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Shareholder Protection Across Time

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SHAREHOLDER PROTECTION ACROSS TIME

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Abstract

This Article offers the first systematic attempt to measure the development of shareholder protection in the United States across time. Using three indices developed to measure the relative strength of shareholder protection across nations, this Article evaluates numerically the protections corporate and securities law have offered shareholders from the beginning of the 20th century to the present day. It accomplishes this by tracking the rights accorded to shareholders across time under three important sources of corporate law: Delaware and Illinois and the Model Business Corporation Act.

This Article's novel study yields novel results. First, we find that the protections afforded to shareholders by state corporation law have decreased since 1900 but only modestly so. This indicates that, contrary to the assumptions of many scholars, state competition in corporate law has not significantly eroded shareholder rights. Second, after adding in measures that count protections provided by federal as well as state law, we find that shareholder protection actually improved over time. This implies that federal intervention has played a crucial and perhaps underappreciated role in shaping U.S. corporate law. Beyond its specific findings, this Article illustrates how quantitative analysis of legal trends provides scholars with valuable insights regarding fundamental questions in corporate law.

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This Article is a substantially revised version of Brian R. Cheffins, Steven A. Bank & Harwell Wells, *The Race to the Bottom Recalculated: Scoring Corporate Law over Time* (UCLA Sch. of Law, Law-Econ Research Paper No. 14-10, 2014), <http://ssrn.com/abstract=2475242>. The authors are grateful for feedback from Stephen Bainbridge, Marcel Kahan, Lynn LoPucki, Mathias Siems, and participants at a seminar at the Harvard Business School, as well as for the research assistance of Nathan Davis, Brendan Mace, Samuel Moniz, and Padideh Zargari.

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INTRODUCTION

This Article constitutes the first systematic attempt to measure the development of shareholder protection in the United States across time. The study is set against a background of strong presumptions concerning both present levels of protection and trends over time. Corporate law scholars tend to assume that shareholders in U.S. public companies are poorly protected in relation to their peers in comparable countries. In a 2005 article, Professor Lucian Bebchuk argued in favor of increasing shareholder power in U.S. corporations on the grounds that “the corporate law system of the United States . . . stands out among the corporate law systems of developed countries in how far it goes to restrict shareholder

initiative and intervention.”¹ Professor Martin Gelter suggested in 2009 that “U.S. corporate and securities law is highly unusual in the extent to which it disenfranchises shareholders from both explicit and implicit influence.”² Professor Christopher Bruner, in a 2013 book contrasting U.S. corporate governance arrangements with those in other common law countries, indicated that among “[t]he defining attributes of U.S. corporate law are the shareholders’ marginal role and very weak governance powers.”³

Underlying this view that U.S. shareholder protection is relatively weak is the assumption that the current situation is the product of a decline in shareholder rights across time. For instance, Professor William Roy observed in a 1997 book that since the rise of the industrial corporation, “stockholders and directors have gone to battle over many issues, and the directors have usually won.”⁴ Similarly, Professor Mary Sullivan argued in 2007 that shareholders’ statutory rights were substantially diminished between 1885 and 1930.⁵ Or as Professor Julian Velasco noted, “[t]he history of corporate law has been one of increasing flexibility for directors and decreasing rights for shareholders.”⁶

If shareholder protection has indeed eroded over time, the logical culprit is the United States’ state-based system of corporate law. Companies are incorporated under the laws of one of the fifty states rather than under a federal statute, and a business can incorporate in a state other than the one in which it is headquartered.⁷ States correspondingly can, and at least to some extent do, compete for incorporation business by altering their corporate laws to attract incorporations, with Delaware being the clear winner.⁸ The regulatory competition that is a feature of

1. Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 848 (2005).

2. Martin Gelter, *The Dark Side of Shareholder Influence: Managerial Autonomy and Stakeholder Orientation in Comparative Corporate Governance*, 50 HARV. INT’L L.J. 129, 134 (2009).

3. CHRISTOPHER M. BRUNER, *CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD: THE POLITICAL FOUNDATIONS OF SHAREHOLDER POWER* 37 (2013).

4. WILLIAM G. ROY, *SOCIALIZING CAPITAL: THE RISE OF THE LARGE INDUSTRIAL CORPORATION IN AMERICA* 158 (1997).

5. Mary O’Sullivan, *The Expansion of the U.S. Stock Market, 1885–1930: Historical Facts and Theoretical Fashions*, 8 ENTERPRISE & SOC’Y 489, 529 (2007), <http://dx.doi.org/10.1017/S1467222700006182>.

6. Julian Velasco, *The Fundamental Rights of the Shareholder*, 40 U.C. DAVIS. L. REV. 407, 409 (2006).

7. 1 JAMES D. COX & THOMAS LEE HAZEN, *THE LAW OF CORPORATIONS* § 3:2 (3d ed. 2010).

8. Lucian Arye Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 YALE L.J. 553, 554, 561 (2002); Mark J. Roe, *Is Delaware’s Corporate Law Too Big to Fail?*, 74 BROOK. L. REV. 75, 76 (2008);

U.S. corporate law has sparked a widespread and enduring debate among corporate law scholars,⁹ with one study of leading law journals showing that more than half of all articles on corporate law discussed the topic.¹⁰ There has been vigorous disagreement whether the “race” between the states has been to the “bottom,” in the sense that states have competed by adopting counterproductive manager-friendly laws, or to the “top,” in the sense that states have competed by adopting laws that served investors’ interests.¹¹ It has been generally accepted, though, that this race has resulted in a net reduction in shareholders’ rights, either because states have been cynically watering down existing shareholder protection to appeal to managers—racing to the bottom—or because states have been displacing superfluous or inefficient rules—racing to the top.¹²

While the general consensus has been that the Delaware-led competition between the states in the corporate law realm has prompted a substantial erosion of shareholder rights and thus shareholder protection, there have been dissenting voices. For example, Professor Walter Werner argued in 1977 that over the previous four decades, “[s]hareholders’ legal rights within the corporation have been made

see also John Armour, Bernard Black & Brian Cheffins, *Delaware’s Balancing Act*, 87 IND. L.J. 1345, 1346, 1348 (2012).

9. See, e.g., Robert B. Ahdieh, *Trapped in a Metaphor: The Limited Implications of Federalism for Corporate Governance*, 77 GEO. WASH. L. REV. 255, 257 (2009) (referring to “corporate [law] literature’s singular emphasis on a race among states”); Lucian A. Bebchuk & Assaf Hamdani, *Federal Corporate Law: Lessons from History*, 106 COLUM. L. REV. 1793, 1794 (2006); Daniel J.H. Greenwood, *Democracy and Delaware: The Mysterious Race to the Bottom/Top*, 23 YALE L. & POL’Y REV. 381, 381 (2005) (“Corporate law scholarship has focused on the role of the states as competitive actors in producing corporate law.”); Marcel Kahan, *The State of State Competition for Incorporations* 3 (European Corp. Governance Inst. Working Paper Series in Law, Working Paper No. 263/2014), <http://ssrn.com/abstract=2474658> (“The competition by states for incorporations has long been the subject of extensive scholarship.”).

10. See Robert B. Ahdieh, *The (Misunderstood) Genius of American Corporate Law*, 77 GEO. WASH. L. REV. 730, 731–32 (2009) (indicating that in a search of articles published in leading law reviews, almost three-quarters referred to topics relevant to regulatory competition).

11. Compare William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 701, 705 (1974) (arguing that there was a race to the bottom regarding corporate law), with Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 275–76 (1977) (responding to Professor Cary’s argument with what became known as the race-to-the-top hypothesis), and ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* 19–22 (1993) (providing support for the race-to-the-top hypothesis). For further discussion of this debate, see J. Robert Brown, Jr., *The Irrelevance of State Corporate Law in the Governance of Public Companies*, 38 U. RICH. L. REV. 317, 324 (2004); Roe, *supra* note 8, at 76–77.

12. Roe, *supra* note 8, at 76–77; see also Ahdieh, *supra* note 9, at 263 (indicating that a leading critic of the “race to the bottom” view did not dispute the “observation of declining levels of shareholder protection”).

meaningful.”¹³ Professor Edward Herman suggested similarly in 1984 that “corporate standards of behavior and attention to the welfare of the shareholders are substantially greater . . . than they were in 1925.”¹⁴ Bringing the story up to date, activist hedge funds have successfully challenged boards of publicly traded companies in recent years, suggesting shareholders are hardly weaklings under U.S. corporate law. In 2014, the *New York Times* noted that these shareholder insurgents “have amassed huge war chests, to take on some of the biggest names in corporate America—and win more often than not.”¹⁵

Werner and Herman both drew attention to federal securities legislation, first introduced in the mid-1930s,¹⁶ to buttress their claims that shareholder protection had become more robust during the 20th century.¹⁷ More recently, recognition of the federal dimension has fundamentally shifted the terms of debate on the merits of regulatory competition in the corporate law realm. In particular, Professor Mark Roe reframed the discourse by arguing that the federal government’s actions on the corporate governance front had done more to shape Delaware corporate law than had potential competition from other states.¹⁸

Roe’s contribution, while insightful and influential, raises at least two significant, and as yet unanswered, questions. First, has the federal contribution to the shape of U.S. corporate law in fact been pivotal or only a side-show? Second, assuming that competition between states has over time diminished the rights corporate statutes provide to shareholders, has federal intervention bolstered shareholder protection sufficiently to cancel out moves in the other direction at the state level?

13. Walter Werner, *Management, Stock Market and Corporate Reform: Berle and Means Reconsidered*, 77 COLUM. L. REV. 388, 398 (1977).

14. Edward S. Herman, *The Limits of the Market as a Discipline in Corporate Governance*, 9 DEL. J. CORP. L. 530, 538 (1984).

15. Michael J. de la Merced & Alexandra Stevenson, *Sotheby’s Yields to Hedge Fund Mogul and Allies*, N.Y. TIMES: DEALBOOK (May 6, 2014, 11:48 PM), <http://dealbook.nytimes.com/2014/05/05/sothebys-and-loeb-end-fight-over-board/>.

16. See Securities Act of 1933, Pub. L. No. 73-22, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a–77aa (2012)); Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a–78pp).

17. Herman, *supra* note 14, at 531, 538; Werner, *supra* note 13, at 398.

18. Mark J. Roe, *Delaware’s Competition*, 117 HARV. L. REV. 588, 591–93 (2003) [hereinafter Roe, *Delaware’s Competition*]; Mark J. Roe, *Delaware’s Politics*, 118 HARV. L. REV. 2491, 2493–94 (2005). On the nature of Professor Roe’s contribution to the discourse, see Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749, 1767 (2006); Note, *The Case for Federal Threats in Corporate Governance*, 118 HARV. L. REV. 2726, 2726 (2005).

With respect to the first question, Roe argues that “[t]here is a large federal presence in corporate law,”¹⁹ but this claim has been contested. For instance, Professor Roberta Romano has challenged what she has referred to as the “federal supremacy hypothesis,” saying that the dynamics of corporate law in the United States can still be explained best by the working of competition between states.²⁰ Professors Marcel Kahan and Ed Rock struck a middle ground in a 2005 article, suggesting that the federal “threat” to Delaware is only potent at moments when, due to the political climate, federal lawmakers can reap populist political dividends by supporting corporate governance reform.²¹

With the second question, again there is disagreement. According to some observers, the interaction between state-based corporate law and periodic federal intervention provides shareholders with ample and appropriate protection. Professor Brett McDonnell has suggested that under many circumstances, the United States’ mixed system of state and federal corporate law produces better results than a pure state or pure national system would yield.²² Leo E. Strine, Jr., Chief Justice of the Delaware Supreme Court, maintains that investors benefit from a combination of Delaware courts enforcing fiduciary duties expertly and the federal government vigorously policing laws mandating disclosure to investors.²³

Other scholars are less sanguine. Bebchuk and Assaf Hamdani argue that, even when federal intervention is taken into account, “regulatory competition tends to produce insufficient investor protection.”²⁴ Professor J. Robert Brown, Jr., maintains similarly that “neither the states nor the federal government adequately regulates the behavior of officers and directors.”²⁵

Empirical analysis of the development of U.S. corporate law across time could help to resolve these controversies. As Professor Todd

19. Mark J. Roe, *Delaware and Washington as Corporate Lawmakers*, 34 DEL. J. CORP. L. 1, 33 (2009).

20. Roberta Romano, *Is Regulatory Competition a Problem or Irrelevant for Corporate Governance?*, 21 OXFORD REV. ECON. POL’Y 212, 213, 223 (2005).

21. Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 VAND. L. REV. 1573, 1576 (2005).

22. Brett H. McDonnell, *Recent Skirmishes in the Battle over Corporate Voting and Governance*, 2 J. BUS. & TECH. L. 349, 353 (2007); see also Kahan & Rock, *supra* note 21, at 1622 (“[Federal] regulations help ward-off crises and thus provide a lightning rod for a populist backlash that could produce severe harm to Delaware’s position as the creator of our de facto national corporate law.”).

23. Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 686 (2005).

24. Bebchuk & Hamdani, *supra* note 9, at 1796.

25. Brown, *supra* note 11, at 320–21.

Henderson has suggested, empirical research could bring “the debate down to the level of the real-world merits and applicability of . . . conflicting visions of corporate law.”²⁶ Nevertheless, until now only a tiny handful of studies have attempted to measure quantitatively changes in U.S. corporate law over time, and those studies have typically sought to measure the pace of change rather than to quantify the level of protection afforded to shareholders.²⁷ This Article breaks new ground with a pioneering empirical analysis that provides insights concerning the evolution of shareholder rights across time. It does so by measuring the evolution of shareholder protection from 1899 to the present day using “leximetric” tools developed to engage in quantitative measurement of corporate law.²⁸

To execute our historically-based leximetric analysis of the development of shareholder protection we draw upon methodologies developed by academics researching comparative corporate governance. In particular, we rely on three indices constructed to measure aspects of corporate law across national borders: (1) a six-element “anti-director rights index” (ADRI); (2) an “anti-self-dealing index” (ASDI); and (3) a ten-variable shareholder protection index constructed by an academic team associated with the Cambridge, U.K.-based Centre for Business Research (CBR SPI).²⁹ We use each of these indices to measure shareholder protection under three different corporate law regimes: Delaware, Illinois, and the Model Business Corporations Act (Model Act)—the model statute promulgated by the Committee on Corporate Laws of the Section of Business Law of the American Bar Association and adopted in whole or substantial part by more than thirty states.³⁰

To anticipate, our empirical analysis casts doubt on some aspects of the received wisdom concerning regulatory competition in the corporate law realm while affirming other aspects. Some caution is warranted in

26. M. Todd Henderson, *Two Visions of Corporate Law*, 77 GEO. WASH. L. REV. 708, 713 (2009).

27. See Brian R. Cheffins, Steven A. Bank & Harwell Wells, *Law and History by Numbers: Use, but with Care*, 2014 U. ILL. L. REV. 1739, 1742–43 (discussing William J. Carney, *The Production of Corporate Law*, 71 S. CAL. L. REV. 715 (1998) and Roberta Romano, *The States as a Laboratory: Legal Innovation and State Competition for Corporate Charters*, 23 YALE J. ON REG. 209 (2006)).

28. Priya P. Lele & Mathias Siems, *Shareholder Protection: A Leximetric Approach*, 7 J. CORP. L. STUD. 17, 18 (2007). The term “leximetrics,” described as the “systematic quantitative” analysis of law, was coined in a 2003 working paper by Robert Cooter & Tom Ginsburg, *Leximetrics: Why the Same Laws Are Longer in Some Countries than Others* (UNIV. OF ILL. LAW & ECON., Working Paper No. LE03-012, 2003), <http://ssrn.com/abstract=456520>.

29. Mathias Siems, *Shareholder Protection Around the World (Leximetric II)*, 33 DEL. J. CORP. L. 111, 116–19 (2008).

30. See *infra* note 60 and accompanying text.

drawing inferences from the results. As we have acknowledged in prior related work, deploying leximetrics to measure U.S. corporate law accurately is challenging, particularly when one goes back through time.³¹ Nevertheless, leximetric analysis can generate sufficiently accurate scores to identify quantitatively key trends.³² Correspondingly, this Article's empirical analysis is a valuable benchmarking exercise that provides novel insights into the development of shareholder protection over time.

Part I of this Article sets the scene for our leximetric analysis. It explains why we chose the jurisdictions we did. It also describes our leximetric methodology, doing so in part by summarizing who makes law under the United States' system of corporate law federalism.

The leximetric analysis occurs in Part II. Here we identify formally the hypotheses we test, we set out the present-day ADRI, ASDI, and CBR SPI scores for Delaware, Illinois, and the Model Act and conclude by describing our historical results. Our core findings are that state law protections of shareholders have diminished since 1900, but not substantially, and that shareholder protection overall *increased* over time due to a federally prompted surge in shareholder rights.³³

With respect to state law trends, ADRI scores, which are governed purely by state law, drop over time but generally only modestly. The downward trend is what would be anticipated, given that competition between states on the corporate law front has reputedly eroded shareholder rights. On the other hand, the modest rate of change indicates that there was not much of a "race" between states in the period covered.

When we take into account federal law trends using the ASDI and the CBR SPI, federal intervention was not only significant, but, contrary to what one would expect if vigorous state competition was eroding shareholder rights generally, more than offset any erosion of shareholder protection at the state level. Specifically, whereas the state-law-based ADRI scores of Delaware, Illinois, and the Model Act dropped—albeit modestly—from 1899 onward, the aggregate ASDI and CBR SPI scores for these jurisdictions, which measure aspects of federal as well as state law, *increased* over time, dramatically in the case of the CBR SPI. Moreover, after taking into account federal reforms introduced either directly by the federal government or by national stock exchanges working in tandem with federal regulators, the level of shareholder protection the United States currently offers is—contrary to what

31. Cheffins, Bank & Wells, *supra* note 27, at 1763.

32. *Id.*

33. See Brian R. Cheffins, Steven A. Bank & Harwell Wells, *Questioning 'Law and Finance': U.S. Stock Market Development, 1930–70*, 55 BUS. HIST. 598, 605 (2013) (anticipating these findings in part).

observers such as Professors Bebchuk, Bruner, and Gelter imply—quite high by global standards.

Part III offers a robustness check of our findings. One point we make in this Part is that while the indices we focus on have only been developed over the past two decades they provide a suitable departure point for analyzing trends extending back more than a century. Part III demonstrates this in part by using as a benchmark a fourteen-point list of shareholder rights promulgated in 1929, thereby countering the possibility that the variables in the indices we use are too modern to rely upon for historical analysis. Part III also identifies key changes to state law occurring during the 20th century to ascertain whether reform displaced the protection of shareholders in fundamental ways not captured by our indices or by the 1929 fourteen-point list. The analysis suggests, corroborating what the indices reveal about trends concerning state law, that while there was erosion of some forms of shareholder protection arising under state law, there was no decisive curtailing of shareholder rights. It seems that if the rights corporate law provided to shareholders were ever reduced markedly, this occurred primarily as the 19th century drew to a close, rather than continuing during the 20th century.

This Article concludes by underscoring the contributions it makes to theoretical debates concerning corporate law. It also acknowledges that it is left to others to gauge the normative implications of the trends identified.

I. METHODOLOGY

Part I sets the scene for this Article's leximetric analysis. Sections I.A and I.B explain why we selected the indices we deploy and the jurisdictions on which we focus. Section I.C explains the coding protocols associated with the indices we deploy, and Section I.D provides an introduction to the variables associated with each index. Section I.E describes the types of rules taken into account with the scoring of each index. Section I.F canvasses the relevance of who makes the rules that potentially could be taken into account.

A. *Selecting the Indices*

In the mid-1990s, as corporate governance first emerged as a topic of international interest,³⁴ academics began to develop indices to quantify the protection the corporate laws of various countries offered investors. These efforts have continued to the present day. Here we deploy three

34. On the relevant chronology, see generally Brian R. Cheffins, *The History of Corporate Governance*, in *THE OXFORD HANDBOOK OF CORPORATE GOVERNANCE* 46, 56–58 (Mike Wright, Donald S. Siegel, Kevin Keasey & Igor Filatotchev eds., 2013).

different indices originally developed for cross-country comparison to examine the development of U.S. corporate law over time.

There are several reasons we chose to rely on existing indices rather than constructing an entirely new one. First, there is familiarity. Most readers likely already know of one or more of the indices used, which will increase the accessibility of the results. Second, drawing upon existing indices means this Article “speaks the same language” as the modern literature on quantitative analysis of corporate law. Thus, future scholars will be able to compare readily our historically-oriented results with those for a wide range of present-day jurisdictions. Third, relying on existing indices avoids the distraction of defending the effectiveness of a new index and maintains focus on correct historical coding rather than index comparison.

The first of the three indices we deploy is the six element anti-director rights index. It was constructed in the mid-1990s by financial economists Rafael La Porta, Florencio López-de-Silanes, Andrei Shleifer, and Robert Vishny.³⁵ The second is the anti-self-dealing index which La Porta, López-de-Silanes, and Shleifer developed in the mid-2000s with Simeon Djankov. It focuses on the regulation of transactions between a company and those who control it.³⁶ The third is the CBR SPI, a ten-variable shareholder protection index Professor Mathias Siems constructed in the late 2000s with the Cambridge, U.K.-based Centre for Business Research.³⁷

Combining discussion of these indices risks deployment of a slew of acronyms referring to both indices and authors. At the risk of some confusion to the reader, this Article uses various acronyms because they have become standard in the scholarly literature. To clarify matters, the key acronyms are set out in Table 1. Drawing the elements together, LLSV produced the ADRI, DLLS produced the ASDI, and Siems–CBR produced the CBR SPI.

Table 1: List of Acronyms

Index or Author Group	Acronym
Anti-Director Rights Index	ADRI
Rafael La Porta, Florencio López-de-Silanes, Andrei Shleifer, and Robert Vishny	LLSV
Anti-Self-Dealing Index	ASDI

35. The ADRI was initially fully deployed in a published paper in Rafael La Porta, Florencio López-de-Silanes, Andrei Shleifer and Robert Vishny (“LLSV”), *Law and Finance*, 106 J. POL. ECON. 1113 (1998). A working paper version was distributed in 1996 as part of the NBER Working Paper Series: <http://www.nber.org/papers/w5661.pdf>.

36. Simeon Djankov, Rafael La Porta, Florencio López-de-Silanes & Andrei Shleifer, *The Law and Economics of Self-Dealing*, 88 J. FIN. ECON. 430, 442 (2008) [hereinafter DLLS].

37. Siems, *supra* note 29, at 116–19.

Simeon Djankov, Rafael La Porta, Florencio López-de-Silanes, and Andrei Shleifer	DLLS
Shareholder protection index constructed by the Centre for Business Research	CBR SPI
Mathias Siems and the CBR academic team that constructed the CBR SPI	Siems–CBR

Why did we choose each index? With the ADRI, its wide acceptance strongly influenced us. The publication of the original ADRI in a 1998 article sparked the development of a rapidly burgeoning “law and finance” literature oriented around quantitative comparative analysis which aims to trace the relationship between nations’ laws and legal institutions, on the one hand, and corporate governance outcomes, on the other.³⁸ In the law and finance realm, the ADRI has achieved the greatest prominence with respect to the measurement of corporate law.³⁹ As of 2010, over one hundred academic papers had used the ADRI to test theories concerning the interaction between law and markets.⁴⁰ Correspondingly, for the quantitative analysis of the historical development of U.S. corporate law, the ADRI was an obvious metric to deploy.

Relying solely on the ADRI, however, could yield a seriously incomplete picture. This index fails to take into account numerous key corporate law topics, including powers shareholders have to remove directors, the scope of shareholders’ managerial powers, and the legality of takeover defenses.⁴¹ It is hardly surprising that the ADRI is not comprehensive, given that it only has six components. This problem is compounded, however, because of the component selection process. Several years after the ADRI was first developed, three of its creators, La Porta, López-de-Silanes, and Shleifer, writing in tandem with Djankov, conceded that the ADRI was “based on an ad hoc collection of

38. See generally John Armour, Simon Deakin, Priya Lele & Mathias Siems, *How Do Legal Rules Evolve? Evidence from a Cross-Country Comparison of Shareholder, Creditor, and Worker Protection*, 58 AM. J. COMP. L. 579, 582–92 (2009) (giving an overview of this literature and its popularity).

39. Lucian Bebchuk & Assaf Hamdani, *The Elusive Quest for Global Corporate Governance Standards*, 157 U. PA. L. REV. 1263, 1276 (2009) (stating that the ADRI was, “[a]mong academic researchers, the most influential metric for evaluating governance arrangements worldwide”).

40. Holger Spamann, *The “Antidirector Rights Index” Revisited*, 23 REV. FIN. STUD. 467, 468 (2010), <http://rfs.oxfordjournals.org/content/23/2/467.full.pdf>.

41. Lele & Siems, *supra* note 28, at 20–21; see also Detlev Vagts, *Comparative Company Law—The New Wave*, in Festschrift für Jean Nicolas Druey 595, 601 (Rainer J. Schweizer, Herbert Burkert & Urs Gasser eds., 2002).

variables.”⁴² Thus, the ADRI in isolation is a less than ideal proxy for the level of protection corporate law has provided for shareholders over time.

Djankov, La Porta, López-de-Silanes, and Shleifer (DLS), when they criticized the original ADRI, were putting forward a second index designed to measure shareholder protections—the ASDI. There are good reasons why the ASDI should be part of a project to code shareholder protection historically.⁴³ First, DLS explicitly proffered this index as a superior alternative to the ADRI, saying that the ASDI dealt “with corporate self-dealing in a more theoretically grounded way.”⁴⁴ Second, in empirical tests DLS ran on the relationship between stock market development and corporate law, the ASDI delivered more robust results than the ADRI.⁴⁵ Third, the ASDI has proven popular in its own right among those carrying out empirical law and finance research, and it could indeed be supplanting the ADRI as the most accepted numerical measure of the quality of corporate law.⁴⁶

Whatever the ASDI’s merits in comparison with the ADRI, because of its narrowness the ASDI is, in isolation, an insufficient measure of shareholder protection for this Article’s purposes. The ASDI addresses a solitary legal topic: the regulation of related-party transactions involving a company and its dominant shareholder, who is also a director.⁴⁷ The underlying scenario is a classic example of the sort of conflict of interest that can bedevil corporations.⁴⁸ Nevertheless, it is unrealistic to be confident that regulation of this particular topic will be broadly representative of the level of protection corporation law affords to shareholders.

Because the ASDI’s narrow scope partly compromises its utility, the broad coverage of the CBR SPI provides a compelling rationale for using it as the third index. The CBR SPI encompasses ten variables, selected by the index’s creators partly because the variables represented the full range of shareholder protections used in the countries coded.⁴⁹ The wide

42. DLS, *supra* note 36, at 432.

43. For a more detailed analysis, see generally Cheffins, Bank & Wells, *supra* note 27, at 1751–52.

44. DLS, *supra* note 36, at 432.

45. *Id.* at 456–61.

46. Cheffins, Bank & Wells, *supra* note 27, at 1752.

47. *Id.* at 1741.

48. Mary A. Jacobson, *Interested Director Transactions and the (Equivocal) Effects of Shareholder Ratification*, 21 DEL. J. CORP. L. 981, 986–87 (1996); Eric G. Orlinsky, *Corporate Opportunity Doctrine and Interested Director Transactions: A Framework for Analysis in an Attempt to Restore Predictability*, 24 DEL. J. CORP. L. 451, 453 (1999).

49. John Armour et al., *Shareholder Protection and Stock Market Development: An Empirical Test of the Legal Origins Hypothesis*, 6 J. EMPIRICAL LEGAL STUD. 343, 353–55 (2009);

range of data taken into account by the CBR SPI potentially makes it a more reliable proxy for shareholder protection levels than either the ADRI or ASDI.

Although the range of issues the CBR SPI addresses is wider than those covered by the ADRI or ASDI, it would be imprudent to use the CBR SPI as the exclusive measure of corporate law for this Article's historically-related leximetric exercise. One consideration is that, whatever the CBR SPI's merits might be as a corporate law index, it is not as well-known and has not been as influential as the ADRI and ASDI.⁵⁰ Also, the CBR SPI's designers selected variables thought to form the core of international corporate governance "best practice" between 1995 and 2005.⁵¹ In so doing, they intentionally focused on a period when proposals to strengthen shareholder protection were high on the policy agenda in numerous countries and deliberately biased the selection of variables in favor of those expected to exhibit a relatively high degree of change during the decade selected.⁵² No explicit equivalent "present-day" bias affects the ADRI and ASDI, meaning that for a historically oriented study such as the one in this Article, they provide a useful cross-check against this feature of the CBR SPI.

Minimal overlap between the three indices reinforces the utility of each as a cross-check against the others. For example, neither the ADRI nor the CBR SPI explicitly addresses rules governing transactions between a corporation and one of its directors or dominant shareholders, which means these indices cover different ground than the ASDI. There is overlap between the ADRI and the CBR SPI in that they both take into account the extent to which corporate law facilitates shareholder voting by way of proxies and the degree to which the law protects against minority shareholder oppression, defined largely in terms of the

Siems, *supra* note 29, at 116–19. The initial CBR SPI was a highly detailed sixty-variable index coded for five countries. Lele & Siems, *supra* note 28, at 23, 45–49.

50. The number of citations for each of the papers where the indices were initially deployed provides an admittedly crude illustration of this point. See *Search Results for LLSV, Law and Finance*, GOOGLE SCHOLAR, http://scholar.google.com/scholar?q=La+Porta%2C+Lopez-de-Silane%2C+Schleifer%2C+Vishny%2C+Law+and+Finance&btnG=&hl=en&as_sdt=0%2C10 (last visited Oct. 17, 2016) (17,321 citations); *Search Results for DLLS, The Law and Economics of Self-dealing*, GOOGLE SCHOLAR, http://scholar.google.com/scholar?q=Djankov%2C+La+Porta%2C+Lopez-de-Silanes%2C+Shleifer%2C+The+Law+and+Economics+of+Self-Dealing&btnG=&hl=en&as_sdt=0%2C10 (last visited Oct. 17, 2016) (2286 citations); *Search Results for Lele & Siems, Shareholder Protection: A Leximetric Approach*, GOOGLE SCHOLAR, http://scholar.google.com/scholar?q=Lele%2C+Siems%2C+Shareholder+Protection%3A+A+Leximetric+Approach&btnG=&hl=en&as_sdt=0%2C10 (last visited Oct. 17, 2016) (195 citations).

51. Armour et al., *supra* note 49, at 355, 374.

52. See *id.* at 353, 355.

procedure governing shareholder derivative suits.⁵³ However, a majority of the six topics the ADRI addresses are not components of the CBR SPI.⁵⁴ Similarly, the bulk of CBR SPI elements lack an ADRI counterpart.⁵⁵

In sum, each index used, in isolation, has drawbacks as a mechanism for measuring the historical development of U.S. corporate law. Nevertheless, taken together, the three indices canvass a wide range of mechanisms that afford protection to shareholders and collectively should offer a sufficiently representative picture of shareholder rights to allow for a fruitful historical analysis. This may be the best that can be achieved given the tools at hand. A more exhaustive empirical analysis of corporate law developments impacting shareholder rights is unlikely to be feasible because fully “[e]valuating the substance of state corporation laws [is] a daunting task.”⁵⁶

B. *Selecting the Legal Regimes*

When seeking to ascertain trends concerning shareholder protection in the United States, it would be unwise to restrict the analysis to one state. As William Roy has observed, historically “[s]tockholders’ rights were actively protected in some states and ignored in others.”⁵⁷ Yet surveying all fifty states would be extremely difficult. Coding corporate law using the three chosen indices is a labor-intensive process involving not only careful research of the applicable law, but also difficult judgment calls on appropriate coding. The challenges multiply with historically oriented analysis because tracking down relevant statutory provisions, administrative rules, and case law back to 1900 is often far from straightforward.⁵⁸ We therefore restricted our analysis to three legal

53. The variables comprising both indices are identified individually below. *See infra* Section III.C. LLSV took account empirically of the regulation of multiple voting rights attached to shares—an element of the CBR SPI—but they did not treat this form of regulation as part of the ADRI. *See* LLSV, *supra* note 35, at 1126–27.

54. The elements of the ADRI are set out below. *See infra* Table 2. To anticipate, the components of the ADRI not addressed in the CBR SPI are the rights individual shareholders have to call shareholder meetings, the ability of companies to block share transfers immediately prior to shareholder meetings, the fostering of a director election system known as cumulative voting, and “preemptive” rights shareholders can be vested with in relation to the issuance of shares.

55. The CBR SPI components are summarized below. *See infra* Table 3. The CBR SPI components not part of the ADRI are the regulation of shares with multiple voting rights attached, requirements concerning the appointment of independent directors, and rules forcing shareholders to make a takeover offer after acquiring a large minority stake—a “mandatory bid.”

56. Wells M. Engledow, *Handicapping the Corporate Law Race*, 28 J. CORP. L. 143, 153 (2002).

57. ROY, *supra* note 4, at 156.

58. *See* Siems, *supra* note 29, at 116 (“[T]he compilation and coding of legal rules across time is very complex and time-consuming.”). *See generally* Cheffins, Bank & Wells, *supra* note

regimes, namely Delaware, the Model Act, and Illinois. These three should nevertheless collectively provide a highly representative sampling of trends affecting U.S. corporate law.

Delaware was an obvious choice, given that, for nearly a century, more publicly traded companies have been incorporated in Delaware than in any other state.⁵⁹ The Model Act was also a clear choice, given that it is a highly influential model statute adopted substantially in more than thirty states.⁶⁰ Due to the high degree of uniformity between the Model Act and the corporate law statutes of numerous states, it has been referred to as “the backbone of U.S. statutory corporate law.”⁶¹

We chose Illinois primarily to foster continuity in the analysis. We scored Delaware’s corporate law back to 1899, the year when the state first enacted a new general incorporation statute intended to attract incorporation business.⁶² The first Model Act was not produced until 1950, however,⁶³ so we needed a proxy for state law developments occurring before the Model Act’s promulgation. We chose Illinois because the Illinois Business Corporations Act of 1933 was the primary precedent for the 1950 Model Act—partly because the principal drafters of the initial Model Act were from Illinois.⁶⁴ Moreover, the 1933 Illinois legislation was considered to be innovative and influential in its own right⁶⁵ and, seemingly contrary to the 20th century trend of states reducing shareholder rights in corporate law, was ostensibly structured to give shareholders more protections than the laws of Delaware and other

27, at 1748–51, 1759–63 (providing examples of the challenges involved with coding historically).

59. Cheffins, Bank & Wells, *supra* note 33, at 605.

60. MODEL BUS. CORP. ACT ANN., intro. xix (AM. BAR ASS’N 2013) (stating that thirty-two states had adopted all or substantially all of the provisions of the current Model Act and four other states had statutes based on the 1969 version).

61. Mark D. West, *The Puzzling Divergence of Corporate Law: Evidence and Explanations from Japan and the United States*, 150 U. PA. L. REV. 527, 548 (2001); *see also* STEPHEN M. BAINBRIDGE, CORPORATE LAW 9 (2d ed. 2009) (“The most important alternative to Delaware law is the American Bar Association’s Model Business Corporation Act.”); Michael P. Dooley & Michael D. Goldman, *Some Comparisons Between the Model Business Corporation Act and the Delaware General Corporation Law*, 56 BUS. LAW. 737, 738 (2001) (referring to “[t]he relatively greater success of the Model Act in terms of adoptions”).

62. Cheffins, Bank & Wells, *supra* note 33, at 605.

63. COX & HAZEN, *supra* note 7, § 2:5, at 140 (“The Model Act first appeared in completed form in 1950.”); Romano, *supra* note 27, at 236 n.73 (2006) (“[T]he 1950 revision of [a 1946] draft statute is now considered the first Model Act.”).

64. Romano, *supra* note 27, at 236–37 n.73; West, *supra* note 61, at 543; *Cf.* Jeffrey M. Gorris, Lawrence A. Hamermesh & Leo E. Strine, *Delaware Corporate Law and the Model Business Corporation Act: A Study in Symbiosis*, 74 L. & CONTEMP. PROBS. 107, 109 (acknowledging the Illinois influence but stating that the drafters used Delaware law as their primary departure point).

65. *See* COX & HAZEN, *supra* note 7 § 2:5, at 140; West, *supra* note 61, at 542–43.

“chartermongering” states.⁶⁶ As with Delaware, we score Illinois law back to 1899.

C. Coding Protocol—In General

For each of the three indices we have deployed the same coding protocol to score shareholder protection going back through time. We began with the present-day score for each of the three corporate law regimes—Delaware, the Model Act, and Illinois. Having ascertained the present-day scores for each, we worked backwards to identify changes to the law that would have caused the score for any of the relevant variables to move up or down.

With one of our indices, the ADRI, our efforts were complicated by the fact that it has been reworked since its initial deployment. The ADRI that LLSV originally promulgated was significantly rescored not once but twice, by DLLS in a 2008 article and by Professor Holger Spamann for a project culminating in an article published the following year.⁶⁷ The rationale for recoding and the key differences between the scoring methodologies for each version of this index are discussed below.⁶⁸ For present purposes, it suffices to say that we took the scorings by DLLS and Spamann as our departure point and did not take LLSV’s analysis into account.

In determining present-day scores for the ADRI, ASDI and CBR SPI, Delaware was the obvious place to start because reliable present-day

66. Harwell Wells, *The Modernization of Corporation Law, 1920–1940*, 11 U. PA. J. BUS. L. 573, 576, 594 (2009). While the fact that Illinois has reputedly placed more emphasis on shareholder rights than other states helps to explain the focus on this jurisdiction, continuity with the Model Act was the key consideration. If the primary concern was to trace developments in a state with a reputation for protecting shareholders, California would be a better choice. A significant proportion of the largest U.S. companies are incorporated under California law; as of the mid-2000s, twenty percent of *Fortune* 500 companies were incorporated in California compared with sixty percent incorporated in Delaware. Matt Stevens, Note, *Internal Affairs Doctrine: California Versus Delaware in a Fight for the Right to Regulate Foreign Corporations*, 48 B.C. L. REV. 1047, 1049 (2007). Also, California has long had a reputation for having corporate law that offered significant protection to shareholders. See Andrew J. Collins, Comment, *Choice of Corporate Domicile: California or Delaware*, 13 U.S.F. L. REV. 103, 106 (1977); Francis G. Wilmarth, Comment, *Choice of a Corporate Domicile*, 49 CAL. L. REV. 518, 523–27 (1961). On the other hand, California has never been influential as a source of corporate law nationally in the same way as Delaware and the Model Act. See Lucian Arye Bebchuk & Alma Cohen, *Firms’ Decisions Where to Incorporate*, 46 J.L. & ECON. 383, 396 (2003) (“California appears unable to ‘sell’ its corporate law system to any significant number of out-of-state firms”); Guhan Subramanian, *The Influence of Antitakeover Statutes on Incorporation Choice: Evidence on the “Race” Debate and Antitakeover Overreaching*, 150 U. PA. L. REV. 1795, 1854 (2002) (remarking upon California’s “poor showing in the market for corporate charters”).

67. DLLS, *Law and Economics*, *supra* note 36, at 461; Spamann, *supra* note 40, at 477.

68. See *infra* Section I.E.

scoring for Delaware was readily available for all three indices. The ADRI was already scored for Delaware because the authors who developed or reworked that index—LLSV, DLLS and Spamann—had taken Delaware as representative of U.S. corporate law.⁶⁹ The ASDI and CBR SPI were also already scored for Delaware because both DLLS and Siems and his Centre for Business Research co-authors likewise treated Delaware as their proxy for U.S. corporate law.⁷⁰

With Delaware's present-day scores we drew verbatim from the work of DLLS, Spamann, and Siems–CBR. Since we adopted the scoring from each source without variation, even if we had qualms about how a particular variable was scored, we refrained from recoding. We scored Illinois and the Model Act ourselves, although whenever the applicable rule in these jurisdictions was substantially similar to Delaware's, we used the Delaware coding of DLLS, Spamann, and Siems–CBR to promote consistency.

Given the extensive borrowing from DLLS, Spamann, and Siems–CBR, one might assume that ascertaining present-day scores would be a straightforward exercise. On the contrary, identifying the suitable scores posed various challenges that influenced the approach taken with historical scoring. The remaining Sections in this Part illustrate that point in the course of summarizing the key elements of the ADRI, the ASDI, and the CBR SPI and identifying the sources of law that need to be taken into account when coding shareholder protection using each index.

D. *The Relevant Variables*

To ascertain appropriate present-day coding for the ADRI, ASDI and CBR SPI, we identified each index's variables and each variable's basic scoring regime. This Section describes each index in detail.

1. ADRI

The ADRI, which was constructed and initially deployed by LLSV in a 1998 *Journal of Political Economy* article to compare the protection afforded by corporate law to shareholders in forty-nine countries,⁷¹ has six variables, each described briefly in Table 2.

69. DLLS, *supra* note 36, at 454; LLSV, *supra* note 35, at 1119; Spamann, *supra* note 40, at 472 n.12.

70. DLLS, *supra* note 36, at 442 (ASDI); Siems, *supra* note 29, at 120 (CBR SPI).

71. LLSV, *supra* note 35, at 1147–49.

Table 2: ADRI Elements

ADRI Variable	Definition
Vote by Proxy Allowed	The ability of shareholders to mail in a proxy vote rather than to vote only in person at a meeting of the shareholders. ⁷²
No Block	The absence of a requirement that shareholders intending to vote their shares at a shareholder meeting deposit those shares before the meeting, rendering them nontransferable. ⁷³
Cumulative Voting	The availability of cumulative voting, which permits minority shareholders to “bundle” their votes and thereby increases the likelihood that they can elect their representatives to the board of directors. ⁷⁴
Oppressed Minority	The availability of mechanisms offering relief to minority shareholders who have been oppressed or unfairly prejudiced. ⁷⁵
Preemptive Rights	Rules obliging a company to give existing shareholders a right of first refusal when issuing new shares. ⁷⁶
Ability to Call General Meeting	The ability of shareholders owning ten percent or more of a company’s shares to call an extraordinary shareholders’ meeting. ⁷⁷

LLSV awarded jurisdictions either “0” or “1” for each variable, with a higher cumulative score for a country signaling a more shareholder-friendly legal regime.⁷⁸ The maximum score any country could receive was “6,” although “5” in fact was the highest score that LLSV awarded.⁷⁹ When DLLS recoded the ADRI for forty-nine countries for the purposes of their 2008 article, they scored the law as of 2003.⁸⁰ The highest score they awarded remained “5.”⁸¹ The DLLS recoding, however, often changed the scores awarded to individual countries for particular variables, with the correlation with the original LLSV coding being 0.60.⁸² Also, while LLSV scored each ADRI variable as either “0” or “1,”

72. *Id.* at 1127.

73. *Id.*

74. *Id.*

75. *Id.* at 1128.

76. *Id.*

77. *Id.*

78. *Id.*

79. *See id.*

80. DLLS, *supra* note 36, at 432.

81. Simeon Djankov, Rafael La Porta, Florencio López-de-Silanes & Andrei Shleifer, *The Law and Economics of Self-Dealing: Data*, HARVARD UNIV., Revised Antidir tab (2008), http://scholar.harvard.edu/files/shleifer/files/data_for_web.xls?m=1360042200 [hereinafter DLLS, *Data*] (showing that nine countries were awarded a score of “5”).

82. DLLS, *supra* note 36, at 455.

DLLS allowed a score of “0.5” for the oppressed minority shareholder variable where this improved the accuracy of coding.⁸³

2. ASDI

For DLLS the primary purpose of their 2008 article was not to recode the ADRI but rather to deploy a new measure of corporate law, the ASDI, for which they assessed the law of seventy-two countries.⁸⁴ The departure point for coding the ASDI is a hypothetical transaction implicating self-dealing.⁸⁵ This transaction involves Buyer Co., a publicly traded food manufacturer of which a Mr. James is both a director and sixty-percent shareholder.⁸⁶ Following a proposal by Mr. James, Buyer Co. agrees to purchase an unused fleet of trucks from Seller Co., a privately held retailer of which Mr. James is a ninety-percent shareholder.⁸⁷ Though all required approvals were obtained and all required disclosures made, Buyer Co. shareholders sue on Buyer Co.’s behalf the interested parties and the body that approved the transaction.⁸⁸

To measure the law governing their hypothetical self-dealing transaction, DLLS compiled two anti-self-dealing indices, one measuring public enforcement—fines and other criminal sanctions—and the other measuring private enforcement—civil remedies.⁸⁹ They evaluated public enforcement by assessing whether Mr. James and the approving parties could be fined or imprisoned as a result of what had occurred.⁹⁰ Though we have investigated how scoring under the public enforcement index developed over time we do not report the results here.⁹¹ This is because the public enforcement index has attracted considerably less interest than the private enforcement index, due partly to only the latter index being correlated in a meaningful way with measures of stock market development.⁹²

The ASDI private enforcement index is made up of two subindices, one addressing *ex ante* private control of self-dealing and the other *ex post*.⁹³ The *ex ante* index, which focuses on regulation of the process by which the sale of the trucks could be validated, deals with requirements

83. *Id.* at 455 tbl.9.

84. *Id.* at 432.

85. *Id.*

86. *Id.* at 433.

87. *Id.*

88. *Id.*

89. *Id.* at 435.

90. *Id.* at 436.

91. For a discussion of the trends with the public enforcement index, see generally Cheffins, Bank & Wells, *supra* note 27, at 1754.

92. DLLS, *supra* note 36, at 451.

93. *Id.* at 434–35 tbl.1.

for advance disclosure of the proposed transaction by Mr. James and Buyer Co. as well as for an independent review of the transaction by a financial expert or auditor.⁹⁴ The *ex post* index, which measures the ease with which minority shareholders of Buyer Co. could establish potential wrongdoing in the courts after the transaction had been entered into, deals with requirements Buyer Co. would face to disclose the transaction, standing to sue, burden of proof, and access to evidence.⁹⁵

As with the ADRI variables, the variables in the ASDI private enforcement index are scored between “0” and “1.”⁹⁶ In some instances, such as with a requirement for an independent review, “0” and “1” are the only possible scores.⁹⁷ More often, allowance is made for the possibility of intermediate scores, with the range usually limited to “0,” “0.5,” and “1.”⁹⁸ For instance, with the advance disclosures Mr. James had to make for validation of the hypothetical transaction to be possible, a country would score “0” if no disclosure was required, “0.5” if only the conflict of interest had to be disclosed, and “1” if all material facts had to be divulged.⁹⁹

3. CBR SPI

The ten-variable CBR SPI is the third and final index we deploy. Siems–CBR initially deployed the CBR-SPI to score corporate law in twenty countries from 1995 to 2005,¹⁰⁰ and then subsequently used it to score corporate law in thirty countries from 1990 to 2013.¹⁰¹ As shown in Table 3, the index addresses five basic categories, each associated with two of the ten variables.¹⁰²

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. Siems, *supra* note 29, at 116; Armour et al., *supra* note 49, at 353.

101. Dionysia Katelouzou & Mathias Siems, *Disappearing Paradigms in Shareholder Protection: Leximetric Evidence for 30 Countries, 1990–2013*, 15 J. CORP. L. STUD. 127, 129–30 (2015); Mathias M. Siems, *The Leximetric Research on Shareholder Protection*, in RESEARCH HANDBOOK ON SHAREHOLDER POWER (Jennifer Hill G. & Randall S. Thomas eds., 2015).

102. Siems, *supra* note 29, at 116–19.

Table 3: CBR SPI Elements

CBR SPI Category	Variables
Shareholder Power at Shareholder Meetings	Shareholders' right to vote collectively on sale of the company's assets. Minority shareholders' rights to require that that an item be put on a shareholder meeting agenda. ¹⁰³
Shareholder Voting	Fostering effective shareholder voting by making it possible for proxies to be sent by mail and by requiring the use of "two way" proxies that give a shareholder the possibility of voting "yes" or "no." Regulation of shares with multiple voting rights. ¹⁰⁴
Encouraging Directors to Take Shareholder Interests into Account	Regulation of board composition in the form of independent director requirements. Rules regarding shareholder dismissal of directors before the expiration of their term. ¹⁰⁵
Legal Actions Minority Shareholders Can File	Minority shareholders' ability to enforce breaches of duty by way of derivative suits. Shareholders' ability to challenge shareholder resolutions. ¹⁰⁶
Change of Corporate Control Protection	Imposing on a shareholder who acquires a large stake in a corporation an obligation to offer to buy the remaining shares. Disclosure requirements for acquirers of large-share ownership stakes. ¹⁰⁷

Consistent with the other indices, each CBR SPI variable is scored on a range between "0" and "1."¹⁰⁸ Like the revised ADRI and the ASDI, the CBR SPI forsakes strict binary "0" and "1" coding.¹⁰⁹ The CBR SPI indeed goes further to accommodate intermediate scoring, with the intention being to provide a more accurate picture of the law.¹¹⁰ Although

103. *Id.* at 119.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 116–19.

109. *Id.* at 120.

110. *Id.*

the revised ADRI and the ASDI permit non-binary options only when explicitly identified, such as “0,” “0.5,” and “1,” those coding the CBR SPI were prepared to give a wide range of intermediate scores for every variable.¹¹¹ For instance, while the description of the CBR SPI variable dealing with independent directors indicates that the scoring options are “1” if at least half of the board must be independent directors, “0.5” if 25% of the board must be independent, and “0” otherwise,¹¹² Siems–CBR awarded China 0.4 for 2002 and 0.6 for 2003 to 2005.¹¹³

E. Which Types of Rules Qualify?

When deciding how to score legal rules going back through time, we had to take into account the form those rules took. Corporate law rules fall into three basic categories: mandatory; default or presumptive (applicable unless there has been a waiver or other form of “opting out”); and enabling or permissive (inapplicable unless there has been “opting in” by specific election).¹¹⁴ When LLSV coded the original ADRI, they failed to distinguish explicitly between these categories.¹¹⁵ In contrast, when DLLS recoded the ADRI in 2008, they ignored enabling rules, meaning that a country would only receive a positive score when its corporate law had a default or mandatory rule providing the relevant protection to shareholders.¹¹⁶ The creators of the CBR SPI similarly awarded points only for mandatory and default rules.¹¹⁷ DLLS did not indicate specifically which rules they focused on with the ASDI, but because they were seeking to measure “hurdles” that had to be jumped,¹¹⁸ they should not have taken into account permissive enabling rules.

111. MATHIAS SIEMS ET AL., CBR EXTENDED SHAREHOLDER PROTECTION INDEX 4 (2009), http://www.cbr.cam.ac.uk/fileadmin/user_upload/centre-for-business-research/downloads/research-projects-output/Shareholder%20protection%20index%20references%2025%20countries.pdf.

112. Siems, *supra* note 29, at 117.

113. SIEMS ET AL., *supra* note 111, at 34.

114. BRIAN R. CHEFFINS, COMPANY LAW: THEORY, STRUCTURE AND OPERATION 217–20 (1997).

115. *See* DLLS, *supra* note 36, at 454.

116. *Id.*

117. SIEMS ET AL., *supra* note 111, at 3–4 (indicating that only mandatory laws were counted with respect to rules precluding shares with multiple voting rights and requiring a shareholder to make a takeover bid for all shares upon acquiring a specified percentage of shares). Professors Dionysia Katelouzou and Mathias Siems, working with CBR SPI data, subsequently categorized legal rules that were elements of the CBR SPI as “enabling” and “paternalistic.” Katelouzou & Siems, *supra* note 101, at 132. In so doing, they were not attempting to revamp the basic typology of corporate law rules set out here but rather were distinguishing between those CBR SPI rules that automatically imposed the rights in question on shareholders—“paternalistic”—and those where shareholders had to be proactive to exercise the rights they had been given—“enabling.” *See id.*

118. DLLS, *supra* note 36, at 432.

Changing the types of rules that count can significantly alter scores awarded. In 1998, LLSV gave the United States an overall score of “5” for the ADRI, with the only “0” occurring because shareholders lacked preemptive rights under Delaware law, which LLSV focused on to code the United States.¹¹⁹ In Delaware, a corporation is authorized to “opt in” to give shareholders cumulative voting rights and the right to call an extraordinary meeting.¹²⁰ LLSV gave the United States a “1” for both variables, but when DLLS recoded the ADRI in 2008, they coded both as “0” because the rules governing these areas of the law were enabling rather than presumptive or mandatory.¹²¹ This meant the aggregate score for the United States dropped from a “5” for LLSV to a “3” for DLLS.¹²² Since DLLS themselves treated the revised ADRI as superior to the original, we decided to adopt the same approach to enabling rules and excluded laws of this type from consideration when coding the ADRI going back through time.

Given how DLLS scored the ADRI for the United States, it might seem that “3” would be the obvious present-day baseline for historical research on Delaware. Spamann’s recoding of the ADRI, however, provides an additional wrinkle. Like DLLS, he discounted enabling rules and so awarded the United States “0”s for cumulative voting and for the calling of shareholder meetings.¹²³ Spamann, however, awarded the United States a “2” rather than a “3” overall because he adopted a tougher standard than DLLS for awarding a “1” for proxy voting, a standard that Delaware failed to meet.¹²⁴ Spamann’s coding of Delaware law provides as credible a departure point for our analysis as does DLLS’s coding, so we correspondingly decided to rely on both.

F. *Who Made the Rules?*

As part of our exercise of determining present-day coding before working backwards, we needed to determine not only the form of the relevant rules but also their source. The ADRI was scored purely by reference to “company and bankruptcy/reorganization laws” and excluded securities law and stock exchange listing rules.¹²⁵ LLSV were

119. LLSV, *supra* note 35, at 1119, 1130.

120. Cheffins, Bank & Wells, *supra* note 27, at 1746–47.

121. Cheffins, Bank & Wells, *supra* note 33, at 607.

122. *Id.* at 606.

123. Spamann’s article does not provide an element-by-element breakdown of ADRI scores for the United States or any other country. For this data, see Holger Spamann, *The “Antidirector Rights Index” Revisited: Supplementary Data*, REV. FIN. STUD. (2010), http://rfs.oxfordjournals.org/content/suppl/2009/09/24/hhp067.DC1/ADRI_RFS.xls.

124. See Spamann, *supra* note 40, at 474 & n.22.

125. LLSV, *supra* note 35, at 1120.

prepared, however, to factor in judicial rulings when scoring jurisdictions.¹²⁶ For instance, they explicitly drew attention to the U.S. derivative suit as an example of a legal mechanism that afforded shareholders protection against perceived oppression, and its contours are defined primarily by case law.¹²⁷

At first glance, it seems there is no need to go any further than LLSV did in identifying the laws that offer shareholder protection in the United States. Corporate law constitutes the most obvious source of shareholder rights, and the relevant statutes are promulgated at state level.¹²⁸ While proposals to provide for federal incorporation predate the adoption of the U.S. Constitution,¹²⁹ Congress has consistently resisted calls to provide for federal incorporation, leaving the matter instead to the states.¹³⁰ Each state has in turn promulgated a general corporate statute establishing the procedure for incorporating businesses and providing the ground rules governing the internal affairs of already incorporated companies.¹³¹ When a corporation is incorporated under the laws of a particular state, that state's corporate law will be applicable notwithstanding where the principal place of business might be. The laws of the state of incorporation will be determinative due to a choice of law rule known as "the internal affairs doctrine" which does much to sustain Delaware's status as the leading supplier of corporate charters.¹³²

The internal affairs doctrine has also formed the basis of an understanding among federal and state lawmakers that has done much to shape U.S. corporate law. The key precept is that the internal affairs of corporations fall within the purview of state law and are not a proper subject for federal regulation.¹³³ Some judicial rulings imply that due to the nature of the U.S. federal system, the internal affairs doctrine is

126. *Id.* at 1126.

127. *Id.* at 1128; *see also* Armour, Black & Cheffins, *supra* note 8, at 1349 (describing the prerequisites for bringing a derivative suit in Delaware as a "judicial construct").

128. Jill E. Fisch, *Leave It to Delaware: Why Congress Should Stay out of Corporate Governance*, 37 DEL. J. CORP. L. 731, 732 (2013); Stephen M. Bainbridge, *The Creeping Federalization of Corporate Law*, REG., Spring 2003, at 26, 26 ("For over 200 years, corporate governance has been a matter for state law.").

129. William W. Bratton & Joseph A. McCahery, *The Equilibrium Content of Federalism*, 41 WAKE FOREST L. REV. 619, 652–53 (2006).

130. Robert B. Thompson, *Delaware, the Feds, and the Stock Exchange: Challenges to the First State as First in Corporate Law*, 29 DEL. J. CORP. L. 779, 784 (2004) [hereinafter Thompson, *Delaware, the Feds, and the Stock Exchange*]; Robert B. Thompson, *Delaware's Disclosure: Moving the Line of Federal-State Corporate Regulation*, U. ILL. L. REV. 167, 177 (2009).

131. Wells, *supra* note 66, at 573.

132. Frederick Tung, *Before Competition: Origins of the Internal Affairs Doctrine*, 32 J. CORP. L. 33, 39, 42–43 (2006).

133. Renee M. Jones, *Does Federalism Matter? Its Perplexing Role in the Corporate Governance Debate*, 41 WAKE FOREST L. REV. 879, 882 (2006).

constitutionally mandated.¹³⁴ This in fact is not the case. The correct view is that federal corporate law-making authority is very broad and that Congress could if it wished federalize corporate law largely without limit.¹³⁵

Constitutional potentialities aside, over most of U.S. history, Congress steered clear of enacting federal corporate law. There was no meaningful federal contribution to U.S. corporate law until the enactment of the Securities Act of 1933¹³⁶ and the Securities Exchange Act of 1934,¹³⁷ which established the federal Securities and Exchange Commission (SEC).¹³⁸ Even these important pieces of legislation ultimately constituted only a tentative foray by Congress into the corporate law realm. Although the SEC would subsequently argue that key aspects of the 1934 Act authorized it to create rules that directly affected the governance of corporations, such as regulation of shareholder voting conducted by proxy,¹³⁹ this was not the consensus view at the time the federal securities law reform was undertaken.¹⁴⁰ The standard assumption was that federal regulation should target trading markets with disclosure and anti-fraud rules—“securities law”—thereby leaving “corporate law” relating to the internal affairs of companies to the states.¹⁴¹ The legislative history relating to the enactment of the 1933 and 1934 Acts indeed indicates that Congress did not intend to authorize federal securities regulators to interfere in the management of companies.¹⁴²

This pattern began to change in the late 20th century. Between the 1968 enactment of the Williams Act,¹⁴³ which amended section 14 of the Securities and Exchange Act of 1934 to impose a range of obligations on parties making a tender offer to acquire shares,¹⁴⁴ and the close of the 20th century, there were various federal incursions into the corporate law

134. COX & HAZEN, *supra* note 7, § 2:13, at 172; Greenwood, *supra* note 9, at 413; Roe, *Delaware’s Competition*, *supra* note 18, at 596.

135. Fisch, *supra* note 128, at 737–38; Roe, *Delaware’s Competition*, *supra* note 18, at 597.

136. Pub. L. No. 73–22, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a–77aa (2012)).

137. Pub. L. No. 73–291, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a–78pp).

138. *Id.* § 4(a).

139. Patrick Moyer, *The Regulation of Corporate Law by Securities Regulators: A Comparison of Ontario and the United States*, 55 U. TORONTO FAC. L. REV. 43, 49 (1997).

140. *See id.*

141. Bratton & McCahery, *supra* note 129, at 624–25. During the 1930s, a variety of tax provisions were enacted that appeared to be motivated at least in part by the desire to affect corporate governance, but these were usually defended on tax policy grounds as well. *See* Steven A. Bank, *Tax, Corporate Governance, and Norms*, 61 WASH. & LEE L. REV. 1159, 1163–64 (2004).

142. Moyer, *supra* note 139, at 49–50.

143. Pub. L. No. 90–439, 82 Stat. 454 (codified as amended in scattered sections of 15 U.S.C. (2012)).

144. *See id.* at 454–57.

realm. Laws and regulations were adopted fostering disclosure of transactions involving publicly traded companies going private, discouraging the listing of dual-class shares and deregulating proxy requirements to facilitate institutional shareholder voice.¹⁴⁵ Federal tax provisions also limited the tax deductibility of executive compensation.¹⁴⁶

These post-1968 incursions would soon be overshadowed, however, by the most ambitious federal corporate law initiative to date. The game-changer was the Sarbanes–Oxley Act of 2002 (SOX),¹⁴⁷ which Congress enacted in response to high-profile corporate scandals involving companies such as WorldCom and Enron.¹⁴⁸ As Mark Roe observed in a 2003 article where he emphasized the federal government’s impact on competitive federalism, “with [SOX] in 2002, Congress did not even pretend to stay on the disclosure-and-trading side of the rhetorically traditional federal-state division of power, not even offering perfunctory respect for state rules governing the corporation’s internal affairs.”¹⁴⁹

The nature and depth of SOX’s corporate law content was something of a shock to those who had assumed the states’ preeminence.¹⁵⁰ SOX made key changes that included creating the possibility of executive pay “clawbacks” where there had been problematic restatements of corporate earnings, prohibiting corporate loans to senior executives, requiring CEO certification of financial reports filed with the SEC, granting the SEC formal authority to regulate the structure and duties of board committees dealing with the audit function, and giving the SEC explicit powers to formulate accounting standards.¹⁵¹

The Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd–Frank Act)¹⁵² constituted another substantial federal incursion into the corporate law realm. While this post-financial crisis legislation focused primarily on the regulation of banks, it contained a

145. Roe, *Delaware’s Competition*, *supra* note 18, at 616, 620–21.

146. Bank, *supra* note 141, at 1161.

147. Pub. L. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15, 18, 28, and 29 U.S.C. (2012)).

148. Bratton & McCahery, *supra* note 129, at 664–65.

149. Roe, *Delaware’s Competition*, *supra* note 18, at 633.

150. See Bratton & McCahery, *supra* note 129, at 667–68 (noting that the “off-handed but emphatic revision of the internal affairs line drawn after 1934 . . . upset settled expectations”).

151. Brown, *supra* note 11, at 358–71; see also Robert B. Ahdieh, *From “Federalization” to “Mixed Governance” in Corporate Law: A Defense of Sarbanes–Oxley*, 53 BUFFALO L. REV. 721, 724–25 (2005) (discussing the SOX auditing requirements in depth). See generally Brian R. Cheffins, *Introduction*, in 1 THE HISTORY OF MODERN U.S. CORPORATE GOVERNANCE xxvi (Brian R. Cheffins ed., 2011) (providing background on why SOX was enacted and the controversial response its enactment received).

152. Pub. L. No. 111-203, 124 Stat. 1376 (codified as amended in scattered sections of 7, 12, and 15 U.S.C.).

subtitle entitled “Strengthening Corporate Governance” applicable to all issuers falling under the SEC’s jurisdiction, not just financial companies.¹⁵³ This subtitle amended federal securities law to instruct the SEC to introduce rules requiring companies that had not split the chief executive officer and chairman of the board roles to explain why and to authorize the SEC to develop a “proxy access” rule permitting shareholders with significant stakes to nominate directors on a company’s own proxy card under prescribed circumstances.¹⁵⁴ Another subtitle of Dodd–Frank, dealing with executive compensation,¹⁵⁵ amended federal securities laws to mandate an advisory “say on pay” shareholder vote and additional compensation disclosures for all publicly traded companies subject to SEC jurisdiction.¹⁵⁶

The ADRI, due to its exclusive focus on state corporate law,¹⁵⁷ does not take account of securities law-based federal initiatives that might bolster shareholder protection. The situation is different with the ASDI and the CBR SPI, which both factor in a wider range of laws and correspondingly can reflect rules promulgated outside the state context. With the ADSI, DLLS coded by reference to “stock market act(s) and regulations” (i.e. securities law) and stock exchange listing rules, as well as corporate legislation and judicial precedent.¹⁵⁸ With the CBR SPI, Siems and his colleagues similarly took into account federal securities law and stock exchange listing rules in addition to state corporate law statutes and case law.¹⁵⁹

To simplify rule categorization, this Article treats all laws not promulgated at state level as “federal,” in the sense that they apply nationwide. Who are the relevant federal rule makers? Congress obviously is one. Though there is no federal incorporation legislation, since the early 1930s Congress has periodically enacted statutory measures as part of federal securities law that operate as *de facto* corporate law.¹⁶⁰ The SEC is another rule maker. As the administrative agency charged with administering federal securities law, the SEC promulgates regulations and issues rulings pursuant to the statutory

153. *See id.* §§ 971–72.

154. *Id.*

155. *Id.* §§ 951–57.

156. *See id.* § 951 (explaining shareholder voting on executive compensation); § 953 (discussing disclosure). Of the provisions in Title IX, Subtitle E governs all publicly traded companies subject to SEC jurisdiction save for § 956, which requires disclosure of executive pay arrangements to regulators only if it is one of several “covered financial institutions.” *Id.* § 956.

157. LLSV, *supra* note 35, at 1120.

158. *See* DLLS, *supra* note 36, at 433.

159. *See* Siems, *supra* note 29, at 120 (explaining the coding process used in the research).

160. *See supra* notes 143–48 and accompanying text.

mandate under which it operates.¹⁶¹ Federal courts are a third rule maker, as they interpret federal securities law and SEC regulations and rulings.¹⁶²

Beyond the official governmental realm, there are private actors—leading national stock exchanges—whose rules are taken into account in ADRI and CBR SPI coding and which this Article treats as generating “federal” rules. The New York Stock Exchange (NYSE), for instance, is a private body, not an agency of the federal government. Nevertheless, the Securities Exchange Act of 1934 requires the NYSE, operating as a national securities exchange and self-regulatory organization under the Act, to submit listing rules governing companies traded on the NYSE to the SEC for approval.¹⁶³ Also, the SEC can amend the NYSE’s listing rules to further the purposes of the 1934 Act.¹⁶⁴ The SEC thus has substantial power to ask, and even direct, the NYSE to make rules that affect shareholder protections.¹⁶⁵ Indeed, Professor Robert Thompson, in discussing NYSE listing rule amendments promulgated from the late 1970s onwards dealing with governance-related topics such as shareholder voting rights, board composition, and shareholder approval of executive pay, has said, “Without the SEC’s leadership, the exchanges would not likely have entered into the arena of corporate governance.”¹⁶⁶

II. HYPOTHESES AND FINDINGS

The historically-oriented leximetric investigation of U.S. corporate law that forms the core of this Article allows us to analyze numerous aspects of shareholder protection under corporate and securities law. To ensure our empirical research directly addresses the key issues, we have generated a series of specific, testable hypotheses set out in Section II.A. Section II.B sets out present day scores for Delaware, the Model Act and Illinois under the ADRI, the ASDI, and the CBR SPI. Section II.C examines historical trends.

A. Hypotheses

Hypothesis 1 (H1): Shareholder protection index scores, to the extent they reflect state law, should decline over time. The first hypothesis, and perhaps the most obvious, that can be tested by using the ADRI, ASDI, and CBR SPI to measure shareholder protection over time is that scores should decline over time, at least when measuring state corporate law.

161. Roe, *supra* note 19, at 11.

162. *Id.*

163. Pub. L. No. 73-291, § 19(b), 48 Stat. 881, 898 (codified as amended at 15 U.S.C. § 78s (2012)).

164. *See id.* § 19(c).

165. Roe, *supra* note 19, at 11.

166. Thompson, *Delaware, the Feds, and the Stock Exchange*, *supra* note 130, at 795–97.

The corporate law “race” rhetoric used to characterize the evolution of the law, whether to the top or bottom, connotes movement.¹⁶⁷ Moreover, given the general consensus that competition among states for incorporation business in the twentieth century served to erode shareholder rights while enhancing managerial flexibility,¹⁶⁸ shareholder protection scores dictated by state law should have fallen.

Hypothesis 2 (H2): Shareholder protection index scores, to the extent they reflect federal law, should increase over time. While the standard narrative is that shareholder rights have eroded over time, various observers have cited reform at the federal level to argue that shareholder protection was in fact bolstered from the 1930s onwards.¹⁶⁹ Assuming these observers are correct, one would expect that federally influenced shareholder protection scores should have risen.

Hypothesis 3 (H3): If changes to federal law heavily influenced the scoring of individual components of shareholder protection indices, these indices’ aggregate scores should have increased over time. Due to growing recognition of the role the federal government has played, the conventional wisdom concerning state dominance of the U.S. system of corporate law federalism has been shifting over the past decade.¹⁷⁰ The extent of federal influence, however, is open to debate.¹⁷¹ If this influence was substantial, then federal intervention fortifying shareholder rights may have been enough to more than offset any erosion of those rights at the state level, meaning the overall level of shareholder protection would have increased.

All three of these hypotheses can be tested with the ASDI and the CBR SPI. This is because these indices are scored not only by reference to state corporate law, but also by reference to securities law and rules developed by key players at the federal level, namely the SEC and national stock exchanges.¹⁷² With the ADRI, the fact that coding occurs purely by reference to state corporate law means that scoring over time can only be used to test H1.

B. Present-Day Scores

Given our methodology, which involves determining present-day coding before working backwards,¹⁷³ the scoring begins with considering each jurisdiction’s present-day score under the selected indices. This not only constitutes the foundation for our historical analysis, but also

167. See Roe, *Delaware’s Competition*, *supra* note 18, at 609.

168. See *supra* notes 4–6 and accompanying text.

169. See *supra* notes 14–17 and accompanying text.

170. See *supra* notes 18–19 and accompanying text.

171. See, e.g., Romano, *supra* note 20, at 213, 223.

172. See *supra* Section I.F.

173. See *supra* Section I.C.

provides insights into the level of shareholder protection the United States currently offers compared to other countries. Under the ADRI, which is governed solely by state corporate law, the U.S. scores poorly by global standards. In contrast, with the ASDI and the CBR SPI, both of which factor in federal securities regulation and stock market listing rules, the level of shareholder protection is high in global terms.

1. ADRI

With the ADRI, as mentioned we draw upon the approaches DLLS and Spamann developed.¹⁷⁴ As shown in Table 4, DLLS gave the United States (i.e., Delaware) a “3” out of “6” overall, while Spamann gave Delaware an aggregate score of “2.” This discrepancy arises from the proxy voting element of the ADRI. DLLS gave Delaware a “1” for proxy voting¹⁷⁵ because the Delaware General Corporation Law (DGCL) explicitly authorizes voting by proxy.¹⁷⁶ Spamann only gave countries a “1” with this variable if the law required that proxies provide for yes or no “two-way” voting.¹⁷⁷ Delaware corporate law does not do this, so he scored this element “0.”

Table 4: Delaware’s Present-Day ADRI Scores

ADRI Element	DLLS	Spamann	Justification for Present-Day Score
Vote by Proxy Allowed	1	0	DGCL § 212(b) gives shareholders the right to vote by proxy but does not provide, as Spamann requires, for two way voting. ¹⁷⁸
No Block	1	1	“Under the default regime, firms cannot require deposit of shares . . . by stockholders exercising their right to vote.” ¹⁷⁹

174. See *supra* Sections I.C–I.E.

175. DLLS, *Data, supra* note 81 (Revised Antidir tab, col. B).

176. DEL. CODE ANN. tit. 8, § 212(b) (2015); see also DLLS, *supra* note 36, at 454 (indicating that it would suffice if “shareholders can vote by mail on each of the items on the agenda through a ballot or proxy form”). For the elements of DLLS’s revised ADRI, see *id.* at 455 tbl.9.

177. Holger Spamann, *On the Insignificance and/or Endogeneity of La Porta et al.’s ‘Anti-Director Rights Index’ Under Consistent Coding* 27 (Harvard Law Sch., John M. Olin Ctr. for Law, Econ., & Bus. Fellows’ Discussion Paper No. 7, 2006), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=894301. “Yes or no” or “two-way” voting refers to a proxy form that explicitly gives shareholders the ability to instruct the proxy to vote for or against a resolution. *Id.* at 24.

178. DEL. CODE ANN. tit. 8, § 212(b) (2015).

179. Holger Spamann, *Appendix to the ‘Anti-Director Rights Index’ Revisited*, REV. FIN. STUD. 183 (2010), http://rfs.oxfordjournals.org/content/suppl/2009/09/24/hhp067.DC1/hhp067_suppl_data.pdf.

Cumulative Voting	0	0	DGCL § 214 provides for an enabling rule, not a default rule. ¹⁸⁰
Oppressed Minority	1	1	Minority shareholders can enforce breaches of duty by directors with a derivative suit and can challenge shareholder amendments to the corporate charter on grounds of “unfairness.” ¹⁸¹
Preemptive Rights	0	0	“Preemptive rights exist only to the extent expressly granted in the [certificate of incorporation].” ¹⁸²
Ability to Call General Meeting	0	0	“[S]hareholders can call a special meeting only if allowed by, and under the conditions specified in, the [certificate of incorporation].” ¹⁸³
Total	3 ¹⁸⁴	2 ¹⁸⁵	

Given that in recent years Delaware law has not been amended in a way that would affect the scoring of any ADRI variables, DLLS’s and Spamann’s codings for U.S. corporate law should determine Delaware’s present-day score for this Article’s purposes. These codings imply that Delaware corporate law is not “shareholder friendly,” at least in comparison with other countries scored using the ADRI. DLLS’s U.S. score of “3” was substantially below the average score of 4.29 DLLS awarded to common law countries and was similar to the average for civil law countries (2.88).¹⁸⁶ According to Spamann’s coding, Delaware’s aggregate ADRI score of “2” trailed well behind the overall average for common law countries (4.06) and civil law countries (3.93).¹⁸⁷ Indeed, no country had a lower overall score.¹⁸⁸

180. DEL. CODE ANN. tit. 8, § 214.

181. Spamann, *supra* note 179, at 184.

182. *Id.* (citation omitted) (citing DEL. CODE ANN. tit. 8, § 102(3)).

183. *Id.* (citation omitted) (citing DEL. CODE ANN. tit. 8, § 211(d)).

184. DLLS, *Data*, *supra* note 81 (Revised Antidir tab); Spamann, *supra* note 40, at 475 tbl.1.

185. Spamann, *supra* note 40, at 475 tbl.1. For an in-depth look at this data, see Spamann, *supra* note 123.

186. See DLLS, *supra* note 36, at 460 & tbl.13 (discussing the common law averages). DLLS did not specify the civil law average but was set out in Table XII of a working paper version. DLLS, *The Law and Economics of Self-Dealing* 62 tbl.12 (Nat’l Bureau of Econ. Research Working Paper Series, Paper No. 11883, 2005), <http://www.nber.org/papers/w11883.pdf>. In his 2010 article, Spamann provided different averages for the DLLS ADRI, namely 4.22 for common law countries and 3.11 for civil law countries. Spamann, *supra* note 40, at 475 tbl.1. DLLS and Spamann provided aggregate data for civil law and common law countries because an important feature of the “law and finance” literature has been to determine whether legal protection relevant to investors differs among different legal families, such as civil or common law.

187. Cheffins, Bank & Wells, *supra* note 33, at 606, 608 tbl.2.

188. Spamann, *supra* note 40, at 475 tbl.1.

For both Illinois and the Model Act, using DLLS's approach to the ADRI, "4" appears to be the appropriate present-day aggregate score (see tables 5 and 6). This aligns these jurisdictions more closely with the DLLS average for common law countries and means that they have significantly higher aggregate scores than the typical civil law country. The situation is somewhat different if Spamann's methodology is used. Given that neither the Model Act nor Illinois mandate the use of two-way proxies, under Spamann's methodology their aggregate present-day scores become "3" rather than "4" respectively. This is below the overall average for both common law countries and civil law countries, but the discrepancy is not as dramatic as with Delaware.

Table 5: Illinois Present-Day ADRI Scores

ADRI Element	DLLS	Spamann	Justification for Present-Day Score
Vote by Proxy Allowed	1	0	Illinois Business Corporation Act (IBCA) § 7.50; reasoning for scoring is the same as Delaware. ¹⁸⁹
No Block	1	1	IBCA § 7.25 (provides for the concept of record ownership of shares, which means companies can identify who is entitled to vote without blocking share transfers prior to shareholder meetings). ¹⁹⁰
Cumulative Voting	1	1	IBCA § 7.40 requires cumulative voting unless the articles of incorporation say otherwise. ¹⁹¹
Oppressed Minority	1	1	Brown v. Tenney, 532 N.E.2d 230, 232–33 (Ill. 1988); Kalabogias v. Georgou, 254 Ill. App. 3d 740, 747 (1993); IBCA §7.80 (governing the procedure for derivative litigation).
Preemptive Rights	0	0	IBCA § 6.50, which merely permits preemptive rights to be created in the certificate of incorporation. ¹⁹²
Ability to Call General Meeting	0	0	IBCA § 7.05 (shareholders owning 20% of the shares can call a meeting, which exceeds

189. See 805 ILL. COMP. STAT. 5/7.50 (2015) (stating that "[a] shareholder may appoint a proxy to vote").

190. *Id.* 5/7.25.

191. *Id.* 5/7.40.

192. 805 ILL. COMP. STAT. 5/6.50.

			10% maximum required for a “1”).” ¹⁹³
Total	4	3	

Table 6: Model Act Present-Day ADRI Scores

ADRI Element	DLLS	Spamann	Justification for Present-Day Score
Vote by Proxy Allowed	1	0	Model Act § 7.22; reasoning for scoring is the same as Delaware. ¹⁹⁴
No Block	1	1	Spamann cites Model Act §§ 6.27 and 7.07 to show blocking is permissible. ¹⁹⁵
Cumulative Voting	0	0	Model Act § 7.28(b) (providing for an enabling rule, not a default rule). ¹⁹⁶
Oppressed Minority	1	1	Spamann (2008, p. 184), citing Model Act §§ 8.31, 8.61, 13.02, and Chapter 7 Subchapter D. ¹⁹⁷
Preemptive Rights	0	0	Model Act § 6.30; reasoning similar to that for Illinois; see also Spamann (2008, p. 184). ¹⁹⁸
Ability to Call General Meeting	1	1	Model Act § 7.02(a) (10% threshold). ¹⁹⁹
Total	4	3	

2. ASDI

Recall that the second index upon which we rely, the ASDI, measures the law applicable to a hypothetical self-dealing transaction by way of a public and private enforcement index.²⁰⁰ The ASDI private enforcement index is comprised of two sub-indices relating respectively to *ex ante* and *ex post* control.²⁰¹ For the most part, each of these sub-indices’ present-day scores for Delaware, Illinois, and the Model Act are identical. With

193. *Id.* 5/7.05.

194. MODEL BUS. CORP. ACT ANN. § 7.22 (AM. BAR ASS’N 2013).

195. *See* Spamann, *supra* note 180, at 184 (citing MODEL BUS. CORP. ACT ANN. §§ 6.27, 7.07).

196. MODEL BUS. CORP. ACT ANN. § 7.28(b); Spamann, *supra* note 180, at 184 (“Preemptive rights exist only to the extent expressly granted in the [certificate of incorporation].” (citations omitted)).

197. *See* Spamann, *supra* note 180, at 184 (citing MODEL BUS. CORP. ACT ANN. §§ 8.31, 8.61, 13.02).

198. MODEL BUS. CORP. ACT ANN. § 6.30.

199. *Id.* § 7.02(a).

200. *See supra* text accompanying note 89.

201. *See supra* text accompanying notes 93–95.

the Model Act, this is partly due to our drawing upon Delaware and Illinois scoring for one ASDI element where coding was problematic, as the Model Act is a model statute not anchored to the laws of a particular state.²⁰²

The element we drew on from Delaware and Illinois law to code the ASDI for the Model Act involves a component of the *ex post* control of the anti-self-dealing index regarding “access to evidence.”²⁰³ With “access to evidence,” the possible overall score ranges from “0” to “1.”²⁰⁴ A jurisdiction receives 0.25 each when a plaintiff-shareholder challenging the hypothetical transaction who owns at least ten percent of the shares can (i) request that a court investigate the self-dealing transaction; (ii) request “documents relevant to the case from the defendant”; (iii) ask the defendant questions prior to trial without prior judicial approval; and (iv) ask the same of non-parties without judicial approval.²⁰⁵ For U.S. companies, these issues are governed by civil procedure rules of the state where the litigation would occur rather than by corporate law itself.²⁰⁶ Given that DLLS awarded the United States (i.e., Delaware) a “0.75” for access to evidence²⁰⁷ and given that this in all likelihood is the appropriate score for Illinois,²⁰⁸ we have given the same score to the Model Act.

Although ASDI scores are much the same for Delaware, the Model Act, and Illinois, the situation is different for disclosure requirements in the *ex ante* private control of self-dealing index applicable to Buyer Co. and Mr. James. DLLS awarded the United States (i.e., Delaware) “1” for these variables.²⁰⁹ They did not do so because an explicit statutory duty is imposed; there are no provisions mandating such disclosure in the DGCL.²¹⁰ Instead, it appears that Delaware received “1”s for disclosure

202. MODEL BUS. CORP. ACT ANN., intro. xix (stating that “[t]he Model Act is designed as a free-standing general corporation statute”).

203. See DLLS, *supra* note 36, at 434 tbl.1.

204. *Id.*

205. *Id.*

206. See *infra* note 304 and accompanying text.

207. See DLLS, *Data*, *supra* note 81 (*Ex Post* Control tab, col. H).

208. On Delaware, DLLS, *Data*, *supra* note 81, *Ex Ante* Control tab, columns D and E. Illinois should be given one-quarter point each because, under the hypothetical, the plaintiff shareholder could request documents, could ask the defendant questions prior to trial and could do the same with non-parties. See ILCS Supreme Court Rules, R. 206 (right to conduct oral depositions of parties and non-parties), R. 210 (right to conduct written depositions of parties and non-parties), R. 213 (right to conduct interrogatories), R. 214 (right to demand document production). The overall score should not be 1.00 because Illinois, like Delaware, lacks procedural or corporate law rules permitting a shareholder to request a court investigation.

209. DLLS, *Data*, *supra* note 81 (*Ex Ante* Control tab, cols. D–E).

210. See Cheffins, Bank & Wells, *supra* note 27, at 1758–59 & n.127 (citing DEL. CODE ANN. tit. 8, § 144 (2014)).

by Buyer Co. and by Mr. James because the relevant disclosures would have to occur for the parties to the hypothetical transaction to be able to rely on a statutory “safe harbor” provision in Delaware’s corporate statute designed to help shield a related-party transaction from challenge and protect the directors involved from liability.²¹¹

The Model Act’s related-party transaction “safe harbor” provision is worded similarly to Delaware’s,²¹² meaning the Model Act similarly should receive “1”s for the rules governing disclosure by the Buyer Co. and Mr. James. In contrast, Illinois’s “safe harbor” provision explicitly ensures that a transaction can be insulated from challenge if it was “fair” regardless of whether *ex ante* disclosure occurred. The relevant measure provides that the absence of full disclosure merely shifts the burden of proof on to those asserting that the related-party transaction should be treated as valid on the grounds of its fairness.²¹³ Correspondingly, Illinois should receive a “0” both for rules governing disclosure by the Buyer Co. and by Mr. James. With Illinois scoring “0”s for other elements of the ASDI’s *ex ante* private control of self-dealing sub-index, Table 7 shows that Delaware and the Model Act necessarily have higher overall scores.

Table 7: Present-Day ASDI *Ex Ante* Private Control of Self-Dealing Sub-index—Delaware, Illinois, and the Model Act

ASDI Element	Delaware	Illinois	Model Act	Justification for Present-Day Score
Disinterested Shareholder Approval	0	0	0	None of the jurisdictions have rules in place requiring that shareholders vote on related-party transactions. The United Kingdom is an example of a jurisdiction where such approval is required. ²¹⁴

211. *Id.* at 1758–59.

212. MODEL BUS. CORP. ACT ANN. § 8.61 (AM. BAR ASS’N 2013).

213. 805 ILL. COMP. STAT. 5/8.60 (2015); *see also* Janice M. Church, *Director Conflict of Interest Under the 1983 B.C.A.: A Standard of Fairness*, 1985 U. ILL. L. REV. 741, 750 (“Section 8.60 supports such an approach because it relegates factors relevant to procedural fairness—disclosure and approval—to the issue of shifting the burden of proof.”).

214. Companies Act 2006, c. 46, §§ 190–96 (UK).

Disclosure by Buyer Co.	1	0	1	See discussion on disclosure above. ²¹⁵
Disclosure by Mr. James	1	0	1	See discussion of disclosure above. ²¹⁶
Independent Review	0	0	0	None of the jurisdictions require that an independent auditor or financial expert scrutinize a related-party transaction. ²¹⁷
<i>Ex Ante</i> Disclosure	0.67	0	0.67	Average of previous three variables. ²¹⁸
<i>Ex Ante</i> Private Control of Self-Dealing	0.33	0	0.33	Average of approval by disinterested shareholders and <i>ex ante</i> disclosure. ²¹⁹

Compared with countries elsewhere the *ex ante* private control of self-dealing scores for the regimes we focus on are mediocre at best. The Delaware and Model Act scores of 0.33 were below the average of 0.36 for the seventy-two countries DLLS focused on.²²⁰ Only three of the countries—Austria, Hungary, and Tunisia—scored as poorly as Illinois with its 0.00.²²¹

With *ex post* private control of self-dealing, the story is much different. The overall Delaware, Illinois, and Model Act scores of 0.98 (see Table 8) are inferior to only one jurisdiction—Singapore with 1.00.²²² Unlike with *ex ante* private control of self-dealing, the *ex post* sub-index elements did not vary between Delaware, Illinois, and the Model Act.

215. See *supra* notes 209–13 and accompanying text.

216. See *supra* notes 209–13 and accompanying text.

217. See Cheffins, Bank & Wells, *supra* note 27, at 1756 tbl.2.

218. See *id.*

219. See *id.*

220. *Id.* at 1756.

221. DLLS, *Data*, *supra* note 81 (*Ex Ante* Control tab, col. H).

222. Cheffins, Bank & Wells, *supra* note 27, at 1756.

Table 8: Present-Day ASDI *Ex Post* Private Control of Self-Dealing Sub-index and Overall ASDI Scores—Delaware, Illinois, and the Model Act

ASDI Element	Delaware	Illinois	Model Act	Justification for Present-Day Score
Disclosure in periodic filings	1	1	1	Federal regulations. ²²³
Standing to Sue (equals 1 if a derivative suit can be brought against Mr. James and bodies approving the transaction)	1	1	1	Discussion of derivative action in relation to the oppressed minority variable above. ²²⁴
Rescission (equals 1 if rescission is available if the transaction is unfair or involves a conflict of interest)	1	1	1	At common law, a related-party transaction was void or at least voidable. ²²⁵ Delaware, Illinois, and the Model Act each have statutory safe harbor provisions that can shelter transactions from challenge. ²²⁶ However, these provisions would not operate if a transaction was unfair or had not been approved by the board or the shareholders.
Ease of Holding Mr. James Liable (equals 1 if the interested director is liable if the	1	1	1	The Model Act specifically recognizes that damages will be recoverable

223. See 17 C.F.R. §§ 229.494, 240.14a-2, 240.15d-1 (2016).

224. See *supra* Tables 4–6.

225. MODEL BUS. CORP. ACT § 8, subch. F, intro. cmt. 1 (AM. BAR ASS’N 2013).

226. See *supra* notes 211–13 and accompanying text.

transaction is unfair, oppressive, or prejudicial)				when a related-party transaction cannot be saved under a statutory safe harbor. ²²⁷ The remedy should also be available at common law. ²²⁸
Ease of Holding Approving Body Liable (equals 1 if the members of the approving body are liable if the transaction is unfair, oppressive, or prejudicial)	1	1	1	Unclear. Relevant Delaware case law indicates that, in a related-party transaction context, directors who approve a one-sided transaction will be held liable only if they have breached duties of loyalty and care (i.e., gross negligence). ²²⁹ Under DLLS's coding scheme, this means the United States should have received "0." However, consistent with our policy of deferring to original coding, ²³⁰ all three jurisdictions are scored "1."
Access to Evidence	0.75	0.75	0.75	See discussion on access to

227. MODEL BUS. CORP. ACT ANN. § 8.61(a).

228. See, e.g., Levin v. Levin, 405 A.2d 770, 779 (Md. Ct. Spec. App. 1979).

229. See, e.g., *In re Loral Space & Comm'n's, Inc.*, 2008 WL 4293781, at *33 (Del. Ch. 2008) (“[B]eing a non-independent director who approved a conflict transaction found unfair does not make one, without more, liable personally for harm caused. Rather, the court must examine that director’s behavior in order to assess whether the director breached her fiduciary duties . . .”).

230. See *supra* Section I.C.

				evidence above. ²³¹
Ease of Proving Wrongdoing	0.95	0.95	0.95	Average of previous five variables. ²³²
Ex Post Private Control of Self-Dealing	0.98	0.98	0.98	Average of disclosure and ease of private wrongdoing. ²³³
Anti-self-dealing Index (Private Enforcement)	0.65	0.49	0.65	Average of <i>ex ante</i> private control of self-dealing and <i>ex post</i> private control of self-dealing. ²³⁴

As Table 8 indicates, with the ASDI the *ex ante* and *ex post* sub-indices are averaged to produce an overall ASDI private enforcement score. For Delaware and the Model Act, the combination of the very high *ex post* private control of self-dealing score with the mediocre score of 0.33 for *ex ante* private control yields an overall present-day score of 0.65. This placed Delaware (i.e., the United States) tenth highest among the seventy-two countries DLLS coded and well above the global average of 0.44.²³⁵ Illinois's overall private control of self-dealing score of 0.49—despite being driven downwards by the score of 0 with *ex ante* private control—would have still placed Illinois twenty-fourth out of the seventy-two countries.²³⁶

3. CBR SPI

With the CBR SPI, the third and final index we consider, when Siems and his CBR co-authors scored the United States (again, meaning Delaware) for 2005, they gave it a score of 7.25 out of 10.²³⁷ When they updated the CBR SPI in 2013, the score for the United States increased to 7.5, because the Dodd-Frank Act of 2010 introduced an advisory say-on-pay vote for executive pay.²³⁸ There have been no relevant changes to the law since. Given our methodological choice not to depart from scores

231. See *supra* notes 203–08 and accompanying text.

232. Cheffins, Bank & Wells, *supra* note 27, at 1757 tbl.3.

233. See *id.*

234. See *id.*

235. *Id.* at 1756, 1757 tbl.3.

236. See DLLS, *Data*, *supra* note 81 (*Ex Post* Control tab, col. K).

237. See Armour et al., *supra* note 49, at 357 tbl.2, 359.

238. MATHIAS SIEMS ET AL., CBR EXTENDED SHAREHOLDER PROTECTION INDEX 106 (2d ed. 2013).

generated by those initially constructing an index we use, Delaware’s present-day score correspondingly is 7.5, as shown in Table 9 below.

Table 9: Delaware Present-Day CBR SPI Scores

CBR SPI Element	Delaware Score (2013–present day)	Justification for Present-Day Score²³⁹
Powers of the General Meeting for de facto changes (the level of shareholder approval required for a sale of the company’s assets governs the score)	0.75	DGCL § 271 requires shareholder approval for the sale, lease, or exchange of “substantially all” of the assets. ²⁴⁰ The relevant case law indicates that fifty percent does not automatically constitute “substantially all,” which was the threshold specified for awarding a “1.” ²⁴¹
Agenda Setting Power (the score is based on the ability of shareholders owning specified percentages of shares to put a matter to a shareholder vote)	1	SEC Rule 14a-7 (requiring a public company to provide a shareholder list to shareholders who ask). ²⁴² SEC Rule 14a-8 allows shareholders meeting modest share ownership requirements to circulate resolutions in proxy material their company circulates. ²⁴³
Anticipation of Shareholder Decision Facilitated (equals 0.5 if postal voting is possible; 1 if postal voting is possible and companies soliciting proxies must use “two-way”—“yes” and “no”—proxy forms)	1	NYSE Manual, § 402.04 (requiring listed companies to solicit proxies to facilitate shareholder voting); ²⁴⁴ SEC Rule 14a-4(b)(1) (mandating use of two way proxies). ²⁴⁵
Prohibition of Multiple Voting Rights	0.5	NYSE Manual § 313.00 states that voting rights cannot be disparately reduced or restricted but that companies with non-voting shares are permitted to continue to list and issue such shares. ²⁴⁶
Independent Board Members (equals 1 if at least half of the board members must be	1	NYSE Manual § 303A.01 states that half of the board members must be independent. ²⁴⁷

239. *Id.* at 105–07; SIEMS ET AL., *supra* note 111, at 103–05.

240. DEL. CODE ANN. tit. 8, § 271(a) (2015).

241. SIEMS ET AL., *supra* note 111, at 103.

242. 17 C.F.R. § 240.14a–7 (2016).

243. *Id.* § 240.14a–8.

244. N.Y. STOCK EXCH. LISTED CO. MANUAL § 402.04 (2013) [hereinafter NYSE MANUAL].

245. 17 C.F.R. § 240.14a-4.

246. NYSE MANUAL, *supra* note 244, § 313.00.

247. *Id.* § 303A.01.

independent; 0.5 if twenty-five percent of them must be independent)		
Feasibility of Director's Dismissal (equals 0.75 if a dismissed director can only claim for contractual compensation if dismissed without good reason if compensation is specifically contractually agreed)	0.75	There can be compensation agreements with dismissed directors (DGCL § 141(k)), ²⁴⁸ and shareholders, by virtue of the Dodd-Frank Act of 2010, ²⁴⁹ have the right to an advisory "say-on-pay" vote. ²⁵⁰
Private Enforcement of Director Duties (score is based on the ease with which a minority shareholder can bring a derivative suit)	0.75	Siems-CBR acknowledged that derivative actions are feasible in the United States but did not award a "1" because various restrictions apply, such as a contemporaneous ownership requirement (the plaintiff must have owned shares at the time the alleged breach of duty occurred), a requirement that a plaintiff typically make "demand" (ask the board to sue), and judicial deference to screening by special litigation committees. ²⁵¹
Shareholder Action Against Resolutions of the General Meeting (equals 1 if every shareholder is eligible to challenge a shareholder resolution)	1	Siems-CBR relied upon Delaware case law to justify awarding "1." ²⁵² The cases cited indicate that the powers of the majority are "always subject to the historical processes of a court of equity to gauge whether

248. See DEL. CODE ANN. tit. 8, § 141(k) (2015).

249. See *supra* note 156 and accompanying text.

250. Those constructing the CBR SPI apparently inaccurately conflated dismissal as a director with dismissal as an executive. The analysis of the "0.75" scoring for the United States cited MBCA § 8.08(a), which specifically permits a corporation's shareholders to dismiss a director without cause, meaning the dismissed director will not be entitled to compensation, as well as the provision in the Dodd-Frank Act that provided for an advisory "say on pay" vote. SIEMS ET AL., *supra* note 238, at 106. Despite section 8.08(a), an individual who is an executive, in addition to being a director, who is fired as an executive without cause, will be able to sue for damages for wrongful termination from the executive position. It seems this possibility was sufficient for Professor Siems and the CBR team to refrain from giving the United States (i.e., Delaware) a score of "1," even though this scenario has nothing directly to do with director dismissal. Citing of the "say on pay" rule introduced by Dodd-Frank is also confusing in that the ability of shareholders to vote on executive compensation policy on an advisory basis has no obvious connection with the feasibility of director dismissal.

251. SIEMS ET AL., *supra* note 238, at 105–07; SIEMS ET AL., *supra* note 111, at 105.

252. SIEMS ET AL., *supra* note 238, at 105–07; SIEMS ET AL., *supra* note 111, at 105.

		there has been an oppressive exercise of the power granted.” ²⁵³
Mandatory Bid (score is determined by the presence of rules requiring a shareholder who buys a designated percentage of shares to make an offer to buy the shares of all remaining shareholders)	0	Neither Delaware nor federal law requires an investor who acquires a large stake in a company to make a bid for all of the shares of the company. ²⁵⁴
Disclosure of Major Shareholder Ownership (equals 0.75 if shareholders who acquire at least five percent of a company’s shares have to disclose their stake)	0.75	Securities Exchange Act of 1934 § 13(d) and Schedule 13D of the Act combine to require those acquiring a stake of five percent or more to disclose their interest. ²⁵⁵
Total	7.5	

In comparative terms, shareholders in Delaware corporations are well-protected. Among the twenty countries in the Siems–CBR dataset for 2005, the United States, with its score of 7.25, tied for second best with France, trailing slightly behind the United Kingdom at 7.375 and substantially exceeding the average score of 5.2.²⁵⁶ Due to improved shareholder protection elsewhere, the United States’ aggregate score of 7.5 for 2013 did not rank quite as highly as its 2005 score.²⁵⁷ Three countries—China, Russia and France—each had scores exceeding the U.S. aggregate, and the United Kingdom, Japan, and Slovenia all had equivalent overall scores.²⁵⁸

While under the ADRI, the Illinois and Model Act present-day aggregate scores diverge from Delaware’s,²⁵⁹ and the same occurs with Illinois and the ASDI, with the CBR SPI²⁶⁰ as Table 10 indicates, all three sources of law have present-day scores which are identical element-by-element. The fact that federal law (including stock exchange listing rules) determined the relevant score with five variables and influenced the scoring for a sixth contributed substantially to this uniformity.

253. *Barrett v. Denver Tramway Corp.*, 53 F. Supp. 198, 202 (D. Del. 1943), *aff’d* 146 F.2d 701 (3d Cir. 1944).

254. SIEMS ET AL., *supra* note 238, at 105–07; SIEMS ET AL., *supra* note 111, at 105.

255. Schedule 13D, 17 C.F.R. § 240.13d-101, Item 5(d)–(e).

256. *See* Armour et al., *supra* note 49, at 357 tbl.2 (calculating the average from figures provided in Table 2).

257. SIEMS ET AL., *supra* note 238, at 105–07.

258. Katelouzou & Siems, *supra* note 101, at 133–34 & fig.1.

259. *See supra* Tables 3–4.

260. *See supra* Tables 7–8.

Table 10: Illinois and Model Act Present-Day CBR SPI Scores

CBR SPI Element	Illinois/Model Act Scores (2013–present day)	Justification for Present-Day Score
Powers of the General Meeting for de facto changes	0.75/0.75	IBCA § 11.60 has the same standard as Delaware. ²⁶¹ Model Act § 12.02(a) in effect requires a shareholder vote if less than twenty-five percent of assets will remain after a disposition. ²⁶²
Agenda Setting Power	1/1	Federal securities law. ²⁶³
Anticipation of Shareholder Decision Facilitated	1/1	NYSE listing rules and federal securities law. ²⁶⁴
Prohibition of Multiple Voting Rights	0.5/0.5	NYSE listing rules. ²⁶⁵
Independent Board Members	1/1	NYSE listing rules. ²⁶⁶
Feasibility of Director’s Dismissal	0.75/0.75	IBCA § 8.35 and Model Act § 8.08 both permit shareholders to dismiss directors without cause, but executives dismissed without cause can still sue for compensation. ²⁶⁷ The Dodd-Frank provisions concerning “say on pay” amend federal securities law. ²⁶⁸
Private Enforcement of Director Duties	0.75/0.75	As is the case with Delaware, ²⁶⁹ derivative actions are feasible under the IBCA and the Model Act but with similar limitations in place, a “1” is not justified. ²⁷⁰

261. See 805 ILL. COMP. STAT. 5/11.60 (2015).

262. MODEL BUS. CORP. ACT ANN. § 12.02(a) (AM. BAR ASS’N 2013).

263. 17 C.F.R. §§ 240.14a-7, 240.14a-8 (2016).

264. *Id.* § 240.14a-4; NYSE MANUAL, *supra* note 244, § 402.04.

265. NYSE MANUAL, *supra* note 244, § 313.00.

266. *Id.* § 303A.01.

267. 805 ILL. COMP. STAT. 5/8.35 (2015); MODEL BUS. CORP. ACT ANN. § 8.08(a).

268. See *supra* note 156 and accompanying text.

269. See *supra* Table 9.

270. On the necessity of demand, see 805 ILL. COMP. STAT. 5/7.80(b); MODEL BUS. CORP. ACT ANN. § 7.24(1). On special litigation committees, see *Weiland v. Ill. Power Co.*, 1990 WL 267364 (C.D. Ill. 1990) (accepting the use of a special litigation committee); MODEL BUS. CORP. ACT ANN. §§ 1.43, 7.44 (indicating that “qualified” directors lacking a material interest in the challenged transaction can dismiss a derivative suit). On contemporaneous ownership, see 805 ILL. COMP. STAT. 5/7.80(a); MODEL BUS. CORP. ACT ANN. § 7.41(1).

Shareholder Action Against Resolutions of the General Meeting	1/1	Cases cited to justify a “1” for Delaware are consistent with general common law trends. ²⁷¹
Mandatory Bid	0/0	The position is the same under Illinois law and the Model Act as it is for Delaware. ²⁷²
Disclosure of Major Shareholder Ownership	0.75/0.75	Federal securities law. ²⁷³
Total	7.5/7.5	

C. Historical Trends

This Section turns from the present day to historical trends. The scoring for Delaware and Illinois for the ADRI, ASDI, and the CBR SPI extends back to 1899. The start date for the Model Act is 1950 because it was promulgated then.

1. ADRI

With four of the six ADRI variables it appears that the scores remained unchanged going back through time—to 1899 in the case of Delaware and Illinois and to 1950 for the Model Act. First, with voting by proxy, just as is the case today, Delaware and Illinois corporate legislation authorized shareholders to vote in this manner in 1899 without requiring the proxy documentation to provide for “two-way” voting.²⁷⁴ The Model Act has done likewise since 1950.²⁷⁵

Second, our searches failed to reveal any historical evidence of provisions in Delaware, Illinois, or the Model Act designed to block the transfer of shares prior to shareholder meetings.²⁷⁶ Third, regarding the oppressed minority variable, although Delaware courts did not specifically confirm shareholders’ right to file derivative suits against directors until the early 1920s,²⁷⁷ it was clearly available in Illinois as the

271. See Rutherford B. Campbell, Jr., *Corporate Fiduciary Principles for the Post-Contractarian Era*, 23 FLA. ST. U. L. REV. 561, 573 & n.63 (1996) (treating the cases cited as authoritative jurisprudence concerning recapitalizations involving preferred shareholders).

272. See *supra* Table 9.

273. Schedule 13D, 17 C.F.R. § 240.13d-101, Item 5(d)–(e) (2016).

274. An Act Providing a General Corporation Law, ch. 273, § 20, 21 Del. Laws (1899) (current version at DEL. CODE ANN. tit. 8, § 212 (2015)); 32 ILL. REV. STAT. § 3 (1874) (codified as amended at 805 ILL. COMP. STAT. 5/7.50).

275. MODEL BUS. CORP. ACT § 31 (AM. BAR ASS’N 1950).

276. At various points in time, there were statutory provisions that gave a corporation’s directors the power to close the stock transfer books prior to a shareholder meeting to fix who could vote. See, e.g., DEL. REV. CODE ch. 65, § 17 (1925); MODEL BUS. CORP. ACT § 28. These measures, however, did not authorize the directors to preclude dealing in the shares.

277. *Fleer v. Frank H. Fleer Corp.*, 125 A. 411, 414 (Del. Ch. 1924); *Allied Chem. & Dye Corp. v. Steel & Tube Co. of Am.*, 120 A. 486, 491 (Del. Ch. 1923).

19th century drew to a close.²⁷⁸ More generally, the derivative suit was available in the United States at least as early as 1831²⁷⁹ and was widely understood to be a general feature of U.S. corporate law by the late-19th century.²⁸⁰ Correspondingly, “1” is the appropriate score for Delaware and Illinois from the present day back to 1899 and for the Model Act back to 1950.

Finally, regarding a shareholder’s right to call a shareholder meeting, Delaware did not statutorily regulate this topic until 1967 and has never specifically authorized shareholders owning a designated percentage of shares to call a meeting.²⁸¹ While Illinois has empowered shareholders to call shareholder meetings since 1872 and the ownership threshold was reduced from two-thirds to twenty percent in 1933, the relevant figure has always exceeded the ten-percent threshold required to receive a “1” under the ADRI.²⁸² The Model Act, in contrast, has since 1950 authorized shareholders owning ten percent or more of a corporation’s shares to call a meeting, thus meriting a “1.”²⁸³

Cumulative voting and preemptive rights are the two ADRI variables where change has occurred, moving from “1” to “0” in each case. For cumulative voting, the Model Act is the only legal regime affected, with the score falling from “1” to “0” in 1969.²⁸⁴ Delaware specifically authorized companies to “opt in” to this method of director selection in 1917 but never established cumulative voting as a default rule, meaning its cumulative voting score has remained “0” from 1899 to the present day.²⁸⁵ While Illinois displaced a long-standing mandatory cumulative

278. *Wheeler v. Pullman Iron & Steel Co.*, 32 N.E. 420, 422–23 (Ill. 1892); *City of Chi. v. Cameron*, 11 N.E. 899, 902–03 (Ill. 1887).

279. See *Taylor v. Miami Exporting Co.*, 5 Ohio 162, 165–69 (1831). In *Dodge v. Woolsey*, the U.S. Supreme Court recognized the derivative suit. 59 U.S. 331, 342 (1855). *Dodge* subsequently became the leading case on derivative litigation. Cheffins, Bank & Wells, *supra* note 27, at 1749 n.68; Harwell Wells, *A Long View of Shareholder Power: From the Antebellum Corporation to the Twenty-First Century*, 67 FLA. L. REV. 1033, 1048 (2015).

280. See, e.g., 1 VICTOR MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS § 242 (2d ed. 1886).

281. An Act to Amend Chapter 1 of Title 8 of the Delaware Code, ch. 50, § 211(d), 56 Del. Laws (1967) (codified as amended at DEL. CODE ANN. § 211(d) (2015)); Cheffins, Bank & Wells, *supra* note 33 at 609 tbl.3.

282. See 32 ILL. REV. STAT. § 22 (1918) (current version at 805 ILL. COMP. STAT. 5/7.05 (2015)) (requiring a two-third minimum of stockholders to call a meeting); Henry Winthrop Ballantine, *A Critical Survey of the Illinois Business Corporation Act*, 1 U. CHI. L. REV. 357, 386 (1934) (noting that “[h]olders of not less than one-fifth of the outstanding shares may demand the calling of a meeting”).

283. MODEL BUS. CORP. ACT § 26 (AM. BAR ASS’N 1950).

284. On the chronology, see Cheffins, Bank & Wells, *supra* note 27, at 1750–51.

285. See An Act to Amend Chapter 65 of the Revised Code of Delaware, ch. 113, § 9, 29 Del. Laws (1917); Cheffins, Bank & Wells, *supra* note 33, at 609 tbl.3.

voting rule in favor of a presumptive rule in 1984,²⁸⁶ “1” remains the appropriate score throughout because default rules are taken into account when scoring with the ADRI.

All three jurisdictions experienced a change regarding preemptive rights, with the score dropping from “1” to “0” in each instance. At common law, shareholders had preemptive rights,²⁸⁷ meaning that as of 1899 Delaware and Illinois both scored “1” for this variable, and the Model Act did likewise as of its inception in 1950. The inaugural version of the Model Act expressly permitted shareholders to waive their preemptive rights,²⁸⁸ as Delaware and Illinois had done since 1927 and 1933 respectively.²⁸⁹ These enabling measures were insufficient to change a score of “1” to “0.” This occurred with Delaware, Illinois, and the Model Act in 1967, 1982, and 1984 respectively when they each eliminated preemptive rights unless the articles of incorporation provided otherwise.²⁹⁰

Since all changes affecting the ADRI over time were from “1” to “0,” the ADRI scores for Delaware, Illinois, and the Model Act inevitably trended downward. Moreover, with changes only affecting two of the ADRI variables, it was likely that changes to aggregate scores would be modest. This indeed was the case with Delaware, where the only change was from “4” to “3” (“3” to “2” using Spamann’s methodology) due to the 1967 displacement of preemptive rights, as shown in Table 11. Likewise, Illinois’s aggregate score fell from “5” to “4” (“4” to “3” using Spamann’s methodology) in 1982 due to the same change. These findings lend support to conjectures that meaningful competition between states in the corporate law realm “has long since ended”²⁹¹ and amounts not to a race but a “leisurely walk.”²⁹²

286. Compare 32 ILL. REV. STAT. § 3 (1874), with 805 ILL. COMP. STAT. 5/7.40 (1983) (amended 1995). For a discussion of the Illinois Business Corporation Act of 1983 and its coming into force in 1984, see James M. Van Vliet, Jr., *The New Illinois Business Corporation Act Needs More Work*, 61 CHI. KENT. L. REV. 1, 2–3 (1985).

287. ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 133 (1932); Wells, *supra* note 66, at 610–11.

288. MODEL BUS. CORP. ACT § 24.

289. An Act Proposing an Amendment to Article 2 of the Constitution of the State of Delaware, ch. 85, § 5 para. 10, 35 Del. Laws (1927); ILL. BUS. CORP. ACT § 24 (1934).

290. DEL. CODE ANN. tit.8, § 102(b)(3) (1967); 805 ILL. COMP. STAT. 5/6.50 (2015) (effective July 1, 1984); MODEL BUS. CORP. ACT ANN. § 6.30(a), at 6-198 to 6-200 (AM. BAR ASS’N 2013) (indicating as well that a provision was added to the Model Act in 1955 providing for abolition of preemptive rights that was set out as an alternative to the 1950 “opt out” approach).

291. Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 724 (2002).

292. Bebchuk & Hamdani, *supra* note 88, at 586.

Table 11: Aggregate ADRI Scores—Delaware, Illinois, and Model Act, 1899–Present²⁹³

	1899	1950	1967	1969	1982	1984	Present day
Delaware (DLLS–Spamann)	4/3	4/3	3/2	3/2	3/2	3/2	3/2
Illinois (DLLS–Spamann)	5/4	5/4	5/4	5/4	4/3	4/3	4/3
Model Act (DLLS–Spamann)	X	6/5	6/5	5/4	5/4	4/3	4/3

Under the Model Act, because of the 1984 displacement of preemptive rights and the 1969 side-lining of cumulative voting, the downward trend was more pronounced. However, the drop occurred from a very high starting point. The Model Act’s ADRI aggregate score of “6” for 1950 to 1969, following DLLS’s coding, exceeded the score of every country DLLS considered when revising the ADRI.²⁹⁴ With Spamann’s recoding, only South Korea and Spain, with scores of “6,” exceeded the Model Act’s 1950 to 1969 score of “5.”²⁹⁵

2. ASDI

With Delaware, Illinois, and the Model Act there has been little change over time under the ASDI private control of self-dealing sub-index. The mandating of shareholder approval and independent review of related-party transactions, both of which are facets of the *ex ante* sub-index, have never been features of state corporate law in the United States. Correspondingly, for these variables a score a “0” is appropriate going back through time.

293. Scoring changes are identified in bold.

294. See DLLS, *supra* note 36, at 432.

295. Spamann, *supra* note 40, at 475.

**Table 12: ASDI *Ex Ante* Private Control of Self-Dealing—
Delaware, Illinois, and the Model Act, 1899–Present²⁹⁶**

ASDI Element	1899— Delaware/ Illinois/ Model Act	1950— Delaware/ Illinois/ Model Act	1984— Delaware/Illinois/ Model Act	Present day— Delaware/Illinois/ Model Act ²⁹⁷
Approval by Disinterested Shareholders	0/0/x	0/0/0	0/0/0	0/0/0
Disclosure by Buyer Co.	1/1/x	1/1/1	1/ 0 ²⁹⁸ /1	1/0/1
Disclosure by Mr. James	1/1/x	1/1/1	1/ 0 /1	1/0/1
Independent Review	0/0/x	0/0/0	0/0/0	0/0/0
<i>Ex Ante</i> Disclosure	0.67/0.67/x	0.67/0.67/0 .67	0.67/ 0 /0.67	0.67/0/0.67
<i>Ex Ante</i> Private Control of Self- Dealing	0.33/0.33/x	0.33/0.33/0 .33	0.33/ 0 /0.33	0.33/0/0.33

Change did occur with respect to required disclosure by Mr. James and Buyer Co. Although Delaware and the Model Act remained unaffected, in Illinois the “safe harbor” provision ensuring that *ex ante* disclosure was not even implicitly required only took effect in 1984 when the IBCA came into force.²⁹⁹ Prior to this, the common law likely would have required full disclosure before a court could exercise its discretion to relieve parties of the adverse consequences potentially associated with related-party transactions.³⁰⁰ Hence, the only change to the *ex ante* private

296. Scoring changes are identified in bold.

297. See *supra* Table 7.

298. Illinois initially had a statutory provision specifically governing related-party transactions in 1981. ILL. BUS. CORP. ACT §§ 40a (1933). The enactment of this provision would not have reduced Illinois’s disclosure by Buyer Co. and disclosure by Mr. James scores in the same way as the 1983 IBCA because the 1981 provision specifically required disclosure of the transaction to the board before a court could save the transaction. On the nature of the 1981 provision, see Church, *supra* note 213, at 746–47.

299. 805 ILL. COMP. STAT. 5/8.60 (1983) (amended 1998). On the IBCA coming into force in 1984, see *supra* note 286.

300. See Note & Comment, *Corporations—Directors—Transactions Involving Conflicts of Interest*, 42 ORE. L. REV. 61, 64 (1962) (“A finding of nondisclosure will make a consideration of other facets of a transaction unnecessary in most cases. Nondisclosure of an interest by a director may constitute unfairness per se under the fairness test and thus make the transaction voidable.” (footnote omitted)); Note, *The Fairness Test of Corporate Contracts with Interested Directors*, 61 HARV. L. REV. 335, 338 (1948) (“The courts usually require of the interested director full disclosure of his interest and of those facts, such as his own purchase price, which would affect the board’s decision to buy.”). With respect to Illinois, before 1984 there was conflicting case law concerning related-party transactions, but in *Shlensky v. South Parkway Building Corp.*, full

control of self-dealing sub-index going back to 1899 was that Illinois's *ex ante* disclosure score fell from 0.67 to 0 in 1984, which in turn reduced Illinois's overall *ex ante* private control of self-dealing index score from 0.33 to 0.

As with the *ex ante* private control of self-dealing sub-index, the scoring under the *ex post* sub-index only changed for one variable going back through time, though that change was not restricted to only one jurisdiction. The variable affected was “disclosure in public filings,” with the relevant change occurring in 1935 when disclosure of material contracts between a company and any of its directors or officers became compulsory under federal securities law.³⁰¹ The change more than doubled Delaware and Illinois's *ex post* private control of self-dealing score and increased the overall anti-self-dealing sub-index score for both jurisdictions from 0.41 to 0.65 .

Table 13: ASDI *Ex Post* Private Control of Self-Dealing—Delaware, Illinois, and the Model Act, 1899–Present³⁰²

ASDI Element	1899— Delaware/Ill inois/ Model Act	1935— Delaware/ Illinois/ Model Act	1950— Delaware/ Illinois/ Model Act	1984— Delaware/ Illinois/ Model Act	Present Day— Delaware/ Illinois/ Model Act ³⁰³
Disclosure in Periodic Filings	0/0/x	1/1/x	1/1/1	1/1/1	1/1/1
Standing to Sue	1/1/x	1/1/x	1/1/1	1/1/1	1/1/1
Rescission	1/1/x	1/1/x	1/1/1	1/1/1	1/1/1
Ease of Holding Mr. James Liable	1/1/x	1/1/x	1/1/1	1/1/1	1/1/1
Ease of Holding Approving Body Liable	1/1/x	1/1/x	1/1/1	1/1/1	1/1/1
Access to Evidence	0.75/0.75/x	0.75/0.75/x	0.75/0.75/0.75	0.75/0.75/0.75	0.75/0.75/0.75
Ease of Proving Wrongdoing	0.95/0.95/x	0.95/0.95/x	0.95/0.95/0.95	0.95/0.95/0.95	0.95/0.95/0.95
<i>Ex Post</i> Private Control of Self-dealing	0.48/0.48/x	0.98/0.98/x	0.98/0.98/0.98	0.98/0.98/0.98	0.98/0.98/0.98
Anti-self-dealing Index	0.41/0.41/x	0.65/0.65/x	0.65/0.65/0.65	0.65/ 0.49 /0.65	0.65/0.49/0.65

disclosure was identified as a factor that would determine the outcome of a fairness test. 66 N.E.2d 793, 802 (Ill. 1960); Church, *supra* note 213, at 746, 749–50.

301. Cheffins, Bank & Wells, *supra* note 27, at 1759.

302. Scoring changes are identified in bold.

303. *See supra* Table 8.

For other variables in the ASDI *ex post* private control of self-dealing sub-index, scores for “access to evidence” have remained unchanged over time because Delaware and Illinois civil procedure rules as far back as 1899 provided for the same core litigant rights that justify the present-day score of “0.75.”³⁰⁴ For the variables measuring standing to sue, rescission, and the ease of holding Mr. James and the approving body (i.e., the board) liable, current common law principles provide the justification for the “1”’s awarded to Delaware, Illinois, and the Model Act.³⁰⁵ The same common law principles should have been applicable back to 1899. Verifying this point definitively is admittedly not feasible. For instance, Delaware lacked any case law directly focusing on related-party transactions until the early 1920s.³⁰⁶ Still, the trend of authority from other states should, in the absence of Delaware jurisprudence, provide a reasonably accurate characterization of what the law would have been in Delaware prior to that point.³⁰⁷

3. CBR SPI

With both the ADRI and the ASDI there were relatively few changes to scores over time and, other than the 1935 introduction of the requirement of *ex post* disclosure of related party transactions, what changes there were all moved scores downwards. The situation was much different with the CBR SPI. For the CBR SPI, as Figure 1 shows, the aggregate score changed reasonably often and there was a marked upward trend of aggregate scores. There were changes at the state level as far back as 1903, with the pace of change increasing starting in 1950. As Table 14 shows, each change at the state level, with two exceptions, moved scores upward. Likewise, Table 15 shows that this trend was

304. On the right to request documents relevant to the case from the defendant, see DEL. REV. STAT. ch. 30, § 13 (1893); ILL. REV. STAT. ch. 51, § 9 (1874). On the right to examine the defendant without a court approving the questions, see ILL. REV. STAT. ch. 51, §§ 1, 24–28 (setting out rules for witnesses and indicating that parties were not excluded from being witnesses). On the right to examine non-parties without a court approving the questions, see *id.* §§ 24–28 (1874); DEL. CH. R. 40, 48 (1868) (allowing courts to enter an order of attachment against witnesses who fail to testify after being duly summoned).

305. *See supra* Table 8.

306. *See* Cheffins, Bank & Wells, *supra* note 27, at 1762.

307. There was pre-1920s case law from New York indicating that individual shareholders might lack standing to challenge related-party transactions. *See id.* at 1761–62. Even if this was in fact the law, the doctrine was subject to sufficiently wide exceptions to suggest a “1” was the appropriate score for standing to sue. *See id.*

strongly reinforced by changes in federal securities law and NYSE listing rules, which the SEC strongly influences.³⁰⁸

Figure 1: CBR SPI Aggregate Scores for Delaware, Illinois, and the Model Act, 1899–Present

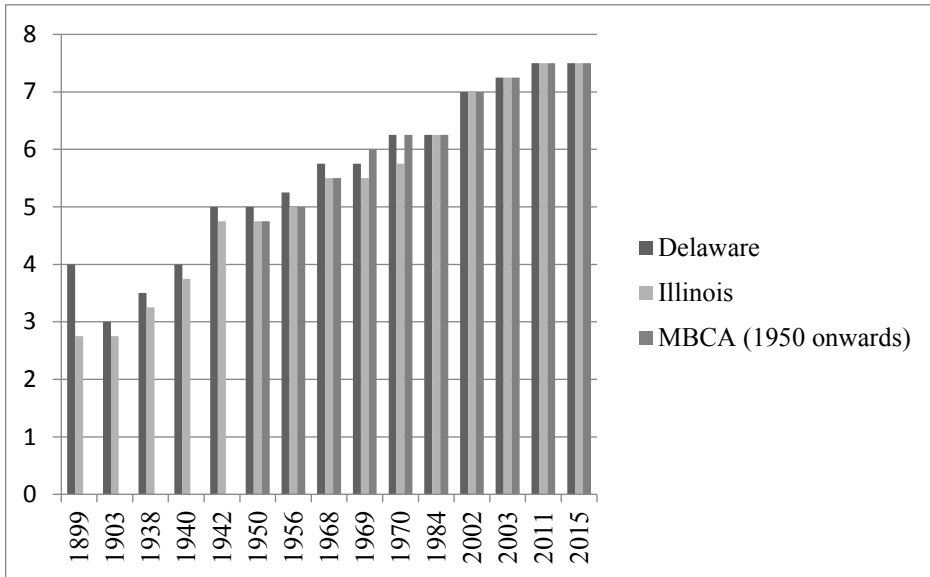


Table 14: Changes to CBR SPI Scores for Individual Variables Generated by State Law—Delaware, Illinois, and the Model Act, 1899–Present

Year	CBR SPI Variable	Jurisdiction(s) Affected	Score Change	Explanation
1903	Prohibition of Multiple Voting Rights	Delaware	1 to 0	The DGCL of 1899 authorized the issuance of share classes with different voting rights, but it only took full effect with the 1903 repeal of a provision in the Delaware Constitution of 1897 which stated that “in all elections for directors or managers of stock corporations, each shareholder shall be entitled to one vote for each share of stock he may hold.” ³⁰⁹
1950	X	Model Act	X	Model Act first introduced.

308. Roe, *supra* note 19, at 11.

309. Brooks v. State ex rel. Richards, 79 A. 790, 800 (Del. 1911) (quoting DEL. CONST. OF 1897, art. 9, § 6).

1969	Feasibility of Director's Dismissal	Model Act	0 to 0.5	In 1960, the forerunner to the current Model Act § 8.08 was introduced as an "optional" provision, and in 1969 the optional designation was removed. ³¹⁰ This displaced the common law rule, which held that shareholders could only remove directors for cause, reflecting the fact that the directors had a statutory entitlement to their office. ³¹¹ The common law rule would score a "0" under the CBR SPI coding protocol. ³¹²
1970	Feasibility of Director's Dismissal	Delaware	0.25 to 0.5	DGCL § 141(k) enacted, ³¹³ which the CBR SPI coders relied upon to give Delaware (the U.S.) a "0.5." ³¹⁴
1982	Prohibition of Multiple Voting Rights	Illinois	1 to 0.5	IBCA § 28 amended to allow corporations formed after December 31, 1981 to eliminate voting rights attached to shares, including those relating to cumulative voting. ³¹⁵
1984	Feasibility of Director's Dismissal	Illinois	0 to 0.5	IBCA § 8.35 came into force, displacing the common law rules that offered shareholders little, if any, scope to dismiss directors. ³¹⁶

310. MODEL BUS. CORP. ACT ANN. § 8.08(a), at 8-82 (AM. BAR ASS'N 2013).

311. *Id.* at 8-81; 2 COX & HAZEN, *supra* note 7, § 9:14, at 86, 91.

312. Under the "[f]easibility of director's dismissal," the CBR coders gave jurisdictions a "0" if "good reason [was] required for the dismissal of directors." Armour et al., *supra* note 49, at 354 tbl.1.

313. An Act to Amend Chapter 1, Title 8, Delaware Code, ch. 437, § 5, 59 Del. Laws (1974) (codified as amended at DEL. CODE ANN. tit. 8, § 141 (2015)).

314. SIEMSET AL., *supra* note 111, at 103–04 tbl.25. Prior to the enactment of Section 141(k), the Delaware General Corporation Law contained a provision indicating that directors could be removed, but it was unclear whether this had to be for cause. See Charles H. Nida, Note, *The New Delaware Corporation Law*, 5 HARV. J. LEGIS. 413, 427 (1968). Delaware had a provision of this sort going back to 1899. See Katharina Pistor et al., *The Evolution of Corporate Law: A Cross-Country Comparison*, 23 U. PA. J. INT'L ECON. L. 791, 815 (2002). A pre-1970 score of "0.25" appears to be appropriate, which the CBR SPI coders award when it is clear that a director can be dismissed but would always be compensated. Armour et al., *supra* note 49, at 354 tbl.1.

315. See *Roanoke Agency, Inc. v. Edgar*, 461 N.E.2d 1365, 1368 (Ill. 1984).

316. See, e.g., Van Vliet, *supra* note 286, at 34 ("New BCA section 8.35 reflects a basic public policy change, granting statutory authority for the removal of directors, with or without cause, by shareholder action. There was no counterpart to this in the Old BCA so that, prior to the

2003	Private Enforcement of Director Duties	Delaware, Illinois, Model Act ³¹⁷	0.5 to 0.75	The private enforcement of directors' duties score increased due to case law developments "evidenc[ing] a heightening of judicial scrutiny on directors in the wake of the corporate governance scandals." ³¹⁸
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Table 15: Changes to CBR SPI Scores for Individual Variables Generated by Changes to Federal Law—Delaware, Illinois, and the Model Act, 1899–Present

Year	CBR SPI Variable	Jurisdiction(s) Affected	Score Change	Explanation
1938	Anticipation of Shareholder Decision Facilitated	Delaware, Illinois	0.5 to 1	SEC Rule X-14A-2, forerunner to SEC Rule 14a-4(b)(1), adopted. ³¹⁹

New BCA, only the common law right to remove a director for cause existed.”). The common law rule generally applicable in U.S. states was that directors could only be removed before the end of their terms “for cause,” but statute gradually replaced this rule beginning in the 1930s. *See* HENRY WINTHROP BALLANTINE, *BALLANTINE ON CORPORATIONS* 433–34 (rev. ed. 1946). The law may have remained restrictive in Illinois because, prior to the adoption of the 1983 Illinois Business Corporation Act, “there was no statutory provision governing the removal of corporate directors.” *Voss Eng’g, Inc. v. Voss Indus.*, 481 N.E.2d 63, 66 (Ill. App. Ct. 1985). At least one Illinois court had earlier suggested that allowing shareholders to remove a director even for cause would be inappropriate because this would permit an end-run around cumulative voting requirements of the Illinois constitution. *See Laughlin v. Geer*, 121 Ill. App. 534, 538–39 (1905); 7 CHARLES W. MURDOCK, *ILLINOIS PRACTICE SERIES: BUSINESS ORGANIZATIONS* § 11.18 (2d ed. 2015).

317. With this case law-driven change in scoring, each case cited was from Delaware. SIEMS ET AL., *supra* note 111, at 105 tbl.25. However, given our policy of deferring to coding by those who constructed the original indices and given the influential nature of Delaware case law, we have assumed that the private enforcement of director duties score would increase with Illinois and the Model Act as well as with Delaware.

318. *Id.* (quoting Jeffrey D. Hern, Comment, *Delaware Courts’ Delicate Response to the Corporate Governance Scandals of 2001 and 2002: Heightening Judicial Scrutiny on Directors of Corporations*, 41 WILLAMETTE L. REV. 207, 228 (2005)).

319. For a chronology of the SEC rules, see Sheldon E. Bernstein & Henry G. Fischer, *The Regulation of the Solicitation of Proxies: Some Reflections on Corporate Democracy*, 7 U. CHI. L. REV. 226, 229 (1940). On the pre-1938 scoring, according to the CBR SPI protocol, a “0.5” is justified if postal or proxy voting is merely authorized. Armour et al., *supra* note 49, at 354 tbl.1. State laws that justify a coding of “1” for Delaware and Illinois for the ADRI proxy voting variable date back to 1899 should meet this threshold. *See supra* note 274 and accompanying text. The CBR SPI coders cite a NYSE listing rule compelling companies to solicit proxies to justify the “1” they give the United States with the “[a]nticipation of shareholder decision facilitated.” *See supra* Table 9. The relevant NYSE listing rule was not introduced until 1959. Douglas C. Michael, *Untenable Status of Corporate Governance Listing Standards Under the Securities Exchange Act*,

1940	Prohibition of Multiple Voting Rights	Delaware ³²⁰	0 to 0.5	The NYSE introduced a rule precluding the listing of non-voting common stock. ³²¹
1942	Agenda Setting Power	Delaware, Illinois	0 to 1	Shareholder proposal mechanism that is now SEC Rule 14A-8 introduced as rule X-14A-7. ³²²
1956	Independent Board Members	Delaware, Illinois, Model Act	0 to 0.25	Companies listed on the NYSE required to have at least two independent directors. ³²³
1968	Disclosure of Major Shareholder Ownership	Delaware, Illinois, Model Act	0 to 0.5	The Williams Act introduced Securities Exchange Act of 1934, § 13(d) and Schedule 13D of the Act, which required

47 BUS. LAW. 1461, 1469 (1992); Thompson, *Delaware, the Feds, and the Stock Exchange*, *supra* note 130, at 795.

320. Illinois's score for this variable did not increase in 1940 because it was already "1" due to a provision in the Illinois constitution prohibiting the use of share classes with different voting rights for directors' elections. *See* ILL. CONST. of 1870, art. XI, § 3 ("[I]n all elections for directors or managers of incorporated companies, every stockholder shall have the right to vote . . . for the number of shares of stock owned by him, for as many persons as there are directors or managers to be elected, or to cumulate said shares, and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock, shall equal, or to distribute them on the same principle among as many candidates as he shall think fit . . ."). *See* Ballantine, *supra* note 282, at 385.

321. Stephen M. Bainbridge, *The Short Life and Resurrection of SEC Rule 19C-4*, 69 WASH. U. L.Q. 565, 569 (1991). The NYSE had refused to list corporations with dual-class capitalizations beginning in 1926 but did not adopt a formal rule forbidding such listings until 1940. JOEL SELIGMAN, *THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE* 585–86 (3d ed. 2003).

322. George W. Dent, Jr., *SEC Rule 14a-8: A Study in Regulatory Failure*, 30 N.Y.L. SCH. L. REV. 1, 3–4, 4 n.14 (1985) (describing the administrative history of Rule 14a-8); *see also* Mortimer M. Caplin, *Proxies, Annual Meetings and Corporate Democracy: The Lawyer's Role*, 37 VA. L. REV. 653, 668–70 (1951) (indicating that prior to 1942 the SEC commented that companies should set shareholder proposals forth in proxy soliciting materials but only specifically permitted a shareholder to submit a proposal at that point).

323. Michael, *supra* note 319, at 1469; Thompson, *Delaware, the Feds, and the Stock Exchange*, *supra* note 130, at 794–95.

				shareholders owning ten percent or more of the shares of an issuer governed by the Act to disclose its stake. ³²⁴
1970	Disclosure of Major Shareholder Ownership	Delaware, Illinois, Model Act	0.5 to 0.75	Ownership disclosure threshold applicable to Securities Exchange Act of 1934, § 13(d) and Schedule 13D reduced to five percent. ³²⁵
2002	Independent Board Members	Delaware, Illinois, Model Act	0.25 to 1	NYSE Manual, § 303A.01 adopted. ³²⁶
2011	Dismissal of Directors	Delaware, Illinois, Model Act	0.5 to 0.75	The Dodd-Frank Act of 2010 provided shareholders with the right to an advisory “say on pay” vote. ³²⁷

D. *Our Hypotheses Revisited*

Distilling the findings thus far necessitates a return to the three hypotheses Part II.A. specified. The first hypothesis (H1) presupposes a state-driven race to the bottom and would be verified if scores fell in relation to those elements of shareholder protection indices determined by state law. The findings on balance confirm H1, but the trend is not robust. With the ADRI, the aggregate scores for Delaware and Illinois did drop when those jurisdictions displaced preemptive rights, but only by one point out of six.³²⁸ The Model Act’s ADRI score fell by one point in

324. Williams Act, Pub. L. No. 90-439, § 2, 82 Stat. 454, 454 (1968) (codified as amended in scattered sections of 15 U.S.C. (2012)).

325. Act of Dec. 22, 1970, Pub. L. No. 91-567, § 1, 84 Stat. 1497, 1497 (codified as amended at 15 U.S.C. § 78m).

326. NYSE MANUAL, *supra* note 244, § 303A.01 (requiring companies to have “a majority of independent directors”).

327. *See supra* note 152 and accompanying text.

328. *See supra* Table 11.

1969 and again by one in 1984, but the decline was from a very high starting point.³²⁹

With the ASDI, because of its state law elements, there again was a downward trend but continuity was the main theme. Between 1899 and the present day, on only one occasion was there state law-driven change to the index—the 1984 amendment to Illinois law that meant advance disclosure of related-party transactions was no longer even implicitly required.³³⁰ Finally, while under the ADRI and the ASDI changes to state law reduced aggregate scores, under the CBR SPI, the trend was mixed. State law-driven changes to this index affecting the use of share classes with multiple voting rights caused the scores of Delaware and Illinois to decline, while those relating to director dismissal and enforcement of directors' duties raised the scores of Delaware, Illinois, and the Model Act.³³¹ The upshot is that H1 is confirmed, but the trend was neither robust nor entirely uniform.

The second and third hypotheses (H2 and H3) relate to the impact of federal law on shareholder protection over time. H2 presupposes that changes to federal law should bolster shareholder rights. The assumption underlying H3 is that changes to federal law were significant enough to outweigh any downward pressure resulting from a state-driven “race to the bottom.”

H2 and H3 are strongly confirmed. Federal law was not taken into account with the coding of the ADRI, and each of the changes to this index that decreased Delaware, Illinois, and the Model Act's aggregate score correspondingly occurred at state, not federal, level. While federal law was taken into account with the ASDI, state law primarily directed scoring for private control of self-dealing.³³² Still, with the one element determined by federal law—disclosure in periodic filings—federal reform drove scores upward in what was otherwise a very stable environment over time.³³³

The impact of federal law was considerably more pronounced with the CBR SPI. Unlike with the ADRI and the ASDI, federal law (defined to include national stock exchange listing rules)³³⁴ had a major impact on the CBR SPI's scoring for Delaware, Illinois, and the Model Act, with federal rules accounting for the scoring of five of its ten elements and

329. *See supra* text accompanying notes 294–95.

330. *See supra* note 213 and accompanying text.

331. *See supra* Table 14.

332. *See supra* Tables 7–8.

333. *See supra* text accompanying notes 301–04.

334. *See supra* notes 159–64 and accompanying text.

influencing a sixth.³³⁵ Overall, the aggregate CBR SPI scores for each jurisdiction increased markedly between 1938 and 2003,³³⁶ with changes to federal law accounting for most of the upward movement.³³⁷ CBR SPI trends correspondingly indicate that federal developments substantially bolstered shareholder protection (H2) and more than cancelled out whatever movement downward was associated with changes to state law (H3).

III. “PRESENT-DAY” BIAS?

This study’s strong confirmation of H2 and H3 affirms the significance of a theme that has recently moved to the forefront of the literature on corporate law federalism, namely that the federal government is an important player.³³⁸ The weak confirmation of H1, combined with the strong confirmation of H2 and H3, runs contrary to a much better established element of the received wisdom, this being that competition between states eroded shareholder protection substantially over time. The results indicate federal intervention more than outweighed a weak trend in favor of diminution of shareholder protection at the state level, meaning that on a net basis shareholder rights became more robust over time.

While the historical findings cast doubt on the received wisdom that jurisdictional competition resulted in a net erosion of shareholder rights and confirm the accuracy of the more recent theory that federal intervention has done much to shape shareholder protection, this presupposes that the selected indices measure what was really occurring. This cannot be taken for granted. Given the historical orientation of this Article’s leximetric investigation, a source of particular concern is that “present-day” bias taints the indices.

This Part elaborates initially on why present-day bias is potentially a source of concern. It then carries out cross-checks, which indicate that whatever bias exists is insufficient to compromise our findings materially. We ultimately show that our historical analysis of corporate law indices provides reliable evidence that the erosion of shareholder protection under state law since 1900 has been modest and that a federally

335. The five variables were agenda-setting power, anticipation of shareholder decision facilitated, prohibition of multiple voting rights, independent board members, and disclosure of major shareholder ownership, and the sixth was dismissal of directors. *See supra* Tables 9 & 10. With anticipation of shareholder decision facilitated, state law was potentially relevant as well. *See supra* Table 14.

336. *See supra* Figure 1.

337. *See supra* Table 15.

338. *See supra* notes 18–21 and accompanying text.

oriented surge in shareholder rights has been a significant countervailing influence.

A. *Reasons for Concern*

Mathias Siems, often with co-authors, has on various occasions suggested that when LLSV constructed the ADRI, they fell into a trap that comparative lawyers seek to avoid, namely imposing one's own preconceptions on foreign legal systems.³³⁹ Siems maintains that LLSV's inclusion of cumulative voting in the ADRI—a topic historically widely debated in the United States but not elsewhere—and the failure to account for potentially shareholder-unfriendly rules that hinder removal of directors betrays a pro-U.S. bias in the ADRI.³⁴⁰ Though plausible, Siems's conjectures do not fit the facts comfortably. If the ADRI was, as Siems alleges, affected by a pro-U.S. bias, one might expect that this would translate into high scores for the supposedly favored country. It is true that under LLSV's original ADRI, the United States did score "5" out of "6."³⁴¹ However, under DLLS's and Spamann's ADRI recodings, the U.S. aggregate score ("3" and "2" respectively) was substantially below the average for the countries taken into account.³⁴²

Given that our leximetric analysis of corporate law focuses exclusively on the United States, it is largely immaterial to our analysis if the indices deployed here betray an implicit partiality for U.S. corporate law. There is, however, another type of bias that potentially affects these indices that could compromise the results, namely a tilt in favor of scores increasing over time. Bias of this sort is a source of concern partly because there are some variables in the indices we use where for substantial periods of time contemporaries would have been unaware that regulating the topic in question might have been beneficial for investors. Under such circumstances, the law governing U.S. corporations could not realistically generate positive scores for these variables. This could only begin to change when the value of the rules in question was recognized, which in turn would tend to bias upward scores from recent decades, with scores rising as the new rules were introduced.

The CBR SPI variable concerning the mandating of a designated proportion of independent directors on the board is an example of an index element with a present-day bias. In 1934, future-Justice William O. Douglas was among the first to advocate that individuals not affiliated

339. See Armour et al., *supra* note 49, at 349; Lele & Siems, *supra* note 29, at 20–21; Mathias M. Siems, *What Does Not Work in Comparing Securities Laws: A Critique on La Porta et al.'s Methodology*, 16 INT'L COMPANY & COM. L. REV. 300, 301 (2005).

340. Lele & Siems, *supra* note 28, at 20–21.

341. LLSV, *supra* note 35, at 1119, 1130.

342. Cheffins, Bank & Wells, *supra* note 33, at 606, 608.

with management occupy a majority of board seats.³⁴³ Thus, it would be unrealistic to expect that the law governing U.S. corporations would have generated a positive score for this variable before that point.

Even setting to one side the independent director variable, the CBR SPI seems particularly susceptible to present-day bias given that its creators selected topics they thought would form the core of international corporate governance “best practice” between 1995 and 2005.³⁴⁴ In so doing, as they explicitly acknowledged, they intentionally focused on a period when change was on the policy agenda in numerous countries.³⁴⁵ Given this, it should not be surprising that, consistent with the 1995-2005 trend for most of the twenty countries Siems–CBR coded over that period,³⁴⁶ the CBR SPI scores for Delaware, Illinois, and the Model Act increased by a full point out of ten between 2001 and 2003.³⁴⁷ For the period between 2006 and 2013, the CBR SPI scores for these jurisdictions increased again but only by a modest 0.25, opening the way for a number of countries to draw level with or pass the United States.³⁴⁸

Present-day bias, in the form of index components with a strongly modern orientation, is, however, by no means an endemic feature of the indices this Article focuses on. For many of the components, it was theoretically possible for scores to be positive back to 1900. The “5” that Illinois had as early as 1899 using DLLS’s ADRI scoring method and the very high scores the Model Act had when it was introduced in 1950 indicate that at least for the ADRI, “1”s have been more than a theoretical possibility for decades.³⁴⁹

Another potential source of upward present-day bias with these indices comes from shareholder protections that may have previously existed but are no longer part of shareholder rights discourse. Due to their outdated nature, these legal protections would be unlikely candidates for inclusion in the ADRI, ASDI, and CBR SPI. The indices, therefore, may not capture significant shareholder protections that existed in 1900, 1910, or 1920 but are largely unknown today. Correspondingly, reforms that compromised, eroded, or abolished such rights could have diminished

343. See William O. Douglas, *Directors Who Do Not Direct*, 47 HARV. L. REV. 1305, 1314–15 (1934) (advocating the introduction of legislation mandating that stockholders independent of management should make up a majority of the board). For a discussion of Justice Douglas’s pioneer status, see Bratton & McCahery, *supra* note 129, at 661 (“Douglas’ article set out the basic terms of the governance agenda that has guided corporate law reform ever since.”). Robert Gordon was another early advocate of mandating the appointment of independent directors. ROBERT AARON GORDON, *BUSINESS LEADERSHIP IN THE LARGE CORPORATION* 347–50 (1945).

344. Armour et al., *supra* note 49, at 355, 374.

345. See *id.* at 353, 355.

346. Siems, *supra* note 29, at 122–23.

347. See *supra* Figure 1.

348. See *supra* notes 256–58 and accompanying text.

349. See *supra* Table 11.

shareholder protection without reducing historical scores for Delaware, Illinois, or the Model Act. This historical leximetric exercise could in turn fail to capture the abrogation or abolition of potentially significant shareholder rights. The next Section accounts for this aspect of present-day bias.

B. *What Shareholder Rights Mattered in 1929?*

A plausible cross-check against present-day bias in the indices is to identify what shareholder rights were thought to matter in the past and ascertain whether these have been eroded over time. Conducting such an exercise is not straightforward because those writing about corporate law in the opening decades of the 20th century were not constructing indices in the same way as LLSV, DLLS, and Siems–CBR. However, a 1929 book by John Sears, *The New Place of the Stockholder*,³⁵⁰ provides a helpful substitute.

Sears indicated that the purpose of his book “[was] to consider methods and practices proposed to *protect the stockholder, use the stockholder, and help the stockholder*.”³⁵¹ He identified as a departure point “an understanding of the deeply fundamental character of the stockholder’s legal rights”³⁵² and then composed a fourteen-point “list of strict legal rights, powers, and remedies” so “[t]hat we may more clearly understand where we stand.”³⁵³ This fourteen-point list can be used to capture a historically sensitive sense of trends concerning shareholder protection.

If it transpired that there had been in the decades following the 1929 publication of Sears’ book a substantial erosion of the protections Sears identified, this would suggest that the indices we have relied upon are seriously compromised by present-day bias. Our findings correspondingly would have to be discounted considerably. As we will see, the legal rights on Sears’ list remain largely intact today and to the extent they have been displaced the indices we use reflect the change. It follows that that the trends we have identified in fact are robust.

Sears’ book would subsequently be overshadowed by Adolf Berle and Gardiner Means’ landmark 1932 volume, *The Modern Corporation and Private Property*.³⁵⁴ Nevertheless, as Professor Lawrence Mitchell has

350. JOHN H. SEARS, *THE NEW PLACE OF THE STOCKHOLDER* (1929).

351. *Id.* at 9.

352. *Id.* at 8.

353. *Id.* at 198.

354. BERLE & MEANS, *supra* note 287. For examples of other over-shadowed books, see Robert Hessen, *The Modern Corporation and Private Property: A Reappraisal*, 26 J.L. & ECON. 273, 279 & n.20 (1983) (citing THOMAS NIXON CARVER, *THE PRESENT ECONOMIC REVOLUTION IN*

observed, Sears' views "were taken seriously" at the time of publication.³⁵⁵ *The Wall Street Journal* referred to *The New Place of the Stockholder* as "[o]ne of the most timely books of recent date,"³⁵⁶ and the *Boston Globe* described the book as "worthy" and of "genuine interest and value" to every stockholder.³⁵⁷ At least one reviewer of *The Modern Corporation and Private Property* explicitly acknowledged Sears' book as a forerunner of Berle and Means' work.³⁵⁸ In fact, Means cited *The New Place of the Stockholder* in a 1930 article that Berle and Means drew upon heavily in *The Modern Corporation and Private Property*.³⁵⁹ Sears' catalog of protections available to shareholders in 1929 thus can serve as a fair measure of the rights shareholders assumed to be relevant at that moment.

With two items on Sears' fourteen-point list—cumulative voting and preemptive rights—shareholder protections available in 1929 were eroded in subsequent decades. In both instances, however, the topics in question have been taken into account for present purposes because, as Table 16 indicates, they are ADRI components. For every item on Sears' list that the ADRI did not deal with, the rights Sears cited remain available to shareholders today (see Table 17). This suggests that even if there is an element of present-day bias in the indices used, findings presented here concerning shareholder protection trends remain valid.

Table 16: Elements of Sears' Fourteen-Point List of Shareholder Rights That Were Also ADRI Components—ADRI Trends

Shareholder Right, Identified by Number of Sears' List	Sears' Description	ADRI Component	ADRI Trend
Right to Vote (#7)—Proxy Voting	"The right to . . . vote by proxy . . . is provided by statute	Vote by Proxy Allowed	DLLS: Delaware "1" (1899–present); Illinois "1" (1899–present); Model Act "1" (1950–present)

THE UNITED STATES (1925), WILLIAM Z. RIPLEY, MAIN STREET AND WALL STREET (1929), and I. MAURICE WORMSER, FRANKENSTEIN, INCORPORATED (1931)).

355. Lawrence E. Mitchell, *The "Innocent Shareholder": An Essay on Compensation and Deterrence in Securities Class-Action Lawsuits*, 2009 WIS. L. REV. 243, 273.

356. *New Publications: New Place of the Stockholder*, WALL ST. J., Sept. 18, 1929, at 20.

357. *Worthy Work Treats of Stockholders' Rights*, DAILY BOS. GLOBE, Sept. 7, 1929, at 4.

358. Robert S. Stevens, *The Modern Corporation and Private Property*, 18 CORNELL L.Q. 634, 634 (1933) (reviewing BERLE & MEANS, *supra* note 287).

359. Gardiner C. Means, *The Diffusion of Stock Ownership in the United States*, 44 Q.J. ECON. 561, 561 & n.1 (1930); *see also* Adolf A. Berle, Jr., *Preface* to BERLE & MEANS, *supra* note 287, at vi (noting Berle and Means' reliance on this research).

	and court decisions.” ³⁶⁰		Spamann: Delaware “0” (1899–present); Illinois “0” (1899–present); Model Act “0” (1950–present) ³⁶¹
Cumulative Voting (#8)	“To accumulate his votes in the election of directors, when statute or state constitution make this right compulsory, and to do so where such right is permissive and the certificate of incorporation, etc., provides therefor.” ³⁶²	Cumulative Voting	Delaware “0” (1899–present); Illinois “1” (1899–present); Model Act “1” (1950–69), “0” (1969–present) ³⁶³
Preemptive Rights (#11)	“Preemptive right to participate in new issue upon increase of capital stock.” ³⁶⁴	Preemptive Rights	Delaware “1” (1899–1967), “0” (1967–present); Illinois “1” (1899–1982), “0” (1982–present); Model Act “1” (1950–84), “0” (1984–present) ³⁶⁵
Derivative Action (#12)	“To bring legal actions, in a representative capacity for all the stockholders, in the event directors are acting fraudulently in withholding suit” ³⁶⁶	Oppressed Minority	Delaware “1” (1899–present); Illinois “1” (1899–present); Model Act “1” (1950–present) ³⁶⁷

360. SEARS, *supra* note 350, at 202.

361. *See supra* Subsection II.B.1; Table 4 (Delaware scores); Table 5 (Illinois scores); Table 6 (Model Act scores).

362. SEARS, *supra* note 350, at 202.

363. *See supra* notes 284–86 and accompanying text.

364. SEARS, *supra* note 350, at 202.

365. *See supra* notes 287–90 and accompanying text.

366. SEARS, *supra* note 350, at 202.

367. *See supra* notes 276–80 and accompanying text.

Table 17: Additional Elements of Sears' Fourteen-Point List of Shareholder Rights—Present-Day Situation

Shareholder Right, Identified by Number of Sears' List	Sears' Description	Present-Day Situation (Delaware, Illinois, Model Act)
Ultra vires (#1)	"Every stockholder, however small, has the right to insist that the purposes of the corporation be confined to those stated in the charter." ³⁶⁸	Individual shareholders have standing to challenge ultra vires transactions if it would be equitable. ³⁶⁹
Shareholder Voting on Charter Amendments (#2)	"To make amendments, to alter the charter, the statutes require the vote of holders of various proportions of stock." ³⁷⁰	Shareholder approval is generally required for corporations to amend their articles of incorporation. ³⁷¹
Calling Stockholder Meetings (#3)	"Power in the stockholders to call meetings, in the event that the regularly constituted officers fail to do so, is usually provided by statute." ³⁷²	Where corporate legislation requires an annual shareholder meeting, individual shareholders have the right to demand that an annual meeting be held. ³⁷³
Power to Dissolve (#4)	"Stockholders, usually by a two-thirds vote at a meeting . . . may dissolve the corporation . . ." ³⁷⁴	"Every state provides for the voluntary dissolution of a corporation when authorized by a vote of the shareholders." ³⁷⁵
Right to Assets on Dissolution (#5)	"After the payment of corporate debts, the	A key duty of directors during the winding-up process for a

368. SEARS, *supra* note 350, at 198.

369. COX & HAZEN, *supra* note 7, § 4:8, at 241; *see, e.g.*, DEL. CODE ANN. tit. 8, § 124(1) (2015); 805 ILL. COMP. STAT. 5/3.15(a) (2015); MODEL BUS. CORP. ACT ANN. § 3.04(b)(1) (AM. BAR ASS'N 2013). With the rise of general incorporation laws and broad corporate purpose clauses, ultra vires was largely a vestigial doctrine by the 1920s. *See* HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836–1937, at 59–62 (1991).

370. SEARS, *supra* note 350, at 200. Procedurally amending the articles required the directors to submit a proposal to the shareholders. *See, e.g.*, DEL. CORP. LAWS § 26 (1915); 32 ILL. COMP. STAT. § 62 (1929).

371. *See, e.g.*, DEL. CODE ANN. tit. 8, § 242(b)(1); 805 ILL. COMP. STAT. 5/10.20; MODEL BUS. CORP. ACT ANN. § 10.03(b).

372. SEARS, *supra* note 350, at 200.

373. 2 COX & HAZEN, *supra* note 7, § 13:13, at 482–84; *see, e.g.*, DEL. CODE ANN. tit. 8, § 211(b); 805 ILL. COMP. STAT. 5/7.05; MODEL BUS. CORP. ACT ANN. § 7.01.

374. SEARS, *supra* note 350, at 200–01. At the time of publication of Sears' book, the procedure for the dissolution of a corporation in both Illinois and Delaware called for the board to present a dissolution proposal to their shareholders. Shareholders, however, could request the proposal. *See* DEL. CORP. LAWS § 39; 32 ILL. COMP. STAT. § 75.

375. 4 COX & HAZEN, *supra* note 7, § 26:2, at 295; *see, e.g.*, DEL. CODE ANN. tit. 8, § 275 (2015); 805 ILL. COMP. STAT. 5/12.15 (2015); MODEL BUS. CORP. ACT § 14.02 (AM. BAR ASS'N 2010).

	stockholder becomes entitled to his proportionate share of the assets of the company.” ³⁷⁶	corporation is “to distribute the remaining assets to the shareholders of the corporation after provision has been made for creditors.” ³⁷⁷
Right to Sell Stock (#6)	“The right of alienation is an inseparable incident to the ownership of stock as it is of other property.” ³⁷⁸	“In publicly held corporations, free alienation of shares is a distinct advantage of the corporate form of doing business.” ³⁷⁹
Right to Vote (#7)	“The stockholder is normally entitled to one vote for each share of stock” ³⁸⁰	“Generally, . . . each outstanding share of stock is entitled to one vote” ³⁸¹
Right to Dividends (#9)	“A well-known law writer [I.M. Wormser] believes that where it appears that dividends have erroneously and unfairly been detained from distribution to the stockholders for a long period of years, a point will be reached where a court of equity should unhesitatingly intervene” ³⁸²	With dividends, “[t]he shareholders are usually entitled to the amounts credited to them In most cases where dividends have been compelled, it has been shown that the directors wilfully abused their discretion” ³⁸³
Defend Suits on Behalf of the Corporation (#13)	If the board’s power to defend suits that have been brought against the corporation is “fraudulently neglected, a stockholder might conceivably act on behalf of and in defense of the corporation.” ³⁸⁴	“[R]efusal to defend [by the board], where it partakes more of disregard of duty than of an error of judgment, or is a breach of trust although not involving intentional moral delinquency, warrants relief to complaining shareholders.” ³⁸⁵
Remedy Against Misconduct by Majority Shareholders (#14)	“A <i>bona fide</i> minority stockholder who has not . . . ratified fraudulent acts of the majority . . . may sue and will be given appropriate remedies against	“In broad overview, transactions shown to produce disproportionate gains to the controlling stockholders are typically judged by a standard of fairness [T]he burden of establishing the fairness of the

376. SEARS, *supra* note 350, at 201.

377. 4 COX & HAZEN, *supra* note 7, § 26:13, at 332.

378. SEARS, *supra* note 350, at 201.

379. COX & HAZEN, *supra* note 7, § 1:5, at 16.

380. SEARS, *supra* note 350, at 201.

381. ROBERT CHARLES CLARK, CORPORATE LAW 361 (1986).

382. SEARS, *supra* note 350, at 134 (footnote omitted).

383. 3 COX & HAZEN, *supra* note 7, §§ 20:1–20:2, at 482, 491.

384. SEARS, *supra* note 350, at 202.

385. 12B WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 5853 (West 2015) (footnotes omitted).

	an offending majority” ³⁸⁶	transaction is placed upon the controlling stockholder” ³⁸⁷
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C. *What Shareholder Protections Were Displaced?*

While the ADRI, ASDI, and CBR SPI scores for Delaware, Illinois, and the Model Act indicate there was only a modest erosion of protection afforded to shareholders under state corporate law from 1899 onward, and although the shareholder rights identified as important by Sears in 1929 remain largely intact today, the literature across the decades abounds with claims that changes to state law markedly compromised shareholder rights. Perhaps, then, neither the leximetric investigation presented here nor the historical cross-check using Sears’ fourteen-point list has captured fully what in fact was a prevalent trend in U.S. corporate law. Correspondingly, this Section identifies changes to the law emphasized by those who claim shareholder protection afforded by state law diminished considerably and assesses whether these changes were of sufficient importance to undermine our ADRI, ASDI, and CBR SPI findings.

Throughout the 20th century, there were numerous assertions that competition between states placed shareholder rights in jeopardy. In 1929, Berle stated that unless managerial power was subject to equitable control by the courts “the interest of anyone who purchases or contracts in respect of shares of a Delaware corporation is so hazardous from a legal point of view that no well informed person would care to run the risk.”³⁸⁸ In a 1930 *Atlantic Monthly* article, John Flynn said that the states’ laws were liberal “to the point of glaring laxity.”³⁸⁹ Future Justice-Wiley Rutledge observed in 1937 that numerous states were following “the lead of Delaware,” meaning that “[t]he individual shareholder now has largely a ‘pig-in-a-poke.’ His old vested rights are gone or are going. He is made more dependent with each new statute upon the desires of the management”³⁹⁰

In 1968, Professor Ernest Folk, who played a leading role in the revision of Delaware corporate law that led to the enactment of the DGCL of 1967, said of the approach taken, “We do not seek to protect shareholders or creditors or others; rather we limit their rights and

386. SEARS, *supra* note 350, at 202.

387. 2 COX & HAZEN, *supra* note 7, § 11:11, at 306–07.

388. A. A. Berle, Jr., *Investors and the Revised Delaware Corporation Act*, 29 COLUM. L. REV. 563, 580–81 (1929).

389. John T. Flynn, *Why Corporations Leave Home*, ATLANTIC MONTHLY, Sept. 1932, at 268, 272.

390. Wiley B. Rutledge, Jr., *Significant Trends in Modern Corporation Statutes*, 22 WASH. U. L.Q. 305, 337 (1937).

remedies. We constantly enlarge the rights and freedom of management.”³⁹¹ Finally, Professor William Cary, in a landmark 1974 article on regulatory competition’s impact on corporate law, indicated that “the race for the bottom” had “watered the rights of shareholders vis-à-vis management down to a thin gruel.”³⁹²

What forms of shareholder protection were abrogated or compromised to elicit such forceful rhetoric? Throughout the 20th century, there were various changes to the law both in Delaware and elsewhere that bolstered managerial freedom of action. Did these compromise shareholder rights in the profound manner implied by the “race” rhetoric used in relation to regulatory competition by states? An analysis of major changes in state corporation law across the century suggests not.

Within two years of Delaware’s 1899 enactment of a new general incorporation statute designed to attract incorporation business,³⁹³ Delaware was revising the legislation to enhance managerial flexibility, adding a new section permitting a corporation’s certificate of incorporation to contain any provision not demonstrably in violation of the statute.³⁹⁴ The process continued in 1917, when Delaware explicitly authorized directors to sell all or substantially all of a corporation’s assets so long as a majority vote of the shareholders approved such action.³⁹⁵ Also, following a precedent set by New York in 1912,³⁹⁶ in 1917 Delaware allowed corporations to issue shares with no par value.³⁹⁷ In 1928, Berle claimed that the institution of no-par stock was “[p]robably the greatest single step in transferring control of property rights from stockholders to corporate managements.”³⁹⁸ This change to the law did theoretically make it easier for directors to benefit favored investors inappropriately by issuing new shares cheaply.³⁹⁹ Still, the salutary

391. Ernest L. Folk, III, *Some Reflections of a Corporation Law Draftsman*, 42 CONN. B.J. 409, 409, 415 (1968). On Professor Folk’s role in the lawmaking process, see generally Comment, *Law for Sale: A Study of the Delaware Corporation Law of 1967*, 117 U. PA. L. REV. 861, 865–68 (1969).

392. Cary, *supra* note 11, at 666.

393. Cheffins, Bank & Wells, *Questioning*, *supra* note 33, at 605.

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

395. *See id.* at 10 (indicating that the amendment to the Delaware law was made in response to a court decision that raised a doubt as to whether a company could sell all of its assets with less than unanimous shareholder approval).

396. *See* Wells, *supra* note 66, at 606.

397. THE CORPORATION TRUST COMPANY, *BUSINESS CORPORATIONS UNDER THE LAWS OF DELAWARE: SHARES WITHOUT PAR VALUE* 14 (4th ed. 1917).

398. ADOLF A. BERLE, JR., *STUDIES IN THE LAW OF CORPORATION FINANCE* 64 (1928).

399. For an overview of the perceived risks created by no-par stock, see Wells, *supra* note 66, at 607.

flexibility of no-par value shares quickly became apparent,⁴⁰⁰ and by the time the 20th century drew to a close, par value was an anachronism.⁴⁰¹

Otherwise, few amendments were made to Delaware's corporation statute until the late 1920s, when legislators made major changes to provisions governing corporation finance.⁴⁰² At this time, Delaware corporations were explicitly authorized to issue stock options and to create large blocks of authorized but unissued "blank stock" for which managers could "tailor the rights and preferences of any class of stock to meet market conditions" at the time of issuance.⁴⁰³ Professor Berle characterized these and related changes to the Delaware legislation as "dangerous" and "unworkable."⁴⁰⁴ Stock options, however, were already popular by the time Delaware changed its rules,⁴⁰⁵ and within a few decades blank stock provisions were commonplace in corporate laws.⁴⁰⁶

The 1933 Illinois Business Corporations Act, befitting a statutory measure that was supposed to protect shareholders from ongoing abuses,⁴⁰⁷ did not bolster managerial discretion or erode shareholder rights dramatically as compared with other legislation of the time. For instance, the 1933 IBCA preserved preemptive rights even though the California General Corporation Law of 1931 had set a precedent for abolition of such rights.⁴⁰⁸ The Illinois Act likewise retained mandatory cumulative voting even though Delaware never went further than authorizing companies to "opt in" to this method of director selection in 1919.⁴⁰⁹ Similarly, while Delaware explicitly authorized the issuance of stock options in the 1920s, the 1933 Illinois Act did not. It also provided

400. See, e.g., BALLANTINE, *supra* note 316, at 473 ("The great feature of no-par shares is price flexibility . . .").

401. *Venture Stores, Inc. v. Ryan*, 678 N.E.2d 300, 303 (Ill. Ct. App. 1997); 3 COX & HAZEN, *supra* note 7, § 16:15, at 315 ("Par value' is a rapidly vanishing feature of corporate law."); cf. BAYLESS MANNING WITH JAMES J. HANKS, JR., *LEGAL CAPITAL* 30 (3d ed. 1990) ("[P]ar stock continues to be in majority use.").

402. Arsht, *supra* note 394, at 10–11.

403. *Id.* at 11; accord Berle, *supra* note 388, at 565–66 (discussing Delaware corporate law in the late 1920s).

404. Berle, *supra* note 388, at 579.

405. John C. Baker, *Stock Options for Executives*, 19 HARV. BUS. REV. 106, 106 (1940) (indicating that stock options "became exceedingly popular during the 1920's").

406. See E. R. Latty, *Some General Observations on the New Business Corporation Law of New York*, 11 BUFF. L. REV. 591, 597 (1962).

407. See *supra* notes 64–65 and accompanying text.

408. See Ballantine, *supra* note 282, at 362–63.

409. See ILL. REV. STAT. § 28 (1933) (repealed 1983); *supra* text accompanying note 315. But see Wesley G. Nissen, Note, *The Constitutionality of the 1983 Illinois Business Corporation Act's Voting Provisions*, 1985 U. ILL. L. REV. 647, 647 (noting that the Advisory Committee to the Secretary of State on the Illinois Business Corporation Act of 1983 found the 1933 provision for mandatory cumulative voting harmful for economic growth).

directors with less scope to carry out share buy-backs and declare dividends than Delaware offered.⁴¹⁰ Illinois then refrained from revising its incorporation statute substantially until the enactment of the IBCA of 1983.⁴¹¹

Between 1929 and 1967, Delaware periodically tweaked its corporate law statute but did not disturb the basic structure of the legislation⁴¹² until concerns arose in the mid-1960s that its dominant position might be under threat from other states seeking to compete for incorporations by changing their laws to “‘out-Delaware’ Delaware.”⁴¹³ Delaware enacted a revised statute in 1967 referred to by one critic as “a modern round of state charter-mongering”⁴¹⁴ and by another as “a prime exemplar of the trend away from shareholder control.”⁴¹⁵ Whether such forceful rhetoric was justified is doubtful. Section II.C. has already canvassed some key changes made by the 1967 legislation, namely the displacement of the presumptive rule concerning the existence of preemptive rights and, in the related-party transaction context, the approval by informed, disinterested directors being statutorily deemed to have “the same insulating effect as a good faith shareholder vote.”⁴¹⁶ Other amendments cited by commentators arguing the 1967 Act diluted shareholder rights substantially were hardly radical. The amendments cited only compromised in some respects the scope for appraisal rights in companies registered on a national stock exchange or having more than 2,000 shareholders⁴¹⁷ and empowered corporations to purchase directors’ and officers’ insurance.⁴¹⁸

Delaware has not engaged in a wholesale revision of its corporation statute since 1967. In the ensuing decades, the 1986 enactment of

410. See Ballantine, *supra* note 282, at 363, 365, 369.

411. See Van Vliet, *supra* note 286, at 2–3.

412. Arsh, *supra* note 394, at 11.

413. See Joel Seligman, *A Brief History of Delaware’s General Corporation Law of 1899*, 1 DEL. J. CORP. L. 249, 279 (1976) (quoting interviews with Samuel Arsh, Partner, Morris, Nichols, Arsh & Tunnell, in Wilmington, Del. (Jan. 15, 1975), and Margaret Storey, Executive Vice President, Corporation Service Company, in Wilmington, Del. (Jan. 16, 1975)).

414. *Id.*

415. Comment, *Vestiges of Shareholder Rights Under the New Delaware Corporation Law*, 57 GEO. L.J. 599, 599 (1969).

416. On preemptive rights, see *supra* note 76 and related discussion. On Delaware’s safe harbor provision, see *supra* note 211 as well as Cheffins, Bank & Wells, *supra* note 27, at 1760.

417. See Comment, *supra* note 391, at 872–73; Comment, *supra* note 415, at 608–09. These commentators used sweeping language to characterize the change. Comment, *supra* note 391, at 873 (“[E]ffectively eliminat[ing] appraisal rights”); Comment, *supra* note 415, at 609 (“Modification of the appraisal right . . . [would be] preferable to its abolition.”). By doing this, they glossed over the fact that appraisal rights were preserved in a stock-for-stock merger, which is still current law. DEL. CODE ANN. tit. 8, § 262(b)(2) (2015).

418. Comment, *supra* note 391, at 884–85; Comment, *supra* note 415, at 603.

Section 102(b)(7) of the DGCL has been the manager-friendly change to Delaware law that has attracted the most attention.⁴¹⁹ Delaware enacted this provision, which authorizes Delaware corporations to limit or eliminate personal liability for directors arising from breaches of the duty of care,⁴²⁰ in response to concerns that honest directors were exposed to a substantial and unjustified risk of personal liability and that the cost of directors' and officers' insurance was escalating counterproductively.⁴²¹ Given that the substantive content of directors' duties is not addressed in a general way by the ADRI, ASDI, or CBR SPI, these indices do not capture this change to the law.

One other area where the ADRI, ASDI, and CBR SPI might not capture significant changes in shareholder protection concerns states' anti-takeover statutes. Following an unprecedented burst of hostile takeover activity in the 1980s, a majority of states adopted statutes that empowered boards to impede unwelcome takeover bids by, for instance, allowing boards to take into account "other constituents" beyond shareholders in making business decisions and temporarily removing would-be acquirers' voting rights.⁴²² Anti-takeover statutes seemingly reduced shareholder value.⁴²³ Therefore, the indices deployed here may have missed an area where shareholder protection was significantly weakened over time.

On the other hand, the anti-takeover measures adopted in the 1980s arguably did not mark a fundamental departure from historical trends but rather merely confirmed that boards had substantial discretion to thwart takeover attempts. For instance, in Delaware—admittedly a state that belatedly adopted a relatively weak anti-takeover statute and one where the courts largely made takeover law—takeover doctrine developed

419. Brown, *supra* note 11, at 331–32 (treating the provision as manager-friendly); Edward P. Welch & Robert S. Saunders, *Freedom and Its Limits in the Delaware General Corporation Law*, 33 DEL. J. CORP. L. 845, 854 (2008) (“[T]he most significant post-1967 amendment . . .”).

420. DEL. CODE ANN. tit. 8, § 102(b)(7).

421. See James L. Griffith, Jr., *Director Oversight Liability: Twenty-First Century Standards and Legislative Controls on Liability*, 20 DEL. J. CORP. L. 653, 688–89 (1995); Stephen A. Radin, ‘Smith v. Van Gorkom’ on its 15th Anniversary, DIRECTORS & BOARDS, Spring 2000, at 24, 27.

422. See Subramanian, *supra* note 66, at 1827–28 (providing summaries of anti-takeover statutes for the various states); see also Michal Barzuza, *The State of State Antitakeover Law*, 95 VA. L. REV. 1973, 2040–46 (2009) (providing tables showing states with “directors’ duties statutes” and states following Delaware’s standards).

423. Subramanian, *supra* note 66, at 1800 (“Econometric analyses of these statutes consistently find that they reduce shareholder wealth . . .”); see also Lucian Bebchuk et al., *Does the Evidence Favor State Competition in Corporate Law?*, 90 CAL. L. REV. 1775, 1801 (2002) (“[A] typical antitakeover statute has a negative, albeit modest, effect on shareholder value . . .”).

during the 1980s may ultimately have circumscribed rather than enhanced board discretion.⁴²⁴

The foregoing synopsis indicates that while some significant shareholder protections were eroded from 1900 onwards, the changes were not dramatic compared to changes to the legal rules this Article has already taken into account by performing a historical analysis with the ADRI, ASDI, CBR SPI, and Sears' fourteen-point list. Correspondingly, while amendments to state law may have diminished shareholder protection to some degree, at least from 1900 onwards, the "race" terminology applied to trends concerning state corporate law is somewhat hyperbolic.

It is possible that focusing on changes to the law occurring in the 20th century may not be the appropriate way to ascertain why there was a general consensus that competition between states for incorporation business caused a substantial erosion of shareholder rights. This is because affirmative statutory shareholder protection may never have been a prominent feature of 20th-century state corporate law. The two pivotal themes in the New Jersey corporation law of 1896—from which Delaware's 1899 statute was derived—were the removal of limits formerly imposed on corporations and the dramatic increase in the scope that incorporators and directors had, relative to shareholders, to dictate the internal structure and operation of corporations.⁴²⁵ As far back as 1899, then, Delaware's general incorporation statute failed to specify in any systematic way the responsibilities of management to shareholders or afford to dissident shareholders substantial rights and remedies.⁴²⁶ Correspondingly, the "race" that has ostensibly characterized the development of shareholder protections under state corporate law may have been largely over just as it started.

This revised characterization of the chronology of state corporate law is not novel. Professors William Bratton and Joseph McCahery have said that "[l]egislative innovation at the state level never again reached the intensity experienced in the wake of New Jersey's competitive initiative."⁴²⁷ They have similarly observed that "the structure of state

424. Ahdieh, *supra* note 9, at 299–300 ("Enthusiasts of federalism . . . have pointed to reductions in the level of resistance condoned by successive generations of state antitakeover statutes . . ."). Compare *Cheff v. Mathes*, 199 A.2d 548, 556 (Del. 1964) (effectively applying the business judgment rule to takeover defenses), with *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955–56 (Del. 1985) (applying a more searching two-prong test for evaluating board use of defensive tactics to fend off an unwelcome takeover bid).

425. Wells, *supra* note 66, at 584.

426. Kenneth K. Luce, *Trends in Modern Corporation Legislation*, 50 MICH. L. REV. 1291, 1298 (1952); see also *Arsht*, *supra* note 394, at 8 ("[T]he 1899 Act was largely silent with respect to the standards to be adhered to by officers and directors in the performance of their duties . . .").

427. Bratton & McCahery, *supra* note 129, at 631.

[corporate] law showed remarkable stability between 1896 and the takeover wars of the 1980s, and that structure was determined in a manifestly competitive environment,” referring with respect to the 1980s to the introduction of anti-takeover legislation in that decade.⁴²⁸ William Cary has similarly suggested that Delaware had “a modern and ‘liberal’ act” by 1915.⁴²⁹

These observations accord with historical patterns as measured by the ADRI, ASDI, and CBR SPI: there was no dramatic erosion of shareholder rights during the period analyzed, at least with respect to state law. Some statutory amendments occurring in the 20th century did elicit strong reactions. Nevertheless, Bratton and McCahery’s characterization of 20th-century rounds of innovation as “minor adjustments to a stable legal regime” appears to be on the mark.⁴³⁰ Leximetric analysis indicates changes to state law did not fundamentally compromise shareholder rights after 1899.

If a substantial erosion of shareholder protection was not in fact a hallmark of state corporate law in the United States from 1899 onwards, was there ever a robust race to the bottom? To the extent it did happen, the closing decades of the 19th century stand out as the crucial period. It has been said that “American corporate law lost a substantial part of its regulatory content from the 1880s”⁴³¹ and that “the position of minority shareholders in corporations if anything became weaker” as the 19th century drew to a close.⁴³² This Article leaves it to others to verify these claims. From 1899 onwards, however, general trends concerning state corporate law in the United States appear to accord with the empirical findings that a “race” did not compromise fundamentally shareholder rights under state corporate law.

CONCLUSION

Today, the general consensus is that U.S. law offers less robust shareholder protection than other comparable countries’ laws. To the extent this is the case, the pattern can be attributed most obviously to a central and distinctive feature of U.S. corporate law, namely competition between states for incorporation business stemming from the ability of corporations to incorporate under the law of a state different from the one in which they are headquartered. Although there has been acrimonious debate over whether competition between states has produced a legal

428. *Id.* at 646.

429. Cary, *supra* note 11, at 664–65.

430. Bratton & McCahery, *supra* note 129, at 635.

431. P. M. Vasudev, *Corporate Law and Its Efficiency: A Review of History*, 50 AM. J. LEGAL HIST. 237, 260 (2008–10).

432. Naomi R. Lamoreaux, *Scylla or Charybdis? Historical Reflections on Two Basic Problems of Corporate Governance*, 83 BUS. HIST. REV. 9, 21 (2009).

regime that disproportionately disempowers shareholders to managers' benefit (and so been a "race to the bottom") or instead has prodded states to develop corporate law that enhances shareholder wealth (and so been a "race to the top"), there has been general agreement that shareholder rights have diminished over time. This Article has deployed empirical analysis to discern how shareholder protection has evolved over time and casts doubt on this received wisdom. In so doing, it has made three major contributions to the literature on corporate law and shareholder protection.

First, this Article presents a fresh way to track quantitatively the development of U.S. corporation law over time. Using indices originally developed to compare shareholder protections across nations, it charts the development of three vital bodies of U.S. corporate law, those of Delaware, Illinois, and the Model Business Corporation Act, since the turn of the 20th century. The nature of these findings suggests quantitative analysis of the development of corporate law over time could be deployed effectively to provide insights in other contexts.

Second, the Article uses quantitative analysis to cast new light on the nature of jurisdictional competition between states. Its deployment of leximetric analysis indicates, for instance, that shareholder protections offered by state law have eroded over the past century. This erosion was generally modest, however, suggesting that if there was a meaningful race to the bottom (or top), it did not occur from 1900 onwards.

This Article's third and final significant contribution is to put into context the federal government's role in affording shareholders protection. We have demonstrated quantitatively that federally-oriented reform has considerably bolstered shareholder rights over time and indeed has more than offset whatever diminution occurred due to state law changes. Today's shareholders, at least those in public corporations, are better protected by the current amalgam of state and federal "corporation law," including stock exchange listing rules, than were shareholders of a century or even a half-century ago. This Article correspondingly shows that there has not been a steady erosion of shareholder rights in the period under scrutiny, at least once the significant effect of federal intervention is taken into account. Moreover, the level of protection shareholders currently enjoy is reasonably high by global standards.

For present purposes, this Article leaves open the normative implications of the identified trends. This is because assessing the desirability of shareholder protection is anything but straightforward. While this Article indicates that shareholders were offered greater protection overall over time, it is possible the costs of such additional protection may have outweighed the benefits. Views expressed by those in the "race-to-the-top" camp illustrate the point. Given that the "race-to-

the-bottom” theory presupposes a sacrificing of shareholder rights in favor of managerial flexibility, it might seem to follow that a “race to the top” would imply fortification of shareholder rights. To the extent that this is correct, “race-to-the-top” advocates seemingly should have welcomed the federal interventions that pushed scores upward. Their reaction in fact was largely the opposite.⁴³³ What they admire about state corporate law, and dislike about federal corporate law, relates to choice rather than content. As Judge Frank Easterbrook has observed, “States can’t harm investors [I]f they make bad laws, capital migrates elsewhere. . . . If Congress makes a mistake, it is not automatically undercut by market forces.”⁴³⁴

The ADRI, ASDI, and CBR SPI do not purport to measure regulatory style. Instead, they focus on the presence or absence of rules that can offer protection to shareholders. Correspondingly, this Article’s historically-oriented leximetric analysis does not provide an appropriate basis for evaluating whether the sort of race that “race-to-the-top” advocates favor has been a dominant feature of U.S. corporate law over time. More broadly, this Article leaves it to others to assess the normative implications of its findings. This Article provides an unprecedentedly rich understanding of trends relating to shareholder protection that offers an improved foundation for policy analysis.

433. See, e.g., Roberta Romano, *The Sarbanes–Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1529–43 (2005) (canvassing the empirical evidence relating to four key changes SOX made); see also Larry E. Ribstein, *Markets vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes–Oxley Act of 2002*, 28 J. CORP. L. 1, 11–18, 57–61 (2002) (critiquing key SOX provisions and advocating state-led corporate law).

434. Frank H. Easterbrook, *The Race for the Bottom in Corporate Governance*, 95 VA. L. REV. 685, 698 (2009); accord Romano, *supra* note 20, at 216; see also Daniel R. Fischel, *The “Race to the Bottom” Revisited: Reflections on Recent Developments in Delaware’s Corporation Law*, 76 NW. U. L. REV. 913, 921–22 (1982) (“In the context of the market for corporate charters, this means that only states (such as Delaware) which have corporation laws that enable private parties to maximize their joint welfare without undue regulatory interference will attract a high percentage of incorporations.”).

