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David E. Rosenbaum

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CLASSIFIED BOARDS IN MISSOURI

I. INTRODUCTION

In all elections for directors or managers of any corporation, each shareholder shall have the right to cast as many votes in the aggregate as shall equal the number of shares held by him, multiplied by the number of directors or managers to be elected, and may cast the whole number of votes, either in person or by proxy for one candidate, or distribute such votes among two or more candidates; and such directors or managers shall not be elected in any other manner; provided, that this section shall not apply to cooperative associations, societies or exchanges organized under the law.

MISSOURI CONSTITUTION art. XI, § 6.
(Except for proviso, substantially identical
to MO. CONST. art. XII, § 6 (1875))¹

Literally this provision grants three rights: to choose directors by election, to vote, and to cumulate. Corporate elections are usually held annually to select an entire board of directors. In the case of vacancies statutes provide for appointment of directors to fill such vacancies.² In two states, under proper circumstances, statutes provide for appointment of a provisional director by a court.³ Where a constitution prescribes the manner of selecting directors, "appointments" without shareholder elections have been challenged;⁴ however, a discussion of the problem is beyond the scope of this comment.

The language of the constitutional provision giving the shareholder as many votes as he has shares, has been held to apply only to shares which are entitled to vote by corporate charter or shareholder agreement.⁵ Thus, the right of cumulative voting in director elections is guaranteed only to *voting shares*.⁶

1. The adoption of a provision in the same terms as in a former constitution carries the meaning of the prior provision into the new constitution. 1 COOLEY, CONSTITUTIONAL LIMITATIONS 136 (8th ed. 1926), *citing* Sanders v. St. L. & N. O. Anchor Line, 97 Mo. 26, 30, 10 S.W. 595, 597 (1888).

2. § 351.320, RSMo 1959.

3. § 351.323, RSMo 1959; CAL. CORP. CODE § 819.

4. *Compare* People *ex rel.* Weber v. Cohn, 339 Ill. 121, 171 N.E. 186 (1930) (vacancy-filling by board held to be an unconstitutional denial of cumulative voting right), *with* Wickersham v. Brittan, 93 Cal. 34, 38 (1898) (cumulative voting not applicable to "appointment" of directors to fill vacancies). See PEARCY, MISSOURI GENERAL AND BUSINESS CORP. LAW 258 (1948).

5. State *ex rel.* Frank v. Swanger, 190 Mo. 561, 89 S.W. 872 (En Banc (1905)); Shapiro v. Tropicana Lanes, Inc., 371 S.W.2d 237 (Mo. 1963). *Cf.* Sensabaugh v. Polson Plywood Co., 135 Mont. 562, 342 P.2d 1064 (1959) (dictum). *Contra*, People's Home Sav. Bank v. Superior Court, 104 Cal. 649 (1894) (dictum), Centrifugal Nat'l Concentrator Co. v. Eccleston, 122 Cal. App. 698, 10 P.2d 1033 (1932) (dictum); Brooks v. State *ex rel.* Richards, 26 Del. 1, 79 Atl. 790 (1911); People *ex rel.* Wateska Tel. Co. v. Emmerson, 302 Ill. 300, 134 N.E. 707 (1922); State *ex rel.* Dewey Portland Cement Co. v. O'Brien, 142 W. Va. 451, 96 S.E.2d 171 (1956).

6. Apparently shares must either be completely disenfranchised or be given full voting rights, for a class of shares may not be given voting rights restricted

The constitutional provision grants the shareholder the right to add all his votes together and distribute them among the candidates as he sees fit. This supersedes several systems of electing directors.⁷ Cumulative voting makes it possible for shareholders to have representation on the board of directors roughly proportional to their interests in the corporation.

The purpose of this comment is to examine one of the several methods of frustrating the constitutionally mandatory cumulative voting right.

It is the practice of some business corporations, permitted by statute, to divide their boards of directors into groups and stagger the election of the groups. The purpose of such classification is said to be the assurance of continuity of policy on the board. Curiously, cumulative voting was early thought to serve a like purpose.⁸ Another probable reason for the enactment of statutes authorizing classification was the great competition among the states for passing favorable incorporation acts. The Missouri statute permitting classified boards and staggered elections in business and manufacturing companies probably was originally taken from a similar Illinois provision.⁹

Classification has been challenged on the ground that it impairs or diminishes the effect of cumulative voting and thus undermines the constitutional right.¹⁰ The percentage of voting shares required to elect a director by cumulative voting increases as the number of directors to be elected is reduced. A nine-man board will

only to the election of one-half of the directors. OPS. ATTY. GEN. OF MO., August 24, 1964, No. 238. Cf., *Diamond v. Parkersburg-Aetna Corp.*, 146 W. Va. 543, 122 S.E.2d 436 (1961). Query whether a fractional share is entitled to vote. *State ex rel. Frank v. Swanger*, *supra* note 5, held that the right to vote may be denied to preferred shareholders by an agreement between the shareholders. No Missouri case has held that the legislature may constitutionally deny this right. Yet, § 351.300, RSMo 1959 provides that fractional shares are not voting shares unless otherwise provided. It is submitted that a fractional shareholder has the right to cast a fractional vote in director elections by virtue of the constitutional cumulative voting provision. See Peterson, *The Right to Vote a Fractional Share of Stock*, 87 CENT. L. J. 222 (1918), Kraus, *Cumulative Voting for Directors in Missouri Corporations*, 16 J. MO. BAR 441, 445 (1960).

7. The common law "rule of numbers" allowed only one vote to each shareholder, regardless of his interest in the corporation. The modern "rule of interest" gave all shareholders one vote per share, but enabled majority shareholders to exclude the minority from any representation on the board. See *State ex rel. Lawrence v. McGann*, 64 Mo. App. 225, 231 (St. L. Ct. App. 1895).

8. In 1844 Thomas Gilpin, who laid the theoretical basis for minority representation generally and for cumulative voting in particular, wrote that minority representation in elected bodies "would produce the steadiness of legislation, would prevent the sudden dismissal of all the representatives of a party from power at any one time." (Emphasis in original.) Gilpin, *On the Representation of Minorities to Act with the Majority in Elected Assemblies*, reprinted as, *An Early Essay on Proportional Representation*, 7 ANNALS 233, 243 (1896). Perhaps it is thought to serve this purpose even today. See Stephen, *Cumulative Voting and Classified Boards: Some Reflections on Wolfson v. Avery*, 31 NOTRE DAME LAW. 351, 376 (1956).

9. Compare § 351.315(1), RSMo 1959 (first enacted in 1881), with Ill. Laws 1871-72, at 296. The Illinois provision was the only general classification statute in existence in 1881. It was held unconstitutional in *Wolfson v. Avery*, 6 Ill.2d 78, 126 N.E.2d 701 (1955).

10. E.g., *Wolfson v. Avery*, *supra* note 9.

serve as an example. Under cumulative voting, if all nine directors are selected at one time, 10% of the shares plus one will elect a director. However, if the board is divided into three classes and only three directors elected at one time, 25% plus one share is required to elect a director.¹¹ Classification thus dilutes the effect of cumulative voting. A corporation could undoubtedly incorporate with a three-man board. The question is whether it can constitutionally achieve a three-director election by dividing the board into classes of three.¹²

II. ONE DIRECTOR CLASSES

If only one man is to be elected, the effect of cumulative voting, which is to aggregate the votes for all directors on one or more candidates, is gone. Thus, where majority shareholders attempted to elect seven directors, singly, on seven separate ballots, a California court held that the election violated the constitutional cumulative voting provision.¹³ Similarly, it has been held that the board may not be divided into classes so that only one director may be elected annually.¹⁴

There are no Missouri cases on this point. However, article XI, section 6 gives the right to multiply the number of shares times "the number of directors or managers to be elected. . . ." The use of the plural in this context is not without purpose.¹⁵ It is submitted that this language necessarily contemplates that more than one director will be elected at each election.

There are other indications that the constitution does not sanction one-man elections. Prior to the adoption of the cumulative voting provision in the 1875 constitution, no general and probably no special incorporation law had specifically authorized a board of directors with fewer than three members.¹⁶ At the constitu-

11. WILLIAMS, CUMULATIVE VOTING FOR DIRECTORS 48 (1951), Kraus, *Cumulative Voting for Directors in Missouri Corporations*, 16 J. MO. BAR 401, 407 (1960).

12. See *Shearman v. Mo. Pac. R.R. Co.*, 250 F.2d 191 (8th Cir. 1957) (injunction against constitutional challenge of classified board in a state court upheld pending final decision on reorganization plan in federal court).

13. *Wright v. Central Calif. Colony Water Co.*, 67 Cal. 532, 8 Pac. 70 (1885), cited with approval in *State ex rel. Frank v. Swanger*, *supra* note 5, at 576, 89 S.W. at 876.

14. *Stockholders' Comm. v. Erie Technological Prods., Inc.*, 248 F. Supp. 380 (W.D. Penn. 1965). *Accord*, *Bohannon v. Corp. Comm'n*, 82 Ariz. 299, 301, 313 P.2d 379, 381 (1957) (dictum); *Wolfson v. Avery*, *supra* note 9, at 87, 126 N.E.2d at 707 (dictum); *State ex rel. Syphers v. McCune*, 143 W. Va. 315, 101 S.E.2d 834 (1958).

15. It is presumed that constitutions are drafted with care. In construing them, courts strive to adopt a construction which will render every word operative and leave nothing idle or nugatory. *Brown v. Morris*, 365 Mo. 946, 290 S.W.2d 160 (En Banc 1956), *Wolfson v. Avery*, *supra* note 9, at 99, 126 N.E.2d at 713 (dissenting opinion), *COOLEY, op. cit. supra* note 1, at 128.

16. The pre-1865 special incorporation acts are too numerous to cite. The general incorporation laws in force at the time of the constitutional convention and the number of directors authorized by each were: railroad companies, Mo. Laws 1865, ch. 70, at 29, § 6 (3 to 7 directors); road companies, Mo. Laws 1865, ch. 71, at 40, § 5 (3 to 9 directors); insurance companies, Mo. Laws 1865, ch. 74, at 51, § 5 (5 to 9 directors); savings banks and loan companies, Mo. Laws 1865, ch. 75, at 62, § 3 (5 to 13 directors); manufacturing and business companies, Mo. Laws 1865, ch. 76, at 65, § 3 (3 to 13 directors). One general law, authorizing the

tional convention of 1875 Mr. Albert Todd proposed, unsuccessfully, a cumulative voting provision for all state-wide *political* elections:

At every election in which there shall be *more than one person to be elected* for the like office, any voter may cast for any designated candidate, as many votes as there are *persons* to be elected or may distribute his votes among the candidates at his discretion.¹⁷

Apparently, it was known that the cumulative voting system would work only where more than one office was to be filled.

It has been suggested that since cumulative voting contemplates the election of more than one director, the constitutional mandate simply is not directed to one-director elections.¹⁸ But if this had been the intent of the framers of the corporate cumulative voting provision, it is likely that they would have used language similar to Mr. Todd's proposal. Moreover, article XI, section 6 directs that cumulative voting be used "in *all* elections for directors or managers" (excluding none). The provision concludes with the prohibition that "such directors or managers shall not be elected in any other manner." It is submitted that the constitutionally contemplated effect of cumulative voting is destroyed and the constitution violated by one-director classes and by section 351.315(1), RSMo 1959 which permits incorporation with one-man boards.

III. CLASSES OF MORE THAN ONE DIRECTOR

A. Decisions

Most classified boards consist of groups of more than one director. This practice dilutes the cumulative voting right. Its constitutionality was first challenged in *Wolfson v. Avery*.¹⁹ The Illinois Supreme Court construed the purpose of the cumulative voting provision to be to provide representation on the board in proportion to interest in the corporation. Since classified boards and staggered elections make the representation disproportionate, the statute allowing it was held unconstitutional. The West Virginia Supreme Court reached the same result.²⁰ California courts have also held that cumulative voting was intended to afford representation in proportion to interest.²¹

incorporation of telegraph companies, may have authorized a board of less than three directors. The stockholders were given the authority to elect "such number of *directors* as they may determine. . . ." Mo. Laws 1865, ch. 72, at 44, § 1. (Emphasis added.)

17. 1 JOURNAL OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1875 448 (hereinafter cited as "JOURNAL"). (Emphasis added.) See also, 2 JOURNAL 717.

18. Moudy, *Cumulative Voting Versus Classification of Directors*, 22 Mo. L. Rev. 38, 43 (1957).

19. 6 Ill.2d 78, 126 N.S.2d 701 (1955); Stephen, *op. cit. supra* note 8; Notes, 69 HARV. L. REV. 380 (1955); 55 MICH. L. REV. 997 (1956); 50 NW. U. L. REV. 112 (1955); 103 U. PA. L. REV. 822 (1955).

20. *State ex rel. Syphers v. McCune*, 143 W. Va. 315, 101 S.E.2d 834 (1958).

21. In *Film Producers, Inc. v. Jordan*, 171 Cal. 664, 154 Pac. 605 (1916), articles of incorporation gave one vote per share to common stock, having a par value of \$1, and preferred stock, having a par value of \$20. Since "shares," as used

On the other hand, the constitutionality of a classification statute was upheld in *Janney v. Philadelphia Transp. Co.*²² In the Arizona case of *Bohannon v. Corp. Comm'n*²³ the practice of classification was upheld under a constitutional cumulative voting provision nearly identical to article XI, section 6 of the Missouri constitution. Curiously, the court held that the mention of providing minority shareholders with a "look-in" on the board at the 1910 constitutional convention did not indicate that cumulative voting was intended to afford proportional representation.²⁴ Another basis for the *Bohannon* decision was that the 1910 constitution "assumes the existence of a system of laws which is to remain in force. . . ."²⁵ Apparently this was a reference to the widespread popularity of classified boards when the Arizona constitution was adopted.²⁶

Certain criteria are consistently used to judge the validity of classification. The courts look first to the plain and natural meaning of the various constitutional provisions.²⁷ Each court has decided or assumed that the language of the particular constitutional provision neither clearly contemplates nor prohibits classified boards. The "system" of corporate elections in force at the time of the adoption of the constitution is another factor in the decisions. These two criteria will be discussed immediately. A third criterion, the intended purpose of the constitutional cumulative voting provision, will later be discussed.

B. *The Meaning of "Directors to be Elected" and the "Well-Understood System"*

One of the most persistent defenses of classification has been that the phrase, "the number of directors or managers to be elected," as used in the constitution

in the statutory cumulative voting provision, were merely representatives of *value*, it was not a sufficient compliance with the law merely to give each share one vote. The articles were held to be in violation of the cumulative voting statute because the statute was intended to give shareholders voting power "in proportion to their interest in the capital stock of the corporation." *Id.* at 666, 154 Pac. at 606. (Emphasis added.) In *Del Monte Light & Power Co. v. Jordan*, 196 Cal. 488, 238 Pac. 710 (1925) (par and no par stock), the *Film Producers* case was given constitutional status. Since these holdings effectively required that all stock be issued at identical par values, the California Bar advocated repeal of the constitutional cumulative voting provision. 1928 CALIF. B. PROC. 187. CAL. CONST. art. XII, § 12, was repealed in 1930.

22. 387 Pa. 282, 128 A.2d 76 (1956), *Sell, Corporations*, 19 U. PITT. L. REV. 277-81 (1958); Notes, 55 MICH. L. REV. 997 (1956); 26 U. CINC. L. REV. 312 (1957).

23. 82 Ariz. 299, 313 P.2d 379 (1957).

24. *Id.* at 303, 313 P.2d at 382.

25. *Id.* at 304, 313 P.2d at 382.

26. In 1910 there were approximately nineteen states which expressly authorized classified boards: Delaware, Colorado, Idaho, Illinois, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, South Dakota and Virginia. A section in Thompson's treatise was devoted to the subject. 1 THOMPSON, PRIVATE CORPORATIONS § 791 (1st ed. 1895).

27. See 1 COOLEY, *op. cit. supra* note 1, at 130.

contemplates the election at any time of fewer than the total number of directors.²⁸ As part of a constitution, this ambiguous language must, if possible, be given effect.²⁹ The phrase in question can be used to justify classification only if the framers so intended it.

In ascertaining whether this language contemplates classified boards, one must keep in mind the maxim that a constitution "assumes the existence of a well-understood system which is to remain in force and be administered, but under such limitations and restrictions as that instrument imposes. . . ."³⁰ Hence, a second inquiry: Were classified boards part of the "well-understood system" in 1875?

There are three plausible meanings of "the number of directors or managers to be elected" in the context of cumulative voting.

Classification. It is scarcely possible that by the qualifying phrase, "to be elected," the framers had in mind the practice of classifying boards and staggering elections. If the clause were to be written today, it might be otherwise.³¹ But at the time of the 1875 Constitutional Convention classified boards were almost unheard of in this country.³²

Prior to 1865 most Missouri corporations were created by special or private acts of the legislature.³³ One of the earliest acts, creating the Bank of St. Louis in 1813, provided for thirteen directors "who shall hold their offices for one year . . . and shall be elected on the second Monday in December in every year. . . ."³⁴ In similar terms nearly all special acts of that period set a certain day for yearly elections of all directors.³⁵

28. See Adkins, *Corporate Democracy and Classified Boards*, 11 BUS. LAW. 31, 36 (1958), Moudy, *op. cit. supra* note 18, at 46, Sell & Fuge, *Impact of Classified Corporate Directorates on the Constitutional Right of Cumulative Voting*, 17 U. PITT. L. REV. 151, 168 (1956); Notes, 69 HARV. L. REV. 380 (1955), 55 MICH. L. REV. 997, 1002 (1956), 26 U. CINC. L. REV. 312, 315 (1957), 103 U. PA. L. REV. 822, 826 (1955). *But cf.*, Stephen, *op. cit. supra* note 8, at 373.

29. Wolfson v. Avery, *supra* note 9, at 99, 126 N.E.2d at 713; 1 COOLEY, *op. cit. supra* note 1, at 128. For Missouri law to this effect, see note 15 *supra*.

30. State v. Harp, 320 Mo. 1, 6 S.W.2d 562 (En Banc 1928); 1 COOLEY, *op. cit. supra* note 1, at 133. See also, Bohannon v. Corp. Comm., *supra* note 25.

31. At least forty states currently allow classification. See Wolfson v. Avery, *supra* note 9, at 106, 126 N.E.2d at 716 (dissenting opinion). *But cf.*, NATIONAL INDUSTRIAL CONFERENCE BOARD, STUDIES IN BUSINESS POLICY, No. 103, at 25 (the overwhelming majority of firms surveyed elect directors for one year terms annually).

32. Classification was authorized in only one state. See note 9 *supra*. It was not until 1891 that classified boards in stock companies were referred to in any textbook:

In the American States directors are usually elected annually to serve one year. But in England under the Companies Clauses Act of 1845, they serve three years, one-third retiring from offices annually.

BEACH, PRIVATE CORPORATIONS § 226, at 379 (1891).

33. Pittman, *Nonvoting Shares—In Missouri*, 26 Mo. L. REV. 117, 127, n.33 (1961).

34. Mo. Terr. Laws 1813, at 68.

35. See, *e.g.*, the following acts: Bank of Missouri, Mo. Terr. Laws 1816-17, at 100; Cape Girardeau Mill Co., Mo. Laws 1826, at 11, §§ 5, 7; Ins. Co. of St. Louis, Mo. Laws 1830, at 61, § 6; Marine Ins. Co. of St. Louis, Mo. Laws 1834-35, at 58, § 6.

Other typical provisions, requiring the election of an entire new board of directors yearly, were:

- [the directors] "shall be elected by the stockholders at their regular annual meetings . . . and shall hold their offices for one year," or
 "the directors shall hold their offices one year . . . elections for directors, shall be holden annually," or
 "the affairs of the company shall be managed by a board of five directors, to be elected annually by the shareholders."

From 1813 to 1865 corporations continued to be created by special acts. Of the 756 special acts incorporating stock companies prior to 1865, 726, or 96%, provided for annual elections for *all* directors. (See Appendix.)

The first *general* incorporation act was passed in 1849. This permitted the formation of companies organized for manufacturing, mining, mechanical and chemical purposes. The articles of incorporation were to name the directors for the first year and

not less than three, nor more than nine directors . . . shall, except the first year, be annually elected by the stockholders . . .³⁶

In 1855 four general incorporation acts were enacted. Three of these laws, authorizing the incorporation of railroad associations,³⁷ road companies,³⁸ and companies formed for manufacturing, mining, mechanical or chemical purposes,³⁹ required yearly elections for the *entire* board. The remaining act, which authorized the formation of fund associations,⁴⁰ contained no provisions relating to elections.

The 1865 constitution forbade the creation of private corporations by special act.⁴¹ In that year a general act relating to manufacturing and business companies provided for "directors, not less than three no[r] more than thirteen in number . . . to be elected by ballot by the stockholders in said company for one year . . ."⁴² Similarly, the directors were to be elected annually for one year terms in all railroad companies,⁴³ macadamized, graded and plank road companies,⁴⁴ telegraph companies,⁴⁵ and insurance companies.⁴⁶ The general act relating to savings banks and fund companies provided only that the directors were to serve for one year.⁴⁷

Thus, nearly every special or general incorporation law prior to 1875 pro-

36. Mo. Laws 1849, at 18, § 3.

37. Ch. 39, § 5, at 408, RSMo 1855 provided that the directors "shall be chosen annually. . . ."

38. Ch. 38, § 5, at 395, RSMo 1855.

39. Ch. 37, § 3, at 385, RSMo 1855.

40. Ch. 36, at 381, RSMo 1855.

41. Art. VIII, § 4.

42. Mo. Laws 1865, ch. 76, at 65, § 3.

43. Mo. Laws 1865, ch. 70, at 29, § 6.

44. Mo. Laws 1865, ch. 71, at 40, § 5.

45. Mo. Laws 1865, ch. 72, at 44, § 3.

46. Mo. Laws 1865, ch. 74, at 51, § 5 (fire and marine), and at 57, § 37 (life, health and accident).

47. Mo. Laws 1865, ch. 75, at 62, § 3.

vided for annual elections of *all* directors. Classification, by comparison, was practically nonexistent in Missouri prior to the 1875 constitution.

The first stock company in Missouri which was permitted to classify its board was the Missouri Iron Company in 1836. The nine-man board was divided into two classes of five and four directors, respectively. Each class was to serve for two years.⁴⁸ Another typical provision was one authorizing a board of twenty directors to be divided into five classes of four directors each so that "the terms of service of one of said classes shall expire at the end of two years, one at the end of four years . . ." (and so forth).⁴⁹ However, this practice was not very popular. By 1865 only twenty-five out of the 756 stock companies incorporated has classified boards.⁵⁰ (See Appendix.)

None of the *general* incorporation acts of 1849, 1855, or 1865 allowed classification. Only one general incorporation act prior to 1875 permitted this practice in Missouri stock companies. The statute, passed in 1872, permitted railroad companies to divide their boards into three equal classes. Only one class was to be elected every year.⁵¹ The purpose of this act is significant. It was entitled "An act for the better regulation of railroad companies and to protect the rights of minority shareholders."⁵² The Grangers were responsible for this and other legislation regulating railroads for the protection of the public.⁵³ The probable object of this particular statute was to prevent "rings" of speculators, such as the infamous "Erie Railroad ring," from purchasing a bare voting majority of stock in small railroad companies, electing only their own agents to the board, and quickly selling the companies from under the minority stockholders.⁵⁴ Although classification postponed the capture of the board by such "rings," some more permanent protection for minority shareholders was written into the 1875 constitution.

48. Mo. Laws 1836, at 220, § 2.

49. This appeared in the act which incorporated Missouri Life Ins. & Trust Co. Mo. Laws 1836, at 207, § 9.

50. Among these were nine business and manufacturing companies, seven insurance companies, seven savings fund associations, one loan association and one utility company. These figures do not include several state banks authorized to classify by a general act of 1857. Mo. Laws 1856-57, at 21, art. I, § 23. In 1863 these banks were dissolved and reorganized under the provisions of the National Banking Act. Mo. Laws 1863-64, at 9. The National Banking Act provided for not less than five directors to be elected annually for one year terms. Ch. 106, §§ 9, 10, 13 Stat. 102 (1864). It is noteworthy that in Illinois, which held classification unconstitutional, there were at least 124 stock companies created by special act prior to the 1870 constitution which had classified boards. See note, 55 MICH. L. REV. 997, 1003 (1956). See also, note, 50 NW. U. L. REV. 112 (1955).

51. Mo. Laws 1872, at 68.

52. See *Senate Journal*, Twenty-Sixth General Assembly, Adj. Sess. 724 (1871-72).

53. 2 Williams & Shoemaker, MISSOURI, MOTHER OF THE WEST 274 (1930). See statutes cited in Shoemaker, MISSOURI AND MISSOURIANS 17 (1943).

54. During the debate on cumulative voting at the Ohio Constitutional Convention of 1874 a Mr. Ewing explained that this was the sole purpose behind "staggered" elections (referring to classification). 2 OHIO DEBATES 2407. This was also one of the reasons for cumulative voting. *Ibid.*; Wolfson v. Avery, *supra* note 9, at 92, 126 N.E.2d at 709; 3 DEBATES AND PROCEEDINGS IN THE NEBRASKA CON-

It is fair to say that by 1875 classification was only rarely used in stock companies except to protect minority shareholders in railroad companies.

Sliding boards. Another possible explanation of the phrase "the number of directors or managers to be elected" is that it contemplates the possibility that the number of directors on the board will vary from year to year. In "sliding boards" there is a minimum and a maximum number of directors "to be elected." Prior to each annual meeting, the shareholders decide upon the number of directors to be elected for the ensuing year.

Sliding boards were very popular in nineteenth-century stock companies. Probably the first special act permitting a sliding board was Mine A'La Motte & Mississippi Railroad Company in 1836. It provided that at the annual meetings the stockholders were "to choose — directors. . . ."⁵⁵ Other acts provided for a sum certain of directors "and such others as the stockholders may appoint."⁵⁶ Typical acts authorizing sliding boards prior to 1865 contained such provisions regarding the number of directors "to be elected" as:

"such number of their own body as they [shareholders] may deem expedient," or
 "not less than five," or
 "not less than three, nor more than five," or
 "five directors (which may be increased at any time by majority vote of the stockholders to seven)," or
 "not exceeding thirteen."

Of the 756 special acts incorporating stock companies prior to 1865, approximately 177, or one in every four, contained similar provisions. (See Appendix.)

In 1875, about four months before the cumulative voting provision was proposed at the constitutional convention, one special act was amended to allow the shareholders "to designate by resolution . . . the number of directors of which the board shall consist, not less than five nor more than fifteen. . . ."⁵⁷

The provisions in *general* incorporation acts are typified by the 1849 act relating to manufacturing, mining, mechanical and chemical companies. It provided for "not less than three, nor more than nine directors. . . ."⁵⁸ The articles of incorporation were to specify only "the number of directors to be elected for the first year. . . ."⁵⁹ Nearly identical provisions appeared in all general incorporation laws prior to 1875, except for an 1855 act relating to fund associations⁶⁰ and an 1865 act relating to telegraph companies.⁶¹ Although sliding boards were not specifically

STITUTIONAL CONVENTION (1871) 104 (hereinafter cited as "NEBRASKA DEBATES"); 4 DEBATES OF THE PENNSYLVANIA CONSTITUTIONAL CONVENTION (1872-73) 605. See also, Kraus, *op. cit. supra* note 11, at 402.

55. Mo. Laws 1836, at 261, § 5. The act incorporating Weston Gas-Light Co. contained an identical provision. Mo. Laws 1856, at 492, § 6.

56. See, *e.g.*, Mo. Laws 1847, at 151, § 2.

57. Mo. Laws 1875, at 441, § 41.

58. Mo. Laws 1849, at 19, § 3.

59. *Id.*, § 1.

60. Ch. 36, at 381, RSMo 1855.

61. Mo. Laws 1865, ch. 72, at 44, § 1.

authorized by these acts, they probably were permissible in view of their popularity and the fact that the articles were only to state the number of directors to be elected at the *first election*.⁶²

Thus, sliding boards were authorized in one-fourth of the special acts and probably in nearly every general incorporation act prior to 1875.

Variations in the size of corporate boards. The phrase, "the number of directors or managers to be elected," may simply refer to the different sizes of corporate directorates. Prior to the 1875 constitution the number of directors in Missouri corporations had always varied from three to thirteen or more.⁶³ It would have been impractical to specify a particular number of directors for all the hundreds of corporate bodies in Missouri. The use of the phrase in question merely "searches out all such bodies in the State without exception and applies to them the needed reform."⁶⁴

In determining which of the three possible meanings is to be attributed to the constitutional language, one must keep in mind the "well-understood system" at the time of the constitution's adoption.⁶⁵ While the "system" was primarily the practice of having a *fixed number* of directors (from three to thirteen) with one year terms, the practice of sliding boards was rather widely recognized. Classified boards and staggered elections, in comparison, were uncommon in 1875. This practice could not reasonably have been a "well-understood system" of electing directors in stock companies nor was it likely to have been in the minds of the original framers of article XI, section 6.

C. Proportional Representation in 1875

The cases have generally held that if the *intended purpose* of a cumulative voting provision is to provide proportional representation, classified boards and staggered elections are unconstitutional because they make representation disproportionate to interest.⁶⁶ The purpose of most provisions has been ascertained by

62. See Lyons, *Changes in the General and Business Corporation Law*, 18 Mo. B. J. 90 (1962). This practice is no longer permissible. The articles must state the number of directors "to constitute the board of directors. . . ." § 351.055(6), RSMo 1959.

63. See statutes cited note 16 *supra*.

64. 3 PROCEEDINGS AND DEBATES OF THE THIRD CONSTITUTIONAL CONVENTION OF OHIO 2410 (1874) (hereinafter cited as "OHIO DEBATES"). A cumulative voting provision had been proposed at the convention. This remark, by Mr. Miner, came after it had been pointed out that there were several thousand corporations with varying numbers of directors and that the language should be broad enough to cover every conceivable directorate. A Mr. Smith had earlier suggested an alternative to the broad language of the proposed section—*i.e.*, that it list the exact number of votes each share would have where the number of directors was three, four, five, and on *ad infinitum*. *Id.* at 2409. Mr. Smith's suggestion was not accepted by the convention.

65. See note 30 *supra*.

66. *Wolfson v. Avery*, *supra* note 9, at 94, 126 N.E.2d at 710; *Bohannon v. Corp. Comm'n*, *supra* note 14, at 302, 313 P.2d at 381, *State ex rel. Syphers v. McCune*, *supra* note 14, at 323, 101 S.E.2d at 839 (1958). In *Janney v. Philadelphia Transp. Co.*, 387 Pa. at 289, 128 A.2d at 80, the court held that cumulative voting was intended to provide an *opportunity* to obtain proportional representa-

analyzing the constitutional convention debates on cumulative voting. There was no debate on *corporate* cumulative voting at the 1875 Missouri Constitutional Convention. However, the general understanding of cumulative voting *circa* 1875 indicates that the probable purpose of article XI, section 6 was to provide for proportional representation.

Cumulative voting was first propounded by various political theorists such as Thomas Gilpin⁶⁷ and John Stuart Mill⁶⁸ as a means of achieving proportional representation in representative assemblies. Shortly after the Civil War it was advocated in the United States as a reform of legislatures by David Dudley Field,⁶⁹ Horace Greeley,⁷⁰ Senator Buckalew of Pennsylvania,⁷¹ and Joseph Medill of the *Chicago Tribune*.⁷²

Champions of "corporate democracy" at the Illinois Constitutional Convention wrote proportional representation into the corporate law in the form of a cumulative voting provision.⁷³ The adoption of corporate cumulative voting, *as a device to achieve representation in proportion to interest*, was considered by constitutional conventions in New York (1867),⁷⁴ Nebraska (1871),⁷⁵ West Virginia (1872),⁷⁶ Pennsylvania (1872-73),⁷⁷ and Ohio (1874).⁷⁸

tion, but not to *guarantee* such representation in any event. The court failed to explain how there is such an "opportunity" where there are classified boards and staggered elections.

67. GILPIN, *op cit supra* note 8, at 243.

68. "In a really equal democracy any section would be represented, not disproportionately, but proportionately." Mill, *Of True and False Democracy—Representation of all and Representation of the Majority Only*, in CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 102, 103 (1958). Later in this passage Mill states that his remarks on cumulative voting as premised, in part, on a pamphlet by an American, James Garth Marshall.

69. In a paper read before the American Social Science Association in 1870 Field listed cumulative voting as one of six practical applications of proportional representation. *Representation of Minorities*, 3 J. Soc. Sci. 133, 142 (1871).

70. See 2 DEBATES OF THE NEW YORK CONSTITUTIONAL CONVENTION OF 1867 1092 (hereinafter cited as "NEW YORK DEBATES").

71. In Congress, Senator Buckalew consistently referred to cumulative voting as "proportional representation." See, e.g., Buckalew, *Report from the Select Committee on Representative Reform*, CONG. GLOBE APP., 40th Cong., 3rd Sess. 268 (1869).

72. *Wolfson v. Avery*, *supra* note 9, at 89, 126 N.E.2d at 708.

73. *Id.* at 94, 126 N.E.2d at 710.

74. Both the proponents and the opponents of corporate cumulative voting in New York understood cumulative voting to be a device to obtain representation *strictly* in proportion to interest. See 2 NEW YORK DEBATES 1092-98. The provision was rejected by the Convention.

75. The only remarks on the proposed section, nearly identical to Missouri's cumulative voting provision, were by a Mr. Wakeley. The words which Mr. Wakeley chose to describe this provision were "proportionate representation." 3 NEBRASKA DEBATES 104. An identical provision was adopted without debate in 1875 and is now article XII, section 5 of the Nebraska Constitution.

76. The debates on West Virginia's constitutional cumulative voting provision are not available. However, the 1872 constitution did authorize the legislature to propose "a plan or scheme of proportional representation in the Senate. . . ." W. VA. CONST. art. VI, § 5. Classification, being a device "which prevents *full enjoyment*" of the cumulative voting right, is unconstitutional in West Virginia. State Published by University of Missouri School of Law Scholarship Repository, 1967

The debates at the Missouri convention of 1875 on a related provision—cumulative voting for Representatives in the General Assembly⁷⁹—indicate that this new system of voting had a similar purpose in Missouri. During this discussion cumulative voting was referred to as “proportional representation.”⁸⁰

IV. CONSTRUCTION

The most impressive evidence that the cumulative voting provision was not intended to permit classification came after the adoption of the constitution of 1875. The task of implementing its provision fell to the Twenty-Ninth General Assembly, which convened in January, 1877. Cumulative voting promptly was made mandatory in all elections for directors of savings banks. This law also provided that savings bank directors, not less than three nor more than thirteen, were to be elected annually for one year terms.⁸¹ In the same spirit the General Assembly took another look at the 1872 railroad classification statute. Possibly the legislators believed that classification violated the constitutional cumulative voting provision

ex rel. Syphers v. McCune, *supra* note 14, at 323, 101 S.E.2d at 839. (Emphasis added.)

77. Apparently the delegates at the Pennsylvania constitutional convention understood that cumulative voting would give minority shareholders “the power of electing as many of the directors and managers of a corporation as their number of shares will entitle them to. . . .” 4 DEBATES OF THE PENNSYLVANIA CONSTITUTIONAL CONVENTION [1872-73] 593 (hereinafter cited as “PENNSYLVANIA DEBATES”). Delegate Buckalew, a former United States Senator, was instrumental in getting the corporate cumulative voting provision adopted by the convention. See WILLIAMS, CUMULATIVE VOTING FOR DIRECTORS 27 (1951); Maynard v. Bd. of Canvassers, 84 Mich 228 (1890). He felt that cumulative voting would provide the shareholder with representation “proportionate to the interest which he hold. . . .” 4 PENNSYLVANIA DEBATES 605. See also note 71 *supra*.

78. The delegates at the Ohio convention understood that the purpose of cumulative voting was to give any number of shares “its exact proportional influence in the choice [of directors].” 2 OHIO DEBATES 2409. The debates on cumulative voting were indexed under “*Proportional Representation*.” The corporate cumulative voting provision was adopted by the convention, but rejected by the people.

79. One proposal, offered by Mr. Thomas Gantt of St. Louis, would have applied cumulative voting to all elections for representatives. 1 JOURNAL OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1875 224. Gantt’s idea was rejected by the convention.

80. After a state-wide cumulative voting section had failed, the St. Louis delegation offered a provision which would have applied only to St. Louis County. This would have given the right to cast “as many votes as there are Representatives to be elected in said county,” etc. 1 JOURNAL 378. (Emphasis added.) It was withdrawn the next day by Mr. Gantt, who explained:

[T]he St. Louis delegation consulted together yesterday and were unable to agree with entire unanimity upon the subject of *proportional representation*; therefore they abandoned that project. . . .

4 DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION 268. (Emphasis added.) It is noteworthy that Mr. J. C. Edwards, Chairman of the Corporations Committee which drafted the corporate cumulative voting provision, was a member of the St. Louis delegation.

81. Mo. Laws 1877, at 29, § 5.

by making representation disproportionate to interest.⁸² For whatever reason, the 1872 statute no longer served to "protect the rights of minority stockholders." It was repealed. Substituted in its place was the following:

At the next and all succeeding annual elections of directors by any railroad company incorporated by any law of this state, the stockholders shall elect a full board of directors, (unless it is otherwise provided in the act incorporating such company),⁸³ who shall hold their offices for one year. . . .⁸⁴

Thus, the first legislature after the adoption of the 1875 constitution repealed the only existing general classification statute and expressly forbade classified boards and staggered elections in railroad corporations. A court would be justified in applying the maxim that great weight is to be afforded to the construction given to a constitutional provision by the first legislature.⁸⁵

After 1877, no doubts remained as to the purpose of the cumulative voting provision. The cases assumed that this section was intended to grant representation in proportion to interest.

State ex rel. Lawrence v. McGann, decided in 1895, held that shareholders are entitled to elect no more than their equitable proportion of the board.⁸⁶ Ten

82. After discussing the conflict between staggered elections and cumulative voting the 1874 Ohio constitutional convention came to this conclusion. 3 OHIO DEBATES 2339, 2405-2407.

83. This parenthesis was probably inserted to avoid possible application of *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819). This case held that since incorporation by legislative act was a "contract" between the state and corporation, the charter could not be changed by the legislature unless it reserved the right to alter the charter. Some of the pre-1865 special incorporation acts in Missouri had not reserved this right. Thus, companies created by an "act" were exempted from the statute.

84. Mo. Laws 1877, at 373.

85. *Rathjen v. Reorganized School District R-II*, 284 S.W.2d 516 (Mo. En Banc 1955); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 418 (1821). See *Wolfson v. Avery*, *supra* note 9, at 103, 126 N.E.2d at 715 (Hershey, J., dissenting). The situation was different in Illinois. Since the first Illinois General Assembly made classification mandatory (Ill. Laws 1871-72, at 625), the *Wolfson* dissenter would have applied this maxim to validate classified boards.

86. 64 Mo. App. 225 (St. L. Ct. App. 1895). Due to the majority shareholders' failure to cumulate, minority shareholders, otherwise entitled to elect only two of the five directors, claimed three seats on the board. The majority shareholders, realizing their mistake, submitted a second ballot with cumulated votes. The second ballot was accepted and the three majority candidates declared directors. Upholding the validity of the election, the court stated:

These provisions were designed, as the terms indicate, to enable a minority in interest of the stockholders to elect a minority of the directors. The larger the minority, the greater the representation possible to be secured. . . . It can not be seriously contended for a moment that the object of such provisions is to enable the minority in interest of the stockholders present at the corporate meeting to elect the majority in number of the directors. . . . (Emphasis added.)

Id. at 232. Thus, the court felt that a minority of shares, by virtue of cumulative voting, was entitled to its proportional share of representation—and no more. It would seem to follow from this that a majority of shares is entitled to no more than a majority on the board.

years later in *State ex rel. Frank v. Swanger*⁸⁷ the Missouri Supreme Court upheld the constitutionality of nonvoting preferred stock. The court held that the *intended purpose* of article XI, section 6 was not to give each share one vote, but rather to guarantee the cumulative voting right to shareholders having the right to vote.⁸⁸ As if to emphasize a point already well-made, the court, citing the *McGann* case, stated:

The object and purposes of this provision in our Constitution is well understood and has been judicially expounded on several occasions. Its purpose was to introduce the principle of [the] cumulative system of voting in elections of stockholders so as to secure to the minority of the company a voice in the management of the affairs of the company *in proportion to the number of their shares*⁸⁹

V. CONCLUSION

The cumulative voting provision of the 1945 constitution remained substantially the same as that contained in the 1875 constitution. The adoption of a provision from a former constitution carries into the new constitution not only the original meaning of the prior section,⁹⁰ but also the interpretation which courts have placed upon it.⁹¹ It is submitted that article XI, section 6 of the Missouri Constitution provides for proportional representation and probably does not permit classified boards and staggered elections destructive of its purpose.⁹²

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87. 190 Mo. 561, 89 S.W.2d 872 (En Banc 1905).

88. *Id.* at 576, 89 S.W. at 876.

89. *Id.* at 575, 89 S.W. at 876. (Emphasis added.)

90. 1 COOLEY, CONSTITUTIONAL LIMITATIONS 136 (8th ed. 1926), *citing* Sanders v. St. L. & N.O. Anchor Line, 97 Mo. 26, 10 S.W. 595, 97 (1888).

91. Rathjen, *supra* note 85, at 519, Ludlow-Saylor Wire Co. v. Wollbrinck, 275 Mo. 339, 205 S.W. 196 (1918).

92. For a different analysis of the same problem, see Moudy, *Cumulative Voting Versus Classification of Directors*, 22 Mo. L. REV. 38 (1957). See also, Kraus, *Cumulative Voting for Directors in Missouri Corporations*, 16 J. MO. BAR 490 (1960).

COMMENTS

APPENDIX

Election of Directors in Stock Companies—1813-1865

Year of Incorporation*	Total Companies Incorporated**	Annual Elections of All Directors†		Classified Boards†† and Staggered Elections
		Fixed Number of Directors	Sliding Boards	
1813	1	1		
1817	1	1		
1822-23	1	1		
1826	1	1		
1830	4	4		
1832	2	2		
1834-35	3	3		
1836-37	2	2		
1837	46	43	1	2
1838	10	8	1	1
1840	6	5	1	
1842	4	4		
1844	4	4		
1846	17	15	2	
1848	37	32	4	1
1850	38	26	11	1
1852	33	21	12	
1854	72	57	15	
1855-56	57	43	13	1
1856-57	75	48	25	2
1857	31	22	7	2
1858	74	55	16	3
1859-60	73	57	14	2
1860 (Call.)	4	2	2	
1860-61	39	26	11	2
1862	10	7	2	1
1863	62	30	27	5
1864-65	44	29	13	2
		549	177	
TOTALS	751	726		25

*This includes year of incorporation as a stock company only. Often the original charter of a mutual company was amended in later years to authorize issuance of stock, election of directors, etc. The later year is counted as the year of incorporation. The original voting provisions were seldom changed.

**This includes revivals of expired charters, but not extensions of charters.

†This figure includes the number of such provisions under special acts, or, in a few cases, under general laws. A few of the acts included here provided for *biennial* elections of all directors, but, for the purposes of this comment, were no different than the usual annual elections. A typical provision was: "That the affairs of said company, shall be managed by five directors, who shall be elected by the stockholders, once in two years. . . ." Mo. Laws 1850, at 40, § 5. Other typical acts were: Mo. Laws 1848, at 224, § 4, Mo. Laws 1848, at 371, § 6.

††This includes all companies which were classified at their inception and all that were amended to allow classified boards and staggered elections—as of the date when classification was authorized. Several banks which were originally authorized to classify, but were later required by law to elect all directors annually for one year terms, are excluded. See note 50 *supra*.