Shareholder Access to the Proxy Revisited

Jayne W. Barnard
SHAREHOLDER ACCESS TO THE PROXY REVISITED

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We have an interesting situation in which large institutions are rejecting the old Wall Street rule because their holdings are [now] large enough that it makes economic sense for them to spend time and money protecting the governance power associated with their shareholdings. . . . In the future, you'll . . . see pension funds becoming even more aggressive in perhaps nominating their own candidates for boards of directors and asking more pointed, specific questions about the operation of the corporation.1

One of the goals underlying the enactment of the Securities Exchange Act of 19342 was to reduce management's domination of corporate boards of directors. In enacting Section 14 of the Exchange Act,3 Congress hoped to ensure shareholders an informed and constructive role in the selection and oversight of corporate directors.4 The Securities and Exchange Commission's (SEC or Commission) application and enforcement of Section 14 has only partially achieved that result. Investors now receive comprehensive in-

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3. Id. § 78n.
4. See infra note 51 and accompanying text; see also SEC v. Transamerica, Inc., 163 F.2d 511, 518 (3d Cir. 1947), cert. denied, 332 U.S. 847 (1948) ("It was the intent of Congress to require fair opportunity for the operation of corporate suffrage. The control of great corporations by a very few persons was the abuse at which Congress struck in enacting Section 14(a).")
formation on board candidates and their backgrounds. They are not, however, significantly involved in matters of corporate governance.

There are sound economic and behavioral reasons why many shareholders do not take an active role in the selection and oversight of top management. But, contrary to the assertions of those who disparage "corporate democracy" as a fanciful and largely empty notion, some shareholders do actively seek to participate in governance matters and have relevant expertise to bring to the process. Ironically, accumulated actions of the SEC have excluded these shareholders from playing an effective governance role. Not only has the SEC limited the means by which shareholders may initiate dialogue on governance matters, it also has failed to support shareholders seeking to participate in the selection of their own fiduciaries.

Shareholders in large publicly held companies, while nominally empowered under state law to elect the directors who will represent their interests, are systematically deprived of two significant opportunities: they are neither permitted to play a meaningful role in the selection of directoral candidates, nor to choose among competitive candidates for scarce board positions.

A typical proxy ballot will list, for example, ten "official" candidates for ten board seats. Generally, either the incumbent board or a nominating committee comprised primarily of outside directors selects the nominees. Those nominees who are suggested by shareholders—even substantial and well-informed shareholders—but who are not favored by incumbent management do not appear on the ballot, nor does management provide any opportunity to choose among its "approved" candidates.

On rare occasions, shareholders are provided a choice among directoral candidates. During the infrequent proxy fight, an insurgent faction may organize its own slate of candidates and present the names of these candidates for shareholder consideration in documents separate from those pre-

5. See infra note 85 and accompanying text.
6. See infra notes 259-62 and accompanying text.
7. See infra notes 29, 234 and accompanying text.
8. See infra notes 13-15, 213-29 and accompanying text.
11. According to a study published by the Investor Responsibility Research Center (IRRC), during the 1989 proxy season there were only 20 proxy contests, of which 12 were pursued to conclusion, in a population of over 15,000 public companies. Lieberman & Cobb, Proxy Contests Fewer, Quieter in 1989, 6 IRRC CORP. GOVERNANCE BULL. 106 (July/Aug. 1989). During the 1988 season there were only 30 proxy contests. Id.
pared by management. The routine application of "shareholder democracy," however, is anything but democratic.12

Federal law supports this tradition of the self-perpetuating board. SEC rule 14a-8, the "shareholder proposal rule,"13 provides that shareholders holding at least $1000 or 1% of a corporation's stock, whichever is less,14 may advance and circulate to other shareholders at the corporation's expense certain categories of generally innocuous proposals. The rule specifically excludes, however, proposals relating to an "election to office."15 Thus, this rule denies a non-management shareholder, regardless of the extent of the shareholder's ownership or the merits of the shareholder's nominee, a practical mechanism for nominating even a single directoral candidate.

The shareholder may lobby the board of directors or its nominating committee, but little incentive exists for those men and women to upset their existing organizations.16 Alternatively, the shareholder may choose to undertake an independent proxy solicitation, which with legal, printing, and professional solicitation fees may often cost millions of dollars,17 with only a scant chance of reimbursement.18 Only someone mounting an out-and-out contest for control is likely to assume this expense. Coupled with the specific complicity of the SEC, the process of directoral selection remains, as it was before 1934, the exclusive preserve of corporate management.

Directoral selection appears to be of particular importance to institutional investors. Some institutions routinely attempt to influence the board composition of corporations in crisis,19 and others cast "no" votes against manage-

12. Cf. E. EPSTEIN, WHO OWNS THE CORPORATION 13 (1986) ("[Corporate elections] are procedurally much more akin to the elections held by the Communist party of North Korea than those held in Western democracies.").
14. Id. § 240.14a-8(a)(1).
15. Id. § 240.14a-8(c)(8).
16. One respondent to a recent survey of corporate directors remarked that "as an incumbent, independent director, why should I be pleased to be ousted?" For a description of this survey, see infra note 77 and accompanying text.
17. Challenger Harold Simmons spent more than $6 million for advertising, printing, postage and proxy solicitation services in his 1990 proxy fight for control of Lockheed Corporation. Lockheed spent more than $8 million responding to Simmons' challenge. Pender, Big Lockheed Investors Fare Well, San Francisco Chron., Mar. 30, 1990, at C1, col. 2.
18. See generally Machtinger, Proxy Fight Expenditures of Insurgent Shareholders, 19 CASE W. RES. 212 (1968) (discussing the difficulty insurgent shareholders face in getting reimbursed for costs of proxy fights).
19. See, e.g., O'Hara, Texaco Accepts Director Nominated by Shareholders, 6 IRRC CORP. GOVERNANCE BULL. 6 (Jan./Feb. 1989) (institutional investors instrumental in placing John Brademas on the board of Texaco after it entered Chapter 11 and shareholder Carl Icahn had undertaken a contest for control); Pension Funds Urge Changes by Oil Firms, Wash. Post, July
ment's proposed directoral slates in protest against undesirable management policies.\textsuperscript{20} In addition, some institutions seek to persuade board members to take specific actions, such as the dismissal of a chief executive officer, with the implicit understanding that board replacement is a possible remedy for noncompliance with their wishes.\textsuperscript{21} They have even attempted to intercede in board deliberations concerning executive succession.\textsuperscript{22} In a recent proxy fight at Lockheed Corporation, some institutional shareholders effectively "sold" their vote to management in exchange for the right to name up to three members of the Lockheed board.\textsuperscript{23} Many institutions are now seeking access to the proxy\textsuperscript{24} to regularize their directoral selection role.

These investors believe it is possible that empowering institutional shareholders to nominate and effectively solicit votes for their own directoral candidates could produce significant benefits. First, access to the proxy might reduce the antagonism between incumbent management and significant investors which results from sporadic and often contentious communication. Second, access might enrich the process of decisionmaking by ensuring that the board of directors has diverse points of view and is regularly apprised of the concerns of knowledgeable key investors. Finally, access to the proxy might reduce the likelihood—greatly feared by management—that key investors will tender into the first premium offer presented to them; having placed a trusted nominee on the board, these investors might be more likely

\textsuperscript{5, 1989, at B2, col. 1 (citing efforts of members of the Council of Institutional Investors to place an environmental expert on Exxon's board of directors); see also Cogan, Shareholder Campaign on Environment Spreading, 6 IRRC CORP. GOVERNANCE BULL. 111 (July/Aug. 1989) (two major institutional investors urge six petrochemical companies to name an environmentalist to their boards).

\textsuperscript{20.} See, e.g., Lieberman, Election of Directors, Shareholder Proposals Relating to the Board and Selection of Auditors: 1989 Background Report J, IRRC CORP. GOVERNANCE SERV. J-2-5 (March 1989) (stating that half of institutional investors surveyed in 1988 reported voting against incumbent nominees for various reasons, including: approving greenmail or other anti-takeover devices, where "inside" representation on the board was excessive, for poor attendance or conflict of interest, or where all nominees were white males); see also O'Hara, New York, Pennsylvania Funds Scrutinize Corporate Boards, 6 IRRC CORP. GOVERNANCE BULL. 143 (Sept./Oct. 1989) (the New York State Common Retirement Fund withheld votes from 60 board slates—representing 10% of its portfolio—during 1989 because they were not made up of a majority of outside directors).

\textsuperscript{21.} E.g., Rose & Hilder, Mounting Junk Woes Imperil First Executive and Chief Fred Carr, Wall St. J., Jan. 29, 1990, at 1, col. 6.


\textsuperscript{23.} Simmons Loses, But Lockheed Shareholders Win, San Francisco Chron., Apr. 11, 1990, at C1, col. 1.

\textsuperscript{24.} "Access to the proxy," as used throughout this Article, refers to access for purposes of directoral nomination. This term has been used elsewhere to include shareholder communications unrelated to directoral nomination. See infra note 184 and accompanying text.
to accept management claims of a profitable long-term strategy than to cash out for a short-term gain.25

Both contractarian scholars and mainstream corporate managers oppose the idea of institutional access to the proxy. Contractarian scholars regard the idea as inconsistent with the economic nature of the firm, and corporate managers regard most shareholders, particularly institutional shareholders, as so transfixed with "short-termism" that they are inappropriate participants in long-term governance decisions.26 While these managers traditionally tolerate creditor selection of directors,27 shareholder selection apparently is less palatable, presumably because it is not accompanied by an infusion of new cash.

Thinking about access to the proxy for purposes of directoral nomination provides an opportunity to reconsider the value and the contours of corporate democracy in the 1990's. Shareholders are told that they may seldom play a direct role in governance decisions because state law entrusts these decisions to members of the board,28 while the SEC rules exclude them from any meaningful role in the selection of that board. There is little wonder

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25. Institutions—particularly public pension funds—are often exhorted to consider long-term values, rather than seeking short-term profits, in order to minimize the impact of corporate debt on national competitiveness, alleviate the personnel dislocations which follow many takeovers, and help preserve the integrity of the capital markets. See, e.g., Governor's Task Force on Pension Fund Inv., New York State Indus. Cooperation Council, Our Money's Worth 27 (1989) (urging the New York State pension funds to act as "patient investors").

26. Corporate lawyer Joseph H. Flom has stated that institutional investors have a "15-minute attention span." Their participation in corporate governance would be a "disaster." Opinions Differ Widely on Institutions' Role in Corporate Governance, 4 Corp. Couns. Weekly (BNA) No. 49, at 8 (Dec. 13, 1989). Citicorp's CEO John Reed views institutions with similar disdain:

> The interest of an institutional investor is too short-term. You know, all you would need on my board is three big funds that own 25 percent of my stock, and hell, they'd have me selling off the [credit] card business, which is worth a lot of money. Hell, those guys would sell it off, and they wouldn't care if it was there the next morning, because they would have sold their [stock] position.


that shareholder voting is so easily discounted as a cumbersome fiction, except in the context of contested takeover battles.29

This Article explores the rule excluding directoral nomination from the cost-sharing advantages of rule 14a-8, and the exclusionary tradition which the rule supports. It then reconsiders the alternative of permitting at least some shareholders to make direct nominations of directoral candidates, with the particulars of nominating and supporting information to be included in management's proxy at the corporation's expense.30 Part I of this Article briefly examines the historical directoral selection practices which led to the enactment of the proxy provisions of the Exchange Act. Part II reviews two mechanisms which developed independently of the Exchange Act—cumulative voting and the "independent nominating committee," both of which had the potential to facilitate shareholder involvement in directoral selection, but failed to achieve that result. In Part III, this Article analyzes various access to the proxy proposals advanced by the SEC, and by commentators from many disciplines, as supplements to cumulative voting and the committee nominating process. If adopted, these proposals would afford shareholders the right to nominate directoral candidates and share the costs of nomination with other shareholders. Part IV reviews the role played by the SEC and its staff, which has alternately promoted and discouraged shareholder access to the proxy.

Part V of this Article considers the policy arguments in opposition to and in favor of access to the proxy and explores some of the logistical problems inherent in any workable access proposal. Finally, Part VI advocates an access to the proxy regulation that would recognize a role in directoral selection for substantial shareholders with some demonstrated long-term commitment to a public company, provide a structure for these shareholders to share with other shareholders the cost of advancing the candidacies of the directoral nominees of their choice, and distinguish the essentially benign nature of directoral nomination by these shareholders from the more predatory efforts of those shareholders whose goal is to transfer managerial control in its entirety.

The benefits of this proposal are likely to be threefold. First, it will stimulate those involved in existing directoral selection practices, generally board nominating committees, to be more inclusive and less parochial in their

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30. This reconsideration is timely, in light of indications that the SEC has undertaken a review of the entire proxy solicitation process. As Proxy Use Widens, New Rules are Urged, N.Y. Times, June 15, 1990, at D1, col. 3 (various groups' petitions for a comprehensive review of the proxy voting system are being given "serious consideration" by the Commission).
searches for candidates for board positions. Second, it will lead to an elected board characterized by increasingly diverse backgrounds and loyalties, with a consequent impact on directorial decisionmaking likely to be of value to shareholders. Third, it will lead to enhanced share value.

This Article concludes that shareholder voting is both practical and important beyond the boundaries of the takeover market. Shareholder voting can constructively influence the basic governance structure of public companies and their share values, even in the absence of a takeover threat, and even in the presence of the traditional problems of collective action and uncompensated voter choice. This view of shareholder democracy goes beyond imprecise, though tantalizing, analogy to the public electoral process. It regards as important, both economically and psychologically, the process of consensual decisionmaking, the value of managerial diversity, and the restorative powers of competition.

I. The Origins of the Shareholder Participation Statute

In the years leading up to the Great Crash of 1929, managers of large public companies seldom concerned themselves with shareholder relations: Unfettered by external restraints such as active shareholder participation or supervisory regulatory agencies, directors managed with virtually no duty to account for their actions. Corporate corruption ran rampant as a result. Insider trading scams and fraudulent corporate reporting, designed to entice purchases of bogus stock, became commonplace. Finally, in the early twenties, companies began to experiment with what one critic terms "the crowning infamy of all," the issuance of non-voting [common] shares. The corporation could easily deny the shareholder the right to vote and thereby solidify its authority by issuing non-voting shares. Several dramatically inequitable transactions occurred as a result.

Though the New York Stock Exchange ultimately responded to this particular form of abuse by enacting its one common share/one vote rule in 1926, other abuses continued and new ones soon emerged. In his impas-

31. See infra note 77 and accompanying text.
32. See infra notes 251-55 and accompanying text.
33. See infra note 329 and accompanying text.
34. See infra notes 381-83 and accompanying text. In public democratic theory, the existence of competing factions is a given. See J. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 269 (1943) ("[Democracy is] that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote.").
sioned condemnation of disenfranchising corporate practices common in the mid-1920’s. Harvard’s William Z. Ripley noted widespread use of pyramidal holding companies, statutory abrogation of shareholder preemptive rights, exclusive distribution of non-voting preferred shares to the public with voting control retained by management, substitution of non-voting preferred shares for voting preferred shares, and numerous examples of obfuscatory disclosure.

During this period, shareholders enjoyed little, if any, meaningful role in the selection of corporate directors. The “overwhelming majority” of stockholders were “‘little people,’ that is, members of the investing public who own small blocks of stock, who know little or nothing about the corporate activities; whose advice is not sought in running the corporation and probably would be worth little if it were given.” These shareholders found attendance at annual meetings to voice complaints or to vote their interests impractical; accordingly, the tradition of tendering proxies to management selected representatives evolved.

In theory, proxy voting was a courtesy that corporate managers extended to shareholders to facilitate shareholder participation in corporate governance. In practice, managers selected proxy holders, made their services available to shareholders, and directed the proxy holders to cast their votes—ostensibly on the shareholders’ behalf—as directed by the managers who appointed them. As Adolph Berle and Gardiner Means described it, “since the proxy committee [was] appointed by the existing management, the latter [could] virtually dictate their own successors.” William O. Douglas complained that, because of this practice, most corporate boards of this era, even those purporting to some level of independence, were “controlled or dominated by the managers.” Often, Douglas said, corporate managers enjoyed a “feudal tenure.”

38. Id. at 317.
39. Id. at 39.
40. Id. at 124.
41. Id. at 125.
42. Id. at 162-83. The use of voting trusts as a disenfranchising device was also common. Loomis & Rubman, Corporate Governance in Historical Perspective, 8 HOFSTRA L. REV. 141, 153 (1979).
43. Berle, Stockholders: Their Rights and Duties, HANDBOOK OF BUSINESS ADMINISTRATION 374, 374-75 (1931), quoted in Loomis & Rubman, supra note 42, at 143.
46. W. DOUGLAS, DEMOCRACY AND FINANCE 16 (1940).
Many proposals—ranging from increased disclosure to mandatory outside directors—were advanced during this period to enhance "shareholder protection" generally and to increase the shareholders' oversight role specifically.\footnote{47} In a particularly prescient recommendation, Adolph Berle encouraged institutional shareholders—at that time made up primarily of insurance companies and banks holding depositors' stock in trust—to assemble in a "permanent protective committee" to represent shareholder interests in the face of managerial abuses.\footnote{48}

Institutional holders, however, were reluctant to undertake this role. Typically, when dissatisfied with managerial performance, institutional investors followed the "Wall Street Rule," selling their stock rather than engaging in costly and generally futile efforts at reform. Cultural norms in the financial community reinforced the notion that attacking management was ungentlemanly.\footnote{49} Consequently, few proxy fights or contests for corporate control occurred during the period preceding the Exchange Act.\footnote{50} As a result, institutional engagement in the governance of publicly held corporations was uncommon, and mechanisms of participation, other than physical representation at shareholders' meetings, were nonexistent.

When Congress passed the Exchange Act to authorize a federally regulated uniform proxy solicitation process, it considered these practices and broadly empowered the SEC to develop rules encouraging shareholder participation in governance matters.\footnote{51} When Congress chose not to leave proxy

\footnotesize{\textsuperscript{47} See generally Loomis & Rubman, supra note 42, at 171-79 (describing the "corporate reform" proposals of the 1930's).}

\footnotesize{\textsuperscript{48} A. BERLE, STUDIES IN THE LAW OF CORPORATION FINANCE 39 (1928).}

\footnotesize{\textsuperscript{49} See generally J.R. EHRlich & B.J. REHFELD, THE NEW CROWD—THE CHANGING OF THE JEWISH GUARD ON WALL STREET (1989) (describing the shifting emphasis in investment banking from carefully negotiated transactions and nurturing long-term business relationships to hostile "megadeals" and high-risk trading in the period 1945-1989).}

\footnotesize{\textsuperscript{50} Cf. C. HENDERSON & A. LASHER, 20 MILLION CARELESS CAPITALISTS 75 (1967) ("There were only a handful of cases in corporations of any kind where small stockholders got together to battle entrenched management and directors, and only one or two in which they won.").}

\footnotesize{\textsuperscript{51} See S. REP. NO. 792, 73d Cong., 2d Sess. 12, 77 (1934).

Fair corporate suffrage is an important right that should attach to every equity security bought on a public exchange. Managements of properties owned by the investing public should not be permitted to perpetuate themselves by the misuse of corporate proxies. . . . [T]he proposed bill gives the . . . Commission power to control the conditions under which proxies may be solicited with a view to preventing the recurrence of abuses which have frustrated the free exercise of the voting rights of stockholders.


A comprehensive review of the legislative history of Section 14 of the Exchange Act appears in Ryan, Rule 14a-8, Institutional Shareholder Proposals, and Corporate Democracy, 23 GA. L. REV. 97 (1988). Professor Ryan's conclusions concerning Congress' intent in enacting Section}
solicitation issues to state oversight, it declined the opportunity to focus exclusively on exchange regulation and disclosure requirements in the new issue market. That Congress specifically addressed shareholder voting as an object of regulatory attention suggests a commitment both to suffrage and to participatory directoral selection as important elements of public policy. This view would have been consistent with the idea that highly placed business leaders had transformed public companies into private governments.  

II. Two Devices Which Have Failed to Stimulate Shareholder Participation—Cumulative Voting and the Independent Nominating Committee

Many commentators have proposed schemes designed to magnify the voice of shareholders in corporate governance discourse and to improve management accountability to shareholders. Modest proposals include mandatory cumulative voting and the use of a board nominating committee comprised solely of independent, though incumbent, directors.

A. Cumulative Voting

Cumulative voting, a venerable and simple means of facilitating shareholder involvement in directoral selection, developed out of the impassioned advocacy of Joseph Medill, publisher and editor of the Chicago Tribune from 1855 to 1899. Medill, an influential delegate to the Illinois Constitutional Convention in 1870, was enamored with the political philosophy of John Stuart Mill who embraced the notion of minority, or "proportionate," representation in elected legislatures. While successfully arguing for proportionate representation in the election of representatives to the Illinois General Assembly through cumulative voting, Medill also encouraged cumulative voting in private corporations. Illinois adopted a mandatory cumulative voting provision that became the model for many states.

Proponents of cumulative voting argued that minority representation on the board would lead to thoughtful discussions of controversial governance matters and permit early detection and deterrence of any unacceptable self-dealing by those in control of the board. Opponents argued that minority representation...
representation interfered with effective, collegial decisionmaking and squandered the valuable time and energy of directors on peripheral issues.

While cumulative voting was crafted for close corporations, it also applied to more widely held enterprises—suggesting that a significant minority of shareholders in such companies could enjoy proportional representation on their boards. Consequently, because cumulative voting provided the only opportunity for non-management shareholders to influence the election of directors who presumably would represent their interests, it became the most popular subject of shareholder proposals after the 1942 adoption of the predecessor to rule 14a-8.57

Early shareholder advocates regarded cumulative voting as the most important plank in their reform platform.59 These advocates understood, however, that cumulative voting, without some funding mechanism, amounted to an illusory grant of shareholder power. Even shareholder advocate Lewis Gilbert, cumulative voting's strongest partisan, conceded that "[i]t is usually next to impossible for [a shareholder of a publicly held company] to nominate and elect his own independent representatives to the board of directors. It will take cumulative voting and a better mechanism for allowing shareholders to make independent nominations to remedy this."60

The popularity of cumulative voting has declined in recent years. Hundreds of companies, in connection with the enactment of anti-takeover devices, have eliminated cumulative voting and replaced it with straight voting and staggered boards.61 Even California, the last holdout of mandatory cumulative voting, recently made cumulative voting optional for its domiciliary corporations.62 Even where cumulative voting remains, under the current system, where the nominators bear all costs of solicitation, its use is cost prohibitive unless a substantial transfer of control is sought.63

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57. Cumulative voting does not ensure that minority shareholders will be independently represented on the board. However, it does afford shareholders the opportunity to build alliances and work together to elect their own representatives. E.g., Maddock v. Voreclone Corp., 17 Del. Ch. 39, 147 A. 255 (1929).
60. Id. at 11 (emphasis added).
63. Occasionally, a shareholder willing to assume the costs of an independent solicitation may take advantage of cumulative voting. For example, at the June 1989 annual meeting of Pacific Enterprises, the parent company of Pacific Gas & Electric Co., shareholder Sam Weinstein, who is also the regional director of the Utility Workers Union Region 5, received ap-
absence of a mechanism for including shareholder-initiated nominations on the corporate proxy statement and the official proxy ballot, cumulative voting provides neither a significant restraint on managerial domination over board composition nor a genuine vehicle for the expression of shareholder discontent.

B. The Independent Nominating Committee

In 1982, the American Law Institute (ALI) published Tentative Draft No. 1 of the Principles of Corporate Governance and Structure: Restatement and Recommendations. The Draft proposed that the boards of all large publicly held corporations consist primarily of independent directors. It further advocated the selection of all nominees for board positions by a nominating committee composed exclusively of directors "who are not officers or employees of the corporation, including at least a majority of directors who have no significant relationships with the corporation's senior executives." The purpose of this proposal was to "provide an independent locus of responsibility for the selection and nomination of directors and the composition of the board." The Draft noted that "there is often a natural tendency for a director who is brought onto the board directly by the chief executive officer to feel special obligations to the chief executive." The "independent locus of responsibility," however, was not premised on any special duty to shareholders or on the likelihood that shareholders could better communicate with a nominating committee than they could with CEO's. The ALI drafters apparently valued "independence" for its own sake, and not as a mechanism to increase shareholder influence on directoral selection.

64. PRINCIPLES OF CORPORATE GOVERNANCE AND STRUCTURE: RESTATEMENT AND RECOMMENDATIONS (Tent. Draft No. 1, 1982) [hereinafter Tent. Draft No. 1]. The project has since been renamed PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS.

65. A "large publicly-held corporation" is defined as a corporation that, as of the record date for its most recent shareholders' meeting, had both 2,000 or more record holders of its equity securities and $100 million in total assets. PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 1.16 (Tent. Draft No. 2, 1984).

66. Tent. Draft No. 1, supra note 64, § 3.06(a)(1) (citations omitted).

67. Id. comment c, at 101-02.

68. Id.
This proposal proved uncontroversial because many public companies had already adopted some form of nominating committee, and both the American Bar Association and the Business Roundtable advocated the use of non-management controlled nominating committees in public companies. Moreover, the ALI Reporter noted that this proposal would in no way exclude in-house managers from the nominating process. The CEO, in particular, would remain involved:

[T]he chief executive officer can be expected to be highly active in recommending and discussing candidates with the committee and is recruiting candidates for the board. Indeed, the chief executive officer's active participation in recruitment is often an important and perhaps essential element in convincing high-quality individuals to become directors.

Thus, although the Business Roundtable decried the Tentative Draft and its generally inflexible prescriptive nature, it tacitly supported the nominating committee idea.

In practice, the nominating committee has failed as a means of both distancing the directoral selection process from the CEO and facilitating shareholder involvement in corporate governance. So-called “independent directors” are seldom that at all. According to one observer with substantial access to corporate boards, “nominating committees are a sham.” With few exceptions, the CEO still dominates the nominating committee, which accedes to the CEO's wishes. Nominating committees rarely seri-

69. Id. comment a, at 98.
72. Tent. Draft No. 1, supra note 64, § 3.06(a)(1) comment c, at 102-03. Shareholders could also be involved. The ABA proposal took notice of the possibility of shareholder input to nominating committee deliberations. “This procedure will, it is believed, be a more effective and workable method of affording access to the nominating process to individual shareholders than a direct 'right' of nominating in the corporation's proxy materials.” Corporate Director's Guidebook, supra note 70, at 35.
74. See generally Brudney, The Independent Director—Heavenly City or Potemkin Village?, 95 Harv. L. Rev. 597, 611-13 (1982) (noting the disinclination on the part of “independent directors” to keep management at arm's length due to several psychological and social considerations); Cox & Munsinger, Bias in the Boardroom: Psychological Foundations and Legal Implications of Corporate Cohesion, 48 Law & Contemp. Probs. 43 (1985).
75. Proxy Hearings, supra note 61, at 12-16 (testimony of Dale M. Hanson, CEO, California Public Employees Retirement System).
76. Id. at 59.
ously solicit shareholder input or advance shareholder nominated candidates.\textsuperscript{77}

In a recent review of the proxy statements distributed to shareholders of 125 large public companies during the 1988 proxy season,\textsuperscript{78} thirty-seven (or 30\%) had no standing nominating committee.\textsuperscript{79} Of those companies with nominating committees, five were chaired by the company’s CEO.\textsuperscript{80} Many other companies listed the CEO as a member, although not the chair, of their nominating committees. Six companies referred their nominating decisions to an Executive Committee.\textsuperscript{81}

Whether or not these companies had nominating committees, only sixty-nine (or 55\%) of the companies gave any indication in their proxy statements that they would accept directoral nominations from shareholders.\textsuperscript{82}

\textsuperscript{77} In 1989, the author surveyed 85 men and women who served on the nominating committees of S&P 500 corporations during fiscal year 1988; thirteen of these committee members responded. The survey requested their estimate of the percent of directoral candidates whose names appeared on the official corporate ballot during their tenure who were recommended initially by the CEO, by other members of the board of directors, or by any shareholder other than the CEO or members of the board, including institutional investors. The responses uniformly identified the CEO as the primary source of directoral nominees—the minimum reported in any company was 50\% of all nominees. The respondents more typically stated that 90-100\% of all nominees were initially recommended by the CEO. Shareholders accounted for 5\% or less of all nominees. One respondent dismissed the input of shareholders as being no more than “one person recommending [himself]—with little or no qualifications.” None of the respondents routinely sought the input of key institutional investors, even though these investors are usually well known to committee members.

\textsuperscript{78} The documents underlying this study [hereinafter Proxy Statement Review] are on file with the author.

\textsuperscript{79} Id.; e.g., ALBERTO-CULVER CO., PROXY 3 (Dec. 10, 1987); AMERICAN HOME PRODUCTS CORP., PROXY 6 (Mar. 15, 1988); APPLE COMPUTER, INC., PROXY 3 (Dec. 7, 1987); E.I. DU PONT DE NEMOURS AND CO., PROXY 3 (Mar. 29, 1988); MARRIOTT CORP., PROXY 6 (Mar. 29, 1988); THE NEW YORK TIMES Co., PROXY 7-14 (Mar. 8, 1988); THE WALT DISNEY Co., PROXY 8 (Jan. 8, 1988).


\textsuperscript{81} See Proxy Statement Review, supra note 78; e.g., BAKER HUGHES, INC., PROXY 9 (Dec. 16, 1987); BAUSCH & LOMB, INC., PROXY 2 (Mar. 18, 1988); DAYTON HUDSON CORP., PROXY 6 (Apr. 22, 1988); MATTEL, Inc., PROXY 4 (Mar. 27, 1988).

\textsuperscript{82} See Proxy Statement Review, supra note 78. The SEC requires this information for public companies with standing nominating committees. 17 C.F.R. § 240.14a-101 Item 7(e)(2) (1990). One reason offered to explain why so many companies fail to create nominating committees is that they wish to avoid having to disclose shareholder recommendation procedures. Olson, “Proxy Statement Disclosures as to the Operations of the Board of Directors: Board Committees, Board Meetings, Resignations and Removals of and Disagreements with Directors,” in Proxy Statements and Annual Meetings Under the New SEC Rules. LAW & BUS. 11, 18 (1979), quoted in SENATE COMM. ON BANKING, HOUSING, AND URBAN AFFAIRS, 96TH CONG., 2D SESS., SEC STAFF REPORT ON CORPORATE ACCOUNTABILITY 117 (Comm. Print 1980) [hereinafter SEC STAFF REPORT ON CORPORATE ACCOUNTABILITY].
Of these companies, many conceded that they had not established procedures for reviewing shareholder nominations, while others described elaborate and deterrent procedures, either embodied in corporate bylaws or management tradition. These procedures included a common requirement that the shareholder proponent provide the company with biographical and all other information necessary to comply with the disclosure requirements of the federal proxy regulations before the nominee would be considered. Fifteen companies even required the shareholder proponent to supply an executed consent form from the nominee before the company would consider the nominee. Surely these procedures were not designed to maximize shareholder input to the directoral selection process or to generate top-quality nominees.

An individual typically seeks a corporate directorship only after careful consideration and, under existing nominating practices, some assurance of acceptance by the committee in control. A board member of a large industrial company generally receives a retainer in the range of $10,000 to $50,000, plus deferred compensation, and meeting fees ranging upwards to $2500 per meeting. A directorship position requires a commitment of twenty-four to thirty-six full days per year and a willingness to enter into confidential and sometimes quite intimate relationships with other directors, especially during a business crisis. In addition, a directorship carries the potential for both legal liability and public exposure. Absent an acceptable alternative means of nomination, such as the one suggested in this Article, it is difficult to imagine an able directoral candidate giving a signed consent to

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85. See Proxy Statement Review, supra note 78. Required information includes share ownership, business experience and positions held during the last five years, other directorships, involvement in legal proceedings, personal or family business or other similar relationships with the corporation, any of its subsidiaries, or with the corporation's officers and directors, and personal or familial indebtedness to the corporation. 17 C.F.R. § 240.14a-101 Item 7 (1990).
a shareholder to make, in essence, a "cold call" on the nominating committee with a petition promoting her nomination in hand.\textsuperscript{89}

In recent years, many institutional investors, rather than consenting to the proprietary practices of board nominating committees, have attempted to participate in the directoral nominating process. In 1988, the California Public Employees Retirement System (CalPERS), the nation's largest public pension fund, submitted a shareholder proposal under rule 14a-8 to Texaco, Inc., to provide for the establishment of a Stockholders' Advisory Committee made up of nine of the company's largest shareholders or their representatives. CalPERS envisioned this Committee providing input into the directoral nomination process. Although CalPERS later withdrew this proposal when Texaco's management agreed to nominate a directoral candidate from a list submitted by CalPERS,\textsuperscript{90} the fund submitted similar proposals for the creation of shareholders' advisory committees for inclusion in the 1990 proxies of TRW, Avon, and Occidental Petroleum.\textsuperscript{91}

CalPERS generally prefers a less formal approach, and has undertaken a "multi-year program in which it will seek to achieve the level of cooperation and support necessary to increase shareholder input into the nomination process."\textsuperscript{92} Specifically,

CalPERS has identified at least one company from its portfolio that has: (1) consistently performed poorly over the last several years, in comparison to its market; and (2) exhibited insensitivity toward its shareholders through the adoption, without shareholder approval, of numerous anti-takeover provisions. During the next 12 months, executives from CalPERS will attempt to meet with the management of this company to discuss the fund's concern with the company's performance. Although CalPERS' goal is to attain management support through communication and mutual respect, if the managers fail to consider the fund's interests, the second 12-

\textsuperscript{89} It is fair to ask why capable candidates would be willing to subject themselves to a competitive selection process when officially nominated, rather than just unofficially recommended, by a shareholder. The answer to this question will ultimately depend on a number of considerations. These include: the stature and credibility of the nominators, a developing consensus that candidates nominated under an access rule are equal to those candidates nominated by management, and the existence of ambitious and able candidates who are not part of the traditional pool from which corporate directors have been drawn.

\textsuperscript{90} See Clark, \textit{Why Dale Hanson Won't Go Away}, \textit{INST'L INVESTOR} Apr. 1990, at 84.

\textsuperscript{91} CalPERS withdrew the proposals at TRW and Occidental when those companies agreed to meet with CalPERS to discuss improved shareholder participation. The proposal appeared on Avon's ballot at its May 3, 1990, annual shareholders' meeting and was narrowly defeated. Letter from Kayla Gillan, CalPERS Assistant General Counsel, to the author (Apr. 5, 1990) (on file at the Catholic University Law Review).

\textsuperscript{92} Koppes & Gillan, \textit{The Role of Pension Fund Investors in the Election of Corporate Directors}, 2 \textit{INSIGHTS} No. 12, at 11, 13 (Dec. 1988).
month period will involve establishing a broad level of support from fellow shareholders. Shareholder proposals, soliciting votes against incumbent management, and, as a last resort, a proxy contest may be considered.\footnote{Id.}

At one point, CalPERS supported shareholder access to the proxy.\footnote{Proxy Hearings, supra note 61, at 70 (written answers of Dale M. Hanson to subcommittee questions); Letter from Richard H. Koppes, CalPERS General Counsel, to the author (Aug. 22, 1989) (on file at the Catholic University Law Review).} Alternatively, it suggested a formal role on the nominating committee for major institutional investors.\footnote{Sullivan, Two of Texaco's Institutional Holders To Seek a Role in Nominating Directors, Wall St. J., Aug. 17, 1988, at 5, col. 1.} The recent CalPERS petition to the SEC, urging overhaul of existing proxy voting regulations,\footnote{See Letter from Richard H. Koppes, CalPERS General Counsel, to Linda C. Quinn, Director, Division of Corporation Finance, Securities and Exchange Commission (Nov. 3, 1989) (on file at the Catholic University Law Review).} abandons both positions, perhaps because of CalPERS' success in demanding a governance role even in the absence of an access rule.\footnote{See Clark, supra note 90, at 29. CalPERS' CEO regularly meets with Texaco's management, has met with the CEO of General Motors, and is working with TRW's management on corporate governance concerns. \textit{Id.} at 84. "We'd just as soon avoid the proxy vote," CalPERS' chief executive has said. "We don't like to be adversarial." \textit{Id.}} Other institutional investors, however, are increasingly expressing an interest in playing a meaningful and ongoing role in directoral selection.\footnote{A motivating factor, according to one fund manager, is the refusal of existing boards to take the institutional investors seriously. "'They respond surprisingly poorly to our concerns' . . . 'We have a limitation of 10% ownership of a company. Management won't listen to us when we own 3%.'" Hollie, \textit{Activism Not Role for Firms.} PENSIONS \& INVESTMENT AGE, Oct. 2, 1989, at 24 (quoting John Brennan, president of The Vanguard Group, which manages $45 billion in assets).} In a 1989 survey of institutional investors, the Investor Responsibility Research Center found that 43% of the respondents favored access to the ballot proposals, 26% disfavored them, and 31% indicated that they would consider such proposals on a case by case basis.\footnote{L. \textsc{Krasnow}, \textit{Voting by Institutional Investors on Corporate Governance Issues in the 1989 Proxy Season} 22 (1989). Of those responding to the survey, 64% of the public funds, 38% of the investment managers, and 18% of the universities, foundations, and church groups favored equal access to the proxy. \textit{Id.} at 23.} These responses reflect a substantial increase in support for access proposals when compared to a similar survey conducted the previous year.\footnote{Id.} The Council of Institutional Investors, representing $300 billion in assets, has also expressed interest in the access issue.\footnote{O'Hara, \textit{Council Roundtable to Discuss Director Nominations}, 6 IRRC \textsc{Corp. Governance Bull.} 58-59 (Mar./Apr. 1989).}
III. DIRECT ACCESS TO THE PROXY PROPOSALS

Neither cumulative voting nor the widespread use of independent nominating committees succeeded in providing an effective role for shareholders in the selection of directoral candidates or in the formulation of board policies. Many proposals have attempted to create such a role and to resolve the access to the ballot problem in diverse ways. Some proposals involved radically overhauling the corporate governance structure, with shareholder access to the proxy merely an element of the larger scheme. Most proposals advocated a straightforward attempt to achieve greater shareholder representation within the existing governance structure.

A. The Early Access Proposals

In 1942, the SEC proposed an amendment to the then-existing proxy rules that required inclusion of shareholder-designated directoral nominees in the annual corporate proxy statement.\(^{102}\) Poorly crafted and widely criticized by corporate managements consumed with problems of wartime production, the proposal was soon abandoned.\(^{103}\)

The first resurrection of the access issue after the war appeared in an article by Mortimer M. Caplin, later appointed Commissioner of Internal Reve-

102. The proposed Rule provided, \textit{inter alia}:

No authority shall be sought to vote a proxy upon the election of any person to any office for which a bona fide nominee is not named in the proxy statement. The name of each nominee of the persons making the solicitation shall be set forth in the form of proxy in such a manner that the person solicited can strike out the name of a nominee for whom he does not wish to vote. In the event a security holder has notified the management pursuant to Item 5(M) of Schedule 14A of an intention to nominate and support a nominee or nominees the name of each such nominee shall also be set forth in the form of proxy together with a form of ballot in which the person solicited can indicate that he wishes his securities voted for such nominee and a statement to the effect that the proxy may be voted for the election of the nominees proposed by the management unless the person solicited indicates he wishes his securities voted for another nominee or other nominees and specifies the nominee or nominees proposed by the management for whom he does not wish his securities voted. In the event that security holders notify the management of an intention to nominate and support more than twice as many nominees as there are directors of the issuer, the management may select, on any equitable basis, name and furnish the required information concerning only twice as many nominees as there are directors.


103. SEC Exchange Act Release No. 3347 (Dec. 18, 1942) (LEXIS, Fedsec library, Noact file). "The principal reasons given for this decision were that unqualified persons might be nominated, that too many candidates might be nominated, and that the shareholders would become confused and improperly mark their proxies." Hetherington, \textit{When the Sleeper Wakes: Reflections on Corporate Governance and Shareholder Rights}, 8 HOFstra L. Rev. 183, 214 (1979).
The article complained that the post-Exchange Act proxy voting machinery, like that which preceded the Act, was completely dominated by corporate managers. Noting that shareholders lacked any practical low-cost means for making directoral nominations, Caplin advocated that shareholders of public companies should have a "real channel for the free nominations of all directors." Caplin then proposed a formula for determining the maximum number of directoral candidates, including those nominated by management, which could be submitted to shareholders on the company's proxy. Alternatively, he suggested a rule that would permit individual companies to determine the manner in which directoral nominations could be submitted. Finally, Caplin argued that one position on the board of directors should be set aside exclusively for direct shareholder nomination. Criticism of Caplin's proposal focused primarily on his jurisdictional claims that section 14 essentially empowered the SEC unilaterally to adopt his proposal as a matter of federal law. According to Caplin, the Commission at the time was "not that aggressive," and regarded his ideas as "a little far out." The access to the proxy issue then lapsed for nearly twenty years.

B. The Access-on-Demand Theory

In the 1970's, Professor Melvin Eisenberg brought greater depth to the access discussion in his article Access to the Corporate Proxy Machinery.
and his book *The Structure of the Corporation*.\(^\text{111}\) Both works challenged the notion that shareholders lack a means of access to the corporate proxy statement. Noting the shareholders' exclusive right to elect corporate directors, Eisenberg argued that shareholders enjoy a corollary right to nominate candidates for board positions which, because "the proxy system is today's shareholders' meeting,"\(^\text{112}\) includes access to the proxy materials for the purpose of making the nomination known to other shareholders.\(^\text{113}\) Eisenberg urged shareholders to demand the right to include their board candidates in the proxy statement, even in the absence of the sort of SEC or legislative action proposed by Caplin. Eisenberg noted that the marginal cost of adding shareholder nominated directoral candidates to the corporate proxy statement would be minimal, and that the cost could be further reduced by adopting exclusionary by-laws which would impose a standing requirement in the form of a minimum ownership percentage.\(^\text{114}\)

Eisenberg emphasized a principle of neutrality in matters of ballot access. Examining the case law that permitted management to utilize the corporate proxy machinery to solicit shareholder support on "issues of policy," but not "issues of personnel," Eisenberg found the distinction "incapable of meaningful application."\(^\text{115}\) As a consequence, Eisenberg discovered, management routinely used the corporate proxy solicitation to seek support for its directoral candidates in contests for control, without incurring personal financial obligations. Eisenberg argued that fairness and fiduciary principles required granting nonmanagement shareholders the same privilege.

Little came of Eisenberg's proposal in the short run. Although he encountered no immediate feedback,\(^\text{116}\) his ideas surfaced repeatedly as part of the growing literature on corporate accountability during the 1970's.

C. The "Social Responsibility" Proposals of the 1970's

A number of commentators explored ballot access issues throughout the 1970's. Following a seminar on the Corporation in Modern Society, student Robert Shwartz published a widely cited Note\(^\text{117}\) urging the creation of a mechanism that would allow shareholders to select directoral nominees who would be designated as such on the corporate proxy statement.\(^\text{118}\) He ex-

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113. *Id.*
114. *Id.* at 1510.
116. Telephone interview with Melvin Eisenberg, Professor of Law, University of California, Berkeley (May 24, 1990).
118. *Id.* at 1146-48.
explored and rejected three possible means of achieving this result: shareholder proposals on a corporation-by-corporation basis, revision of state law on a state-by-state basis, and revision of the listing requirements of the New York Stock Exchange.119

Concluding that the SEC's proxy regulation powers would be the most effective vehicle for generating shareholder access, Shwartz considered the specifics of such a plan, focusing first on the "standing" question.120 Asking how many shares a shareholder should own or control to be entitled access to the proxy, he argued that "[t]he standard should be sufficiently high to ensure that shareholder sponsors will represent a 'significant interest' of the corporate electorate"121 and to guard against or minimize the harassment of management.122 Nevertheless, he advocated a "minimal" ownership requirement for entitling shareholders to nominate directoral candidates, preferring to rely on a numerical limitation, or "cap," on the total number of candidates listed in any proxy statement123 as the primary medium for controlling runaway proxies filled with nominations.124

Shwartz also examined some logistical questions related to the access issue, including the determination of an appropriate formula for selecting nominees in the event "too many" candidates' names were submitted, and the options for dealing with unsigned ballots. In a key lapse of real-world understanding, however, he failed to appreciate that putting together a nominating group might constitute "solicitation" under rule 14a-1.125

119. Id. at 1148-54.
120. Id. at 1157-59.
121. Id. at 1157. The notion of requiring some significant showing of electoral support before having one's name appear on the ballot is common in public suffrage. See, e.g., Anderson v. Celebrezze, 460 U.S. 780, 788-89 n.9 (1983) (states have an "undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot."); American Party of Tex. v. White, 415 U.S. 767, 782 (1974) (state may require minor political parties to demonstrate a "significant, measurable quantum of community support" through petition signatures, as a condition of ballot access); Jenness v. Fortson, 403 U.S. 431, 438 (1971) (state may require independent candidates to submit signatures equal to 5% of those eligible to vote for the office sought at the last election).
122. Note, supra note 102, at 1157.
123. Id. at 1159.
124. States can effectively cap the number of candidates whose names may appear on a general election ballot. E.g., Munro v. Socialist Workers Party, 479 U.S. 189, 199 (1986) (state may exclude from the general election ballot any minor party's candidates, when such candidates in the primary election did not receive at least 1% of all votes cast for the office sought). See generally Lubin v. Panish, 415 U.S. 709, 712 (1974) (citing historical efforts at limiting the length of the ballot).
125. 17 C.F.R. § 240.14a-1 (1990); see infra notes 338-46 and accompanying text.
Other commentaries followed, addressing similar issues. For example, who would be subject to liability for misstatements in descriptive materials contained in the proxy statement in support of the shareholder nominated directoral candidates? What limits would be placed on electioneering to avoid the application of rule 14a-11, the proxy contest rule?

Finally, a new voice joined these recurring and largely technical discussions of shareholder access to the proxy. In TAMING THE GIANT CORPORATION, consumer advocate Ralph Nader and his colleagues advocated federal chartering of large publicly held corporations, establishing an exclusively "outside" board of directors, and the "institutionalization of a new profession: the full-time 'professional' director." Under this model, these directors would be well paid and well staffed to induce them to work full time, even at the cost of possible disharmony with the operating executives. Moreover, the Nader group proposed assigning each director a particular constituency, such as employees, consumers, neighboring citizens, shareholders, or other groups. Each director would be responsible for the concerns of his or her constituents when attending to corporate governance matters. Underlying these proposals was a selection and nomination process that wholly excluded incumbent management:

[A]ny shareholder or allied shareholder group which owns .1 percent of the common voting stock in the corporation or comprises 100 or more individuals and does not include a present executive of the corporation, nor act for a present executive, may nominate up to three persons to serve as directors. This will . . . increase[ ] the likelihood of a diverse board by preventing any one or two sources from proposing all nominees.

. . . All campaign costs would be borne by the corporation. [Cumulative voting would be required.]

All of these proposals shared the ultimate goal of broadening the corporation's mission to encompass protection of every aspect of society. A decade later, however, new voices joined in the quest for access to the proxy. Their

127. Id., supra note 126, at 633.
128. Id.; see infra notes 349-54 and accompanying text.
130. Id. at 121.
131. "Under normal circumstances there should be a healthy friction between operating executives and the board to assure that the wisest possible use is made of corporate resources."
132. Id. at 125.
133. Id. at 127-28.
ultimate purpose was quite different—the protection of incumbent management from hostile takeovers.

D. The "Anti-Takeover" Proposals of the 1980's

In 1987, Martin Lipton, critic of corporate takeovers and "inventor" of the poison pill, strongly urged comprehensive reform of the tax and federal securities laws to curb hostile takeover activity, accompanied by a "renewal of shareholder democracy." He proposed that:

[T]he federal securities laws [should] be amended to allow any shareholder, or group of shareholders, with more than $5 million in market value of the corporation's shares free and equal access to the corporation's proxy machinery at the corporation's expense. Shareholders with less than a $5 million stake would remain free to pursue independent proxy solicitations.

Lipton advanced this proposal to provide "a means of making management responsive to the needs of shareholders and other corporate constituencies." He argued that "shareholder democracy" was far preferable to the "hostile tender offer as a device for disciplining management." Further, he advocated a central role for institutional shareholders in corporate reform, noting the expertise they might bring to corporate decisionmaking once freed from their fixation on short-term gain:

Institutional shareholders will be able to guide corporate management in the long-term interest of the corporation and all its constituencies. To the corporation's benefit, its shareholder constituency will remain relatively stable. The diversity of its institutional owners, moreover, will ensure that a variety of views is expressed over time, with the attendant benefits of pluralist corporate democracy.

Professor Louis Lowenstein continued to examine the role of shareholder voting in reducing abuses in the takeover market in his book, What's Wrong With Wall Street: Short-Term Gain and the Absentee Shareholder, published shortly after the 1987 market break. Lowenstein asked how shareholders, especially institutional investors, could be encouraged to perform better as corporate monitors given their herdlike
behavior and nomadic turnover in holdings. As one response, he proposed granting shareholders the exclusive right to nominate and elect, "separately from the nomination [and election] of directors generally, a significant but still minority number of additional directors, e.g., 20-25% of the board." Lowenstein designed this proposal to encourage the nomination and election of candidates put forward by, and accountable to, institutional investors. This proposal would create a new class of "very independent" directors, who nevertheless would be subject to all the fiduciary obligations of other board members.

Professor Lowenstein envisioned a procedure which would allow any shareholder to propose one or more candidates for the reserved positions. The shareholders as a group would then receive a final list of candidates consisting of approximately twice the number of candidates as available directorial positions, with the selection comprised of the candidates receiving the largest number of nominations. Lowenstein argued that his plan would permit "open[ing] up the nomination process, without fear that it will somehow be trivialized by corporate gadflies and others whose interests may be primarily personal, social, or political."

A subsequent Wall Street Journal commentary, relying largely on European models, advocated a more radical version of Lowenstein's dual class board. Under this proposal, public companies would have two governing bodies: first, a group of "loyal cabinet advisers" selected by management and accountable only to management; and second, a distinct group of "supervisory directors" selected by shareholders from candidates nominated both by management and individual shareholders. Non-management nominees would have to demonstrate some minimum level of support—for example, 3% or $500,000 of a corporation's stock—to appear on the corporate ballot. Only the supervisory directors could be held accountable to

140. Id. at 5, 8.
141. Id. at 209 (emphasis added).
142. Id. at 210.
143. Id.
144. Id. at 209-10.
145. Id. at 210.
147. Id. at A8, col. 5.
148. Id.
150. Nadel, supra note 146, at A8, col. 5.
Shareholders. That is, shareholder derivative suits for breach of fiduciary duty could only be brought against these directors and not against the "cabinet." 151

E. Congressional Access Proposals

 Occasionally, Congress has considered the access issue, usually in connection with proposed anti-takeover legislation. The first bills to incorporate access to the proxy provisions appeared in the early 1980's, when Senator Howard Metzenbaum (D-Ohio) introduced the "Protection of Shareholders' Rights Act of 1980" 152 and Representative Benjamin Rosenthal (D-N.Y.) introduced the "Corporate Democracy Act of 1980." 153 While the issue died quickly in 1980, an increase in hostile takeovers and resultant defensive activities during the mid-1980's 154 brought renewed interest in shareholder democracy issues.

Several bills which encompassed access to the proxy provisions were introduced in the 100th Congress. Senator Donald Riegle (D-Mich.) and former Senator William Proxmire (D-Wis.), respectively the current and former chairman of the Senate Banking Committee, introduced the "Tender Offer Disclosure and Fairness Act of 1987." 155 As amended, the bill provided shareholders owning 10% or more of a company's stock with access to the proxy for purposes of either responding to management's directoral nominations or proposing their own. 156 After extended floor debate in the summer

151. Id. at A8, col. 6.
152. S. 2567, 96th Cong., 2d Sess. § 8(a) (1980). This bill provided:

Shareholders of an affected corporation, in advance of the meeting at which directors are to be elected, shall have the right to nominate candidates for the board of directors of such affected corporation if each such candidate nominated for a directorship by a shareholder is supported by the holder or holders of one-half of 1 per centum of shares outstanding at the time the name of such candidate is sought to be placed in nomination.

Id., quoted in SEC STAFF REPORT ON CORPORATE ACCOUNTABILITY, supra note 82, at A57.

153. H.R. 7010, 96th Cong., 2d Sess. § 105(a) (1980). This bill provided that "[s]hareholders of voting stock of any corporation subject to this Act shall have the right to nominate candidates for the board of directors of such corporation." Id., quoted in SEC STAFF REPORT ON CORPORATE ACCOUNTABILITY, supra note 82, at A58. The bill authorized the SEC to establish threshold requirements for access to the ballot for shareholder nominated directoral candidates. Id.


156. Id. § 11 as amended, reprinted in 19 INST. ON SEC. REG. 383 (1987).
During the same term, Representatives John Dingell (D-Mich.) and Edward Markey (D-Mass.), respectively the current Chairman of the House Energy and Commerce Committee and Chairman of the House Subcommittee on Telecommunications and Finance, introduced the "Tender Offer Reform Act of 1987." The Dingell-Markey bill entitled any shareholder with the greater of either 3% of the voting power or $500,000 worth of shares in any public company to access to the corporate proxy machinery to nominate directoral candidates. This bill, along with its Republican counterpart, died without reaching the House floor. Later, Congressman Markey indicated his willingness to introduce another access proposal.

In the 101st session of Congress, Senators Howard Metzenbaum (D-Ohio) and William Armstrong (R-Colo.) jointly introduced "The Corporate Takeover Reform Act of 1989." This bill provided that any shareholder or shareholder group representing 3% or more of a company's voting shares may submit in proxy materials statements or counterproposals on transactional issues and the nomination of directoral candidates. These statements and counterproposals would be afforded "equal space, coverage, and treatment" as is conferred on management's statements and proposals.

IV. THE MERCURIAL ROLE OF THE SEC IN PROMOTING, THEN THWARTING, SHAREHOLDER ACCESS TO THE PROXY

The Securities and Exchange Commission has played an interesting role in the debate over the importance of shareholder access to the proxy. After the Commission initiated the idea in 1942, thirty-five years passed before the Commission readdressed the issue. Since then, the Commission has moved...
slowly from embracing the access idea to abandoning it, both at the policy level and at the operational level.

A. The Commission's Shifting Regulatory Posture

In the wake of the corporate democracy movement of the mid-1970's and in response to proposals such as Ralph Nader's,\textsuperscript{165} the Commission resurrected its general interest in shareholders' rights and its specific interest in access to the proxy. The influence of then-Chairman Harold M. Williams, a vigorous advocate of the wholly independent board of directors,\textsuperscript{166} and then-SEC Enforcement Division Director Stanley M. Sporkin\textsuperscript{167} greatly contributed to the Commission's interest.

On April 28, 1977, the Commission issued a release seeking public comment on several corporate governance issues, including the question of shareholder access to the proxy.\textsuperscript{168} One of the stated reasons for the inquiry was the Commission's recognition "that under the existing regulations shareholders often may not be provided adequate opportunities to participate meaningfully in corporate governance or the corporate electoral process."\textsuperscript{169} After considering preliminary responses, the Commission focused on several specific questions relating to shareholder access and then resolicited public comment.\textsuperscript{170} More than 300 witnesses testified before the Commission on these and related questions.

\textsuperscript{165} See supra text accompanying notes 129-33.


\textsuperscript{167} In June 1977, in a speech before the Business Week Conference on Corporate Directors, Sporkin presented his "six-point" program to improve corporate governance. The first of his six points was to ensure that "public shareholders have board representation even though it might be disproportionate to their holdings." Ferrara & Goldfus, The Government and Corporate Governance: What It Hears and How It is Responding, in A. Cohen & R. Loeb, Corporate Governance 107 (1979).


\textsuperscript{169} Id.

\textsuperscript{170} The specific questions posed were:

(1) Should shareholders have access to management's proxy soliciting materials for the purpose of nominating persons of their choice to serve on the board of directors?

(a) Would a Commission rule granting shareholders such access be in conflict with state law? Is this result consistent with Congressional intent in enacting Section 14(a)?

(b) If the Commission determines to adopt such a rule, what type of rule would be most appropriate? What criteria, if any, should be applied to shareholders who wish to have access to management's proxy soliciting materials for the purpose of making nominations?
The Commission initially approached access to the proxy and other governance issues cautiously. The Commission's order, characterized as "Stage I" of a contemplated three-stage response to concerns about corporate governance, proposed modest amendments to the existing disclosure requirements concerning board candidates and governance structures.171 "Stage II," to come shortly thereafter in the form of a "comprehensive staff report" would, according to the SEC, address some of the more complex questions raised in the governance hearings. These issues would include: "existing checks on corporate conduct, available shareholder remedies, the role of the board of directors and the need for structural board reforms and clarification of the directors' responsibilities, and the respective roles of the private sector, shareholders, the Commission, the self-regulatory organizations and Congress in corporate accountability."172

Several months later, but before the issuance of any staff report, the Commission adopted the new proxy rules in final form. The Commission added substantial new material to the required disclosure on executive compensation.173 The SEC required directoral candidates to provide information in the proxy statement concerning any conflict of interest transactions with the corporation, and it required companies to identify standing board committees, disclose directoral attendance records, and publish information concerning directoral resignations.174

(i) For example, should the right to make nominations in management's proxy materials be conditioned on the ownership of a minimum percentage of dollar value of a class of securities?

(ii) Should there be a limitation on the number of nominees which must be included? If so, what limitation would be appropriate?

(iii) Should all nominations be screened by a nominating committee composed of outside directors or other disinterested persons?

(iv) What disclosures should be required of shareholders who utilize management's proxy soliciting materials for the purpose of making nominations?

(c) Are there soliciting activities preliminary to (1) making a shareholder nomination in management's proxy materials or (2) an election contest to which the proxy rules should not apply? . . .

(d) Should shareholders utilizing management's proxy materials for the purpose of making nominations be subject to the requirements of Rule 14a-11 (Special Provisions applicable to Election Contests)?


172. Id. at 80,576.


Nearly two years passed before the publication of the Commission's "Stage II" report. The SEC Staff Report on Corporate Accountability, when finally issued, continued the SEC's conservative approach to the question of shareholder access to the proxy. Noting the "growth of nominating committees" in the years leading up to the report's publication, and the objections of the American Bar Association and others to the notion of direct shareholder nomination of directoral candidates, the Staff proposed further study of nominating committees as a vehicle for shareholder empowerment:

The staff believes that Commission action may be necessary to facilitate shareholder participation in the corporate electoral process. At the same time, we do not want to discourage the voluntary initiatives currently under way toward establishment of nominating committees. We therefore recommend examining the 1980 proxy data with a view toward determining the extent to which companies are establishing nominating committees and the extent to which these committees are considering shareholder nominations. If there is not sufficient progress, the staff recommends that the Commission authorize it to develop a rule which would require issuers to establish, beginning two years from adoption of the rule, procedures for shareholder access to issuer proxy material for the purpose of making shareholder nominations, which procedures would be disclosed in proxy statements.

No evidence exists that the Commission staff followed up on the Staff Report after its issuance or that it reviewed the 1980 proxy materials to measure the effectiveness of corporate nominating committees.

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175. SEC Staff Report on Corporate Accountability, supra note 82.
176. Id. at 99.
177. Id. at 108.
178. Id. at 125-26.
179. Recall that by 1981, John Shad, President Reagan's appointee, had replaced Chairman Williams, President Carter's appointee, and the world view of the SEC had changed substantially. Chairman Shad was said to have considered the SEC not as an independent agency, but "more like 'the Agriculture Department, whose job is to promote the interests of farmers.'" Siedel, Rule 2(e) and Corporate Officers, 39 Bus. Law. 455, 470 (1984) (quoting Welles, John Shad's Biggest Deal, Inst'l Investor, Apr. 1982, at 58).
The closest attempt to a comprehensive review of nominating committee practices during this period was a 1981 Conference Board report that contained the results of a 1980 survey by the American Society of Corporate Secretaries of over 300 public companies with nominating committees. The survey requested respondents to identify the sources of candidates for board membership under the new nominating committee regime:

<table>
<thead>
<tr>
<th>Candidate Source</th>
<th>Prime Source, Often Used</th>
<th>Good Source, Sometimes Used</th>
<th>Source, or Has Not Been Used</th>
</tr>
</thead>
<tbody>
<tr>
<td>CEO</td>
<td>262</td>
<td>52</td>
<td>1</td>
</tr>
<tr>
<td>Committee members</td>
<td>177</td>
<td>92</td>
<td>21</td>
</tr>
<tr>
<td>Other board members</td>
<td>184</td>
<td>124</td>
<td>7</td>
</tr>
<tr>
<td>Large or influential shareholders</td>
<td>12</td>
<td>66</td>
<td>204</td>
</tr>
<tr>
<td>Shareholders generally</td>
<td>1</td>
<td>16</td>
<td>259</td>
</tr>
</tbody>
</table>

This report could hardly support the conclusion that shareholders were finally finding a voice in the board nominating process.

The Commission's next announcement on the subject of shareholder access to the proxy was a "concept" release inquiring with retrograde curiosity "whether security holder access to the issuer's proxy statement should be provided under the Securities Exchange Act of 1934 or left to regulation under state law." This inquiry led to the 1983 amendments to Rule 14a-8, substantially curtailing previously authorized means of access to the proxy for substantive shareholder proposals.

181. Id. at 25 table 5.
Thus, once in the thrall of Reagan-era deregulation, the SEC made no further mention of requiring or facilitating direct shareholder nomination of directors. Other issues took priority and, under the chairmanship of John Shad, the Commission abandoned consideration of access to the proxy as a mandatory public policy. This left open the possibility of a corporation-by-corporation approach to the access issue by means of shareholder proposals. Under this approach as well, the Commission, through the staff No-Action Letter process, soon abandoned shareholder interests in favor of management entrenchment.


During the 1980's a number of access proposals were submitted to shareholders under the shareholder proposal rule. A significant number of these proposals attempted to create a mechanism which would enable communication between shareholders in response to management initiatives, rather than create a new mechanism for shareholder initiatives as urged in this Article. Many proposals, however, focused on the nomination process and sought to permit direct nomination of directoral candidates by various categories of shareholders.

In 1980, a shareholder of Unicare Services, Inc. succeeded, over management objection, in placing a proposal on Unicare's annual proxy ballot which would permit any three shareholders to nominate a directoral candidate for inclusion on the proxy statement alongside management's slate of

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184. A typical proposal, submitted at the 1989 Annual Meeting of Chevron Corporation, read as follows:

RESOLVED, that the owners of Chevron recommend that the board of directors adopt and implement the following policy:

In any proxy statement sent by Chevron to its shareholders, with respect to any issue presented for decision by the shareholders (including candidates for election as directors), there shall be allowed statements with regard to that issue by beneficial owners of voting equity securities of Chevron. Such statements shall receive treatment in the proxy statement, in terms of placement, coverage and space, equal to the position of the board of directors or management of Chevron.

CHEVRON CORP., PROXY (Mar. 20, 1989). An identical proposal was submitted to the shareholders of Unocal Corp. and Amoco Corp.

185. Proposals to permit direct shareholder nomination have for years been a recurring feature of the shareholder proposal landscape. Gaining access to the proxy to permit shareholders to make direct nomination of socially conscious board candidates was one of the planks of "Campaign GM" in 1971. Black, supra note 126, at 300 (Project on Corporate Responsibility submitted a resolution to GM requiring management to include in its proxy the names of any candidates nominated in a petition signed by 100 shareholders or by the owners of 1,500 shares).
candidates. In the same year, the International Human Rights Law Group submitted a proposal to Mobil Corporation shareholders which would permit "a reasonable number of stockholders and/or owners of a reasonable number of shares to place candidates for the Board of Directors on the Corporation's proxy statement, and have such candidates voted upon by the shareholders."

In 1981, the SEC staff required Union Oil Co. of California to include in its proxy materials a proposal which would permit 500 or more individual shareholders, "notwithstanding the number of shares they individually or collectively represent," to nominate directoral candidates and have their nominations presented on the corporate proxy "in the same manner as any and all other nominees presented for election." In 1983, the SEC staff again required the company—by then renamed Unocal—to include in its proxy statement a shareholder proposal which would permit shareholders with 125,000 shares or more to nominate directoral candidates and have their candidates' names and qualifications "put before other shareholders for careful consideration by being included in . . . the [corporate] proxy."

During this period, issuers raised many objections to shareholder proposals seeking access for purposes of directoral nomination. For example, in 1988, Unocal shareholder Louise B. Wulff submitted a new access proposal. Wulff believed her proposal demanded not only shareholder dialogue on matters submitted by management for shareholder approval, but also on shareholder nomination of directoral candidates. Unocal's management strongly resisted the proposal. As permitted under SEC Rule 14a-8(d), Unocal sought a No-Action Letter from the SEC Division of Corporation

189. Id.
Finance authorizing Unocal to exclude the proposal from its proxy statement. Unocal argued, in part, that the proposal's inclusion would violate rule 14a-8(c)(2) by permitting differential treatment of similarly situated shareholders. In particular, Unocal argued that the proposal:

[W]ould give individual stockholders (or groups) free access to the Company's proxy materials if they own $1,000,000 in equity securities of the Company. Other stockholders would be relegated to whatever rights they may have under SEC Rule 14a-8 or which might be voluntarily offered to them by the Company. We believe this discrimination in favor of large stockholders and to the detriment of small stockholders would cause the Company to violate the [equal treatment] principle . . . .\(^{195}\)

Unocal also took exception to Wulff's assertion that her proposal would permit shareholder nomination of directoral candidates, arguing that direct shareholder nomination would violate rule 14a-11 which governs proxy contests.\(^{197}\)

The SEC staff rejected Unocal's rule 14a-8(c)(2) "discriminatory treatment" argument\(^{198}\) and did not address the rule 14a-11 proxy contest argument, finding that the specific language of Wulff's proposal did not require it. In prior decisions, however, the SEC staff had resolved the rule 14a-11 question in favor of other proponents, holding that access proposals do not involve a "solicitation . . . for the purpose of opposing a [management] solicitation . . . with respect to the election or removal of directors,"\(^{199}\) and so could not be excluded from the ballot on that basis.\(^{200}\) The staff also

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\(^{194}\) Id. § 240.14a-8(c)(2) ("The registrant may omit a proposal . . . [i]f the proposal, if implemented, would require the registrant to violate any state law or Federal law of the United States, or any law of any foreign jurisdiction to which the registrant is subject . . . .").


\(^{196}\) 17 C.F.R. § 240.14a-11 (1990) (special rules applicable to solicitations "with respect to the election or removal of directors at any annual or special meeting . . . .").


\(^{199}\) \textit{See supra} \textit{note} 196.

\(^{200}\) \textit{See, e.g.,} Unocal Corp., SEC No-Action Letter (Feb. 24, 1983) (LEXIS, Fedsec library, Noact file) (staff declined to exclude proposal that would provide access to shareholders with 125,000 shares as violative of rule 14a-11 because "[i]t appear[ed] to the staff that the proposal relate[d] to the selection in subsequent years of nominees for election to the Board of Directors and not to a solicitation in opposition to management's nominees"); Union Oil Co. of Cal., SEC No-Action Letter (Feb. 20, 1981) (LEXIS, Fedsec library, Noact file), aff'd, Union Oil Co. of Cal., SEC No-Action Letter (Jan. 29, 1981) (LEXIS, Fedsec library, Noact file) (staff declined to exclude proposal that would permit 500 or more shareholders to collec-
rejected management's invocation of rule 14a-8(c)(8)\textsuperscript{201} for the proposition that access proposals for the purpose of shareholder nomination could be excluded because they "relate[] to an election to office."\textsuperscript{202}

The SEC staff over the years had repeatedly rejected management objections to shareholder access proposals. In 1986, for example, a shareholder of Newbery Corporation proposed a bylaw amendment that would permit access to the proxy for purposes of directoral nomination by shareholders eligible to submit shareholder proposals.\textsuperscript{203} Newbery’s management attempted to exclude the proposal under rule 14a-8(c)(9),\textsuperscript{204} arguing that any nomination by a shareholder would by definition be "counter to a proposal to be submitted by the registrant at the meeting."\textsuperscript{205} Presumably because the proposal itself was not "counter to" any management proposal pending before the shareholders that year, the staff held the exclusion inapplicable, and denied the requested No-Action Letter.\textsuperscript{206}

In 1987, a shareholder of Chittenden Corporation proposed a mechanism for shareholder nomination of "opposition candidates," including placement of the nominees' "names, biographies, and photographs . . . in Annual Share-
Management objected on the ground, among others, that the proposal related to a personal grievance and was beyond the power of the corporation to effectuate.\textsuperscript{208} The staff rejected all of Chittenden's claims.\textsuperscript{209}

The staff, in at least one case, overtly counseled shareholder proponents to maximize the chances that the proponents' access proposal could be placed on the ballot. In 1982, a group calling itself the TWA Shareholder Project, Inc., proposed that "[t]he Board of Directors shall include in their slate of nominees for election as Directors at each Annual Meeting at least four active employees of TWA (exclusive of corporate officers)."\textsuperscript{210} While ruling that the proposal, as drafted, unlawfully intruded upon the discretionary authority of the board under Delaware law,\textsuperscript{211} the staff suggested that:

> If, however, the form of the proposal were changed to a recommendation or request that the Board take the necessary steps to effect the action contemplated by the proposal, we believe this defect would be cured. As amended, staff is unable to conclude that [there is] a sufficient legal basis for the proposition that Delaware law would necessarily prohibit a by-law amendment requiring certain directors be nominated by the Company's shareholder-employees. We note in this connection that shareholders generally have no choice in the nomination of the directors upon whose election they vote.\textsuperscript{212}

In light of this history of approval for shareholder access proposals, the SEC staff's reversal on the access to the proxy issue in consecutive No-Ac-


\textsuperscript{208} \textit{See} 17 C.F.R. § 240.14a-8(c)(4), (6) (1990).


\textsuperscript{210} Letter from Richard P. Barthelemy, Secretary, TWA Shareholder Project, Inc., to L. Edwin Smart, Chairman of the Board, Trans World Corp. (Jan. 12, 1980) (containing shareholder proposal), \textit{reprinted in} Trans World Corp., SEC No-Action Letter (Feb. 8, 1982) (LEXIS, Fedsec library, Noact file).

\textsuperscript{211} Trans World Corp., SEC No-Action Letter (Feb. 19, 1982) (LEXIS, Fedsec library, Noact file). In a similar case, a proposal submitted to Public Service Electric & Gas Co. setting aside two seats on the board of directors for "two individual Shareholders to be selected by nomination by any duly qualified Shareholder" was excluded because its language was directorary rather than precatory. Public Serv. Elec. & Gas Co., SEC No-Action Letter (Feb. 2, 1978) (LEXIS, Fedsec library, Noact file).

\textsuperscript{212} Trans World Corp., SEC No-Action Letter (Feb. 19, 1982) (LEXIS, Fedsec library, Noact file).
tion Letters to Bank of Boston,\textsuperscript{213} Unocal,\textsuperscript{214} Amoco,\textsuperscript{215} and Thermo Electron\textsuperscript{216} in early 1990 was a surprise. Typical of those rejected, the Amoco proposal provided:

RESOLVED that the board of directors take whatever steps are necessary to provide that, effective with the 1991 annual meeting, in the event a shareholder or group of shareholders representing more than $100,000 in market value of shares nominates a candidate for a position on the board of directors and secures that candidate's consent to be so nominated, that candidate's name and accompanying biographical data shall appear in the corporate proxy statement, and that candidate's name shall appear on the corporate ballot sent to shareholders, in the same manner as if the candidate had been nominated by the Nominating Committee.\textsuperscript{217}

This proposal did not "set aside" board positions for any particular class of candidates,\textsuperscript{218} include the names of any proposed directoral nominees,\textsuperscript{219}

\begin{itemize}
\item \textsuperscript{213} Bank of Boston, SEC No-Action Letter (Jan. 26, 1990) (LEXIS, Fedsec library, Noact file) (proposal to permit any shareholder eligible to make a shareholder proposal to make a directoral nomination may be excluded from the proxy pursuant to rule 14a-8(c)(8)).
\item \textsuperscript{214} Unocal Corp., SEC No-Action Letter (Feb. 6, 1990) (LEXIS, Fedsec library, Noact file) (proposal to permit any shareholder who owns or controls at least 125,000 shares to make a directoral nomination may be excluded from the proxy pursuant to rule 14a-8(c)(8)).
\item \textsuperscript{215} Amoco Corp., SEC No-Action Letter (Feb. 14, 1990) (LEXIS, Fedsec library, Noact file) (proposal to permit any shareholder or group of shareholders representing more than $100,000 in market value of the company's shares to make a directoral nomination may be excluded from the proxy pursuant to rule 14a-8(c)(8)).
\item \textsuperscript{216} Thermo Electron Corp., SEC No-Action Letter (Mar. 22, 1990) (LEXIS, Fedsec library, Noact file) (proposal to permit any shareholder eligible to make a shareholder proposal to make a directoral nomination may be excluded from the proxy pursuant to rule 14a-8(c)(8)).
\item \textsuperscript{217} Letter from Jane E. Klein to SEC (Dec. 21, 1989) (containing shareholder proposal submitted by Kurt H. Wulff, Amoco Corp. shareholder), reprinted in Amoco Corp., SEC No-Action Letter (Feb. 14, 1990) (LEXIS, Fedsec library, Noact file). The author of this Article served as counsel to Mr. Wulff in connection with this proposal in the No-Action proceedings before the SEC.
\item \textsuperscript{218} Cf. Harper & Row Publishers, Inc., SEC No-Action Letter (May 9, 1985) (LEXIS, Fedsec library, Noact file) (proposal requiring a corporate employee to be put on management's slate of nominees for directors may be excluded from the proxy); Allied Corp., SEC No-Action Letter (Jan. 5, 1984) (LEXIS, Fedsec library, Noact file) (proposal to set aside a board position for a non-management salaried employee is excludable from the proxy); Braniff Int'l Corp., SEC No-Action Letter (Feb. 5, 1982) (LEXIS, Fedsec library, Noact file) (proposal requiring directors to nominate four employees to the corporate board "relates to the election of specific individuals to the Company's Board ... and thus is excludable under Rule 14a-8(c)(8)"); Pacific Gas & Elec. Co., SEC No-Action Letter (Feb. 12, 1979) (LEXIS, Fedsec library, Noact file) (proposal to set aside board positions for representatives of the American Friends Service Committee, Friends of the Earth, or the Mobilization for Survival, as well as for representatives of registrant's labor unions, may be excluded from the proxy); Chrysler Corp., SEC No-Action Letter (Jan. 25, 1977) (LEXIS, Fedsec library, Noact file) (proposal to set aside a board position for a nominee sponsored by the Stockholder Employees Committee of Chrysler Corp. may be excluded from the proxy). \textit{But see} IBM Corp., SEC No-Action
or create a "dual class board" in violation of state law. 220 The proponent fulfilled all the standing requirements of rule 14a-8. 221 His proposal was neither duplicative of earlier failed proposals, and hence excludable under rule 14a-8(c)(12), 222 nor "vague and indefinite and, therefore, potentially misleading," and hence excludable under rule 14a-8(c)(3). 223 Rather, the proposal provided a procedure by which certain shareholders could make nominations for inclusion on Amoco's proxy statement in future years, similar to the proposals at Unicare, 224 Mobil, 225 Unocal, 226 American Airlines, 227 Newbery, 228 and Chittenden, 229 which had successfully withstood challenge before the SEC in preceding years.

By permitting Amoco to exclude this proposal from its proxy, the SEC staff apparently changed its view of both rule 14a-8(c)(8), the "related to an election" exception to the shareholder proposal rule, and rule 14a-11, the "proxy contest rule." In a letter promising no action if Amoco excluded the proposal from the Amoco proxy, the staff stated "[i]nsofar as it seeks to

Letter (Dec. 19, 1985) (LEXIS, Fedsec library, Noact file) (refusing to exclude a proposal to establish a board position in which the director would "represent the interest of [IBM] Shareholders who are Company employees").


222. 17 C.F.R. § 240.14a-8(c)(12) (1990); see, e.g., Unocal Corp., SEC No-Action Letter (Feb. 23, 1984) (LEXIS, Fedsec library, Noact file) (proposal to adopt certain directorial nominating procedures is duplicative of proposals included in the company's 1981 and 1983 proxy materials and excludable under rule 14a-8(c)(12)).


224. See supra notes 186, 202 and accompanying text.

225. See supra notes 187, 202 and accompanying text.

226. See supra notes 188-90, 198 and accompanying text.

227. See supra note 206 and accompanying text.

228. Id.

229. See supra note 207 and accompanying text.
implement a common ballot procedure, it appears that this proposal, rather than establishing procedures for nomination or qualification generally, would establish a procedure that may result in contested elections to the board which is a matter more appropriately addressed under rule 14a-11.”

This change of position by the SEC staff was not its only reversal in 1990. During the same proxy season, the staff reversed itself on proposals related to golden parachutes and the cessation of production of dangerous products. These changes of position, however, favored shareholder proponents, while the staff’s new position on the access to the proxy issue favored incumbent management.

A simple reason for the staff’s change of course might be that the 1990 position is more “correct” under existing law than the staff’s previous positions. In prior years, the staff may have failed to consider the long-term implications of their decisions because they assumed that access proposals, like most shareholder proposals, would not command substantial shareholder support and could not win against management opposition. This assumption, however, was beginning to prove unsupportable. By 1990, an increasing number of shareholder proposals, particularly those initiated by institutional investors, were winning majority votes. Accordingly, the SEC staff may have, for the first time, considered the actual consequences of shareholders enjoying direct access to the proxy, and found it unacceptable under existing proxy contest rules.

V. THE WISDOM AND PITFALLS OF PROVIDING DIRECT ACCESS TO THE PROXY

All of the proposals discussed in Parts III and IV invite obvious and more subtle objections. Some critics cite the practical problems accompanying the implementation of an access to the proxy rule, while others focus on the

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231. Transamerica Inc., SEC No-Action Letter (Jan. 10, 1990) (LEXIS, Fedsec library, Noact file) (proposal that the board discontinue golden parachute agreements with company executives may not be excluded under rule 14a-8(c)(7)).


233. In the 1990 proxy season, more shareholder proposals passed than in the preceding 40 years combined. 5 USA ADVOCATE No. 7, at 1 (July 1990).
notion of corporate democracy itself. After identifying, exploring, and ultimately refuting the most colorable of these objections, this Article argues that affirmative reasons exist for embracing a policy of limited shareholder access to the proxy.

A. The Recurring Objections

1. Overseeing and Responding to Contested Directorial Elections Would Waste Managerial Resources

Some critics worry that encouraging election contests by providing shareholder access to the ballot may discourage competent incumbent directors from seeking renomination and dissuade others selected by the incumbent board, or a nominating committee, from putting themselves forward and risking public rejection. This argument comports with other protectionist arguments which seek to defend the status quo by discouraging competitive behavior. Thus, for example, corporate managers who lobby for tariffs or other barriers to exclude quality foreign products from the market for goods and services may also prefer costly proxy fights to exclude directoral challenges from the market for corporate control.

It is questionable whether management-selected directorial candidates would refuse nomination in the face of competing bidders. Directorial service provides substantial personal benefits to those chosen by management, quite apart from financial considerations. First, exposure to other enterprises provides learning and networking opportunities. Second, selection by management to serve on a public company’s board carries substantial prestige. For service providers, such as commercial bankers, investment bankers, or outside counsel, board service offers a means of bonding a lucrative business relationship. Moreover, for those board members with previous service, the advantages of incumbency and “ballot position” within

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236. See supra text accompanying note 87.
237. See J. LORSCH, PAWNS OR POTENTATES: THE REALITY OF AMERICA’S CORPORATE BOARDS 26 (1990) (opportunity to learn is rated as the second most important reason cited by directors for their acceptance of a board position); see also M. MACE, DIRECTORS: MYTH AND REALITY 104-05 (1986 ed.) (one of two principal reasons why executives will serve as directors is the opportunity to learn something new).
management's slate may provide additional incentives to run for reelection.239

The real question is not whether the prospect of an election contest scares off the occasional incumbent, but whether that prospect is likely to stimulate boards to better directoral performance. As discussed in the next section, psychological studies suggest that the existence of a challenger may result in better board decisionmaking.

2. A Diversified Board is Likely to be an Ineffective Decisionmaking Body

Some observers argue that a high degree of homogeneity and cohesiveness leads to a more effective board of directors, and that the presence of “constituency directors,” including those elected by cumulative voting to represent shareholder interests, disrupts the decisionmaking process.240 Others challenge the notion that a homogeneous board, especially one selected primarily by the CEO, can perform effectively.241 Social scientists studying the conditions which characterize efficient decisionmaking have found that homogeneity and cohesiveness, taken too far, can impair decisionmaking to the point where, in the jargon of social psychologists, it becomes “pathological.” This impairment can result from premature closure of discussion, intolerance of deviant points of view, pressure towards consensus, or the phenomenon referred to as “groupthink.”242

“Groupthink” is “a mode of thinking that people engage in when they are deeply involved in a cohesive in-group, when the members’ strivings for unanimity override their motivation to realistically appraise alternative courses of action.”243 It is common in the deliberations of corporate boards selected in the traditional manner.


241. E.g., Brudney, supra note 74, at 622 (the effectiveness of a traditional board is limited by “structural bias,” inadequate resources and the lack of economic incentives to monitor).

242. See generally Swap, Destructive Effects of Groups on Individuals, in GROUP DECISION MAKING 69-95 (1984) (groups exert pressure on members to reach a consensual decision that is not necessarily the best decision).

Boards are frequently constrained by what one director has called the "cult of politeness." Another knowledgeable commentator has described "a subtle set of unspoken norms" which inhibit robust discourse within the confines of the boardroom. This pattern of conscious civility, while conducive to a high comfort level in group situations, may also interfere with the board's monitoring function. For example, many directors suppress their concerns in board meetings for fear of appearing disrespectful of the CEO or of indicating a vote of "no confidence." Furthermore, cultural norms mandate that directors interact only in structured board settings and solely as peers, rather than informally with any one of them asserting leadership over the others. Boards rarely vote other than unanimously on issues of importance to the CEO.

These behavioral patterns can ultimately lead to an institutional inability to challenge the management-delivered view of corporate affairs and a resulting failure of the board to exercise sound and independent business judgment. As one social psychologist noted, "[g]roup members may be so concerned with maintaining positive interpersonal relations and reducing conflict that they lose the ability or willingness to critically evaluate the risks and advantages of decision alternatives." Providing, within limits, for a more diverse and heterogeneous board of directors is likely to improve, rather than impair, the quality of decisionmaking. This is particularly true where "new" board members gain their seats at the table.


245. J. LORSCH, supra note 237, at 91.

246. Id. at 93; M. MACE, supra note 237, at 55. This is particularly true among directors who themselves are CEO's. One of the traditional mores of corporate upward mobility is never to contradict or embarrass one's boss or "patron" in the presence of others, and always to appear totally loyal to him or her. R. JACKALL, MORAL MAZES: THE WORLD OF CORPORATE MANAGERS 19 (1988).

247. J. LORSCH, supra note 237, at 93.

248. In a recent book about his experiences on the board of General Motors, Inc., Ross Perot disclosed that when he voted against a proposed acquisition of Hughes Aircraft Co. in 1985, it was the first time since the Depression that any member of the GM board had dissented in any board decision. D. LEVIN, IRRECONCILABLE DIFFERENCES 251 (1989).

249. E.g., Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985) (directors failed to challenge any aspect of or even to read proposed merger agreement).

250. Swap, supra note 242, at 83.

251. See, e.g., C. ANDERSON & R. ANTHONY, supra note 238, at 83. The authors argue that:

[One] dimension of a good board is a balanced membership—balance of occupation, experience, age, gender, race, geographical representation, and so on. In general it is beneficial to have people from several different industries on the board. They can bring important insights to board meetings, based on their varied experiences. It is
following direct nomination by a substantial shareholder. In his landmark study of corporate boards, Myles Mace found that traditionally selected outside directors are especially passive as a group, are hesitant to risk embarrassment either to themselves or to the CEO, and seldom ask discerning questions about ongoing or proposed corporate activities. However, "'[o]utside board members who own or represent the ownership of substantial stock in the company are much more likely to ask discerning questions than an outside director who does not own stock, or at least not very many shares.'" In addition, the presence on the board of one such director encourages other outsiders to get involved in the questioning of the CEO.

The point is not to stimulate rancor among a factionalized board or to create a new model of board composition in which shareholder nominated directors are expected to play some oppositional role. Rather, the goal is also helpful to have someone on the board with experience in the public sector, as this person contributes a perspective frequently missed by the business person. An academic can add still another perspective. Our point is that a board consisting of persons with varied backgrounds can engage in discussions with a richness and breadth that inevitably lead to better decision making. A board with diverse membership will also have an extensive network of contacts throughout industry, government, and the professions, that can be useful to the company in many ways.

Id. 252. M. MACE, supra note 237.
253. Id. at 52-53.
254. Id. at 61 (emphasis added).
255. Id. at 64.
256. Absent some sense of unity among elected directors, a single director nominated by anyone other than those on the official nominating committee might well face the treatment portrayed in a recent NEW YORKER cartoon:

"Thank you. We're all refreshed and challenged by your unique point of view. Now, we have many serious matters to discuss today, so I suggest we stick with our agreed-upon agenda."

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to create an environment in which decisionmakers bring diverse perspectives to the process, optimize their individual strengths, and resist the centripetal forces of “groupthink.”²⁵⁷ Many models exist suggesting that this bonding process can work.²⁵⁸

If one accepts the monitoring role of the board, then any mechanism which stimulates attentiveness and directoral activity is desirable. However, giving shareholders the right to nominate is not equivalent to ensuring their ability to elect a director of their own selection. Even where management-nominated candidates prevail over shareholder nominees, the expressed concerns of the nominators and the discontent over board actions which aroused slumbering investors are likely to sensitize the newly elected board members. The availability and occasional use of direct nomination, rather than degrading the board’s deliberative processes, will serve to focus the board on shareholder gain.

3. “Shareholder Democracy” is Unlikely to Stimulate Shareholder Participation

Historically, shareholders have been described as passive and apathetic in proxy voting.²⁵⁹ Economists argue that many shareholders do not vote, or do not vote against management’s position, because it is seldom in their economic interests to do so. The outcome of the vote seldom repays the cost of the time a shareholder must expend to study the various proxy proposals and cast a well-informed vote.²⁶⁰ Additionally, a “free-rider” problem exists in that the shareholder who is willing and able to spend the necessary time and resources to take a position lacks the incentive to organize others²⁶¹

²⁵⁷. It is possible, of course, that “new” board members, in seeking a sense of belonging on the board, will soon be co-opted by the incumbent majority. Professor George W. Dent, Jr., describes this phenomenon in his article Toward Unifying Ownership and Control in the Public Corporation, 1989 Wis. L. REV. 881, 899.

²⁵⁸. There has been considerable study on the dynamics by which small decisionmaking groups, comprised of participants with diverse, even competitive, perspectives, can most effectively reach consensus and achieve “decision quality.” See, e.g., Smith, Petersen, Johnson & Johnson, The Effects of Controversy and Concurrence Seeking on Effective Decision Making, 126 J. SOC. PSYCHOLOGY 237 (1986); Tjosvold & Field, Effect of Concurrence, Controversy, and Consensus on Group Decision Making, 125 J. SOC. PSYCHOLOGY 355 (1985); Wall, Galanes & Love, Small Task-Oriented Groups: Conflict, Conflict Management, Satisfaction, and Decision Quality, 18 SMALL GROUP BEHAV. 31 (1987).


²⁶⁰. Fischel, supra note 234, at 1277.

²⁶¹. Id.; see also Easterbrook & Fischel, supra note 259, at 397; Gordon, Ties that Bond: Dual Class Common Stock and the Problem of Shareholder Choice, 76 CALIF. L. REV. 1, 44 (1988).
"[b]ecause no compulsory cost-sharing mechanism exists in these circumstances, and because no single shareholder can capture the whole gain to shareholders generally from the proposal's defeat, there will be insufficient incentive to organize opposition."

These assumptions, however, are proving increasingly unsupportable. Shareholders today vote in very high numbers, given the stakes usually involved. They differentiate among the issues presented to them, favoring some management proposals by wide majorities and others by narrow margins. Moreover, notwithstanding the free-rider problem, shareholders can and do organize when it is beneficial to them. What else would explain the rising percentage of votes cast for shareholder proposals in recent years? No longer do only religious groups join together in proxy voting campaigns. Now other groups of investors, seeking economic as well as social reforms, organize collective strategies.

Institutional investors in particular are learning to overcome collective choice and free-rider problems when they believe their actions will sufficiently enhance share value to justify the costs incurred. For example, in April 1989, CalPERS and its Pennsylvania counterpart, the Pennsylvania Public Employees Retirement System, joined together to defeat two anti-takeover measures submitted by management for shareholder approval at Honeywell Inc.'s annual meeting. The proposals were routine shark repellents that would have created a classified board with staggered terms and

262. Gordon, supra note 261, at 44; Fischel, supra note 234, at 1277.

263. See Appendix A (a sampling of available information regarding recent shareholder voting). Many factors may account for the high voter turnout reflected in this sampling from the 1989 proxy season. Some voting may have been stimulated by the presence of the Department of Labor, which had threatened an audit of ERISA fund proxy voting practices. See infra note 283 and accompanying text. Other factors may have included the presence of economically significant shareholder proposals (such as those which would require termination of poison pills) and the exhortive encouragement of the various proxy voting consulting firms. See infra notes 280-87 and accompanying text.

264. See Appendix.

265. See O'Hara, Both Shareholders, Management Rack Up Proxy Wins, 7 IRRC CORP. GOVERNANCE BULL. 90 (July/Aug. 1990) ("At least 20 resolutions at 12 companies have received majorities of the shares voted, and average shareholder support for almost every type of proposal is running ahead—in some cases far ahead—of last year's figures.").

266. The Interfaith Center for Corporate Responsibility, an affiliate of the National Council of Churches, has organized proxy campaigns among shareholding churches, religious orders, and others since 1971.

267. An example is the campaign of the United Shareholders Association, announced in the summer of 1989 and executed during the 1990 proxy season, entitled USA Target 50. This campaign aimed to secure four reforms at 50 public companies: confidential proxy voting, elimination of poison pills, shareholder approval of golden parachutes, and exemption from state antitakeover statutes. 4 USA ADVOCATE No. 8, at 4-5 (Aug. 1989).
abolished shareholder action by written consent. Though CalPERS and the Pennsylvania fund together represented less than 5% of Honeywell's ownership, they organized a campaign among other institutional investors to defeat these proposals. Their joint efforts took three weeks to execute and cost approximately $350,000, primarily for the services of a professional proxy solicitor. The organizers of this collective action now estimate that Honeywell's shareholders benefitted by a rise in share value from $70 per share when they began to $79 per share, or a total of $388 million in equity value, when the defeat of the anti-takeover measures was announced three weeks later.

The successful Honeywell initiative was based on the willingness of institutional shareholders to band together and vote as a group. Underlying any contemporary discussion of the access issue is the fact that the majority of shareholders in public companies are no longer mom-and-pop investors with tiny stakes in a handful of companies. Rather, estimates now indicate that more than 50% of all shares of public companies are held by well-informed institutional investors. Due to the size of their asset base, many of these investors control percentage ownerships in each of several companies.

269. Honeywell: The Value of Shareholder Activism, 4 USA ADVOCATE No. 9, at 3 (Sept. 1989) [hereinafter Honeywell].
271. Honeywell, supra note 269, at 3. Organizers of the Honeywell initiative also point out that, following the annual meeting, Honeywell's management restructured the company in July, 1989 by issuing a substantial dividend, offering to repurchase up to 23% of the company's stock, and selling its declining weapons systems business and most of its interest in a Japanese joint venture. By early August 1989, Honeywell's stock was selling at $89 per share. Id.
272. The breakdown of ownership has been estimated as follows:

<table>
<thead>
<tr>
<th>Ownership Category</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Private Pension Funds</td>
<td>15.5%</td>
</tr>
<tr>
<td>State and Local Employee Retirement Plans</td>
<td>5.1%</td>
</tr>
<tr>
<td>Mutual Funds</td>
<td>5.4%</td>
</tr>
<tr>
<td>Life Insurance Companies</td>
<td>2.8%</td>
</tr>
<tr>
<td>Foreign</td>
<td>5.6%</td>
</tr>
<tr>
<td>Banks, as Trustee</td>
<td>15.3%</td>
</tr>
<tr>
<td>Foundations, etc.</td>
<td>4.3%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>54.0%</strong></td>
</tr>
</tbody>
</table>

sufficient to demand management's attention. In addition, a majority of public companies have a concentration of institutional owners such that coalitions may be formed and, as in the Honeywell case, joint electoral efforts may be easily undertaken.

As recently as the 1970's, institutional investors were reluctant, even in the face of constituent pressures, to involve themselves in governance matters. That is no longer the case. Respectable institutions, as well as the traditional self-promoters, are bringing shareholder proposals to the corporate ballot and seeking other means of influencing significant management decisions. These investors are seeking to exercise a "voice" as well as an "exit" option as owners of corporate equity.

At least three reasons account for this increased willingness to participate in governance decisions. First, and particularly with the decline of the junk bond market, institutional investors increasingly take equity positions, rather than investing in debt. As they do so, and especially as managed funds strategically invest in substantial equity blocks rather than more broadly diversifying their portfolios, their ability to exit quickly may be

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274. For example, CalPERS owns between .7 and 1.0% of nearly 3,000 public companies. Telephone interview with Kayla J. Gillan, CalPERS Assistant General Counsel (May 17, 1990). The press may assist institutions in their effort to influence corporate policy. When the state of Michigan announced its intention to vote its General Motors holdings, comprising approximately 1.5% of the company's common stock, against a proposed executive pension plan, the story was flagged on the front page of the Wall Street Journal. GM's Plan to Boost Executive's Pensions Draws Fire: One Big Holder is to Vote 'No,' Wall St. J., May 14, 1990, at A1, col. 2, and A4, col. 2.


277. See, e.g., Parker, Funds Gird For Proxy Season: 2 Shareholder's Resolutions Make Their Debut on 1990 Ballots, PENSIONS & INVESTMENT AGE, Nov. 13, 1989, at 92 (describing (1) TIAA-CREF proposal to require a shareholder vote on any plan to issue a large block of stock to a single investor; (2) CalPERS and Connecticut Trust Fund's proposal regarding the counting of abstentions; (3) NYCERS' and CalPERS' proposals urging opt-out from Delaware anti-takeover statute; (4) CalPERS' and CalSTRS' proposals to create shareholder advisory committees; and (5) Wisconsin State Investment Board and State of Connecticut Trust Fund's proposals concerning poison pills).

278. See infra note 319 and accompanying text.


280. See Conard, supra note 275, at 132.
encumbered. As a consequence, the voice option becomes more compelling.

Second, some institutional investors are now subject to regulatory oversight of their voting behavior. In particular, the Department of Labor, in a widely published advisory letter issued in February 1988, characterized the right to vote corporate stock as an ERISA "plan asset," thereby subjecting ERISA trustees and asset managers to liability for voting without due care. The Office of the Comptroller of the Currency and the Federal Reserve Board also review the exercise of equity voting rights during bank examinations. Regulators are now encouraging institutional investors to give careful thought to the use of their equity voting power, rather than simply deferring to managerial objectives or, as has recently occurred, responding uncritically to short-term market incentives. These circumstances have resulted in an enhanced sense of stewardship toward share beneficiaries and responsibility in governance matters.

Third, new practices, such as the proxy voting protocol and the availability of shared cost research, have reduced the per share cost of information gathering and voting. Moreover, as share ownership continues to shift from individuals to large collective entities, this cost will continue to decline.

Because institutional investors employ professional management and many must annually account for their voting behavior, they are more likely than individuals to cast proxy votes, and their votes are more likely to be well informed. Typically, institutional investors can more effectively evaluate the performance of management, and the strength of management nominees, than most individual investors. Moreover, through professional

281. Index funds, which now comprise a substantial percentage of all public and private pension funds, by definition cannot exit.
282. Cf. Schwartz, supra note 276, at 495 ("The 'Wall Street Rule'... may not be wholly feasible for institutions holding large blocks of stock that cannot be freely sold; such institutions may thus be compelled to take an interest in managerial conduct.").
284. Id. at 243-45.
285. Joint Statement by Departments of Labor and Treasury on Pension Investments, 6 Pens. Plan Guide (CCH) ¶ 23,770R (Jan. 31, 1989) (confirming that ERISA does not require plan managers to automatically tender shares held by the plan to capture any premium represented by a tender offer).
287. Shared cost research is available through groups such as the Council of Institutional Investors, IRRC, Analysis Group, Inc., and Institutional Shareholder Services, Inc.
288. See supra text accompanying notes 283-84.
contacts, they are well situated to assemble, at minimum cost, voting groups comprised of their peer institutions.

Thus, it is no longer necessarily true that shareholders will not vote, or will not vote against the status quo. Rather, it is more likely that institutional investors, granted a practical means of nominating and electing their directorial choices, will exercise that option sparingly and for demonstrable strategic reasons.289


According to contractarians, investors who purchase common shares in public companies contract away many of their ownership rights in exchange for liquidity. This theory assumes that the price paid for shares reflects a discount for the possibility that incumbent management will shirk their responsibilities or engage in self-dealing,290 and also for the fact that by choosing to invest in a public, rather than a closely-held company, investors have relinquished their right to nominate directoral candidates or to effectively monitor those elected. If these shareholders later become dissatisfied with management's performance, they can adequately protect their interests either by selling their shares or by initiating a shareholders' derivative action.291 Alternatively, when ineffective management sufficiently devalues a corporation's shares to render it a target for takeover, dissatisfied shareholders can turn to the market for corporate control. Eventually, this process will lead to more competent substitutes replacing the non-performing managers.292

These characterizations of the corporate world invite many responses. Practical considerations, especially applicable to293 institutional investors,

289. A survey of institutional investors conducted in 1990 found that as many as 33% of them would consider nominating at least one board candidate under certain circumstances. J. Biersach, Voting by Institutional Investors on Corporate Governance Issues in the 1990 Proxy Season 9 (1990).
291. Fischel, supra note 234, at 1277 n.63 (because of the liquidity of the capital markets, the “voice” option is irrelevant to shareholders in public companies); Comment, supra note 235, at 156 (citing Manne, The “Higher Criticism” of the Modern Corporation, 62 COLUM. L. REV. 399, 410 (1962)).
292. Fischel, supra note 290, at 919.
293. An institutional investor's sale of a block of shares in a single nonperforming company might result in a substantial price depression. See generally Dent, supra note 257, at 906 (collective abandonment of a security by a number of institutions would further depress the price). Further, an institutional investor's sale of shares in every company which behaves unacceptably, for example by adopting a poison pill, would leave that investor with no place to go.
limit the use of the Wall Street Rule and the courts to redress managerial misconduct. The market for corporate control is decidedly imperfect, limiting its usefulness as a mechanism of managerial discipline. Control transactions only occur where the projected benefits of the transfer substantially outweigh the transaction costs incurred. Moreover, state anti-takeover statutes, various corporation-specific defensive maneuvers, threatened application of antitrust laws, and the decline in funding sources for financing control purchases have substantially impaired the market's efficiency. More importantly, the market for corporate control may prove particularly unsatisfactory as a mechanism for replacing one or more corporate directors when a complete transfer of control is neither appropriate nor desirable. Why should investors be forced to choose between no change and total change in the composition of a corporate board when a partial change may be enough?

The same theorists who advocate reliance on the market for corporate control supported managers over shareholders in the 1988 debate over the dual class recapitalization, or "one share/one vote," issue. These theorists argued that shareholders definitionally lack the expertise and access to information enjoyed by management and, accordingly, cannot easily grasp complex strategic proposals. Consequently, these theorists claimed that decreasing or eliminating the traditional role of shareholders in corporate governance could act to economically benefit these shareholders.

The notion that shareholders would be "better off" without the costly intrusions of the voting process and that corporations should consequently redeem that portion of their shareholders' equity which represents the suffrage right is understandably seductive to managers. This is especially true where,
as in the case of the prototypical dual class recapitalization, the price offered for the redemption may be less than the present value of the votes foregone.\textsuperscript{298} Economic theorists, however, are less self-interested than executives in the outcome of the one share/one vote debate and thus more difficult to defend.

Whatever the validity of the theorists' patronizing arguments, the contrary position, advocated by many investors,\textsuperscript{299} makes clear that the right to vote, even when attenuated from the more direct economic benefits of share ownership and even when control is not in question, is an asset of substantial value to its owners. The very process of recapitalization confirms the shareholders' position when issuers offer increased dividends or other economic incentives in exchange for the forfeiture of the shareholder vote.

Equity investors see the market for corporate control as only one of several mechanisms of protection for their economic interests. They rely not only on a potential takeover bidder, but also on state and federal regulators, an active business press, aggressive investment analysts, and the collective response of other shareholders to maximize the value of their shares. None of these mechanisms provides an exclusive remedy and none is at all times superior.

5. \textit{Transient Investor Coalitions Will Inevitably Select Directors with Short-term Vision}

One critic has suggested that the voting coalitions necessary to achieve the election of shareholder nominated directorial candidates tend to be short-lived.\textsuperscript{300} Moreover, shareholder nominated directors typically serve only for

\textsuperscript{298} Quantifying the value of a shareholder vote, however, is difficult. One method compares the price of publicly traded voting shares with otherwise equivalent non-voting shares. Using this method, researchers have found the presence of voting rights results in an average premium value of 5.4\%. Fischel, \textit{supra} note 29, at 144-46. Other methods have also been used to measure the value of the shareholder vote. See Bhagat & Brickley, \textit{Cumulative Voting: The Value of Minority Shareholder Voting Rights}, 27 J.L. & ECON. 339, 353-62 (1984) (charter amendments terminating cumulative voting result in abnormally negative reductions in share price); Jarrell & Poulsen, \textit{Dual-Class Recapitalizations as Antitakeover Mechanisms: The Recent Evidence}, 20 J. FIN. ECON. 129, 149 (1988) (noting "significant negative abnormal stock price returns" averaging 2\% immediately following the announcement of a dual class recapitalization) (1988); Warren, \textit{One Share, One Vote: A Perception of Legitimacy}, 14 J. CORP. L. 89, 90 n.6 (1988).

\textsuperscript{299} See SEC One Share, One Vote Rule a 'Great Victory' for Shareholders, 3 USA ADVOCATE No. 8, at 3 (Aug. 1988) (recounting two years of lobbying by the the United Shareholders Association to persuade the SEC to adopt a one share/one vote rule); letter from CalPERS to Nancy Smith, \textit{reprinted in} 134 CONG. REC. S8281 (daily ed. June 21, 1988) (advocating a statutory one share/one vote guarantee).

\textsuperscript{300} Reich, \textit{Corporate Accountability and Regulatory Reform}, 8 HOFSTRA L. REV. 5 (1979).
a limited time. This results in decisionmaking "dominated by short-term immediate concerns at the expense of long-term policies." 301

In politics, memories are often short and passions run high. Exigencies of the moment may overwhelm more sensible, incremental solutions. Thus legislators, regulatory agency administrators, and corporate directors and managers may aim for short-term results that immediately satisfy their constituencies and over which temporary compromises can be negotiated, even though the solutions may not be as beneficial over the long term. 302

Evidence exists that members of traditionally selected boards capitulate to short-term values, 303 and commentators in the last two years have increasingly exhorted managers and directors to resist quick fixes and embrace the long-term view. 304 Whether the presence of one or more shareholder nominated directors on a corporate board would exacerbate existing decisional patterns is unclear. The assertion that shareholder nominated directors are likely to reject long-term strategies contradicts Lipton and Lowenstein, who argue that providing shareholder access to the proxy would encourage long-term thinking and ultimately serve to retard hostile takeovers. 305

There are, however, more effective means of curbing hostile takeovers. More importantly, granting institutional investors direct access to the proxy is likely to result in a decrease, rather than an increase, in anti-takeover behavior such as the approval of poison pills and preemptive business combinations. 306 Nevertheless, the fact that these investors are likely to prefer market driven corporate policies 307 over market inhibiting policies does not mean they will necessarily favor "short-term" policies prompting impressive quarterly financial figures over "long-term" policies promoting steady value gain.

Moreover, no reason exists to assume that a board which includes one or more members elected following nomination by institutional shareholders, rather than by the incumbent board, is any more likely as a group to focus on

301. Id. at 26.
302. Id.
303. See, e.g., B. BURROUGHS & J. HELYAR, BARBARIANS AT THE GATE 4-5 (1990) (noting the preoccupation of CEO Ross Johnson and his board with RJR's "undervalued" stock price and the need to improve the company's quarterly financial figures).
304. E.g., J. LORSCH, supra note 237, at 188.
305. See supra notes 134-45 and accompanying text.
306. Martin Lipton has said that the new-found interest of institutional investors in corporate governance is really a disguise for the "movement to promote takeovers." Lenzner, Shareholders Get Tough—Institutional Funds Flex Their Muscles to Get Some Action, Boston Globe, May 4, 1989, at 60, col. 4.
307. For example, the imposition of aggressive and unsentimental cost control measures.
308. For example, the adoption of shark repellents.
short-term concerns. And there can be the additional safeguard of electing directors for extended terms. That is, one method of discouraging a short-term mentality, both among management nominated and shareholder nominated directors, would be to adopt staggered boards with all the members serving two or three year terms.\textsuperscript{309}

6. **Empowering Institutional Investors May Ultimately Harm Their Constituents**

Those critical of shareholder access can argue that, by playing a direct role in nominating directoral candidates, shareholders may subject themselves to the coverage of the "controlling persons" provisions of the 1933 and 1934 Acts,\textsuperscript{310} or to assertions that they are board members and thus may be liable for short swing trading liabilities under Section 16(b) of the 1934 Act.\textsuperscript{311} These are not arguments against access to the proxy \textit{per se} but a caution to those shareholders, especially institutional investors, who might seek to exercise their access rights.

Institutional investors who nominate directoral candidates may take several precautions. First, they should insulate themselves from information held confidentially by their nominees who are successfully elected.\textsuperscript{312} Second, they should and easily can refrain from the kinds of domineering or manipulative behaviors which could lead to "controlling person" liability.\textsuperscript{313} Third, they should understand that directors—regardless of the source of

\textsuperscript{309} This approach, however, inhibits takeovers and the efficient operation of the market for corporate control. Massachusetts recently passed a law mandating staggered boards in response to the request of Norton Co., which was threatened with a takeover by a British raider. Foust & Smart, \textit{The Merger Parade Runs into a Brick Wall}, \textit{Bus. Week}, May 14, 1990, at 38. Staggered boards do not inhibit tender offers for companies which do not have poison pills. They do inhibit control transfers undertaken by means of a proxy fight.


\textsuperscript{311} \textit{Id.} § 78p(b); \textit{see also} Feder v. Martin Marietta Corp., 406 F.2d 260 (2d Cir. 1969) (Martin Marietta's CEO served on the board of Sperry Rand and was considered "deputized" to act on Martin Marietta's behalf, effectively rendering Martin Marietta a director, thus exposing it to short-swing liability for corporate trading in Sperry Rand's stock).

\textsuperscript{312} Lowenstein points out that:

[I]t ought to be at least as possible for [institutional] investors to develop procedures like the Chinese Wall of investment bankers so that the information a director receives at board meetings does not become water fountain gossip back at the mutual fund offices. [In addition], it would always be available to investors to nominate business school deans, security analysts, industry specialists, and others who could represent shareholder interests effectively but whose knowledge would not be imputed to the investor.

L. LOWENSTEIN, \textit{supra} note 139, at 216.

\textsuperscript{313} \textit{Cf.} Cameron v. Outdoor Resorts of Am., Inc., 608 F.2d 187, 194 (5th Cir. 1979) (liability based on fact that defendant, the corporation's president, controlled the daily operations of the business); Bernstein v. Crazy Eddie, Inc., 702 F. Supp. 962, 979 (E.D.N.Y. 1988)
their nomination—are fiduciaries accountable to all shareholders and not only to those who were responsible for their initial nomination. The right to effectively nominate directoral candidates creates no right to compel directoral behavior and, prudently exercised, ought not result in liability.

7. Shareholder Nominated Directors Will Bring No Demonstrable Improvement to Corporate Performance

The conservative observer could argue that there is no compelling need to impose a new system of directoral selection on public companies at this time. The economy, even if soft, remains productive. There are signs that as a group, the boards of publicly held corporations are more sensitive to shareholder concerns than ever before. Furthermore, as board composition shifts to include a larger proportion of "outside" directors, one can expect boards to act more decisively in the face of crisis and with greater

(plaintiff states claim for controlling person liability where CEO is alleged to have been an instrumental decisionmaker for the corporation).

314. Cf. Weinberger v. UOP, 457 A.2d 701, 710 (Del. 1983) (all directors, regardless of the source of their nomination, owe the corporation and all its shareholders an "uncompromising duty of loyalty").

315. Cf. Fischel, supra note 234, at 1265-71 (arguing that no evidence exists that the status quo disadvantages shareholders); New York, Pennsylvania Funds Scrutinize Corporate Boards, 6 IRRC CORP. GOVERNANCE BULL. 143 (Sept./Oct. 1989) (quoting the Chair of the Business Roundtable asserting that there is "zero correlation" between changes in traditional modes of corporate governance and improved corporate performance). Professor Lewis Solomon's empirical review in 1978 of the aftermath of several court ordered changes in board composition concluded that the difference between the "ethos" and performance of the prelitigation and postlitigation boards was "imperceptible" and that proposals to shift control over directoral nomination from the CEO to some other entity were unlikely to result in any significant shift in governance patterns. Solomon, Restructuring the Corporate Board of Directors: Fond Hope—Faint Promise, 76 Mich. L. Rev. 581, 600 (1978). Professor Victor Brudney also noted the potential shortcomings of relying on "independent" directors as agents of corporate change. Brudney, supra note 74, at 597. But see Baysinger & Butler, Corporate Governance and the Board of Directors: Performance Effects of Changes in Board Composition, 1 J. L., Econ. & Org. 101, 104 (1985) (finding that "board composition, in terms of the proportion of outside independent directors, has a mild [positive] effect on organizational performance, but that the effect is lagged").

316. See generally Taking Charge—Corporate Directors Start to Flex Their Muscle, Bus. Week, July 3, 1989, at 66. "[M]ore and more boards around the country have begun to watch out for shareholders as never before. In short, they are actually performing as they are, in theory, supposed to—but seldom have." Id. Many point to the experience of RJR Nabisco, Inc., as a vivid example of how modern boards can act for the benefit of shareholders when pressed to do so. Immediately prior to submitting management's proposal for a leveraged buyout, RJR Nabisco's CEO regularly treated the board of directors to lavish resort accommodations, private jet transportation, profitable consulting contracts and other perquisites such as participation in nationally televised sporting events. B. Burroughs & J. Helyar, supra note 303, at 165-67. Nevertheless, the board ultimately declined to support management's bid for the company and sold it to an outside bidding group.
willingness, even in the absence of crisis, to challenge management ideas and stimulate greater corporate performance.\textsuperscript{317}

Notwithstanding these reassurances, market participants and others continue to urge reform. Institutional investors exploit crisis situations\textsuperscript{318} and, where none exist, seek to create and participate in new advisory bodies which would assure them some access to otherwise uncommunicative boards of directors.\textsuperscript{319} While market observers urge alterations in board organization,\textsuperscript{320} scholars propose more radical solutions, including the dismantling of the proxy voting system and the removal of responsibility for directoral selection from incumbent managers and incumbent boards.\textsuperscript{321} There is a growing sense that the existing system of directoral selection fails to meet the market’s needs. While that may not be a sufficient reason to embrace an idea repeatedly rejected for nearly 50 years, it does suggest that access to the proxy merits renewed consideration. This is especially true in light of current efforts to make the capital markets of the European Communities more attractive to international investors.\textsuperscript{322} If significant investors value access to the proxy and cannot acquire it in the course of domestic securities purchases, they may look elsewhere.

\textbf{B. The Affirmative Case}

As previously examined, several reasons exist for granting significant shareholders the right to nominate directoral candidates: it will energize board decisionmaking practices; bring balance to any movement toward management entrenchment; and provide fiduciary institutions the opportunity to bring special expertise to the aid of poorly performing companies.

Another potential benefit of shareholder access to the proxy is that it would provide a mechanism by which an attentive shareholder could initiate action in a cost effective manner, thus preventing harm to the corporation.

\begin{itemize}
  \item \textsuperscript{317} See Weisbach, \textit{Outside Directors and CEO Turnover}, 20 J. Fin. Econ. 431 (1988) (suggesting firms with outsider dominated boards are more likely to replace the CEO in the face of poor stock performance, and to do so more quickly, than firms with insider dominated boards, thus resulting in increased share value).
  \item \textsuperscript{318} See supra note 19 and accompanying text.
  \item \textsuperscript{319} See supra note 91 and accompanying text.
  \item \textsuperscript{320} E.g., Knowlton & Millstein, \textit{Can the Board of Directors Help the American Corporation Earn the Immortality It Holds So Dear?}, in J.R. Meyer & J.M. Gustafson, \textit{The U.S. Business Corporation—An Institution in Transition} 184 (1988) (recommending that one of the outside directors, rather than the CEO, routinely serve as chairman of the board); Lipton, \textit{An End to Hostile Takeovers and Short-Termism}, \textit{The Fin. Times}, June 27, 1990, at 21 (recommending quinquennial board elections).
  \item \textsuperscript{321} See infra notes 362-77 and accompanying text.
  \item \textsuperscript{322} See, e.g., \textit{Europe Shows Leadership on Shareholder Rights}, 5 USA Advocate No. 8, at 5 (Aug. 1990).
\end{itemize}
before it occurs. The harm averted may include friction between capital providers and capital expenders. It may also include less than optimal modes of directoral decisionmaking, inattention to constituency demands, and simple self-dealing. Effective prophylactic action, however, will likely occur only if there exists a means of distributing the costs among the beneficiaries.

Currently, shareholders are entitled to share the cost with other shareholders of self-initiated behavior in only three settings: (1) a shareholder derivative suit, where their costs may be reimbursed and their attorneys' fees effectively spread among all shareholders if they prevail;\(^1\) (2) a proxy contest where their costs may be reimbursed only if they succeed in effecting a transfer of control and a shareholder vote authorizes reimbursement;\(^1\) and (3) circulating policy proposals to other shareholders, where they may share the cost if those proposals are among the limited categories authorized by the SEC's shareholder proposal rule.\(^1\)

In the first situation, the derivative suit, the ability to spread the cost of reform depends on a finding that the corporation experienced some harm, that the litigating shareholder detected and corrected the harm, and that the corporation benefitted from the correction.\(^8\) In the second situation, the proxy contest, again the corporation must have experienced harm sufficient to generate a perceived need for change in control. Given their expense, proxy contests are undertaken only in extreme circumstances. In the third situation, the shareholder proposal, harm to the corporation need not be apparent before the proposal is advanced. Regulatory limitations on the use of shareholder proposals, however, result in many important issues never

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\(^1\) Presumably subject to limitations on attorney fees as well.\(^3\)


\(^3\) See supra notes 13-14 and accompanying text.

\(^4\) See, e.g., Mills, 396 U.S. at 389-97 (corporate benefit found in plaintiff's proof of inadequate shareholder communication); Reiser v. Del Monte Properties Co., 605 F.2d 1135 (9th Cir. 1979) (same); Swanson v. American Consumer Indus., Inc., 517 F.2d 555 (7th Cir. 1975) (same); Ramey v. Cincinnati Enquirer, Inc., 508 F.2d 1188 (6th Cir. 1974) (corporate benefit found in plaintiff's delay of a risky repurchase plan permitting renegotiation); Denney v. Phillips & Buttorff Corp., 331 F.2d 249 (6th Cir. 1964) (corporate benefit found in rescission of a corporate purchase of shares at an inflated price); Milstein v. Werner, 58 F.R.D. 544 (S.D.N.Y. 1973) (corporate benefit found in modification of an employee stock purchase plan requiring employees to pay a higher price for their shares); Tanzer v. Huffines, 345 F. Supp. 279 (D. Del. 1972) (corporate benefit found in the removal of management accused of misappropriating corporate assets); Berger v. Amana Soc'y, 135 N.W.2d 618 (Iowa 1965) (corporate benefit found in the nullification of a charter amendment).
reaching the corporate ballot.\footnote{In particular, executive compensation, employee relations, and environmental policies all fall within the "ordinary business operations" exclusion to the shareholder proposal rule.}\textsuperscript{327} In addition, shareholder proposals are non-binding.\footnote{See Valente & Rose, Santa Fe Southern Faces Thorny Issue of Whether to Accept Vote on Poison Pill. Wall St. J., May 26, 1988, at 14, col. 1 (shareholder proposal to rescind a poison pill passed with majority support; board considered whether to follow shareholder wishes or ignore them).} One might argue that this arrangement encourages litigation or outright proxy fights as the only meaningful mechanisms of shareholder expression, rather than encouraging such expression at a prophylactic stage, and that it prohibits timely and preventive shareholder expression with respect to many economically important issues. Shareholder access to the proxy provides an alternative and constructive means of addressing potential harm before it occurs.

There is one final reason supporting shareholder access to the proxy for purposes of directoral nomination. Studies have shown that competition for board positions stimulates an increase in share value.\footnote{Cf. Easterbrook & Fischel, supra note 259, at 395. "[V]oting contests produce price increases—presumably reflecting real increases in the value of the firm—whether or not they lead to changes in control. The price increase takes place when the market learns of the contest, and it persists even if the insurgents are defeated." Id. at 407 (footnote omitted); see also Dodd & Warner, On Corporate Governance: A Study of Proxy Contests. 11 J. Fin. Econ. 401, 435 (1983) ("[t]he positive share price performance holds for contests where the dissidents fail to capture majority control of the board as well as those where the incumbents are ousted.").} Though these studies focused on the traditional proxy contest with independent solicitations and a separate proxy ballot for the insurgents, competition for board positions which occurs in other forms, such as through the use of a common ballot, may have similar, albeit less dramatic, results. Competition invites the market’s attention and, more often than not, its respect.

\section*{C. Logistical Issues Presented by Shareholder Access Proposals}

Several logistical issues require consideration in connection with shareholder access to the proxy proposals. These issues are best characterized by the following questions: (1) who should have standing as a nominator under an access to the proxy rule; (2) if standing is based upon some minimum level of share ownership, is the preferential treatment thereby created impermissible; (3) should shareholders be permitted to aggregate their shares to satisfy the ownership requirement; (4) if shareholders are permitted to aggregate their shares to satisfy the ownership requirement, should the existing restrictions on “solicitation” govern the process of assembling the nominating group; (5) what restriction, if any, should be placed on the number of nominees which can be put forward by a nominating group; (6) if an entitled
shareholder nominates one or more directoral candidates, is the shareholder subject to rule 14a-11 governing election contests; and (7) assuming a shareholder is granted access to the proxy for purposes of making a nomination, does that right include the right to promote the candidate and "electioneer" on the face of the proxy statement or elsewhere?

1. Standing

Many would argue that the mere ownership of stock on a given record date should not afford a shareholder access to the corporate proxy statement, or even the right to vote, when the shareholder may have purchased the stock days, or hours, before and may resell the stock days, or hours, later. Arbitrageurs, for example, or program traders would be poor candidates for status as nominators.

One might argue that, unlike long-term oriented fundamental stock pickers, these traders would have no interest in nominating directoral candidates because the costs of finding and enlisting them would outweigh any short-term gain resulting from their election. Therefore, there is no need to consider them in crafting an access to the proxy regulation. Concerns about transient influence on corporate governance, however, are legitimate. There is some value in limiting a meaningful role in corporate decisionmaking to those with some institutional memory. The SEC's shareholder proposal rule recognizes that even an insignificant role in corporate governance ought to require some proof of durational share ownership. A comparable durational ownership requirement for shareholders seeking access to the proxy for purposes of directoral nomination not only would bring symmetry to shareholder initiated governance measures, but also would create an additional incentive for long-term holding. Any workable access proposal, like the rule 14a-8 shareholder proposal rule, should include a requirement that any nominator demonstrate a minimum durational ownership of one year and continuous ownership through the date of the annual meeting.

330. "A CEO of a major corporation was heard to ask, in the course of a tirade against 'raiders,' 'Can you apply the word "Owner" to a 26-year old pension-fund trader sitting at his CRT screen and trying to out-perform the woman down the hall?'" Conard, supra note 275, at 167.

331. Cf. L. Lowenstein, supra note 139, at 194 ("[I]t is silly to pretend that in-and-out investors have much to contribute to the market or to the companies whose shares they so briefly hold.").

332. Cf. 17 C.F.R. § 240.14a-8(a)(1) (1990) (a proponent of a shareholder proposal must hold the securities for at least one year and shall continue to own such securities through the date on which the meeting is held).
2. The Share Ownership Threshold

A minimum ownership requirement of $1000 or 1% of market value, whichever is less, like the durational ownership requirement discussed above, would create symmetry in matters of ballot access. An ownership requirement this low, however, would freely grant access to the ballot to many shareholders with miniscule holdings, thus trivializing the nominating process. This was one of the recurring concerns about earlier access proposals, which later proposals such as Lipton’s and Lowenstein’s and the recent congressional bills have attempted to address. A workable access rule should set the threshold ownership requirement much higher than is appropriate for shareholder proposals, in the range of $1 million to $5 million or 3 to 5% of the outstanding voting shares, whichever is less.

Any access proposal containing a minimum ownership requirement results in treating some shareholders preferentially to other holders of the same class of shares. The SEC does not permit management to favor certain shareholders over others of the same class in the context of corporate self-tender offers. How can it permit such favoritism in the context of an election for the board of directors? While this treatment may seem unfair, it is not unlawful. States have recognized that shareholders with large holdings may be treated differently, generally more harshly, than shareholders with smaller holdings. The SEC has also approved preferential treatment for shareholders based upon their holdings in the context of rule 14a-8.

3. Aggregation

The shareholder proposal rule does not permit aggregation of shares to meet the $1,000 or 1% of market value ownership requirement. Rather, rule 14a-8 requires the proponent to be the beneficial owner of the required number of securities. The same rule could apply to access to the proxy for purposes of directoral nomination, but it should not. Prohibiting aggregation by shareholders would effectively limit access to a very small universe of investors whose views may already carry substantial weight with incumbent

333. The $1000 or 1% of market value is the minimum ownership required of shareholders wishing to bring shareholder proposals under Rule 14a-8. See supra note 14 and accompanying text.

334. Note that some high capitalization companies have thousands of shareholders with holdings in excess of $500,000, which would render proposals with ownership thresholds below that figure unworkable.


337. See supra note 14 and accompanying text.
management. Permitting aggregation, while technically more complicated, is the better choice; it would broaden the availability of access to effective coalition builders.

4. The “Solicitation” Problem

Section 14(a) prohibits the solicitation of proxies unless that solicitation complies with the SEC proxy rules. These rules describe the required form of proxy and the information which must accompany or precede it. The SEC defines solicitation to include “any request for a proxy.” Courts construe this definition broadly, including within its ambit fundraising letters mailed in anticipation of future collective shareholder action, newspaper advertisements critical of management, and statements made to the financial press advocating the breakup of a public company. Some courts have held “solicitation” to include the dissemination to shareholders of any writings, whether or not they strictly solicit a proxy, which are “part of a continuous plan intended to end in solicitation.” This suggests that contacts between shareholders with the short-term objective of pooling their shares to satisfy the ownership threshold necessary to nominate a directoral candidate, but with the long-term objective of encouraging the casting of proxy ballots for that candidate, may, under existing law, constitute unlawful “solicitation.” These restrictions only apply when the shareholder contacts more than ten other shareholders. Therefore, if eleven or more shareholders are required to satisfy a share ownership requirement for placing a directoral nomination on the ballot, the mere act of putting together a nominating group could result in liability under the securities laws. A workable access rule will require an amendment to rule 14a-1 to exclude from the definition of solicitation the mere formation of a nominating group.

340. Id. § 240.14a-5.
341. Id. § 240.14a-1(f)(1)(i).
345. Studebaker Corp. v. Gittlin, 360 F.2d 692, 696 (2d Cir. 1966); see also SEC v. Okin, 132 F.2d 784, 786 (2d Cir. 1943). Communications among a shareholder group which understands from the outset that each member is opposed to the proposed corporate action do not constitute a “solicitation.” Scott v. Multi-Amp Corp., 386 F. Supp. 44, 73 (D. N.J. 1974). Likewise, communications with the purpose of encouraging shareholders to lobby management where no proxy submission is anticipated do not rise to the level of “solicitation.” Chris-Craft Indus., Inc. v. Independent Stockholders Comm., 354 F. Supp. 895 (D. Del. 1973).
5. Capping the Number of Nominees Which Any Nominating Group May Propose

Many would argue that raiders and others seeking a complete turnover in the control of the board should be excluded from utilizing an access to the proxy regulation. Instead, they should be compelled to use separate solicitation documents to maintain the integrity of the corporate proxy and minimize shareholder confusion. While raiders are unlikely to seek access under the rules proposed in this Article, it is reasonable that they should be prohibited from doing so. As a mechanism for differentiating between long-term investors seeking to contribute to the existing board and those seeking to seize control of the board, there should be a cap on the number of directoral candidates which a nominator or nominating group may advance in a single proxy. A limit of three nominees is reasonable. Admittedly, the cap will not always effectively exclude nominators who are seeking a change in control, but it is an evenhanded way of limiting misuse of the access privilege.

6. Application of the “Election Contest” Rule

Traditionally, when management proposes a slate of directoral candidates and shareholders advance a counter slate, the insurgents prepare their own proxy solicitation and a separate proxy ballot. Rule 14a-11 governs this form of “election contest” and requires that prior to undertaking a proxy solicitation, the insurgent group must first clear with the Commission any solicitation material intended for shareholder distribution. Furthermore, the group must supply on Schedule 14B personal and financial information concerning their nominees.

Nothing in rule 14a-11 requires an insurgent group to solicit by means of an independent proxy solicitation and separate proxy ballot. Presumably, insurgents could merely attend the annual meeting, make a nomination from the floor, and seek votes from the few shareholders present. Alternatively, they could limit their proxy solicitation to no more than ten other shareholders, in which case—absent fraud—they would not subject themselves to the

347. See infra text following note 353.
348. Occasionally, a significant change in control can be effectuated by the election of three or fewer directoral candidates. For example, in 1990, Centaur Partners Group led a proxy contest for three board seats at National Intergroup, Inc., and won, leading to the decision—opposed by the previous board—to liquidate the company. Kramer, National Intergroup to Take Bids for Firm, INVESTOR’S DAILY, Aug. 23, 1990, at 21. Centaur’s proxy contest cost it $4.2 million in solicitation expenses. Id.
350. Id. § 240.14a-11(e).
351. Id. § 240.14a-11(c).
oversight of the SEC. Because premeeting solicitation of many shareholders is necessary to secure an adequate vote, persons engaged in a contest for control subject themselves to the demands of the costly preclearance procedures. Shareholder access to the proxy would provide an alternative to the election contest rule.

The "common ballot" option proposed in this Article would be exclusive. That is, a nominator choosing to place a nominee on the corporate ballot would be foreclosed from later circulating a separate ballot. He would also be foreclosed from distributing written solicitation materials separate from the corporate proxy statement.

Selecting the common ballot option would subject the nominator to at least one substantial disability. Votes cast by shareholders would be returned to management's agent, rather than to the nominator. Advocates of confidential proxy voting argue that when managers receive proxy cards, they commonly resolicit those shareholders who voted against management's recommendations. By contrast, those who oppose management's view cannot resolicit because they, unlike management, are unable to ascertain who has rejected their proposals.

Because of the importance of monitoring incoming ballots, thus permitting resolicitation of targeted shareholders, investors pursuing a change in control will always select the separate ballot option under rule 14a-11. Others, such as institutional investors seeking to alter the composition of the board by one or two members, might well select the common ballot option to reduce their solicitation costs. Regardless of which option they chose, nominators and their candidates would bear the responsibility for compliance with disclosure and antifraud rules. Either option would require nominees to file with the SEC the information now required on Schedule 14B.

7. Electioneering

Permitting a shareholder to include a biographical description of a directoral nominee in a company's proxy material is quite different from permitting that shareholder to explain the rationale for presenting the nominee to other shareholders and for preferring that nominee over one or more of the board-nominated candidates. Such explanations presumably would involve criticism of the existing board.

352. See supra note 346 and accompanying text.
The existing shareholder proposal rule permits proponents to include, alongside the text of their proposal, a supporting statement which, within reason, may incorporate personal invective and opinion. The SEC, however, prohibits proponents from attacking management personally, for example, by seeking removal of individual directors or by advancing a proposal “counter to a proposal to be submitted by the [management] at the meeting.” Apparently, the theory is that official corporate documents should be decorous and speak with one voice. Statements impugning the quality of incumbent management, or challenging their strategic vision, only confuse shareholders and ought to appear elsewhere.

This theory not only underestimates those shareholders who choose to vote, it also penalizes substantial shareholders seeking to communicate with others concerning the need to improve the board. The SEC should permit advocacy in support of directoral nominations to appear on corporate proxy statements to the same extent they now permit advocacy for shareholder proposals. This would serve the dual goals of providing full disclosure to investors and a more enlightened forum for the exchange of ideas among shareholders. Specifically, the SEC should permit shareholder nominators to make the case in support of their nominees, and against one or more of the incumbent candidates, on the face of the proxy statement—subject to existing limitations on hyperbole and defamation. Management, of course, should be permitted to respond in kind.

VI. A PROPOSAL FOR A LIMITED ACCESS TO THE PROXY REGULATION

The SEC should adopt, as part of an overall review of the federal proxy rules or otherwise, a regulation substantially similar to that proposed in The Corporate Takeover Reform Act of 1989. This regulation would permit a shareholder or shareholder group owning $1 million or 3% of the market value, whichever is less, of a public company’s voting stock to nominate up to three directoral candidates. In addition, the candidates’ credentials would appear on the corporate proxy statement, and their names on the official

355. Id. § 240.14a-8(b)(1).
358. See, e.g., Westland Corp., SEC No-Action Letter (Sept. 10, 1982) (LEXIS, Fedsec library, Noact file) (requiring proponent to label opinions as such and to delete unsupported statements such as: “nominations to the Board of Directors of the Company have been controlled by existing directors,” “shareholders of the Company have expressed a strong willingness to nominate and elect new representatives to the Board,” and “existing directors have controlled the election process”).
359. See supra note 162 and accompanying text.
corporate ballot. Owners whose shares are counted in the nominating group must have owned their shares at least one year prior to the scheduled annual meeting.

Access to the proxy is preferable to alternative proposals, particularly to the shareholder advisory committee proposals advanced by some shareholders during the 1990 proxy season. It is similarly preferable to the proposal recently advanced by Professor George V. Dent, Jr., advocating a shift in control over proxy solicitation from incumbent management to a committee comprised of a corporation's largest shareholders.

A. The Shareholders' Advisory Committee

Creating a shareholders' advisory committee will only add an unneeded layer to the process of corporate governance, which is already characterized by a proliferation of special committees, advisory committees, and other task groups which tend to diffuse responsibility for decisionmaking. In addition, it is difficult to tell how many shareholders will find it worth the cost to participate in meetings designed to convey advice and counsel to a body, the board of directors, which is free to disregard it, and over which they have no enforcement powers. Conversely, it is also hard to tell how much credence the board is likely to give the recommendations of an advisory body when the advisors, unlike the decisionmakers, run no risk of personal liability and little risk of public opprobrium. The advisory committee proposals may appeal to their sponsors as a way of insulating institutional investors from real responsibility, while guaranteeing that they will receive some increased attention from management. They are unlikely, however, to improve corporate performance.

B. Professor Dent's Proposal

Professor Dent advocates a system in which the ten to twenty largest shareholders of a public company would assume control over the nomination of all directoral candidates and the administration of the proxy voting system. Dent argues that institutional investors willingly will assume many of the costs of such a system and that his proposal is preferable to access to the proxy. Dent asserts that the strength of his proposal lies in its avoid-

360. See, e.g., CalPERS proposal to shareholders of Avon Products, Inc., supra note 91 and accompanying text.
361. Dent, supra note 257, at 907.
362. Id. at 908.
Dent's proposal, while provocative, is flawed. Many institutional investors want nothing to do with directoral selection. As for those that might, consider an investor such as CalPERS. As a largely indexed fund with holdings between .7 and 1.0% of the shares of approximately 3000 public companies, CalPERS is probably among the largest ten to twenty shareholders of several hundred companies. It is unrealistic to assume that a publicly funded pension system, whose primary fiduciary obligation is to its beneficiaries, would assume the task of actively managing the directoral selection processes of all these companies, regardless of the quality of their incumbent managements. If given the power, CalPERS or other large investors are far more likely to target selectively specific corporations in which they believe a more balanced board would lead to improved performance.

Furthermore, consider the other investors who are likely to be among the ten to twenty largest shareholders of a public company. Statistics suggest that some members of the board, including the CEO, management controlled pension funds, and employee stock ownership plans, often fall within this group. What is the point of overhauling the entire system of directoral selection, when many of the same players whose roles Dent criticizes will simply reappear as influential members of the new nominating body?

Dent favors the wholesale turnover of the directoral selection process from incumbent management to institutional investors, arguing that this would generate less contention than amending the existing system to provide limited shareholder access to the proxy. Shifting responsibility for the nomination of directors away from management and into the hands of large investors might eliminate the managerial pressure tactics which often ac-

363. Id. at 908-09.
364. See Hollie, Activism Not Role for Firms, PENSIONS & INVESTMENT AGE, Oct. 2, 1989, at 17 (mutual fund managers "do not support the kind of activism that seeks to make changes in the boards," and accordingly do not seek, or want, a role in corporate governance).
366. The prospect of assuming such responsibilities might inhibit investors from acquiring substantial blocks of shares.
367. CalPERS is governed by a Policy Statement which limits the fund's involvement in governance matters to those companies which are poor performers. Telephone interview with Kayla J. Gillan, CalPERS Assistant General Counsel (May 17, 1990).
369. Dent, supra note 257, at 908.
company a contested proxy issue. The risk of abuse in a competitive voting system, however, is quite small. Though corporate managers possess some leverage over service providers and their own ESOP's and in-house pension funds, they possess no leverage over consumer marketed mutual funds or public pension funds and are unlikely to influence their votes. Managers' alleged influence over the ESOP's and pension funds of other companies is also overstated. To the extent that undue managerial influence on proxy voting exists, regulators should prohibit such conduct or require its disclosure rather than dismantle, as Dent suggests, the entire proxy voting system.

Dent finally argues that any system in which someone other than incumbent management nomimates less than a majority of the board inevitably results in the co-optation of the minority. He recounts the dismal history of outside directors acquiescing to the wishes of management in such matters as executive compensation and anti-takeover strategies. Recent evidence suggests Dent's cynicism about director independence may be misplaced, or at least that directoral acquiescence may be receding. Even hand picked boards sometimes demonstrate an ability to remain independent when confronted with gross conflicts of interest or the need to remove a friend from office. In any event, Dent's assumption that a minority bloc of shareholder-elected directors "would [in no event] be very effective" discounts modern learning about group dynamics and the abilities of a persuasive and persistent minority to effect change.


371. The latter funds may allocate no more than 10% of their assets to the sponsoring company's shares. 29 U.S.C. § 1107(a)(2) (1982).

372. See J. Heard & H. Sherman, supra note 370, at 53; L. Lowenstein, supra note 139, at 208 (describing letters between CEO's urging each other to influence or direct the vote of their pension fund managers).

373. Dent, supra note 257, at 909.

374. Id. at 900.

375. See supra notes 316-17 and accompanying text.

376. Dent, supra note 257, at 909.

377. See, e.g., Moscovici, Social Influence and Conformity, in The Handbook of Social Psychology 347 (G. Lindzey & E. Aronson 3d ed. 1984) (group participants representing a minority viewpoint can be effective persuaders if they demonstrate commitment, an acceptable "behavioral style," consistency but not rigidity, and rely on current and "novel" information); Wall, Galanes & Love, supra note 258, at 32 ("[C]onflict that expands the options available to
V. Conclusion

Twelve years ago, at the height of the shareholder democracy movement, the Supreme Court, in a decision striking down a state statute prohibiting certain forms of political lobbying by corporations, embraced the notion that "shareholder democracy" is real.378 The Court found no rational justification for enacting legislation with the stated intent of protecting minority shareholders from the expenditure of corporate funds in the pursuit of public policy choices personally offensive to them:

Ultimately shareholders may decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues. Acting through their power to elect the board of directors or to insist upon protective provisions in the corporation's charter, shareholders normally are presumed competent to protect their own interests.379

The Delaware Supreme Court also gives substantial lip service to shareholder democracy in the context of directoral election, if not in the context of other contests for control.380

As practiced today, the "power to elect the board of directors" is an illusory one, just as the power of black voters to meaningfully participate in the election of state and local officials in the absence of a genuine role in the nomination process was held illusory in the historic "White Primary" cases.381 In the case of public suffrage, the Constitution ensures that voters will have an effective voice in the selection of their representatives,382 including a group and increases the motivational and involvement level of the members will enhance the quality of outcome.

One additional alternative to the access proposal is to leave well enough alone. I do not address that option here, but merely reiterate Lowenstein's point that access is an experiment worth trying. L. Lowenstein, supra note 139, at 217-18.

379. Id. at 794-95 (footnote omitted) (emphasis added).
380. E.g., Saxon Indus., Inc v. NKFW Partners, 488 A.2d 1298 (Del. 1985) (shareholders may compel convening of shareholders meeting to replace directors, notwithstanding pendency of Chapter 11 proceedings, given "the strong Delaware policy behind the free exercise of a stockholder's right to elect directors"); see also Stroud v. Grace, No. 10719 (Del. Ch. Nov. 1, 1990) (LEXIS, States library, DEL file) (bylaws circumscribing the right of shareholders to nominate directoral candidates held unlawful).
381. E.g., Terry v. Adams, 345 U.S. 461 (1953) (state may not facilitate system in which black voters are excluded from straw vote conducted by local political organization, the "Jaybird Democratic Club," where, as a practical matter, only the candidate who won this straw vote would seek nomination in the "official" Democratic primary); Smith v. Allwright, 321 U.S. 649 (1944) (state cannot exclude a voter from a party primary on the basis of race, where the primary is the sole means for certifying nominees for inclusion on the general election ballot).
ing an opportunity to participate in the selection of those candidates whose names will appear on the general election ballot.\textsuperscript{383} No comparable protection exists for American shareholders. At best, they have been relegated to a ceremonial role in the governance of corporations.\textsuperscript{384}

Recent court decisions have held that, with rare exceptions, corporate governance is the exclusive domain of the board of directors.\textsuperscript{385} That being the case, the SEC should afford shareholders a practical means of challenging the makeup of the board, as it has afforded them a practical means of challenging or criticizing the board's policy decisions under Rule 14a-8, without requiring shareholders to undertake a costly all-out proxy fight.

The SEC should adopt a limited access to the proxy rule for a limited category of shareholders. The object of this proposal is quite modest—to permit shareholders of demonstrated strength and fidelity to a public company to express directly and communicate a directoral preference to other shareholders. If shareholders' suffrage rights are to mean anything, this option should be made available for their use.

\textsuperscript{383} The Court has recognized the primary election as an "integral part of the entire election process." Storer v. Brown, 415 U.S. 724, 735 (1974); see also Durkin v. Nat'l Bank of Olyphant, 772 F.2d 55, 59 (1985), which held that the statutory right to vote for bank directors includes the right to nominate directoral candidates:

\begin{quote}
We rest our holding . . . on the common sense notion that the unadorned right to cast a ballot in a contest for office, a vehicle for participatory decisionmaking and the exercise of choice, is meaningless without the right to participate in selecting the contestants. As the nominating process circumscribes the range of the choice to be made, it is a fundamental and outcome-determinative step in the election of officeholders. To allow for voting while maintaining a closed candidate selection process thus renders the former an empty exercise. This is as true in the corporate suffrage context as it is in civic elections . . . .
\end{quote}

\textit{Id.}

\textsuperscript{384} Buxbaum, \textit{supra} note 336, at 1683.

\textsuperscript{385} E.g., Paramount Comms., Inc. v. Time Inc., [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) \textsuperscript{\textcopyright} 94,514, at 93,284 (Del. Ch. July 14, 1989), \textit{aff'd}, 571 A.2d 1140 (Del. 1990). "The corporation law does not operate on the theory that directors . . . are obligated to follow the wishes of a majority of shares. In fact, directors, not shareholders, are charged with the duty to manage the firm." \textit{Id.}
## APPENDIX

**VOTER RESULTS ON MANAGEMENT AND SHAREHOLDER PROPOSALS, SEPTEMBER 1, 1988 - AUGUST 31, 1989**

### Votes

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