Fordham Journal of Corporate & Financial Law

Proxy Access and Optimal Standardization in Corporate Governance: An Empirical Analysis

Reilly S. Steel[*]

[*]U.S. Senate Committee on Banking, Housing, and Urban Affairs

Proxy Access and Optimal Standardization in Corporate Governance: An Empirical Analysis

Reilly S. Steel

Abstract

According to the conventional wisdom, "one size does not fit all" in corporate governance. Firms are heterogeneous with respect to their governance needs, implying that the optimal corporate governance structure must also vary from firm to firm. This one-size-does-not-fit-all axiom has featured prominently in arguments against numerous corporate law regulatory initiatives, including the SEC's failed Rule 14a-11—an attempt to impose mandatory, uniform "proxy access" on all public companies—which the D.C. Circuit struck down for inadequate cost–benefit analysis.

This Article presents an alternative theory as to the role of standardization in corporate governance—in which investors *prefer* standardized terms—and empirical evidence that is consistent with this theory. Under my theory, shareholders prefer standardization because they must incur considerable transaction costs to exercise control rights that contain idiosyncratic terms. Standardization reduces these transaction costs. Consistent with this theory, I find that standardization, not heterogeneity, has pervaded the post–Rule 14a-11 private ordering of proxy access. Shareholder proposals and adopted bylaws alike have converged around standardized terms, and regression analysis suggests that this standardization reflects shareholder preferences. Moreover, employing a regression-discontinuity design, I find evidence indicating that markets have generally reacted favorably to the passage of these standardized proposals. However, robustness checks cast some doubt on the internal validity of this regression-discontinuity design, and thus these results should be taken with a grain of salt.

My theory and empirical findings have important implications for longstanding normative debates in corporate law. With a proper understanding of the role of standardization in corporate governance, the one-size-fits-all critique—though not baseless—takes on a different meaning. Although lawmakers would still do well to retain a presumption in favor of default rules instead of mandatory rules, the need for heterogeneity does not appear to be as great as some have supposed, and lawmakers may benefit from a greater focus on encouraging *optimal standardization* instead of optimal heterogeneity. These insights bear both on optimal regulatory design in the abstract and on the wisdom of currently pending federal legislation in a more concrete way.

KEYWORDS: Proxy, Corporate Governance, SEC, Regulation, Shareholder, Transaction Costs

PROXY ACCESS AND OPTIMAL STANDARDIZATION IN CORPORATE GOVERNANCE: AN EMPIRICAL ANALYSIS

Reilly S. Steel[*]

ABSTRACT

According to the conventional wisdom, "one size does not fit all" in corporate governance. Firms are heterogeneous with respect to their governance needs, implying that the optimal corporate governance structure must also vary from firm to firm. This one-size-does-not-fit-all axiom has featured prominently in arguments against numerous corporate law regulatory initiatives, including the SEC's failed Rule 14a-11—an attempt to impose mandatory, uniform "proxy access" on all public companies—which the D.C. Circuit struck down for inadequate cost–benefit analysis.

This Article presents an alternative theory as to the role of standardization in corporate governance—in which investors *prefer* standardized terms—and empirical evidence that is consistent with this theory. Under my theory, shareholders prefer standardization because they must incur considerable transaction costs to exercise control rights that contain idiosyncratic terms. Standardization reduces these transaction costs. Consistent with this theory, I find that standardization, not heterogeneity, has pervaded the post–Rule 14a-11 private ordering of proxy access. Shareholder proposals and adopted bylaws alike have converged around standardized terms, and regression analysis suggests that this standardization reflects shareholder preferences. Moreover, employing a regression-discontinuity design, I find evidence indicating that markets have generally reacted favorably to the passage of these standardized proposals. However, robustness checks cast some doubt on the

---

internal validity of this regression-discontinuity design, and thus these results should be taken with a grain of salt.

My theory and empirical findings have important implications for longstanding normative debates in corporate law. With a proper understanding of the role of standardization in corporate governance, the one-size-fits-all critique—though not baseless—takes on a different meaning. Although lawmakers would still do well to retain a presumption in favor of default rules instead of mandatory rules, the need for heterogeneity does not appear to be as great as some have supposed, and lawmakers may benefit from a greater focus on encouraging *optimal standardization* instead of optimal heterogeneity. These insights bear both on optimal regulatory design in the abstract and on the wisdom of currently pending federal legislation in a more concrete way.

TABLE OF CONTENTS

INTRODUCTION

According to a chorus of scholars, lawmakers, and practitioners, regulators should not impose standardized corporate governance structures on firms because "one size does not fit all."[1] Just as differences

---

1.   *See, e.g.*, Barry D. Baysinger & Henry N. Butler, *Race for the Bottom v. Climb to the Top: The ALI Project and Uniformity in Corporate Law*, 10 J. CORP. L. 431, 456 (1985) (claiming "any imposition of uniformity" in corporate law rules "will be *Pareto* inefficient"); Lucian Ayre Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 867 (2005) ("Rules chosen by public officials . . . inevitably suffer from the problem that 'one size does not fit all.'"); Jeffrey L. Coles et al., *Boards: Does One Size Fit All?*, 87 J. FIN. ECON. 329, 351–52 (2008) (presenting evidence that the shareholder-value effects of board size vary along firm-specific dimensions); Zohar Goshen & Richard Squire, *Principal Costs: A New Theory for Corporate Law and Governance*, 117 COLUM. L. REV. 767, 826 (2017) ("[T]he inescapable tradeoff between principal costs and agent costs cautions against . . . one-size-fits-all regulations."); Joseph A. Grundfest, *The SEC's Proposed Proxy Access Rules: Politics, Economics, and the Law*, 65 BUS. LAW. 361, 371 (2010) (criticizing the SEC's proposed proxy access rule as a "one-size-fits-all approach to corporate law"); Letter from Cravath, Swaine & Moore

in waistlines imply differences in optimal belt sizes, so too do differences in firm characteristics imply differences in optimal corporate governance structures. For decades, this one-size-does-not-fit-all critique has featured prominently in corporate law debates both in the United States and abroad,[2] undergirding criticisms of universal proxy access,[3] dual-class-share bans,[4] mandatory board structures,[5] and a host of other proposed and adopted rules.[6] Moreover, commentators have leveraged the critique to denounce proxy advisers for offering relatively uniform governance recommendations[7] and, more generally, to question various private

---

LLP et al., to Elizabeth Murphy, Sec'y, U.S. Sec. & Exch. Comm'n 6–8 (Jan. 19, 2010), https://www.sec.gov/comments/s7-10-09/s71009-619.pdf [https://perma.cc/4QW4-KPH 6] [hereinafter Seven Law Firms Letter] (leveraging the one-size-fits-all argument to critique the SEC's proxy access rule); Letter from Wachtell, Lipton, Rosen & Katz to Elizabeth M. Murphy, Sec'y, U.S. Sec. & Exch. Comm'n 9 (Aug. 17, 2009), https://www. sec.gov/comments/s7-10-09/s71009-263.pdf [https://perma.cc/3YR5-LTZ5] [hereinafter Wachtell Letter] ("[A]ny attempt to fashion a single size for all will impose inappropriate mandates on some companies . . . .").

2.   For an international example analyzing U.K. firms' decisions to opt out of specified "best practices," see Sridhar R. Arcot & Valentina G. Bruno, One Size Does Not Fit All, After All: Evidence from Corporate Governance (May 16, 2006) (unpublished manuscript) (on file with the *Fordham Journal of Corporate & Financial Law*).

3.   *See, e.g.*, Grundfest, *supra* note 1, at 371.

4.   *See, e.g.*, Charles M. Yablon, *Innovation, the State and Private Enterprise: A Corporate Lawyer's Perspective*, 40 DEL. J. CORP. L. 1017, 1058–59 (2016) (reviewing MARIANA MAZZUCATO, THE ENTREPRENEURIAL STATE: DEBUNKING PUBLIC VS. PRIVATE SECTOR MYTHS (2014)) (cautioning against "'one-size-fits-all' proposals to ban all dual class structures").

5.   *See, e.g.*, Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governanc*e, 114 YALE L.J. 1521, 1595–97 (2005).

6.   *See, e.g.*, Stephen M. Bainbridge, *Dodd-Frank: Quack Federal Corporate Governance Round II*, 95 MINN. L. REV. 1779, 1805 (2011) (lamenting Dodd-Frank's imposition of a "one-size-fits-all model . . . on all public companies"); D. Gordon Smith et al., *Private Ordering with Shareholder Bylaws*, 80 FORDHAM L. REV. 125, 128 (2011) (arguing that the interaction between federal and state law has produced a "one-size-fits-all governance structure" characterized "by almost complete reliance on centralized decision making by directors and officers").

7.   *See, e.g.*, Matthew D. Cain et al., *How Corporate Governance Is Made: The Case of the Golden Leash*, 164 U. PA. L. REV. 649, 697 (2016) (arguing "governance intermediaries' market-wide pronouncements" that particular governance terms are "universally harmful (or beneficial)" are "suspect" based on evidence that "one size does

efforts to effect corporate governance reforms.[8] Indeed, the one-size-does-not-fit-all argument underlies currently pending legislation that would drastically transform the regulatory framework governing proxy advisers and significantly impact the private ordering of corporate governance.[9]

The one-size-fits-all issue is particularly important to the debate surrounding so-called "proxy access." Proxy access refers to shareholders' rights to place a limited number of board nominees on the annual corporate ballot, at company expense, instead of undertaking the expensive process of soliciting proxies themselves.[10] Proponents of proxy access point to its ability to increase directors' accountability by reducing

---

not fit all"); Paul Rose, *The Corporate Governance Industry*, 32 J. CORP. L. 887, 916–19 (2007).

    8.   *See, e.g.*, Sanjai Bhagat et al., *The Promise and Peril of Corporate Governance Indices*, 108 COLUM. L. REV. 1803, 1808 (2008) (criticizing the use of corporate governance indices for failing to take firm-specific circumstances into account); K.J. Martijn Cremers et al., *Staggered Boards and Long-Term Firm Value, Revisited*, J. FIN. ECON. (forthcoming) (manuscript at 33) (on file with the *Fordham Journal of Corporate & Financial Law*) (presenting evidence indicating a "nuanced" relationship between staggered boards and firm value and challenging "the 'one-size-fits-all' policy that favors the annual election of directors—and which is currently supported by many proxy advisory firms and other shareholder advocates—as inconsistent with the empirical evidence on staggered boards"); Martin Lipton & Marshall P. Shaffer, *Wachtell Lipton Discusses Staggered Boards, Long-Term Investments and Long-Term Firm Value*, COLUM. L. SCH.: CLS BLUE SKY BLOG (Dec. 3, 2015), http://clsbluesky.law.columbia.ed u/2015/12/03/wachtell-lipton-discusses-staggered-boards-long-term-investments-and-long-term-firm-value [https://perma.cc/87JV-MVHH].

    9.   *See infra* Section IV.B.2.

    10.   *See* HAROLD S. BLOOMENTHAL & SAMUEL WOLFF, 10A INTERNATIONAL CAPITAL MARKETS AND SECURITIES REGULATION § 25:4, Westlaw (database updated July 2017). Voting at shareholders' meetings in public corporations is, for all practical purposes, entirely by proxy, meaning that shareholders vote by giving their proxy to someone who will attend the meeting and cast votes on their behalf. *See* Patrick J. Ryan, *Rule 14a-8, Institutional Shareholder Proposals, and Corporate Democracy*, 23 GA. L. REV. 97, 105 (1988). Boards typically send shareholders an official company proxy statement, which solicits shareholders' proxies to vote according to the board's recommendations. *See, e.g.*, Exelon Corp., Definitive Proxy Statement (Form DEF 14A) (Mar. 19, 2015). Proxy access requires the company to include a limited number of shareholder nominees in the company's own proxy statement—in other words, it gives shareholders "access" to the proxy statement. *See* BLOOMENTHAL & WOLFF, *supra*.

the costs associated with challenging incumbent directors.[11] Meanwhile, opponents decry its potential to distract directors, encourage special-interest campaigns, and increase short-termism.[12] In 2009, when the Securities and Exchange Commission (SEC) proposed a mandatory proxy access rule, critics denounced the rule as imposing one-size-fits-all corporate governance.[13] In essence, critics argued that mandated, uniform proxy access is undesirable because firms' heterogeneity implies that the optimal proxy access regime, if any, must vary significantly from firm to firm. Instead, these critics supported more modest changes permitting market participants to lobby for proxy access on a firm-by-firm basis through shareholder proposals.[14] This private ordering, critics posited, would allow each firm to tailor its proxy access regime to its own unique circumstances, producing an optimal heterogeneity in terms.[15] The rule's defenders, by contrast, either ignored these concerns, characterized them as secondary to the core agency problems that proxy access would alleviate, or claimed that permitting firms to opt out by structuring proxy access as a "default" rule should assuage critics' one-size-fits-all worries.[16] Both sides of the debate, however, seemed to accept the premise that corporate governance should vary from firm to firm—what one might call the "optimal-heterogeneity thesis."

There are plausible theoretical grounds for supposing that one size does not fit all in corporate governance. As others argue, one would expect the economic effect of a given allocation of control rights to differ by firm according to firm-specific characteristics, implying that the

---

11.   *See, e.g.*, Lucian A. Bebchuk & Scott Hirst, *Private Ordering and the Proxy Access Debate*, 65 BUS. LAW. 329, 335–36 (2010).

12.   *See, e.g.*, Grundfest, *supra* note 1, at 378–84; Martin Lipton & Steven A. Rosenblum, *Election Contests in the Company's Proxy: An Idea Whose Time Has Not Come*, 59 BUS. LAW. 67, 82–84 (2003).

13.   *See, e.g.*, Wachtell Letter, *supra* note 1.

14.   *See, e.g.*, Grundfest, *supra* note 1, at 362–66, 375–76.

15.   *See, e.g.*, *id.*

16.   *Cf.* Bebchuk & Hirst, *supra* note 11, at 332–36 (proposing an "opt-out" regime); Letter from Jeff Mahoney, Gen. Counsel, Council of Institutional Inv'rs, to Elizabeth M. Murphy, Sec'y, U.S. Sec. & Exch. Comm'n 1–3 (Aug. 4, 2009), https://www.sec.gov/comments/s7-10-09/s71009-78.pdf [https://perma.cc/5WS3-7MGQ] [hereinafter 2009 CII Letter] (rejecting the one-size-fits-all criticism in favor of a uniform regime). A default rule is a rule that the law provides as a default but that market participants can change by "opting out" or tailoring its terms. *See* Bebchuk & Hirst, *supra* note 11, at 332–33.

optimal corporate governance regime must also vary from firm to firm.[17] However, as prior empirical research demonstrates, there is often uniformity in corporate contracting,[18] which lies in tension with the optimal-heterogeneity thesis. If one size does not fit all, why do firms so frequently adopt corporate contracts with standardized terms?

This Article presents an alternative theory as to the role of standardization in corporate governance—in which investors frequently *prefer* standardized terms—and empirical evidence that is consistent with this theory.[19] According to my theory, investors prefer standardization because there are transaction costs associated with using the control rights they possess. Before using a control right, an investor must determine its scope, mechanics, and application to her circumstances; accordingly, a diversified investor may rationally prefer that the terms of a control right are identical to those of other firms in her portfolio. With standardized terms, the investor faces reduced costs of acquiring and processing the information necessary to exercise the right, which—to the extent that use of the control right efficiently reduces agency costs—increases shareholder value. Standardization may thus be a second-best solution in a world beset by considerable transaction costs.

To test this theory empirically, I examine the private ordering of proxy access that has followed the D.C. Circuit's 2011 opinion in *Business Roundtable v. SEC*, which vacated the SEC's final proxy access rule (Rule 14a-11) but left in place changes that permit private parties to lobby for proxy access on a firm-by-firm basis.[20] In the wake of *Business Roundtable*, investors have submitted hundreds of shareholder proposals requesting proxy access bylaws, and many boards have agreed to

---

17.   *See* Goshen & Squire, *supra* note 1, at 771.

18.   *See generally* Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (Or "The Economics of Boilerplate")*, 83 VA. L. REV. 713 (1997).

19.   *See infra* Part II.

20.   *See* Bus. Roundtable v. SEC, 647 F.3d 1144, 1148 (D.C. Cir. 2011). To my knowledge, there have been only two other empirical studies that consider the post–*Business Roundtable* private ordering of proxy access. *See infra* Section I.B.2. However, neither study delves into the details of the shareholder proposals' terms or employs a regression-discontinuity design to estimate the effect of these proposals on shareholder value. Moreover, neither study situates the private ordering of proxy access in a theoretical framework like that developed in this Article.

implement some version of proxy access.[21] If the optimal-heterogeneity thesis is correct, then shareholders should not exhibit a preference for standardized terms, and we should observe a diversity in terms among those proxy access bylaws that firms adopt.

Leveraging a hand-collected dataset, I show that private ordering has *not* produced the heterogeneity in terms that some commentators predicted.[22] In each of three groups—those shareholder proposals that make it to a vote, those proposals that pass, and the bylaws that boards actually implement—the major terms of these proposed and adopted proxy access regimes have been remarkably *homogeneous*.[23] To the extent that heterogeneity exists, it has generally manifested only in choices about whether a firm should adopt proxy access at all—and not in the terms of the proxy access provisions that firms in fact adopt.[24] Moreover, multivariate regression analysis of shareholder proposal vote outcomes suggests that investors prefer it this way: standardization in proposal terms is associated with significantly higher shareholder support.[25] In my preferred specification, the presence of a standard "3/3" proposal is associated with a nearly thirty-point increase in the percentage of votes cast "for" the proposal, and the presence of additional standardized details is associated with another nine percentage points in support.[26] These results are consistent with a transaction-cost-based theory of investors' preference for standardized corporate governance.

Despite shareholders' apparent preference for standardized terms, however, it is still possible that the individuals making the voting decisions—generally agents who are not the ultimate beneficiaries of the shares they vote—may be inefficiently voting for standardization. One might instead place more faith in the opinions of those actually pricing the firms' securities—those voting with their money, so to speak. I therefore employ a regression-discontinuity design, which estimates the causal effect of a standardized proposal's narrow passage on cumulative abnormal returns surrounding the vote-disclosure date, to assess market reactions to "close call" votes.[27] This regression-discontinuity design

---

21. *See infra* Section III.B.
22. *See infra* Part III.
23. *See infra* Section III.B.
24. *See infra* Section III.B.
25. *See infra* Section III.C.
26. *See infra* Table 2.
27. *See infra* Section III.D.

indicates that a "pass" produces mean cumulative abnormal returns of 335 basis points[28]—implying that for those firms at which the vote is a close call, a pass increases the value of a firm's common stock by an average of 3.35%. These results are statistically significant and hold across different asset-pricing models.[29] There is, however, some weak evidence of vote-outcome manipulation around the majority threshold, which casts some doubt on a critical identification assumption that agents cannot perfectly sort themselves onto one side or the other of the cutoff point.[30] Additionally, the coefficients are not statistically significant in robustness checks that use alternative methodology.[31] Overall, I interpret these results as providing weak evidence that the market has welcomed this standardized proxy access.

My theory and empirical analysis have important implications for corporate law and policy.[32] To begin, a mandatory rule regarding proxy access—either in favor or against—seems undesirable.[33] But more importantly, my analysis has broader implications beyond proxy access. As a purely descriptive matter, private ordering has not avoided the one-size-fits-all phenomenon.[34] To the extent there has been heterogeneity in terms, this heterogeneity has manifested only in investors' acceptance of standardized proxy access in some instances and rejection of proxy access altogether in others—resulting in a *numerus clausus*–like menu of options instead of an abundance of individualized, tailored provisions.[35] For cynics who believe that this level of standardization is likely to be suboptimal, this should be troubling. But as my theory and the evidence suggest, there are good reasons to believe that this standardization may in fact have positive effects. Thus, perhaps one size does not fit all, but a limited variety of sizes is enough. Accordingly, while lawmakers should still take care to ensure that private actors are afforded some degree of flexibility, an emphasis on avoiding one-size-fits-all regulation seems misplaced. Instead, lawmakers may benefit from focusing more on the content of the standardized terms that they promulgate—while still

---

28.   *See infra* Table 3.
29.   *See infra* Table 3.
30.   *See infra* Section III.D.
31.   *See infra* Section III.D.
32.   *See infra* Part IV.
33.   *See infra* Section IV.A.
34.   *See infra* Section IV.B.
35.   *See infra* Section IV.B.1.

retaining a presumption in favor of allowing market participants to alter these rules.

Despite the "failure" of private ordering to produce great heterogeneity in the terms of proxy access, there may be at least one benefit generated by private ordering: *optimal* standardization. [36] Although the proxy access provisions that firms have adopted closely resemble the SEC's failed Rule 14a-11 in many respects, they depart in one significant way: the addition of aggregation limits. Judging by the failure of "fix-it" proposals targeting those aggregation limits, shareholders appear to have accepted these aggregation limits, possibly as a means to ensure that would-be activists obtain the consent of at least some long-term blockholders. This analysis has implications for the longstanding debate among scholars about public versus private provision of corporate law [37] : firms' adoption of aggregation limits (and shareholders' apparent preference for these terms) suggests that private provision may have some advantages after all.[38] Thus, to the extent that there are reasons for regulatory changes, regulators should supplement existing forms of lawmaking (such as traditional notice-and-comment rulemaking) with data-driven, market-based insights. [39] However, one cannot rule out the possibility that blockholders have inefficiently favored aggregation limits to cement their own power, underscoring the need for future research.

In addition to these theoretical and big-picture issues, this Article also provides perspective on concrete policy issues regarding currently pending federal legislation. Among other things, the controversial Financial CHOICE Act (the CHOICE Act) includes provisions that would (1) drastically restrict shareholders' ability to bring resolutions under the SEC's shareholder proposal rule and (2) subject proxy advisory firms to significant additional SEC oversight.[40] My findings provide a basis to question some of the arguments underlying these legislative proposals.[41]

The remainder of the Article proceeds in four parts. Part I provides an overview of the proxy access debate, regulatory and institutional

---

36. *See infra* Section IV.B.1.

37. *See generally* Gillian Hadfield & Eric Talley, *On Public Versus Private Provision of Corporate Law*, 22 J.L. ECON. & ORG. 414 (2006).

38. *See infra* Section IV.B.2.

39. *See infra* Section IV.B.2.

40. *See* Financial CHOICE Act of 2017, H.R. 10, 115th Cong. §§ 481–483, 844 (1st Sess. 2017).

41. *See infra* Section IV.B.

details, and prior empirical research. Part II offers a theory as to why investors might prefer standardization in corporate governance. Part III, the heart of the Article, presents the results of my empirical analysis. Finally, Part IV discusses implications for law and policy. A brief conclusion follows.

I. THE PROXY ACCESS DEBATE

Proxy access has long been the subject of considerable debate. Since in the 1940s, proxy access has appeared on the SEC agenda several times,[42] with the SEC abandoning the idea each time until 2011, when the agency finally promulgated Rule 14a-11[43]: a mandatory, universally applicable proxy access rule, which the D.C. Circuit later invalidated for inadequate cost–benefit analysis.[44] This Part provides background on proxy access, including the invalidated SEC rule and relevant prior empirical research. Section I.A provides a brief overview of proxy access, the rise and fall of Rule 14a-11, and some of the key issues implicated by the debate over Rule 14a-11. Section I.B reviews the prior empirical literature.

A. PROXY ACCESS AND THE RISE AND FALL OF RULE 14A-11

An exhaustive account of the long history of proxy access is beyond the scope of this Article.[45] However, proxy access's more recent history, including the SEC's failed rule, may put in perspective the subsequent private ordering. This section therefore provides a brief overview of proxy access as a governance tool, the SEC's failed rule, and the debate over whether market participants should be allowed to tailor proxy access through private ordering.

---

42.   *See* Marcel Kahan & Edward Rock, *The Insignificance of Proxy Access*, 97 VA. L. REV. 1347, 1353–57 (2011).

43.   Facilitating Shareholder Director Nominations, 75 Fed. Reg. 56, 668 (Sept. 16, 2010) (codified at 17 C.F.R. § 240.14a-11 (2010)), *vacated by*, Bus. Roundtable v. SEC, 647 F.3d 1144, 1156 (D.C. Cir. 2011).

44.   *See Bus. Roundtable*, 647 F.3d at 1149–51.

45.   *See generally* Kahan & Rock, *supra* note 42, at 1353–57.

1. Proxy Voting and Proxy Access

Under state law, shareholders generally have the right to nominate board candidates at the annual shareholders' meeting.[46] However, at the large public corporations that drive the U.S. economy, proxy voting has effectively replaced the annual meeting as the channel through which votes are decided.[47] Thus, if a shareholder wishes to challenge incumbent directors by nominating her own candidates, she must expend considerable resources to solicit other shareholders' proxies and convince them to support her candidate—with one estimate suggesting that the average "proxy contest" costs the challenger nearly $11 million.[48]

Many scholars and commentators, viewing shareholders' ability to challenge incumbent directors as an important accountability mechanism, have called for "proxy access" rules that require boards to include shareholder nominees in the companies' annual proxy statements, at company expense.[49] By shifting some of the costs associated with proxy contests to companies instead of shareholders, proxy access could make it easier for shareholders to hold boards accountable, and thereby reduce the agency costs produced by the classic separation between ownership and control.[50]

Proxy access would, however, likely produce costs as well. As skeptics argue, proxy access may distract boards, allow special interests

---

46.   *See* 5 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 2017, Westlaw (database updated Sept. 2016) (noting that shareholders may typically elect a candidate "through 'write-ins' on the ballot," though courts have upheld bylaws requiring advance notice).

47.   Ryan, *supra* note 10, at 105. "Proxy voting" refers to voting in which the voter gives another shareholder her "proxy" to vote for her at the meeting, often with a specific set of voting instructions. *See supra* text accompanying note 10.

48.   *See* Nickolay M. Gantchev, The Costs of Shareholder Activism: Evidence from a Sequential Decision Model 36 (Dec. 21, 2011) (unpublished Ph.D. dissertation, University of Pennsylvania), http://repository.upenn.edu/cgi/viewcontent.cgi?article=15 73&context=edissertations [https://perma.cc/UJ35-D5C9].

49.   *See, e.g.*, Bebchuk & Hirst, *supra* note 11.

50.   *See generally* ADOLPH A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1933) (describing the modern corporation as afflicted by a problematic "separation of ownership and control"); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976) (providing the canonical exposition of the role of "agency costs" in the theory of the firm).

to extract private benefits, and increase short-termism.[51] In other words, just as proxy access may reduce agency costs, it may also increase what Professors Zohar Goshen and Richard Squire call "principal costs."[52]

2. Rule 14a-11 and the Debate over Private Ordering

Under U.S. corporate and securities law, proxy access is neither a mandatory rule nor a default rule. In fact, until recently, federal securities law prohibited shareholders from utilizing the federal shareholder proposal rule—the primary means of shareholder-initiated private ordering in corporate governance—to lobby for proxy access even on a firm-by-firm basis.[53] But in 2009, after multiple failed attempts to institute proxy access dating back to the 1940s, the SEC finally proposed a proxy access rule with the potential to stick.[54]

As proposed, Rule 14a-11 required public companies to include in their annual proxy statements, at company expense, nominees from certain qualifying shareholders.[55] Under the proposed rule, nominators had to satisfy tiered minimum-ownership requirements: large accelerated filers had to own 1% of the firm's outstanding stock, accelerated filers had to own 3%, and nonaccelerated filers had to own 5%.[56] Meanwhile, the proposed rule required the nominator to hold this amount of stock for at least one year, limited nominations at up to 25% of the board, and allowed unlimited aggregation of shares for the purpose of satisfying the ownership requirements.[57] Additionally, the SEC proposed amending the shareholder proposal rule's "relates to an election" exclusion (Rule 14a-8(i)(8)), which at the time permitted companies to exclude shareholder proposals that request proxy access.[58] The amendments to Rule 14a-

---

51.   *See, e.g.*, Grundfest, *supra* note 1.

52.   *See generally* Goshen & Squire, *supra* note 1.

53.   *See* 17 C.F.R. § 240.14a-8(i)(8) (2010) (permitting firms to exclude shareholder proposals that "relate[] to . . . a procedure for" the nomination or election of directors).

54.   Facilitating Shareholder Director Nominations, 74 Fed. Reg. 29,024 (June 18, 2009) (to be codified at 17 C.F.R. § 240.14a-11).

55.   *See id.* at 29,035.

56.   *Id.*

57.   *See id.* at 29,035, 29,039, 29,043.

58.   *See id.* at 29,055–56; *see also* 17 C.F.R. § 240.14a-8(i)(8) (2010) (identifying a proposal's relation to a "procedure" as grounds for exclusion).

8(i)(8) would permit shareholders to lobby for proxy access on a firm-by-firm basis.[59]

The proposed Rule 14a-11 generated considerable debate, including over 600 comment letters.[60] While both supporters and critics of the proposed rule generally expressed support for the amendments to Rule 14a-8(i)(8),[61] commentators were sharply divided over whether the SEC should promulgate (1) a mandatory proxy access rule,[62] (2) a default rule in favor of proxy access (an "opt-out" regime),[63] or (3) a default rule against proxy access (an "opt-in" regime).[64]

At the heart of this debate were two issues that have long been central to corporate law. First, many commentators expressed concern with the imposition of "one-size-fits-all" corporate law.[65] As Professor Joseph Grundfest put it, the SEC's "standardized, mandatory form of proxy

---

59.   *See* 74 Fed. Reg. at 29,055–56.

60.   *Comments on Proposed Rule: Facilitating Shareholder Director Nominations*, U.S. SEC. & EXCHANGE COMMISSION, http://www.sec.gov/comments/s7-10-09/s71009.h tml [https://perma.cc/55AE-VLCK] (last modified Nov. 11, 2010).

61.   *See, e.g.*, Letter from Lucian A. Bebchuk, William J. Friedman and Alicia Townsend Friedman Professor of Law, Econs., and Fin., Harvard Law Sch., & Scott Hirst, Co-Exec. Dir., Program on Corp. Governance, Harvard Law Sch., to Elizabeth M. Murphy, Sec'y, U.S. Sec. & Exch. Comm'n (Jan. 19, 2010), https://www.sec.gov/com ments/s7-10-09/s71009-604.pdf [https://perma.cc/CR3G-2NR9]; Seven Law Firms Letter, *supra* note 1; Broc Romanek, *Parsing the Proxy Access Comment Letters*, THECORPORATECOUNSEL.NET (Oct. 1, 2009), http://www.thecorporatecounsel.net/blog/ 2009/10/with-the-comment-letter.html [https://perma.cc/4PLC-WUN5].

62.   *See, e.g.*, 2009 CII Letter, *supra* note 16 (supporting a "uniform baseline" with shareholders retaining the option to pursue "a stronger proxy access mechanism" through private ordering); Letter from Jonathan D. Urick, Analyst, Council of Institutional Inv'rs, to Elizabeth M. Murphy, Sec'y, U.S. Sec. & Exch. Comm'n, 1 (Jan. 14, 2010), https://www.sec.gov/comments/s7-10-09/s71009-592.pdf [https://perma.cc/FKG9-SKB3] [hereinafter Jan. 2010 CII Letter] (preferring a "uniform" rule over both opt-in and opt-out versions).

63.   *See, e.g.*, Bebchuk & Hirst, *supra* note 11.

64.   *See, e.g.*, Grundfest, *supra* note 1.

65.   Seven Law Firms Letter, *supra* note 1, at 6–7 (questioning the wisdom of a uniform, "one-size-fits-all" standard); *see, e.g.*, Letter from Alexander M. Cutler, Chairman & Chief Exec. Officer, Eaton Corp., and Chair, Corp. Leadership Initiative, Bus. Roundtable, to Elizabeth M. Murphy, Sec'y, U.S. Sec. & Exch. Comm'n 45 (Aug. 17, 2009), https://www.sec.gov/comments/s7-10-09/s71009-267.pdf [https://perma.cc/ 6K6L-4MJR] [hereinafter Business Roundtable Letter] (praising "the opportunity that state law affords to tailor a system of proxy access to the needs of the individual company").

access" was a "one-size-fits-all approach to corporate law"[66]—evidently a bad thing due to the "wide variety of circumstances" in which firms operate.[67] In other words, firms' heterogeneity implies that the optimal proxy access regime, if any, must vary significantly from firm to firm. Thus, while a 3% ownership requirement may be appropriate for some firms, a 5% ownership requirement might be appropriate for others—and for others still, a 10% ownership requirement might be appropriate. Legal scholars have, across many areas in corporate law, long leveraged this one-size-does-not-fit-all argument, [68] although some scholars have expressed a degree of skepticism.[69] The rule's defenders, by contrast, apparently believed the likely reduction in agency costs that would accompany proxy access outweighed such concerns.[70]

Second, some critics doubted the SEC's ability to determine the optimal rule (whether mandatory or default). [71] In Grundfest's words, designing the right rule would be "a very difficult, highly technical task" that the SEC is ill equipped to take up.[72] If the first issue boils down to the reach and content of the law, then this second issue essentially boils down to *who* should design the law: public or private decisionmakers?

---

66.   Grundfest, *supra* note 1, at 371.

67.   Grundfest, *supra* note 1, at 372 n.44 (quoting Letter from James L. Holzman, Chair, Council of the Corp. Law Section, Del. State Bar Ass'n, to Elizabeth M. Murphy, Sec'y, U.S. Sec. & Exch. Comm'n 5 (July 24, 2009) (internal quotations marks omitted), http://www.sec.gov/comments/s7-10-09/s71009-65.pdf [https://perma.cc/UM2Y-4B2D] [hereinafter DE Bar Letter]).

68.   *See supra* note 1 and accompanying text.

69.   *See, e.g.*, Michal Barzuza, Do Heterogeneous Firms Select Their Right "Size" of Corporate Governance Arrangements? (2017) (unpublished manuscript) (on file with the *Fordham Journal of Corporate & Financial Law*) (critiquing the one-size-does-not-fit-all argument on the grounds that firms do not necessarily choose their right "size"); Bebchuk & Hirst, *supra* note 11, at 334–35, 349–50 (arguing the one-size-fits-all critique does not lead to the conclusion that a "no-access default" is "optimal").

70.   It is difficult to ascertain the precise rationale of those who supported a mandatory rule. However, Bebchuk and Hirst, who supported a sort of "sticky default" in favor of proxy access, cited empirical evidence tending to show that insulating directors from accountability reduces firm value and performance and the difficulty of opting out of value-enhancing rules that favor boards relative to value-enhancing rules that disfavor boards. *See* Bebchuk & Hirst, *supra* note 11, at 335–38, 359. These are essentially agency cost rationales. *See generally* Jensen & Meckling, *supra* note 50.

71.   *See, e.g.*, Grundfest, *supra* note 1, at 366 (questioning the SEC's ability to "guess at the appropriate default rule").

72.   *Id.*

Apparently believing that the latter would be better candidates for the job, Grundfest and others suggested an opt-in approach or, failing that, using "a stratified random sample of shareholder preferences" to set the "default rule."[73] Again, scholars have long debated (and will likely continue to debate) the deeper issue here—*who* should design corporate law and governance—beyond the proxy access context.[74]

Ultimately, the SEC promulgated a mandatory rule with a 3% ownership threshold, three-year holding period, 25% maximum slate, and no aggregation limits.[75] Unlike the proposed rule, the final Rule 14a-11 was to apply uniformly to all public companies.[76] However, Rule 14a-11 never got the chance to get off the ground. Before it could become effective, industry groups Business Roundtable and the U.S. Chamber of Commerce challenged the rule in the D.C. Circuit, and the SEC stayed the rule's effectiveness pending the outcome of the court's decision.[77] Several months later, the D.C. Circuit vacated Rule 14a-11 for inadequate cost–benefit analysis, dooming the SEC's attempt at mandatory proxy access.[78] The court did not, however, vacate the amendment to Rule 14a-8(i)(8),[79] opening the door to private ordering.

B. Prior Empirical Literature on Proxy Access

To date, there have been several empirical studies of proxy access in the United States, related to both Rule 14a-11 and private ordering that

---

73.   *Id.*; *see also* Business Roundtable Letter, *supra* note 65; DE Bar Letter, *supra* note 67; Seven Law Firms Letter, *supra* note 1.

74.   *See, e.g.*, Hadfield & Talley, *supra* note 37 (presenting a model in which "private provision of corporate law" is more efficient than "public provision of corporate law"); *cf.* Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 Geo. L.J. 923, 947–49 (2013) (arguing that disclosure of corporate political spending "should not be left to private ordering"). Recent empirical work on the corporate opportunity doctrine has also engaged with this issue. *See* Gabriel Rauterberg & Eric Talley, *Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers*, 117 Colum. L. Rev. 1075, 1119–28 (2017).

75.   Facilitating Shareholder Director Nominations, 75 Fed. Reg. 56, 668, 56-674–77 (Sept. 16, 2010) (codified at 17 C.F.R. § 240.14a-11 (2010)), *vacated by*, Bus. Roundtable v. SEC, 647 F.3d 1144, 1156 (D.C. Cir. 2011).

76.   *Id.* at 56,688–91.

77.   Bus. Roundtable v. SEC, 647 F.3d 1144, 1148 (D.C. Cir. 2011).

78.   *Id.* at 1153, 1156.

79.   *Id.* at 1153. The petitioners did not challenge this amendment. *See id.*

has followed *Business Roundtable*. This section reviews this literature. Overall, the evidence is mixed as to both Rule 14a-11 and the post–*Business Roundtable* private ordering.

1. The Rule 14a-11 Literature

There are several published studies related to Rule 14a-11, each employing some version of an event-study design to assess the effect of proxy access on shareholder value.[80] On balance, these studies offer mixed results as to the value of the rule. While three studies purport to find evidence that Rule 14a-11 would have hurt shareholders,[81] another three studies claim to find that Rule 14a-11 would have *benefited* shareholders.[82]

The indeterminacy of this prior literature is likely due to several factors. First, market-wide event studies run a high risk of producing results that are confounded by other, unrelated events. This risk is particularly pronounced for corporate governance studies because of the potential for macroeconomic events to exert a much greater influence on stock returns. This risk becomes even more acute if the market partially anticipates and has therefore already priced (partially or fully) the

---

80.   Event studies measure stock-market reactions to corporate events. *See generally* S.P. Kothari & Jerold B. Warner, *Econometrics of Event Studies*, *in* 1 HANDBOOK OF CORPORATE FINANCE 3 (B. Espen Eckbo ed., 2007). Assuming appropriate methodology and some version of the efficient capital markets hypothesis (ECMH), an event study permits the researcher to infer the average effect of the event on shareholder value. *See generally id.* Here, the event studies examine announcements that reflect either an increased or a decreased likelihood that Rule 14a-11 (or some version of Rule 14a-11) would become effective.

81.   *See* Ali C. Akyol et al., *Shareholders in the Boardroom: Wealth Effects of the SEC's Proposal to Facilitate Director Nominations*, 47 J. FIN. & QUANTITATIVE ANALYSIS 1029, 1030 (2012); David F. Larcker et al., *The Market Reaction to Corporate Governance Regulation*, 101 J. FIN. ECON. 431, 432–33 (2011); Thomas Stratmann & J.W. Verret, *Does Shareholder Proxy Access Damage Share Value in Small Publicly Traded Companies?*, 64 STAN. L. REV. 1431, 1459–65 (2012).

82.   *See* Bo Becker et al., *Does Shareholder Proxy Access Improve Firm Value? Evidence from the Business Roundtable's Challenge*, 56 J.L. & ECON. 127, 129 (2013); Joanna Tochmann Campbell et al., *Shareholder Influence Over Director Nomination via Proxy Access: Implications for Agency Conflict and Stakeholder Value*, 33 STRATEGIC MGMT. J. 1431, 1444 (2012); Jonathan B. Cohn et al., *On Enhancing Shareholder Control: A (Dodd-) Frank Assessment of Proxy Access*, 71 J. FIN. 1623, 1624 (2016).

announcement.[83] Second, one might reasonably interpret some of the authors' chosen events to have the opposite effects on the likelihood of proxy access as those envisioned by the studies.[84] Third, some of the studies base their conclusions on cross-sectional variation in returns, which depends on questionable assumptions about which firms are likely to be targets for proxy access nominations.[85]

---

83.   This may have occurred for several of the events used in the Rule 14a-11 literature. For example, there is reason to doubt Stratmann and Verret's claim that the market anticipated an exemption for firms with a market capitalization of under $75 million: this information arguably leaked prior to the event date when an article reported that the SEC abandoned the proposed rule's tiered structure in favor of a uniform 3% ownership threshold. Kara Scannell, *SEC Set to Open Up Proxy Access*, WALL STREET J. (Aug. 5, 2010), http://www.wsj.com/articles/SB1000142405274870474190457540968 0246527908 [https://perma.cc/LYT6-LB6P]. Although the article did not specifically mention any exemption, one might reasonably infer its absence based on the article's characterization of the final rule as "an across-the-board 3% rule follow[ing] a recommendation by the Council of Institutional Investors." *Id.* An "across-the-board" rule would presumably not contain an exemption, and the Council of Institutional Investors (CII) repeatedly stressed the need for uniformity in their comment letters. *See, e.g.*, Jan. 2010 CII Letter, *supra* note 62, at 1; *see also* Becker et al., *supra* note 82, at 137–38 (criticizing other prior studies for containing events that were "widely anticipated, confounded, . . . and/or not meaningful").

84.   For example, some of the studies describe legislative developments related to the adoption of section 112 of the Delaware General Corporation Law as decreasing the likelihood of proxy access. *See* Akyol et al., *supra* note 81, at 1036 tbl.1; Larcker et al., *supra* note 81, at 436 tbl.1. But section 112 simply clarified that proxy access bylaws are permissible under Delaware law. *See* DEL. CODE ANN. tit. 8, § 112 (West 2017). It seems dubious that informed market participants would perceive section 112 as decreasing the likelihood that the SEC would pass its own proxy access rule. Federal law, after all, preempts state law. *See* U.S. CONST. art. VI, cl. 2. If anything, the developments merely affirmed shareholders' ability to lobby for proxy access regardless of the outcome of any SEC rulemaking—an increase in the likelihood that at least some firms would adopt proxy access.

85.   Two of the studies find a greater response to the events in question among firms with a greater activist presence. *See* Becker et al., *supra* note 82, at 148 tbl.4; Cohn et al., *supra* note 82, at 1649–54. However, these results are somewhat puzzling. As Professors Kahan and Rock explain, it seems unlikely that activist hedge funds—who appear to comprise the bulk of activist investors measured in both studies—would make much use of proxy access. *See* Kahan & Rock, *supra* note 42, at 1376 (noting activist hedge funds' relatively short investment horizons imply they would be unlikely to satisfy Rule 14a-11's three-year holding period).

2. The Post–Business Roundtable Private Ordering Literature

Two empirical studies consider the post–*Business Roundtable* private ordering of proxy access under Rule 14a-8, again leveraging event-study designs. These studies find mixed evidence about this experiment in private ordering.

One study, by Professors John Matsusaka, Oguzhan Ozbas, and Irene Yi, examines market reactions to SEC no-action letter decisions[86] for shareholder proposals generally, including proxy access proposals specifically.[87] They find that grants of no-action relief are associated with positive abnormal returns,[88] which holds for proxy access as well.[89] In general, denials of no-action relief generally remain positive but lose their statistical significance,[90] while in the proxy access context, the signs on the coefficients are mixed (and statistically insignificant).[91] Based on these findings, Matsusaka and his coauthors conclude that managers appear to resist shareholder proposals to protect shareholder value (rather than extract private benefits) and that some uses of the shareholder proposal rule harm shareholders.[92]

However, there are at least two limitations to their analysis. First, the premise that the market does not anticipate no-action letter outcomes is questionable. As I have shown in prior research, no-action letters can follow a predictable, rule-like pattern.[93] If one assumes some version of the efficient capital markets hypothesis (ECMH)—as an event study must—then one would expect the market to catch on to these patterns and

---

86.   A no-action letter is an informal opinion by the SEC staff, issued in response to a request by management to exclude a shareholder proposal from its proxy statement, that the company may or may not exclude the proposal from its annual proxy statement. *See generally* Reilly S. Steel, Note, *The Underground Rulification of the Ordinary Business Operations Exclusion*, 116 COLUM. L. REV. 1547, 1551–55 (2016) (explaining the SEC process for issuing no-action letters under Rule 14a-8).

87.   John G. Matsusaka et al., *Can Shareholder Proposals Hurt Shareholders? Evidence from SEC No-Action Letter Decisions* 2 (Univ. of S. Cal. Ctr. for Law & Soc. Sci., Law and Economics Research Paper No. CLASS17-4), https://ssrn.com/abstract=2881408 [https://perma.cc/74ZN-29JF].

88.   *See id.* at 14, tbl.4.

89.   *See id.* at 19, tbl.6.

90.   *See id.* at 15, tbl.4.

91.   *See id.* at 18, tbl.6.

92.   *See id.* at 6–7.

93.   *See* Steel, *supra* note 86, at 1564–72.

anticipate the bulk of no-action letter outcomes. Second, Matsusaka and his coauthors' evidence is equally consistent with the theory that the SEC staff has been doing a good job, from a shareholder-value perspective, in deciding which proposals are excludable. [94] This explanation is also consistent with the generally positive signs on abnormal returns for both grants and denials of no-action relief.

The other study, by SEC economist Tara Bhandari and Professors Peter Iliev and Jonathan Kalodimos, examines several issues related to the private ordering of proxy access. [95] Two findings are particularly relevant here. First, the authors find mean abnormal returns of fifty-three basis points across the seventy-five firms targeted by the New York City Comptroller's Boardroom Accountability Project (BAP), using the project's announcement as the event window. [96] This, they conclude, implies that on average, proxy access created shareholder value in the targeted firms. [97] Second, they find a convergence over time toward proposals with a three-percent ownership threshold and three-year holding period, and in regressions with vote outcomes as the dependent variable and ownership measures as covariates, they find that the presence of "3/3" terms is associated with greater shareholder support.[98] Based on this "lack of tailoring," they infer "an imperfect solution to the collective action problem" due to the costs associated with determining which terms are appropriate for each company.[99] Speculating that "the optimal terms of access would vary across firms with, for example, different ownership

---

94. Although "shareholder value" is not an explicit criterion on which to base excludability determinations, it is plausible (and, hopefully, probable) that the Rule 14a-8 exclusions are generally designed to promote shareholder value. Additionally, it is expected that a well-advised shareholder will draft proposals that are not excludable. It is therefore plausible that excludability determinations are ultimately attributable to proponent characteristics, including the proponent's information and even intelligence. If a proponent's poor information or intelligence leads them to submit value-destructive proposals, then this would present a potential confounding variable.

95. Tara Bhandari et al., Governance Changes Through Shareholder Initiatives: The Case of Proxy Access (Jan. 17, 2017) (unpublished manuscript), https://ssrn.com/abstract=2635695 [https://perma.cc/L76G-F736].

96. *Id.* at 11–12.

97. *See id.* at 13.

98. *See id.* at 43 tbl.8, 23. These specifications also include controls for whether the firm was targeted by the BAP, whether the firm was previously targeted, firm size, and industry and year fixed effects.

99. *Id.* at 4–5.

structures," they pejoratively describe the trend toward standardization as a "one-size-fits-all" solution.[100] In other words, they appear to accept the optimal-heterogeneity premise and view the trend toward standardization as an unfortunate byproduct of the costs of designing proposals.[101]

The Bhandari, Iliev, and Kalodimos study provides several useful insights, but like many observational empirical studies of corporate governance, it is also subject to endogeneity problems.[102] To begin, one might question whether the BAP-announcement finding would generalize to a broader population of firms. Public statements by the Comptroller indicate that he selected the BAP target firms based on specific criteria, including a "fail[ure] to align executive compensation with business performance."[103] It is thus plausible that BAP-targeted firms, relative to those that the BAP did not target, were particularly likely to benefit from proxy access. Bhandari and her coauthors attempt to assuage this concern by presenting evidence that firms' abnormal returns surrounding the *Business Roundtable* stay and another announcement—their proxy for expected benefits from proxy access—do not predict whether the firms were targeted.[104] However, the Comptroller may have targeted firms for good reasons that their expected-benefit measure does not capture—for example, because the benefits became apparent only after these events, which occurred approximately four years before the BAP announcement.[105]

Additionally, the authors' brief discussion of the popularity of 3/3 proposals raises intriguing questions that merit further study. What role, if any, have proxy access terms other than ownership thresholds and holding periods played in driving vote outcomes? Bhandari and her

---

100. *Id.*

101. Indeed, Bhandari and her coauthors explicitly reject the possibility that the observed "convergence may be explained if the optimal terms for proxy access do not differ across firms," which they find "implausible given the initial variation in proposed terms and the variation across targets in their size and ownership structures." *Id.* at 19.

102. *See generally* Yair Listokin, *Interpreting Empirical Estimates of the Effect of Corporate Governance*, 10 AM. L. & ECON. REV. 90 (2008) (describing and modeling the endogeneity difficulties faced by empirical studies of corporate governance).

103. *Boardroom Accountability Project*, OFFICE OF THE N.Y.C. COMPTROLLER, https://comptroller.nyc.gov/services/financial-matters/boardroom-accountability-project/overview [https://perma.cc/JDW9-KLZF] (last visited Sept. 25, 2017).

104. *See* Bhandari et al., *supra* note 95, at 14–17.

105. *See id.* at 10–11 (noting the stay and Dodd announcements occurred in 2010, while the BAP announcement occurred in 2014).

coauthors apparently code only whether a proposal fits the 3/3 template, even though the proposals may have other substantive features, such as aggregation limits. And what role have preexisting and competing management provisions played? The Bhandari study does not track the presence of management-sponsored proxy access, which is important both as a descriptive matter and for assessing shareholders' preferences regarding terms. Finally, is there reason to suspect that coordination and collective-action problems do not account for the observed convergence toward standardized terms? The authors' regression analysis of vote outcomes indicates that 3/3 proposals are associated with greater shareholder support—which suggests that shareholders may *prefer* standardized terms—but there are numerous omitted variables that may account for this result.[106] Additional research is necessary to answer these questions.

II. A THEORY OF THE ROLE OF STANDARDIZATION IN CORPORATE GOVERNANCE

As previously discussed, scholars and other commentators frequently criticize both regulators' and private parties' attempts to standardize corporate law and governance.[107] According to this view, standardized corporate governance is inefficient because it fails to recognize firms' heterogeneity. But on reflection, there is no *a priori* reason this must be so, and as prior empirical research shows, there is frequently standardization in corporate contracting.[108] This Part thus offers an alternative theory, styled as an informal principal–agent model, in which standardization plays a positive role in corporate governance. Under this theory, principals prefer standardization because there are transaction costs associated with using the control rights they possess. Standardization reduces these transaction costs, thereby increasing principals' ability to hold their agents accountable. Section II.A describes the foundations of this informal model, while section II.B ties the theory to proxy access. Section II.C relates the theory to other explanations for

---

106. For example, it is possible that certain types of proponents, such as public pension funds, tend to both submit 3/3 proposals *and* target firms at which a proposal would enjoy success.

107. *See supra* notes 1–8, 63–69 and accompanying text.

108. *See* Kahan & Klausner, *supra* note 18, at 740–59.

the role of standardization, in both the property literature and the corporate law literature.

A. DIVERSIFICATION AND TRANSACTION COSTS AS DRIVERS OF STANDARDIZATION

To develop this theory, I begin with an informal principal–agent model based on the "principal costs" framework developed by Goshen and Squire.[109] In the first instance, I assume the principal is undiversified. As we shall see, this analysis suggests that the optimal corporate governance structure will vary from firm to firm. However, when the assumption that the principal is not diversified is relaxed, the recurring transaction costs that the principal must incur to exercise her control rights—costs that arise anew for each firm whose terms differ from those of other firms—increase the attractiveness of a standardized corporate governance structure.

1. Undiversified Ownership and Optimal Heterogeneity

Consider a principal (*P*) who hires an agent (*A*) to manage a widget-manufacturing firm (*F*). Assume *P* invests her entire savings in *F*, so she is undiversified. Since the future is uncertain, the parties' contract is necessarily "incomplete."[110] For example, technological change could render widgets obsolete, requiring a change in business strategy. The parties could attempt to specify in their initial contract how to handle such

---

109.   *See generally* Goshen & Squire, *supra* note 1.

110.   There is a substantial interdisciplinary body of literature in law and economics on "incomplete contracts." *See, e.g.*, Philippe Aghion & Patrick Bolton, *An Incomplete Contracts Approach to Financial Contracting*, 59 REV. ECON. STUD. 473 (1992); Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989); Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547 (2003); Arnoud W.A. Boot & Jonathan R. Macey, *Monitoring Corporate Performance: The Role of Objectivity, Proximity, and Adaptability in Corporate Governance*, 89 CORNELL L. REV. 356, 361 (2004); Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 426 (1993); Sanford J. Grossman & Oliver D. Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 J. POL. ECON. 691 (1986); Oliver Hart & John Moore, *Property Rights and the Nature of the Firm*, 98 J. POL. ECON. 1119 (1990); Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 COLUM. L. REV. 1641 (2003).

contingencies, but in many cases, it would be prohibitively costly (if not impossible) to do so. Instead, the contract assigns "control rights" (R) to one party or the other (or both). For instance, the contract might allocate day-to-day decisionmaking authority to A and give P the right to fire A for "good cause."

Assuming the parties wish to maximize the value of the enterprise, one can expect the parties to divide R between them with a view to minimizing the costs produced by each party's exercise of control. Goshen and Squire call these costs "principal costs" and "agent costs": principal costs are the costs that arise when P exercises control, and agent costs are the costs that arise when A exercises control.[111] By minimizing these costs, the parties maximize the cash flows available to them jointly and can then allocate these cash flows between them as they see fit. As Goshen and Squire explain, the relative efficiency of allocating R to one party or the other depends on firm-specific characteristics such as F's industry, P's expertise, and A's honesty.[112] Accordingly, if these characteristics do in fact vary in relevant ways from firm to firm, the optimal allocation of R will also vary from firm to firm.[113] This conclusion is essentially a version of the optimal-heterogeneity claim.

As an illustration, consider the previously mentioned right to fire for "good cause." Suppose that P is competent and can easily understand F's business. Here, the parties might efficiently define "good cause" expansively, allowing P to fire A for any reason (save perhaps racial or other discrimination)—in other words, at-will employment. Alternatively, suppose that P has limited competence, F has a complex business structure, and A is a genius with an "idiosyncratic vision" for the company.[114] The parties expect that A's idiosyncratic vision will lead to long-term profitability, but they also realize that P may be tempted to inefficiently interfere in the short term if she lacks the information

---

111.   *See* Goshen & Squire, *supra* note 1, at 784. Though related, Goshen and Squire's definition of "agent costs" differs somewhat from Jensen and Meckling's definition of "agency costs." While Goshen and Squire's definition is limited to costs that agents produce when they exercise control, the Jensen and Meckling definition also includes "monitoring costs" that Goshen and Squire would include within their definition of *principal* costs. *See id.* at 776–77, 784–85.

112.   *Id.* at 796–805.

113.   *See id.*

114.   *Cf.* Zohar Goshen & Assaf Hamdani, *Corporate Control and Idiosyncratic Vision*, 125 YALE L.J. 560 (2016).

necessary to accurately evaluate A's performance. In this case, the parties might efficiently define "good cause" such that a finding of fraud or self-dealing is necessary before P can fire A.

2. Diversification, Transaction Costs, and Optimal Standardization

So far, this analysis has assumed that P holds an undiversified investment portfolio consisting solely of equity in F. Let us now relax this assumption and consider another possibility: P holds a diversified portfolio consisting of 500 firms.[115] Assume further that there are two types of transaction costs associated with the exercise of any given R. First, P must incur costs to determine the scope of R. P bears this cost once per each unique R. Second, P must incur a cost to determine whether she can use R at a firm. This is a recurring cost: P must bear it again for each firm at which she wishes to use R. For example, to fire A under a "good cause" standard, P must first determine (1) the scope of the good cause standard and (2) whether A's conduct meets that standard. To the extent that the standard's content varies from firm to firm, P must incur the costs of determining this content again for each different firm (in addition to the costs of determining whether the standard applies to A's conduct).

These transaction costs can make standardization in R more efficient than heterogeneity. Consider again the good cause standard for firing A. If each firm in her portfolio has a different good cause standard, P must repeatedly incur the cost of determining the standard's scope for each individual firm in the portfolio. F_1 might define "good cause" to mean fraud or self-dealing; F_2 might define it to mean fraud, self-dealing, or

---

115. This condition is likely to be satisfied in the real word. Many investors, including those most likely to make use of proxy access, are diversified. *See, e.g.*, *Pension / Investment Management: Asset Allocation*, OFFICE OF THE N.Y.C. COMPTROLLER, http://comptroller.nyc.gov/services/financial-matters/pension/asset-allocation [https://perma.cc/L39R-BL3T] (last visited Sept. 25, 2017); 2009 CII Letter, *supra* note 16 (noting CII members' diversification). Indeed, a longstanding theoretical literature in finance has predicted that the average investor will own something resembling the "market." *See, e.g.*, William F. Sharpe, *Capital Asset Prices: A Theory of Market Equilibrium Under Conditions of Risk*, 19 J. FIN. 425 (1964). The capital asset pricing model (CAPM) implies that the mean-variance efficient portfolio consists of value-weighted interests in all capital assets. *See id.* The investor may then lever this portfolio up or down according to her risk aversion.

gross negligence; F_3 might define it to mean fraud, self-dealing, or simple negligence; and so on. If each firm has the same good cause standard, by contrast, P must incur this cost only once, and the only cost that remains is the cost of determining whether A's conduct meets the standard. The reduced transaction costs make it more likely that P will exercise the right when it is efficient to do so. In other words, the reduction of transaction costs improves allocative efficiency.[116]

As the preceding analysis shows, in the presence of diversification, standardization can be more efficient than heterogeneity. Without diversification, one might expect the parties to seek heterogeneity in governance to suit each firm's unique circumstances. But once P is diversified, the calculus changes. Diversification transforms suboptimal standardization into optimal standardization. Of course, this does not necessarily imply that complete standardization (i.e., wholesale uniformity) is optimal. Rather, one might characterize the resulting equilibrium as either "limited standardization" or "limited heterogeneity."

Two caveats are in order. My theory explains only a plausible basis for how standardization *could* be more efficient than heterogeneity. In the real world, things may be different. Transaction costs might be quite small. Investors might not be diversified. It is therefore necessary to turn to the empirical evidence to assess whether this theory holds outside of the ivory tower.

B. OPTIMAL STANDARDIZATION IN PROXY ACCESS

With this theory in mind, I now turn to proxy access. Could diversification and transaction costs explain a preference for standardized proxy access terms? To explore the plausibility of my theory and generate empirical predictions that can be tested, it is useful to think of the private ordering of proxy access in three stages: the proposal stage, the voting stage, and the use stage. Each stage involves transaction costs, and in theory, any of these transaction costs could lead to standardization. As shall become clear, however, the first two types of transaction costs essentially represent defects in the voting process, while only *use-stage* transaction costs—which are essentially the transaction costs discussed in the previous section—render standardized proxy access efficient.

---

116. Economists have long recognized that transaction costs impede allocative efficiency. *See, e.g.*, R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

1. Proposal-Stage and Voting-Stage Transaction Costs

In the "proposal stage" of the private ordering of proxy access, a shareholder proposes a proxy access bylaw through Rule 14a-8. To make a proposal, the proponent must both decide on a company to target and determine the terms of her proposal. These activities, however, require the proponent to spend time and money gathering information about the firm, such as the firm's business activities, ownership structure, and governance characteristics. These information-gathering expenses are transaction costs. Conceivably, these proposal-stage transaction costs could lead shareholders to propose a uniform set of terms based on what they believe to be the best set of terms "on average." Ultimately, these costs could lead firms to suboptimally adopt standardized terms, particularly if investors are not presented with alternatives. An empirical test might therefore look to whether investors were able to express a preference for alternative terms, whether presented by management or other shareholders.

In the "voting stage," shareholders vote on the proxy access proposal that appears on the corporate ballot. To determine how to vote, shareholders must assess whether the terms of the proposal are superior to (1) no proxy access (the "no-access default") and (2) management's proposed or preexisting alternative (if one exists). Again, however, these activities require the shareholders to spend time and money gathering information about the firm. Like in the proposal stage, these information-gathering expenses are transaction costs. Conceivably, these voting-stage transaction costs could lead investors to vote for standardized terms over alternative heterogeneous terms—even though alternative terms would be a better fit—if shareholders believe the voting-stage information-gathering costs will likely exceed the benefit, if any, that heterogeneous terms produce for them individually—particularly to the extent that each shareholder believes that her vote will not be dispositive. This could lead firms to adopt standardized terms if shareholders are not presented with credible information about the benefits of the alternative terms. An empirical test might therefore search for evidence of shareholders being unable to distinguish between the benefits of alternative terms.

2. Use-Stage Transaction Costs

In the "use stage," shareholders *use* a firm's proxy access bylaw to nominate a director candidate. Here, shareholders incur transaction costs

determining (1) the scope of the firm's proxy access provision and (2) how it will apply to their ability to nominate a candidate. These are essentially the same types of transaction costs that the theoretical discussion in Section II.A contemplates. Assuming the ECMH, one would expect shareholders to predict and discount to present value any such transaction costs that might arise when evaluating the relative efficiency of different proxy access terms at the voting stage. Accordingly, if use-stage transaction costs exceed the benefits produced by heterogeneity, these costs could explain shareholders' voting patterns and the trend toward standardization.

Some rudimentary formal analysis should clarify the potential effect of these use-stage transaction costs. For firm j, the firm's proxy access provision can be defined as the set of attributes $x_j = \{x_{j1}, x_{j2}, x_{j3}, \ldots, x_{jn}\}$, where x_{ji} is a term in the provision (e.g., ownership threshold, holding period, maximum slate, aggregation limit, etc.). The optimal-heterogeneity claim implies that the optimal x_j varies significantly from firm to firm, while the optimal-standardization theory implies that the optimal x_j will be standardized (at least relative to that predicted by the optimal-heterogeneity theory). For simplicity, suppose that x_j is univariate: the percentage of shares a shareholder must own to force the board to include the shareholder's nominees in the company proxy statement (the "ownership threshold"). One might understand the default rule (no proxy access) as $x_j = 50\%$. Each percentage value of x_j also has an economic value V_{x_j}. For example, suppose $V_{50\%} = \$85$, $V_{5\%} = \$95$, and $V_{3\%} = \$90$. In the absence of transaction costs, $x_j = 5\%$ is optimal.

Now, assume there are transaction costs associated with using x_j that reduce V_{x_j} by τ to $V_{x_j}^*$. The variable τ includes both the transaction costs themselves—which are a function of interpreting the scope and applicability of x_j—and, more importantly, the reduction in use of x_j below the optimal level. Partially because unfamiliar percentage values of x_j impose greater use-stage transaction costs—which in turn cause shareholders to use x_j less frequently than is optimal—the value of τ differs according to the percentage value of x_j. Suppose, for example, that for $x_j = 50\%$, $\tau = \$1$; for $x_j = 5\%$, $\tau = \$20$; and for $x_j = 3\%$, $\tau = \$5$. Using the same base economic values as before, this implies that $V_{50\%}^* = \$85 - \$1 = \$84$, $V_{5\%}^* = \$95 - \$20 = \$75$, and $V_{3\%}^* = \$90 - \$5 = \$85$. Once transaction costs enter the picture, $x_j = 3\%$ is optimal.

Use-stage transaction costs are likely real and substantial. To be sure, it would probably cost an investor little to determine the difference

between a 5% ownership threshold and a 3% ownership threshold. But in the real world, x_j is not univariate. Real proxy access bylaws are much more complicated than a simple ownership threshold, and a bylaw's terms—particularly the ownership threshold, holding period, aggregation limits, and procedural requirements—can interact in complex ways.[117] Nevertheless, the magnitude of these transaction costs and the extent to which they outweigh the benefits of heterogeneity are ultimately empirical questions. An empirical test might search for evidence that investors express a preference for standardized terms—an issue that Part III addresses.

C. Relation to Other Literature

My theory, whereby standardization in corporate governance is optimal because of diversification and use-stage transaction costs, is

---

117.   Consider, for example, the proxy access bylaw of McDonald's Corporation. At 3846 words, the McDonald's proxy access bylaw is written in the sort of dense legal jargon that only a high-priced attorney can decipher. *See* McDonald's Corp., Bylaws of McDonald's Corporation as Amended and Restated with Effect as of October 26, 2015 (Form 8-K) (Oct. 28, 2015). Even with a standardized form, shareholders may find it difficult to understand and ensure compliance with the bylaw. First, there are the eligibility requirements. Although the ownership threshold, holding period, and aggregation limits are relatively easy to find, *see id.* § 12(E), the definition of "ownership" itself is considerably more complex. To determine whether their shares "count" for the bylaw, shareholders would need to ensure that they hold both (1) "the full voting and investment rights pertaining to the shares" and (2) "the full economic interest in (including the opportunity for profit and risk of loss on)" the shares, subject to three relatively complicated exclusions. *Id.* § 12(A)(4). Particularly for groups of shareholders, ensuring compliance with these eligibility and ownership requirements could be quite onerous. Second, there is procedure. Not only does the proxy access provision itself impose various procedural requirements, but it also interacts with other terms in the McDonald's bylaws, including the advance-notice nomination requirements. *See id.* § 12(C). Ensuring compliance with these procedural requirements would require our would-be nominators to incur additional costs once they determine they are eligible. Particularly given that a shareholder considering using a firm's proxy access bylaw could incur all the aforementioned expenses only to discover they cannot use the bylaw, these costs could exert a strong deterrent effect on shareholders from ever using proxy access in the first place. With standardized bylaws, on the other hand, would-be nominators can realize economies of scope when determining their eligibility for proxy access at different firms.

related to—but distinct from—two other well-known theories in the literature. This section discusses and distinguishes these theories.

First, Professors Thomas Merrill and Henry Smith argue that the "*numerus clausus*," defined as "the principle that property rights must conform to certain standardized forms," underlies numerous different doctrinal areas in the law of property, from estates in land to intellectual property.[118] Merrill and Smith ultimately trace this standardization to the "*in rem* nature of property rights," namely the third-party information costs associated with acquiring and avoiding violating these rights.[119]

My theory, like Merrill and Smith's, links standardization with information costs, but it also departs in significant ways. While Merrill and Smith focus on how third parties must measure property rights to acquire and avoid violating these rights, my theory approaches the problem from a different angle: that of the rights holder. In my theory, the person incurring the measurement cost is an "owner" (or, if one prefers the contractarian metaphor,[120] a "party to the contract"), not an outsider

---

118.   Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1, 3–4, 9–24 (2000).

119.   *Id.* at 8, 24–42. Smith extends this analysis to contract boilerplate, focusing on the information externalities that deviation from boilerplate can produce. Henry E. Smith, *Modularity in Contracts: Boilerplate and Information Flow*, 104 MICH. L. REV. 1175, 1210–14 (2006). Professor Joshua Fairfield, also focusing on contracts, argues that standardization can reduce the information externalities associated with obtaining "informed consent." *See* Joshua Fairfield, *The Cost of Consent: Optimal Standardization in the Law of Contract*, 58 EMORY L.J. 1401, 1431–51 (2009). Smith's and Fairfield's theories are like my own in that we each focus on transaction costs, but in my theory, the transaction costs arise when parties to the contract attempt to *use* contractual rights they have already acquired, not when parties attempt to enter the contract in the first place. Additionally, Fairfield and Smith focus on externalities, whereas I focus on costs that the parties internalize. Finally, Professors Charles Goetz and Robert Scott frame the benefits of contractual standardization in terms of error reduction. *See* Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interaction Between Express and Implied Contract Terms*, 73 CAL. L. REV. 261, 264–89 (1985). To the extent that "error" reduction plays a role in my theory, the error reduction consists of less costly use of corporate governance rights rather than merely a reduced incidence of interpretive errors.

120.   The contractarian paradigm has been dominant in corporate law for decades. *See* Michael Klausner, *The Contractarian Theory of Corporate Law: A Generation Later*, 31 J. CORP. L. 779 (2006). Some scholars have offered alternative accounts. *See, e.g.*, Victor Brudney, *Corporate Governance, Agency Costs, and the Rhetoric of Contract*, 85 COLUM. L. REV. 1403 (1985); Melvin A. Eisenberg, *The Conception that the Corporation*

who wishes to acquire the right or avoid violating it. An important consequence of this distinction is that the creators of the costs produced by heterogeneous corporate governance terms must *internalize* these costs,[121] while the information costs that Merrill and Smith discuss are *externalities*. This distinction is crucial given the common understanding that the law should regulate conduct that generates externalities differently from conduct that does not.[122]

Second, Professors Marcel Kahan and Michael Klausner identify "learning" and "network" benefits as drivers of standardization in corporate contracting.[123] As Kahan and Klausner explain, the former "arise[] when a firm adopts a contract term that has been commonly used in the past," while the latter "arise[] when a firm adopts a term that will be part of the firm's contract at the same time that it is part of many other firms' contracts."[124] Examples of learning benefits include "drafting efficiency," "reduced uncertainty over the meaning and validity of a term due to prior judicial rulings," and "familiarity with a term among lawyers, other professionals, and the investment community."[125] Examples of network benefits include "higher quality and lower cost legal and professional services" as a result of professionals' familiarity with the term, more accurate pricing of the term as a result of investors' and analysts' pricing of the term, and the clarity afforded by "judicial interpretations" of the term.[126]

My theory, like Kahan and Klausner's, focuses on market actors' familiarity with the terms. If one understands learning and network benefits as *cost savings*, then these benefits are equivalent to the reduction

---

Is a Nexus of Contracts, and the Dual Nature of the Firm, 24 J. CORP. L. 819 (1999); Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The* Numerus Clausus *Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. 373 (2002).

121.   To the extent that standardized terms create network benefits, this internalization need not necessarily be complete.

122.   *See, e.g.*, Roberta Romano, *Answering the Wrong Question: The Tenuous Case for Mandatory Corporate Laws*, 89 COLUM. L. REV. 1599, 1616–17 (1989) (favoring mandatory rules if and only if externalities exist).

123.   Kahan & Klausner, *supra* note 18. Klausner analyzes network effects in additional detail in Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757 (1995).

124.   Kahan & Klausner, *supra* note 18, at 718.

125.   *Id.* at 719–20.

126.   *Id.* at 726.

of transaction costs.[127] However, the transaction cost framework yields additional useful insights. First, while Kahan and Klausner focus on learning and network *externalities*,[128] my theory approaches the issue from the vantage point of a diversified principal who internalizes these costs. My theory can thus explain the presence of standardization even in the absence of externalities, which again is relevant for law and policy given the common understanding that the law ought to treat conduct that produces externalities differently from conduct that does not. Second, my framework builds on a school of thought with a rich, longstanding history in law and economics: the transaction costs approach. Transaction costs have featured prominently in law and economics scholarship ever since Coase popularized the concept in the early-to-mid-twentieth century.[129]

III. Empirical Evidence on the Private Ordering of Proxy Access

As Part I explained, there has been vociferous debate about the place of proxy access in corporate law and governance, with empirical research yielding mixed results. The "one-size-does-not-fit-all" critique—a

---

127. It is important to note that Kahan's and Klausner's discussion of network externalities focuses on *positive* externalities—that is, externalities that benefit third parties. If one understands "out-of-network" contractual provisions as imposing negative externalities in the form of transaction costs, then these negative externalities would be akin to the transaction costs that I have identified. As discussed below, however, my theory does not depend on externalities at all; it can exist in a universe in which there is only one principal.

128. Kahan & Klausner, *supra* note 18, at 715–17.

129. *See generally* R. H. Coase, *The Nature of the Firm*, 4 Economica 386 (1937); Coase, *supra* note 116. Other important works include Oliver E. Williamson, *The Economics of Organization: The Transaction Cost Approach*, 87 Am. J. Soc. 548 (1981); Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J.L. & Econ. 233 (1979). Prominent Delaware jurists have also recognized the importance of transaction costs. Drawing on their experience resolving alternative-entity disputes, Chief Justice Leo Strine and Vice Chancellor Travis Laster observe that unlimited contractual freedom can impose transaction costs to the extent that investors must evaluate unfamiliar terms in LLC and other alternative-entity governing documents. *See* Leo E. Strine, Jr. & J. Travis Laster, *The Siren Song of Unlimited Contractual Freedom*, *in* Research Handbook on Partnerships, LLCs and Alternative Forms of Business Organizations 11, 18 (Robert W. Hillman & Mark J. Loewenstein eds., 2015). Chief Justice Strine and Vice Chancellor Laster note that standardization can reduce these transaction costs. *Id.*

familiar criticism in corporate law scholarship and commentary—has been perhaps the most common argument leveled against proxy access.[130] These critics, believing that heterogeneity in terms is optimal, championed private ordering as allowing firms to tailor their provision of proxy access to their diverse circumstances. But as Part II demonstrates, there are sound theoretical reasons to doubt the underlying premise that heterogeneity in terms is necessarily optimal.

Ultimately, however, these issues cannot be resolved based on theory alone. This Part therefore takes an empirical turn, analyzing the drivers and effects of vote outcomes for over 200 proxy access shareholder proposals from the 2012 through 2016 proxy seasons and presenting evidence on the proxy access regimes that firms adopted in response. Section III.A describes the data. Section III.B presents descriptive statistics, which show a convergence over time toward standardized terms, greater shareholder support for proposals that feature standardized terms, and a convergence toward standardized terms even in firms' adopted proxy access regimes. Section III.C reports the results of a regression analysis of shareholder proposal vote outcomes, showing that the presence of standardized terms is associated with significantly higher shareholder support. Finally, Section III.D employs a regression-discontinuity design to assess the market reaction to "close call" votes, providing evidence that the market has generally attached a positive value to those proposals. Overall, these findings support the optimal-standardization theory developed in Part II.

A. DATA

To evaluate the past several years' private ordering of proxy access, I collected data from several sources. First, I gathered data on shareholder proposals and vote outcomes for all publicly traded companies in FactSet's Shark Repellent database[131] from 2012 through 2016 and extracted the proxy statements of these proposals from EDGAR.[132] I then read these proxy statements, hand coded the proposals' substantive terms

---

130. *See supra* notes 1–8, 63–69 and accompanying text.

131. SHARKREPELLENT.NET, https://sharkrepellent.net [https://perma.cc/RWJ9-AH BE] (last visited Apr. 23, 2017).

132. *EDGAR: Company Filings*, U.S. SEC. & EXCHANGE COMMISSION, https://www.sec.gov/edgar/searchedgar/companysearch.html [https://perma.cc/AL4E-S 577] (last visited Sept. 26, 2017).

along eleven dimensions, and hand coded the major substantive terms of any dueling management proposal or preexisting proxy access bylaw that the firm had already adopted. For ease of analysis, I created four dummy variables[133] from these hand-coded data: the first equal to 1 if the proposal was a standard "3/3" proposal, the second equal to 1 if the proposal contained all the other details from the BAP proposal template,[134] the third equal to 1 if there was either a dueling or preexisting 3/3 provision, and the fourth equal to 1 if there was either a dueling or preexisting 5/3 provision. All dueling and preexisting provisions fit either the 3/3 or 5/3 mold. Next, I gathered data on firms' adopted proxy access regimes as of January 31, 2017 from a dataset produced by Covington & Burling attorneys and published by the Council of Institutional Investors (CII).[135] I then linked the proposal and vote-outcome data with various other commonly used databases, including financial statement data from FactSet Fundamentals,[136] ownership data from FactSet Ownership,[137] governance and board data from Institutional Shareholder Services (ISS),[138] and stock-return data from the Center for Research on Security Prices (CRSP).[139] For all analyses, I exclude firms with more than one class of common stock. This process yielded 213 total firm-year observations for the shareholder proposals. The Appendix includes my coding rubric, variable definitions, summary statistics, and an example of a BAP-style proposal.

---

133.   A dummy variable is a binary variable that can take only one of two values: 1 or 0.

134.   For additional explanation, *see infra* Appendix at Table A.1.

135.   Updates are available at *Proxy Access*, COUNCIL OF INSTITUTIONAL INV., http://www.cii.org/proxy_access [https://perma.cc/K465-MNXA] (last visited Sept. 26, 2017). I will provide the January 2017 version upon request.

136.   *Data: Fundamentals*, FACTSET, https://www.factset.com/data/company_data/fundamentals [https://perma.cc/UMB8-NVLX] (last visited Sept. 26, 2017).

137.   *Data: Ownership*, FACTSET, https://www.factset.com/data/company_data/ownership [https://perma.cc/7LLY-2R52] (last visited Sept. 26, 2017).

138.   *ISS Analytics,* INSTITUTIONAL SHAREHOLDER SERVS., https://www.issgovernance.com/solutions/iss-analytics [https://perma.cc/USY7-ZYFK] (last visited Oct. 21, 2017).

139.   *CRSP US Stock Databases*, U. CHI. BOOTH SCH. BUS. CTR. FOR RES. SEC. PRICES, http://www.crsp.com/products/research-products/crsp-us-stock-databases [https://perma.cc/RD7E-N7EE] (last visited Sept. 26, 2017).

B. Descriptive Statistics: Proposal Terms, Vote Outcomes, and
Provisions in Effect

The descriptive statistics reveal several interesting trends. First, the shareholder proposals in my sample are remarkably standardized, with a clear majority (80%) fitting the BAP template—3% ownership requirement, three-year holding period, 25% maximum slate, and no aggregation limit (among other details). As Figure 1 shows, this standardization began slowly, with most proposals during the first two years not even fitting the 3/3 form. In 2015, however, the standardization reached a tipping point, and by 2016, nearly all proposals fit the standard BAP template.

Figure 1: Vote Outcomes by Proposed Terms over Time[140]
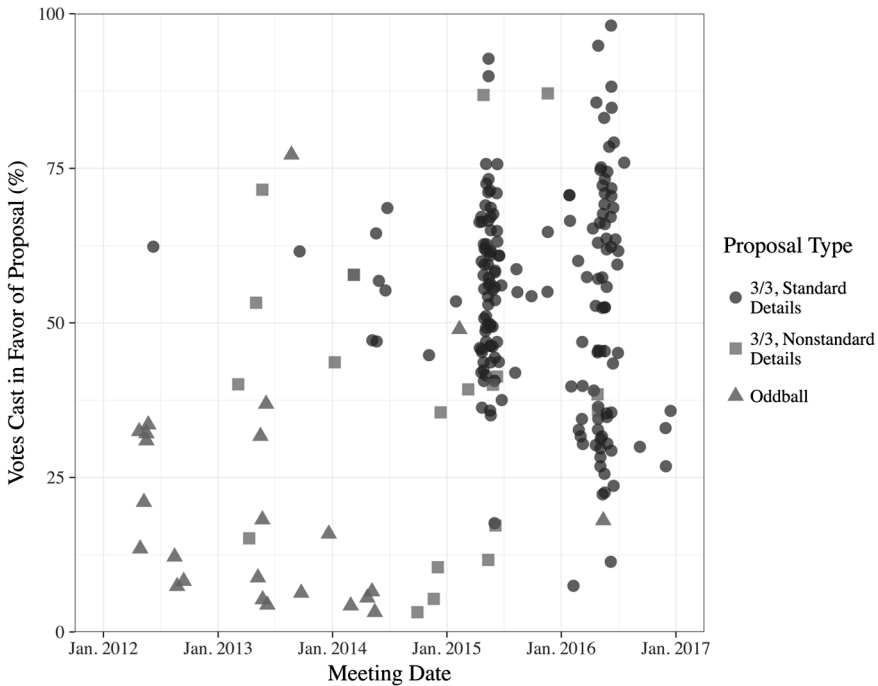
The second noteworthy trend, apparent from a casual visual inspection of Figure 1, is that standardized proposals appear to have garnered greater shareholder support, measured as the percentage votes cast in favor, than nonstandard proposals. Indeed, Figure 2 confirms that on average, BAP-style 3/3 proposals have earned the greatest amount of support, followed by 3/3 proposals with nonstandard details, and finally "oddball" proposals that do not follow the 3/3 template. These results suggest that shareholders may in fact *prefer* standardized proposals, although additional analysis will be necessary to confirm this.

---

140.   "3/3, Standard Details" refers to proposals that follow all substantive terms of the BAP template. "3/3, Nonstandard Details" refers to proposals that contain a 3% ownership threshold and three-year holding period but fail to follow some or all of the other BAP details. "Oddball" refers to proposals that do not follow the 3/3 standard.

Figure 2: Mean Vote Outcomes by Proposed Terms[141]
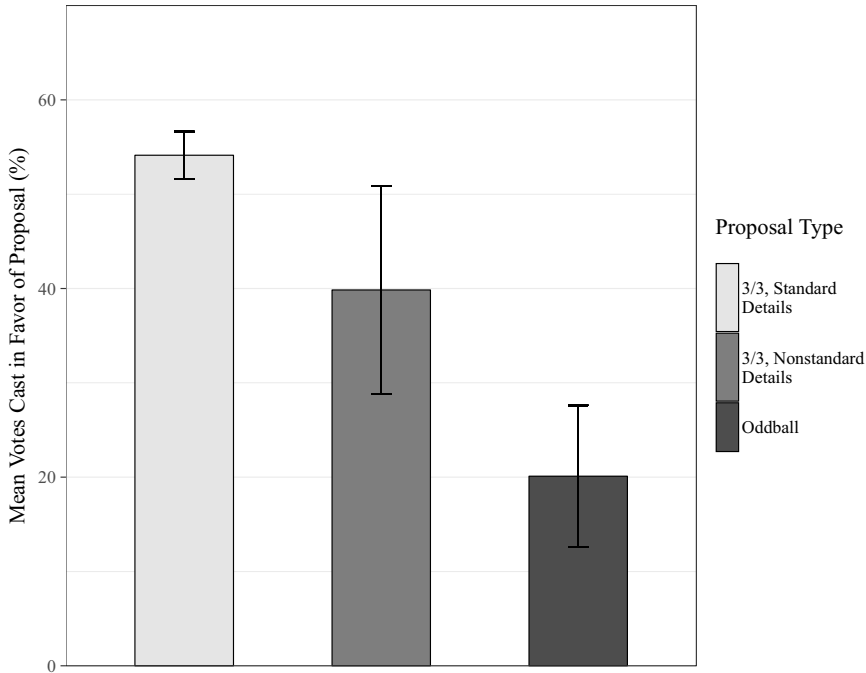
Another dimension on which to view the shareholder proposals is the presence, if any, of a competing management proposal or preexisting proxy access bylaw. Figure 3 restricts the sample to standardized BAP-style proposals and shows vote outcomes over time by the terms of the competing management proposal or preexisting bylaw, if any (collapsing these two categories into one). As Figure 3 shows, no competing provision existed opposite a BAP-style shareholder proposal until 2015, when thirteen 5/3 proposals and two 3/3 proposals appeared. In 2016, as firms adopted proxy access in greater numbers,[142] numerous competing provisions appeared, mostly fitting the 3/3 mold.

---

141.   "3/3, Standard Details" refers to proposals that follow all substantive terms of the BAP template. "3/3, Nonstandard Details" refers to proposals that contain a 3% ownership threshold and three-year holding period but fail to follow some or all of the other BAP details. "Oddball" refers to proposals that do not follow the 3/3 standard. Error bars represent 95% confidence intervals.

142.   *See* GIBSON DUNN & CRUTCHER LLP, SHAREHOLDER PROPOSAL DEVELOPMENTS DURING THE 2016 PROXY SEASON 19 (2016), http://www.gibsondunn.com/publications/ Documents/Shareholder-Proposal-Developments-2016-Proxy-Season.pdf [https://perma .cc/ZA29-NBW2].

Figure 3: BAP-Style Proposal Vote Outcomes by Management Terms over Time[143]
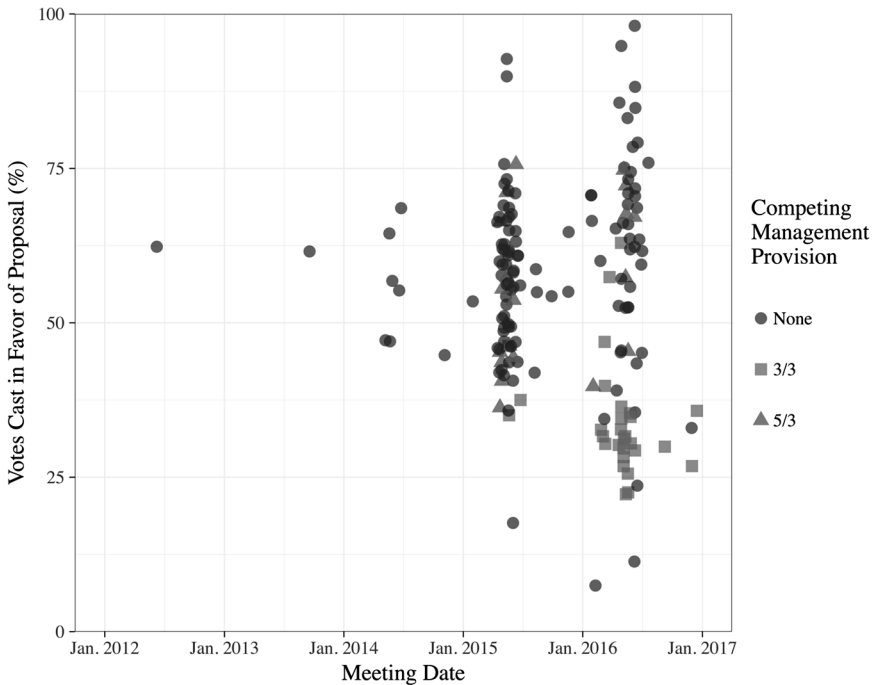
Casual visual inspection of Figure 3 suggests that shareholder support for proposals facing competing 5/3 provisions was relatively indistinguishable from shareholder support for proposals that faced no competing provision at all, while shareholder support for proposals facing competing 3/3 provisions tended to be significantly lower than support for other proposals. Again, Figure 4 confirms this: on average, shareholder proposals facing competing 3/3 provisions received significantly lower support, but there is little difference between the other two categories. One plausible explanation for these results is that while shareholders prefer the BAP template compared to other shareholder proposals, they have also preferred boards' "improvements" over shareholder-proponents' templates.

---

143. "3/3, Standard Details" refers to proposals that follow all substantive terms of the BAP template. "3/3, Nonstandard Details" refers to proposals that contain a 3% ownership threshold and three-year holding period but fail to follow some or all of the other BAP details. "Oddball" refers to proposals that do not follow the 3/3 standard.

Figure 4: Mean BAP-Style Proposal Vote Outcomes by Management Terms[144]
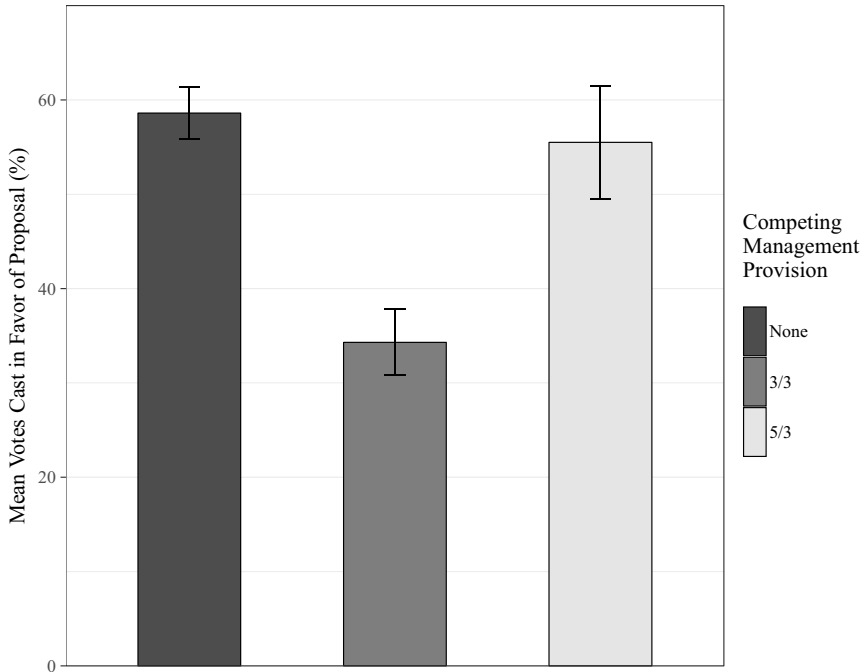
Finally, one might wonder how the terms of the proxy access provisions that firms have adopted compare to those proposed. Focusing on four major terms (ownership threshold, holding period, maximum slate, and aggregation limits),[145] Table 1 tracks these terms' distribution along three different categories: all shareholder proposals that made it to a vote, majority-supported shareholder proposals, and provisions in

---

144.   "3/3, Standard Details" refers to proposals that follow all substantive terms of the BAP template. "3/3, Nonstandard Details" refers to proposals that contain a 3% ownership threshold and three-year holding period but fail to follow some or all of the other BAP details. "Oddball" refers to proposals that do not follow the 3/3 standard. Error bars represent 95% confidence intervals.

145.   For an explanation of how I coded these terms, *see infra* Appendix at Table A.1. I view these as the most "major" terms in part because practitioner-authored reports focus principally on these four terms. *See, e.g.*, Yafit Cohn, *The 2016 Proxy Season: Proxy Access Proposals*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Aug. 26, 2016), https://corpgov.law.harvard.edu/2016/08/26/the-2016-proxy-season-proxy-access-proposals [https://perma.cc/8224-M8UJ], and in part because these are the terms about which I observed the most disagreement between boards and shareholder-proponents in the proxy statements that I coded.

effect. Each cell in the left-hand column displays the value of the term, and each cell in the three right-hand columns displays the percentage of provisions that feature that value. For example, Table 1a indicates that out of all shareholder proposals that went to a vote, 8.9% featured a 1% ownership threshold.

Overall, Table 1 shows a remarkable standardization across all four terms. The ownership requirement has converged around 3% across all three categories, and the holding period has converged around three years. Meanwhile, the maximum slate and aggregation limits have also converged around standardized terms, but the provisions in effect are slightly more restrictive than the proposed terms: the maximum slate has dropped from 25% to 20%, and aggregation limits have gone from nonexistent to up to twenty shareholders. These drops would be consistent with either an agency-cost explanation or an efficiency-based explanation—that is, the drops may be attributable to either managerial opportunism (perhaps combined with asset-manager opportunism) or the possibility that market participants correctly judged that the additional shareholder power would increase principal costs more than it would reduce agency costs.[146]

---

146. *See generally* Goshen & Squire, *supra* note 1.

Table 1: Major Terms of Proposals and Adopted Provisions

Table 1a: Ownership Threshold			
Value	Proposals (All)	Proposals (Passed)	Provisions in Effect
1%	8.9%	0.9%	0.0%
1.5%	0.5%	0.0%	0.0%
2%	1.4%	0.0%	0.0%
3%	89.2%	99.1%	96.8%
5%	0.0%	0.0%	2.4%
20%	0.0%	0.0%	0.8%
Table 1b: Holding Period (Years)			
Value	Proposals (All)	Proposals (Passed)	Provisions in Effect
1	4.2%	0.9%	1.6%
2	7.0%	0.0%	0.4%
3	88.7%	99.1%	97.2%
Unspecified	0.0%	0.0%	0.8%
Table 1c: Maximum Slate			
Value	Proposals (All)	Proposals (Passed)	Provisions in Effect
20%	3.8%	4.7%	83.4%
24%	2.3%	0.0%	0.0%
25%	85.9%	94.3%	14.2%
34%	0.5%	0.0%	0.0%
40%	1.4%	0.0%	0.0%
48%	5.2%	0.0%	0.0%
Other	0.0%	0.0%	0.8%
No Limit	0.9%	0.9%	1.2%
Table 1d: Aggregation Limits			
Value	Proposals (All)	Proposals (Passed)	Provisions in Effect
Up to 20	0%	0%	88.1%
Up to 25	0%	0%	2.8%
None	100%	100%	2.8%
Other	0%	0%	6.3%

* * *

In sum, the descriptive statistics presented in this section show that the private ordering of proxy access has produced remarkable standardization, both overall and over time. Among proposals that made it to a vote, majority-supported proposals, and provisions in effect, the major terms have been relatively uniform. Additionally, shareholders

have tended to express greater support, measured by the percentage of votes cast in favor, for standardized proposals. For those commentators who expected the private ordering of proxy access to produce heterogeneity in terms, these findings should be surprising. Not only have shareholders tended to submit proposals containing standardized terms, but the proposals they have approved have tended to be even more standardized. And boards have not avoided the one-size-fits-all phenomenon. Although two of the provisions in effect are more restrictive than shareholders' proposals, they have still converged around standardized terms. In the end, the so-called "3/3/20/20" model has become market standard.[147]

C. REGRESSION ANALYSIS: STANDARDIZATION AND VOTE OUTCOMES

As the previous section shows, the private ordering of proxy access has converged toward standardized terms. Despite this convergence, however, it is still unclear whether shareholders in fact *prefer* this standardization. Ultimately, it is possible that shareholders' collective-action problems have impeded them from obtaining the optimal heterogeneity that they would like.[148] Although shareholders' greater support for proposals featuring standardized terms suggests they have preferred these terms, it is unclear whether this greater support is attributable to the terms themselves or to some omitted variable. For example, it is possible that the shareholder-proponents who submit standardized proposals are simply more effective at identifying the firms that most need proxy access, and the greater support for standardized proposals is a product of other shareholders' recognition that the firms would benefit more from proxy access. Indeed, given the NYC Comptroller's stated reasons for selecting the BAP's target firms, this is a plausible theory.[149] It is therefore necessary to dive deeper into the data to eliminate alternative explanations.

---

147.   *See* Alexandra Higgins & Peter Kimball, *The Finer Points of Proxy Access Come Under the Microscope*, INSTITUTIONAL SHAREHOLDER SERVS.: GOVERNANCE INSIGHTS, https://www.issgovernance.com/finer-points-proxy-access-bylaws-come-microscope [https://perma.cc/8FXJ-RQ6S] (last visited Sept. 26, 2017) (noting "[t]he basic features of proxy access bylaws are largely consistent" and the 3/3/20/20 model "has taken hold as the most widely adopted model").

148.   *See* Bhandari et al., *supra* note 95, at 4–5.

149.   *See Boardroom Accountability Project*, *supra* note 103, and accompanying text.

To shed additional light on shareholders' apparent preferences, I run several multivariate ordinary least squares (OLS) regressions with the votes cast in favor of the proposal as the outcome variable. The main explanatory variables of interest are dummy variables indicating whether the proposal fit the "3/3" template, whether the proposal included the additional BAP-template details, and whether there was a "competing" (i.e., concurrently proposed or preexisting) management provision (which I divide into two categories, according to whether the competing provision fit the 3/3 template or the 5/3 template[150]). As controls, I include covariates related to whether management recommended voting "for" the proposal, the firms' ownership, governance, board composition, financial characteristics, and lagged risk-adjusted stock returns, shareholders' views toward the firms' executive compensation, and fixed effects for proponent type, industry, and year. These controls, described further in the Appendix,[151] help to eliminate alternative explanations for any observed association between standardization and shareholder support. Table 2 reports the results of these regressions, with most of the controls omitted from the table for ease of exposition.

---

150.   As previously explained, all competing provisions in the sample fit one of those two templates.

151.   *See infra* Appendix at Table A.2.

Table 2: OLS Regression Analysis of Vote Outcomes[152]

	(1)	(2)	(3)	(4)	(5)
			Dependent Variable		
			Votes Cast in Favor of Proposal (%)		
3/3	20.231***	17.356***	26.995***	28.936***	29.878***
	(6.315)	(5.688)	(6.515)	(7.284)	(6.328)
BAP	14.211***	20.449***	14.193**	14.975**	8.518*
	(5.286)	(4.442)	(6.178)	(6.979)	(5.073)
Comp. (3/3)		−22.780***	−22.395***	−23.837***	−29.593***
		(2.205)	(3.679)	(3.888)	(3.721)
Comp. (5/3)		−0.837	−5.060*	−5.977*	−11.083***
		(2.539)	(2.853)	(3.255)	(3.058)
Mgmt. Rec.		35.261***	37.697***	37.048***	34.923***
		(6.452)	(6.544)	(7.697)	(7.609)
Constant	19.506***	19.281***	25.312	18.636	8.591
	(3.886)	(3.974)	(15.888)	(20.665)	(23.087)
Firm Controls	No	No	Yes	Yes	Yes
Proponent-Type F.E.	No	No	Yes	Yes	Yes
Industry F.E.	No	No	No	Yes	Yes
Year F.E.	No	No	No	No	Yes
Obs.	213	213	167	167	167
R^2	0.283	0.507	0.731	0.769	0.822
Adjusted R^2	0.276	0.495	0.665	0.666	0.734
F Statistic	34.969***	36.808***	21.094***	22.667***	30.567***

Note: *$p < 0.1$; **$p < 0.05$; ***$p < 0.01$

This regression analysis supports the view that shareholders have indeed preferred standardized terms. Across all specifications, including those with controls, the coefficients for the standardized-term variables are large and statistically significant. For example, the fifth model indicates that the presence of a 3/3 proposal is associated with an additional thirty percentage points of shareholder support for the proposal

---

152.   Figures in parentheses are robust standard errors clustered at the firm level.

and the presence of all additional BAP details is associated with an additional nine percentage points of shareholder support.

This analysis also yields useful insights regarding shareholders' views toward competing management provisions. Consistent with the previous section's descriptive statistics, shareholders appear to have preferred boards' competing provisions—so long as they fit the 3/3 mold. Across all specifications, the coefficients for the competing 3/3 dummy are large and statistically significant. The fifth model, for example, shows that the presence of a competing 3/3 provision is associated with thirty fewer percentage points in support for the shareholder proposal. The coefficients for the competing 5/3 variable, by contrast, are much lower, and their statistical significance is sensitive to the specification. One might reasonably interpret these results to suggest that shareholders have generally preferred boards' "improvements" to shareholders' proposed terms so long as the company provisions fit the 3/3 template. The presence of a competing 5/3 provision, on the other hand, appears to have reduced support for the shareholder proposal only slightly, if at all. In other words, to the extent that shareholders have exhibited a preference for proxy access, it appears to have been for standard 3/3 terms with the additional BAP details and whatever innovations management has offered—a standard model for proxy access.

Framed in terms of the theory developed in Part II, the evidence is consistent with the possibility that use-stage transaction costs make standardization optimal in some instances. First, proposal-stage transaction costs cannot fully explain the prevalence of standardization in proxy access. While proposal-stage transaction costs could conceivably explain such phenomena as proponents' use of the same proposal template for different firms, these costs cannot adequately explain shareholders' rejection of alternative proposals presented by other shareholders and management. [153] Despite the overall trend toward convergence, shareholders *did* present alternative terms toward the beginning of the private ordering of proxy access (including lower ownership thresholds), and management *did* present shareholders with their own alternative terms (including higher ownership thresholds).[154] Second, nor can voting-stage transaction costs explain the convergence toward standardized terms. When management presented shareholders

---

153. *See supra* Sections III.A.–B.
154. *See supra* Section III.A.

with two types of more onerous terms—five-year ownership thresholds and twenty-shareholder aggregation limits—and the potential benefits of these provisions, shareholders appear to have rejected the former and accepted the latter,[155] suggesting that they have not been passive voters.[156] And ultimately, firms adopted a standardized template.[157] This leaves the third type of transaction cost—use-stage transaction costs—as the most likely culprit.

Two caveats are in order. First, as with all observational, correlational studies, it is difficult to draw a causal inference. Although reverse causality is not a concern,[158] there is always a possibility that omitted variables are driving the observed relationship between standardized terms and shareholder support. I include the more obvious candidates as controls, though, so this possibility seems remote enough—especially considering the size of the standardized-term variables' coefficients. Second, and perhaps more significantly, the possibility of an additional layer of agency costs limits one's ability to infer shareholder value from these vote outcomes. Even if the persons who vote shareholders' proxies appear to prefer standardized terms, many of those making voting decisions are agents themselves, which creates the possibility of what Professors Ronald Gilson and Jeffrey Gordon call the "agency costs of agency capitalism"[159] or what Chief Justice Strine calls "the separation of 'ownership from ownership.'"[160] For example, the

---

155.   *See supra* Sections III.A.–B.

156.   Nor does it seem that shareholders have simply voted on what they believed was best for the "average" firm. Shareholders rejected proxy access altogether in many instances, *see supra* Section III.A., which suggests that they sometimes judged that the "no-access default" was superior.

157.   *See supra* Section III.A.

158.   Because the explanatory variables—including the proposal terms—are temporally prior to the vote outcomes, the vote outcomes could not be exerting an effect on the values of the explanatory variables.

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

160.   *See generally* Leo E. Strine, Jr., *Toward a True Corporate Republic: A Traditionalist Response to Bebchuk's Solution for Improving Corporate America*, 119 HARV. L. REV. 1759, 1764–66 (2006); Leo E. Strine, Jr., *Can We Do Better by Ordinary Investors? A Pragmatic Reaction to the Dueling Ideological Mythologists of Corporate Law*, 114 COLUM. L. REV. 449 (2014). Additionally, vote outcomes may diverge from

employees of large institutional investors such as BlackRock who control the firms' proxy-voting policies might prefer standardization because the burden of handling differing proxy access regimes would fall disproportionately on them, without any of the commensurate benefit. Indeed, prior literature has criticized the "corporate governance industry" for supporting one-size-fits-all "best practices" that fail to recognize firm heterogeneity.[161]

D. Regression-Discontinuity Design: Assessing the Market Reaction to "Close Calls"

Given the possibility of a divergence in interests between those making voting decisions and the votes' ultimate beneficiaries, it would be appropriate to look to other sources to gain insight into the efficiency of the standardized proxy access described in the preceding sections. Assuming that share prices reflect all (or close to all) publicly available information, market reactions may provide a better basis for assessing the value of this standardized proxy access.[162] Following recent research in finance,[163] I therefore employ a regression-discontinuity (RD) design, limiting the sample to BAP-style proposals only and excluding proposals that face a competing management-sponsored 3/3 provision,[164] to estimate the average value of these standardized provisions to

---

optimal outcomes even without these agency costs. *See generally* Yair Listokin, *Corporate Voting Versus Market Price Setting*, 11 AM. L. & ECON. REV. 608 (2009).

161.   Rose, *supra* note 7, at 916–19.

162.   *Cf.* Rauterberg & Talley, *supra* note 74, at 1133 (assessing the value of "corporate opportunity waivers" by reference to market reactions to their disclosure).

163.   *See* Vicente Cuñat et al., *The Vote Is Cast: The Effect of Corporate Governance on Shareholder Value*, 67 J. FIN. 1943 (2012) [hereinafter Cuñat et al., *Vote Is Cast*]; Vicente Cuñat et al., *Say Pays! Shareholder Voice and Firm Performance*, 20 REV. FIN. 1799 (2016); Caroline Flammer, *Does Corporate Social Responsibility Lead to Superior Financial Performance? A Regression Discontinuity Approach*, 61 MGMT. SCI. 2549 (2015); Vicente Cuñat et al., *Corporate Governance and Value: Evidence from "Close Calls" on Shareholder Governance Proposals*, 25 J. APPLIED CORP. FIN. 44 (2013) [hereinafter Cuñat et al., *Corporate Governance and Value*].

164.   I limit the sample to BAP-style proposals only and exclude proposals that face management-sponsored 3/3 provisions to isolate the value of standardized proxy access. Incidentally, this also helps to avoid endogeneity problems that could arise if proponents tailored proposal terms to companies' circumstances—because I consider only standardized proposals, proponents cannot tailoring the terms to each company.

shareholders. This section explains the research design in greater detail and reports the results of this analysis.

1. Empirical Design and Caveats

RD is a research design that attempts to approximate a randomized experiment using observational data. To begin, the researcher identifies a "running variable" and assigns observations on one side of some threshold (or "cutoff" point) to a treatment group and observations on the other side of the threshold to a control group.[165] The researcher then effectively limits the sample to observations that lie very close to the threshold and calculates the difference in mean values of the outcome variable of interest between the control and treatment groups. For example, a researcher interested in the effect of a scholarship whose grant is conditional on passing a bright-line threshold, such as eighty points on a test, might compare the mean post-test income of students who earn eighty points (the treatment group) with that of students who earn seventy-nine points (the control group).[166] By focusing on these "close call" observations, the researcher can make a causal inference regarding the effect of the scholarship on income. So long as the agent cannot precisely control whether she ends up on one side of the threshold or the other, assignment to the treatment or control group is "as good as randomized," making the RD design resemble the gold standard of a classic randomized experiment.[167]

Following the dominant approach in the literature,[168] I measure market reactions as cumulative abnormal returns (CARs) using an event-study approach.[169] I use the date on which the annual-meeting vote results

---

165. David S. Lee & Thomas Lemieux, *Regression Discontinuity Designs in Economics*, 48 J. ECON. LITERATURE 281, 281 (2010).

166. This example comes from the first introduction of RD in the 1960s. *See* Donald L. Thistlethwaite & Donald T. Campbell, *Regression-Discontinuity Analysis: An Alternative to the Ex Post Facto Experiment*, 51 J. EDUC. PSYCHOL. 309 (1960).

167. Lee & Lemieux, *supra* note 165, at 282 (internal quotation marks omitted).

168. *See supra* note 163.

169. For an explanation of the event-study approach, *see supra* Section I.B.1. To infer that market reactions provide evidence of the socially optimal regime, one must assume that market valuations provide unbiased estimates of the securities' values. The ECMH implies this proposition. *See supra* note 80. It is also possible that market valuations are biased, for example toward "short-termism." *See, e.g.*, Lynn A. Stout, *The Mechanisms of Market Inefficiency: An Introduction to the New Finance*, 28 J. CORP. L. 635, 653–55

were disclosed on the company's Form 8-K as the event date, with the event window beginning the day before the filing date and ending the day after the filing—a "(−1, +1)" event window.[170] Each firm's CARs are the difference between expected returns, which I alternatively estimate using a market model, the Fama–French three-factor model, and the Fama–French–Carhart four-factor model,[171] and actual returns.[172] These CARs are then the outcome variable for the RD design. I use the percentage of votes cast in favor of the proposal for the running variable,[173] with fifty percent as the cutoff point. In my baseline model, I run local linear regressions on each side of the cutoff point,[174] following the Imbens–Kalyanaraman approach to calculate optimal bandwidth.[175] Essentially,

---

(2003). On the whole, the available empirical evidence does not support the short-termism view. Mark J. Roe, *Corporate Short-Termism—In the Boardroom and in the Courtroom*, 68 BUS. LAW. 977, 1005 (2013).

170.   Prior research has used an event window centered around the annual-meeting date. *See, e.g.*, Cuñat et al., *Vote Is Cast*, *supra* note 163, at 1962 tbl.IV. Consistent with other research on 8-K filing timing, however, I find that there is typically a delay between the annual meeting and the date on which companies disclose the vote results. *See infra* Appendix at Figure A.2 (showing a mean delay of two business days); *see also* Itay Goldstein & Di Wu, Disclosure Timing, Information Asymmetry, and Stock Returns: Evidence from 8-K Filing Texts (June 2015) (unpublished manuscript), https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=AFA2016& paper_id=1415 [https://perma.cc/YQZ4-PU8A].

171.   Mark M. Carhart, *On Persistence in Mutual Fund Performance*, 52 J. FIN. 57, 61–62 (1997); Eugene F. Fama & Kenneth R. French, *Common Risk Factors in the Returns on Stocks and Bonds*, 33 J. FIN. ECON. 3, 7–10 (1993).

172.   I measure returns as "buy and hold" returns—the hypothetical returns an investor would earn by purchasing the securities at the beginning of the event window and selling them at the end of the event window.

173.   I calculate this percentage out of all votes cast either "for" or "against" (i.e., excluding abstentions). I use this approach because this is the standard that ISS uses when determining whether a proposal is "majority-supported." *See* INSTITUTIONAL SHAREHOLDER SERVS., U.S. PROXY VOTING POLICY PROCEDURES AND PROCEDURES (EXCLUDING COMPENSATION RELATED): FREQUENTLY ASKED QUESTIONS 13 (Dec. 18, 2015), https://www.issgovernance.com/file/policy/us-policies-and-procedures-faq-dec-2015.pdf [https://perma.cc/NN3Y-67ZA]. The ISS standard is important because ISS may recommend voting against directors who have failed to implement a majority-supported proposal. *See id.* at 17–20.

174.   *See generally* Lee & Lemieux, *supra* note 165, at 319–24 (explaining this approach).

175.   *See generally* Guido Imbens & Karthik Kalyanaraman, *Optimal Bandwidth Choice for the Regression Discontinuity Estimator*, 79 REV. ECON. STUD. 933 (2012).

proposals that just barely pass are assigned to the treatment group, proposals that just barely fail are assigned to the control group, and the local average treatment effect represents the effect of a pass on shareholder value.

Before proceeding, three caveats are in order. First, this RD design is limited in its ability to speak to the value of proxy access for firms at which a vote would not be a "close call." There are essentially two endogeneity issues here. The first involves endogeneity in the vote outcomes. Because there may be meaningful differences between firms at which the vote ends up "close" and firms at which the vote either succeeds or fails by a large margin, it would be a mistake to extrapolate from close calls to other firms. Indeed, given the significant variance in vote outcomes,[176] it seems likely that shareholders have judged that proxy access is well suited to some firms and ill suited to others. The second concern involves endogeneity in the selection of firms that receive a vote in the first place. Not only may shareholder-proponents target firms for specific reasons,[177] but the proposals that make it to the voting stage (instead of being settled beforehand[178]) may result in selection bias. Firms that settle may very well differ systematically from firms that do not, although the direction in which this would bias the results is unclear.[179]

Second, my RD design cannot speak directly to whether shareholders value standardized terms more than nonstandard terms. That would require something approximating a randomized experiment in which, for

---

176. *See supra* Figures 1, 3.

177. *But see* Bhandari et al., *supra* note 95, at 14–20 (presenting evidence that there is a significant degree of randomness in target selection).

178. Proponents and boards frequently settle shareholder proposals before the vote occurs. *See, e.g.*, Sarah C. Haan, *Shareholder Proposal Settlements and the Private Ordering of Public Elections*, 126 YALE L.J. 262, 277–79 (2016) (documenting settlements in the political-spending context). Indeed, settlements have occurred for numerous proxy access proposals. *See Boardroom Accountability Project Company Focus List*, OFFICE OF THE N.Y.C. COMPTROLLER, https://comptroller.nyc.gov/services/ financial-matters/boardroom-accountability-project/focus-companies [https://perma.cc/ C7QB-PSMJ] (last visited Sept. 27, 2017).

179. On the one hand, settling firms may plausibly already have "strong" governance in place (and therefore benefit less from proxy access), which would suggest that the "true" average value of proxy access is less than the RD design suggests. On the other hand, firms may settle because they predict the proposal would gain substantial support due to their low managerial accountability and high agency costs, which would suggest that the true average value of proxy access is higher than the RD design suggests.

example, one compares market reactions to standardized terms with market reactions to nonstandard terms.[180] At best, my RD design speaks to the value of standardized proxy access compared with no proxy access—the entire package versus nothing at all.

Third, as previously mentioned, an RD design is valid insofar that agents cannot perfectly "sort" themselves onto one side or the other of the given cutoff point.[181] Here, one might worry that some boards can gather information about the likely vote outcome before the vote occurs and then, with a little extra effort, swing the vote their way, for example by lobbying major shareholders. Prior research has generally *not* found evidence indicating that boards act in this way for shareholder proposals,[182] but some more recent research suggests otherwise.[183] To assess whether there has been sorting, I perform a McCrary density test.[184] This test plots a density function for the running variable on each side of the cutoff point, the theory being that a discontinuity around the cutoff indicates sorting.[185] The Appendix reports a graphical representation of this test's results. Ultimately, there does appear to be some weak evidence of sorting, although one cannot reject the null hypothesis that there is no sorting ($p = 0.20$).[186] On balance, this suggests some reason for caution when interpreting the RD results.

---

180.   There are very few "close call" proposals that do not feature standardized terms, so this is not possible here.

181.   *See supra* note 167 and accompanying text.

182.   *See* Yair Listokin, *Management Always Wins the Close Ones*, 10 AM. L. & ECON. REV. 159, 174–75 (2008) (finding no discontinuity around the majority threshold for a large sample of shareholder proposals); Cuñat et al., *Vote Is Cast*, *supra* note 163, at 1958–59 (performing a McCrary density test and finding the distribution of votes around the cutoff is "smooth"); Flammer, *supra* note 163, at 2556–58 (finding no evidence of sorting both using a McCrary density test and looking for "preexisting differences" around the majority threshold).

183.   *See* Laurent Bach & Daniel Metzger, Are Shareholder Votes Rigged? (Dec. 2016) (unpublished manuscript), http://www.law.nyu.edu/sites/default/files/Daniel%20 Metzger%20paper.pdf [https://perma.cc/Y2BL-95YM].

184.   *See generally* Justin McCrary, *Manipulation of the Running Variable in the Regression Discontinuity Design: A Density Test*, 142 J. ECONOMETRICS 698 (2008). I set the cutoff point to 50, restrict the sample to BAP-style proposals for which there is no competing management-sponsored 3/3 proposal, and include only those observations for which stock-price data was available from CRSP.

185.   *Id.*

186.   *See infra* Appendix at Figure A.3.

2. Results

With these caveats in mind, the RD design can still yield useful insights about the market's reception of these standardized proxy access proposals. I therefore now turn to the results, which Table 3 reports numerically and Figure 5 reports graphically. In my baseline estimates, I find economically and statistically significant evidence that the market has received the proposals favorably.[187]

Table 3: Regression-Discontinuity Design[188]

	Dependent Variable		
	Cumulative Abnormal Returns (%)		
	(1)	(2)	(3)
	Market Model	Fama–French	Fama–French–Carhart
LATE	3.448***	3.509***	3.346**
	(1.130)	(1.329)	(1.513)
Obs.	26	25	28
Bandwidth	4.785	4.768	4.997

Note: $*p < 0.1; **p < 0.05; ***p < 0.01$

As Table 3 shows, there is an economically and statistically significant local average treatment effect across all three models. In the first model, which uses a market model to estimate expected returns and which effectively limits the sample to votes that fall within 4.79 percentage points of the majority threshold, the local average treatment effect is 345 basis points. This implies that on average, a narrow "pass" increases shareholder value by 3.45%, though the size of the standard error gives a fairly large margin of error. In the second model, which uses the Fama–French three-factor asset-pricing model for expected returns, the local average treatment effect is 351 basis points. Finally, in the third model, which uses the Fama–French asset-pricing model as extended by

---

187. *See infra* Table 3.
188. Coefficients represent the local average treatment effect where local linear regressions are run on each side of the cutoff point ($c = 50$). Figures in parentheses are heteroskedasticity-robust standard errors. I calculate optimal bandwidth following Imbens and Kalyanaraman.

Carhart with an additional momentum factor, the local average treatment effect is 335 basis points.

Figure 5: Regression-Discontinuity Design[189]

Votes Cast in Favor of Proposal (%)
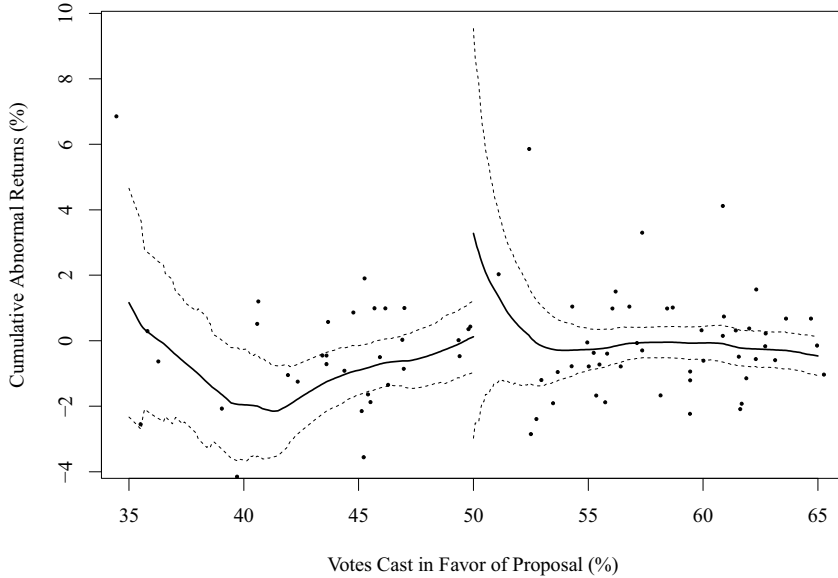
The graphical representation in Figure 5 confirms the essential results of the preceding analysis. There is a sharp discontinuity around the majority threshold, with narrow passes producing significantly higher CARs than narrow failures. Additionally, CARs generally hover around zero once one moves away from the majority threshold, consistent with the theory that the market predicts in advance vote outcomes that are not close calls.

Skeptics might suspect that these effects are simply too large to be accurate. Indeed, it seems hard to believe that proxy access is so consequential that the pass of a shareholder proposal requesting proxy access would increase shareholder value by over three percent. This intuition underscores the importance of keeping in mind the size of the standard errors and the wide range of possible "true" effects that might exist. For example, the true effect for the Carhart model could very well be two standard errors below the estimated effect (thirty-two basis points

---

189.   The solid lines are estimates from local linear regressions run on each side of the cutoff point ($c = 50\%$). The dashed lines are 95% confidence intervals. Expected returns are estimated using the Fama–French–Carhart four-factor model.

instead of 335). This would still be economically significant, though: for a firm with $100 billion in market capitalization, a thirty-two-basis-point effect would imply that a narrow pass increases shareholder value by $320 million. Taking a broader view, the S&P 500 Index had a market capitalization of $22.6 trillion as of September 29, 2017.[190] Applied to the S&P 500, a thirty-two-basis-point effect would reflect an increase in shareholder value of over $72 billion.

However, I also run robustness checks, reported in the Appendix, that cast doubt on the validity of my baseline results. First, and less concerningly, in robustness checks using alternative bandwidths, the local average treatment effect retains a positive sign, but it diminishes and loses its statistical significance with a larger bandwidth.[191] These results, however, are consistent with the theory that the market can at least somewhat accurately predict and price vote outcomes that are not close calls. Accordingly, they do not cast significant doubt on the validity of my baseline results. Second, and more problematically, in additional robustness checks that employ a "fuzzy" RD design[192] and alternative inference and bandwidth-selection methodology, the estimates are even noisier.[193] Third, the results are not statistically significant in robustness checks that employ a parametric design.[194] Overall, the failure of my baseline results to hold up to these robustness checks—particularly those that employ a fuzzy design—casts doubt on the internal validity of this RD design. Thus, it is important to take the baseline results with a grain of salt.

* * *

Overall, this Part has shown that standardization has been central to the private ordering of proxy access. This standardization has surfaced not only in the proposals presented, but also in those proposals that passed and in the proxy access bylaws that are in effect. Moreover, regression

---

190.   *See* S&P GLOBAL: S&P DOW JONES INDICES, EQUITY: S&P 500 (2017), http://us.spindices.com/idsenhancedfactsheet/file.pdf?calcFrequency=M&force_downlo ad=true&hostIdentifier=48190c8c-42c4-46af-8d1a-0cd5db894797&indexId=340 [https://perma.cc/Z6SC-WB8D].

191.   *See infra* Appendix at Table A.4.

192.   A fuzzy RD design accounts for the facts that majority support does not ensure that the company will adopt proxy access, and less-than-majority support does not ensure that the company will not adopt proxy access. *See generally* Lee & Lemieux, *supra* note 165, at 299–301.

193.   *See infra* Appendix at Table A.5.

194.   *See infra* Appendix at Table A.6.

analysis of vote outcomes suggests that shareholders have *preferred* this standardization—a result that should give pause to those who would decry one-size-fits-all corporate governance. Finally, my RD design produces evidence that the market has received these standardized proposals favorably, though this result loses its statistical significance in robustness checks.

IV. IMPLICATIONS FOR LAW AND POLICY

This Article has found pervasive standardization in the post–Rule 14a-11 private ordering of proxy access. Moreover, contrary to the widespread denigration of "one-size-fits-all" corporate governance, I find no evidence to suggest that this standardization has been harmful. In fact, there are signs that investors have *preferred* standardized terms, which is plausible on theoretical grounds. This Part explores these findings' implications for law and policy. Section IV.A probes implications for the merits of proxy access. Ultimately, my findings suggest that a mandatory rule regarding proxy access would have been bad policy, although the optimal terms of the default rule are far from clear. Section IV.B pivots to the broader implications of my findings for the roles of standardization and private ordering in corporate governance. Given the apparent benefits of standardization in corporate governance, any attempt to ensure that corporate governance structures exhibit a significant degree of heterogeneity seems misguided. Rather, market participants appear to choose their preferred governance structure from a limited number of "sizes." But even if private ordering has not avoided standardization in corporate governance, it does appear to have helped to achieve *optimal* standardization. When designing corporate governance rules, regulators therefore might learn from this private ordering to optimize regulatory design. Finally, Section IV.C turns to pending legislation related to shareholder proposals and the regulation of proxy advisers. Ultimately, my findings provide cause for concern about this legislation. First, shareholder proposals played an important role in enabling the private ordering of proxy access, and the evidence suggests that investors have welcomed this private ordering (or at least have not reacted unfavorably). This provides reason to believe that tightening the shareholder proposal rule would impede many value-enhancing resolutions. Second, to the extent that the increased regulation of proxy advisers is premised on these entities' tendency to support one-size-fits all governance, the proxy-

adviser legislation seems both unnecessary and unlikely to achieve its purpose.

A. THE MERITS OF PROXY ACCESS

On a basic level, my theory and findings have obvious implications for the merits of proxy access. Given that proxy access continues to occupy a prominent position in both academic and popular debates about corporate law and governance, these implications should be of interest to scholars, lawmakers, and market participants alike. This section thus explores the implications of my theory and evidence for proxy access and its regulation.

For lawmakers, the evidence counsels against both a mandatory rule in favor of proxy access *and* a mandatory rule against proxy access. First, shareholders' apparent opposition to proxy access at some firms [195] implies that the imposition of mandatory proxy access across all firms—as contemplated by the failed Rule 14a-11—would be unwise. If one assumes that a wide-margin failure to gain majority support indicates that proxy access would be inefficient for that firm,[196] then there are numerous firms in my sample at which proxy access would be inefficient—and this does not even take into account the countless firms that did not receive proxy access proposals at all (perhaps because would-be proponents recognized that proxy access would clearly be ill suited for the firm).

Second, shareholders' apparent appetite for proxy access suggests that anything resembling a mandatory rule *against* proxy access would also be unwise. Although it appears to be a minority position among both scholars and practitioners, at least one commentator has continued to advocate a return to the SEC's old approach to Rule 14a-8(i)(8), under which boards could exclude proposals requesting proxy access for

---

195.   *See supra* Section III.A. Proxy access shareholder proposals failed to gain majority support at numerous firms, and this result holds even if I narrow the sample to shareholder proposals that follow the standard "BAP template," exclude firms that already have or are concurrently proposing proxy access bylaws, and remove insider votes from the denominator for votes cast in favor. (These changes account for the possibilities that idiosyncratic proposal terms, the existence of competing management provisions, and insider ownership are driving vote outcomes.)

196.   Admittedly, shareholder voting does not always lead to an efficient outcome. *Cf.* Listokin, *supra* note 160.

"relat[ing] 'to an election.'"[197] But given boards' lack of incentives to implement proxy access absent shareholder pressure—and historical evidence showing that boards very rarely implemented proxy access prior to the current version of Rule 14a-8(i)(8)—a return to the old Rule 14a-8(i)(8) would effectively gut shareholders' ability to bring about proxy access via private ordering. Shareholders' apparent acceptance of proxy access,[198] along with evidence indicating that the market has also reacted favorably (or at least not unfavorably),[199] suggests that this would be an ill-advised course of action.

My findings also provide some support for casting proxy access as a default rule, although it is more difficult to assess the *optimal* default. On the one hand, shareholder activists' great success in obtaining proxy access suggests that a default rule in favor of proxy access is not necessary. Even if a presumption that the default rule should favor proxy access would have been wise in a prior era,[200] the private ordering of proxy access shows this might not be necessary in the current era of shareholder activism and powerful institutional investors. On the other hand, if one adopts the majoritarian-preference approach to default rules,[201] the widespread adoption of proxy access may indicate that proxy access is the majority preference, which would militate toward making proxy access the default rule. Additionally, it is possible that many firms have inefficiently failed to adopt proxy access—another reason to favor proxy access as the default.[202] Although most of the S&P 500 has now adopted proxy access, there are still many smaller firms that have not done so, presumably because they have not been targeted by shareholder proposals. If these failures to adopt are inefficient—the product of

---

197.   *See* Bernard S. Sharfman, *What Theory and Empirical Evidence Tell Us About Proxy Access*, 13 J.L. ECON. & POL'Y 1, 5 (2017).

198.   *See supra* Part III.

199.   *See supra* Section III.D. (presenting weak evidence of a favorable market reaction in an RD design); Bhandari et al., *supra* note 95, at 11–14 (presenting economically and statistically significant evidence of positive abnormal returns for firms targeted by the BAP announcement).

200.   *Cf.* Lucian Ayre Bebchuk & Assaf Hamdani, *Optimal Defaults for Corporate Law Evolution*, 96 NW. U. L. REV. 489 (2002) (recommending a "reversible defaults" approach in which lawmakers favor rules that are more restrictive on management).

201.   *See generally* FRANK EASTERBROOK & DANIEL R. FISCHER, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991).

202.   *Cf.* Barzuza, *supra* note 69 (arguing firms do not always choose their right "size").

managerial agency costs and shareholders' collective-action problems—
this would militate toward making proxy access the default. Ultimately,
the relatively widespread adoption of proxy access and possibility of an
even more widespread inefficient failure to adopt seems to suggest that a
default rule in favor of proxy access—perhaps following the current
market standard, and perhaps with a threshold exempting smaller
firms [203]—would be optimal. However, additional research would be
necessary to confirm this conclusion. And more pragmatically, it may not
be worth the political capital to push for such a regulatory change.

B. OPTIMAL STANDARDIZATION IN CORPORATE GOVERNANCE

Although the empirical portion of this Article focuses on the private
ordering of proxy access, my findings—particularly when situated in the
generalized theoretical framework developed in Part II—have important
implications beyond this narrow realm. This section places my findings
and theory in a broader context, exploring general implications for the
appropriate role of lawmakers in designing corporate governance.

1. Private Ordering, Optimal Standardization, and the Law

If nothing else, this Article shows that as a positive matter, private
ordering has not avoided the standardized corporate governance about
which critics of the SEC's mandatory proxy access rule worried. Instead,
standardization has pervaded the private ordering of proxy access.[204] But
there are also indications that as a normative matter, this standardization
may even be *desirable*. Regression analysis suggests that shareholders
have *preferred* standardization,[205] and there is weak evidence that the
market has welcomed these standardized proposals[206]—findings that are
consistent with Part II's theoretical discussion of the potential benefits of
standardization. This evidence provides cause to rethink the deep-seated
narrative in corporate law scholarship and commentary that decries "one-

---

203.   *Cf.* Stratmann & Verret, *supra* note 81 (presenting evidence of an average
negative reaction among small firms to the mandatory imposition of proxy access).

204.   *See supra* section III.B.

205.   *See supra* section III.C.

206.   *See supra* section III.D.

size-fits-all" corporate governance as inefficient for failing to recognize firms' heterogeneous governance needs.[207]

Despite the apparent benefits of standardization, however, this Article's findings also provide qualified support to those who would seek to thwart a federally imposed mandate of uniform corporate governance terms on all firms. [208] First, even if shareholders prefer *some* standardization, they do not appear to prefer *complete* standardization. Rather, a *numerus clausus*–like menu of options has emerged. Based on the vote outcomes presented in Part III, shareholders appear to have generally chosen either (1) proxy access on standardized terms or (2) no proxy access at all. And for some companies, the choice seems to have been clear. Take, for example, Genomic Health, Inc. (Genomic), whose bylaws currently do not provide for proxy access.[209] In 2016, shareholder James McRitchie submitted a proxy access proposal to Genomic, but the proposal failed by a significant margin—nearly fifteen percentage points[210]—even though the proposal conformed to the substantive terms of the BAP template. Genomic did not have large insider ownership[211] or other similar characteristics that one would expect to cause particularly low shareholder support, [212] suggesting that Genomic shareholders rationally determined that proxy access would be inefficient for the firm. Meanwhile, at the other end of the spectrum, SciClone Pharmaceuticals, Inc. (SciClone) shareholders expressed clear support—88% of votes cast—for a 2016 proxy access proposal,[213] and the firm subsequently adopted a standard 3/3/20/20 bylaw.[214] Unlike Genomic, it appears that SciClone shareholders determined that proxy access would be efficient for the firm. These examples lend support to the view that even if the

---

207.   *See supra* notes 1–9 and accompanying text; *infra* note 243.

208.   *Cf.*, *e.g.*, Goshen & Squire, *supra* note 1, at 825–28 (advising against "one-size-fits-all regulations" in corporate law).

209.   *See* Genomic Health, Inc., Definitive Proxy Statement (Form DEF 14A) (Apr. 28, 2017).

210.   Data Set (on file with the author).

211.   At the time of the proposal, insiders owned about 3% of the firm's common equity. *Id.*

212.   *See id.*

213.   *Id.*

214.   *See* SciClone, Pharm., Inc., Amended and Restated Bylaws § 1.11 (May 9, 2017), https://www.sec.gov/Archives/edgar/data/880771/000119312517164148/d393060dex32.htm [https://perma.cc/Z3B4-XMRY].

optimal-heterogeneity claim is overstated, *some* choice appears to be desirable. While wholesale heterogeneity may be undesirable, "limited heterogeneity" might be efficient.[215]

Second, shareholders appear to have accepted at least one of the innovations produced by private ordering: aggregation limits. Although no shareholder proposal in my sample requested aggregation limits, firms have adopted these limits as part of the now-market-standard 3/3/20/20 bylaw.[216] Given shareholders' tepid response to so-called "fix-it" proposals that would remove any aggregation limits,[217] it seems that shareholders have accepted the limits as efficient. Indeed, this should not be particularly surprising considering the pre–Rule 14a-11 commentary. One of Rule 14a-11 opponents' main concerns was the potential that public pension funds, union funds, and other similar shareholders would use proxy access to extract private benefits.[218] Aggregation limits effectively force smaller-stakes shareholders to team up with large blockholders (e.g., asset managers such as BlackRock, State Street, and Vanguard),[219] thereby reducing the risk of these conflict costs. Indeed, this may explain the opposition of CII, an organization whose principal constituencies are public pension and union funds,[220] to aggregation limits.[221] At the same time, however, one cannot rule out the possibility

---

215.   *See supra* Section II.A.

216.   *See supra* Section III.B.

217.   *See supra* Sections III.B.–C.

218.   *See supra* Section I.A. Professor Roberta Romano long ago identified public pension funds' capacity to extract private benefits. *See* Roberta Romano, *Public Pension Fund Activism in Corporate Governance Reconsidered*, 93 COLUM. L. REV. 795 (1993).

219.   *See* COUNCIL OF INSTITUTIONAL INV'RS, PROXY ACCESS: BEST PRACTICES 3 (2015), http://www.cii.org/files/publications/misc/08_05_15_Best%20Practices%20-%20Proxy%20Access.pdf [http://perma.cc/GFK6-TYGT] ("[W]ithout the ability to aggregate holdings even CII's largest members would be unlikely to meet a 3% ownership requirement to nominate directors. . . . [E]ven if the 20 largest public pension funds were able to aggregate their shares they would not meet the 3% criteria at most of the companies examined.").

220.   *See Members*, COUNCIL OF INSTITUTIONAL INV., http://www.cii.org/members [https://perma.cc/4TT2-N746] (last visited Sept. 27, 2017); Council of Institutional Investors, *About Us*, LINKEDIN, https://www.linkedin.com/company-beta/594217/?path Wildcard=594217 (last visited Sept. 27, 2017).

221.   *See* COUNCIL OF INSTITUTIONAL INV'RS, *supra* note 219, at 3 ("CII policies and related public positions do not endorse limits or caps on the number of shareowners in the nominating group.").

that these large blockholders have inefficiently caused the adoption of aggregation limits to cement their own power, underscoring the need for additional research.

This analysis also bears on a longstanding debate about the extent to which corporate law should consist of default rules versus mandatory rules. Overall, shareholders' apparent desire for some choice supports the case for default rules. At the same time, to the extent that standardization accompanies mandatory rules, mandatory rules produce a benefit as well: reduction in use-stage transaction costs.[222] This explanation complements other potential justifications for mandatory rules, such as the public-goods hypothesis, [223] the innovation hypothesis, [224] and the opportunistic-amendment hypothesis.[225] However, some caution is in order here. Even if mandatory rules reduce use-stage transaction costs, default rules (and particularly "sticky" defaults) may be able to accomplish this purpose just as effectively, and default rules avoid the costs associated with limiting the parties' choice. One should therefore not assume that the benefits produced by the tendency of mandatory rules to reduce use-stage transaction costs will necessarily exceed mandatory rules' substantial costs.

2. Optimizing Regulatory Design

The private ordering of proxy access also provides lessons for the lawmakers who design corporate law's default rules. First, the earlier theoretical discussion reveals that there is always *some* sort of default rule

---

222.   This benefit seems particularly relevant to the shareholder proposal rule, which is one of the principal tools of would-be corporate reformers. Indeed, when the SEC polled shareholders and companies in the late 1990s about whether it should permit companies to develop firm-specific systems for shareholder proposals, the vast majority of shareholders and about half of companies expressed opposition to such changes. *See* Amendments to Rules of Shareholder Proposals, 62 Fed. Reg. 50,682, 50,684 n.28 (proposed Sept. 26, 1997) (codified at 17 C.F.R. pt. 240).

223.   *See* Jeffrey N. Gordon, *The Mandatory Structure of Corporate Law*, 89 COLUM. L. REV. 1549, 1567–69 (1989).

224.   *See id.* at 1569–73.

225.   *See id.* at 1573–85; *cf.* Lucian Ayre Bebchuk, *Limiting Contractual Freedom in Corporate Law: The Desirable Constraints on Charter Amendments*, 102 HARV. L. REV. 1820, 1848–51 (1989).

in place,[226] which suggests the need for greater attention to the content of these default rules. As noted in Part II, the absence of proxy access is essentially a default rule providing for $x_j = 50\%$, while Rule 14a-11 (were it a default rule) would have provided for a default of $x_j = 3\%$. Thus, the absence of proxy access is a regulatory choice just as much as making a 3% ownership threshold the default would have been.[227] Particularly given the "stickiness" of default rules[228]—and the strange convergence of market-standard proxy access around terms that closely resemble Rule 14a-11—this insight underscores the need for greater attention to the form that these default rules take.

Second, lawmakers should recognize that markets may be better positioned than regulators to arrive at optimal corporate governance terms.[229] Accordingly, to the extent that lawmakers must set default rules—and inaction is effectively a choice to retain the status quo—lawmakers might attempt to better harness market forces when designing these rules. For example, in future rulemaking initiatives, the SEC might

---

226. Others recognized this prior to the private ordering of proxy access, *see* Bebchuk & Hirst, *supra* note 11, at 338–39, but the real-world experience with proxy access provides additional clarity. There are, of course, exceptions. For example, Delaware law requires the corporate charter to specifically state some terms, which effectively forces the parties to consciously choose a rule rather than simply accept whatever the law might provide by default. *See* DEL. CODE ANN. tit. 8, § 102(a)(3) (West 2017) (requiring a corporation to state its purpose); *id.* § 102(a)(4) (requiring a corporation to state the number of classes of stock that the corporation may issue and the number of authorized shares in each class).

227. This highlights the incoherence of the "regulation–deregulation" dichotomy that has persisted in the popular press. Indeed, the distinction between "private" and "public" provision of corporate governance is somewhat tenuous in the first place: as long as the state provides for enforcement of a corporate governance structure, there is necessarily government involvement in corporate governance. *Cf.* Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923) (critiquing the public–private distinction in the context of the common law); Katharina Pistor, *A Legal Theory of Finance*, 41 J. COMP. ECON. 315, 322–23 (2013) (arguing that financial markets ultimately exhibit public–private hybridity).

228. *See* Omri Ben-Shahar & John A. E. Pottow, *On the Stickiness of Default Rules*, 33 FLA. ST. U. L. REV. 651 (2006); Yair Listokin, *What Do Corporate Default Rules and Menus Do? An Empirical Examination*, 6 J. EMPIRICAL LEGAL STUD. 279 (2009); Brett H. McDonnell, *Sticky Defaults and Altering Rules in Corporate Law*, 60 SMU L. REV. 383 (2007).

229. This relates to the longstanding debate about public versus private provision of corporate law. *See, e.g.*, Hadfield & Talley, *supra* note 37.

attempt something resembling Grundfest's suggestion to conduct a randomized poll of shareholders' preferences. [230] There is reason to believe that markets, which have skin in the game, will arrive at better solutions than agency decisionmakers, who risk regulatory capture and the influence of interest-group politics. [231] The market's apparent acceptance of aggregation limits, which Rule 14a-11 did not include, provides support for this view.

---

230. *See* Grundfest, *supra* note 1, at 366.

231. *See generally* Gary S. Becker, *Pressure Groups and Political Behavior*, *in* CAPITALISM AND DEMOCRACY: SCHUMPETER REVISITED 120 (Richard D. Coe & Charles K. Wilbur eds., 1985); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971). Indeed, the SEC's decision to adopt a mandatory rule regarding proxy access in the face of widespread academic consensus that a default rule would be superior—even Professor Bebchuk, perhaps the staunchest proponent of shareholder rights, supported a default rule regarding proxy access, *see supra* section I.A.—could be understood as the agency having caved in to these interest-group pressures. This understanding, though speculative, would not be surprising given the numerous meetings that CII, public pension funds, and union funds obtained with then–Chair Mary Schapiro and others in the agency. *See, e.g.*, Memorandum from Kayla J. Gillian, Deputy Chief of Staff, Office of the Chairman, Facilitating Shareholder Director Nominations (Feb. 2, 2010), https://www.sec.gov/comments/s7-10-09/s71009-635.pdf [https://perma. cc/XRX6-SKXR]; Memorandum from Kayla J. Gillian, Deputy Chief of Staff, Office of the Chairman, Facilitating Shareholder Director Nominations (Apr. 25, 2010), https://www.sec.gov/comments/s7-10-09/s71009-651.pdf [https://perma.cc/2MV2-GN 9J]. These are the organizations that Grundfest predicted would benefit from significant "megaphone externalities" under a mandatory proxy access regime. *See supra* Section I.A. This risk of capture goes both ways: during the Bush years, the SEC acted to limit the private ordering of proxy access, *see* Shareholder Proposals Relating to the Election of Directors, Exchange Act Release No. 34-56,914, 72 Fed. Reg. 70,450 (Dec. 11, 2007) (2008 SEC release amending Rule 14a-8(i)(8)), perhaps due to pressure from pro-management groups such as the Business Roundtable and the U.S. Chamber of Commerce, *cf.* Letter from Anne M. Mulcahy, Chairman, Bus. Roundtable Corp. Governance Task Force, to Nancy M. Morris, Sec'y, U.S. Sec. & Exch. Comm'n (Oct. 1, 2007), https://www.sec.gov/comments/s7-17-07/s71707-77.pdf [https://perma.cc/MC R4-F6MH] (advising against amendments to Rule 14a-8 that would have permitted shareholders to lobby for proxy access on a firm-by-firm basis). *See generally* Peter L. Kahn, *The Politics of Unregulation: Public Choice and Limits of Government*, 75 CORNELL L. REV. 280 (1990) (criticizing many applications of public choice theory for failing to recognize that special interests and regulatory capture can also drive decisions *not* to regulate).

C. Currently Pending Federal Corporate Governance
Legislation

My theory and findings also have concrete implications for the
wisdom of currently pending legislation. Specifically, the CHOICE Act,
which the House of Representatives approved this past June and now lies
before the Senate,[232] contains two provisions that could radically change
the U.S. corporate governance landscape: section 844, which would
drastically restrict shareholders' ability to use Rule 14a-8, and sections
481 through 483 (previously known as the Corporate Governance Reform
and Transparency Act[233]), which would impose burdensome restrictions
on proxy advisers such as ISS.[234] My analysis suggests that at least some
of the premises underlying these legislative proposals are mistaken.

1. *Restrictions on Shareholder Proposals*

The CHOICE Act's proposed changes to the shareholder proposal
rule are perhaps the most problematic. Section 844 of the Act would,
among other things, require the SEC to amend Rule 14a-8 to increase the
restrictions on resubmissions of proposals that failed to gain a certain
level of support [235] and make the rule's ownership requirements
considerably more difficult to satisfy. [236] The ownership-requirement
changes are particularly troubling. Section 844 would peg minimum
ownership at one percent, eliminate shareholders' ability to satisfy
ownership requirements through ownership of a certain dollar amount of

---

232. *See* Ryan Tracy & Rachel Witkowski, *House Passes Bill Rolling Back Wall
Street Rules*, WALL STREET J. (June 8, 2017), https://www.wsj.com/articles/house-set-to-
pass-bill-rolling-back-wall-street-rules-1496914205 [https://perma.cc/BKV7-ECHC].

233. Corporate Governance Reform and Transparency Act of 2016, H.R. 5311, 114th
Cong. (2d Sess. 2016).

234. *See* Financial CHOICE Act of 2017, H.R. 10, 115th Cong. §§ 481–483, 844 (1st
Sess. 2017).

235. *See id.* § 844(a) (increasing thresholds from 3% to 6% for proposals submitted
once within the past five years, 6% to 15% for proposals submitted twice within the past
five years, and 10% to 30% for proposals submitted three times within the past five
years).

236. *See id.* § 844(b) (eliminating the dollar amount option to satisfy the threshold,
requiring 1% ownership at minimum, and lengthening the holding period from one to
three years).

shares, and increase the holding period to three years[237]—changes that would effectively block all retail investors and even most institutional investors from using Rule 14a-8. But many of the successful shareholder proposals in my sample were submitted by small-stakes shareholders, including numerous retail investors. Indeed, out of the ten proposals in my sample that gained the highest percentage of "for" votes—proposals that one might presume enhance shareholder value—four were submitted by individuals, and even the institutional proponents would have failed to satisfy the CHOICE Act's proposed one percent ownership threshold.[238] Ultimately, section 844 would likely stop virtually all shareholders—except large asset managers, who have traditionally not submitted shareholder proposals anyway[239]—from using Rule 14a-8. Shareholder proposals' role in causing widespread adoption of proxy access—along with empirical evidence from other research that indicates that shareholder proposals play a positive role in corporate governance[240]—suggests that the resulting drop in proposal volume would be undesirable.

---

237.   *Id.*

238.   Moreover, these top-ten firms' current ownership profiles suggest there would be very few other candidates to submit proxy access proposals. My review of FactSet Ownership statistics indicates that as of May 5, 2017, none of the firms currently had shareholders who had both held (1) 1% of the firm's shares for the required three years and (2) were present in my sample as having submitted proxy access proposals. *See Data: Ownership*, *supra* note 137.

239.   *See* Kahan & Rock, *supra* note 42, at 1375–83; *cf.* Gilson & Gordon, *supra* note 159, at 895 (characterizing these investors as "rationally reticent").

240.   *See, e.g.*, Laurent Bach & Daniel Metzger, How Do Shareholder Proposals Create Value? (Mar. 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/pape rs.cfm?abstract_id=2247084 [https://perma.cc/B438-HDE4] (employing an RD design and finding positive abnormal returns for narrow passes); Cuñat et al., *Corporate Governance and Value*, *supra* note 163 (employing an RD design and finding positive value for corporate governance proposals); Cuñat et al., *Vote Is Cast*, *supra* note 163 (same); *cf.* Flammer, *supra* note 163. Although some research has failed to identify a positive effect, this may be due to the failure of these studies to identify properly exogenous shocks. The RD literature is much better suited to this task. *See* Sanjat Bhagat & Roberta Romano, *Event Studies and the Law: Part II: Empirical Studies of Corporate Law*, 4 AM. L. & ECON. REV. 380, 404–05 (2002); *cf.* Lee & Lemieux, *supra* note 165, at 281–83 (noting the advantages of RD designs).

2. Increased Oversight of Proxy Advisers

Although the CHOICE Act's proposal to increase oversight of proxy advisers presents a more complicated set of issues, my analysis provides cause for skepticism about this proposal as well. Contained in Title IV of the CHOICE Act, the "Corporate Governance Reform and Transparency" provisions would subject "proxy advisory firms" to significant SEC oversight, including registration and disclosure requirements; prohibition, management, or disclosure of conflicts of interests; and substantive supervision of advisory-service quality.[241] Additionally, the bill would require the SEC to direct its staff to withdraw two influential no-action letters that permit registered investment advisers to rely on proxy advisers' voting recommendations for certain fiduciary-duty-related purposes.[242] Based on the bill's legislative history, one of the underlying justifications for this regulatory scheme appears to be proxy advisers' alleged tendency to promote inefficient "one-size-fits[-]all" corporate governance.[243]

---

241. Financial CHOICE Act of 2017, H.R. 10, 115th Cong. §§ 482–83 (1st Sess. 2017).

242. *See id.*; Egan-Jones Proxy Services, SEC No-Action Letter, Fed. Sec. L. Rep. (CCH) ¶ 78,820 (May 27, 2004); Institutional Shareholder Services, Inc., SEC No-Action Letter, Fed. Sec. L. Rep. (CCH) ¶ 78,845 (Sept. 15, 2004). These no-action letters address investment advisers' duties under Investment Advisers Act Rule 206(4)-6 to vote client securities in the best interests of clients. *See* 17 C.F.R. § 275.206(4)-6 (2017). The *Egan-Jones* letter essentially permits investment advisers to rely on proxy advisers' voting recommendations to "cleanse" the investment advisers' conflicts of interest, subject to due diligence requirements. *See* Egan-Jones Proxy Services, *supra*. The *Institutional Shareholder Services* letter essentially permits investment advisers to rely on proxy advisers' written conflict-of-interest-management policies to satisfy the investment advisers' duty of care in connection with voting client securities. *See* Institutional Shareholder Services, Inc., *supra*. The SEC staff synthesized these no-action letters in a later staff legal bulletin, the basic takeaway being that investment advisers can rely on a proxy adviser's voting recommendations, but they cannot do so blindly—due diligence is necessary. *See* SEC Staff Legal Bulletin No. 20 (IM/CF) (June 30, 2014), https://www.sec.gov/interps/legal/cfslb20.htm [https://perma.cc/YJ7K-CCMG].

243. *See Legislative Proposals to Enhance Capital Formation, Transparency, and Regulatory Accountability: Hearing Before the Subcomm. on Capital Mkts. and Gov't Sponsored Enters. of the H. Comm. on Fin. Servs.*, 114th Cong. 5 (2016) [hereinafter May 2016 Hearing] (statement of Tom Quaadman, Senior Vice President, Ctr. for Capital Mkts. Competitiveness of the U.S. Chamber of Commerce) (criticizing ISS and Glass Lewis for offering "one-size-fits[-]all recommendation[s]"); *see also Examining the*

This Article's analysis undermines the one-size-fits-all critique of proxy advisers. Even if proxy advisers have contributed to the standardization of corporate governance, this standardization is not necessarily undesirable. As explained in Part II, there are theoretical reasons to suppose that some standardization serves a useful role, and there is evidence that shareholders have in fact *preferred* standardization in proxy access.[244] Granted, I did not include proxy advisers' voting recommendations in my regression specifications, so I cannot rule out the possibility that these recommendations account for much of shareholders' apparent preference for standardization.[245] But even if proxy advisers have contributed to the standardization of proxy access, the RD design results show that the market appears to have welcomed this standardized proxy access.[246] Moreover, other empirical research indicates that an "ISS

Market Power and Impact of Proxy Advisory Firms: Hearing Before the Subcomm. on Capital Mkts. & Gov't Sponsored Enters. of the H. Comm. on Fin. Servs., 113th Cong. 2 (2013) (statement of Rep. Scott Garrett, Chairman, Subcomm. on Capital Mkts. & Gov't Sponsored Enters.) ("[P]roxy advisory firms often make voting recommendations based on one-size-fits-all policies and checklists that fail to take into consideration how voting recommendations affect the actual shareholder value."); *id.* at 15 (statement of Darla C. Stuckey, Senior Vice President, Policy & Advocacy, Soc'y of Corp. Sec'ys & Governance Prof'ls) ("[P]roxy firm reports are based on one-size-fits-all policies. This is a problem simply because companies are not the same."); *id.* at 27 (statement of Harvey L. Pitt, Founder & CEO, Kalorama Partners, LLC) (criticizing ISS and Glass Lewis for adopting "one-size-fits-all position[s]" on the frequency of say-on-pay votes); *cf.* Rose, *supra* note 7, at 916–19 (criticizing proxy advisers on similar grounds).

244.   *See supra* Part III.

245.   Additionally, proxy advisers may exert influence through other channels, such as their policies regarding director recommendations. ISS, for example, is well known for issuing "withhold" recommendations against directors who have failed to substantially implement majority-supported shareholder proposals. *See* INSTITUTIONAL SHAREHOLDER SERVS., *supra* note 173, at 17–19. Indeed, ISS's evaluation of boards' responses to majority-supported proxy access shareholder proposals suggests that their approval of the 3/3/20/20 template may have contributed to the template becoming market standard. *See id.* at 19–20 (announcing "ISS may issue an adverse recommendation" in director elections if the board has, after receiving a majority-supported proxy access shareholder proposal, adopted proxy access on more stringent terms than the shareholder proposal, but condoning the 3/3/20/20 template). Nevertheless, my empirical analysis suggests that shareholders preferred the 3/3/20/20 template at any rate, so ISS may simply have been following its clients' wishes.

246.   *See supra* Section III.D.

recommendation shifts [only] 6% to 10% of shareholder votes,"[247] though this effect may be larger for certain vote topics.[248] Given the enormity of shareholders' apparent preference for standardization—in my preferred regression specification, the presence of a 3/3 proposal is associated with an additional thirty percentage points in votes cast for the proposal, and the presence of the additional BAP-template details is associated with another nine percentage points in favor[249]—this preference likely exists independently of proxy advisers' influence.

This is not to deny that there may be other reasons for concern about the role of proxy advisers in corporate governance. Even if they are not responsible for all the standardization for which critics blame them, proxy advisers undoubtedly exercise a great deal of influence, such that they effectively play the role of a public regulator—without being subject to any of the administrative law safeguards that reduce the risk of arbitrary exercise of power.[250] Consistent with the privatization literature,[251] this delegation of power raises concerns about democratic legitimacy and arbitrariness.[252] Additionally, my analysis cannot shed light on whether conflicts of interests impede proxy advisers' ability to render impartial advice, [253] and there is still a possibility that ISS's voting

---

247. *See* Stephen Choi et al., *The Power of Proxy Advisors: Myth or Reality?*, 59 EMORY L.J. 869, 906 (2010); *see also* Stephen J. Choi et al., *Director Elections and the Role of Proxy Advisors*, 82 S. CAL. L. REV. 649 (2009).

248. *See* Yonca Ertimur et al., *Shareholder Votes and Proxy Advisors: Evidence from Say on Pay*, 51 J. ACCT. RES. 951, 975 tbl.6 (2013) (finding evidence of a larger impact for say-on-pay votes); David F. Larcker et al., *Outsourcing Shareholder Voting to Proxy Advisory Firms*, 58 J.L. & ECON. 173, 185 tbl.2 (2015) (same); Nadya Malenko & Yao Shen, *The Role of Proxy Advisory Firms: Evidence from a Regression-Discontinuity Design*, 29 REV. FIN. STUD. 3394, 3408 tbl.3 (2016) (same).

249. *Supra* Table 2.

250. Proxy advisers are not, for instance, subject to the procedural restrictions of the Administrative Procedure Act, and updates to their voting policies are not subject to hard-look review under *State Farm*. *See generally* Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29 (1983).

251. *See* Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003).

252. *See generally* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461 (2003); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1559–62, 1576 (1992).

253. This concern also underlies the Corporate Governance Reform and Transparency legislation. *See* May 2016 Hearing, *supra* note 243.

recommendations may, in some cases, lead to value-reducing corporate changes.[254] These possibilities arguably support the case for requiring additional disclosure from proxy advisers regardless of their alleged tendency to promote one-size-fits-all corporate governance. Nevertheless, to the extent that criticism of proxy advisers is premised on the one-size-fits-all critique, this criticism appears to be unwarranted (or at least overblown).

CONCLUSION

This Article shows that, contrary to some commentators' predictions, standardization has pervaded the private ordering of proxy access. Moreover, I offer evidence suggesting that shareholders actually *prefer* this standardization, and I find weak evidence indicating a favorable market reaction to this standardized proxy access regime. I also show, based on the transaction costs that shareholders must incur to use control rights that feature idiosyncratic terms, that shareholders' apparent preference for standardization in corporate governance is plausible on theoretical grounds. These findings have important implications for law and policy, including currently pending legislation.

The Article also leaves several remaining puzzles for future research. To begin, why has the market adopted proxy access on terms that so closely mirror the vacated Rule 14a-11? One possibility is that the SEC managed to identify terms for proxy access that were very close to the terms that the market would have independently developed—notice-and-comment rulemaking at its best. Perhaps more likely, though, is the possibility that Rule 14a-11 served as a focal point for the private ordering that ensued after the rule's invalidation. Indeed, Rule 14a-11 has featured prominently in shareholder proposals' supporting statements, and CII's "best practices" guide even includes a direct comparison between market practices and Rule 14a-11.

Second, how many firms have inefficiently failed to adopt proxy access? Although there are thousands of public companies in the United

---

254.   *See* Larcker et al., *supra* note 248 (presenting empirical evidence indicating that proxy advisers' recommendations regarding say-on-pay votes lead firms to adopt value-reducing changes to their executive-compensation packages). *But see* Ertimur et al., *supra* note 248 (finding no market reaction to announcements of changes to executive-compensation plans following adverse shareholder votes accompanied by negative ISS recommendations).

States, only a few hundred have adopted proxy access so far. It is unclear whether this failure to adopt is largely efficient—the product of a determination that at those firms, the principal costs produced by proxy access would exceed any reduction in agency costs—or largely inefficient—the product of a pernicious interaction between managerial agency costs and shareholders' collective-action problems.

Finally, how does standardization feature into corporate governance in contexts other than proxy access? Although my theoretical analysis applies to corporate governance generally, the empirical evidence presented covers only proxy access. Future research could attempt to determine whether my findings generalize to other contexts.

APPENDIX

Figure A.1: BAP Template

RESOLVED: Shareholders of The AES Corporation (the "Company") ask the board of directors (the "Board") to adopt, and present for shareholder approval, a "proxy access" bylaw. Such a bylaw shall require the Company to include in proxy materials prepared for a shareholder meeting at which directors are to be elected the name, Disclosure and Statement (as defined herein) of any person nominated for election to the board by a shareholder or group (the "Nominator") that meets the criteria established below. The Company shall allow shareholders to vote on such nominee on the Company's proxy card. The number of shareholder-nominated candidates appearing in proxy materials shall not exceed one quarter of the directors then serving. This bylaw, which shall supplement existing rights under Company bylaws, should provide that a Nominator must:

a)   have beneficially owned 3% or more of the Company's outstanding common stock continuously for at least three years before submitting the nomination;

b)   give the Company, within the time period identified in its bylaws, written notice of the information required by the bylaws and any Securities and Exchange Commission rules about (i) the nominee, including consent to being named in the proxy materials and to serving as director if elected; and (ii) the Nominator, including proof it owns the required shares (the "Disclosure"); and

c)   certify that (i) it will assume liability stemming from any legal or regulatory violation arising out of the Nominator's communications with the Company shareholders, including the Disclosure and Statement; (ii) it will comply with all applicable laws and regulations if it uses soliciting material other than the Company's proxy materials; and (c) to the best of its knowledge, the required shares were acquired in the ordinary course of business and not to change or influence control at the Company.

The Nominator may submit with the Disclosure a statement not exceeding 500 words in support of the nominee (the "Statement"). The Board shall adopt procedures for promptly resolving disputes over whether notice of a nomination was timely, whether the Disclosure and Statement satisfy the bylaw and applicable federal regulations, and the priority to be given to multiple nominations exceeding the one-quarter limit.

Figure A.2: Delay Between Annual Meeting and 8-K Filing[255]

Count

Delay in Business Days
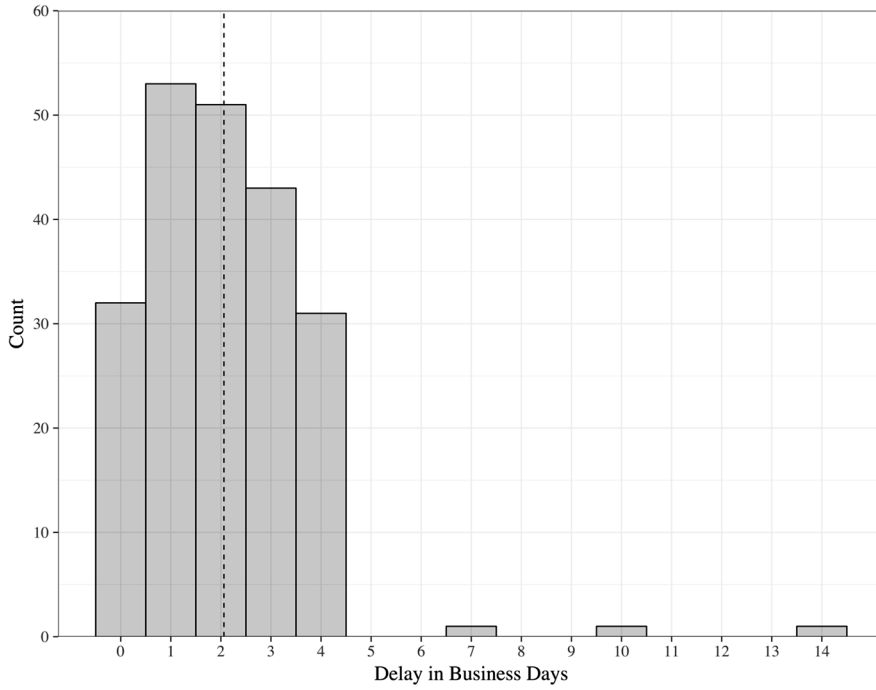
Figure A.3: McCrary Density Test

Votes Cast in Favor of Proposal (%)
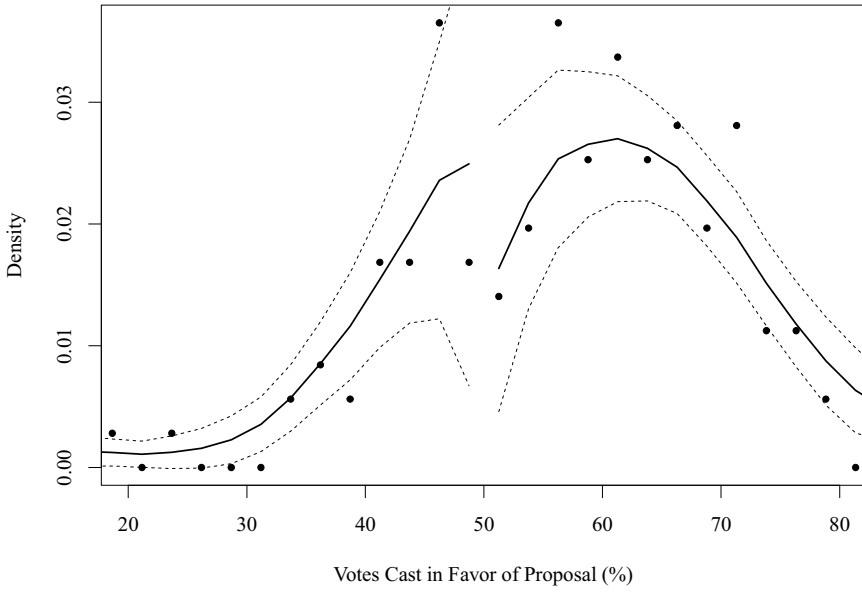
Table A.1: Coding Rubric

Term	Required Value for "3/3" Dummy Variable to Equal 1	Required Value for "BAP" Dummy Variable to Equal 1
Ownership Threshold[256]	3%	3%
Holding Period (Years)[257]	3	3
Maximum Slate[258]	—	25%
Aggregation Limits	—	No
Differential Application Based on Size of Nominating Group	—	No
Maximum-Ownership Requirements	—	No
Certification Requirements	—	Yes
Restrictions on Board's Presentation of Nominees in Proxy Statement	—	No
Binding Bylaw Amendment	—	No
Restrictions on Board's Ability to Amend Bylaw	—	No

---

256.   For proposals that specify different rules for different group sizes, I use the more "general" threshold (i.e., the threshold applicable to the less restrictive group-size requirements).

257.   For proposals that specify different rules for different group sizes, I use the more "general" threshold (i.e., the threshold applicable to the less restrictive group-size requirements).

258.   For proposals that specify different rules for different group sizes, I use the total proportion of the board that may be elected if both groups were to nominate a candidate. Additionally, when a maximum-slate term provides for a number that is "the greater of" either a percentage or a number, I identify only the percentage.

Table A.2: Variable Definitions

Variable	Source	Definition
3/3	DEF 14A	See Coding Rubric
BAP	DEF 14A	See Coding Rubric
Comp. (3/3)	DEF 14A	Dummy variable equal to 1 if the proxy statement indicates that the board (1) is concurrently proposing a 3/3 bylaw or (2) has already adopted a 3/3 bylaw; and 0 otherwise
Comp. (5/3)	DEF 14A	Dummy variable equal to 1 if the proxy statement indicates that the board (1) is concurrently proposing a 3/3 bylaw or (2) has already adopted a 5/3 bylaw; and 0 otherwise
Mgmt. Rec.	DEF 14A	Dummy variable equal 1 if the board has recommended voting "for" the proposal; and 0 otherwise
Staggered Board	ISS[259]	Dummy variable equal to 1 if the firm has a staggered board; and 0 otherwise
SM Bylaws	ISS	Dummy variable equal to 1 if the firm has a supermajority requirement to amend the bylaws; and 0 otherwise
SM Charter	ISS	Dummy variable equal to 1 if the firm has a supermajority requirement to amend the charter; and 0 otherwise
SM Mergers	ISS	Dummy variable equal to 1 if the firm has a supermajority requirement to approve a merger; and 0 otherwise
Golden Parachute	ISS	Dummy variable equal to 1 if the firm has a golden parachute; and 0 otherwise
Poison Pill	ISS	Dummy variable equal to 1 if the firm has a poison pill; and 0 otherwise

259.   The year for all ISS variables is equal to the year of the annual meeting, except where that data was not available yet, in which case the variables correspond to the most recent year for which data was available.

Cumulative Voting	ISS	Dummy variable equal to 1 if the firm has cumulative voting; and 0 otherwise
Majority Voting	ISS	Dummy variable equal to 1 if the firm has majority voting; and 0 otherwise
Board Independence	ISS	$\dfrac{Number\ of\ Independent\ Directors}{Total\ Number\ of\ Directors} \times 100$
CEO Duality	ISS	Dummy variable equal to 1 if the CEO is also the chairman of the board; and 0 otherwise
Boys' Club	ISS	Dummy variable equal to 1 if the fewer than 10% of the firm's directors are women; and 0 otherwise
Insider Ownership	FactSet[260]	$\dfrac{Shares\ Owned\ by\ "Insiders"}{Total\ Shares\ Outstanding} \times 100$
Institutional Ownership	FactSet	$\dfrac{Shares\ Owned\ by\ Inst.\ 13F\ Filers}{Total\ Shares\ Outstanding} \times 100$
Number of Blockholders	FactSet	The number of shareholders that own at least 1% of the firm's common equity
Say-on-Pay Vote (Same Meeting)	FactSet	$\dfrac{Votes\ "For"\ Pay\ Package}{Votes\ "For" + Votes\ "Against"} \times 100$
Market Capitalization	FactSet	$Ln(Price \times Shares\ Outstanding)$
ROA (Winsorized at 95%)	FactSet	$\dfrac{Operating\ Income}{Total\ Assets} \times 100$
Operating Margin (Winsorized at 95%)	FactSet	$\dfrac{Operating\ Income}{Revenue} \times 100$

---

260.   FactSet ownership variables are calculated as of the most recently available Form 13F data prior to the annual meeting, FactSet financial statement data are calculated as of the end of the fiscal year preceding the annual meeting, and FactSet proponent-type and sector data are drawn from Shark Repellent for the annual meeting.

PTB Ratio (Winsorized at 95%)	FactSet	$\dfrac{Price \times Shares\ Outstanding}{Book\ Value\ of\ Common\ Equity}$
Leverage (Winsorized at 95%)	FactSet	$\dfrac{Total\ Debt}{Total\ Assets}$
R&D	FactSet	$\dfrac{R\&D\ Spending}{Revenue} \times 100$
EPS Growth	FactSet	Dummy variable equal to 1 if EPS grew from the prior year; and 0 otherwise
CAPM Alpha	CRSP	The annualized CAPM alpha for the 500 trading days preceding the company's annual meeting (up to the day before the meeting), benchmarking against a value-weighted index
Proponent Type	FactSet	Categorical variable corresponding to the "type" of proponent (e.g., individual, public pension fund, investment adviser, etc.); I manually reclassified all proponents in the "Other Stake Holders" category
Industry	FactSet	Categorical variable corresponding to the firm's "sector"
Year	FactSet	The year of the annual meeting

Table A.3: Summary Statistics[261]

Statistic	N	Mean	St. Dev.	Min	Max
Votes Cast in Favor (%)	213	48.799	20.856	3.192	98.087
Majority Supported (Dummy)	213	0.498	0.501	0	1
BAP-Style Proposal (Dummy)	213	0.793	0.406	0	1
3/3 Proposal (Dummy)	213	0.887	0.317	0	1
No-Action Letter Sought (Dummy)	213	0.225	0.419	0	1
Binding Bylaw Amendment (Dummy)	213	0.038	0.191	0	1
Ownership Threshold (%)	213	2.800	0.586	1	3
Holding Period (Years)	213	2.845	0.465	1	3
Maximum Slate (%)	213	26.934	9.016	20	100
Group Size Differences (Dummy)	213	0.089	0.286	0	1
Maximum Ownership (Dummy)	213	0.042	0.202	0	1
Certification Requirements (Dummy)	213	0.840	0.367	0	1
Presentation Requirements (Dummy)	213	0.117	0.323	0	1
Binding Bylaw Amendment (Dummy)	213	0.038	0.191	0	1
Amendment Restrictions (Dummy)	213	0.009	0.097	0	1
Dueling 3/3 Proposal (Dummy)	213	0.023	0.152	0	1
Mgmt. Rec. (Dummy)	213	0.028	0.166	0	1

261. This table presents summary statistics for all shareholder proposals in the sample, excluding dual-class firms.

Dueling 5/3 Proposal (Dummy)	213	0.056	0.231	0	1
Preexisting 3/3 Proposal (Dummy)	213	0.113	0.317	0	1
Preexisting 5/3 Proposal (Dummy)	213	0.056	0.231	0	1
Staggered Board (Dummy)	174	0.190	0.393	0	1
SM Bylaws (Dummy)	174	0.305	0.462	0	1
SM Charter (Dummy)	174	0.397	0.491	0	1
SM Mergers (Dummy)	174	0.149	0.358	0	1
Golden Parachute (Dummy)	174	0.736	0.442	0	1
Poison Pill (Dummy)	174	0.057	0.233	0	1
Cumulative Voting (Dummy)	174	0.029	0.168	0	1
Majority Voting (Dummy)	174	0.810	0.393	0	1
Board Independence (%)	174	82.281	9.219	50	93.75
CEO Duality (Dummy)	174	0.448	0.499	0	1
Boys' Club (Dummy)	174	0.132	0.340	0	1
Institutional Ownership (%)	213	78.803	22.135	5.783	100
Insider Ownership (%)	212	6.138	11.092	0.003	66.272
Number of Blockholders	213	16.216	6.125	0	32
Say-on-Pay Vote (%)	213	88.013	13.768	22.6	99.8
Market Capitalization (Millions)	212	42,180.44	88,819.88	2.43	639,938.8
Assets (Millions)	212	85,794.13	301,801.20	2.599	2,225,494
Sales (Millions)	212	24,568.94	54,878.77	4.459	485,651
ROA (%)	212	8.347	6.990	−3.736	23.044
Operating Margin (%)	212	14.938	12.526	−11.662	37.320
PTB Ratio	202	3.792	3.464	0.828	14.053
Leverage	212	0.286	0.185	0	0.676

R&D (as % of Sales)	212	0.045	0.131	−0.255	0.393
EPS Growth (Dummy)	213	0.540	0.500	0	1
CAPM Alpha (%)	206	0.639	19.905	−68.692	97.784

Table A.4: RD Robustness Checks (Alternate Bandwidths)[262]

Market Model

	Dependent Variable				
	Cumulative Abnormal Returns (%)				
	(1)	(2)	(3)	(4)	(5)
LATE	3.448***	2.617*	2.260	1.869	0.477
	(1.130)	(1.455)	(1.569)	(1.632)	(1.555)
Obs.	26	33	36	42	59
Bandwidth	4.785	5.5	6.0	6.5	9.569

Note: *p < 0.1; **p < 0.05; ***p < 0.01

Fama–French

	Dependent Variable				
	Cumulative Abnormal Returns (%)				
	(1)	(2)	(3)	(4)	(5)
LATE	3.509***	2.794*	2.478	2.099	0.753
	(1.329)	(1.692)	(1.817)	(1.869)	(1.737)
Obs.	25	33	36	42	59
Bandwidth	4.768	5.5	6.0	6.5	9.536

Note: *p < 0.1; **p < 0.05; ***p < 0.01

Fama–French–Carhart

	Dependent Variable				
	Cumulative Abnormal Returns (%)				
	(1)	(2)	(3)	(4)	(5)
LATE	3.346**	2.681	2.280	1.874	0.436
	(1.513)	(1.797)	(1.931)	(1.986)	(1.759)
Obs.	28	33	36	42	60
Bandwidth	4.997	5.5	6.0	6.5	9.995

Note: *p < 0.1; **p < 0.05; ***p < 0.01

---

262.   These robustness checks use the same methodology as my baseline models but add specifications with alternate bandwidths: 5.5, 6.0, 6.5, and double the Imbens–Kalyanaraman optimal bandwidth.

Table A.5: RD Robustness Checks (Fuzzy Design)[263]

Market Model

| | *Dependent Variable* | | |
| | Cumulative Abnormal Returns (%) | | |
	(1)	(2)	(3)
LATE	26.889	18.775	18.775
	(46.334)	(46.334)	(65.888)
Method	Conventional	Bias-Corrected	Robust

Note: $*p < 0.1; **p < 0.05; ***p < 0.01$

Fama–French

| | *Dependent Variable* | | |
| | Cumulative Abnormal Returns (%) | | |
	(1)	(2)	(3)
LATE	18.058	13.676	13.676
	(27.992)	(27.992)	(38.259)
Method	Conventional	Bias-Corrected	Robust

Note: $*p < 0.1; **p < 0.05; ***p < 0.01$

Fama–French–Carhart

| | *Dependent Variable* | | |
| | Cumulative Abnormal Returns (%) | | |
	(1)	(2)	(3)
LATE	14.317	11.396	11.396
	(26.653)	(26.653)	(35.326)
Method	Conventional	Bias-Corrected	Robust

Note: $*p < 0.1; **p < 0.05; ***p < 0.01$

---

263.   These robustness checks employ a fuzzy RD design with robust bias-corrected inference and bandwidth-selection procedures following Sebastian Calonico et al., *Robust Nonparametric Confidence Intervals for Regression Discontinuity Designs*, 82 ECONOMETRICA 2295 (2014).

Table A.6: RD Robustness Checks (Parametric)[264]

"Close Calls" Only

	Dependent Variable		
	Cumulative Abnormal Returns (%)		
	(1)	(2)	(3)
	Market Model	Fama–French	Fama–French–Carhart
Pass	0.072	0.390	0.247
	(1.552)	(1.712)	(1.749)
Obs.	28	28	28
Bandwidth	5.0	5.0	5.0
Note:			*p* < 0.1; **p* < 0.05; ***p* < 0.01

Full Sample

	Dependent Variable		
	Cumulative Abnormal Returns (%)		
	(1)	(2)	(3)
	Market Model	Fama–French	Fama–French–Carhart
Pass	0.516	0.503	0.472
	(0.580)	(0.569)	(0.559)
Obs.	135	135	135
Bandwidth	Full Sample	Full Sample	Full Sample
Note:			*p* < 0.1; **p* < 0.05; ***p* < 0.01

---

264.   In these robustness checks, I run simple OLS regressions in the form $CAR = \alpha + D\tau + X\beta + \varepsilon$, where D is a dummy variable equal 1 if the proposal gained at least fifty percent of the vote and X is the percentage of votes cast in favor. τ is thus the treatment effect ("Pass" in the table). Figures in parentheses are heteroskedasticity-robust standard errors.