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CUMULATIVE VOTING FOR CORPORATE DIRECTORS UNDER THE ILLINOIS CONSTITUTION

INTRODUCTION

Cumulative voting was made mandatory in all elections for the directors of Illinois business corporations under article XI, section 3 of the 1870 Constitution of Illinois. In the face of continuing debate in some quarters over the practicality of mandatory cumulative voting, the 1970 Constitution of Illinois has not imposed this form of corporate suffrage on business corporations organized subsequent to the adoption of the new constitution.[1] The vehicle for continuing the constitutional mandate of the 1870 Constitution with respect to pre-1970 corporations is section 8 of the transition schedule to the 1970 Constitution which provides that the shareholders of all pre-1970 corporations shall retain the right to vote cumulatively.

The delegates to the 1970 constitutional convention believed that cumulative voting was not a proper subject for inclusion in a constitution but that it was a subject solely for legislative consideration.[2] In the four years since the adoption of the constitution, the General Assembly has not yet addressed the question of cumulative voting.[3]

This article will review article XI, section 3 of the 1870 Constitution, examining the reasons for its inclusion in that document and what effect it has had on Illinois corporations. By resorting almost exclusively to the constitutional debates, the

1. Unless otherwise indicated, "cumulative voting" will be used to refer to cumulative voting for the directors of Illinois business corporations, and "corporation" will refer only to a business corporation. "Pre-1970" and "post-1970" will be the terminology used to refer to corporations organized prior to and subsequent to the effective date of the 1970 Constitution, July 1, 1971.

2. *General Gov't. Comm. Proposal # 14*, REC. OF PROCEEDINGS, SIXTH ILL. CONSTITUTIONAL CONVENTION, *Comm. Proposals*, vol. VI at 617 (1969-70) [hereinafter cited as *Comm. Proposals*].

3. Cumulative voting has been mandatory by statute in Illinois for all business corporations since 1872. Act of July 1, 1872, § 3, [1871-72] Ill. Laws at 297, enacted pursuant to article XI, section 3 of the 1870 Constitution. It is currently required by ILL. REV. STAT. ch. 32, § 157.28 (1973).

Although not directly addressing the question of cumulative voting, the General Assembly has attempted to ameliorate one of the side-effects of the constitutional provision mandating cumulative voting, but the bills have been tabled or died in committee. H.B. 327, 77th Gen. Assembly, 1971 Sess. and S.B. 507, 77th Gen. Assembly, 1971 Sess., both amending ILL. REV. STAT. ch. 32, § 157.28 (1973) to allow the issuance of non-voting stock. ILL. REV. STAT. ch. 32, §§ 157.1-157.167 (1973) will hereinafter be cited as B.C.A. §§ 1-167.

reader will be apprised of the reasons for the elimination of cumulative voting and the extent to which cumulative voting and its progeny have been eliminated. Further consideration will be given to what effect the 1970 Constitution will have on the pre-1970 and post-1970 Illinois corporation absent any legislative action and what constitutional constraints section 8 of the transition schedule would place on the General Assembly if it should decide to make cumulative voting permissive rather than mandatory for all corporations.

Cumulative Voting as a Protector of the Minority Shareholder

At common law, the shareholder of a business corporation voted on a *per capita* basis—he was entitled to one vote regardless of the number of shares held.[4] Gradually, the states recognized the inequities resulting from this method of allocating corporate suffrage and by statute allowed a shareholder to cast one vote on all corporate matters for each share of stock held. Occasionally, the shareholder's right to vote was subject to a limitation in the form of a maximum number of votes that he could cast.[5] This limitation no longer exists with regard to voting on general corporate matters; but in some states, a different "limitation," cumulative voting, has been placed on a shareholder's right to vote for directors.

Under the straight voting method of electing directors, a shareholder is permitted to cast one vote per share for each director to be elected. Thus, a shareholder owning 100 shares may cast up to 100 votes for each director to be elected. The candidates receiving the most votes are elected. The result is that a majority shareholder can elect the *entire* board thereby denying the minority a meaningful vote. The purpose and effect of cumulative voting is to facilitate minority representation on the board of directors. Under the cumulative voting method, a shareholder may cast the same number of votes as with straight voting—that is, the number of shares owned multiplied by the number of vacancies to be filled. Cumulative voting differs from straight voting, however, in that the shareholder is not required to distribute the votes equally among the vacancies to be filled; he may "cumulate" his votes and cast all the votes for one candidate. Thus, if three directors are to be elected, an owner of 100 shares may cast 300 votes for one director.[6]

4. N. Lattin, The Law of Corporations 295 (1959).
5. *Id.*
6. The following is the formula for most effectively cumulating the votes to be cast in an election for corporate directors:
X = number of shares required to elect N^1 directors.

Historical Impetus Toward Cumulative Voting in Illinois

A movement for inclusion of a cumulative voting provision in the 1870 Constitution began in the early 1860's. This movement was, to a large extent, brought by the corporations upon themselves. The press had publicized

> the excesses and frauds of certain railroad managements and . . . was vehement in its denunciation of the 'rings' which controlled many of the railroad companies which defrauded minority stockholders.[7]

The chief advocate of cumulative voting was the Minority Representation Society, the leading member of which was Joseph Medill, publisher of the Chicago Tribune.[8]

One of the delegates to the 1870 constitutional convention said of cumulative voting:

> 'If I am an individual owner of one third of the capital stock of an incorporation [*sic*] organized for pecuniary profit, it would enable me to have representation in the board of directors *equal to my interest* in the stock of that corporation. . . . [I]t is just and fair and equitable, and . . . it secures, beyond any doubt or peradventure, the interests and rights of minorities in these corporations.'[9]

In urging the adoption of the constitutional provision mandating cumulative voting, the press said that it " 'will go far to break up the swindling rings which use so many corporations for their private advantage.' "[10] " 'The selfishness, rapacity, and mismanagement of corporate bodies and the secrecy, intrigue, and corruption in the proceedings of their officers will receive a healthy and salutary check.' "[11]

These statements demonstrate that although cumulative voting was the only "just and fair and equitable" means of distributing corporate suffrage, the primary impetus for the inclusion of the provision in 1870 may have been a general fear of the

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N^1 = number of directors desired to be elected.
N = total number of directors to be elected.
Y = total number of shares to be voted.

$$X = \frac{Y \times N^1}{N + 1} + 1$$

For example, if all of the members of a nine man board are to be elected and there are 1000 outstanding shares of stock, a shareholder would have to own 101 shares of stock to elect one member of the nine man board.

7. Wolfson v. Avery, 6 Ill. 2d 78, 89, 126 N.E.2d 701, 708 (1955).
8. *Id.* The society not only advocated cumulative voting for corporate directors, but also advocated its use in political elections.
9. *Id.* at 90-91, 126 N.E.2d at 709, *citing* Constitutional Debates, 1667.
10. Wolfson v. Avery, 6 Ill. 2d at 92, 126 N.E.2d at 709, *citing* the Edwardsville Intelligencer, June 9, 1870 at 1, col. 2.
11. Wolfson v. Avery, 6 Ill. 2d at 92, 126 N.E.2d at 709, *citing* the Chicago Tribune, June 25, 1870.

corporate structure.[12] But whatever the ultimate purpose of cumulative voting, it became the province of the Illinois courts to give substance to the words of article XI, section 3 of the 1870 Constitution and the statute enacted pursuant thereto.[13]

Actions Proscribed by the Constitutional Provision for Cumulative Voting

The Illinois courts reacted to the mandatory cumulative voting provision of the 1870 Constitution by consistently prohibiting attempts to dilute or circumvent the shareholder rights created by the provision. Thus, article XI, section 3 was construed to prohibit the issuance of bonds with voting rights or of non-voting preferred stock, the filling of vacancies created on the board by vote of the directors, and the classification of the board of directors.

In *Durkee v. People ex rel. Askren*,[14] the appellate court held that a corporation was without the power to issue bonds with voting rights. The court reasoned that by statute and by article XI, section 3 of the constitution, the right to elect the directors exists only in the shareholders. Recognizing that cumulative voting was intended to protect minority shareholders, the court concluded that a by-law which gave a bondholder the right to vote for directors would defeat the object of the constitution because the rights of all shareholders would be diluted by the bondholders' exercise of voting power. A fortiori, the dilution of the rights of all shareholders dilutes the rights of minority shareholders.[15] This result was certainly within the purpose of the 1870 constitutional provision because, by the simple expedient of issuing voting bonds, the minority voting rights could be diluted to a point of non-existence.

The petitioner in *People ex rel. Watseka Telephone Co. v. Emmerson*[16] sought a writ of mandamus compelling the Secretary of State to issue a certificate of amendment to the articles of incorporation permitting the corporation to issue non-voting pre-

12. 1 W. Fletcher, Cyclopedia of the Law of Private Corporations § 2 (1963).

13. See note 2, *supra*.

14. 53 Ill. App. 396 (1894).

15. A contention that the by-law was binding as a contract was rejected. Though adopted by all the shareholders, it was not operative as a contract; in conflict with the statute and the constitution, it was void and inoperative. The contract was not subject to ratification since it was not one that the corporation could have made, and furthermore, a shareholder was not estopped from showing the contract void.

The Supreme Court of Illinois, 155 Ill. 354, 40 N.E. 626 (1895), adopted the lower court's reasoning and stated further that the bondholders did not have the same interests in the corporation that the shareholders had.

16. 302 Ill. 300, 134 N.E. 707 (1922).

ferred stock. The secretary had refused to issue the certificate contending that the amendment was inconsistent with the 1870 Constitution. The amendment provided that the shareholders of the proposed issue of preferred stock would not be entitled to vote for the directors and that they had no right to consent or to refuse to consent to corporate action. In denying the writ and holding the amendment invalid, the court stated that a corporation had neither the right nor the power to provide for preferred stock, the owner of which was expressly deprived of the right to vote for directors. It refused to construe the phrase in article XI, section 3, "every shareholder shall have the right to vote . . ." as "every shareholder *entitled to vote* shall have the right to vote."[17] This result was consistent with the intent of providing shareholder representation in proportion to investment.

It has also been held that a statute which provided that the board of directors shall fill vacancies created by death, resignation or otherwise was unconstitutional as a denial of a shareholder's right to elect the directors. In *People ex rel. Weber v. Cohn*,[18] a vacancy created by resignation on a three-member board was filled by vote of the shareholders rather than by vote of the board of directors as required by statute. The dissatisfied board member obtained a judgment of ouster against the newly elected board member based on the election being contrary to statute. Although reversing the judgment of ouster on constitutional grounds, the court relied mainly on the necessities of this particular case—the necessities being that the two remaining directors were in conflict on all corporate matters and that corporate activity was brought to a standstill. Viewing the case as an article XI, section 3 decision, any statute which confers the right to elect a member of the board on anyone other than a shareholder, under any circumstances, is void as a denial of

17. *Accord*, State *ex rel.* Dewey Portland Cement Co. v. O'Brien, 142 W. Va. 451, 96 S.E.2d 171 (1956); however, this result has been changed by amendment to the state constitution. Diamond v. Parkersburg-Aetna Corp., 146 W. Va. 543; 122 S.E.2d 436 (1961).

A contrary result was reached in State *ex rel.* Frank v. Swanger, 190 Mo. 561, 89 S.W. 872 (1905) which the court in *Emmerson* distinguished by saying that the constitutional provisions were "markedly different." Mo. CONST. art. 12, § 6 (1875) provided that "[i]n all elections for directors or managers, each shareholder shall have the right to [vote] cumulatively . . . ." The court adopted the construction rejected by the court in *Emmerson* and construed "each shareholder" as "every shareholder entitled to vote." It was reasoned that there was no intention to abrogate the common law right of issuing non-voting preferred stock and that in a statute which gave the shareholders the power to determine the "character" of preferred stock, "character" was broad enough to include the not so unusual denial of voting power to preferred stock. *See* Williams v. Davis, 297 Ky. 626, 180 S.W.2d 874 (1944).

18. 339 Ill. 121, 171 N.E. 159 (1930).

a shareholder's right to elect the board members.[19]

In *Wolfson v. Avery*,[20] the Supreme Court of Illinois held that a statute allowing staggering or classification of the board of directors was unconstitutional as an impairment of the right of cumulative voting as secured by article XI, section 3 of the 1870 Constitution.[21]

The numerous persuasive arguments of the defendant-directors were rejected by the court. A determination was first made that the phrase "to be elected" found in article XI, section 3 carried no implication that less than the entire board could be elected at one time.[22] Although the classification of directors was not expressly prohibited by the constitution, the court stated that "[t]he guaranty of minority representation prohibits any law which in effect defeats or nullifies it, even though such law does not in express terms attempt to nullify the right."[23] While the statute did not abrogate the right of a shareholder to vote cumulatively, it did emasculate the right. The constitution compelled this result although the existence of the right to vote cumulatively did not *insure* minority representation.[24] Arguments

19. Section 36 of the B.C.A. requires vacancies to be filled by vote of the shareholders. Except in the situation in which a vacancy results in the minority members of the board being equal in number to the majority members, the outcome of an election by the board or by the shareholders should be the same.

In Laughlin v. Geer, 121 Ill. App. 534 (1905), the court held that a by-law authorizing the board to remove a director, absent a showing of cause, nullified the right of the shareholders to choose the members of the board of directors and was void as contrary to the constitutional provision requiring cumulative voting. Illinois has no statute providing for the removal of a board member. It is probable that on a showing of cause, a director could be removed by a majority vote of the shareholders, and that absent an express constitutional provision to the contrary, the 1870 Constitution did not abrogate this common law right. *See* 2 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 354.1 (1969).

20. 6 Ill. 2d 78, 126 N.E.2d 701 (1955).

21. Act of May 26, 1933, § 35, [1933] Ill. Laws 326-27 (repealed 1957) provided:

> When the board of directors shall consist of nine or more members, in lieu of electing the whole number of directors annually, the by-laws may provide that the directors be divided into either two or three classes, each class to be as nearly equal in number as possible, the term of office of directors of the first class to expire at the first annual meeting of shareholders after their election, that of the second class to expire at the second annual meeting after their election, and that of the third class, if any, to expire at the third annual meeting after their election. At each annual meeting after such classification the number of directors equal to the number of the class whose term expires at the time of such meeting shall be elected to hold office until the second succeeding annual meeting, if there be two classes, or until the third succeeding annual meeting, if there be three classes.

Referring to the formula in note 6, *supra*, any decrease in the total number of directors to be elected at a meeting of the shareholders increases the number of shares needed to elect one director.

22. 6 Ill. 2d at 85, 126 N.E.2d at 706.

23. *Id.* at 87, 126 N.E.2d at 707.

24. *Id.*

based on the lengthy period that the statute was in effect, on the long-continued administrative construction of the statute, and on the fact that the legislature which passed the statute included thirteen members of the 1870 constitutional convention were summarily rejected by the court.[25]

In summary, article XI, section 3 of the 1870 Constitution has been construed to prohibit the issuance of voting bonds, the issuance of non-voting preferred stock, and the classification of the board of directors. Against this background, the issue of cumulative voting was once again raised by the delegates to an Illinois constitutional convention.

CUMULATIVE VOTING—1970

Generally, no reference was made by the constitutional convention delegates to the "rings of directors" or to the "selfishness, rapacity and mismanagement of corporate bodies" in arriving at their decision not to retain the 1870 cumulative voting provision.[26] Instead, the delegates took a realistic approach and had more confidence than their 1870 predecessors in leaving the question of the retention of mandatory cumulative voting to the General Assembly.

The Committee on General Government, which dealt with the portion of the constitution pertaining to corporations, believed

> that the regulation of the internal affairs of Illinois Corporations [was] a matter more appropriately the concern of the General Assembly, not the Constitutional Convention. The issue [was] not whether the principle of preserving minority representation on corporate boards of directors [had] any value. Rather, the issue [was] whether, assuming its value, it [belonged] in the Constitution.[27]

On this basis, the committee proposal recommended that the new constitution be silent on the question of cumulative voting.

The delegates, rather than considering the issue of whether cumulative voting belonged in the constitution, debated the value of cumulative voting. Eleven delegates spoke against and eight

25. *Id.* at 95-96, 126 N.E.2d at 711. *Contra*, Janney v. Philadelphia Transp. Co., 387 Pa. 282, 128 A.2d 76 (1956). For strong criticism of *Wolfson, see* W. Sell & L. Fuge, *Impact of Classified Corporate Directorates on the Constitutional Right of Cumulative Voting*, 17 U. PITT. L. REV. 151 (1956).

26. One delegate did make reference to the "free booters on the inside," but the thrust of his statement was addressed to mistakes such as "the Edsel" occasionally being made by the insiders. REC. OF PROCEEDINGS, SIXTH CONSTITUTIONAL CONVENTION, *Verbatim Transcripts*, vol. III at 1819 (1969-70) [hereinafter cited as *Verbatim Transcripts*]. The same delegate also made reference to "horse thieves." *Id.* at 1818.

27. *Comm. Proposals*, vol. VI at 624.

delegates spoke in favor of an amendment to the committee proposal to make cumulative voting mandatory for all Illinois corporations.[28] Numerous arguments were advanced in support of the amendment. One argument advanced was that since the new constitution was to provide that corporations shall only be incorporated by general laws, it could not be said that another corporate matter, cumulative voting, was of no concern to the delegates.[29] Some of the supporters felt that the constitution should not be silent on the issue of corporate democracy[30] and that cumulative voting insured minority representation.[31] The constitution should not provide an avenue for the General Assembly to eliminate cumulative voting.[32] If cumulative voting were only permissive by statute, corporations would never grant the right[33] since the corporate charter is drawn at the direction of the promoters, not the minority shareholders.[34] It was also believed that since Illinois corporations have prospered in spite of mandatory cumulative voting, it did not have the deleterious effect that many believed.[35] Although the purpose of a classified board was to maintain an experienced board, the prohibition of classified directors was beneficial because an experienced board was just another name for the inertia created by a board set in its ways.[36] Neither did cumulative voting cause corporations to incorporate in Delaware rather than in Illinois—they did so merely for tax reasons.[37] And in addition, one delegate felt that cumulative voting would be beneficial to the general public since it would enable a minority shareholder to act as one of "Nader's Raiders."[38]

The opponents of the amendment responded to some of the above arguments but also raised additional arguments. Cumulative voting was said to cause many corporations, which would have otherwise incorporated in Illinois, to incorporate elsewhere[39] either to achieve financing flexibility[40] or to be able to classify the board of directors,[41] options which had been denied Illinois corporations under article XI, section 3. The delegates

28. The amendment was defeated by a vote of 55 to 50. *Verbatim Transcripts*, vol. III at 1826.
29. *Id.* at 1816, 1819.
30. *Id.* at 1819, 1821-22.
31. *Id.* at 1817.
32. *Id.*
33. *Id.* at 1818.
34. *Id.* at 1819.
35. *Id.* at 1819, 1823.
36. *Id.* at 1819.
37. *Id.* at 1822.
38. *Id.* at 1820.
39. *Id.* at 1817, 1820, 1821, 1822.
40. *Id.* at 1817, 1820, 1821.
41. *Id.* at 1818, 1819.

echoed the committee view that the value of cumulative voting was a matter that should be left to the General Assembly.[42] Further, they felt that cumulative voting would probably be made permissive by statute, but never totally prohibited.[43] The minority shareholder was believed to be adequately protected by Blue Sky Laws, by the Securities Act of 1933, and by the Securities Exchange Act of 1934.[44] The delegates stated that since the rights of the shareholders of pre-1970 corporations would remain unchanged through section 8 of the transition schedule, cumulative voting could properly be eliminated in the 1970 Constitution.[45]

In addition to the arguments asserted by the delegates, many additional arguments both for and against the value of cumulative voting have been advanced by legal writers.[46] The proponents of cumulative voting urge that any potential danger of factionalism on the board of directors is far outweighed by having a minority representative serve as watchdog. With board members knowing that they will be held accountable for their actions by the minority board members, greater care will be taken in the performance of corporate duties. Minority shareholders, on principles of equity and fairness, should have a voice in the corporate decision-making process since they have an economic stake in the corporation. The board of directors is the only effective avenue that a minority shareholder has for expressing an opinion, and this forum is of particular importance on matters where the interests of management and shareholder conflict, such as dividend and salary determinations. Lastly, the board should be an open forum for the discussion of corporate problems.

The opponents of cumulative voting postulate that the orderly functioning of the corporation is of more concern than concepts of exact justice based on investment dollars and calls for the frank interchange of ideas unhampered by contentious factions. This orderly function will be hindered by the presence of partisan directors. For instance, when a director knows that any mistake will subject him to strong criticism by a minority board member, he will be inhibited in taking action in a situation which calls for a calculated risk to be taken. Cumulative voting would not be used much in practice since most shareholders are more concerned with a well-run corporation than with corporate democracy. When it is used, cumulative voting tends to be ex-

42. *Id.* at 1819, 1823.
43. *Id.* at 1817.
44. *Id.* at 1821.
45. *Id.* at 1817, 1818, 1821.
46. *See, e.g.*, Young, *The Case for Cumulative Voting*, 1950 WIS. L. REV. 49; Axley, *The Case Against Cumulative Voting*, 1950 WIS. L. REV. 278; Williams, *Cumulative Voting*, 33 HARV. BUS. REV. 108 (1955).

ploited by persons seeking control and results in the corporation becoming a battleground. A dissenting shareholder may sell his stock if dissatisfied with the performance of the corporation; and in a closed corporation, he may initially contract for cumulative voting. Finally, a shareholder himself is a sufficient check on corporate mismanagement since he has the right to examine the books and to present his views at shareholders' meetings and in proxy campaigns.[47]

Some of the preceding arguments can be presented in the context of Illinois law. Control in proportion to ownership is easily avoided by the issuance of different classes of voting stock having a great disparity in par value.[48] The idea of having a director present to voice the minority view may be circumvented by delegating the functions of the board to an executive committee by majority vote of the board.[49] Furthermore, upon a showing of a "proper purpose," a shareholder has a statutory right to examine the books and records of account of the corporation and the minutes of the meetings of the shareholders and of the directors.[50] Finally, in light of the determination by the Supreme Court of Illinois that a closely-held corporation is sui generis,[51] cumulative voting has vitality only in a publicly-held corporation.

It is submitted that the elimination of the constitutional mandate for cumulative voting was proper primarily for two reasons. First, as stated by the General Government Committee proposal, the value of cumulative voting is a matter for consider-

47. Section 14 of the Securities Exchange Act of 1934, 15 U.S.C. 78n and S.E.C. rule 14(a)-8, 17 C.F.R. 240.14(a)-8 deal with the inclusion of shareholder proposals in proxy solicitation by the corporation. Under rule 14(a)-8(c), management may omit a shareholder proposal if it is "not a proper subject for action by security holders" or if the proposal consists of a recommendation, request or mandate that action be taken with respect to any matter, including a general economic, political, racial, religious, social, or similar cause, that is not significantly related to the business of the issuer or is not within the control of the issuer.

In Medical Comm. for Human Rights v. SEC, 432 F.2d 659 (D.C. Cir. 1970), *vacated on other grounds*, 404 U.S. 403 (1973), the court held that a shareholder proposal that the board of directors of Dow Chemical Co. consider adopting a resolution that the company not make napalm was improperly excluded from the proxy and was a proper subject for shareholder consideration.

48. *See, e.g.*, Stroh v. Blackhawk Holding Corp., 48 Ill. 2d 471, 272 N.E.2d 1 (1973).

49. B.C.A. § 38.

50. *Id.* § 45.

51. In Galler v. Galler, 32 Ill. 2d 16, 203 N.E.2d 577 (1964), the court enforced a shareholder agreement which, *inter alia*, allowed the wife of a shareholder-director to appoint a director to fill the vacancy created by the death of the shareholder-director. Thus, in a closely-held corporation, the voting rights of the shareholders are subject to alteration by contract.

ation by the General Assembly.[52] Since the General Assembly would not be hampered by the time constraints which confronted the delegates, any studies undertaken by a legislative committee and action taken by the General Assembly can be given greater consideration than was given to the matter at the convention with the result that many of the unanswered questions could be answered.[53]

Secondly, addressing the value of cumulative voting, balancing the interests of the public, the shareholder and the corporation, the scales tip in favor of the elimination of mandatory cumulative voting. But admittedly, this balance must be struck by the General Assembly. If the General Assembly concludes that cumulative voting should not be mandated by statute, it becomes necessary to determine what constraints are imposed by section 8 of the transition schedule.

SECTION 8 OF THE TRANSITION SCHEDULE

Generally

Section 8 of the transition schedule to the 1970 Constitution, the means by which the delegates sought to leave the rights of the shareholders of pre-1970 corporations intact, provides:

> Shareholders of all corporations heretofore organized under any law of this State which requires cumulative voting of shares for corporate directors shall retain their right to vote cumulatively for such directors.

This section apparently leaves the right to vote cumulatively in corporations incorporated in Illinois prior to the adoption of the 1970 Constitution unaltered.

Although transition schedules are generally considered temporary enactments, the sole purpose of which is to effect the transition from an old constitution to a new constitution, the provisions of the schedule can afford constitutional protection to rights created under a previous constitution.[54] This section has not been construed by the Illinois courts, but section 8 should be held to maintain rights at a constitutional level. Therefore, any legislation in conflict with the rights protected by section

52. Note 27, *supra*, and accompanying text.

53. *See, e.g., Verbatim Transcripts*, vol. III at 1822-23: the reasons for corporations not incorporating in Illinois and the frequency with which this occurs.

54. The latter was the effect given to various provisions of the transition schedules by the Illinois courts. *See* Garrick v. Chamberlain, 97 Ill. 620 (1880), *construing* ILL. CONST. transition schedule, § 1 (1870); Phillips v. Quick, 63 Ill. 445 (1872), *construing* ILL. CONST. transition schedule, § 1 (1870); People *ex rel.* Decatur & S.L. Ry. v. McRoberts, 62 Ill. 38 (1871), *construing* ILL. CONST. transition schedule, § 1 (1870); Wood v. Blanchard, 19 Ill. 37 (1857), *construing* ILL. CONST. transition schedule, § 1 (1848).

8, rights which are yet to be determined,[55] may be held unconstitutional.

Indeed, this was the intent of the drafters of section 8. It was further suggested that even if the constitution were totally silent on the question of cumulative voting, the rights existing in the shareholders of pre-1970 corporations would remain intact and would not be subject to alteration without their consent.[56]

> The elimination of the mandatory cumulative voting requirement from the Constitution, will not, in the Committee's view, affect the rights of minority shareholders of existing corporations to cumulate their votes in director elections. Under the theory of the *Dartmouth College* case, rights created by virtue of the corporate charter are contract rights which cannot be impaired by State action. . . . Thus, any change in the laws requiring cumulative voting will have prospective effect only.[57]

Section 8: Blind Foresight

The reference to *Trustees of Dartmouth College v. Woodward*[58] indicates that section 8 of the transition schedule secures a right that would otherwise be protected by the impairment clause of the United States Constitution as interpreted by that case. It is submitted that this interpretation of *Dartmouth College* is erroneous.

Dartmouth College was granted its corporate charter by King George IV. Under the terms of the charter, the trustees were to fill all vacancies which may have been created in their own body. The New Hampshire legislature passed an act the effect of which was to transfer the governing power from the trustees to the governor. The act in question increased the number of trustees and gave the governor the power to appoint the additional trustees. Any further vacancies would also have been filled by the governor. In addition, the act created a board of overseers which had the power to inspect and control all the important acts of the trustees.[59] Chief Justice Marshall, writing for the majority, held that a corporate charter was a contract between the state and the corporation within the meaning of the impairment clause of the United States Constitution,[60] and that any amendment to the charter by the state without the consent of the corporation was an impairment of the contract and void.

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55. See text accompanying notes 85-97.
56. *Verbatim Transcripts*, vol. III at 1817, 1818, 1819, 1821.
57. *Comm. Proposals*, vol. VI at 625. See *Verbatim Transcripts*, vol. III at 1817.
58. 17 U.S. (4 Wheat.) 518 (1819).
518 (1819).
59. *Id.* at 626.
60. U.S. CONST. art. I, § 10.

As pointed out by Justice Story, if the state, in its grant of corporate power, had reserved the right to amend the charter, an amendment of the charter or alteration of the corporation laws of the state would not be void under the impairment clause.[61]

Heeding Justice Story's advice, all states reserve the power to alter, amend, or repeal the corporate law or corporate charters. In most states, this reservation is contained in the state constitution.[62] However, some states, including Illinois, have only statutory reservations of this power.[63] The effect of this reservation has been to allow the state to alter the voting rights of shareholders without running afoul of the impairment clause.

In *Looker v. Maynard*,[64] the Michigan legislature had made cumulative voting mandatory by statute, the power to amend the corporate law having been reserved in the state constitution. The shareholders of a corporation incorporated prior to the enactment by the legislature contended that this statute impaired their contractual right to vote for directors in violation of the impairment clause of the Constitution. The contractual right asserted was the right to vote for directors under the straight voting method.

Speaking of the reservation provision, the United States Supreme Court stated:

> The effect of such a provision, whether contained in an original act of incorporation, or in a constitution or general law subject to which a charter is accepted, is, at the least, to reserve to the legislature the power to make any alteration or amendment of the charter subject to it, which will not defeat or substantially impair the object of the grant, or any right vested under the grant . . . .
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> . . . .
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> Remembering that the *Dartmouth College case*, (which was the cause of the general introduction into the legislation of the several States of a provision reserving the power to alter, amend or repeal acts of incorporation,) concerned the right of a legislature to make a change in the number and mode of appointment of the trustees or managers of a corporation, we cannot assent to the theory that an express reservation of the general pow-

61. 17 U.S. (4 Wheat.) at 710 (Story, J., concurring).

62. CORPORATION MANUAL (published by United States Corporation Company) § 1 (1974 ed.).

63. Section 162 of the B.C.A. provides:

> The General Assembly shall at all times have power to prescribe such regulations, provisions, and limitations as it may deem advisable, which regulations, provisions, and limitations shall be binding upon any and all corporations, domestic or foreign, subject to the provisions of this Act, and the General Assembly shall have power to amend, repeal, or modify this Act at pleasure.

Provisions similar to this have been in existence in Illinois since 1872. *See* Act of July 1, 1872, § 9, [1871-72] Ill. Laws 299-300.

64. 179 U.S. 46 (1900).

er does not secure to the legislature the right to exercise it in this respect.[65]

Therefore, the right of a shareholder to elect the board of directors is subject to alteration by the legislature provided that the power to do so is reserved by the state. If the right to vote for directors on a straight method is subject to alteration by the legislature, the right to vote cumulatively should also be within this power of alteration. As long as the power to alter the right is reserved in the grant of corporate existence, it is irrelevant whether the reservation is contained in a corporate charter, corporation act or constitution. That the right being altered had been previously secured by a constitution, as in Illinois, rather than by statute, does not prevent the state legislature from altering the right.[66]

There had been two barriers to the constitutionality of a statute eliminating cumulative voting. The federal barrier, under *Dartmouth College* and *Looker*, had been removed by a reservation by the state of the power to alter the corporation laws. The only Illinois barrier was article XI, section 3, and had that been totally eliminated by the delegates, a statute altering cumulative voting enacted subsequent to the effective date of the 1970 Constitution could not be held unconstitutional under the new document.[67] Under prior law, had section 8 of the transition schedule not been included in the 1970 Constitution, the General Assembly would have had the power to totally eliminate cumulative voting for both pre-1970 and post-1970 corporations. Its inclusion cannot be said to have been superfluous as had been suggested.[68]

The Illinois Business Corporation Act and the Illinois Constitutions

Even though the 1970 Constitution no longer mandates cumulative voting for post-1970 corporations, corporate activity which had been previously held unconstitutional would still be proscribed by the Business Corporation Act. Section 28 of the B.C.A. provides that "[e]ach outstanding share, regardless of class shall be entitled to one vote on each matter submitted to

65. *Id.* at 52-54.

66. *See* Sherman v. Smith, 66 U.S. (1 Black) 587 (1861).

67. Where a statute reserves the power to amend the general corporate laws, a constitutional provision and the statute passed pursuant thereto making cumulative voting mandatory does not constitute an impairment of contract under the United States Constitution. The right to vote in a non-cumulative manner is a vested right existing in the majority shareholders, but in the face of a reserved power clause, it is subject to alteration by the legislature. Gregg v. Granby Mining & Smelting Co., 164 Mo. 616, 65 S.W. 312 (1901); *accord*, Cross v. West Va. Cent. & Pac. Ry., 35 W. Va. 174, 12 S.E. 1071 (1891).

68. Note 57, *supra*, and accompanying text.

a vote at a meeting of the shareholders" and also incorporates, without material change, article XI, section 3 of the 1870 Constitution which made cumulative voting mandatory.

There is no reason to believe that any different construction would be given by the courts to section 28 than had been given to its constitutional counterpart.[69] It is clear on the face of the statute that every share of stock shall be voting. Section 28 should be construed to proscribe the issuance of bonds with voting rights and the issuance of preferred stock without voting rights.[70] However, the interpretation of this section with respect to the classification of directors is not as clear.

By reason of section 8 of the transition schedule, *Wolfson v. Avery* still has application to pre-1970 corporations.[71] A construction of section 28 which would allow a pre-1970 corporation to classify its board would render the statute unconstitutional under the 1970 Constitution. But what of the application of section 28 to the post-1970 corporation that desires to classify its board? Would such action be held unconstitutional? Since section 8 of the transition schedule has application only to a pre-1970 corporation, the 1970 Constitution does not bar the classification of the directors of a post-1970 corporation. However, this does not completely resolve the question.

In spite of the adoption of the 1970 Constitution, the 1870 Constitution still has vitality in Illinois. In *People ex rel. Hanrahan v. Caliendo*,[72] the Supreme Court of Illinois stated that it does not accept the proposition

> that the adoption of a new constitution serves to validate all statutes enacted under the former constitution [of 1870] regardless of their legality or illegality under the earlier constitution. . . . [Where] the legislative origin of the Act . . . was under the earlier constitution, we should consider the legality of that legislation under both constitutions.[73]

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69. The same general principals to be applied in construing statutes apply in the construction of constitutions. If there is any distinction . . . less technical [rules] are applied in construing constitutions. Wolfson v. Avery, 6 Ill. 2d 78, 94, 126 N.E.2d 701, 710 (1955).

70. See text accompanying notes 14-17, *supra*.

71. See text accompanying notes 86-90, *supra*.

72. 50 Ill. 2d 72, 277 N.E.2d 319 (1971).

73. *Id.* at 76, 277 N.E.2d at 322. *Accord*, Annot., 171 A.L.R. 1070 (1947). *Contra*, City of Gaylord v. Beckett, 378 Mich. 273, 144 N.W.2d 460 (1966). *People ex rel. Hanrahan v. Caliendo* involved the constitutionality of the Urban Transportation District Act. ILL. REV. STAT. ch. 111⅔, §§ 501-18 (1973), which was enacted in 1969. Pursuant to the statutory grant of authority, the voters of the city of Chicago approved the establishment of an urban transportation district in the city on June 30, 1970. The constitutionality of the Act and the authority of the district to issue bonds and levy taxes was challenged subsequent to the adoption of the 1970 Constitution. The court believed that the procedure of determining the validity of the Act under both constitutions was compelled by section 9 of the transition schedule to the 1970 Constitution. That section provides:

> The rights and duties of public bodies shall remain as if this Consti-

However, this is not the precise issue that would be involved in construing section 28 of the B.C.A. with respect to a post-1970 corporation. The *validity* of the statute is not in question—the enactment was certainly within the power of the General Assembly under article XI, section 3 of the 1870 Constitution. What is involved, is the *construction* to be afforded the statute. The precise issue is whether a statute which *is valid* under the 1870 Constitution must be *construed* so as to be constitutional under the 1870 Constitution. Or, does the adoption of a new constitution allow the courts to give a broader construction to a valid statute than could have been given to the statute under the previous constitution? Authority on this point is almost non-existent, and the authority that does exist is in a state of conflict. Before proceeding to construe section 28 of the B.C.A., the court must first resolve the issue as set out above.[74]

Assuming the court finds that the construction of section 28

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tution had not been adopted . . . . All laws . . . not contrary to, or inconsistent with, the provisions of this Constitution shall remain in force . . . .

Since the district was a "public body," and since the legality of "laws" was involved, whether the district was legally formed depended on its formation being consistent with the 1870 Constitution. The possibility exists that this case may be distinguished from future cases on the basis of the existence of a public body being in question in *Caliendo* and that the result was compelled by the first sentence of section 9 of the transition schedule.

74. The rule has been stated that a construction of a statute cannot be enlarged or extended by a subsequent change in the constitution. *See* Annot., 171 A.L.R. 1070, 1078 (1947), *citing* Ursuline Academy v. Board of Tax Appeals, 141 Ohio St. 563, 49 N.E.2d 674 (1943); Dewar v. People, 40 Mich. 401 (1879); Mount Pleasant v. Vansice, 43 Mich. 361, 5 N.W. 378 (1880); Carlton Independent School Dist. v. Jordan, 9 S.W.2d 384 (Tex. Civ. App. 1928), *rev'd on other grounds*, 25 S.W.2d 610 (Tex. Com. App. 1930). *Contra*, People *ex rel.* McClelland v. Roberts, 148 N.Y. 360, 42 N.E. 1082 (1896).

However, the cases cited in the annotation do not deal with the issue which would confront the Illinois courts. *Ursuline Academy* involved a contended construction that flew in the face of the plain language of the statute in question. *Dewar* and *Mount Pleasant* dealt with statutes which were void on their face. Furthermore, although these two cases were distinguished in City of Gaylord v. Beckett, 378 Mich. 273, 144 N.W.2d 460 (1966), their authority in Michigan is in doubt in light of the holding in the *City of Gaylord* that a new constitution validates previous laws not inconsistent with the new constitution. The *Carlton* case involved a statute which had been judicially construed under the previous constitution as void.

The *McClelland* case, cited in the annotation for the contrary position, dealt with a civil service act which had been construed under the prior constitution not to encompass one of the departments of state government. The statute was subsequently construed under the new constitution to include the department which had been excluded from the operation of the statute under the prior construction. The court had summarily concluded that it was the intent of the people in adopting the new constitution to effectuate the changes in the constitution through existing legislation.

Any statements in the above cases regarding the effect of a change in the new constitution on the construction of a statute which was valid at the time of its enactment under the prior constitution is dicta. The resolution of the issue must be left to the Illinois courts.

is not limited by the 1870 Constitution, the next inquiry is whether section 28 of the B.C.A. prohibits the classification of directors. It is submitted that the statute does not give rise to such a prohibition. At the same time that the General Assembly enacted the first statute dealing with cumulative voting,[75] it also enacted a statute which allowed corporations to classify their boards.[76] As a result of these two statutes having been enacted contemporaneously, section 28 can be construed as allowing the classification of the board of directors of post-1970 corporations.

It is a principal canon of statutory construction that when construing a statute, in this case section 28, courts should give effect to the intent of the legislature[77] which enacted the statute.[78]

> That which is within the intention is within the statute though not within the letter, and though within the letter it is nevertheless not within the statute if not likewise within the intention.[79]

If the intent of the legislature is not clear on the face of the statute, the statute is ambiguous, and a court may resort to extrinsic aids to ascertain the legislative intent.[80]

One such extrinsic aid of construction is contemporaneous legislation dealing with the same subject matter or related subject matter.

> [T]o ascertain . . . the purpose and intent of the legislature, . . . it is not only proper to compare statutes relating to the same subject passed at the same or different sessions of the legislature, but to consider statutes on cognate subjects though not strictly *in pari materia*.[81]

Furthermore,

> [a]n act relating to the same subject matter need not be a valid and existing statute to be construed with an ambiguous act in order to determine its meaning . . . . [U]nconstitutional [or repealed] statutes relating to the same subject matter may be

75. Act of July 1, 1872, § 3, [1871-72] Ill. Laws at 297.
76. *Id.*
77. People *ex rel.* Fyfe v. Barnett, 319 Ill. 403, 408, 150 N.E. 290, 291 (1925).
78. *Id.* at 410, 150 N.E. at 292.
79. Peabody v. Russel, 301 Ill. 439, 442-43, 134 N.E. 148, 149 (1922).
80. *E.g.*, People v. Shamery, 415 Ill. 177, 112 N.E.2d 466 (1953); Walgreen Co. v. Murphy, 386 Ill. 32, 53 N.E.2d 390 (1944). It is submitted that section 28 is ambiguous for two reasons. First, the original enactment of section 28 and section 35 in 1872 gives rise to the ambiguity. Secondly, in construing article XI, section 3 of the 1870 Constitution, which was for the most part identical to section 28, the court implicitly found the constitutional provision ambiguous in *Wolfson* by its resort to the extrinsic aids of the debates, 6 Ill. 2d at 90-91, 126 N.E.2d at 708, and contemporaneous exposition, 6 Ill. 2d at 91-93, 126 N.E.2d at 709.
81. People *ex rel.* Fyfe v. Barnett, 319 Ill. 403, 408, 150 N.E. 290, 292 (1925).

construed in order to determine the legislative intent in enacting a statute.[82]

Therefore, although section 35 was held unconstitutional in *Wolfson* and subsequently repealed,[83] it can be used to ascertain the intent of the General Assembly in enacting section 28. It is submitted that the intent of the General Assembly was that the classification of directors was not such a dilution of cumulative voting as to be incompatible with that right. The intent of section 28 was to guarantee to minority shareholders only such proportionate representation as could be achieved with a classified directorship.[84] Since such action would not be prohibited by law, a post-1970 corporation could make provision for a classified directorship in its by-laws.[85]

Permissive Cumulative Voting for All Illinois Corporations

The change in the 1970 Constitution with respect to cumulative voting has had only a minimal effect on the general corporate law of Illinois. The prior constitutional mandate of article XI, section 3 is still in existence in the form of the statutory mandate of section 28 of the B.C.A. Should the General Assembly decide that it would be in the best interests of the state to allow a corporation to have permissive cumulative voting, to issue voting bonds, to issue non-voting preferred stock, or to classify the board of directors, what constitutional constraints will confront the General Assembly?

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82. 2A Sutherland, Statutes & Statutory Construction § 51.04 & nn.1-5 (4th ed. C.D. Sands 1973).

83. Act of July 9, 1957, [1957] Ill. Laws 2192.

84. *See* Humphrys v. Winous Co., 165 Ohio St. 45, 133 N.E.2d 780 (1956), wherein the court held that classification of directors and cumulative voting were compatible.

85. Section 5(1) of the B.C.A. allows a corporation to make by-laws not inconsistent with the laws of Illinois. The degree of classification allowed would be that which had been allowed by section 35. See note 21, *supra*.

Wolfson v. Avery is noticeably absent from the preceding discussion of the interpretation of section 28 for the following reason. *Wolfson* involved the ascertainment and effectuation of the intent of the drafters of the 1870 Constitution, and it did not involve a construction of section 28. The textual discussion of the intent behind section 28 is a search for the intent of the General Assembly, a body separate and distinct from the constitutional convention.

A presumption that is accorded to statutes should also be noted. The legislature is presumed to have acted within constitutional limits. 2A Sutherland, Statutes & Statutory Construction § 45.11 & n.2 (4th ed. C.D. Sands 1973). But what are the constitutional limits within which the legislature intends to work? Is it only the constitution in effect when the statute is enacted? Or can they be presumed to know that constitutions are subject to alteration and that they are presumed to have intended a constitutional result with respect to the constitution in existence at the time the statute is challenged? Again, this is a question that is raised by the adoption of a new constitution and one that must be resolved by the Illinois courts.

Post-1970 Corporations

Referring to the 1970 Constitution itself and to the convention debates, cumulative voting could be made permissive or even totally prohibited for post-1970 corporations. The General Assembly would have the same freedom with respect to the issuance of voting bonds and non-voting preferred stock and with respect to the classification of the board of directors.

Pre-1970 Corporations

The proscription placed on the General Assembly by the transition schedule regarding pre-1970 corporations is, however, open to question. Section 8 of the transition schedule provides:

> Shareholders of all corporations heretofore organized under any law of this State which requires cumulative voting of shares for corporate directors shall retain their *right* to vote cumulatively for such directors (emphasis added).

What "right" did the drafters intend to secure? Was it merely the right to vote cumulatively without consideration being given to the effectiveness of that right? Or was it the intent of the delegates to secure the right as it existed prior to the adoption of the 1970 Constitution? If the latter was the intent of the framers, section 8 would prohibit a statute allowing a pre-1970 corporation to eliminate cumulative voting, to issue bonds with voting rights, to issue preferred stock with less than full voting rights, and to classify the board of directors.

It is implicit throughout the debates that it was the delegates' intent to secure the shareholders' rights that existed prior to the adoption of the 1970 Constitution. At one point in the debates it was stated that "basically no rights of the present shareholders are being watered down . . ."[86] and that the delegates were "not taking any rights away from present shareholders . . . ."[87]

The delegates debated the value of cumulative voting under an amendment proposed from the floor which would have made cumulative voting mandatory for *all* corporations.[88] Both the opponents and proponents recognized that if the amendment were successful, the classification of directors[89] and the financial flexibility afforded by the issuance of bonds with voting rights and non-voting stock[90] would be prohibited by the 1970 Constitution. Since the intent of this amendment was that all the rights

86. *Verbatim Transcripts*, vol. III at 1821.
87. *Id.*
88. *Id.* at 1816.
89. *Id.* at 1817, 1818, 1819, 1820, 1822.
90. *Id.* at 1817, 1820, 1821, 1822, 1824, 1825.

encompassed within cumulative voting prior to the 1970 Constitution would have been preserved had the amendment prevailed, the preservation of these same rights must have been within the contemplation of the delegates in adopting section 8 of the transition schedule.

Thus, although the transition schedule speaks only of cumulative voting, it also secures the rights that article XI, section 3 of the 1870 Constitution had been interpreted to guarantee.

However, an inspection of the Record of Proceedings discloses one inconsistency that must be resolved and one that is determinative of whether the rights of a shareholder of a pre-1970 corporation which are embodied in the right to vote cumulatively are absolutely inviolate. It is submitted that these rights are not inviolate. The right secured by section 8 is a right subject to divestment—divestment by merger with a post-1970 corporation which does not elect directors by the cumulative voting method.

Delegate Connor, who had been selected by the Committee on General Government to present the majority proposal, said that section 8 of the transition schedule was intended to insure "that any corporation in existence now or in existence when the constitution is approved . . . will not find themselves with their mandatory cumulative voting requirement eliminated . . . ."[91] In response to the question of whether the rights of present shareholders are being watered down, Delegate Connor replied that "the intention is to absolutely insure to the existing corporations their present right of shareholders to have cumulative voting."[92]

The question was asked by Delegate Tomei whether the transition schedule would prevent the shareholders from amending their corporate charter to eliminate cumulative voting.[93] Delegate McCracken, chairman of the Committee on General Government and the delegate who introduced the amendment to the committee proposal, replied that it would prevent such action.[94] The following colloquy between Delegate Davis, committee member and drafter of section 8 of the transition schedule, and Delegate Tomei resulted:

> MR. DAVIS: [T]here is nothing . . . [in the transition schedule] that would prevent an existing corporation from merging with another corporation of Delaware or some other state, adopting the corporate structure and . . . thereby cease to be an

91. *Id.* at 1817. "[A]ny change in the laws requiring cumulative voting will have prospective effect only." *Comm. Proposals*, vol. VI at 625.
92. *Verbatim Transcripts*, vol. III at 1821.
93. *Id.* at 1818.
94. *Id.*

Illinois corporation for the purpose of getting rid of the cumulative voting provisions.

MR. TOMEI: . . . Could the shareholders of an existing corporation vote to dissolve that corporation and then reform a new corporation which would permit election of directors by other than by cumulative voting?

MR. DAVIS: They can do it under the provisions of the Illinois Corporation Act, yes . . . .

MR. TOMEI: . . . [I]n other words, instead of having unanimous consent of shareholders to amend the charter so as to abolish cumulative voting for directors, could they—by other vote—dissolve the corporation and reform a new one which would permit election of directors by other than cumulative voting?

MR. DAVIS: . . . I would see no reason why this would interfere in any way with the ability of an Illinois corporation to dissolve, subject to the requirements of law.[95]

Delegate Mathias then stated that in order to insure the protection of other rights of the shareholders, the proper course for a corporation seeking to eliminate cumulative voting, and one that would be allowed under section 8, would be to set up a new corporation under Illinois law and then merge the pre-1970 corporation with the post-1970 corporation.[96]

Therefore, the delegates recognized that a pre-1970 corporation could not eliminate cumulative voting. However, by the simple expedient of merging with a post-1970 corporation, section 8 of the transition schedule could be circumvented.[97] Section 8 does not secure rights which are totally inviolate—the rights embodied in the right to vote cumulatively for corporate directors can be divested by merging with a corporation that does not vote cumulatively for directors. The "right" which section 8 secures is a right subject to divestment—divestment by merger in accordance with law.

A strong argument in favor of giving this construction to section 8 of the transition schedule is that a shareholder who is divested by merger of either the right to vote cumulatively or the other rights embodied therein is afforded another impor-

95. *Id.*
96. *Id.*
97. However, it must be kept in mind that " 'in construing the constitution the true inquiry concerns the understanding of the meaning of its provisions by the voters who adopted it . . . .' " Elk Grove Eng'r Co. v. Korzen, 55 Ill. 2d 393, 398, 304 N.E.2d 65, 68 (1973). A court could resort to this principle and hold that the meaning of section 8 as understood by the voters was that that section only secured the right to vote cumulatively and that it could not be circumvented.

It could also be contended that a merger for the *sole* purpose of eliminating cumulative voting would not be permitted. *But see* text accompanying note 95, *supra*, "*for the purpose of* getting rid of the cumulative voting provisions (emphasis added)."

tant right. Merging "subject to the requirements of law"[98] requires the approval "of the holders of at least two-thirds of the outstanding shares . . ."[99] and also requires that a shareholder who dissents to the merger be afforded the opportunity to sell his shares to the corporation at their fair value.[100] If a shareholder is entitled to the right to vote cumulatively because he has an economic stake in the corporation, he loses nothing when deprived of that right by way of merger because he has the right to have his economic stake returned to him.

Statutory Abolition of Mandatory Cumulative Voting: Substance Over Form

Since the intent of the convention delegates was to allow section 8 to be circumvented by merger with a post-1970 corporation, why not allow the General Assembly to do directly what could be accomplished by the corporation indirectly? If the General Assembly concludes that permissive cumulative voting is in the best interests of all concerned, why require a pre-1970 corporation to take the circuitous route of merger solely to eliminate cumulative voting or the other shareholder rights embodied therein?

Should the General Assembly choose to make cumulative voting permissive in pre-1970 corporations, the amendment to section 28 of the B.C.A. must afford a shareholder who dissents to the elimination of cumulative voting the same rights that he would have in the event of a merger. Under section 8 of the transition schedule, the statute must require the approval of the holders of at least two-thirds of the outstanding shares and must afford a dissenting shareholder the opportunity to sell his shares to the corporation at their fair value.

Although not constitutionally mandated, the statute should take the same form for post-1970 corporations in existence at the time of the proposed amendment to the B.C.A. By giving the shareholders of all corporations the right to sell their shares to the corporation, the General Assembly would protect a minority shareholder who had invested in the corporation relying on the presence of cumulative voting from being placed at the mercy of the majority shareholder.

It must also be noted that the intent of the 1970 delegates was to guarantee the same rights that article XI, section 3 had been interpreted by the courts to encompass. Any proposed statute which would allow a pre-1970 corporation to issue voting

98. See text accompanying note 95, *supra.*
99. B.C.A. § 64.
100. *Id.* at § 70.

bonds, to issue non-voting or limited voting preferred stock, or to classify the board of directors must require that such action be approved by a two-thirds majority and must give dissenting shareholders the right to sell their shares to the corporation.[101]

CONCLUSION

While cumulative voting may have been justified at the time of its inclusion in the laws of Illinois, it is no longer of constitutional stature. It is a matter for legislative consideration, and whether it is still a necessity or has vitality within the Illinois corporate structure should be resolved by the General Assembly, striking the proper balance among the interests of the public, the shareholder, and the corporation. Should the General Assembly conclude that in the balance the interests of all would best be served by making cumulative voting permissive, the choice should be extended to *all* Illinois corporations within the limits of section 8 of the transition schedule. There is no justification for distinguishing among Illinois corporations on the basis of their date of incorporation.

William W. Kurnik

101. This form of statute would be similar to the change made in Pennsylvania corporate law when its constitution was amended to eliminate mandatory cumulative voting for *all* corporations. PA. STAT. ANN. tit. 15, § 1505.

The necessity of a vote of at least two-thirds of the outstanding shares would make the elimination of cumulative voting another type of extraordinary corporate action which, under the B.C.A., requires the approval of at least two-thirds of the outstanding shares. *See* B.C.A. § 41(a), payment of a liquidating dividend; B.C.A. § 53, amendment to the articles of incorporation; B.C.A. § 64, merger or consolidation; B.C.A. § 72, sale of substantially all of the corporate assets; B.C.A. § 76, voluntary dissolution by act of the corporation.