frequently have economic incentives that are not aligned with those of shareholders at large or pursue political or ideological agendas. Individual shareholders who hold substantial stakes but no managerial role and are plausibly motivated to maximize the value of their portfolio are largely absent from both sides of the issues.

Rather than epic battles between the forces of good and evil, governance debates thus involve disputes between different shades of grey. Neither side is entirely free from self-interest, and neither side has a monopoly on valid arguments. A symbolic victory by shareholder activists may have both positive and negative consequences, and the balance of consequences may differ from firm to firm.

Take, for example, the wholesale shift from plurality voting to majority voting in large firms. While there are good arguments in favor of majority voting, both as a matter of principle and from a pragmatic perspective,¹⁸⁶ we are not convinced that its rapid and widespread adoption among large firms was warranted.¹⁸⁷ We are also not sure why firms outside the Standard & Poor's 500 lag behind in their adoption of majority voting.¹⁸⁸ Is it because the optimal governance regime for smaller firms differs from the one for large ones, because the direct benefits of majority voting in small firms are insufficient to warrant the cost of inducing a change, because there is less glamor—and lower symbolic benefits—in inducing governance changes in smaller firms, or is it because folklore and myths are generated around large, well-known companies?

D. *The Best of All Possible Worlds?*

Finally, taking the perspective of Thurman Arnold, one may observe all the battles and conclude that we live, if not in the best of all possible worlds, then at least in a pretty good one. Despite the back and forth, corporate governance in the United States is characterized by a high degree of stability and slow paced, gradual change. Because we ritually affirm the principle of shareholder control—maintained by the symbolic, and largely harmless, disputes discussed in this article—the current system of corporate governance enjoys widespread support. Shareholder activism, rather than undermining the legitimacy of the current system, serves a legitimating function showing that reform for the better is possible and that shareholders have power.

In truth, however, the actual power in corporations is wielded by a small

¹⁸⁶ See *supra* notes 59, 65, 108 and accompanying text (discussing the benefits of majority voting).

¹⁸⁷ See *supra* note 75 and accompanying text (arguing that there is a tradeoff between messages sent by plurality and majority voting).

¹⁸⁸ See *supra* note 68 and accompanying text; Lucian A. Bebchuk & Scott Hirst, *Private Ordering and the Proxy Access Debate*, 65 BUS. LAW 329, 343 (2010) (reporting that as of September 2009, only 12% of the 5,390 firms outside of the S&P 500 have majority voting).

number of actors who are *not* the beneficial holders of the equity interests. This number may be somewhat larger than it was in Arnold's time, but is dominated by—or perhaps, it is—the Establishment. First and foremost, CEOs remain a dominant force, if less so than twenty years ago.¹⁸⁹ On day-to-day matters, the CEO calls most of the shots, and is left to do so as long as she does a reasonably good job in managing the corporation. Other forces include the more assertive outside directors, managers of major institutional investors, private equity firms and activist hedge funds, and some influential outside professionals. These actors are involved in setting up the incentive structure for CEOs and occasionally get involved when there is a crisis, CEO performance is not satisfactory, a merger or reorganization is contemplated, or a vacancy is to be filled. The power of the top, say, 5,000 people in these groups, and the wealth beneficially owned by others that they control, are staggering.

Waging symbolic battles, some of which may be won, may thus dull the public's desire for more transformative changes. On the issues that matter, we are largely in equilibrium. Having created the myth of shareholder control, we can politically accept a system that is economically beneficial. Thurman Arnold—Yale Law School professor, Assistant Attorney General for Antitrust, Judge of the D.C. Circuit, founder of Arnold & Porter, and indisputably a member of the Establishment—would smile at Vanity's Fair, appreciating shareholder activism's spectacle, glitter and performance, while at the same time seeking practical, non-ideological solutions to practical, non-ideological problems.

CONCLUSION

The politics of corporate governance reform shares much in common with politics generally. In both, there is a persistent gap between rhetoric and reality. In both, that gap may reflect the difficulty of change, the pursuit of a long-term strategy, the ignorance and confusion of participants, or the rent-seeking by interest groups of one sort or another. However, beyond these conventional explanations, we should be open to the possibility that corporate governance politics, like politics generally, may serve a “mythological” or “symbolic” function separate and apart from these more instrumental and practical uses.

The Folklore of Capitalism, Thurman Arnold's cynical and ironic masterpiece, can serve as a useful supplement to the dominant modes of analysis. Focused as it ultimately is on the regulation of business, it provides a refreshing perspective on current controversies that, at their heart, are not so different from the battles over the New Deal that so energized him. Arnold's analysis provides three useful takeaways. First, we ignore the “ritual” function of corporate governance politics and law at our peril. Second, well-meaning reformers who insist that we live up to our ideals can cause real harm.

¹⁸⁹ *Embattled CEOs*, *supra* note 158 (describing CEOs' recent and gradual loss of power).

Last but not least, Arnold reminds us that, as essential as myths may be, we must guard against allowing them to confuse us in analyzing real world problems. Here, his warnings of the mischief that can be caused by taking the concept of “corporate personality” too seriously provide a cautionary reminder. It does not take much imagination to guess how Arnold would have reacted to the use of “corporate personality” in the line of United States Supreme Court cases culminating in *Citizens United v. Federal Election Commission*.¹⁹⁰ In summarizing that history, the majority’s opinion stated:

Under the rationale of these precedents, political speech does not lose First Amendment protection “simply because its source is a corporation.” *Bellotti, supra*, at 784; see *Pacific Gas & Elec. Co. v. Public Util. Comm’n of Cal.*, 475 U.S. 1, 8, (1986) (plurality opinion) (“The identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the ‘discussion, debate, and the dissemination of information and ideas’ that the First Amendment seeks to foster” (quoting *Bellotti*, 435 U.S., at 783)). The Court has thus rejected the argument that political speech of corporation or other associations should be treated differently under the First Amendment simply because such associations are not “natural persons.” *Id.*, at 776; see *id.*, at 780, n. 16. Cf. *id.*, at 828 (Rehnquist, J., dissenting).¹⁹¹

There are a variety of arguments that can be made for and against the regulation of corporate campaign expenditures, but the “corporate personality” of corporations is not one of them.

¹⁹⁰ 558 U.S. 310, 342-43 (2010).

¹⁹¹ *Id.* See also *Burwell v. Hobby Lobby Stores, Inc., et al.*, 134 S. Ct. 2751 (2014) (holding that a corporation is a “person” for the purposes of the Religious Freedom Restoration Act).