The Ideal Shareholder: Competing Norms on the Appropriate Characteristics of Public Company Shareholders

Lisa M. Fairfax*

INTRODUCTION

One of the most significant changes in modern corporate governance has been the exponential rise of shareholders' activism and influence over corporate affairs. The rise in shareholder influence is highlighted in many ways. Most notably, shareholders have vigorously advocated for changes in corporate governance structures with the goal of facilitating shareholders' ability to use their voting power to impact the corporation and its board. Shareholders' increased activism also manifests in their increased willingness to vote against incumbent directors, as well as the rise in director election contests coupled with the growth of shareholder success related to those contests. Shareholders' efforts in these areas illuminate how shareholders have actively sought to influence the corporation through enhanced corporate governance and increased use of their votes in director elections.

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The rise in shareholder influence is highlighted by the significant increase in corporate responsiveness to shareholder concerns pursuant to which corporations have made significant changes as a direct result of shareholders' increased activism. On the one hand, shareholders' increased activism has turned the corporate governance landscape on its head. Corporate governance polices that were historically non-existent or only adopted by a small handful of corporations have now become so dominant they are viewed as corporate governance best practices.[1] By contrast, practices that were historically embraced by most public companies are now viewed as outliers and inconsistent with best practices.[2] Examples of this phenomenon abound, and include the shift from plurality voting to majority voting, the shift from classified boards to annual elections, and the rapid embrace of proxy access.[3] The virtual sea change in corporate governance practices is a clear reflection of corporations increased responsiveness to shareholder influence. This responsiveness is particularly remarkable in light of the fact that corporations and their directors consistently and vigorously resisted shareholder calls to alter the very same governance structures that corporations have now rapidly abandoned in the face of increased shareholder activism.[4] On the other hand, shareholders' increased activism has led to a much more dynamic director election landscape whereby corporations now acknowledge the need to both proactively engage with shareholders and effectively respond to shareholder concerns.[5] This acknowledgement is rooted in shareholders increased influence in both contested and uncontested director elections. This acknowledgement underscores the extent to which corporations have altered their policies and practices in response to increased shareholder influence.

Increased shareholder activism and influences means that it is no longer the case that shareholders are passive participants in the corporate landscape. It also means that it is no longer the case that corporations feel free to ignore shareholder expectations and preferences.[6]

In addition to triggering significant controversy and debate, the ascendancy of shareholder influence begs an important question—what characteristics define an ideal public company shareholder? This Article argues that increased shareholder power not only has illuminated the fact that we have embedded assumptions about the ideal public company shareholder but also has made clear that there is significant disagreement about the core

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1. *See* Lisa M. Fairfax, *Just Say Yes? The Fiduciary Duty Implications of Directorial Acquiescence*, 106 IOWA L. REV. 1315, 1325–33 (2021) (discussing "changes that have emerged as a result of directors' acquiescence to activists' demands").

2. *See id.* at 1326–27 (discussing, for example, how plurality voting used to be majority rule and is now the minority rule).

3. For a discussion and definition of these concepts, see *infra* Part I.

4. *See* Fairfax, *supra* note 1, at 1329–32 (discussing director resistance to reforming board declassification, supermajority voting thresholds, and other elements of corporate governance).

5. *See, e.g.*, Jamie Smith, *2024 Proxy Season Review: Five Takeaways*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 30, 2024), https://corpgov.law.harvard.edu/2024/07/30/2024-proxy-season-review-five-takeaways/ [https://perma.cc/8RYU-7E8M] ("This year's proxy season included a busier year for activism amid a demanding economic context [] [and] a recalibrated shareholder proposal landscape . . . . During this proxy season, directors received more support despite investors' increased focus on board effectiveness and director accountability.").

6. *See, e.g.*, Fairfax, *supra* note 1, at 1329–30 (describing directors' historical refusal to accede to shareholder demands around governance proposals); Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 853–54 (2005) (providing data which suggests that most boards have refused to implement shareholder decisions, specifically shareholder decisions to repeal staggered boards).

characteristics of the ideal public company shareholder. This Article further contends that this disagreement has important consequences for how we view shareholder power and the appropriate response to that power, both corporate and regulatory. While conceptions about the ideal shareholder are normative in nature, they have important policy repercussions. Importantly, this Article insists that normative presumptions about the ideal shareholder are strongly held, but often implicit and unstated. This Article also insists that these normative presumptions are driving important regulatory and corporate law debates. In this respect, this Article's primary purpose is to highlight and make explicit the underlying normative disagreements around shareholder power that are shaping disagreements around corporate and regulatory behavior.

Part I of this Article will discuss the rise in shareholder activism and influence. Part II will highlight some competing normative conceptions of the ideal shareholder and the manner that such conceptions impact perceptions around the appropriateness of shareholder behavior as well as the appropriateness of responses to that behavior, both regulatory and corporate. This Article focuses on the ideal shareholder in the context of the public company shareholder. Part III concludes.

I. The Rise of Shareholder Activism and Influence

One of the most significant changes in modern corporate governance has been the exponential rise of shareholders' influence over corporate affairs. This rise is highlighted in several ways.

A. Shareholder Proposals

Shareholder proposals are non-binding recommendations from shareholders requesting the corporation or its directors to take some action.[7] Shareholder proposals are regulated under Rule 14a-8 of the Securities Exchange Act of 1934 (the shareholder proposal rule).[8] The shareholder proposal rule was adopted in 1942 and has undergone several amendments.[9] Under Rule 14a-8, so long as shareholders comply with certain procedural and substantive rules, corporations must include shareholder proposals in the corporation's annual proxy materials to be voted on at the annual shareholders' meeting.[10]

Shareholder proposals have played a critical role in augmenting shareholders' influence. First, shareholder proposals serve as a critical source of information around shareholder preferences because shareholder proposals enable shareholders to highlight the issues that they believe to be important.[11] In this regard, the subject matter of shareholder

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7. *See* SEC Rule 14a-8, 17 C.F.R. § 240.14a-8 (2025).

8. *Id.*

9. *See* Lisa M. Fairfax, Shareholder Democracy: A Primer on Shareholder Activism and Participation 65 (2011) ("The SEC first adopted federal rules governing proxies in 1935, but those rules did not contain a shareholder proposal provision. However, . . . the SEC . . . per adopt[ed] a rule requiring disclosure of shareholder proposals in 1942. Since that time, the shareholder proposal rule has undergone several changes.").

10. SEC Rule 14a-8, 17 C.F.R. § 240.14a-8 (2025); *see also* Fairfax, *supra* note 9, at 63–70 (describing procedural rules, such as requirements for minimum investments in the company's securities, and substantial rules, such as the company's right to exclude from proxy statements proposals that would be illegal to implement).

11. *See* Fairfax, *supra* note 9, at 63–64 ("Shareholder proposals are . . . critical to the shareholder empowerment movement . . . . [T]hey highlight shareholder views on important issues impacting the corporation.").

proposals, along with the volume and support for shareholder proposals, serves to inform corporations about shareholder preferences. Second, shareholder proposals provide critical feedback to the corporation, enabling shareholders to express their views and highlight their concerns about corporate policies and practices.[12] Finally, shareholder proposals influence corporate policies and practices when corporations adapt their behavior in response to activity within the shareholder proposal landscape.[13]

Recently shareholders have actively used the shareholder proposal arena, and shareholder proposals have received record levels of shareholder support.[14] Historically, shareholders submitted very few shareholder proposals, and those proposals rarely received strong shareholder support.[15] In sharp contrast, "[i]n the last decade, shareholders have submitted a record number" of shareholder proposals.[16] In 2021, the number of shareholder proposals exceeded 700 for the first time in history followed by record numbers of submissions in the following years.[17] In 2024, the number of shareholder proposals reached over 850 for the first time in history during the core proxy season.[18] In addition, there has been a significant growth in support of shareholder proposals with many proposals receiving record levels of support for the first time in history.[19]

Although shareholder proposals are non-binding, in recent years, the activity in the shareholder proposal arena has had a dramatic impact on corporations, whereby corporations have responded to shareholders proposals by altering their corporate policies and practices. Indeed, studies reveal that prior to 2000, many corporations ignored shareholder proposals even when they received majority support.[20] However, in the last few decades, corporations have responded to shareholders' request for changes made through the shareholder proposal process. Thus, corporations now routinely alter their policies after shareholder proposals receive a majority or more of the shareholder vote.[21] Many corporations also alter their policies and practices when proposals receive a sizable portion of the vote (such as 20–30%), even though it is less than a majority.[22] Moreover, corporations may

12. *See id.* ("[S]hareholder proposals represent the primary means by which shareholders express their views regarding important corporate issues and propose changes to corporate policy.").

13. *See id.*

14. *See* Lisa M. Fairfax, *From Apathy to Activism: The Emergence, Impact, and Future of Shareholder Activism as the New Corporate Governance Norm*, 99 B.U. L. REV. 1301, 1320 (2019) (describing "steady growth" in shareholder activism).

15. *See id.* at 1307–10 (discussing the era of apathy).

16. *Id.* at 1320.

17. *See* SULLIVAN & CROMWELL LLP, 2024 PROXY SEASON REVIEW: PART I 2 (2024), https://www.sullcrom.com/SullivanCromwell/_Assets/PDFs/Memos/2024-Proxy-Season-Review-Part-1.pdf [https://perma.cc/9BN2-ZB5X].

18. *Id.*

19. *See* Fairfax, *supra* note 14, at 1315–18 (describing how, starting in 2005, a number of shareholder proposal campaigns succeeded).

20. *See* Lucian Arye Bebchuk, John C. Coates IV & Guhan Subramanian, *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy*, 54 STAN. L. REV. 887, 900–01 (2002) (describing company resistance of majority-supported board declassification proposals).

21. *See* SULLIVAN & CROMWELL LLP, *supra* note 17, at 2–3 (noting that the passing rate of shareholder proposals has increased).

22. *See ISS and Glass Lewis Policy Updates for 2025*, COVINGTON (Dec. 23, 2024), https://www.cov.com/en/news-and-insights/insights/2024/12/iss-and-glass-lewis-policy-updates-for-2025 [https://perma.cc/99S5-4GTP] ("Glass Lewis's policy on board responsiveness continues to provide that boards should engage with shareholders when at least 20% of shareholders vote contrary to management on a director

alter their policies even when a shareholder proposal is not voted upon.[23] On the one hand, corporations may negotiate with shareholders so that shareholders agree to withdraw their proposal prior to any vote, which generally means that corporations agreed to make some change in their policy or practice.[24] On the other hand, when certain issues receive a lot of attention in the shareholder proposal arena either because of the volume of shareholder proposals submitted related to the issue or because the proposal consistently receives strong shareholder support, corporations may proactively alter their policies and practices even when they do not receive a shareholder proposal.[25] As a result, many of the most consequential changes in corporate governance and corporate practices, including disclosure practices, have occurred in response to shareholder proposal activity.[26]

The rise in shareholder proposal activity reflects shareholders' increased activism and influence over corporate affairs. Indeed, the seismic shift in corporate governance practices within the last decade has occurred as a direct result of activity within the shareholder proposal arena.[27] Additionally, shareholders have successfully managed to use the shareholder proposal arena to usher in important changes to corporate policies and practices around a range of issues including those associated with compensation practices as well as important environmental and social matters.[28] Indeed, the corporate governance changes discussed below directly resulted from shareholder proposal activity.

B. Majority Voting

Historically, the vast majority of public company directors were elected based on a plurality system whereby a director is elected so long as she receives most of the votes cast, without regard to votes withheld or cast against her.[29] Under such a system, in an uncontested election, so long as at least one vote is cast in favor of a director nominee, it is possible for such nominee to be elected director even if 99% of votes were cast against her or withheld.

In the early 2000s, shareholders began to vigorously push corporations to change from plurality voting to majority voting based on the view that a plurality voting system

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nominee or vote against a management-sponsored proposal."); *see also* Amendments To Rules On Shareholder Proposals, Exchange Act Release No. 34-40018, Investment Company Act Release No. 23200, n.112 (May, 21 1998), https://www.sec.gov/rules-regulations/1998/05/amendments-rules-shareholder-proposals (on file with the *Journal of Corporation Law*) [hereinafter Amendments] ("Even if a proposal does not obtain shareholder approval, however, it may nonetheless influence management, especially if it receives substantial shareholder support.").

23. *See* Amendments, *supra* note 22, at n.112 ("[I]n some instances management has made concessions to shareholders in return for the withdrawal of a proposal.").

24. *Id.*

25. *See* Fairfax, *supra* note 14, at 1329 (noting, in the context of a "shift in viewpoint" about proxy access and the role of shareholders, that sometimes "directors affirmatively implement policies even when they do not receive a shareholder proposal").

26. *Id.* at 1315–18, 1336–37.

27. *Id.* at 1315–18.

28. *See* Lisa M. Fairfax, *The Perils and Promise of Shareholders as Stakeholder Advocates*, *in* BOARD-SHAREHOLDER DIALOGUE: POLICY DEBATE, LEGAL CONSTRAINTS AND BEST PRACTICES 214 (Luca Enriques & Giovanni Strampelli eds., 2024) (describing shareholders as "prioritiz[][ing]" environmental, social, and governance (ESG) standards "in their engagement efforts and voting policies").

29. *See* Lisa M. Fairfax, *The Future of Shareholder Democracy*, 84 IND. L.J. 1259, 1288 (2009).

undermined shareholders ability to truly impact director elections in uncontested elections.[30] Majority voting refers to a system pursuant to which a director must receive a majority of the shareholder votes cast in order to be elected as a director.[31] In 2005, a record number of shareholders began urging public corporations to adopt majority voting through the shareholder proposal process.[32]

Corporations rapidly responded to these calls by shifting from plurality voting to majority voting in record numbers. Prior to shareholders' strenuous push for majority voting in 2005, less than 10% of S&P 500 companies had adopted some form of majority voting in director elections.[33] Three years later in 2008, that number had climbed to 66%.[34] Five years later, in 2010, more than 77% of S&P 500 companies had adopted some form of majority voting.[35]

Today majority voting is widespread and viewed as a corporate governance best practice, at least at large public corporations. In the S&P 100, majority voting went from 10% in 2004 to 96% in 2024.[36] Similarly, more than 90% of S&P 500 companies have adopted some form of majority voting.[37]

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30. *See id.* at 1290 (describing how shareholder support for majority voting systems grew significantly from 2004 to 2007).

31. *See id.* at 1289–90 (explaining different majority voting systems).

32. *See* Fairfax, *supra* note 14, at 1315 ("In 2005, shareholders began advocating in earnest for majority voting to replace the rule of plurality voting in director elections."); *see also* Fairfax, *supra* note 29, at 1290 ("[S]hareholders submitted over 150 proposals in 2006. More than 150 proposals were submitted in 2006 and 2007 . . . . Moreover, such proposals have garnered a record amount of shareholder support.").

33. *See* Brooke A. Masters, *Shareholders Flex Muscles Proxy Measures Pushing Corporate Accountability Gain Support*, WASH. POST (June 17, 2006), https://www.washingtonpost.com/archive/business/2006/06/17/shareholders-flex-muscles-span-classbankheadproxy-measures-pushing-corporate-accountability-gain-supportspan/e9c11d2e-7258-4f6b-aab9-29668a7b1d02/ [https://perma.cc/VP7T-J4L6] ("About 145 companies in the Standard & Poor's 500-stock index now elect directors by majority vote . . . . Fewer than 30 companies had such policies in place at the start of 2005."); *see also* Edward B. Rock, *Does Majority Voting Improve Board Accountability?*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 27, 2015), https://corpgov.law.harvard.edu/2015/11/27/does-majority-voting-improve-board-accountability/ [https://perma.cc/U5ZL-TWZD] ("As recently as 2005, only nine of the S&P 100 companies used majority voting in director elections."); Fairfax, *supra* note 29, at 1288 ("Until recently, the vast majority of corporations elected directors based on a plurality system.").

34. CLAUDIA H. ALLEN, STUDY OF MAJORITY VOTING IN DIRECTOR ELECTIONS ii (2007) ("To date [as of November 2007] . . . 66% of the companies in the S&P 500 . . . have adopted a majority vote policy, bylaw and/or charter provision.").

35. Lisa M. Fairfax, *Mandating Board-Shareholder Engagement?*, 2013 UNIV. ILL. L. REV. 821, 825–26; Fairfax, *supra* note 1, at 1326 –27.

36. *See* DAVID A. BELL & WENDY GRASSO, CORPORATE GOVERNANCE PRACTICES AND TRENDS IN SILICON VALLEY AND AT LARGE COMPANIES NATIONWIDE 33 (2025), https://assets.fenwick.com/documents/Fenwick-Corporate-Governace-Survey-2024.pdf [https://perma.cc/S7F7-6E2H].

37. *See* Matteo Tonello & Paul Hodgson, *Corporate Board Practices in the Russell 3000, S&P 500, and S&P Mid-Cap 400*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 6, 2021), https://corpgov.law.harvard.edu/2021/11/06/corporate-board-practices-in-the-russell-3000-sp-500-and-sp-mid-cap-400/ [https://perma.cc/BZ6T-ANZ9] ("[M]ore than 90 percent of S&P 500 companies have adopted a majority voting standard for uncontested director elections."); *see also* SULLIVAN & CROMWELL LLP, *supra* note 17, at 17 (noting that more than 80% of boards have adopted some form of majority voting).

Majority voting not only increases shareholders' ability to impact director elections but also increases shareholders indirect influence over the board and its decision-making.[38] By altering the standard pursuant to which directors are elected, majority voting increases shareholders ability to unseat incumbent directors. In so doing, majority voting also increases shareholders indirect influence over the board and board decision-making.[39] To be sure, majority voting has its limitations. In particular, most majority voting regimes leave the ultimate decision about a director's removal in the hands of the board because, while such regimes require that directors who receive less than a majority vote tender their resignation to the board, majority voting regimes do not require the board to *accept* such resignation.[40] Hence, majority voting allows boards to have the final word over election outcomes.[41] Nonetheless, it is clear that majority voting has enhanced shareholder power both directly and indirectly. Indeed, experts have stressed the importance of board engagement with shareholders to address shareholder concerns when directors receive low levels of shareholder support, even when they do not fall below a majority.[42] In this respect, the shift from plurality voting to majority voting has enhanced shareholder power and influence.

C. Board Declassification

Under a classified board structure, directors are divided into classes and serve staggered terms. This not only means that only one class, constituting less than a majority of the board, stands for re-election in any given year, but also that each class of directors has a multi-year term.[43] A typical classified board structure divides directors into three classes with directors in each class serving a three-year term and only a third of the directors standing for re-election each year.[44]

38. *See* Fairfax, *supra* note 29, at 1294–95 ("Professor Joseph Grundfest . . . notes that majority voting also has an indirect benefit . . . . [B]y enabling shareholders to reject specific directors, majority voting may serve to communicate shareholders' discontent with particular directors or their policies.").

39. *See* Fairfax, *supra* note 35, at 825–26 ("A majority voting regime increases the likelihood that shareholders will have the ability to unseat incumbent directors or prevent new directors from holding office.").

40. *See* Fairfax, *supra* note 29, at 1296–99 ("[W]hen such resignations are tendered, boards remain free to accept or reject them . . . . [E]ven if a director resigns, the board retains the power to fill the vacancy. Such power . . . ensures that directors have the ability to determine the composition of the board.").

41. *Id.* at 1298; *see also Zombie Directors and Board Accountability*, ROBBINS GELLER RUDMAN & DOWD LLP (July 16, 2014), http://www.rgrdlaw.com/news-item-Zombie-Directors-Board-Accountability-071614.html [https://perma.cc/2DBE-HSKN] (describing directors who have been voted out but who nonetheless remain active directors as "zombie directors"); Lisa M. Fairfax, *Toward a Theory of Shareholder Leverage*, 62 UCLA L. REV. DISC. 92, 94 (2014) (discussing zombie directors and other concerns around majority voting).

42. *See* Smith, *supra* note 5 (describing the importance of monitoring shareholder movements against directors); James J. Hanks, Jr. et al., *Responding to Annual Meeting Voting Results*, VENABLE LLP (Oct. 31, 2023), https://www.venable.com/insights/publications/2023/10/responding-to-annual-meeting-vote-results [https://perma.cc/2HBX-UG9F] ("Glass Lewis believes that a board should respond with increased disclosure and engagement with shareholders if 20% or more of votes cast are against any recommendation of the board.").

43. Dan Byrne, What is a Staggered Board?, CORP. GOVERNANCE INST., https://www.thecorporategoveranceinstitute.com/insights/lexicon/what-is-a-staggered-board/?srsltid=AfmBOoqgHK7dXEic-BVfRAhp50xVJxl_DFPvSR30oWWC0z0sFxoBrTZ0q [https://perma.cc/2A7W-Q7EW].

44. *Id.*

As a result of shareholder pressure, corporations have abandoned classified boards in favor of declassified boards, pursuant to which all directors stand for election annually.[45] In 2009, 68% of S&P 500 boards were declassified.[46] By 2024, 91% of S&P 500 boards were declassified.[47] Similarly, classified boards in the S&P 1500 "decreased from 58% in the early 1990s to 31% in 2020."[48]

Shareholders contend that classified boards undermine their power by undermining their ability to turn over the entire board in one election cycle.[49] Classified boards represent an important anti-takeover defense.[50] In this regard, classified boards promote stability and serve to protect existing boards and their long-term strategies.[51] However, this feature also represents a source of concern for shareholders who view classified boards as a managerial entrenchment tool that makes it more difficult to turnover and refresh existing boards.[52] By increasing the possibility that shareholders can gain control of the board in one election cycle, the push for annual elections through board declassification is designed to give shareholders more direct and indirect influence over the board and management.

D. Supermajority Voting

Supermajority voting refers to situations in which more than a simple majority vote is necessary to approve some action.[53] Supermajority provisions can require as much as two-thirds or more of shareholder votes for approval around certain kinds of actions.[54] Supermajority provisions can appear in connection with many actions including bylaws, charters, and other fundamental transactions.[55]

45. Scott Guernsey et al., *How Classified Boards Have Evolved Over the Last Thirty Years*, CLS BLUE SKY BLOG, (Dec. 5, 2024), https://clsbluesky.law.columbia.edu/2024/12/05/how-classified-boards-have-evolved-over-the-last-thirty-years [https://perma.cc/4PY3-XD4A] ("Among S&P 1500 firms, the prevalence of classified boards declined from 58 percent in the early 1990s to 31 percent in 2020."); *but cf.* ("In contrast, the number of classified boards at firms outside the S&P 1500 rose from 42 percent to 52 percent over the same period."). *Id.*

46. *See* SPENCERSTUART, 2024 U.S. SPENCERSTUART BOARD INDEX 36 (2025), https://www.spencerstuart.com/-/media/2024/09/ssbi2024/2024_us_spencer_stuart_board_index.pdf [https://perma.cc/R8XV-2LS6].

47. *See id.* (describing that "91% of large-cap boards have one year terms," which is a defeature of the declassified board structure).

48. Scott Guernsey et al., *Thirty Years of Change: The Evolution of Classified Boards* 3 (Eur. Corp. Governance Inst., Finance Working Paper No. 939/3023, 2024), https://download.ssrn.com/2024/12/9/4085735.pdf [https://perma.cc/C4TX-LPYX].

49. *See* Bebchuk, Coates IV & Subramanian, *supra* note 20, at 899 (discussing the utility of staggered boards as a mechanism against takeovers).

50. *Id.*

51. *See id.*

52. Fairfax, *supra* note 1, at 1329–30.

53. James Chen, *Supermajority: What it Means, Examples in Corporate Finance*, INVESTOPEDIA (June 27, 2021), https://www.investopedia.com/terms/s/supermajority.asp [https://perma.cc/UAT5-8BAD].

54. *Id.* (describing a broad range of percentages that can count as a "supermajority," from 67% to as high as 90%).

55. *See* SANDRA HERRERA LOPEZ & STEPHANIE HOLLINGER, *ARE SUPERMAJORITY VOTES HEADED FOR EXTINCTION?* 2 (2024), https://s3.us-east-1.amazonaws.com/iss-corporate.com/prod/wp-content/uploads/are-super-majority-votes-headed-for-extinction.pdf? [https://perma.cc/TN6C-V42L] ("56% of companies in the Russell 3000 require a supermajority vote to approve amendments to their charter or bylaws.").

Shareholders' efforts to encourage corporations to eliminate supermajority voting have increased dramatically[56] and have translated into corporate changes.[57] In recent years, shareholder proposals seeking to reduce or eliminate supermajority voting have received significant shareholder support, especially at S&P 500 companies.[58] Corporations have responded to shareholders increased desire for simple majority voting. In 2019, 43% of S&P 500 companies required supermajority voting for approval of bylaws and charters.[59] By 2021, 71% of S&P 500 companies eliminated supermajority voting practices.[60] In 2024, only 35% of S&P 500 companies required supermajority voting to amend the charter and bylaws.[61]

Shareholders believe that supermajority voting provisions limit their ability to make meaningful changes in the corporation and thus reduce their influence over significant matters.[62] Thus, changing from supermajority voting to simple majority voting is viewed as important to increasing shareholder power and influence.

E. Proxy Access

Proxy access refers to shareholders' ability to nominate a director candidate of their choice on the corporation's proxy statement even when that director is not supported by management.[63] Without proxy access, the only way in which shareholders can nominate a candidate of their choice is to wage a proxy contest, which is expensive, or seek to convince the board to nominate their candidate of choice, which is unlikely.[64] Because of the relative unattractiveness of these other alternatives, shareholders have focused on proxy access as a more accessible method for ensuring that shareholders have an effective nomination right. There are benefits and drawbacks to proxy access.[65] Indeed, corporations condition the availability of proxy access on specific requirements, including holding requirements (often three years and 3% of the securities) and caps on the number of director candidates that

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56. *See id.* at 5 (showing that, compared with any of the five years prior, there was at least three times as many shareholder proposals to reduce supermajority voting among S&P 500 companies in 2024).

57. *See id.* at 6–7 (showing that management proposals to reduce supermajority voting requirements correlate with shareholder proposals of the same).

58. *Id.* at 5–6.

59. *Id.* at 3.

60. *See* SULLIVAN & CROMWELL LLP, 2022 PROXY SEASON REVIEW: PART 1 RULE 14A-8 SHAREHOLDER PROPOSALS 19 (2022), https://www.sullcrom.com/SullivanCromwell/_Assets/PDFs/Memos/sc-publication-2022-Proxy-Season-Part-1-Rule-14a-8.pdf [https://perma.cc/A843-RN7W] (noting that over 70% of S&P 500 companies have eliminated supermajority voting provisions).

61. *See* LOPEZ & HOLLINGER, *supra* note 55, at 3.

62. *See id.* at 5 (describing, in the context of management proposals, that advocates for reducing or eliminating supermajority requirements "argue that granting shareholders more of a stake in decisions improves accountability . . . ."); Fairfax, *supra* note 14, at 1317 ("Shareholders contend that dismantling supermajority vote rules will give them a greater voice in critical corporate actions including amendments to the charter and bylaws, removal of directors, and approval of fundamental transactions such as mergers and acquisitions.").

63. FAIRFAX, *supra* note 9, at 129.

64. *Id.* at 128.

65. *See id.* at 129–31 (describing some of the benefits of proxy access, including increased shareholder rights and increased board accountability, and some of the drawbacks, including increased and excessive amounts of proxy contests and concerns about larger shareholders using proxy access for self-dealing).

can be nominated through proxy access (often less than 20%).[66] Nonetheless, shareholders have long believed that proxy access represents a pivotal corporate governance tool and that the lack of proxy access undermines the effectiveness of the shareholder vote.[67] This is because shareholders believe that without a means of impacting the nomination process, director elections become a rubber stamp whereby shareholders are simply voting on director candidates selected by management. This fact potentially reduces directors' responsiveness to the shareholder vote, thereby undermining the impact of shareholder voting as a means of holding directors and managers accountable.[68] Proxy access is not only designed to ensure that shareholders have a viable means to nominate director candidates of their choice, but also to provide shareholders with a critical tool for indirectly influencing corporate behavior.

Prior to 2010, regulatory barriers effectively prevented shareholders from pressuring corporations to adopt proxy access through the shareholder proposal landscape.[69] However, in 2010, the SEC altered the shareholder proposal rules to allow shareholders to submit proxy access proposals.[70]

Beginning in 2015, shareholders began to vigorously advocate for proxy access.[71] By 2017, proxy access became the most prominent shareholder proposal of the year and began receiving record levels of shareholder support.[72]

Shareholder efforts quickly impacted corporations, translating into widespread adoption of proxy access.[73] Prior to 2015, only 15 U.S. companies had some form of proxy access.[74] From 2014 to 2016, the number of S&P 500 companies that had voluntarily adopted proxy access shot up from less than 1% to 33%.[75] By 2019, 71% of S&P 500 companies had adopted proxy access.[76] At the start of 2025, 85% of S&P 500 companies now have proxy access.[77] As a result of shareholder efforts, proxy access has gone from

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66. *See* Holly J. Gregory, Rebecca Grapsas & Claire Holland, *The Latest on Proxy Access*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 1, 2019), https://corpgov.law.harvard.edu/2019/02/01/the-latest-on-proxy-access/ [https://perma.cc/GZ2N-YDPJ]. Most corporations have adopted a proxy access rule that allows shareholders holding 3% of the company's shares for at least three years to nominate candidates and cap the number of proxy access nominees at the greater of either 20% or 2 directors while limiting the nominating group to 20 shareholders. *Id.* This 3%/3 year/20%/20 group became viewed as the market standard. *Id.*

67. FAIRFAX, *supra* note 9, at 129–31.

68. Fairfax, *supra* note 29, at 1266–67.

69. *See* Fairfax, *supra* note 1, at 1332.

70. *Id.*; Gregory, Grapsas & Holland, *supra* note 66. The SEC also adopted a mandated proxy access rule, which was then struck down by the D.C. Circuit in 2011. *Id.*

71. *See id.* (describing the "significant increase in the number of shareholder proxy access proposals and shareholder support for such proposals" in 2015 and the continued adoption of such proposals in subsequent years).

72. Fairfax, *supra* note 14, at 1318.

73. Gregory, Grapsas & Holland, *supra* note 66.

74. *Id.*

75. *See* Broc Romanek, *Shareholder Proposals: ISS-Corporate Tracks 10 Years of Trends*, COOLEY: THE GOVERNANCE BEAT (Dec. 10, 2024), https://governancebeat.cooley.com/shareholder-proposals-iss-tracks-10-years-of-trends/ [https://perma.cc/6NQK-CZGX]; Holly J. Gregory, Rebecca Grapsas & Claire Holland, *Proxy Access: A Five-Year Review*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 4, 2020), https://corpgov.law.harvard.edu/2020/02/04/proxy-access-a-five-year-review/ [https://perma.cc/6S94-TCBW].

76. Gregory, Grapsas & Holland, *supra* note 66.

77. KOSMAS PAPADOPOULOS, JUN FRANK & PINAK PARIKH, U.S. SHAREHOLDER PROPOSALS: A DECADE IN MOTION 11 (2024),

an essentially non-existent corporate governance practice to a mainstream governance practice within a relatively short window.[78]

F. Shareholder Engagement

In the 1990s, shareholder engagement with the corporation outside of the annual meeting was virtually non-existent.[79] Indeed, historically the corporation's primary, if not sole, engagement with public company shareholders came by way of communications during the annual shareholders' meeting.[80] Moreover, although companies held annual meetings at a physical location, it was rare for corporations to meet face to face with shareholders because shareholders in public companies vote by proxy and thus did not attend the annual meeting.[81] Hence, any communication with shareholders was limited to an exchange of information within the annual proxy statement, along with any communications related to shareholders proposals that appeared in the proxy statement. Consequently, face to face engagement between shareholders and the corporation was virtually non-existent.

In very sharp contrast, shareholder engagement has now become a routine practice at the largest public companies. In 2022, more than 80% of S&P 500 companies disclosed engagement with their largest shareholders, up from 56% in 2015, and less than 20% a decade ago.[82] This engagement occurs outside of the annual meeting, and some corporations have standing engagement meetings with their largest shareholders. Moreover, director involvement in engagement has increased. "In 2015, less than 10% of S&P 500 companies indicated that a non-employee director was involved with the company's engagement efforts with shareholders.[83] By 2022, 60% of companies indicated that at least one member of the board is involved with engagement, which is an increase from 42% in 2017.[84]

Shareholder engagement is consequential. Thus, shareholder engagement results in changes to disclosure, governance policies, and corporate strategy.[85] Shareholder engagement also has resulted in changes to the board itself, including both the inclusion of certain

https://higherlogicdownload.s3.amazonaws.com/GOVERNANCEPROFESSIONALS/a8892c7c-6297-4149-b9fc-378577d0b150/UploadedImages/ISS-Corporate_US_Shareholder_Proposals_A_Decade_in_Motion.pdf [https://perma.cc/ZJ5K-VTQE].

78. Gregory, Grapsas & Holland, *supra* note 66.

79. *See* Fairfax, *supra* note 14, at 1320; Fairfax, *supra* note 35, at 830.

80. Fairfax, *supra* note 35, at 843; Fairfax, *supra* note 14, at 1323.

81. Fairfax, *supra* note 35, at 844.

82. *See* Matteo Gatti, Giovanni Strampelli & Matteo Tonello, *How Does Board-Shareholder Engagement Really Work? Evidence from a Survey of Corporate Officers and from Disclosure Data, in* BOARD-SHAREHOLDER DIALOGUE: POLICY DEBATE, LEGAL CONSTRAINTS AND BEST PRACTICES 6 (Luca Enriques & Giovanni Strampelli eds., 2024, Cambridge University Press); *see* also Fairfax, *supra* note 14, at 1321 (reporting 77% disclosed engagement in 2018, up from 56% in 2015).

83. *See* Fairfax, *supra* note 14, at 1321.

84. *See* PWC, PWC'S 2022 ANNUAL CORPORATE DIRECTORS SURVEY: CHARTING THE COURSE THROUGH A CHANGING GOVERNANCE LANDSCAPE 24 (2022), https://www.pwc.com/us/en/services/governance-insights-center/assets/pwc-2022-annual-corporate-directors-survey.pdf [https://perma.cc/9XDV-6P39].

85. *See id.* at 25 (describing 2022 survey data which showed that, because of shareholder input, 28% of directors reported changes in disclosures, 12% reported changes to governance, and 11% reported changes to company strategy).

director nominees on the board and the agreement to remove particular directors from the board.[86]

G. Election Contests: Uncontested and Contested

Historically, shareholders did not seriously challenge director candidates.[87] This fact is illuminated in two contexts. In uncontested elections, it was exceedingly rare for a director candidate to receive less than an overwhelming majority of the shareholder vote.[88] Hence, shareholders did not withhold their vote against directors. Second, not only were election contests very rare, but they were almost never successful.[89] For example, in 1957, there were only 12 proxy contests out of 3000 public companies.[90] Reflecting their greater activism, shareholders have radically changed their posture around director elections both in uncontested elections and in contested elections.

1. Uncontested Elections

Shareholders now play an active role in uncontested elections. First, shareholders are much more willing to withhold their vote against directors. Thus, there has been a growth in the number of directors who have failed to receive a majority of the shareholder vote. In 2017, among all Russell 3000 companies, only seven directors failed to receive a majority of the vote.[91] In 2022, 75 directors failed to receive a majority of the shareholder vote.[92] While the overall percentage of directors who fail to receive a majority of the shareholder vote has never been more than 4%, these numbers reflect a significant departure from historical shareholder behavior with respect to uncontested elections, signaling their willingness to utilize their increased power. Second, there has been a decrease in the overall average support for directors. Thus, on average, 95% of directors receive 95% of the shareholder vote.[93] However, in 2022, for the first time in history, this average shareholder support fell below 95%.[94] Third, even when the overall approval ratings remain high, there has been an increase in challenges focused on specific directors, such that some directors'

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86. *See id.* (describing survey data showing that 5% of directors reported changes in their board's succession plan based on shareholder input).

87. *See* Fairfax, *supra* note 14, at 1308 ("[E]ven when shareholders did vote, they rarely used their vote to challenge directors.").

88. *See id.* ("With respect to uncontested elections, shareholders rarely voted against incumbent directors."); *see also* Bernard S. Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520, 526–27 (1990).

89. *See* Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 688–89 (2007) (describing successes as "quite rare"); Black, *supra* note 88, at 526–27 (describing how proxy battles had been so unsuccessful that prevailing theories considered them "not economically viable").

90. Kobi Kastiel & Yaron Nili, *The Giant Shadow of Corporate Gadflies*, 94 S. CAL. L. REV. 569, 578 (2021).

91. *See* MATTEO TONELLO, SHAREHOLDER VOTING TRENDS (2018–2022) 25 (2022), https://www.conference-board.org/pdfdownload.cfm?masterProductID=40064 [https://perma.cc/ER86-HCD7].

92. *See id.*

93. *See id.* at 26.

94. *See id.* at 25 ("In the Russell 3000, for example, average support level went from 98.2 percent of votes cast in 2017 to 95.1 percent in 2020 and 94.1 percent in 2022 . . . . [T]hese numbers . . . were never observed in earlier years." (citation omitted)); SEMLER BROSSY, 2022 SAY ON PAY & PROXY RESULTS 6 (2023), https://semlerbrossy.com/wp-content/uploads/2022/04/SBCG-2022-SOP-Report-2022-05-12.pdf [https://perma.cc/S3JK-T3KW].

overall approval ratings fall well below the overall numbers. Thus, the portion of directors receiving less than 70% of the shareholder vote has been on the rise.[95] In 2017, the number of directors in the Russell 3000 who failed to receive 70% of the shareholder vote was 83.[96] By contrast, in 2022, the number of directors who failed to receive 70% of the shareholder vote was 442.[97] In the S&P 500, the number of directors who failed to receive 70% of the vote went from 34 in 2018 to 48 in 2022.[98] These patterns are a key testament to the manner in which shareholder influence has increased. Declining support for directors often reflects concerns with governance practices or other policies that are out of alignment with shareholder expectations.[99]

These changes are important because they reflect the way shareholders have sought to use their increased power to alter corporate behavior. Importantly, when shareholders fail to receive a majority of the shareholder vote or otherwise fail to garner a strong percentage of shareholder support, that failure is generally linked to shareholder concerns around particular corporate policies or practices. Indeed, it has become routine for large shareholders to disclose their expectations around specific corporate policies and practices and link their voting behavior to those expectations. In this regard, shareholders have strategically used their voting power in uncontested elections to influence the evolution of corporate policies and practices.

And corporations have responded. Indeed, one of the reasons why shareholder engagement has become a routine practice is because it allows corporations to better understand shareholder concerns and proactively address those concerns. Corporate response to shareholder concerns enables corporations to avoid situations in which their incumbent directors are not well supported in annual elections.

2. Election Contests

The shift in shareholder influence can also be seen in contested elections. First, there has been a rise in proxy contests.[100] Second, there has been a rise in shareholder support for non-incumbent directors, including support that results in shareholders unseating incumbent directors.[101]

Shareholder actions related to election contests are especially noteworthy because they have significant repercussions for the corporation. The rise in proxy fights has directly led to shareholders replacing members of the board, thereby changing board

95. However, 2024 saw an increase in director support. *See, e.g.*, BROADRIDGE, 2024 PROXY SEASON REVIEW 3 (2024), https://www.broadridge.com/_assets/pdf/proxypulse2024.pdf [https://perma.cc/SN5K-FY9T].

96. TONELLO, *supra* note 91, at 25.

97. *Id.* at 26 fig.14.

98. *Id.*

99. *See id.* at 4 (presenting "perceived ESG shortcomings" as a possible reason for declining shareholder support).

100. *See* Jim Rossman, Quinn Pitcher & Josh Jacobs, *2024 Review of Shareholder Activism*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 21, 2025), https://corpgov.law.harvard.edu/2025/01/21/2024-review-of-shareholder-activism/ [https://perma.cc/C39C-BB7Z] (describing the "post-pandemic (2022-2024) period" as "the busiest three-year period for activism on record" and noting that "243 campaigns [in 2024] mark the highest total since 2018's record of 249 campaigns").

101. *See id.* (showing an increase in board seats won by activists from 2021–2023 but a slight decline in 2024).

composition.[102] The rise in proxy fights have also had important indirect impacts. Thus, there has been a growth in proxy contests targeting officers, and as a result, the growth in proxy contests has led to record CEO turnover.[103] There also has been an increased in focus on M&A activity in the context of proxy contests, which has meant that many proxy contests involve key changes to corporate structure and long-term strategies. [104] Indeed, even when shareholders are not successful in their election contests, it is often the case that the corporation makes important changes as a result of the contests, including changes to board composition as well as corporate policies and practices.[105] Indeed, many election contests are settled prior, and thus never make it to a shareholder vote. Nonetheless, these negotiated settlements include changes to particular corporate policies and practices, including changes to board composition. In 2024, activist campaigns resulted in over 100 board seats, 86% by way of settlement.[106] One study found that more than 92% of board seats gained related to director election contests in 2024 were through settlement.[107]

Corporations now recognize that in order successfully thwart a proxy contest, they must account for their shareholders. Corporations recognize that they must reach out to their shareholders and maintain an open line of communication so that they are not taken unawares about important shareholder concerns. Corporations also appreciate that they must address any concerns raised by shareholders so that they can maintain shareholder support in the event of an election contest. Increased shareholder influence is exemplified by the high priority corporations now place on shareholder interactions linked to shareholders' heightened involvement in the director election arena.

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The combination of these changes in shareholder behavior reflects the way shareholders have used their power to increase their influence over the board and the corporation. As a result of shareholder efforts, the corporate governance landscape has changed dramatically. Moreover, as a result of shareholder efforts, shareholders have an important seat at the corporate table, meeting routinely with the corporation and its directors to provide insight and feedback around critical corporate policies and practices. These governance changes have combined with other indicia of increased shareholder participation such as increased proxy fights and shareholders' increased willingness to vote against directors and

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102. *See id.*

103. *See id.* (noting that "[o]ver the past two years, 20% of activist targets have seen their CEO resign within a year of campaign initiation, vs. average CEO turnover of 12%").

104. *See id.*

105. *See* Rossman, Pitcher & Jacobs, *supra* note 100.

106. *Shareholder Activism Increased by 9% in the First Half of 2024, According to Diligent*, DILIGENT (July 30, 2024), https://www.diligent.com/company/newsroom/shareholder-activism-increased-in-the-first-half-of-2024 [https://perma.cc/3X88-J8F3].

107. *See* FRESHFIELDS, TRENDS AND UPDATES FROM THE 2024 PROXY SEASON 69 (2024), https://www.freshfields.com/globalassets/noindex/documents/trends-and-updates-from-the-2024-proxy-season.pdf [https://perma.cc/8V92-QFPU].

other managerial recommendations.[108] In the last few decades, shareholder activism and influence has become the new norm in corporate governance.[109]

II. THE IDEAL SHAREHOLDER?

Alas, the increased role and influence of shareholders has highlighted the lack of consensus around the appropriate role and function of public company shareholders. That is, a lack of consensus around the characteristics of the ideal shareholder. The lack of consensus around the ideal shareholder not only influences our assessment of shareholder behavior but also impacts our assessment around the appropriate response to that behavior. An understanding of the appropriate role of shareholders is critical precisely because it drives our understanding of the most appropriate corporate and regulatory response to shareholder engagement and activism.

There are many ways in which the tensions associated with the ideal shareholder have emerged. This Article focuses on three.

A. Apathy vs. Activism

There is clearly tension between those who embrace a theory of rational apathy and those who support shareholder activism as an appropriate characteristic of an ideal shareholder. This tension impacts views on shareholder behavior and the appropriate response to that behavior.

Historically, shareholder apathy was essentially viewed as the only appropriate governance norm.[110] First, this view stemmed from collective action and free riding concerns which appear to make apathy the rational choice for public company shareholders.[111] The collective action concern stems from the notion that the dispersed nature of shareholders not only makes it difficult for shareholders to engage in collective action but also undermines any incentive to engage in collective action because the cost of doing so would outweigh any benefit that would be derived from the relatively small portion of votes held by each individual public company shareholder.[112] Free rider concerns stem from the strong possibility that other shareholders may take advantage of any time or resources devoted to becoming an informed shareholder, thereby decreasing the incentives to devote such time or resources.[113] These twin concerns make shareholder apathy both rational and

108. *See* Jamie Smith, *2024 Proxy Season Review: Five Takeaways*, EY (July 16, 2024), https://www.ey.com/en_us/board-matters/proxy-season-review [https://perma.cc/4Y59-SADX] (describing 2024 as "a busier year for activism"); Fairfax, *supra* note 14, at 1318 (describing the popularity of proxy access proposals and indicia of activism such as "a rise in shareholder willingness to reject directors").

109. Fairfax*, supra* note 14, at 1322–33 ("Shareholders as well as corporate officers and directors have rejected the propriety of apathy and embraced the appropriateness of activism, at least at some level and for some shareholders.").

110. *Id.* at 1310–12 (describing the historic consensus of rational apathy).

111. *Id.* at 1310–11.

112. *Id.* at 1310; *see also* Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395, 395 (1983) ("Shareholders are apathetic in the best of times because it is so unlikely that their votes would make a difference.").

113. *See* Black, *supra* note 88, at 527–28 (describing how the costs of being a proponent is disproportionately high compared to the "pro rata share of the gains from success, while other shareholders free ride" in such a way

appropriate. Second, a normative preference for rational apathy stems from the view that shareholders are ill-suited to intervene in corporate affairs considering their limited knowledge around corporate affairs and their potential to be motivated by personal or special interests.[114] The dispersed nature of public company shareholders means that they are not involved in the day-to-day affairs of the corporation and may have limited mechanisms for gaining the requisite knowledge or expertise to effectively weigh-in on important corporate matters.[115] Third, the preference for shareholder apathy is an outgrowth of the preference for directors and officers and the belief that directors and officers are better situated to make decisions on behalf of the corporation.[116] Directors and officers are bound by fiduciary duty constrains thereby ensuring that they act on behalf of the corporation and its shareholders. Directors and officers also have more knowledge and expertise to carry out these duties. In this regard, the normative preference for shareholder apathy is aligned with a theory of director primacy and the notion that shareholder interference with director power and authority is inappropriate and should be discouraged.[117] These arguments buttressed conventional wisdom about the propriety of shareholder apathy.

To be sure, the apathy norm was not without its historical critics.[118] Hence, some have insisted that apathy may have been the result of legal barriers rather than shareholder preference.[119] Others contend that apathy may be inconsistent with accountability and thus may be inappropriate because it does not provide for any meaningful corporate governance mechanism for ensuring that directors and officers do not run afoul of their responsibilities.[120] Indeed, given this accountability concern, it should come as no surprise that often calls to increase shareholder influence—and thus reject apathy—are most acute on the heels of corporate governance scandals. Such scandals appear to highlight the need for increased managerial accountability, while also illuminating potential flaws in the shareholder apathy norm. With respect to accountability, many corporate scholars agree on the essential importance of the market for corporate control.[121] The theory of the market for corporate control is that the threat of losing their board seats in a control contest serves an important discipling function, incentivizing directors to take their responsibilities more seriously less they be displaced.[122] This theory, of course, depends upon shareholder activism in the most crucial of settings—the contest to change control and strategic direction of the corporation. The embrace of the theory surrounding the market for corporate control, which

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as to discourage shareholder activism); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 310–11 (1999) (discussing the free rider problem further).

114. Fairfax, *supra* note 14, at 1311.

115. *Id.*

116. *Id.*

117. *See generally, e.g.*, Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Law*, 97 NW. U. L. REV. 547 (2003).

118. *See* Fairfax, *supra* note 14, at 1312–14 (discussing critiques of the rational apathy theory by scholars).

119. *See* Black, *supra* note 88, at 523–24 (addressing legal barriers to shareholder activity).

120. *See* Bebchuk, *supra* note 6, at 869–70 (discussing a proposed greater role of shareholders in corporate governance).

121. *See, e.g.*, Larry E. Ribstein, *Takeover Defenses and the Corporate Contract*, 78 GEO. L.J. 71, 150 (1989) (arguing that the limits of fiduciary duties are rational "in light of the importance of the market for control"); *see also* Gregg A. Jarrell, James A. Brickley & Jeffry M. Netter, *The Market for Corporate Control: The Empirical Evidence Since 1980*, 2 J. ECON. PERSPS. 49, 49–50 (1988); Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 112–14 (1965) (discussing the market for corporate control).

122. *See* Manne, *supra* note 121, at 112 (discussing the market for corporate control).

dates back at least to the 1950s, reveals a long-standing normative preference for some forms of shareholder activism, undermining conventional wisdom around the strong normative consensus for shareholder apathy.

Today, there are strong signs that the business community may have repudiated apathy in favor of activism. As indicated by their increased activism, it appears that shareholders have now embraced a normative preference for activism, particularly as an important check on potential abuses of managerial power and authority.[123] At least rhetorically, corporate officers and directors also have expressed a belief in the propriety of shareholder activism. Thus, public company disclosures are replete with statements indicating belief that allowing shareholders to have a greater voice and influence over corporate affairs is in the best interests of the corporation.[124] In voluntarily adopting the range of corporate governance practices pinpointed in Part I, corporate disclosures have emphasized the importance of providing shareholders with tools that reinforce shareholders ability to actively influence corporate decision-making.[125] Of course, it is entirely possible that such disclosures simply result from shareholder pressure and thus do not reflect actual director preferences. Alas, we have no way of credibly judging the veracity of these corporate disclosures. At the very least, however, these corporate disclosures appear to be intentionally designed to project a belief in the propriety of shareholder activism.

Importantly, the emerging belief in the propriety of shareholder activism may stem from the recognition that shareholder activism can take different forms. On the one hand, some conflate shareholder activism with a form of confrontational and aggressive activity that may be viewed as inappropriate and counterproductive.[126] One the other hand, the rise of shareholder power has revealed a level of "activism for non-activists" pursuant to which investors have increasingly recognized the importance of using their influence to seek to impact corporate affairs, albeit in a less confrontational and more constructive manner.[127] Hence, many institutional shareholders that are viewed as passive investors have made it clear that they believe in the propriety of taking an active role in ensuring that corporations are engaging in appropriate behaviors.[128]

Alas, the rise and embrace of activism by a large portion of shareholders has illuminated the normative tension around the propriety of activism as opposed to apathy. First, and for some, the tension is less about a relative preference but instead centers on the appropriate balance between activism and apathy. Along these lines, there appears to be growing concern that the pendulum has swung too far in favor of activism, triggering

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123. Fairfax, *supra* note 14, at 1323–24.

124. *Id.* at 1329–33.

125. *See id.* at 1333–34 ("[F]ederal proxy statements are filled with language reflecting an embrace of the shareholder activism norm.").

126. *See* Jeffrey R. Katz & Bryan Lowrance, *Activism for Non-Activists*, ROPES & GRAY (Sept. 7, 2023), https://www.ropesgray.com/en/insights/podcasts/2023/09/activism-for-non-activists [https://perma.cc/55HW-26J6] (discussing shareholder activism as historically "aggressive" and "controversial").

127. *Id.*

128. *See* Fairfax, *supra* note 28, at 215 ("It has now become common practice for the CEOs of BlackRock, Vanguard, and State Street Global Advisors . . . , three of the world's largest and most influential shareholders and asset managers, to publish open letters to CEOs outlining their ESG expectations for corporations and their boards." (citation omitted)).

concerns that activism may serve to sterilize, or compromise needed managerial discretion.[129] Of course, this concern raises questions around how much activism is too much. Under what circumstances should activism be constrained? And who decides which circumstances are most appropriate? A second concern centers around the type of shareholder involved in activism. In particular, increased shareholder activism has highlighted the reality that shareholders are different, and that they not only have different goals but also will use different tactics to accomplish those goals.[130] It is clear, for example, that many have a strong and relatively negative reaction to hedge fund activism based on their tactics and perceived motivations.[131] Such reaction reveals that normative preferences around the propriety of activism may be impacted by normative preferences associated with other characteristics of an ideal shareholder, including, as discussed below, the nature of their goals. The conditional and contextual support for activism highlights some of the normative challenges that have emerged with the advent of enhanced shareholder power.

Nonetheless, understanding normative preferences related to the propriety of activism is important. Today, both corporations and regulators are responding to shareholders' increased activism.[132] Some have argued that one of the primary reasons why corporations have remained private longer, or otherwise resisted going public, is to avoid shareholder activism.[133] Then too, there has been a growth in measures that mute public company shareholder power, such as the rise in dual-class voting structures that allocate excessive voting control to founders and other key insiders, thereby shifting voting control out of the hands of public company shareholders.[134] Understanding whether and under what circumstances apathy or activism is the preferred trait of an ideal shareholder is important for understanding the propriety of these kind of measures.

B. Retail vs. Institutions

The public company shareholder landscape has changed dramatically throughout the last century. In 1950, individual investors—referred to as "retail" investors—held 90% of the U.S. equity market.[135] Today, retail investors hold less than 30% of the public company market.[136] Retail investor ownership is even lower at the top corporations, with some

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129. *See* Fairfax, *supra* note 1, at 1329–31 (discussing movements towards more shareholder power and less managerial discretion, especially board declassification and the elimination of supermajority voting requirements).

130. *See* Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255, 1261 (2008) (discussing the increasingly "heterogenous" shareholder and the potential for conflicts of interest).

131. *See id.* at 1279 (describing the "confrontational nature of activist [hedge] funds").

132. *See* Lisa M. Fairfax, *ESG's Death Defying Future: Predicting the Future of ESG Through the Lens of Current ESG Disclosure*, 26 U. PENN. J. BUS. L. 1019, 1023–28 (2024) (discussing federal, state, and even shareholders' responses to ESG initiatives).

133. *See* Fairfax, *supra* note 14, at 1338–40 (discussing developments in capital markets "such as the reemergence of dual-class stock and the increase in companies remaining private, thereby avoiding the public market and its attendant shareholder activism.").

134. *Id.*; *see also* David J. Berger, Jill Fisch & Steven Davidoff Solomon, *Extending Dual-Class Stock: A Proposal*, 25 THEORETICAL INQUIRIES L. 23, 27 (2024) ("The rise of dual-class stock has been controversial. Institutional shareholders have complained that dual class structures unduly disenfranchise public stockholders.").

135. FAIRFAX, *supra* note 9, at 45–46.

136. *See* Alicia J. Davis, *Market Efficiency and the Problem of Retail Flight*, 20 STAN. J. L. BUS. & FIN. 36, 38 (2014) (reporting that retail investors own 23% of stock in the U.S. market as of 2014).

estimates suggesting they only own roughly 11–16% of the S&P 500.[137] By contrast, today's public market is dominated by institutional shareholders. Institutional shareholders currently hold "roughly 70% of the U.S. stock market."[138] Institutional shareholders also own more than 80% of the S&P 500.[139] Moreover, there are certain institutions that dominate the institutional shareholder landscape. Thus, BlackRock, State Street, and Vanguard—also known as the "Big Three"—are the three largest shareholders at 88% of S&P 500 companies.[140]

There is also a significant difference in the level of participation between institutional shareholders and retail shareholders. On average, only 30% of retail shareholders vote, which is contrasted with the fact that over 80% of institutional shareholders cast votes annually.[141] In addition, studies reveal that the increased engagement activity not only occurs almost exclusively with institutional shareholders but also occurs almost exclusively with a small subset of institutions.[142] In other words, corporations routinely engage with their large institutional shareholders, while essentially ignoring retail shareholders in the context of routine shareholder engagement.

This means that institutional shareholders not only dominate the public company market but also have outsized influence over the corporation given their greater tendency to vote. Of course, whether this influence is appropriate may depend, at least in part, upon whether institutional shareholder power is more appropriate than retail shareholder power.

Some have theorized that institutional shareholders represent the most ideal public company shareholder for several reasons. First, institutions have the potential to overcome the collective action and free riding problems that plagued corporations.[143] Hence, institutional shareholders were more appropriately situated to monitor the corporation and its activities. Second, institutions may have better resources and expertise, increasing their ability to engage in appropriate oversight.[144] Third, it is much more likely that institutions will have larger holdings and thus have more 'skin in the game,' increasing the likelihood that they will be incentivized to act and that their actions will align with the corporation's

137. *See* Geoff Serednesky & Karoline Von Tschurtschenthaler, *Close to the Madding Crowd*, BRUNSWICK REV. (July 22, 2022), https://review.brunswickgroup.com/article/close-to-the-madding-crowd [https://perma.cc/2EM7-TY77] (showing that retail investors owned 13.9% of S&P 500 companies' stock in Q1 of 2022 and 11.7% in Q1 of 2020); *see also* Alon Brav, Matthew Cain & Jonathan Zytnick, *Retail Shareholder Participation in the Proxy Process: Monitoring, Engagement and Voting*, 144 J. FIN. ECON. 492, 493 (2022) (showing data indicating that retail investors have roughly 16% ownership interest in the largest companies).

138. Alessandro Romano, *Horizontal Shareholding and Network Theory*, 38 YALE J. ON REG., 363, 371 (2021).

139. Jacob Greenspon, *How Big a Problem Is It That Few Shareholders Own Stock in So Many Competing Companies?*, HARV. BUS. REV. (Feb. 22, 2019), https://hbr.org/2019/02/how-big-a-problem-is-it-that-a-few-shareholders-own-stock-in-so-many-competing-companies (on file with the *Journal of Corporation law*).

140. *Id.*

141. EMMANUEL TAMRAT, GOVERNANCE GUIDE: PROXY VOTING 6 fig.1 (2024), https://www.cii.org/Files/publications/governance_guides/Goverance-Guide-Proxy-Voting-July-2024.pdf (on file with the *Journal of Corporation Law*); BROADRIDGE, *supra* note 95, at 6; BROADRIDGE, 2023 PROXY SEASON REVIEW 7 (2023), https://www.broadridge.com/_assets/pdf/broadridge-proxypulse-2023-proxy-season-review.pdf [https://perma.cc/6RGE-N36C].

142. *See* Gatti, Strampelli & Tonello, *supra* note 82 at 10.

143. Black, *supra* note 88, at 523–24.

144. *See id.* at 608 (concluding that institutional shareholders can overcome collection action and other issues and may fill the "needed" role of monitoring corporate managers).

best interests.[145] Fourth, many institutions tend to be long-term holders of corporate stock, increasing the likelihood that their interests will align with the corporation's long-term goals and strategies.[146] Finally, many institutions are bound by fiduciary duty constraints that serve to better ensure that they will responsibly exercise their duties.

Importantly, preferences for institutional shareholders are often accompanied by a relative disdain for retail investors. As one scholar put it, retail investors tend to be viewed as "economic undesirables," stemming from concerns that retail investors make economically irrational or imprudent investment decisions.[147] In this regard, retail investors are commonly viewed as uninformed, with a tendency to be swayed by emotional or social impulses unconnected with rational economic matters.[148] This portrayal of the retail investors is only underscored by the rise of so called "finfluencers"—people who use their popularity and social media platform to influence financial decision-making—and retail investors outsized reliance on such finfluencers.[149] Others have referred to retail investors as "gadflies," reflecting a view of the retail investors as annoying or a nuisance, often because of their relatively small shareholder ownings and their focus on what was viewed as esoteric issues.[150]

However, the rise in shareholder activism raised questions about norms related to institutional shareholders and retail shareholders. On the one hand, that rise has raised concerns about institutional shareholder power in several ways. First, the rise in shareholder activism has highlighted the significant diversity within the institutional shareholder base that challenges the norm in favor of institutional shareholders.[151] Institutional shareholders have differing objectives and differing time horizons as well as differing resources and incentives. Indeed, some institutional shareholders are diversified while others are not, raising questions around the normative propriety of activism in the hands of shareholders focused on the market as a whole, rather than any specific corporation.[152] The difference among institutions has caused many to revisit their assumptions around the propriety of

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145. *See id.* at 570 (showing that institutional investors have significant investments).

146. *See id.* at 572–73 (noting the trend towards long-term investing among institutions).

147. *See* Davis, *supra* note 136, at 44–45 (explaining the concern some theorists have with irrational retail investor behavior).

148. *See* Jill E. Fisch, *GameStop and the Reemergence of the Retail Investor*, 102 B.U. L. REV. 1799, 1851–60 (2022) (discussing costs associated with retail investors such as "excessive trading" and "following the herd"); Sue S. Guan, *Finfluencers and the Reasonable Investor*, 172 U. PA. L. REV. ONLINE 43, 45–46 (2024) (discussing "gray area" of finfluencer statements and activities allegedly intended to manipulate stock that do not contain any explicit lies, such David Portnoy investing according to randomly selected Scrabble tiles on a livestream); *but see* Davis, *supra* note 136, at 48–51 (discussing empirical research that contradicts the narrative that retail traders are uninformed "noise traders").

149. *See* Guan, *supra* note 148, at 43–44 (discussing lawsuit against a finfluencer for his social media posts and defining a "finfluencer" as "a person . . . that has outsize influence on investor decisions through social media").

150. *See* Kastiel & Nili, *supra* note 90, at 589 ("[G]adflies" are "small insects that bite and annoy livestock. . . . These days, the term 'corporate gadflies' is used to describe small, 'pesky' individual shareholders who are engaged in the submission of massive numbers of shareholder proposals.").

151. *See* Anabtawi & Stout, *supra* note 130, at 1258 (stating that shareholder "interests are becoming more heterogeneous").

152. *See* John C. Coffee, Jr., *The Coming Shift in Shareholder Activism: From "Firm-Specific" to "Systematic Risk" Proxy Campaigns (and How to Enable Them)*, 16 BROOK. J. CORP. FIN. & COM. L. 45, 46–47 (2021) (discussing this new form of "systematic activism" as overtaking the previous "firm-specific activism").

institutional shareholder actions.[153] Importantly, even if the rise in shareholder activism has made it clear that institutional shareholders should be treated different, there are no real guiding principles around how best to make distinctions.

Second, the rise in shareholder activism has elevated concerns around excessive concentrations of institutional ownership. In particular, increased shareholder power raised awareness and concern around the Big Three and their impact.[154] The concern stems from their combined ownership in, and related influence over, the country's largest corporations.[155] To be sure, the concentration of power related to large institutional shareholders highlights the unforeseen risks associated with institutional shareholders. It also appears to undermine the strong norm in favor of institutions.

A third concern with institutional shareholder power is a potential misalignment between institutional shareholders and retail shareholders. Thus, studies have emerged indicating that retail shareholder preferences diverge significantly from institutional shareholder preferences.[156] Such studies reveal that retail shareholders are much more likely to vote in alignment with management than institutional shareholders around a range of different issues. To be sure, studies involving retail shareholder voting are limited by the low percentages of retail shareholders who vote. Moreover, any potential misalignment between retail and institutional shareholders is concerning only if we have a normative preference for retail shareholder power.

Concerns around institutional shareholders have triggered a desire to emphasize retail shareholders. For example, pass-through voting has emerged as a mechanism for undermining institutional shareholder power while simultaneously pinpointing retail shareholder preferences.[157] Like other reforms in this area, the propriety of these actions may depend upon normative assessment regarding the relative benefits of institutional versus retail shareholder power.

C. Financial vs. Social

Conventional wisdom appears to reflect near universal consensus around the proposition that the ideal shareholder is one focused solely on economic matters. By emphasizing that directors must remain focused on economic concerns,[158] important corporate law cases

153. *See id.* at 49 (discussing how institutional investors were previously "notoriously passive").

154. *See id.* at 47 (discussing how the Big Three have a large impact due to the "extraordinary concentration in ownership"); Lucian Bebchuk & Scott Hirst, *Big Three Power, and Why It Matters*, 102 B.U. L. REV. 1547, 1550 (2022) (discussing the "heated ongoing debate" that surrounds the Big Three's power).

155. *See* Bebchuk & Hirst, *supra* note 154, at 1554 (discussing various incentive problems that stem from the concentration).

156. *See* Jill E. Fisch, *Standing Voting Instructions: Empowering the Excluded Retail Investor*, 102 MINN. L. REV. 11, 15 (2017) (stating that, compared with institutional investors, "retail investors are more likely to support management and to vote in favor of executive compensation plans" (citation omitted)).

157. *See* Danielle Gurrieri & Chuck Callan, *Pass-Through Voting: Giving Individual Investors a Voice in Corporate Governance*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 17, 2024), https://corpgov.law.harvard.edu/2024/04/17/pass-through-voting-giving-individual-investors-a-voice-in-corporate-governance/ [https://perma.cc/NR8Q-HKPP] ("Pass-through voting programs provide a mechanism to capture more voices in corporate governance and to further democratize corporate governance.").

158. *See, e.g.*, Dodge v. Ford Motor Co., 204 Mich. 459, 506–07 (Mich. 1919) (discussing how the directors should remain focused on economic concerns); Revlon, Inc. v. MacAndrews & Forbes Holding, Inc., 506 A.2d 173, 182 (Del. 1986) ("However, such concern for non-stockholder interests is inappropriate when an auction

appear to embrace the view that shareholders should be concerned solely with financial or economic return.

Under this narrative, shareholders that focus on matters beyond profit and economic returns are not ideal. Indeed, much of the disdain associated with retail shareholders reflects concern around their focus on issues beyond economics.[159] Moreover, one of the most significant arguments against increased shareholder power often centers on the potential that such power will be "abused" by those with social agendas.[160] Such arguments stem from a normative view that shareholders who focus on non-financial matters are not ideal.

Alas, increased shareholder activism has challenged this conventional conception in several ways. First, increased shareholder activism has brought with it concerns about shareholders with a laser focus on short-term financial results.[161] Increased shareholder activism has brought with it concerns about "short-termism," often in relation to hedge funds that have been accused of using their power to extract short-term gains from the company at the expense of its long-term financial health. Shareholder activism has unmasked the fact that corporations and other shareholders do not believe that prioritizing profit over everything else is ideal in all circumstances. Second, increased shareholder activism has led to an expressed desire to focus on long-term financial health, and both corporations and shareholders have made clear that any focus on the long-term necessitates a focus on other stakeholders and on issues that appear to be non-financial.[162] Shareholders focused on the long-term have insisted that attention must be paid to all of the parties that interact with the corporation as well as to societal factors that could shape the long-term sustainability of the company.[163] As a result, therefore, shareholders with long-term interests have insisted that they most focus on concerns heretofore believed to be unconnected to financial matters. In light of this insistence, many institutional shareholders have strenuously pushed for greater corporate attention around issues not traditionally viewed as economic.[164] Shareholders strenuously contend that their focus on these issues is inextricably linked to financial concerns.[165]

Third, increased shareholder activism has revealed that there are many investors who invest for reasons other than economic ones, as well as investors willing to forego monetary

among active bidders is in progress, and the object no longer is to protect or maintain the corporate enterprise but to sell it to the highest bidder."); eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 42 (Del. Ch. 2010) ("The fair price element relates to the economics of the transaction.").

159. *See* Kastiel & Nili, *supra* note 90, at 589 (describing, but also providing evidence against, the notion that retail activist "gadflies" "tend to pursue their 'own narrow interests' . . . or even larger social issues").

160. *See* Fairfax, *supra* note 114 and accompanying text (discussing concerns with "special interests" shareholders).

161. *See* Fairfax, *supra* note 14, at 1342–43 (describing concerns that short-termism of activist shareholders would eventually lead to "its eventual demise").

162. *See* Lisa M. Fairfax, *Stakeholderism, Corporate Purpose, and Credible Commitment*, 108 VA. L. REV. 1163, 1171–73 (2022) (arguing that "institutional investors have embraced the view that corporations should focus on issues beyond shareholders and profit").

163. *See id.* at 1171–72 (discussing comments from the CEO of BlackRock, Larry Fink).

164. *See* Fairfax, *supra* note 28, at 214–215 (describing how institutional shareholders played an "instrumental role" in the rise of ESG, which has "come to dominate corporate governance").

165. *Id.* at 216.

gains to promote some important interests.[166] Thus, shareholder activism has illuminated the actions of faith investors and other shareholders that vote based on expressed social, religious, or other ideals. Increased shareholder activism has also revealed that even retail shareholders care about social issues, and, in fact, many retail investors see a connection between their investment activity and promoting broader societal goals.[167] Aggregating the revealed preferences of retail and institutional shareholders, at least one study finds that there is "no clear consensus among investors that corporations should, or should not, promote social causes at the expense of their financial gains."[168] These shareholders challenge the view that the ideal shareholder should be judged based on the subject matters around which he is interested.

Of course, competing conceptions around the appropriate subject matter on which the ideal shareholders should focus drives the debate around how best to respond to certain shareholder actions. There is now intense regulatory pressure aimed at discrediting and disrupting shareholder efforts to focus on matters deemed to be non-financial.[169] Those who have pushed against shareholder focus on environmental, social, and governance issues appear to be primarily concerned with the disconnect between that focus and economic concerns.[170] On the one hand, the push back may reflect an unwillingness to believe that social and environmental issues are connected to financial matters.[171] On the other hand, the push back also stems from the normative belief that shareholders should not be concerned with matters beyond those deemed to be solely financial in nature. In this regard, one way to assess the propriety of actions aimed at undermining shareholders' focus on environmental and social matters is against the backdrop of our conception of the ideal shareholder.

III. Conclusion

We have witnessed a dramatic rise in shareholder activism and influence. The rise in shareholder activism can be seen in the way shareholders have vigorously advocated for changes in corporate governance and other corporate policies and practices. The rise in influence can be seen in the way corporations have responded to the activism. As a result of increased shareholder activism and influence, not only has the corporate governance landscaped radically changed, but there have also been significant changes to corporate policies and practices aligned with shareholder preferences. Shareholders' enhanced

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166. *See* Scott Hirst, Kobi Kastiel & Tamar Kricheli-Katz, *How Much Do Investors Care About Social Responsibility*, 2023 WIS. L. REV. 977, 989 ("[Investors surveyed] often indicated that they would be willing to forgo some financial returns to promote social interests . . . .").

167. *See, e.g.*, Fisch, *supra* note 148, at 1850 (contending that "there is increasing evidence that retail investors care about stakeholder considerations"); Michal Barzuza, Quinn Curtis & David H. Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243, 1294 (2020) ("[A] survey found that millennials were significantly more likely to invest in companies or funds that target specific social or environmental outcomes.").

168. Hirst, Kastiel & Kricheli-Katz, *supra* note 166, at 982.

169. *See* Fairfax, *supra* note 132, at 1023–28 (detailing "anti-ESG" legislation and rules at the state and federal levels).

170. *See* Lisa M. Fairfax, *The O.G.: Unmasking Why Governance Is the* Most *Important Component of ESG*, 14 HARV. BUS. L. REV. 153, 157–61, 183–84 (2024) (arguing that the governance element of ESG is essential and distinguishes it from stakeholderism and social responsibility).

171. *Id.* at 161–62.

influence has sparked considerable debate and controversy. It has also sparked differing responses both from corporations and from regulators.

This Article argues that assessing the propriety of enhanced shareholder power and these responses may depend upon competing conceptions of the ideal shareholder. Indeed, normative and often implicit assumptions surrounding the ideal shareholder shape expectations around appropriate shareholder behavior and whether and to what extent we must seek to curb that behavior.

This Article represents an effort to highlight and make explicit the underlying normative disagreements around shareholder power that are shaping disagreements around corporate and regulatory behavior. Such an effort better ensures that we can transparently grapple with the normative concerns that may be driving debates around enhanced shareholder power.