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Symposium: Corporate Accountability

Introduction: Professor Randall Thomas's Depolarizing and Neutral Approach to Shareholder Rights

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Like Gaul, corporate law scholarship can be divided into three overflowing buckets: pro-manager, pro-shareholder, and empirical. We classify empirical scholarship as a separate category, in significant part because of Professor Randall Thomas.

In the pre-Thomas era, much of the literature fell into the first two buckets, with empirical researchers deploying data collection and analysis to support their particular bent. Then Professor Thomas emerged as a distinctive empiricist. Throughout his career, he has published scores of pathbreaking studies while maintaining relative neutrality as to the normative implications. He does not deploy data and its analysis to advocate for particular positions, but instead maps the terrain in which policy can then be considered. Thus, Professor Thomas's category of scholarship is the third way—a balanced approach to generating and assessing evidence, without a particular viewpoint.

We focus here on two areas of empirical exploration of the shareholder franchise, shareholder rights to sue and vote, where

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Professor Thomas has contributed richly and without polemics—as a neutral umpire calling balls and strikes. We show how his work has helped depolarize the division between managerialists and shareholder rights advocates.

I. SHAREHOLDER LITIGATION

No topic in the business sphere touches a raw nerve as sharply and frequently as shareholder litigation. Even though shareholder suits include individual shareholder claims, the focus of concern and complaints is derivative suits and class actions focusing on various forms of alleged breaches of fiduciary duty under state law or fraud claims under the federal securities laws.

Skepticism of shareholder suits, however, precedes the contemporary concern about shareholder deal litigation. The fount of this skepticism is likely not the prevalence of suits, as how can a large number of suits in isolation tell us much about whether they are abusive? Rather, the foundation for distrust of shareholder suits is the poor incentive structure that surrounds all forms of shareholder suits. With the exception of the securities law class action, the suit's plaintiff invariably has too little at stake in shareholder suits to be an adequate monitor of the suit's counsel. Moreover, with such a small ownership interest in the corporation, the plaintiff suffers no observable loss of wealth when the defense cost of the suit visits significant financial burdens on the corporation. And, though in derivative suits there is a requirement that the plaintiff be "adequate," that standard only eliminates the most egregious shareholder from representing the corporation's claim. Furthermore, the well-entrenched contingency fee arrangement encourages entrepreneurial litigation by plaintiff firms who manage and judge their success not on the individual case but on a portfolio of suits. Within such a portfolio there is room for the high-payout, long-shot suit. Finally, under the American Rule, losing a suit only rarely leads to sanctions, so the disciplining force of assigning costs to the loser is absent.

Before Professor Thomas's various studies, there were wide, unchallenged beliefs shaping public policy surrounding shareholder suits. For example, the hearings leading up to the passage of the Private Securities Litigation Reform Act ("PSLRA")[1] included testimony that securities class actions were filed, and quickly, after companies experienced a ten percent or greater decline in stock price, regardless

1. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C.).

of the cause of that decline.[2] A frequently cited law journal article questioned whether the merits of such suits mattered, based on a slender sample of suits with various amounts of damages all settling for the same low percentage.[3] Professor Roberta Romero skewered derivative suits on the ground that the average settlement in her study was $9 million (with the median being $2 million), and these were characterized as small in light of the size of the firm's assets; she also noted that most settlements included fee awards to the plaintiff's attorney.[4] She believed the facts, in combination, were consistent with the belief "that a significant proportion of [the] shareholder suits are without merit."[5]

The above describes the popular image of shareholder litigation when Professor Thomas and his co-investigators began a series of studies of shareholder litigation in state and federal courts.

A. State Fiduciary Claims

Claims of abuse premised on recoveries being but a few million dollars or the prosecuting attorney being paid as part of the terms of the settlement seem hardly definitive on the social benefit of shareholder suits. In contrast, the study Professors Robert Thompson and Thomas conducted of all complaints filed in the Delaware Chancery Court in 1999 and 2000 significantly increased our understanding of state law shareholder litigation by being the first such study to distinguish public companies from private firms when examining characteristics of class actions, derivative suits, and direct actions.[6] They found that about eighty percent of derivative suits in the study period involved public companies and, whereas about one-third of private derivative suits ended with some relief being granted, recoveries were slightly lower, at twenty-eight percent, for derivative suits involving public companies.[7] Within these groups, when monetary

2. *See* James D. Cox, *Making Securities Fraud Class Actions Virtuous*, 39 ARIZ. L. REV. 497, 499–500 (1997) (reviewing testimony before Congress in hearings preceding ultimate enactment of the PSLRA).

3. *See* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 516–17 (1991) (examining eight settlements, two of which fell substantially below the settlement range of 20.06–27.35 percent for the other six settlements).

4. *See* Roberta Romano, *The Shareholder Suit: Litigation Without Foundation?*, 7 J.L. ECON. & ORG. 55, 61 (1991) (describing the settlements' "striking features"). Romano further observed that "[t]he principal beneficiaries of the litigation . . . appear to be [the plaintiffs'] attorneys." *Id.* at 84.

5. *Id.* at 61.

6. *See* Robert B. Thompson & Randall S. Thomas, *The Public and Private Faces of Derivative Lawsuits*, 57 VAND. L. REV. 1747 (2004).

7. *Id.* at 1762, 1767 tbl.6, 1776 tbl.12.

relief was granted, it summed to millions of dollars for both public and private derivative suit proceedings.[8] However, the paucity of derivative suits in the nonpublic sector caused the authors to observe that "private company derivative litigation in Delaware plays little role in the governance of these firms."[9] Indeed, they reported that direct suits occur three times more frequently than suits raising derivative claims,[10] a result they surmised may reflect the Delaware courts' emphasis on private ordering in close corporations.[11] Public companies lack the intimacy that exists in private firms, which means that public companies do not have the expectations between managers and owners that commonly anchor direct claims in private firms. Hence, claims in public firms are normatively based so that, with the exception of well-pled allegations of self-dealing, managers enjoy a high presumption of propriety under the ubiquitous business judgment rule.[12] Derivative suits involving public corporations were found frequently to involve multiple suits arising from the same transaction, and their prosecution was concentrated among several law firms.[13]

Moreover, despite the continuing debate about how states can best approach the historical requirement of a pre-suit demand on the board of directors before initiating suit, Professors Thomas and Thompson found that failure to make a demand represented about one-fourth of the cases dismissed without relief; suits involving claims of self-dealing transactions or other conflicts of interest fared much better than did complaints outside these classic duty of loyalty claims.[14] They thus concluded, "Overall . . . demand does not appear to be carrying as much of the weight of derivative litigation as one might think given the attention devoted to that topic in the academic literature and case commentary."[15] Reflecting on the effect of the demand requirement, they wrote:

> [T]he bulk of all public company derivative suits challenge conflict of interest transactions, and in those derivative cases that produce affirmative relief, the majority of them relate to acquisition transactions, in which the plaintiffs allege that a control shareholder group has a conflict of interest. Acquisitions involve directors in a final period

8. *See id*. at 1777 tbl.13A, 1778 tbl.13B (charting monetary relief in derivative suits against public corporations and large private corporations).

9. *Id*. at 1767.

10. *Id*. at 1785 ("There were about twice as many direct actions filed against private companies as there were derivative actions. When those cases that include both direct and derivative counts are eliminated, the margin of direct suits over derivative suits increases to a three-to-one margin.").

11. *Id.* at 1767, 1793.

12. *See id.* at 1780–81.

13. *Id.* at 1768–69.

14. *See id.* at 1783.

15. *Id.*

> problem, in which the law could have a greater role, even if there are independent directors. These cases almost uniformly allege breaches of the duty of loyalty by directors.[16]

In contrast, claims of failure to monitor made up a minority of the filed cases in their study, which reflects the long odds of such suits ending successfully.[17] The authors attributed this to the demand requirement and suggested that it may be overemphasizing the role that independent directors can play in insightfully and dispassionately considering management's conduct.[18] They thus proposed excusing the demand requirement for public companies when suit is brought by a holder of one percent or more of the company's shares.[19]

Professors Thomas and Thompson thus documented fairly clear and understandable trends in the experience of the corporate derivative suit. Evidence that claims tend to be individual and not corporate in nature in private corporations, the very different outcomes in self-dealing versus oversight claims, and the more limited role of the demand requirement in combination describe a system that is both nuanced and discriminating, not one that is driven by extortion and expediency. This characterization flows from their more textured inquiry as compared to tallying raw outcomes in settlements.

In *The New Look of Shareholder Litigation*, Professors Thomas and Thompson were in the vanguard of academics performing studies of merger and acquisition litigation by separately investigating multiple facets of acquisitions that comprised ninety-four percent of the 824 class action suits in their 1999–2000 database.[20] The analysis of this large subset of their database found several important features unique to deal litigation: there was a "tremendous number of acquisition-oriented class action lawsuits filed in . . . Delaware";[21] the suits were filed quickly following a deal's announcement;[22] there were multiple suits attacking the same transaction, parroting language found in earlier-filed complaints;[23] such deal litigation was

16. *Id.* at 1786.

17. *See id.* at 1773.

18. *Id.* at 1789–90.

19. *See id.* at 1790.

20. *See* Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 VAND. L. REV. 133, 168, 169 tbl.2 (2004) (finding equally significant that acquisition cases made up over seventy-six percent of all fiduciary duty cases litigated in the 1999–2000 data set).

21. *Id.* at 181.

22. *Id.* at 182 (finding that "70 percent . . . are filed within three days of the announcement" and on average are filed more quickly than derivative suits).

23. *See id.* at 183–84 (correlating the number of suits attacking a single transaction with deal size and whether a bidder has also sued).

concentrated among about a dozen plaintiffs' law firms;[24] and deal litigation was on average of significantly shorter duration, with less evidence of activity on the part of their lawyers than in other shareholder suits.[25] These factors could have been invoked to support the claim that deal litigation is not just vexatious, but baseless. The great contribution of the study was that its findings debunked that broadside. Their close analysis of the data established not only that fee awards correlate with the relative strengths of the underlying claim, but that deal litigation yields monetary relief in exactly the class of cases such relief would be expected: where a substantial underpayment was suggested by the deal premium being too small.[26] Moreover, the law firms that were involved in large numbers of the cases had, on average, enviable records in terms of the suit producing meaningful relief to the class, and the likelihood that there would be additional consideration paid to the shareholders was correlated with the number of lawsuits filed challenging a transaction.[27] They further documented that the deals most vulnerable to suits and resulting monetary recoveries were those that involved self-dealing acquisitions, such as acquisition by a control person or a management buyout.[28] In a later publication focused on deals in the same 1999–2000 period, Professor Thomas and his coauthors found that litigation occurred in about ten percent of the deals, reduced the likelihood the transaction would be consummated, and increased the return to shareholders.[29]

Now, two decades later, there is reason to believe the composition of deal litigation is quite different from what it was in 1999–2000. Contemporary studies show a quantum increase in deal litigation. For example, a study of such acquisitions occurring in 2012 found that ninety-three percent of transactions in excess of $100 million were the subject of a shareholder suit.[30] Because it is hard to believe that business mores declined precipitously in the intervening twelve-year period, the surmise, supported by some concrete data, is that the

24. *See id.* at 185–87 (showing that sixteen firms maintained at least twenty such suits). Moreover, some plaintiffs appear multiple times. *Id.* at 188 tbl.13.

25. *See id.* at 189–91 (examining the timeframe for settlement and dismissal).

26. *Id.* at 194, 201.

27. *See id.* at 197 (noting the success of the top sixteen plaintiffs' firms and correlating monetary recovery and the number of suits filed in an acquisition).

28. *See id.* at 200–04 (analyzing control of shareholder transactions).

29. *See* C.N.V. Krishnan, Ronald W. Masulis, Randall S. Thomas & Robert B. Thompson, *Shareholder Litigation in Mergers and Acquisitions*, 18 J. CORP. FIN. 1248, 1264–65 (2012) (discussing the study's conclusions).

30. ROBERT M. DAINES & OLGA KOUMRIAN, SHAREHOLDER LITIGATION INVOLVING MERGERS AND ACQUISITIONS 1 (2013), http://www.cornerstone.com/Publications/Reports/2012-Shareholder-Litigation-Involving-M-and-A [https://perma.cc/4LSE-ZADK].

observed epidemic of deal litigation is lawyer driven and not due to a rise in overreaching misconduct.[31] Contrary to the findings of Professors Thomas and Thompson, a study of deal litigation spawned by transactions in 2005–2013 found that increases in consideration happened less frequently in such suits, with the most common remedy being supplemental disclosures surrounding the transaction or amendments in merger terms.[32] This evidence suggests litigation is at least trending into the vexatious realm, an observation made more plausible by the benchmarking provided by the earlier Thomas and Thompson study. Another trend captured by more recent work by Professor Thomas and his coauthors is that this litigation has migrated, and quickly, outside of Delaware and particularly to federal courts, where the focus is on incomplete disclosures in the proxy materials accompanying shareholder approval of the transaction.[33]

In 2012, Professors Thomas and Thompson returned to the subject of the lawyers' role in burgeoning shareholder litigation by investigating the forces that guide a plaintiff's choice among the various forums in which shareholder litigation may take place.[34] In a federal system, choice abounds, and in the sphere of corporate law, does so in both federal courts and state courts; independent of possibly lodging in federal court a state-based fiduciary claim on the basis of diversity jurisdiction, substantive federal securities disclosure claims regularly spring from behavior triggering state fiduciary claims. Their paper thus provided a coherent theory of, and justification for, the recent epidemic of multiforum litigation and did so in the context of telling the evolving story of how the substance and procedure of litigation morphs through time in response to a variety of judicial and legislative responses to litigation development. For example, they reasoned that *Matsushita*

31. *Cf.* Jill E. Fisch, Sean J. Griffith & Steven Davidoff Solomon, *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. 557, 561 (2015) (finding that the typical relief provided in settlement of merger suits—amendment of the terms, supplemental disclosure, or increase in consideration—does not impact or only weakly impacts shareholder vote); Charles R. Korsmo & Minor Myers, *The Structure of Stockholder Litigation: When Do the Merits Matter?*, 75 OHIO ST. L.J. 829, 873 (2014) (finding no correlation between the premium shareholders receive in a merger and the likelihood of a class action challenging the merger).

32. Fisch et al., *supra* note 31, at 566.

33. *See* Mathew Cain, Jill Fisch, Steven Davidoff & Randall S. Thomas, *The Shifting Tides of Merger Litigation*, 71 VAND. L. REV. 603, 621–629 (2018) (attributing noticeable migration of deal litigation from Delaware state courts to wide adoption of forum selection clauses and *In re Trulia, Inc. Stockholder Litig.*, 129 A.3d 884 (Del. Ch. 2016), which established that disclosure-only settlements will henceforth be viewed with disfavor and withheld approval of settlement and attorney fees to underscore the newly announced position).

34. *See* Randall S. Thomas & Robert B. Thompson, *A Theory of Representative Shareholder Suits and Its Application to Multijurisdictional Litigation*, 106 NW. U. L. REV. 1753 (2012).

Electrical Industrial Co. v. Epstein[35] stimulated multiforum litigation by holding that a state court global settlement was entitled to full faith and credit even though that settlement included claims the court lacked jurisdiction to hear.[36] Another force driving the explosion of deal litigation is that the PSLRA's lead plaintiff provision effectively foreclosed smaller plaintiffs' firms from lucrative securities fraud practice; hence, they shifted their focus to deal litigation or to "tagalong" derivative suits based on state law claims that the board failed to monitor management's disclosure practices and/or the operational practices that gave rise to the event underlying the claimed misrepresentation.[37] Thus, we see that a change in substantive law (*Matsushita*) and procedural law (the lead plaintiff provision) changed the composition, but not the frequency, of shareholder litigation. Professors Thomas and Thompson explained that the problem is not the number of deals attracting litigation but the amount of multijurisdictional litigation[38] and reasoned that the motive of multijurisdictional litigation is that a second set of attorneys can garner a piece of the *pool* of fees the litigation might be expected to generate.[39] Their explanation was that today's explosion of multiforum, multi-type shareholder suits is a strategy for a zero-sum game. The resort to multiple suits from the same transaction is not the traditional quest for a better or different body of law; it is a strategy to garner fees.[40] They referred to this as "fee distribution litigation."[41] It is a means by which smaller, newer firms can participate in the pool of fees, playing on the defendant's wish for peace through a "global settlement."[42] Their explanation does not invoke the traditional arguments surrounding forum shopping, in which there is great sensitivity to states entertaining the suits as a means to advance the state interest that underpins the contested rules of law that are at the center of the litigation.[43] In corporate litigation, it is invariably the state of

35. 516 U.S. 367 (1996).

36. Thomas & Thompson, *supra* note 34, at 1766. Subsequently, the U.S. Court of Appeals for the Ninth Circuit held that classes party to securities law claims that settled in Delaware state courts were adequately represented, meaning the settlement barred further litigation of the matter. Epstein v. MCA, Inc., 179 F.3d 641 (9th Cir. 1999).

37. *See* Thomas & Thompson, *supra* note 34, at 1774–75 (describing the increased frequency of federal securities class actions with additional derivative state law claims).

38. *Id.* at 1789.

39. *See id.* at 1797–98 (explaining "fee distribution litigation").

40. *See id.* at 1798 ("To succeed in the business, new firms must therefore find a way to obtain a slice of the attorneys' fees that are being generated from the limited pool of good, settlement-worthy cases.").

41. *Id.* at 1797.

42. *Id.* at 1799.

43. *Id.* at 1794–95.

incorporation's policies that govern the substantive content of the case.[44] Thus any state interest would be that of the state of incorporation in wishing its laws were interpreted to reflect the domicile's interest. They reasoned that this strategy persists because, outside the federal court system, there is no way to consolidate multistate court proceedings.[45] They then considered several antidotes to the problem, such as forum selection bylaws (still in their infancy when the article was written), collateral attacks on settlements that threaten to preclude a pending suit, judicial comity, embracing lead plaintiff procedures for state proceedings, and legislation authorizing a means to centralize shareholder suits in a designated forum.[46]

As we look back on the substantial empirical data Professor Thomas has gathered through his studies on state-based shareholder claims, we see how his work has shifted the focus of debate. Professors Thomas and Thompson's theory of fee distribution litigation certainly lends support to the long-held view that a fundamental weakness in representative suits is weak incentives, especially on the part of the plaintiffs' bar. This is further underscored by their finding that most Delaware derivative suits are filed by a cadre of well-financed plaintiffs' firms and are filed very quickly, likely too quickly, after a transaction's announcement.[47] At the same time, Professor Thomas's earlier work shows that the judicial system wisely discriminates based on the nature of claims, meaning that transactions involving self-dealing are, as they likely should be, subject to closer scrutiny so that the demand requirement does not overregulate derivative suit litigation.[48] And their data documented that settlements occur in derivative suits and involve amounts that are not trivial; it also revealed that derivative suits in public companies tend to arise from single-event, self-dealing matters and, as such, are not likely to produce as much damage to the corporation as can be expected in care-based suits alleging failure to monitor on the part of directors or managers.[49] Nonetheless, the explosion of multiforum deal litigation can be seen as demonstrating that the hallowed record of shareholder suits captured in the early work of Professors Thomas and Thompson quickly bred abusive litigation, at

44. *Id.* at 1778–79.

45. *Id.* at 1790.

46. *See id.* at 1802–17 (setting forth proposed solutions).

47. *See id.* at 1781.

48. *See* Thompson & Thomas, *supra* note 20, at 195–207 (discussing in the acquisition context how the nature of the claim prosecuted—such as self-dealing versus failure to aggressively pursue other suitors, as well as whether self-dealing is involved—is associated with very different outcomes).

49. Thomas & Thompson, *supra* note 34, at 1775–76.

least in the area of shareholder challenges to deals. Because these are not derivative suits, but rather individual claims that are aggregated in class actions, reform does not appear necessary for derivative suits (recall that Professors Thomas and Thompson find that this procedural device has a more limited role in private companies).[50] Such reform would do well to have as its goal a return to the experiences of deal-based suits first examined by Professors Thomas and Thompson.

B. Federal Securities Class Actions

Professor Thomas coauthored more than a dozen studies of securities class actions that have profoundly changed the debate surrounding these suits. To be sure, efforts to rid the courts of securities class actions have not abated, but arguments against the suits are now framed in terms of macroeconomic concerns such as innovation, aggregation of capital, and the shrinking number of public companies. As discussed earlier, not that long ago, securities class actions were claimed to extort quick settlements in which the merits did not matter.[51] A crucial finding in *Does the Plaintiff Matter?* was that settlement amounts are explained significantly by the amount of loss suffered by the class.[52] The merits not only matter but, per the study's regressions, they matter a lot. This finding rejects so much of the debate that propelled consideration and ultimate reform of securities class actions through the PSLRA of 1995.[53] Moreover, the study supported the PSLRA's intuition that having courts appoint a lead plaintiff and doing so pursuant to a rebuttable presumption that the investor with the largest alleged loss is the most adequate representative for the class. Repeated studies coauthored by Professor Thomas have consistently shown a statistical correlation between better settlements (as a function of the percentage of provable losses recovered) and institutional lead plaintiffs.[54] The research also supported efforts by the plaintiffs' bar to justify the aggregation of claims as a way to establish a group to serve as a lead plaintiff, since *Does the Plaintiff Matter?* found that aggregation yielded better outcomes than an individual

50. Thompson & Thomas, *supra* note 6, at 1767 (concluding that the threat of derivative suits plays little role in the governance of private firms).

51. *See* discussion *supra* notes 3–5 and accompanying text.

52. *See* James D. Cox, Randall S. Thomas & Dana Kiku, *Does the Plaintiff Matter? An Empirical Analysis of Lead Plaintiffs in Securities Class Actions*, 106 COLUM. L. REV. 1587, 1631 (2006).

53. *Compare* Alexander, *supra* note 3, at 516–17 (questioning whether the merits of such suits actually impact settlement figures and thus matter), *with* Cox et al., *supra* note 52.

54. Cox et al., *supra* note 52, at 1638–39.

investor with a smaller claim.[55] To be sure, any study of case outcomes across classes of investors is subject to certain forms of possible selection bias. For example, the better outcomes garnered in cases where the lead plaintiff is a financial institution may well be explained by institutions cherry-picking the suits in which they so participate, stepping forward only in cases that appear to be stronger, with larger provable losses.[56] This supposition, however, is friendly to securities class actions, as it suggests the plaintiff is a powerful signal of the suit's qualities, a message that can assume weight in applying the PSLRA's heightened pleading requirement. Claims once made that private suits are parasitic to government enforcement actions were clearly rebutted by *SEC Enforcement Heuristics*, which found that within the large realm of securities class actions, a government enforcement action, such as by the Securities and Exchange Commission ("SEC"), existed only about fifteen percent of the time and the SEC targeted smaller issuers, in which investors suffered lower provable losses and the defendant was suffering financial distress.[57]

There Are Plaintiffs . . . and There Are Plaintiffs bifurcated the study sample of settlements according to their size and, by doing so, provided useful insights into the nature of shareholder suits.[58] Securities class action suits ending in small settlements, those smaller than $2–3 million, have long been suspected of being "strike suits"—suits without much merit brought primarily to extort a settlement that provides fees to the attorney but little to nothing to class members.[59] In a study of 225 cases filed in the period 1993–2004 that were settled for $3 million or less, Professor Thomas and coauthors found that settlements occurred substantially more quickly and recovered a lower percentage of investor losses than for settlements greater than $3 million; surprisingly, neither the presence of an institutional investor nor a parallel SEC enforcement action improved settlement results.[60] The authors concluded, "[T]hese small settlement cases appear to exhibit the characteristics commonly associated with strike suits: small cash settlements that represent a small percentage of investors' damages."[61] The authors suggested that small settlements appear to

55. *Id.* at 1638–39.

56. *See id.* at 1591.

57. *See* James D. Cox, Randall S. Thomas & Dana Kiku, *SEC Enforcement Heuristics: An Empirical Inquiry*, 53 DUKE L.J. 737, 777–78 (2003).

58. *See* James D. Cox, Randall S. Thomas & Lynn Bai, *There Are Plaintiffs and . . . There Are Plaintiffs: An Empirical Analysis of Securities Class Action Settlements*, 61 VAND. L. REV. 355, 358 (2008).

59. *Id.* at 380.

60. *Id.* at 382–84.

61. *Id.* at 383.

involve single reporting events that are quickly corrected (thereby mitigating investor losses) by small issuers who can be seen as easy prey for a settlement.[62] The study also closely investigated whether settlement experience is different for public pension funds and labor pension funds; the authors found no statistically significant difference between the outcomes for these institutions.[63] The authors thus rejected the criticism sometimes made that plaintiffs' law firms abuse their relationships with labor pension funds.[64]

Letting Billions Slip Through Your Fingers shined a light on massive slumbering that existed in the winding up of securities class actions.[65] While the debate had historically focused on the suits being vexatious and enriching only the legal profession, this study of institutional participation in securities class action settlements showed that, in the average settlement, only twenty-eight percent of eligible institutional investors (those who had claims in a settlement) submitted claims.[66] That is, an astoundingly low seventy-two percent of institutions who were includable in the class because they had traded during the period the deception existed actually submitted a claim to the class action administrator. The article went beyond documenting and lamenting laxity; it offered multiple possible explanations for such slumbering as well as steps that could be expected to increase investor participation in settled securities class actions.[67] It is our understanding that the article provoked dramatic changes in behavior among institutional investors so that the securities class action today stands on much better footing.

In *Letting Billions Slip Through Your Fingers*, the authors share their perspectives on the social value of the securities class action based on their studies. They write that this is a legal institution that is working reasonably well until measured against a compensatory goal.[68] The numerous studies of securities class actions, while documenting that the amount of provable losses are a powerful variable in explaining the size of settlements, also reflect that settlements yield a very small portion of investor losses. As such, the securities class action fails to

62. *Id.* at 385.

63. *Id.* at 370–71.

64. *Id.* at 385.

65. *See* James D. Cox & Randall S. Thomas, *Letting Billions Slip Through Your Fingers: Empirical Evidence and Legal Implications of the Failure of Financial Institutions to Participate in Securities Class Action Settlements*, 58 STAN. L. REV. 411 (2005).

66. *See id.* at 424.

67. *See id.* at 444–49.

68. *See id.* at 414.

measure well as a means to compensate investors for reporting skullduggery:

> Compensation and deterrence do not work at cross purposes; instead, they should be seen as supporting each other. If class actions are not fulfilling a compensatory function, then we need to pay more attention to whether they deter fraud. . . . [W]e believe that the focus in these cases must shift from trying to conscript a company's resources to compensate class members to instead imposing a sanction of sufficient size and content to deter others from failing to monitor their reporting mechanisms, which in turn deters fraudulent reporting.[69]

Simply put, if compensation is the only metric by which the securities class action is judged, it will never be seen as anything other than wasteful.

II. SHAREHOLDER VOTING

Professor Thomas has followed a similarly neutral approach to shareholder voting, examining fundamental questions such as when shareholders should have the right to vote and why, what the implications of shareholder voting are in particular contexts, and how the shareholder franchise should be protected or reformed. Professor Thomas's scholarship provides both explicit and implicit answers to these questions.

His explicit approach has been to develop a theory of shareholder voting, based on both empirical evidence and arguments about economic incentives and costs. His implicit approach has been to consider shareholder voting as an important, often crucial, aspect of the role of corporations and their actors in society. The implicit message in Professor Thomas's scholarship on shareholder voting is that shareholder voting rights should be stronger when voting is of high value and weaker when voting is of low value; this proposition might seem obvious, but it has emerged from Professor Thomas's work in subtle and often surprising ways.

A. Theories of Shareholder Voting Rights

First, the explicit part. Explicitly, Professor Thomas, along with his coauthors, set forth a model of shareholder voting. The model is more subtle and reality based than many prior models of shareholder voting. It does not highlight simple buzzwords. Nor is it straightforward. But the theory, overall, is a kind of intellectual compromise, an argument for the existence of shareholder voting that is flexible and rooted in positive observation and empirics.

69. *Id.* at 452 (footnotes omitted).

In a 2015 article, Professor Thomas and his colleague Paul Edelman develop a model of corporate voting.[70] They ask why shareholders vote, but other stakeholders do not.[71] They critique other models of voting, including models that rely on shareholders being the residual claimants of the firm, and conclude that the best reason to give shareholders a vote is that the sole certainty of return to shareholders is tied to improvements in the price of shares.[72] This is a subtle difference: the relationship between shareholder and share prices is not as absolute as in theories based on the status of shareholders as residual claimants (in part because shareholders are not necessarily residual claimants, as in a firm that issues warrants). The authors stress the importance of the correlation between shareholders' interests and the price of shares without going down the residual claimant rabbit hole.[73]

Professors Edelman and Thomas argue that shareholders deserve a voice, and therefore a vote, under their theory, but that there is no legal requirement for the board "to maximize the short run [shareholder] price[s]."[74] Accordingly, their theory is balanced with respect to the firm mandate that results from their observations about shareholders and share prices. A corollary to their argument is that stakeholders do not deserve the same degree of voice, because they are less exposed to stock price variation.[75] But they are not as firm in this argument as are those in the earlier law and economics mindset. Instead, the difference between shareholders and stakeholders is relatively subtle, and along a continuum; it is not necessarily categorical.

Thus, their theory occupies a middle ground between theories based on agency costs and the residual claimant status of shareholders on one hand, and stakeholder theories that reject shareholder wealth maximization as an optimal firm objective on the other. The article further argues that shareholder voting generates costs, and therefore should be limited to significant matters—again, a middle-ground, compromise position.[76]

70. *See* Randall S. Thomas & Paul H. Edelman, *The Theory and Practice of Corporate Voting at U.S. Public Companies*, *in* THE RESEARCH HANDBOOK OF SHAREHOLDER POWER 459 (Jennifer G. Hill & Randall S. Thomas eds., 2015).

71. *Id.* at 459.

72. *See id.* at 460–64.

73. *See id.* at 464–65.

74. *See id.* at 465.

75. *Id.* at 466.

76. *See id.* at 468–69 ("Nevertheless, the costs of voting must be acknowledged and it is only efficient to have a vote if the benefits to the share price are likely to exceed them.").

In a 2016 article, Professors Edelman and Thomas join with Professor Robert Thompson, and they collectively offer an expanded theory of shareholder voting, adding two theories supporting the existence of shareholder voting: (1) an information aggregation theory, whereby shareholder voting provides a superior way to aggregate private information when there is uncertainty about decisions, and (2) a heterogenous preferences theory, whereby shareholder voting provides a superior way to make decisions that differentially affect shareholders.[77] The authors then apply the new expanded theory to a wide range of corporate practices, some of which allocate voting rights and decision authority to shareholders and some of which allocate voting rights and decision authority to management.[78]

This expanded theory is also empirically based and open to compromise. It recognizes the importance of shareholder voting, but situates shareholder voting rights in their ability to resolve the above two aggregation problems. The theory is flexible, in that the importance of shareholder voting can vary depending on the need for information aggregation or the degree of heterogeneity among shareholders.[79]

Essentially, Professor Thomas and his coauthors are saying that shareholder voting rights are important but should vary depending on a number of factors. It is a balanced and subtle theory. It is derived from observations about extant voting practices but is also critically aware of tensions in the allocation of rights among participants in the firm. At its core, this theory of shareholder voting is contextual, yet intuitive: for many significant decisions, shareholders should have a vote; for other less significant decisions, they should not. Again, it is a balanced approach.

B. Categories of Shareholders and Their Uses of Voting Rights

Implicit messages about shareholder voting rights arise in numerous ways in Professor Thomas's scholarship, some of which are obvious and some less so. One theme of his scholarship has been to analyze separate categories of shareholders and gather information about how they approach different strategies, including how they use voting rights. Two examples are labor unions as shareholders and hedge fund activists as shareholders, both of which have attempted to use shareholder voting rights in quite different ways.

77. *See* Paul H. Edelman, Randall S. Thomas & Robert B. Thompson, *Shareholder Voting in an Age of Intermediary Capitalism*, 87 S. CAL. L. REV. 1359, 1380–82 (2014).

78. *See id.* at 1407–33.

79. *See id.* at 1364.

For example, Professor Thomas's balanced approach to assessing shareholder voting rights is reflected in his 1998 article coauthored with Professor Stuart Schwab on shareholder activism by labor unions.[80] Professors Schwab and Thomas analyze voting by labor unions as shareholders in great detail; it is worth reflecting on the prescience of the article, as well as the extent to which it remains relevant today. During the 1990s, labor unions had in many ways been a polarizing force in society, and Professors Schwab and Thomas focus on the potential for change through the unified incentives of labor unions and other shareholders.[81] They observe an increase in the use of corporate voting by union members and pension funds to press for changes in corporate governance;[82] that is the coauthors' hook for analyzing the actual changes and potential utility of the new involvement by labor unions in exercising shareholder voting rights.[83]

The authors distinguish among a range of voting rights that labor union shareholders exercised at the time, citing voting related to shareholder proposals under Rule 14a-8 as a "largely ineffective method[ ] for focusing shareholders and directors on a limited number of corporate-governance issues."[84] They cite the relatively newer focus on corporate governance as having greater potential than other precatory Rule 14a-8 proposals, in part because corporate governance proposals and voting related to such proposals were designed to appeal more widely to nonlabor shareholders.[85] They argue that "unions need to focus their shareholder voting initiatives in areas where they have special advantages in monitoring management."[86]

As with so much of Professor Thomas's scholarship, the conclusions derive from the empirics. Professors Schwab and Thomas collect proxy voting data and examine proposals from the 1994 and 1995 proxy seasons.[87] Their analysis expands on prior work Professor Thomas did with Professor Kenneth Martin, which found that labor shareholders frequently supported management, and that labor-

80. *See* Stewart J. Schwab & Randall S. Thomas, *Realigning Corporate Governance: Shareholder Activism by Labor Unions*, 96 MICH. L. REV. 1018 (1998).

81. *See id.* at 1037 ("Unions have the capability and incentive to play a beneficial monitoring role for shareholders.").

82. *See id.* at 1042–74.

83. The corporate governance changes they cite include the redemption of shareholder rights plans, confidential shareholder voting, and restrictions on executive pay. *See id.* at 1020. They also discuss "Just Vote No" campaigns, in which unions and other shareholders withhold their approval for director candidates to demonstrate their disapproval. *Id.* at 1072–74.

84. *Id.* at 1024.

85. *Id.* at 1061.

86. *Id.* at 1025.

87. *See id.* at 1045.

sponsored shareholder proposals did no better than proposals submitted by public institutions.[88] Professors Schwab and Thomas compile labor shareholder actions on shareholder proposals, including details about sponsors, the nature of proposals, and their status.[89] They emphasize that unions had been engaging in a tactical approach, attempting to demonstrate to other shareholders that they could play a positive role in maximizing the value of firms, not an antagonistic one (the article suggests that a more strategic approach, rather than a tactical one, might generate more favorable results).[90] Still, Professors Schwab and Thomas frame the union shareholders' new role as a centrist one, adopting "a platform of maximizing long-term growth for shareholders and other stakeholders, as well as for themselves."[91]

Shareholder voting rights also are an important part of Professor Thomas's work on shareholder activism. In two significant articles, Professor Thomas addresses the phenomenon of shareholder activism, finding that the announcement of activism by hedge funds is associated with a statistically significant abnormal return during the window surrounding announcement.[92] These two articles examine closely the variation in announcement returns, as well as subsequent changes at targeted companies. Shareholder voting rights loom large in both of these projects. In the 2008 article, the authors emphasize that the activists occupy a kind of "sweet spot" ownership, typically between five and ten percent, so that they need to obtain support from other shareholders on matters requiring a shareholder vote.[93] This ownership level and objective distinguishes shareholder activism fundamentally from the corporate raiders of the 1980s, who sought one hundred percent voting control.[94]

In the 2016 article, the authors explore the variation among hedge fund activists' success, hypothesizing that the success could be due to (1) learning from more frequent interventions, (2) skill as demonstrated by past success, or (3) "clout and expertise."[95] The

88. *See* Randall S. Thomas & Kenneth J. Martin, *Should Labor Be Allowed to Make Shareholder Proposals?*, 73 WASH. L. REV. 41, 73 (1998).

89. *See* Schwab & Thomas, *supra* note 80, at 1091 tbl.1.

90. *See id.* at 1090.

91. *Id.*

92. *See* Alon Brav, Wei Jiang, Frank Partnoy & Randall Thomas, *Hedge Fund Activism, Corporate Governance, and Firm Performance*, 63 J. FIN. 1729, 1755–57 (2008) (finding that "62% of the events see positive abnormal returns in the" twenty days before and twenty days after the announcement); C.N.V. Krishnan, Frank Partnoy & Randall Thomas, *The Second Wave of Hedge Fund Activism: The Importance of Reputation, Clout, and Expertise*, 40 J. CORP. FIN. 296, 298–300, 304 (2016) ("The average 21-day announcement period abnormal return was 7.17% . . . .").

93. *See* Brav et al., *supra* note 92, at 1748.

94. *Id.*

95. Krishnan et al., *supra* note 92, at 297.

analysis suggests that the third category is associated with the greatest success, in part because of the demonstrated capacity to target entrenched firms, a willingness to express intent to replace directors, and a history of initiating, litigating, and winning proxy rights.[96] Effectively, the most successful firms are those that demonstrate a capacity to muster the shareholder support necessary to mount a credible threat to a board. Obviously, the ability to persuade other shareholders to vote alongside the activist hedge fund is a central part of such successful strategies.

C. Voting Rights in Varied Contexts

Finally, shareholder voting rights also emerge in areas of Professor Thomas's research where voting itself is not central, or the immediate topic of interest, but voting nevertheless occupies an important space, and lessons and insights about shareholder voting abound. For example, Professor Thomas has examined several innovative and previously unexamined business practices where shareholder voting emerges as an important subsidiary topic.

Consider the relationship among private equity, financial innovation, and corporate governance. Professor Thomas has expressed skepticism about financial innovation, arguing that its tendency to distort voting incentives and voting are potentially problematic. An article with Professor Ronald Masulis argues that one reason for the success of private equity is the weakening of public company governance that arose along with financial innovation (and that accordingly created opportunities for private equity firms to add value by taking firms private).[97] For example, some shareholder decisions might be contrary to a firm's economic interest, because derivatives skew the shareholders' incentives with respect to firm value.[98] This argument, too, occupies a "middle ground" among scholars: it criticizes the phenomenon of private equity, but does so in a subtle way, by suggesting that new and complex changes in the markets created opportunities for private equity firms, and further arguing that going-

96. *See id.* at 312.

97. *See* Ronald W. Masulis & Randall S. Thomas, *Does Private Equity Create Wealth? The Effects of Private Equity and Derivatives on Corporate Governance*, 76 U. CHI. L. REV. 219, 258–59 (2009) (describing the weakening oversight of public company boards).

98. *See id.* at 242 (noting that financial accounting systems poorly track risk associated with derivatives, which undermines investors' ability to buy and sell in an informed manner).

private transactions could be value enhancing because of the increased agency costs associated with changes at public firms.[99]

Or consider Professor Thomas's assessment of appraisal rights. When shareholders began voting no (or abstaining) in increasing numbers and then seeking appraisal, Professor Thomas was quick to analyze the impact of the new phenomenon, presenting with coauthors the first large-scale empirical study of the increased use of appraisal from 2000 to 2014.[100] Professor Thomas and his coauthors compare the likelihood of appraisal petitions depending on the degree of perceived conflicts of interest, and find that deals with greater conflicts are more likely to generate appraisal petitions.[101] They also find that appraisal generated significant annualized returns: an average of 32.9 percent during the sample, which explains at least in part why petitions had become more frequent.[102] Notwithstanding these dramatic returns, this article takes a balanced approach, noting that two recent changes in Delaware law (requiring a minimum stake and limiting interest payments) reduced the incentives to file appraisal petitions.[103]

Finally, Professor Thomas also took a balanced approach to shareholder voting in a 2016 article analyzing shareholder voting on "bundled" items.[104] The notion of bundling is potentially problematic: managers could distort shareholder choice by bundling several items together for voting purposes.[105] For example, multiple voting items might be combined into a single box on the proxy card. In 1992, the SEC introduced "Unbundling Rules" to restrict this potentially harmful practice.[106] Professor Thomas and coauthors evaluate those rules. They examine the rules themselves,[107] along with judicial interpretations of the rules,[108] and also look at voting policies (or the lack of voting policies) that potentially could address voting on bundled proposals.[109]

99. *See id.* at 221 (characterizing the trend of greater private equity ownership as a "value-creating response").

100. *See* Wei Jiang, Tao Li, Danqing Mei & Randall Thomas, *Appraisal: Shareholder Remedy or Litigation Arbitrage?*, 59 J.L. & ECON. 697 (2016) (answering the question posed in the title by suggesting that the evidence supports an interpretation that the increase in appraisal petitions is a form of litigation arbitrage).

101. *Id.* at 727.

102. *See id.* at 699, 721 tbl.11.

103. *See id.* at 700.

104. *See* James D. Cox, Fabrizio Ferri, Colleen Honigsberg & Randall S. Thomas, *Quieting the Shareholders' Voice: Empirical Evidence of Pervasive Bundling in Proxy Solicitations*, 89 S. CAL. L. REV. 1175 (2016).

105. *See id.* at 1187.

106. *Id.* at 1178, 1189; *see* 17 C.F.R. § 240.14a-4(a)(3), (b)(1) (2019).

107. *See* Cox et al., *supra* note 104, at 1187–89.

108. *See id.* at 1189–94.

109. *See id.* at 1201–04.

The article also gathers a large dataset of shareholder votes to test the extent of impermissible bundling based on several different definitions.[110] The incidence of bundling in the data is high: almost twenty-nine percent of management proposals had some form of bundling.[111] Accordingly, the authors recommend policy changes to address the challenges associated with bundling.[112] As with Professor Thomas's other work on shareholder voting, the article is even-handed and based on the empirical evidence.

CONCLUSION

Our goal in discussing some of Professor Thomas's articles on shareholder litigation and voting is to demonstrate that in both areas, he has taken a "depolarizing" approach. He has tackled significant problems as an empiricist, not as an advocate. He does not favor shareholders or managers. Instead, he engages in high-quality empirical study of interesting questions related to shareholder rights, letting the chips fall where the data show they do.

We want to close by noting three overarching themes of Professor Thomas's scholarship, aspects of his work that go beyond the substance of his contributions and cement his legacy as a valuable contributor to the world's stock of knowledge. These three themes are: coauthoring, impartiality, and breadth.

First, before the articles we discuss here were published, coauthoring was a rare phenomenon among law professors. Many academics viewed coauthoring skeptically, and often would question the relative contributions of each colleague. Others saw coauthoring as an enterprise fraught with peril, including agency costs and misaligned incentives, and therefore avoided it. But Professor Thomas showed scholars a different way: he coauthored with friends and colleagues, and sustained those relationships before, during, and after the projects. He also demonstrated that there were real synergies to coauthoring, arising both from the comparative advantage brought by each author and also from the nature of the projects.

Second, consistent with our view of the neutrality of Professor Thomas's scholarship, his research is exemplary for its lack of agenda or emotion: he calls 'em as he sees 'em. It is difficult for us to predict, when we hear Professor Thomas is working on a topic, what the

110. *See id.* at 1229–36.

111. *Id.* at 1179.

112. *See id.* at 1236–38 (recommending the withdrawal of certain SEC guidance, an updated bundling definition, an expanded materiality standard, more attentive third-party voting advice, and mobilization of institutional investors).

outcome, finding, or recommendations of the finished product will be. Professor Thomas's scholarship has been guided by the evidence, not the other way around. Sometimes his findings are pro-plaintiff; sometimes they are pro-defendant. Sometimes his articles appeal to those of a more liberal bent; sometimes they appeal to those of a more conservative bent. Thus, Professor Thomas has been a role model scholar, always investigating and exploring, eager to contribute knowledge, without hewing to any particular ideology or world view.

Finally, the breadth of Professor Thomas's scholarship is extraordinary. We have highlighted his articles covering just two areas: shareholder litigation and shareholder voting. But he has also written widely about other topics, including another main shareholder right—the right to sell shares. For example, in a forthcoming paper, *Understanding the (Ir)Relevance Of Shareholder Votes On M&A Deals*, Professor Thomas and his coauthors analyze data reflecting significant share ownership transfers from long-term holders to short-term holders during the quarter in which acquisitions are announced.[113] They find that many institutional shareholders exit after the announcement of a deal reflects the option value of the transaction, and conclude that any price effects are rarely sufficient to discipline managers. This paper is but one example, and we expect to see many more.

We have been honored to work with Professor Thomas and to know him as a friend, colleague, and world-class scholar. We celebrate his work on shareholder rights here and note that his depolarized approach might be of some benefit more broadly. If evidence is normally distributed, a debatable but perhaps not unreasonable proposition, one should not expect scholarship based on evidence consistently to appear at the tails of the distribution. It is a sign of the strength of Professor Thomas's research that his scholarship falls in the middle of the distribution, right where one would expect a neutral empiricist's work to fall.

113. *See* James D. Cox, Tomas J. Mondino & Randall S. Thomas, *Understanding the (Ir)Relevance of Shareholder Votes on M&A Deals*, 69 DUKE L.J. (forthcoming 2019).