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Résumé de l'article

Depuis les trente dernières années, les actionnaires ont vu leurs droits de vote au sein des sociétés par actions se renforcer. Cet état de fait a mené à un grand débat académique quant à la nature et les conséquences de cet élargissement du suffrage des actionnaires. Tous les participants à ce débat partent du principe voulant que les actionnaires votent de manière rationnelle et généralement en fonction de leur intérêts économiques. Toutefois, un pan important de la recherche empirique conduite dans le domaine des sciences politiques constate que, lorsque la valeur marginale d'un vote est faible, les électeurs traitent les informations et votent sur la base de préjugés solidement ancrés, d'allégeances tribales, d'affiliations politiques et d'un désir de consolider une certaine image d'eux-mêmes. En d'autres termes, les électeurs se comportent de manière irrationnelle lorsque l'on considère l'impact concret de leur vote.

Cet article examine le corpus d'études empiriques portant sur le suffrage des actionnaires afin de démontrer que le vote irrationnel est également une des caractéristiques du suffrage au sein des sociétés par actions. Les actionnaires ne donnent presque aucune valeur à leur droit de vote et leur manière de voter ne reflète pas les performances économiques de leur entreprise. De plus, ils votent d'une manière qui va à l'encontre de leur point de vue en matière d'économie (mesurés en observant leurs décisions d'opérations de courtage), et leur vote est motivé par des pratiques de gouvernance d'entreprise empiriquement discutables et délibérément inefficaces. Heureusement, le corpus de recherche empirique dans le domaine des sciences politiques fournit des pistes afin de réformer le suffrage des actionnaires.

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McGill Law Journal — Revue de droit de McGill

Expressive Voting and Irrational Outcomes in Corporate Elections

*Bryce Tingle**

Over the past three decades, shareholders have steadily been provided with greater voting power over corporate decisions. A great academic debate has arisen about the character and outcomes of the shareholder franchise. All parties to this debate start with the assumption that shareholders will vote rationally, and generally in their economic interests. There is a large empirical literature in political science, however, that finds that where the marginal value of a vote is low, information is processed and votes cast on the basis of strongly held prejudices, tribal loyalty, mood-affiliation, and a desire to flatter the voter's self-image. In other words, the voter behaves irrationally from the standpoint of the real-world impact of their vote.

This article reviews the empirical literature around shareholder voting to show that irrational voting characterizes the corporate franchise as well. Shareholders give their voting rights almost no value and their voting patterns do not reflect the economic performance of the company. Moreover, shareholders vote in ways that contradict their economic views (measured by looking at their trading decisions), and their voting is primarily driven by empirically questionable and deliberately ineffective corporate governance practices. Fortunately, the empirical political science literature provides some direction for reforming the corporate franchise.

Depuis les trente dernières années, les actionnaires ont vu leurs droits de vote au sein des sociétés par actions se renforcer. Cet état de fait a mené à un grand débat académique quant à la nature et les conséquences de cet élargissement du suffrage des actionnaires. Tous les participants à ce débat partent du principe voulant que les actionnaires votent de manière rationnelle et généralement en fonction de leur intérêts économiques. Toutefois, un pan important de la recherche empirique conduite dans le domaine des sciences politiques constate que, lorsque la valeur marginale d'un vote est faible, les électeurs traitent les informations et votent sur la base de préjugés solidement ancrés, d'allégeances tribales, d'affiliations politiques et d'un désir de consolider une certaine image d'eux-mêmes. En d'autres termes, les électeurs se comportent de manière irrationnelle lorsque l'on considère l'impact concret de leur vote.

Cet article examine le corpus d'études empiriques portant sur le suffrage des actionnaires afin de démontrer que le vote irrationnel est également une des caractéristiques du suffrage au sein des sociétés par actions. Les actionnaires ne donnent presque aucune valeur à leur droit de vote et leur manière de voter ne reflète pas les performances économiques de leur entreprise. De plus, ils votent d'une manière qui va à l'encontre de leur point de vue en matière d'économie (mesurés en observant leurs décisions d'opérations de courtage), et leur vote est motivé par des pratiques de gouvernance d'entreprise empiriquement discutables et délibérément inefficaces. Heureusement, le corpus de recherche empirique dans le domaine des sciences politiques fournit des pistes afin de réformer le suffrage des actionnaires.

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Introduction

For the last several years, financial market elites have generally held two opinions that they have assumed, without much inspection, do not conflict. The first is that the voting results in favour of Brexit and Donald Trump, both enormously unpopular in London and New York respectively, may not reflect careful, informed processes undertaken by the electorate.[1] These electoral outcomes may instead be the result of voters who have few incentives to engage in the hard work of policy analysis and information gathering. They may make decisions in the voting booth that provide them with the private pleasures of mood affiliation, tribalism, resentment, and xenophobia.[2] (New York and London may be wrong, but this view has been widely held.) The second opinion is that the voting behaviour of shareholders is of a completely different kind.

Just three decades or so ago, shareholders had very limited voting rights. For nearly all of the twentieth century, managers were largely independent of shareholder voting power, except for the most basic fact that they might lose their offices if their failures became notorious.[3] As an American court noted in 1988, shareholder voting was understood to be "a

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1 See Sascha O Becker, Thiemo Fetzer & Dennis Novy, "Who Voted for Brexit? A Comprehensive District-Level Analysis" (2017) 32:92 Economic Policy 601 at 612; Eleonora Alabrese et al, "Who Voted for Brexit? Individual and Regional Data Combined" (2019) 56 European J Political Economy 132 at 136; Lawrence Delevingne, Suzanne Barlyn & Jennifer Ablan, "Wall Street Elite Stunned at Trump Triumph", *Reuters* (9 November 2016), online: <www.reuters.com> [perma.cc/HPY9-DNKZ]; Adam Gabbatt, "Donald Trump Loves NY...but New York Refuses to Love Him Back", *The Guardian* (3 May 2017), online: <www.theguardian.com> [perma.cc/8CBZ-UJHF] ("[o]verall, Trump won 9.87% of the vote in Manhattan, compared with Clinton's 86.36%"). See also Andrea Robbett & Peter Hans Matthews, "Partisan Bias and Expressive Voting" (2018) 157:C J Public Economics 107 (describing the failure of some Leave voters in the Brexit referendum to "gather information in advance or to vote for the outcome they truly prefer" at 107).

2 See generally Alexander A Schuessler, *A Logic of Expressive Choice* (Princeton: Princeton University Press, 2000); Pippa Norris, "Understanding Brexit: Cultural Resentment versus Economic Grievances" (2018) Harvard Kennedy School Working Paper No RWP18-021, online: <www.ssrn.com> [perma.cc/KM2B-34NR]; Jacqueline O'Reilly et al, "Brexit: Understanding the Socio-Economic Origins and Consequences" (2016) 14:4 Socio-Economic Rev 807; Diana C Mutz, "Status Threat, not Economic Hardship, Explains the 2016 Presidential Vote" (2018) 115:19 PNAS E4330.

3 See Stephen M Bainbridge, "Director Primacy in Corporate Takeovers: Preliminary Reflections" (2002) 55:3 Stan L Rev 791 ("[f]ormal shareholder control rights in fact are so weak that they scarcely qualify as part of corporate governance" at 801, n 60). This was true in Canada as well (see Sean Vanderpol & Edward J Waitzer, "Addressing the Tension between Directors' Duties and Shareholder Rights - A Tale of Two Regimes" (2012) 50:1 Osgoode Hall LJ 177).

vestige or ritual of little practical importance."[4] But not long thereafter, Canada, the United States, and the United Kingdom began to give shareholders increasing voting power over areas that used to fall wholly within board discretion.[5] This has produced an enormous body of academic legal journal articles debating the merits of the shareholder franchise.[6]

The debates among corporate law scholars are based on the assumption that when shareholders come to their voting decisions, it is by way of processes that are rationally calculated to promote certain corporate outcomes. For the most part, this means we assume shareholders vote in ways designed to improve the financial performance of their investments, but it could also mean that some investors vote in ways designed to improve environmental and social outcomes. This assumption of voter rationality is not taken for granted by political scientists. Their research on voting in civic elections shows that votes are often cast for expressive reasons unrelated to voters' self-interest or desired outcomes. The almost non-existent marginal value of a single vote means that voters feel free to collect and process information in ways that make themselves feel good. This article argues that the empirical literature around shareholder voting shows the same thing: shareholders give their voting rights almost no

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4 *Blasius Industries, Inc v Atlas Corp*, 564 A (2d) 651 (Del Ch 1988) at 659.

5 These changes include majority voting and say-on-pay, as well as votes given to public companies on private placements, equity incentive plans, related party transactions, etc. The voting power of shareholders was also increased by the rise of institutional investors, proxy advisors, and independent boards. Proxy advisors and institutional shareholders now exercise indirect control over some corporate matters by threatening to withhold votes against directors if they make particular strategic, compensation, or governance decisions.

6 See e.g. Stephen M Bainbridge, "The Case for Limited Shareholder Voting Rights" (2006) 53:3 UCLA L Rev 601; Lucian A Bebchuk, "The Myth of the Shareholder Franchise" (2007) 93:3 Va L Rev 675; KAD Camara, "Shareholder Voting and the Bundling Problem in Corporate Law" (2004) 2004:5 Wis L Rev 1425; Colleen A Dunlavy, "Social Conceptions of the Corporation: Insights from the History of Shareholder Voting Rights" (2006) 63:4 Wash & Lee L Rev 1347; Paul H Edelman, Randall S Thomas & Robert B Thompson, "Shareholder Voting in an Age of Intermediary Capitalism" (2014) 87:6 S Cal L Rev 1359; Henry Hansmann & Mariana Pargendler, "The Evolution of Shareholder Voting Rights: Separation of Ownership and Consumption" (2014) 123:4 Yale LJ 948; Grant M Hayden & Matthew T Bodie, "One Share, One Vote and the False Promise of Shareholder Homogeneity" (2008) 30:2 Cardozo L Rev 445; Joshua R Mourning, "The Majority-Voting Movement: Curtailing Shareholder Disenfranchisement in Corporate Director Elections" (2007) 85:5 Wash UL Rev 1143; René Reich-Graefe, "Deconstructing Corporate Governance: Director Primacy Without Principle" (2011) 16:3 Fordham J Corp & Fin L 465; Mark J Roe, "The Corporate Shareholder's Vote and its Political Economy, in Delaware and in Washington" (2012) 2:1 Harvard Bus L Rev 1; Harry G Hutchinson & R Sean Alley, "Against Shareholder Participation: A Treatment for McConvill's Psychonomicosis" (2007) 2:1 Brooklyn J Corporate Financial & Commercial L 41; Minor Myers, "The Perils of Shareholder Voting on Executive Compensation" (2011) 36:2 Del J Corp L 417.

value, vote in ways that do not reflect the economic performance of the company, do not vote for directors as if the individual in question matters, vote in ways that contradict their economic views (measured by looking at their trading decisions), and their voting decisions are driven by empirically questionable and often deliberately ineffective corporate governance practices.

The first Part of this article will discuss the way that all parties to current academic debates about the shareholder franchise assume shareholders vote rationally. The second Part examines the political science literature on voter ignorance. The third Part examines the political science literature on voter irrationality. The fourth Part looks at whether the well-established political science research is applicable to shareholder voting by examining the empirical evidence on the following topics: shareholders' valuation of their voting rights, shareholder behaviour in uncontested director elections, shareholder behaviour in majority voting situations, shareholder voting in contested director elections, and shareholder voting on corporate governance matters. In all of these areas, the empirical literature strongly suggests that shareholder voting behaviour resembles the predictions generated by the political science literature. The fifth Part of the article revisits the academic debate to see what remains in light of the evidence on how shareholders process information and vote irrationally. The final section proposes a direction (but only a direction) for reform.

I. The Assumption of Rational Self-Interest in Academic Discussions of Shareholder Voting

Current academic discussions about shareholder voting have a settled format. First, arguments begin by pointing out that, in Easterbrook and Fischel's now classic formulation, the shareholders' residual interest in the corporation gives them "the appropriate incentives ... to make discretionary decisions ... The shareholders receive most of the marginal gains and incur most of the marginal costs. They therefore have the right incentives to exercise discretion."[7]

This formulation of shareholder incentives gives rise to a large and heterogeneous debate over whether the economic interests of the shareholders are actually aligned with those of the corporation. The range of possible conflicts is broad. Do some important firm constituencies' inter-

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[7] Frank H Easterbrook & Daniel R Fischel, *The Economic Structure of Corporate Law* (Cambridge, Mass: Harvard University Press, 1991) at 68. See also Edelman, Thomas & Thompson, *supra* note 6 at 1374–75 (for a similar recent argument as to why corporate law provides shareholders with the vote).

ests (such as customers, employees, and suppliers) conflict with those of the shareholders?[8] Are shareholders' economic incentives too short-term?[9] Are there conflicts in which long-term shareholders take advantage of short-term shareholders, or sophisticated shareholders take advantage of unsophisticated shareholders?[10] Do public pension fund managers advance corporate governance agendas designed primarily to appeal to their

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8 For a history of stakeholder theory and analysis of its worth, see Andrew Keay, "Stakeholder Theory in Corporate Law: Has It Got What It Takes?" (2010) 9:3 Rich J Global L & Bus 249. For arguments advocating for stakeholder theories, see Lynn A Stout, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public*, 1st ed (San Francisco: Berrett-Koehler, 2012) [Stout, *Shareholder Value Myth*]; Margaret M Blair & Lynn A Stout, "A Team Production Theory of Corporate Law" (1999) 85:2 Va L Rev 247 (arguing for a variation of stakeholder primacy called team production theory); Lynn A Stout, "On the Rise of Shareholder Primacy, Signs of its Fall, and the Return of Managerialism (in the Closet)" (2013) 36:2 Seattle UL Rev 1169 at 1178–81 (outlining the pitfalls of shareholder primacy). For stakeholder theories in the Canadian context, see Stephanie Ben-Ishai, "A Team Production Theory of Canadian Corporate Law" (2006) 44:2 Alta L Rev 299 (describing team production theory); Poonam Puri & Tuvia Borok, "Employees as Corporate Stakeholders" (2002) 8 J Corporate Citizenship 49; Poonam Puri, "The Future of Stakeholder Interests in Corporate Governance" (2009) 48:3 Can Bus LJ 427 (for an analysis of stakeholder interests concerning social and environmental responsibility); Allan C Hutchinson, *The Companies We Keep: Corporate Governance for a Democratic Society* (Toronto: Irwin Law, 2005) (arguing against shareholder primacy); Leonard I Rotman, "Debunking the 'End of History' Thesis for Corporate Law" (2010) 33:2 Boston College Intl & Comp L Rev 219 ("Canadian corporate law jurisprudence and the structure of Canadian corporate law statutes reveal the complete lack of support for shareholder primacy" at 219).

9 See the text accompanying note 155, *below*. See also Natasha Burns, Simi Kedia & Marc Lipson, "Institutional Ownership and Monitoring: Evidence from Financial Misreporting" (2010) 16:4 J Corporate Finance 443 at 444 (finding short-term investors are positively correlated with increases in the likelihood and severity of accounting restatements); "Overcoming Short-Termism: A Call for a More Responsible Approach to Investment and Business Management" (9 September 2009) at 2, online (pdf): *The Aspen Institute* <www.aspeninstitute.org> [perma.cc/8KEP-JGVR]; Martin Lipton & Steven A Rosenblum, "Election Contests in the Company's Proxy: An Idea Whose Time Has Not Come" (2003) 59:1 Bus Lawyer 67 (criticizing the influence of short-term shareholders); Lynne L Dallas, "Short-Termism, the Financial Crisis, and Corporate Governance" (2012) 37:2 J Corp L 265 (outlining the impacts of short-termism on the recent financial crisis); Stout, *Shareholder Value Myth*, *supra* note 8 at 63–73; UK, Department for Business, Innovation & Skills, *The Kay Review of UK Equity Markets and Long-Term Decision Making* by John Kay (London, UK: BIS, 2012) at 50–51; Brian J Bushee, "The Influence of Institutional Investors on Myopic R&D Investment Behaviour" (1998) 73:3 Accounting Rev 305 at 307 (companies with more short-term shareholders are more likely to cut R&D expenses to make short-term targets).

10 See Jesse M Fried, "The Uneasy Case for Favoring Long-Term Shareholders" (2015) 124:5 Yale LJ 1554 ("over the last forty years, an aggregate of over $2.3 trillion has been transferred to long-term investors through bargain repurchases and inflated-price equity issuances" at 1564).

political masters?[11] Do union pension funds use their power tactically to advance their position at the bargaining table?[12] Do mutual funds reflexively support management to avoid alienating the individuals who decide what fund options will be provided to employees?[13] What about the conflicts between shareholders and debtholders (who, after all, are now the actual suppliers of capital to America's largest companies)?[14] The important thing to note in this vast literature is the universally shared as-

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[11] See Roberta Romano, "Less is More: Making Institutional Investor Activism a Valuable Mechanism of Corporate Governance" (2001) 18:2 Yale J Reg 174 [Romano, "Less is More"] ("[i]t is quite probable that private benefits accrue to some investors from sponsoring at least some shareholder proposals. The disparity in identity of sponsors—the predominance of public and union funds, which, in contrast to private sector funds, are not in competition for investor dollars—is strongly suggestive of their presence" at 231). See also Stephen M Bainbridge, *Corporate Governance After the Financial Crisis* (New York: Oxford University Press, 2012) [Bainbridge, *Corporate Governance*] (for a series of high-profile examples of attempts by the manager of an institutional shareholder to use the proposal process for private purposes).

[12] See Bainbridge, *Corporate Governance*, *supra* note 11 at 246–47. See also *Business Roundtable and Chamber of Commerce of the United States of America v Securities and Exchange Commission*, 647 F (3d) 1144 (DC Cir 2011) [*Business Roundtable*] ("there is good reason to believe institutional investors with special interests will be able to use the rule ... Nonetheless, the [SEC] failed to respond to comments arguing that investors with a special interest, such as unions and state and local governments whose interests in jobs may well be greater than their interest in share value, can be expected to pursue self-interested objectives rather than the goal of maximizing shareholder value" at 1152). See also David F Larcker & Brian Tayan, "Union Activism: Do Union Pension Firms Act Solely in the Interests of Beneficiaries?" (11 December 2012), online (pdf): *Stanford Closer Look Series* <gsb.stanford.edu> [perma.cc/3QX3-XKJA]; John G Matsusaka, Oguzhan Ozbas & Irene Yi, "Opportunistic Proposals by Union Shareholders" (2019) 32:8 Rev Financial Studies 3215 at 3244–47 (finding labour unions used shareholder proposals as bargaining chips to obtain higher wage settlements).

[13] See Ronald J Gilson & Jeffrey N Gordon, "The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights" (2013) 113:4 Colum L Rev 863 at 895 [Gilson & Gordon, "Agency Costs"]; Gregor Matvos & Michael Ostrovsky, "Heterogeneity and Peer Effects in Mutual Fund Proxy Voting" (2010) 98:1 J Financial Economics 90; Jill E Fisch, "Rethinking the Regulation of Securities Intermediaries" (2010) 158:7 U Pa L Rev 1961 at 1967–75; Marcel Kahan & Edward B Rock, "Hedge Funds in Corporate Governance and Corporate Control" (2007) 155:5 U Pa L Rev 1021 at 1056; James D Cox, Tomas J Mondino & Randall S Thomas, "Understanding the (Ir)relevance of Shareholder Votes on M&A Deals" (2019) 69:3 Duke LJ 503 at 535–36; Lucian A Bebchuk, Alma Cohen & Scott Hirst, "The Agency Problems of Institutional Investors" (2017) 31:3 J Economic Perspectives 89.

[14] See Justin Fox & Jay W Lorsch, "What Good Are Shareholders?" (2012) 90:7/8 Harvard Bus Rev 48 ("[c]orporations do need capital to invest in growth, but they don't get it in aggregate from shareholders. Net issuance of corporate equity in the U.S. over the past decade has been negative $287 billion, according to the Federal Reserve. That negative number would be much bigger if we left out financial institutions and their desperate fundraising in 2008 and 2009. Factor in dividend payments, and we find a multi-trillion-dollar transfer of cash *from* U.S. corporations to their shareholders over the past 10 years" at 50).

sumption that the shareholders' economic interests will drive their voting behaviour and thus corporate outcomes.

The second point made in virtually all discussions around shareholder voting is the collective action problem. This is usually couched in terms that again recall Easterbrook and Fischel's point that "[w]hen many are entitled to vote, none of the voters expects his votes to decide the contest. Consequently none of the voters has the appropriate incentive at the margin to study the firm's affairs and vote intelligently."[15] Evidence in favour of this proposition is adduced, usually in the form of the transparent reluctance of shareholders to vote[16] or engage in related activities.[17] Coun-

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15 Frank H Easterbrook & Daniel R Fischel, "Voting in Corporate Law" (1983) 26:2 JL & Econ 395 at 402 (discussing collective action problems). See also Evaristus Oshionebo, "Shareholder Proposals and the Passivity of Shareholders in Canada: Electronic Forums to the Rescue?" (2012) 37:2 Queen's LJ 623 (for an analysis of shareholder passivity related to the difficulties in submitting proposals); Bernard S Black, "Shareholder Passivity Reexamined" (1990) 89:3 Mich L Rev 520 at 567; Bernard S Black, *The New Palgrave Dictionary of Economics and the Law*, ed by Peter Newman, vol 3 (London, UK: Palgrave Macmillan, 1998) sub verbo "shareholder activism and corporate governance in the United States"; Andrei Shleifer & Robert W Vishny, "A Survey of Corporate Governance" (Paper delivered at the Nobel Symposium on Law and Finance, Stockholm, August 1995), (1997) 52:2 J Finance 737 at 764. For a recent discussion of the collective action issue, see Andrey Malenko & Nadya Malenko, "Proxy Advisory Firms: The Economics of Selling Information to Voters" (2019) 74:5 J Finance 2441 ("the market efficiency view does not take into account the collective action problems among shareholders ... there may be excessive overreliance on proxy advisors' recommendations" at 2442).

16 See e.g. Edelman, Thomas & Thompson, *supra* note 6 ("[i]ndividual shareholders routinely ignore requests to cast their proxy ballots in corporate elections" at 1384). Institutional investors are no more keen, which is why institutional voting required regulatory action to get going (see *SEC Proxy Voting Rule*, 17 CFR § 275.206(4)-6 (2003) [*SEC Proxy Voting Rule*]; Stephen J Choi, Jill E Fisch & Marcel Kahan, "Director Elections and the Role of Proxy Advisors" (2009) 82:4 S Cal L Rev 649 at 653–54 [Choi, Fisch & Kahan, "Director Elections"]). The 2003 change followed a similar reform in 1988, when the U.S. Department of Labor announced that ERISA pension fund fiduciaries had a duty to make informed decisions about how they voted the shares in their portfolios (see Bainbridge, *Corporate Governance*, *supra* note 11 at 252–53). See also Comment Letter from Alan D Lebowitz, Deputy Assistant Secretary of the Department of Labor to Helmuth Fandl, Chairman of the Retirement Board of Avon Products (23 February 1988) [Avon Letter] (stating that pension fund advisors' fiduciary duties respecting the management of employee benefit plans include how proxies should be voted); *Interpretive Bulletin Relating to Written Statements of Investment Policy, Including Proxy Voting Policy or Guidelines*, 29 CFR § 2509.94-2 (2007); Robert C Pozen, "Institutional Investors: The Reluctant Activists" [1994] January-February Harvard Bus Rev 140 at 144.

17 For example, institutions that must compete for funds, such as mutual funds, spend little to no time on shareholder democracy. In one two-year period, they made fewer than 0.9 per cent of shareholder proposals, though they were more likely to support proposals produced by other classes of shareholders (see e.g. Gilson & Gordon, "Agency Costs", *supra* note 13 at 887). See also Bryce C Tingle, "Bad Company! The Assump-

ter-arguments consist of pointing out that it must make economic sense for some categories of investors (particularly large institutions) to vote if doing so improves the corporate governance, and thus the economic outcomes, of portfolio companies.[18] Alternatively, some authors argue that market institutions such as proxy advisors and mandated disclosure reduce the cost of investors informing themselves.[19] Imposing legal obligations on institutions to vote their shares has also been assumed to render this issue moot (at least by the regulators), as institutions now vote as a matter of course.[20] Again, this literature is underpinned by the belief that shareholder voting, if properly informed, is (or could be) a valuable method of advancing shareholders' economic interests and improving operational firm outcomes.

The final locus of discussion on voting concerns institutional investors' economic incentives, which are evaluated and generally found to be wanting. As Professor Coffee observes, the "expected gains from most such governance issues are small, deferred, and received by investors, while the costs are potentially large, immediate, and borne by money manag-

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tions Behind Proxy Advisors' Voting Recommendations" (2014) 37:2 Dal LJ 709 [Tingle, "Bad Company"] ("we must recall that the proxy advisory industry would not exist if shareholders were generally able and willing to make informed, intelligent decisions themselves" at 733); Romano, "Less is More", *supra* note 11 at 181. One striking fact is how few people at the largest institutional investors pay attention to governance: fifteen people at Vanguard, which owns about 13,000 companies, two dozen people at BlackRock, which holds shares in 14,000 companies, and fewer than ten employees at State Street Global Advisors, which holds around 9,000 companies (see especially Sarah Krouse, David Benoit & Tom McGinty, "Meet the New Corporate Power Brokers: Passive Investors", *The Wall Street Journal* (24 October 2016), online: <www.wsj.com> [perma.cc/MQ75-QHW2]).

18 See Bernard S Black, "The Value of Institutional Investor Monitoring: The Empirical Evidence" (1992) 39:4 UCLA L Rev 895 [Black, "Investor Monitoring"]; Bernard S Black, "Agents Watching Agents: The Promise of Institutional Investor Voice" (1992) 39:4 UCLA L Rev 811 at 822 [Black, "Agents Watching Agents"]; Lucian Arye Bebchuk, "The Case for Increasing Shareholder Power" (2005) 118:3 Harv L Rev 833 [Bebchuk, "Shareholder Power"]. See also Bernard S Black, "Institutional Investors and Corporate Governance: The Case for Institutional Voice" (1992) 5:3 J Applied Corporate Finance 19 at 19 [Black, "Institutional Voice"]; Mark J Roe, "A Political Theory of American Corporate Finance" (1991) 91:1 Colum L Rev 10 [Roe, "American Corporate Finance"].

19 See George W Dent Jr, "A Defense of Proxy Advisors" (2014) 2014:5 Michigan State L Rev 1287 at 1289; Joseph A McCahery, Zacharias Sautner & Laura T Starks, "Behind the Scenes: The Corporate Governance Preferences of Institutional Investors" (2016) 71:6 J Finance 2905 at 2926. See also Paul Calluzzo & Evan Dudley, "The Real Effects of Proxy Advisors on the Firm" (2019) 48:3 Financial Management 917 at 920.

20 See Edelman, Thomas & Thompson, *supra* note 6 at 1424.

ers."[21] A closely related argument is that institutional money managers worry primarily about their portfolio's relative performance against other funds or index benchmarks. As gains from shareholder voting are received by their competitors equally, they will choose to devote their resources instead on the activities—such as picking stocks and executing trading strategies—that will allow them to differentiate themselves and attract investment.[22] Counter-arguments involve pointing to classes of investors, such as activist hedge funds, that create economic incentives for themselves to intelligently make use of their (and other shareholders') voting power.[23] Proxy advisors have similarly created a business model that arguably incentivizes them to give well-informed voting advice.[24] As with the other loci of debate around voting, both sides assume that if the shareholders did devote the resources—or could follow those, like activists, who do devote the resources to inform themselves—then they would vote in value-maximizing ways.

This assumption that voting behaviour is rationally related to economic incentives is the engine that keeps the entire debate running. Both sides take it as an article of faith. As one recent Canadian Securities Administrators (CSA) Staff Notice puts it, "shareholder voting is ... fundamental to, and enhances the quality and integrity of, our public capital markets."[25] Another Notice puts it this way: "Institutional investors are increasingly engaged in advancing good corporate governance in companies, and one of the ways by which they do so is the exercise of their voting rights."[26]

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21 John C Coffee Jr, "Liquidity versus Control: The Institutional Investor as Corporate Monitor" (1991) 91:6 Colum L Rev 1277 at 1328 [Coffee, "Liquidity versus Control"].

22 See Tingle, "Bad Company", *supra* note 17 at 715–16; Bryce C Tingle, "The Agency Cost Case for Regulating Proxy Advisory Firms" (2016) 49:2 UBC L Rev 725 at 738–39 [Tingle, "Agency Cost"]; Bryce C Tingle, "Two Stories about Shareholders" (2021) 58:1 Osgoode Hall LJ 57 [Tingle, "Two Stories"]; Gilson & Gordon, "Agency Costs", s*upra* note 13 ("absolute performance will play a secondary role" at 890).

23 See Ronald J Gilson & Jeffrey N Gordon, "The Rise of Agency Capitalism and the Role of Shareholder Activists in Making it Work" (2019) 31:3 J Applied Corporate Finance 8.

24 See Dent, *supra* note 19 at 1300–06.

25 *CSA Staff Notice 54-303 – Progress Report on Review of the Proxy Voting Infrastructure*, OSC CSA Notice, (2015) 38 OSCB 772 at 773.

26 *CSA Notice and Request for Comment – Proposed National Policy 25-201 Guidance for Proxy Advisory Firms*, OSC NP, (2014) 37 OSCB 4339 at 4339. Voting is assumed to often be in the best interests of the beneficial holders of securities and the fiduciary duty generally requires asset managers to vote, unless the costs clearly outweigh the benefits and the beneficial holders agree that the asset manager may refrain from voting. The SEC's recent Guidance shares this assumption (see *Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers*, 17 CFR § 271, 276 (2019)).

For their part, market participants have a firm (but largely unexamined) conviction that voting and economic self-interest are linked. According to a recent survey, eighty per cent of investors "believe that proxy voting increases shareholder value."[27] This assumption of economically rational voting seems intuitive because so many other investor behaviours are clearly economically rational.[28] It would be impossible to understand (or justify) financial markets if they were not characterized by economically rational behaviour.[29] Why should voting be any different?

II. Ignorance in Political Voting

The empirical literature around political voting in democracies starts in the same place as the literature around shareholder voting, but it goes in an unexpected direction. It finds that the average voter, though rationally self-interested in their personal life, is irrational in the way they vote. This irrationality is actually a function of the self-interest that lies at the heart of economic explanations for human behaviour. Political voters are, in the words of economist Bryan Caplan, "rationally irrational."[30]

Like shareholders in widely held companies, the voters in a democracy individually have little chance of affecting the outcome of an election. As a result, they perform the same cost-benefit calculation around voting as shareholders. This calculation suggests the marginal value of their vote is insignificant, so they rationally choose not to expend the resources required to properly inform themselves prior to voting.[31] The empirical evidence of this ignorance is both vast and shocking to the uninitiated.[32] In

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27 David F Larcker et al, "2015 Investor Survey: Deconstructing Proxy Statements–What Matters to Investors" (February 2015) at 2, online (pdf): *Stanford Graduate School of Business* <www.gsb.stanford.edu> [perma.cc/Z7QH-D2ZQ].

28 See e.g. Eugene F Fama et al, "The Adjustment of Stock Prices to New Information" (1969) 10:1 Intl Economic Rev 1; Mark Rubinstein, "Rational Markets: Yes or No? The Affirmative Case" (2001) 57:3 Financial Analysts J 15; Lubos Pastor & Pietro Veronesi, "Rational IPO Waves" (2005) 60:4 J Finance 1713.

29 See Burton G Malkiel & Eugene F Fama, "Efficient Capital Markets: A Review of Theory and Empirical Work" (1970) 25:2 J Finance 383.

30 Bryan Caplan, *The Myth of the Rational Voter: Why Democracies Choose Bad Policies* (Princeton: Princeton University Press, 2007) [Caplan, *Rational Voter Myth*].

31 See Anthony Downs, *An Economic Theory of Democracy* (New York: Harper & Row, 1957) ("it is irrational to be politically well-informed because the low returns from data simply do not justify their cost in time and other scarce resources" at 259).

32 Summaries of this ignorance can be found in Caplan, *Rational Voter Myth*, *supra* note 30 (showing in particular the ignorance of voters on basic economic issues); Ilya Somin, *Democracy and Political Ignorance: Why Smaller Government Is Smarter*, 2nd ed (Stanford: Stanford University Press, 2016) at 94; Garett Jones, *10% Less Democracy: Why You Should Trust Elites a Little More and the Masses a Little Less* (Stanford:

the words of one author of a survey of the literature: "The reality that most voters are often ignorant of even very basic political information is one of the better-established findings of social science. Decades of accumulated evidence reinforce this conclusion."[33]

Canada has little cause for celebration. Over half of our citizenry believes we elect the prime minister directly.[34] Indeed, a 2016 Ipsos poll found that Canadians were factually wrong on virtually every major hot-button social and economic issue from health spending, to wealth distribution, to the current Muslim population in this country.[35] A recent academic survey of Canadian political research observed that "Canadian voters are no different from voters south of the border. Scholars have repeatedly noted that they are not very informed."[36]

This political ignorance should not come as a surprise. We are consistently ignorant on matters where our opinions will have little impact and, therefore, we have no incentive to inform ourselves. Over twenty per cent of the residents of the United States do not know that the earth revolves around the sun rather than the reverse.[37] Less than forty per cent of Americans believe in the theory of evolution (the rest either disbelieve it or have no opinion).[38] Over one third of Europeans and Americans believe

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Stanford University Press, 2020) at 95–117 (looking particularly at evidence that government works better the further it is from the influence of voters); Michael X Delli Carpini & Scott Keeter, *What Americans Know About Politics and Why It Matters* (New Haven, CT: Yale University Press, 1996) at 135–77; Scott L Althaus, *Collective Preferences in Democratic Politics: Opinion Surveys and the Will of the People* (Cambridge, UK: Cambridge University Press, 2003); Rick Shenkman, *Just How Stupid Are We? Facing the Truth About the American Voter* (New York: Basic Books, 2008) at 13–36.

33 Somin, *supra* note 32 at 17.

34 See The Canadian Press, "Survey Suggests Canadians Ignorant of Government System", *CBC News* (14 December 2008), online: <www.cbc.ca> [perma.cc/XGG9-YXQD].

35 See Darrell Bricker, "Perils of Perception: Canadians Are Out of Touch with Factual Realities of Global Issues and Features of Their Population" (13 December 2016), online: *Ipsos* <www.ipsos.com> [perma.cc/L5CR-ASQL]. See also Daniel Stockemer & Francois Rocher, "Age, Political Knowledge and Electoral Turnout: A Case Study of Canada" (2017) 55:1 Commonwealth & Comparative Politics 41.

36 Amanda Bittner, "Coping with Political Flux: The Impact of Information on Voters' Perceptions of the Political Landscape, 1988-2011" in Amanda Bittner & Royce Koop, eds, *Parties, Elections, and the Future of Canadian Politics* (Vancouver: UBC Press, 2013) 258 at 260.

37 See Jon D Miller, "Public Understanding Of, and Attitudes Toward, Scientific Research: What We Know and What We Need to Know" (2004) 13:3 Public Understanding Science 273 at 280.

38 See Frank Newport, "On Darwin's Birthday, Only 4 in 10 Believe in Evolution" (11 February 2009), online: *Gallup* <news.gallup.com> [perma.cc/88QR-L6JT].

genetically unmodified foods do not contain genes.[39] A quarter of Europeans believe that eating a genetically modified fruit can result in their bodies' genes being modified.[40]

Several aspects of this literature on rational ignorance must be made clear. The first is that this ignorance is a function of the individual's lack of influence over the outcome of an election; it is not a function of the importance of the ultimate outcome of the election. Obviously, it matters to the average citizen what their government does, in the same way that it matters to the average shareholder who occupies the seats in the boardroom. What drives voter ignorance is the insignificant marginal value of that individual's vote.

The second notable factor is that the motivation of the voter doesn't matter. It doesn't matter, for example, whether the voter is strongly self-interested or altruistic. The strongly self-interested will conclude that they have better things to do than invest a great deal of resources in gathering the information needed to vote wisely; the altruistic will conclude that resources spent informing themselves as a voter would be better devoted to activities with a much higher pay-off to the people they are trying to help.[41]

An additional fact that emerges from the literature on political voting is that voter ignorance has not improved as levels of education and the availability of information have increased:

> [T]he level of political knowledge in the American electorate has increased only modestly, if at all, since the beginning of mass survey research in the late 1930s. A relatively stable level of ignorance has persisted even in the face of massive increases in educational attainment and an unprecedented expansion in the quantity and quality of information available to the general public at little cost.[42]

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39 See Robert Marchant, "From the Test Tube to the Table" (2001) 2:5 EMBO Reports 354 at 355; Douglas Buhler & Sheril Kirshenbaum, "More than One-Third of Americans Do Not Know That Foods with Zero Genetically Modified Ingredients Contain Genes–and Why That Matters" (31 May 2019), online: *Genetic Literacy Project* <geneticliteracyproject.org> [perma.cc/2SJC-V9AX].

40 Marchant, *supra* note 39 at 355.

41 See Somin, *supra* note 32 at 78. This means that even voters who would happily sacrifice to benefit others join their fellow citizens in not understanding, for example, that the American government spends more on Social Security than foreign aid, interest on government debt, or transportation (see "From ISIS to Unemployment: What do Americans Know" (2 October 2014) at 4, online (pdf): *Pew Research Center* <www.pewresearch.org> [perma.cc/3H64-DQUB]).

42 Somin, *supra* note 32 at 21.

This is obviously discouraging news for proponents of the view that better shareholder voting only requires more, and less expensive to consume, information.

III. Irrationality in Political Voting

Thus far, the research into political voting resembles the usual collective action arguments found in academic discussions of shareholder voting. But it is here that the political science data goes in an unexpected direction. Given high and persistent levels of rational ignorance about political matters, how do citizens in a democracy decide to cast their vote? George Akerlof summarizes the choice facing individuals and the way that choice plays out:

> [I]nformation is interpreted in a biased way which weights [*sic*] two ... goals: agents' desire to feel good about themselves, their activities, and the society they live in, on the one hand, and the need for an accurate view of the world for correct decision making, on the other hand ... [B]ecause any individual's influence on the public choice outcome is close to zero, each individual has an incentive to choose a model of the world which maximizes his private happiness without any consideration of the consequences for social policy.[43]

This formulation goes beyond the "rational ignorance" of public choice theory. "[R]ational ignorance assumes that people tire of the search for truth, while rational irrationality says that people actively avoid the truth."[44] What do they pursue instead? They pursue self-expression.[45] They vote in ways that make them feel better about themselves, that confirm and reflect their prejudices, and that help their political "team" score points.[46] They will blame their troubles on harmless scapegoats, punish bearers of bad news for the sin of telling the truth, vote for policies that appear to make their country look "tough," vote for politicians who are like themselves or who tell them the solutions to problems are simple, refuse to believe news that casts a negative light on "their" politicians, choose news sources that confirm their prejudices, justify a politician's bad behaviour by investing new importance to other aspects of their per-

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43 George A Akerlof, "The Economics of Illusion" (1989) 1:1 Economics & Politics 1 at 1.

44 Caplan, *Rational Voter Myth*, *supra* note 30 at 123.

45 See Caplan, *Rational Vote Myth*, *supra* note 30 at 137–38; Robbett & Matthews, *supra* note 1 at 107–08. See generally Schuessler, *supra* note 2; William H Riker & Peter C Ordeshook, "A Theory of the Calculus of Voting" (1968) 62:1 American Political Science Rev 25; Geoffrey Brennan & James Buchanan, "Voter Choice: Evaluating Political Alternatives" (1984) 28:2 American Behavorial Scientist 185 at 187.

46 See generally Geoffrey Brennan & Loren Lomasky, *Democracy and Decision: The Pure Theory of Electoral Preference* (Cambridge, UK: Cambridge University Press, 1993).

sonality or actions, and adopt absurd conspiracy theories that make the other side look bad or explain away uncomfortable facts.[47] In short, their political lives are a form of "mood affiliation."[48]

Professor Ilya Somin calls this behaviour enjoying "the psychic benefits of being a political 'fan.'"[49] Sports fans invest time gathering information and following their team, not because of any expectation that by doing so they are affecting the outcome of the season, but rather because they find it interesting and enjoy rooting for "their" team. Political fans similarly derive enjoyment from supporting their preferred candidates, parties, or ideologies, and from denigrating the other side.[50] They also benefit from the pleasure of having their pre-existing views validated and from associating with like-minded people with the same objectives.

This view of voting explains why, for example, opposition to immigration is not a function of actual exposure to immigration or labour market competition from immigrants, but rather general xenophobic attitudes toward immigrants.[51] These attitudes seem to produce, rather than derive from, beliefs about the costs and benefits of immigration and even the proportion of immigrants in a country or region.[52]

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47 A good example of this kind of behaviour is Evangelical Christians' shift on the importance of character once Trump became the standard-bearer of their preferred political party (see Michele F Margolis, "Who Wants to Make America Great Again? Understanding Evangelical Support for Donald Trump" (2020) 13:1 Politics & Religion 89). Another example is that Republicans are more likely to believe birtherism conspiracies and Democrats to believe 9/11 conspiracies (see J Eric Oliver & Thomas J Wood, "Conspiracy Theories and the Paranoid Style(s) of Mass Opinion" (2014) 58:4 American J Political Science 952 at 955, 964).

48 Tyler Cowen, "The Fallacy of Mood Affiliation" (31 March 2011), online (blog): *Marginal Revolution* <www.marginalrevolution.com> [perma.cc/F3E9-LV43]. For examples in political beliefs, see Steven M Smallpage, Adam M Enders & Joseph E Uscinski, "The Partisan Contours of Conspiracy Theory Beliefs" (2017) 4:4 Research & Politics 1 at 4.

49 Somin, *supra* note 32 at 94.

50 See Hedwig Lieback, "Truth-Telling and Trolls: Trolling, Political Rhetoric in the Twenty-First Century, and the Objectivity Norm" (2019) 12 aspeers 9; Brennan & Buchanan, *supra* note 45 at 186–87.

51 See Jens Hainmueller & Daniel J Hopkins, "Public Attitudes toward Immigration" (2014) 17 Annual Rev Political Science 225 at 227–29. See also Jens Hainmueller & Michael J Hiscox, "Attitudes toward Highly Skilled and Low-Skilled Immigration: Evidence from a Survey Experiment" (2010) 104:1 American Political Science Rev 61; Neil Malhotra, Yotam Margalit & Cecilia Hyunjung Mo, "Economic Explanations for Opposition to Immigration: Distinguishing between Prevalence and Conditional Impact" (2013) 57:2 American J Political Science 391 (finding weak support for the labour market hypothesis because most Americans are not economically threatened by immigrants).

52 See Caplan, *Rational Voter Myth*, *supra* note 30 at 38–39, 58–59 (for economic beliefs about immigration). See also Darrell M West, "The Costs and Benefits of Immigration"

This view of voting also explains why studies repeatedly find that the most knowledgeable voters tend to be the most biased in their interpretation of new information.[53] Bias in evaluating information increases with higher cognitive ability and stronger ideological views.[54] No matter where voters are on the spectrum, they prefer to talk politics with people who have similar opinions and receive news from sources that align with those views.[55] These are not the actions of people seeking truth, they are the actions of fans rationally pursuing their own peace of mind and sense of vindication. The entire dynamic is underwritten by the fact that "the market has a 'user fee' for irrationality, and democracy does not."[56]

This last statement may seem controversial because every voter obviously has a stake in the quality of government. Indeed, one of the most common assumptions about voting patterns is that voters often cast their votes to advance their own self-interest.[57] "They vote their pocketbook" is a phrase at least as old as the time when pocketbooks existed—and were referred to as such. For example, there is a popular belief that rich people vote in favour of lower taxes while poor people vote in favour of more generous social programmes.

Professor Bryan Caplan reviews an extensive political science literature on this hypothesis that voting is characterized by self-interest and concludes: "[P]olitical scientists have subjected the SIVH [self-interested voter hypothesis] to extensive and diverse empirical tests. Their results are impressively uniform: The SIVH fails."[58] He provides numerous ex-

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(2011) 126:3 Political Science Q 427 at 430; Daniel J Hopkins, John Sides & Jack Citrin, "The Muted Consequences of Correct Information about Immigration" (2018) 81:1 J Politics 315 at 315.

53 See Charles S Taber & Milton Lodge, "Motivated Skepticism in the Evaluation of Political Beliefs" (2006) 50:3 American J Political Science 755 at 767.

54 See Dan M Kahan, "Ideology, Motivated Reasoning, and Cognitive Reflection" (2013) 8:4 Judgment & Decision Making 407 at 416.

55 See Diana C Mutz, *Hearing the Other Side: Deliberate versus Participatory Democracy* (New York: Cambridge University Press, 2006) at 76–79; Alan S Gerber et al, "Disagreement and the Avoidance of Political Discussion: Aggregate Relationships and Differences across Personality Traits" (2012) 56:4 American J Political Science 849; Shanto Iyengar & Kyu S Hahn, "Red Media, Blue Media: Evidence of Ideological Selectivity in Media Use" (2009) 59:1 J Communication 19; Eric Lawrence, John Sides & Henry Farrell, "Self-Segregation or Deliberation? Blog Readership, Participation, and Polarization in American Politics" (2010) 8:1 Perspectives on Politics 141.

56 Caplan, *Rational Voter Myth*, *supra* note 30 at 134.

57 See Gary Gutting, "Is Voting Out of Self-Interest Wrong?" (31 March 2016), online (blog): *The New York Times Opinionator* <www.opinionator.blogs.nytimes.com> [perma.cc/L9MS-YHWE].

58 Caplan, *Rational Voter Myth*, *supra* note 30 at 149. See also Somin, *supra* note 32 at 68–70, nn 104–12 (for a discussion of the relevant literature).

amples from the literature. For example, research has found there is only a slight connection between a person's income and their ideology or political party affiliation.[59] Elderly Americans are not more likely to be supporters of Medicare than the young.[60] Males vulnerable to the draft support it at the same rates as other segments of the population.[61]

None of this should come as a surprise to even a moderately well-informed observer of American politics. Poorer parts of the country, particularly the rust belt, South-Eastern states, and parts of the Mid-West vote Republican.[62] One of the most famous books about this phenomenon

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59 See Andrew Gelman et al, "Rich State, Poor State, Red State, Blue State: What's the Matter with Connecticut?" (2007) 2:4 QJ Political Science 345; Andrew Gelman, "Economic Divisions and Political Polarization in Red and Blue America" (2011), online (pdf): *Columbia University Department of Statistics* <stat.columbia.edu> [perma.cc/4NVE-M7U6] ("[i]ncome is only weakly related to political preferences, and there are a fair number of rich Democrats and poor Republicans" at 4); Terry Nichols Clark & Christopher Graziul, "Why Rich States Aren't Republican", Book Review of *Red State, Blue State, Rich State, Poor State: Why Americans Vote the Way They Do* by Andrew Gelman et al (2008) 322:5902 *Science* 676; Jeff Manza & Clem Brooks, *Social Cleavages and Political Change: Voter Alignments and U.S. Party Coalitions* (Oxford, UK: Oxford University Press, 1999) at 49–84; Norman R Luttbeg & Michael D Martinez, "Demographic Differences in Opinion, 1956-1984" (1990) 3 Research in Micropolitics 83 at 87–88; Sheldon Kamieniecki, *Party Identification, Political Behaviour, and the American Electorate* (Westport, CT: Greenwood Press, 1985) at 66–70; Bryan Caplan, "Libertarianism Against Economism: How Economists Misunderstand Voters, and Why Libertarians Should Care" (2001) 5:4 Independent Rev 539 at 543. *Cf* "Wide Gender Gap, Growing Educational Divide in Voters' Party Identification" (20 March 2018), online: *Pew Research Center* <www.people-press.org> [perma.cc/P9MH-T2MJ] (finding a wide gap in party affiliation and educational attainment). See also "How Groups Voted in 2016" (8 November 2016), online: *Roper Center* <ropercenter.cornell.edu> [perma.cc/KD9V-FB6X] (for a breakdown of 2016 presidential voting by income).

60 See e.g. Leonie Huddy, Jeffrey M Jones & Richard E Chard, "Compassionate Politics: Support for Old-Age Programs among the Non-Elderly" (2001) 22:3 Political Psychology 443 at 444; Laurie A Rhodebeck, "The Politics of Greed? Political Preferences among the Elderly" (1993) 55:2 J Politics 342; David O Sears & Carolyn Funk, "Self-Interest in Americans' Political Opinions" in Jane J Mansbridge, ed, *Beyond Self-Interest* (Chicago: University of Chicago Press, 1990) 147. See also Michael Ponza et al, "The Guns of Autumn? Age Differences in Support for Income Transfers to the Young and Old" (1988) 52:4 Public Opinion Q 441 at 455.

61 See Sears & Funk, *supra* note 60. See generally Richard R Lau, Thad A Brown & David O Sears, "Self-Interest and Civilians' Attitudes Toward the Vietnam War" (1978) 42:4 Public Opinion Q 464. See also Douglas Kriner, Breanna Lechase & Rosella Cappella Zielinski, "Self-Interest, Partisanship, and the Conditional Influence of Taxation on Support for War in the USA" (2018) 35:1 Conflict Management & Peace Science 43 (finding in a related area that, "economic self-interest, alone, cannot explain the individual-level variation in reactions to war taxation" at 43).

62 See Gelman et al, *supra* note 59.

of voting against your economic interests is the plaintively titled, *What's the Matter with Kansas?*[63]

The answer, of course, is that nothing is uniquely wrong with Kansas. Voters don't actually automatically vote in their economic self-interest, and we already know why. The chance that their vote will actually have an impact on their economic interests is miniscule. However, they enjoy all the psychic benefits they will receive from voting in a way that flatters their self-image, reflects strongly held prejudices, advances their social standing, and causes the minimum intellectual discomfort. Their votes are entirely rational because the marginal impact of their vote is insignificant. There is literally nothing to be gained from sacrificing these private benefits. To repeat Caplan's apt phrase, voting does not exact a user fee for irrationality.[64]

The way voters process information is irrational even when their aims are entirely altruistic. For example, voters concerned about improving the employment prospects of blue-collar workers support tariffs despite the fact that tariffs create few jobs relative to their enormous costs.[65] In fact,

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63 Thomas Frank, *What's the Matter with Kansas? How Conservatives Won the Heart of America* (New York: Henry Holt & Company, 2004). A similar attitude can be found in Paul Krugman, *The Conscience of a Liberal* (New York: WW Norton & Company, 2007). See also Jeff Madrick "Why the Working Class Votes Against Its Economic Interests", *The New York Times* (31 July 2020), online: <www.nytimes.com> [perma.cc/754N-PDYS].

64 See the text accompanying note 30, *above*.

65 See e.g. Gary Clyde Hufbauer & Euijin Jung, "Steel Profits Gain, but Steel Users Pay, under Trump's Protectionism" (20 December 2018), online (blog): *Peterson Institute for International Economics* <www.piie.com> [perma.cc/RV3H-JYAJ] (Trump's 2018 steel tariffs cost consumers $650,000 per job created); Aaron Flaaen & Justin Pierce, "Disentangling the Effects of the 2018-2019 Tariffs on a Globally Connected US Manufacturing Sector" in *Finance and Economic Discussions Series 2019-086* (Washington, DC: Board of Governors of the Federal Reserve System, 2019), online (pdf): *Federal Reserve* <federalreserve.gov> [perma.cc/XUV8-EFD2] (2018 steel tariffs led to a net loss of manufacturing jobs); Gary Clyde Hufbauer & Sean Lowry, "US Tire Tariffs: Saving Few Jobs at High Cost" (April 2012) at 11, online (pdf): *Peterson Institute for International Economics* <www.piie.com> [perma.cc/CBJ8-DGXH] (Obama's tire tariff cost $900,000 per job); Bonnie J Noreen et al, "Steel: Monitoring Developments in the Domestic Industry (Investigation No TA-204-9)" in *Steel-Consuming Industries: Competitive Conditions With Respect to Steel Safeguard Measures (Investigation No 332-452)*, vol III (Washington, DC: US International Trade Commission, 2003) at viii, online (pdf): *USITC* <www.usitc.gov> [perma.cc/5FMU-XFS2] (Bush's 2002 steel tariffs caused overall employment declines with a net loss to the economy). See also Joseph Francois & Laura M Baughman, "The Unintended Consequences of the U.S. Steel Import Tariffs: A Quantification of the Impact During 2002" (4 February 2003), online (pdf): *Trade Partnership Worldwide* <www.tradepartnership.com> [perma.cc/M2EK-MLK4].

they can produce net job losses.[66] Similarly, voters concerned about the environment often support high profile campaigns against horizontal energy transmission projects that interfere with the adoption of renewable energy and force energy companies to adopt dirtier methods of moving their products.[67] The adherents of the QAnon conspiracy came to their 2020 voting decisions in a way that can scarcely be called rational, but they were partially motivated by sincere concern for other people (especially children).[68]

It may be objected at this point that we are failing to give adequate weight to the rational self-interest of shareholders. This is a particularly salient objection in an article about the corporate franchise, because political voters become citizens mostly as a result of an accident of birth, and even if they immigrate consciously, they usually do so for considerations unrelated to their enthusiasm for the franchise.[69] Shareholders, in contrast, choose to become shareholders in order to make money and thus their relationship to a corporation is suffused with self-interest in a way not true for the average citizen of a democracy.

To determine whether the literature around political voting is relevant to corporate law, it will be necessary to examine the empirical evidence around shareholder voting.

IV. The Empirical Literature around Shareholder Voting

A. The Value Investors Place on Their Vote

There is plenty of evidence readily available that shareholders do not put much value on the voting rights attached to their shares. Even after all of the institutional, market, and normative changes around shareholder voting that have occurred over the past three decades, shareholders are remarkably passive in their voting behaviour. The overwhelming fact of shareholder voting is that it mostly leaves managerial and board arrangements intact. In a typical year, for example, only eight out of

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66 See Francois & Baughman, *supra* note 65.

67 See James W Coleman, "Pipelines & Power-Lines: Building the Energy Transport Future" (2019) 80:2 Ohio St LJ 264.

68 See Kevin Roose, "What Is QAnon, the Viral Pro-Trump Conspiracy Theory?", *The New York Times* (3 September 2021), online: <www.nytimes.com> [perma.cc/4ANX-EDD6].

69 See generally Carmen R Valdez, Jessa Lewis Valentine & Brian Padilla, "'Why We Stay': Immigrants' Motivations for Remaining in Communities Impacted by Anti-Immigration Policy" (2013) 19:3 Cultural Diversity & Ethnic Minority Psychology 279; Filiz Garip, "Discovering Diverse Mechanisms of Migration: The Mexico-US Stream 1970-2000" (2012) 38:3 Population Development Rev 393.

31,000 American directors failed to receive a majority of votes cast by shareholders.[70] Reviewing the data, one academic suggests, "while shareholders may be willing to withhold votes when such an action is merely symbolic, such willingness may wane when the action actually has an impact on a directors' position."[71]

The well-known history of the rise of shareholder voting power since the 1970s supports this picture of disengagement. At every point, the expansion of the franchise was primarily driven by stock exchanges,[72] regulators of investment funds,[73] securities commissions,[74] proxy advisors[75] and academics.[76] Shareholders, themselves, have mostly been bystanders. It took strong action on the part of U.S. regulators to get institutional investors to take their voting power seriously in the first place, and, even

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70 See Lisa M Fairfax, "The Future of Shareholder Democracy" (2009) 84:4 Ind LJ 1259 at 1294. See generally Paul E Fischer et al, "Investor Perceptions of Board Performance: Evidence from Uncontested Director Elections" (2009) 48:2 J Accounting & Economics 172.

71 Fairfax, *supra* note 70 at 1294.

72 The rules introduced include approvals for various types of transactions and executive compensation as well as expansions of the effect of shareholder votes (see e.g. *OSC Notice of Approval – Amendments to Part IV of the TSX Company Manual*, OSC Notice, (2014) 37 OSCB 1769 at 1769 [*TSX Company Manual Amendments*]).

73 See Avon Letter, *supra* note 16. See also the various instruments in: Bernard S Sharfman, "The Risks and Rewards of Shareholder Voting" (2020) 73:4 SMU L Rev 849 [Sharfman, "Risks and Rewards"].

74 See e.g. *SEC Proxy Voting Rule*, *supra* note 16; Center On Executive Compensation, "A Call for Change in the Proxy Advisory Industry Status Quo" (January 2011) at 17–18, online (pdf): *The Wall Street Journal* <www.wsj.com> [perma.cc/4DA8-H558]. See also *Regulation of Communications Among Shareholders*, 57 Fed Reg 48276 (1992), SEC Release No 34-31326; *Self-Regulatory Organizations*, (2009) SEC Release No 34-60215, File No SR-NYSE-2006-92 (discussing the amendment eliminating broker discretionary voting for the election of directors); *Disclosure of Proxy Voting Policies and Proxy Voting Records by Registered Management Investment Companies*, 17 CFR § 239, 249, 270, 274 (2003), SEC Release Nos 33-8188, 34-47304, IC-25922, File No S7-36-02.

75 See Tingle, "Bad Company", *supra* note 17 at 732. See e.g. "United States: Proxy Voting Guidelines Benchmark Policy Recommendations" (19 November 2010) at 17–20, online (pdf): *ISS* <www.issgovernance.com> [perma.cc/3BMA-QCP2] (setting out strong support for various measures that would increase shareholder voting power).

76 See Bebchuk, "Shareholder Power", *supra* note 18. See also Black, "Investor Monitoring", *supra* note 18; Black, "Agents Watching Agents", *supra* note 18 at 829–30; Black, "Institutional Voice", *supra* note 18; Roe, "American Corporate Finance", *supra* note 18; Ronald J Gilson & Reinier Kraakman, "Reinventing the Outside Director: An Agenda for Institutional Investors" (1991) 43:4 Stan L Rev 863; Coffee, "Liquidity versus Control", *supra* note 21; "Policies" (last visited 20 July 2020), online: *Canadian Coalition for Good Governance* <ccgg.ca/policies/> [perma.cc/TN94-WHRB] (think tanks like CCGG routinely take positions on dual class shares, majority voting, proxy access, say on pay, etc. that would have the effect of dramatically enhancing shareholder voting power).

then, most of them immediately delegated a great deal of the work around voting to proxy advisory firms.[77]

These common-sense observations are supported by the research on how voting rights are valued in the market. Looking at companies with dual-class shares, Luigi Zingales finds that the premiums for high-voting stock in America are low and often indistinguishable from zero, except in cases where control of the company is up for grabs.[78] He notes that the "value of a vote is determined by the expected additional payments vote holders will receive if there is a control contest ... [T]he size of this differential payment is a function of the private benefits obtainable from controlling a company."[79] So, control over a company in circumstances where you can extract rents is valuable, but anything less than that is valued by the market as effectively worthless.

Another way of looking at the question of the value given to voting rights by public company investors is to examine the stock lending market. This market generally serves short sellers, but it also allows an investor to borrow stock for the purpose of utilizing the voting rights attached to it. A team of researchers found that the volume of lending activity in a company's shares increases to a level about twenty-five per cent above normal on the record date for annual shareholder meetings, quickly returning to its usual levels afterwards.[80] There is no change in the costs associated with borrowing votes in this way. In fact, the costs of doing so are almost trivially low and do not increase on the record date when voting rights can be exercised.[81]

Recently, two different articles have attempted to determine the market value of voting rights by using bonds and options to replicate the cash flows associated with owning a share in a company.[82] This "contingent

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77 See Tingle, "Agency Cost", *supra* note 22 at 742–46.

78 See Luigi Zingales, "What Determines the Value of Corporate Votes?" (1995) 110:4 QJ Economics 1047.

79 *Ibid* at 1071. There is a premium for high-voting shares in various countries which permit the large-scale extraction of private benefits by the controlling shareholder (see e.g. Luigi Zingales, "The Value of the Voting Right: A Study of the Milan Stock Exchange Experience" (1994) 7:1 Rev Financial Studies 125).

80 See Susan EK Christoffersen et al, "Vote Trading and Information Aggregation" (2007) 62:6 J Finance 2897 at 2911. See also Edwin Hu, Joshua Mitts & Haley Sylvester, "The Index-Fund Dilemma: An Empirical Study of the Lending-Voting Tradeoff" (2020) Columbia Law School Working Paper No 647 (showing a preference on the part of some types of institutional investors for lending stock rather than voting it).

81 See Christoffersen et al, *supra* note 80 at 2912–14.

82 See Avner Kalay & Shagun Pant, "The Market Value of the Vote: A Contingent Claims Approach" (September 2009), online: *SSRN* <ssrn.com> [perma.cc/2X83-BVYV];

claims" approach uses this method to separate out a share's economic value from its voting value. The two articles find voting rights form very little of the value of a share. Their estimates range from 1.23 to 1.64 per cent of a share's value.[83]

These various lines of research explore how shareholders value their voting rights. What the research suggests is that shareholders value their vote about as much as citizens in a democracy: not much. This opens the possibility (but only the possibility at this point) that shareholders behave like ordinary political voters, remaining rationally ignorant and exclusively concerned with receiving certain private psychic and social benefits from their voting behaviour. To evaluate whether we see the same kind of irrationality visible in popular elections, we will have to look at how shareholders actually exercise their franchise.

B. Ordinary Uncontested Director Elections

The "just vote no" campaigns that generate abnormal numbers of "withhold" votes in an uncontested election only weakly reflect a corporation's economic performance.[84] Poor economic performance predicts fewer votes in favour of a director, but a standard deviation in EBITDA-to-Assets ratio relative to industry peers results in an insignificant 0.37 per cent decrease in support.[85] Several studies find a similar result.[86] The evidence is even mixed about whether disappointing stock market returns produce withhold campaigns.[87] As one study of the literature notes, "[c]ompany performance has only a limited impact on the outcome of a director election, with results ranging from a statistically but not economically significant relationship to no relationship at all."[88] There is thus lit-

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Oguzhan Karakas, "Another Option for Determining the Value of Corporate Votes" (13 October 2009), online: *SSRN* <ssrn.com> [perma.cc/4MDB-YSPA].

83 See Kalay & Pant, *supra* note 82 at 25; Karakas, *supra* note 82 at 15.

84 See Jie Cai, Jacqueline L Garner & Ralph A Walkling, "Electing Directors" (2009) 64:5 J Finance 2389 at 2416–17 [Cai, Garner & Walkling, "Electing Directors"].

85 See *ibid* at 2399.

86 See e.g. Diane Del Guercio, Laura Seery & Tracie Woidtke, "Do Boards Pay Attention When Institutional Investor Activists 'Just Vote No'?" (2008) 90:1 J Financial Economics 84; Randall S Thomas & Patrick C Tricker, "Shareholder Voting in Proxy Contests for Corporate Control, Uncontested Director Elections and Management Proposals: A Review of the Empirical Literature" (2017) 70:1 Okla L Rev 9.

87 See Cai, Garner & Walkling, "Electing Directors", *supra* note 84 at 2416 (finding no significant relationship between stock returns and voting outcomes). *Contra* Del Guercio, Seery & Woidtke, *supra* note 86 at 87 (finding negative market-adjusted returns in the prior year).

88 Thomas & Tricker, *supra* note 86 at 70.

tle support for the proposition (often assumed in discussions about shareholder voting) that voting decisions are driven by bottom-line corporate economic performance.

What drives voting behaviour in uncontested elections? To state it simply: corporate governance. This is not "corporate governance" in the older and everyday sense of effectively leading the company to commercial success: it is the modern conception of "corporate governance" as adherence to a list of "best practices."[89] The role of these corporate governance best practices in shareholder voting will be discussed in detail later in the article, as these practices arise repeatedly in research around voting. For now, it is only necessary to introduce the idea that the empirical literature examining these corporate governance best practices overwhelmingly finds that they have either no, or a negative, impact on corporate performance.[90]

There is a strong association between an Institutional Shareholder Services (ISS) withhold recommendation and the percentage of shares voted in favour of withhold.[91] Some of this is undoubtedly causation, some may merely be correlation.[92] For our purposes it suggests that, at least, the rationale given by ISS for a withhold recommendation likely reflects the voting intentions of other institutional shareholders. Given the rarity of withhold votes, it seems unlikely that in a particular year, a body of shareholders engages in the exceptional process of dissenting from a management proxy for completely unrelated reasons. This allows us to explore the motivation behind institutional shareholder voting decisions.

The kind of corporate governance best practices that seem to predict voting behaviour are familiar to anyone associated with corporate boardrooms over the past two decades.[93] One study looking at the votes received by S&P 500 companies over the period 2003–2010 found more than two-thirds of the withhold votes targeted against an individual director arose

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89 For a discussion of the differences between these conceptions of corporate governance, see Bryce C Tingle, "What is Corporate Governance? Can We Measure It? Can Investment Fiduciaries Rely on it?" (2018) 43:2 Queen's LJ 223 [Tingle, "Can We Measure It"].

90 See the text accompanying notes 176–81, *below*. See also *ibid*.

91 See Stephen Choi, Jill Fisch & Marcel Kahan, "Who Calls the Shots: How Mutual Funds Vote on Director Elections" (2013) 3:1 Harv Bus L Rev 35. See also Tingle, "Bad Company", *supra* note 17 at 718–19.

92 See Tingle, "Bad Company", *supra* note 17 at 717–18.

93 See e.g. Cai, Garner & Walkling, "Electing Directors", *supra* note 84 at 2416–17 (finding lower ratings on various indices of corporate governance best practices predicted fewer "for" votes for directors).

from concerns about their independence.[94] The remaining third reflected concerns over the director's "busyness" and meeting attendance record.[95] Where an entire board committee was targeted, it was usually a function of concerns with executive pay.[96] When the board as a whole received an abnormal number of withhold votes, it was due to a lack of responsiveness to shareholder proposals receiving a majority vote (such as declassifying the board) or the board's decision to adopt a poison pill.[97]

It is telling what does not appear to drive voting decisions in relation to directors: competence, experience, contributions to the board, and the underlying economic performance of the business. As one team of researchers observes, shareholders vote for directors as if financial performance, director performance, and firm governance matter, but the impact of these factors on actual votes is trivial.[98]

Research suggests that boards are responsive to the underlying concerns of an abnormal withhold vote. For example, the chance that a board will declassify itself increases from 4.9 to 36.9 per cent subsequent to a withhold recommendation from proxy advisors where this was a stated rationale.[99] In harmony with the vast literature about the irrelevance of these best practices for corporate performance, researchers looking at the S&P 500 companies between 2003–2010 concluded:

> [W]e compare the subsequent performance of responsive and unresponsive firms, but find no evidence of differences, even in the most severe cases. One explanation is that the items on which proxy advisors and voting shareholders focus have little effect on firm value, consistent with the claim that activists misdirect their efforts towards 'symbolic' governance issues.[100]

In other words, shareholder voting in uncontested director elections is irrational.

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94 See Yonca Ertimur, Fabrizio Ferri & David Oesch, "Understanding Uncontested Director Elections" (2018) 64:7 Management Science 3400 at 3400–01 [Ertimur, Ferri & Oesch, "Uncontested Director Elections"].

95 *Ibid* at 3401. See also Marcel Kahan & Edward Rock, "The Insignificance of Proxy Access" (2011) 97:6 Va L Rev 1347 at 1420 [Kahan & Rock, "Proxy Access"].

96 See Ertimur, Ferri & Oesch, "Uncontested Director Elections", *supra* note 94 at 3401.

97 See *ibid*. See also Cai, Garner & Walkling, "Electing Directors", *supra* note 84 at 2417 (finding similar concerns behind abnormally low "for" votes).

98 See Cai, Garner & Walkling, "Electing Directors", *supra* note 84 at 2391.

99 See Ertimur, Ferri & Oesch, "Uncontested Director Elections", *supra* note 94 at 3401. See also Kahan & Rock, "Proxy Access", *supra* note 95 ("often the main aim of the withhold recommendation is to induce corporate changes, rather than to remove the director at issue from the board" at 1421).

100 Ertimur, Ferri & Oesch, "Uncontested Director Elections", *supra* note 94 at 3402.

This irrationality presents in other ways. For example, audit committee members are generally held responsible for accounting restatements, but not for weaknesses in the firm's internal controls.[101] In contrast, representatives of management on the board are held responsible for the latter, but not the former. This demarcation of responsibility is mysterious, as audit committee charters usually contemplate responsibility for both matters.[102] As I have argued elsewhere, it is unlikely that the outsiders that now constitute audit committees could discover problems of either type given their dependence on management and auditors for the information needed to do their jobs.[103] That is what empirical evidence about outside directors on audit committees suggests in any event.[104] It seems arbitrary to hold audit committee members accountable for one failure, but not the other. However, the arbitrary rule that management is responsible for control failures while the audit committee is responsible for restatements is useful in giving shareholders the impression that responsibility and punishment are discriminatorily allocated and administered. The truth about actual competence and failure is irrelevant.

Directors of companies caught up in the last decade's option backdating scandal were significantly more likely to be subjected to withhold votes, even though the actual backdating activities had occurred ten years before, and the directors had joined the board after the backdating had occurred.[105] It is true that directors who had been on the board at the time of the backdating had higher withhold votes cast against them, but the difference was a relatively insignificant additional 3.8 per cent of withheld votes.[106] It is hard to see how penalizing individuals for something done years before they joined the board is rational. It does, however, allow a shareholder to express anger, demonstrate virtue, align themselves with a community, and, in short, behave exactly in the way researchers have come to expect of the average political voter. Indeed, the absence of real shareholder concern with the substance of the backdating scandal—the failure of directors to act with integrity—is clear given that directors

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101 See Thomas & Tricker, *supra* note 86 at 53.

102 See e.g. Maureen Bujno et al, "Sample Audit Committee Charter" (April 2018), online (pdf): *Deloitte* <www2.deloitte.com> [perma.cc/4Z2B-VJDN]; "Audit Committee Charter" (2019), online (pdf): *BCE* <www.bce.ca> [perma.cc/9LZM-TKEC].

103 See Bryce C Tingle, "What Do We Really Know About Corporate Governance? A Review of the Empirical Research since 2000" (2017) 59:3 Can Bus LJ 292 at 302–06 [Tingle, "Corporate Governance"].

104 See *ibid.*

105 See Yonca Ertimur, Fabrizio Ferri & David A Maber, "Reputation Penalties for Poor Monitoring of Executive Pay: Evidence from Option Backdating" (2012) 104:1 J Financial Economics 118 at 123.

106 See *ibid.*

who had overseen backdating at one firm did not receive statistically significantly more withhold votes in relation to the board positions they held at other firms.[107]

C. Majority Voting

According to the Ontario Securities Commission, majority voting policies were introduced because they would "improve corporate governance standards in Canada by providing a meaningful way for security holders to hold individual directors accountable."[108] The way majority voting does this is by simultaneously making the shareholder vote more powerful (as directors can more easily be voted out of office) and less expensive (as a rival slate of directors and accompanying arguments in their favour is no longer required). It may be possible that this combination of greater power and lower costs changes the incentives which lead to the uninformed and irrational shareholder voting that exists under plurality voting regimes.

As usual, most of the research on this topic uses American data. Majority voting has been introduced into the United States by way of shareholder pressure. In 2005, less than ten per cent of the S&P 100 had majority voting policies; by 2014 almost ninety per cent of the S&P 500 had some sort of majority voting.[109] At the same time less than twenty per cent of small-cap companies had adopted majority voting.[110] In keeping with the picture of shareholder disengagement on voting discussed thus far, labour union pension funds (which hold less than 0.01 per cent of America's companies' shares) sponsored over eighty per cent of the majority voting proposals.[111] Given what we know about the incentives of managers of labour union pension funds, it seems very possible that the primary motive of the fund managers in this area was not to improve firms' economic outcomes.[112] Indeed, the early adopters of majority voting poli-

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[107] See *ibid* at 139–41.

[108] *TSX Company Manual Amendments*, *supra* note 72 at 1769. See also Stephen J Choi et al, "Does Majority Voting Improve Board Accountability" (2016) 83:3 U Chicago L Rev 1119 at 1127.

[109] See Choi et al, *supra* note 108 at 1121.

[110] See *ibid* at 1127.

[111] See Jay Cai, Jacqueline L Garner & Ralph A Walkling, "A Paper Tiger? An Empirical Analysis of Majority Voting" (2013) 21 J Corporate Finance 119 at 122–23 [Cai, Garner & Walkling, "Paper Tiger"].

[112] See Romano, "Less is More", *supra* note 11 at 231. See e.g. Paul Jarley & Cheryl L Maranto, "Union Corporate Campaigns: An Assessment" (1990) 43:5 Industrial & Labor Relations Rev 505 at 506 (discussing tactics such as threats to withdraw pension fund assets or stockholder actions in the pursuit of traditional union goals); Roberta Roma-

cies cannot be distinguished from their peers in terms of economic performance.[113]

Even more telling is that the companies initially targeted by majority voting proposals were the "most shareholder responsive" measured by their previous withhold vote totals.[114] Some scholars have suggested this might have been the result of a careful strategy by shareholder activists to start with the most responsive companies as a way of putting pressure on the more recalcitrant ones.[115] But it is also possible that activists are motivated by the private benefits that victories of this sort afford, so they choose the weakest opponents.

The facts which support this latter explanation are: (1) there is considerable evidence that labour fund managers primarily engage in activist campaigns to please the union officials who hire them;[116] (2) there has been a notable lack of pressure on smaller, less visible companies to adopt majority voting, which makes sense if the goal is high-profile victories, but does not make sense if the goal is a more robust shareholder franchise;[117] (3) there is little evidence that shareholders have applied pressure on companies going public to adopt majority voting (IPOs being a time when investors are considered to possess considerable power over the corporate contract);[118] (4) as discussed, there is no evidence that either the early or late companies targeted for adoption had corporate governance issues; and (5) majority voting is actually more likely to be adopted

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no, "Public Pension Fund Activism in Corporate Governance Reconsidered" (1993) 93:4 Colum L Rev 795 at 801–19, 822 (discussing political interests of, benefits to, and pressures on, public pension fund managers) [Romano, "Public Pension Fund Activism"]; Stewart J Schwab & Randall S Thomas, "Realigning Corporate Governance: Shareholder Activism by Labor Unions" (1998) 96:4 Mich L Rev 1018 at 1032–34 (discussing labour unions' corporate campaigns). See also Ashwini K Agrawal, "Corporate Governance Objectives of Labor Union Shareholders: Evidence from Proxy Voting" (2012) 25:1 Rev Financial Studies 187.

113 See Choi et al, *supra* note 108 at 1146.

114 *Ibid* at 1148.

115 See *ibid* at 1146–48.

116 See sources in note 112, *above*.

117 See Marcel Kahan & Edward Rock, "Symbolic Corporate Governance Politics" (2014) 94:6 BUL Rev 1997 at 2041 [Kahan & Rock, "Symbolic Corporate Governance"]; Choi et al, *supra* note 108 at 1127. See also Christian Pieter Hoffman, Peggy Simic Bronn & Christian Fieseler, "A Good Reputation: Protection Against Shareholder Activism" (2016) 19:1 Corporate Reputation Rev 35.

118 See Michael Klausner, "Fact and Fiction in Corporate Law and Governance" (2013) 65:6 Stan L Rev 1325 ("[w]hile publicly held firms were adopting majority voting, essentially no companies going public were committing to majority voting" at 1362).

by companies if they are incorporated in jurisdictions that do *not* require a general vote of the shareholders to do so.[119]

The most compelling evidence that activism around majority voting is more about self-expression than improving corporate performance is that directors of companies with majority voting are significantly less likely to be voted against. The difference is huge: the likelihood that a director of a company with plurality voting fails to receive a majority "for" vote is nineteen times higher than if he or she is subject to a majority voting policy.[120] So, at the very moment when voting against a director ceases to be symbolic and becomes effective, the shareholders stop voting against directors. The gulf between voting behaviour between the two regimes persists even when one looks at the "non-shareholder responsive" late adopters of majority voting.[121] Even the percentage of shares cast in director elections declines slightly after adopting majority voting, a result that seems incompatible with assumptions that shareholders are motivated to substantively impact corporate performance.[122]

For their part, the people with the deepest knowledge about individual directors and the value that those directors contribute to board activities, treat shareholder withhold votes with extreme skepticism. Because majority voting policies usually permit the board to refuse to accept a director's resignation when she receives a majority of withhold votes, we can evaluate the board's view of the quality of these votes from its behaviour. Where they have the power, boards tend to reject the director's resignation and, in many cases, the director is approved by the shareholders the next year.[123]

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[119] See Choi et al, *supra* note 108 at 1145.

[120] See *ibid* at 1122.

[121] *Ibid* at 1150.

[122] See Cai, Garner & Walkling, "Paper Tiger", *supra* note 111 at 131–32.

[123] See *ibid* at 133 (of the twenty-two directors in their sample who received majority withheld votes, nineteen kept their seats); Choi et al, *supra* note 108 at 1122 (of the eight directors in their sample, only three left the board). See also Bo Becker & Guhan Subramanian, "Improving Director Elections" (2013) 3:1 Harvard Bus L Rev 1 at 13–14; Kimberly Gladman, Agnes Grunfeld & Michelle Lamb, "The Election of Corporate Directors: What Happens When Shareholders Withhold a Majority of Votes from Director Nominees" (August 2012) at 2, online (pdf): *IIRC Institute* [perma.cc/R6AW-B8ZL] (finding only five per cent of the 175 directors who failed to obtain a majority of "for" votes left the board); Kahan & Rock, "Symbolic Corporate Governance", *supra* note 117 at 2012 (when the board addresses whatever corporate governance failing caused the vote to go against a director, the next year shareholders re-elect the director with a clear majority).

The failure of boards to respond to the shareholders' vote is usually seen as evidence of unaccountable self-interest and a scandal.[124] It is just as likely that it reflects superior knowledge about the targeted director's contributions to board processes. As we have seen, directors are targeted largely due to decisions of the board as a whole, such as those relating to executive compensation, or the adoption of corporate governance best practices unlikely to improve corporate performance. Almost the only area where directors are targeted for their own behaviour is failing to attend a certain percentage of board meetings.[125] In an era of significant informal and year-round communication amongst directors and managers, formal meeting attendance is a very crude measurement of engagement and value creation. Thus, the most common reasons for a majority withhold vote are likely arbitrary and the votes themselves cast in ignorance of the actual role played by the director in question. Similarly to plurality voting, the empirical evidence about voting patterns under a system of majority voting suggests that "rather than a channel to remove specific directors, director elections [under majority voting] are viewed by shareholders as a means to obtain specific governance changes."[126]

It seems unlikely that the same boards which voluntarily adopted majority voting policies in the first place,[127] de-staggered themselves,[128] created super-majorities of independent directors,[129] and began to compen-

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[124] See e.g. William K Sjostrom Jr & Young Sang Kim, "Majority Voting for the Election Directors" (2007) 40:2 Conn L Rev 459 (referring to the lack of market reaction to the adoption of majority voting policies, indicating that these policies were "smoke and mirrors" because directors remained in charge of whether the rejected board nominee remained).

[125] See Choi, Fisch & Kahan, "Director Elections", *supra* note 16 at 661–62, 671–73.

[126] Yonca Ertimur, Fabrizio Ferri & David Oesch, "Does the Director Election System Matter? Evidence from Majority Voting" (2015) 20:1 Rev Accounting Studies 1 at 5 [Ertimur, Ferri & Oesch, "Director Election System"].

[127] See Choi et al, *supra* note 112 ("[t]he evidence is consistent with the notion that early adopters adopt majority voting voluntarily because they believe that it reflects the principles of shareholder-friendly governance to which they already subscribe, and not due to outside pressure" at 1147).

[128] See Martha Carter, "The Evolution of Active Ownership" in Steven A Rosenblum, Karessa L Cain & Sabastian V Niles, eds, *NYSE: Corporate Governance Guide* (London, UK: White Page, 2014) 20 ("[a]s a result, management-proposed destagger charter changes on ballots to date this season now outnumber shareholder resolutions on the topic by a margin of 71 to 15" at 24); Demoni Newman, "Toward Democratic Governance: Adoption of Majority Voting and Declassified Elections at American Firms" (Undergraduate Thesis, Stanford University, 2013) [unpublished].

[129] See "2019 U.S. Spencer Stuart Board Index" (2019), online (pdf): *Spencer Stuart* <www.spencerstuart.com> [perma.cc/3YPS-EPSH].

sate their executives in the ways promoted by shareholder advocates,[130] suddenly decided to engage in dismissive self-dealing. It seems at least as likely that boards retaining directors who failed to obtain majority support are just trying to do their best to advance the interests of the company, notwithstanding a shareholder vote they regard as a mistake.

The economic effects following the adoption of majority voting are not well studied. There are three studies that look at the stock price reaction to the announcement that firms were adopting majority voting policies. One found a positive abnormal price return,[131] and two found no statistically significant price movement.[132] Event studies are not particularly helpful when evaluating corporate governance events.[133] This is because news about most governance events is often anticipated by the market before it is officially announced. Moreover, it is rare that the adoption of some governance structure is announced at a time when no other announcements or conflating events occur (this is particularly the case when the announcement is about the results of a shareholder meeting). Similarly, it is rare that a major governance change is not part of some larger corporate transition, and many announcements (such as 13D announcements) are invariably associated with some kind of market reaction as speculators acquire shares in the hope something further will occur.[134]

The most useful empirical evidence illustrates the longer-term effects on corporate performance. There is only one study that looks past the initial announcement and it finds that majority voting is associated with worse firm performance relative to matched firms over the year following its adoption.[135] This underperformance can be seen in several areas including return on assets and market adjusted stock returns.[136] It is hard to know what to make of these results, as one year seems too short to see the effects of a change in corporate governance structures. So, perhaps the only conclusion that can be drawn is that the empirical research on

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130 See Bryce C Tingle, "Framed! The Failure of Traditional Agency Cost Explanations for Executive Pay Practices" (2017) 54:4 Alta L Rev 899 [Tingle, "Framed!"].

131 See Ertimur, Ferri & Oesch, "Director Election System", *supra* note 126 at 6–16.

132 See Sjostrom & Kim, *supra* note 124 at 493–94; Cai, Garner & Walkling, "Paper Tiger", *supra* note 111 at 129.

133 See Tingle, "Two Stories", *supra* note 22 at 82.

134 See *ibid*; John C Coffee Jr et al, "Activist Directors and Agency Costs: What Happens When an Activist Director Goes on the Board" (2019) 104:2 Cornell L Rev 381 at 382–83 (discussing the way the appointment of an activist investor to a board produces price gains regardless of any subsequent event, apparently as a result of the dissemination of non-public information to certain market actors).

135 See Cai, Garner & Walking, "Paper Tiger", *supra* note 111 at 132.

136 See *ibid*.

the subject (published in 2013) has not noticeably impacted shareholder enthusiasm for majority voting, and this might be the most telling fact of all.

Indeed, there is some evidence that shareholders themselves understand that majority voting provides little economic benefit. Approximately ninety per cent of companies going public in America have plurality voting for uncontested director elections.[137] An IPO is a time when companies are under pressure to maximize their value, both because it marks the moment powerful private investors exit, and because the shares sold often make it an unusually dilutive transaction for those shareholders who remain. Companies going public are not part of any index, do not have an established track record, and are frequently not yet profitable.[138] They must work unusually hard to attract investors. There are a lot of reasons why we might expect companies and investors to push for majority voting if it was accretive. Instead, we find the opposite. A study discussing majority voting structures observes, "the portfolio managers who buy shares in the IPO are less concerned with the hot-button governance issues ... than are their colleagues who later have responsibility for voting those shares."[139] This gulf between the asset managers who make economic decisions and those that make voting decisions is suggestive of divergent objectives.[140]

D. Voting in Contested Director Elections

Contested director elections are usually fought on the basis of the quality of corporate governance at the targeted firm. As Carl Icahn described the reason for his activism:

> Too many companies in this country are terribly run and there's no system in place to hold the chief executives and boards of these inadequately managed companies accountable ... Our current system of corporate governance protects mediocre chief executives and

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137 See Richard J Sandler & Joseph A Hall, "Corporate Governance Practices in US Initial Public Offerings" (April 2014) at 2, online (pdf): *The Conference Board* <www.davispolk.com> [perma.cc/Z7HH-WPWU].

138 See Xiaohui Gao, Jay R Ritter & Zhongyan Zhu, "Where Have All the IPOs Gone?" (2013) 48:6 J Financial & Quantitative Analysis 1663 at 1665.

139 Sandler & Hall, *supra* note 137 at 2.

140 See Charles M Nathan, "The Parallel Universes of Institutional Investing and Institutional Voting" (6 April 2010), online (pdf): *The Harvard Law School Forum on Corporate Governance* <corpgov.law.harvard.edu> [perma.cc/TNX5-4LMV].

> boards that are mismanaging companies and this must be changed.[141]

The majority of communications in a proxy campaign explicitly reference the quality of corporate governance, even when there is also a clear disagreement on economic strategy at the heart of the campaign.

In a typical proxy campaign, most of the claims made by the insurgents concern allegations of poor corporate performance, bad governance practices, conflicts of interest, insider trading, overly-generous executive compensation, and problems in the quality and experience of individual directors.[142] The arguments from the incumbents are similarly focused on repudiating the allegations, describing governance failures on the other side (such as "golden leash" payments), and criticizing the quality, track record, and independence of the candidates making up the dissident slate.[143] It is this focus on corporate governance, the most visible aspect of proxy contests, that caused *The Economist* to famously refer to activist shareholders as "Capitalism's Unlikely Heroes."[144] Similarly, academics tend to have a favourable view toward activism because of its role in generating "superior corporate governance."[145] In a much-cited recent journal article, professors Ronald Gilson and Jeffrey Gordon argue, "[a]s governance intermediaries or governance arbitrageurs, activist shareholders can, in the right circumstances, serve to reduce the market's undervaluation of governance rights to the advantage of all shareholders."[146]

The surprising thing, then, about contested director elections is that when researchers study them, the elections do not appear to have any-

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141 Katherine Rushton, "Carl Icahn Attacks Companies That Protect 'Unfit' Chief Executives", *The Telegraph* (12 August 2014), online: <www.telegraph.co.uk> [perma.cc/BQP4-7B4G].

142 See e.g. Barry Critchley, "Proxy Fights Get Started: Raging River Wants Change at Taseko Mines", *Financial Post* (20 January 2016), online: <business.financialpost.com> [perma.cc/P7MC-VX4G]; Paul Rose & Bernard S Sharfman, "Shareholder Activism as a Corrective Mechanism in Corporate Governance" (2014) 2014:5 BYU L Rev 1015 at 1018.

143 See e.g. Taseko Mines Limited, "Notice of Special Meeting of Holders of Common Shares Together with Management Information Circular" (28 March 2016) at 3, online (pdf): *SEDAR* <www.sedar.com> [perma.cc/N4GH-2PE3].

144 "Shareholder Activism: Capitalism's Unlikely Heroes", *The Economist* (5 February 2015), online: <www.economist.com> [perma.cc/XC46-JPJ5].

145 Joel Slawotsky, "The Virtues of Shareholder Value Driven Activism: Avoiding Governance Pitfalls" (2016) 12:3 Hastings Bus LJ 521 at 527; Coffee et al, *supra* note 134 ("most of the academic literature on hedge fund activism tends to reflect an optimistic view under which activists are seen as desirable agents of change" at 387).

146 Gilson & Gordon, "Agency Costs", *supra* note 13 at 877.

thing at all to do with corporate governance.[147] First, the companies that experience contested elections actually appear to be generally well-run. There are very few contested elections in the United States. Out of approximately 4,000 public companies, until 2013 there was only an average of thirty-five firms per year where the directors faced competition.[148] This total has increased in the years since to 187 companies in 2019.[149] Targeted companies tend have "low market value relative to book value ... with sound operating cash flows and return on assets."[150] Indeed, most studies have found that the targets of proxy fights are more profitable than control samples.[151] Stated simply, the common target of a contested election is an unusually profitable company, but with recent stock price returns that are lower than its peers.[152]

Second, if we take activist shareholders as the most significant source of contested elections, we know what drives their economic returns, and it is not changes to corporate governance. The real goal of activist shareholders is usually one of a limited range of measures designed to increase the short-term financial returns to the shareholders.[153] These include restructuring the company (spinning off a non-core asset or blocking an ac-

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147 This is not surprising to the advisors who work regularly in contested elections (see Longview Communications, "Shareholder Activism Seminar" (25 March 2020) [unpublished, presentation in author's possession] ("governance is often a battleground, but the war is really over economic issues" at 4)).

148 See Lee Harris, "Corporate Elections and Tactical Settlements" (2014) 39:2 J Corp L 221 at 243.

149 See Lindsay Fortado, "Companies Faced More Activist Investors than Ever in 2019", *Financial Times* (15 January 2020), online: <www.ft.com> [perma.cc/5Z66-R3H6].

150 Alon Brav et al, "Hedge Fund Activism, Corporate Governance, and Firm Performance" (2008) 63:4 J Finance 1729 at 1730. See also John C Coffee Jr & Darius Palia, "The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance" (2016) 41:3 J Corp L 545 at 582.

151 See Coffee & Palia, *supra* note 150 at 582; April Klein & Emanuel Zur, "Entrepreneurial Shareholder Activism: Hedge Funds and Other Private Investors" (2009) 64:1 J Finance 187 at 189; Brav et al, *supra* note 150 at 1753; Matthew R Denes, Jonathan M Karpoff & Victoria B McWilliams, "Thirty Years of Shareholder Activism: A Survey of Empirical Research" (2017) 44 J Corporate Finance 405 (reviewing the literature as a whole and concluding, firms targeted by hedge funds "tend to have high return on assets" though their equity market performance is below that of peers at 415). But see CNV Krishnan, Frank Partnoy & Randall S Thomas, "The Second Wave of Hedge Fund Activism: The Importance of Reputation, Clout, and Expertise" (2016) 40 J Corporate Finance 296 at 298–99.

152 See Denes, Karpoff & McWilliams, *supra* note 151 at 413–15.

153 See Marco Becht et al, "Returns to Hedge Fund Activism: An International Study" (2017) 30:9 Rev Financial Studies 2933 at 2953, Table 6 (source for data); Yvan Allaire, "The Case *for* and *against* Activist Hedge Funds" (25 May 2015) at 9–10, online (pdf): *Institute for Governance of Private and Public Organizations* <igopp.org> [perma.cc/5NQ5-SFBT] (source for calculations).

quisition), changing a payout policy (increasing or implementing a share buyback programme or increasing dividend payments), or selling the company.[154] Board or management changes are generally a prelude to enacting one of these strategies.[155] Virtually all the returns experienced from shareholder activism are attributable to those companies which are sold following their interventions.[156] This explains why unusually profitable companies are the most frequent targets: all of these financial maneuvers depend on fundamentally sound businesses with strong cash flows.[157]

Third, there is no evidence of measurable improvement in a firm's corporate governance following a successful proxy campaign. Operational metrics (such as growth in sales, asset size, profit margin, the spread in borrowing costs, return on assets, return on equity, and profitability) are all unaffected.[158] Indeed, for companies that experience a board change and that are not sold, the best reading of the available evidence is that they lag behind their peers over the long term.[159] Even when an activist only succeeds in placing a few of its directors on the incumbent board, the companies tend to experience significant underperformance in the follow-

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154 See Allaire, *supra* note 153 at 10.

155 See Tingle, "Two Stories", *supra* note 22 at 87.

156 See Ed deHaan, David Larcker & Charles McClure, "Long-Term Economic Consequences of Hedge Fund Activist Interventions" (2019) 24:2 Rev Accounting Studies 536 at 541; Nicole M Boyson, Nickolay Gantchev & Anil Shivdasani, "Activism Mergers" (2017) 126:1 J Financial Economics 54; Robin Greenwood & Michael Schor, "Investor Activism and Takeovers" (2009) 92:3 J Financial Economics 362; Yvan Allaire & François Dauphin, "The Game of 'Activist' Hedge Funds: *Cui Bono*?" (2016) 13:4 Intl J Disclosure & Governance 279 at 296–99 (the clear driver of performance is a corporate sale); Brav et al, *supra* note 150 at 1759; Coffee & Palia, *supra* note 150 ("changes in the expected takeover premium, more than operating improvements, account for most of the stock price gain, both in short-term and long-term studies" at 588). See also Becht, *supra* note 153 at 2954–58 (returns much higher for activist engagements that result in the sale of the corporation).

157 See Thomas and Tricker, *supra* note 86 ("excess cash positively relates to being targeted in a proxy contest" at 36), citing Olubunmi Faleye, "Cash and Corporate Control" (2004) 59:5 J Finance 2041 at 2049–50.

158 See Coffee & Palia, *supra* note 150 at 591–92; deHaan, Larcker & McClure, *supra* note 156 at 554; Klein & Zur, *supra* note 151 at 223; David Ikenberry & Josef Lakonishok, "Corporate Governance Through the Proxy Contest: Evidence and Implications" (1993) 66:3 J Bus 405 at 427–29; Tarun K Mukherjee & Oscar Varela, "Corporate Operating Performance around the Proxy Contest" (1993) 20:3 J Bus Finance & Accounting 417 at 419–21.

159 For an evaluation of the various studies on the long-term outcomes of shareholder activism, see Tingle, "Two Stories", *supra* note 22; Coffee et al, *supra* note 134 at 384, n 1.

ing years.[160] All of this is problematic for proponents of the theory that shareholder activists improve corporate governance.

It is possible that corporate governance is, in a very weak sense, improved if we take its most narrow definition as referring solely to board independence. It is hard to imagine a more independent board than one imposed on the company by the victors of a contested election. Is there evidence that companies that experience a change of directors do a better job of constraining executive compensation and other illegitimate diversions of the firm's free cash flow? Unfortunately, this does not appear to be the case. As two scholars note, after surveying the empirical literature about what successful challengers actually do following an electoral victory, "the majority [of studies] do not report evidence of changes in real variables consistent with this free cash flow hypothesis."[161]

If the companies were not badly run before they were targeted for a contested election, and if it is clear that activist shareholders actually generate their returns in ways that have nothing to do with improving corporate governance, and if there is no improvement (or even a decline) in firm performance following the replacement of incumbent directors, then what is going on? Contested corporate elections appear to be fought on the basis of one thing—corporate governance—that doesn't actually seem to be the point. There are several possible explanations for what we see in contested elections.

One possible explanation is that the war of words around corporate governance has the effect of misleading shareholders in ways calculated to influence their voting. It is not that shareholders in a contested election

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[160] See deHaan, Larcker & McClure, *supra* note 156 at 564–65; Allaire & Dauphin, *supra* note 156 at 303–04; Greenwood & Schor, *supra* note 156 at 368–70; William W Bratton, "Hedge Funds and Governance Targets: Long-Term Results" (2010) University of Pennsylvania Law School's Institute for Law & Economics Research Paper No 10-17; Elaine Buckberg & Jonathan Macey, "Report on Effects of Proposed SEC Rule 14a-11 on Efficiency, Competitiveness and Capital Formation" (17 August 2009), online (pdf): *NERA Economic Consulting* <www.nera.com> [perma.cc/3JHM-M7RK] (there are "[s]everal empirical studies [that] establish that when dissident directors win board seats, those firms underperform peers by 19 to 40% over the two years following the proxy contest" at 9); Martin Lipton, "Empiricism and Experience; Activism and Short-Termism; the Real World of Business" (28 October 2013) at 2–3, online (pdf): *Harvard Law School Forum on Corporate Governance* <corpgov.law.harvard.edu> [perma.cc/YYA6-87PC]. See also Tarun K Mukherjee, "Stock Price Behavior Surrounding Proxy Fights for Control: A Non-Parametric Approach" (1985) 21:1 Rev Bus & Economic Research 85 at 100–01 (companies in which activists failed outperform those at which they succeeded); Ikenberry & Lakonishok, *supra* note 158 at 420–23 (finding a cumulative abnormal return of -17.24 per cent for the period for five months to two years after the contest).

[161] Coffee & Palia, *supra* note 150 at 583.

vote against their economic interests, it is that they can be misinformed about where those interests lie. This is probably the most common explanation for critics of shareholder activism. It is probably not true, however. When we look at the actual economic decisions of shareholders, we find that they show a perfect understanding of the reality of contested board elections. In general, the announcement of a management victory in a contested election does not result in negative abnormal returns as we would expect if the market really believed a negligent or compromised board had succeeded in retaining its authority over the company.[162] Investment bank analysts (who have only an economic interest in predicting the actual results from a contested shareholder election) do not expect post-activism improvements in corporate earnings as shown by their earnings per share forecasts.[163] As we have seen, they are not wrong.

Even more impressively, in a recent article, several scholars show that the market accurately prices the impact of the increase in information leakage that follows a settlement agreement placing hedge fund employees on a corporate board.[164] The accuracy of the market's assessment extends to distinguishing between employees of the hedge fund and independent directors proposed by the hedge fund (information leakage only increases when the former goes on the board), and whether the settlement agreement contains confidentiality provisions (information leakage only increases in the absence of these provisions).[165] When it comes to buying and selling shares, it is clear that the market understands exactly what the effects of a change of directors is going to be and prices it surprisingly accurately.

This brings us to the second possible explanation for the prominence given to corporate governance claims in contested elections: the mistake is not on the part of the shareholders, but on the part of activist shareholders and incumbent boards. These latter groups fight over corporate governance in the mistaken view that it matters, or in the cynical (but also mistaken) view that they can fool the shareholders.

This also seems an unlikely explanation. For one thing, it depends on a fairly fundamental mistake being made by quite sophisticated and well informed parties, both with a deep knowledge of the market. If activists and boards hold the mistaken view that the corporate governance issues matter, then we have to believe that the two parties don't understand the

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[162] See Cindy R Alexander et al, "Interim News and the Role of Proxy Voting Advice" (2010) 23:12 Rev Financial Studies 4419 at 4436.

[163] See deHaan, Larcker & McClure, *supra* note 156 at 541–42, 561–63.

[164] See Coffee et al, *supra* note 134.

[165] See *ibid*.

actual economic drivers of the returns expected by the activist shareholder or, in the case of the board, the actual aspects of the activists' proposed strategy that will impact the long-term prospects of the company.[166] If the mistake is that activists and incumbent boards incorrectly believe shareholders can be fooled, then we are again left with the question of how long this mistake could realistically last? There is near constant communication with shareholders in a contested election. Is it really plausible that a delusion of this sort could last through even a single contested election, much less the collective market experience of hundreds of such elections?

The argument being made in this article provides a third possible explanation: the corporate governance aspects of a contested election actually make a difference to how the shareholders vote, but this voting has nothing to do with the shareholders' clear-eyed assessment of the economic consequences of the corporate governance dispute. The merit of this explanation is that it does not require any of the three sophisticated parties to labour under a persistent misapprehension. The activists and board are right to emphasize corporate governance matters because these, in fact, drive shareholder voting behaviour. The shareholders are aware, in their buying and selling activities, that the corporate governance stuff won't make a difference, but, in their voting, they are taking a virtually costless opportunity to express their values, show solidarity with their tribe, and reaffirm strongly held beliefs about the necessity of shareholder oversight that reflect well on themselves.[167] The outcome may be irrational, but each party in the contest is behaving perfectly rationally.[168]

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166 It should be noted that vast majority of boards give themselves high marks in terms of effectiveness (see Rock Center for Corporate Governance, "2016 Board of Directors Evaluation and Effectiveness" (2016), online (pdf): *Stanford Graduate School of Business* <gsb.stanford.edu> [perma.cc/UZ9Q-ABHJ]).

167 See Thomas & Tricker, *supra* note 86 (the authors refer to one group of researchers that observed after surveying the literature: "[t]he poor operating results of target firms where dissidents win a proxy contest may indicate that shareholders fail to vote rationally in the proxy contests" at 31).

168 Even the settlement agreements that end proxy fights before votes are cast reflect irrational factors (see Harris, *supra* note 148 at 242). Harris finds that whether a board settles depends on the short-term share return performance of the company. If, in the previous year, it lagged the market, then directors feel vulnerable and agree to appoint challengers to the board in order to avoid a fight. There is no relationship between settlement decisions and long-term share returns (see *ibid*). This appears to reflect the behaviour of politicians and, assuming the directors read the mood of their shareholders correctly, of voters described in the text accompanying notes 43–69, *above*.

E. Voting on Corporate Governance Matters

As we have seen, corporate governance best practices drive most shareholder voting in director elections, to the near exclusion of factors such as the firm's economic performance.[169] When we look at voting in other areas of the shareholder franchise, we find a similar focus on governance practices. In a recent representative year, for example, there were 315 shareholder proposals, of which 182 related to the adoption of corporate governance structures (including forty-seven on executive compensation practices).[170] Of the thirty-three proposals that won majority support, all were related to corporate governance (two of them related to executive compensation).[171]

Corporate governance proposals are primarily made by a few public pension and labour funds.[172] For-profit investment managers are unlikely to initiate these types of proposals (in a particular year, less than one per cent originate from this source) but they often vote in favour of corporate governance proposals.[173] Indeed, one study finds that the average governance proposal attracts the support of sixty-five per cent of mutual funds and sixty-nine per cent of pension funds.[174] The support for other sorts of non-governance proposals is much lower.[175]

Viewed from the perspective of economic outcomes, corporate governance best practices form an irrational basis for shareholder voting. The

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[169] See the text accompanying notes 89–100, 126, *above*. See also Letter from Bernard S Sharfman to Vanessa Countryman (20 December 2019), "RE: Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice", online (pdf): *U.S. Securities and Exchange Commission* <www.sec.gov> [perma.cc/VZL5-5BAP] ("the voting of the Big Three institutional investors is not statistically significantly correlated with recent stock performance" at 8); Suren Gomtsian, "Shareholder Engagement by Large Institutional Investors" (2020) 45:3 J Corp L 659 (finding that UK institutional investors direct their engagement efforts with portfolio companies on influencing "corporate governance standards ... rather than business strategy or performance" at 659).

[170] See James R Copland & Margaret M O'Keefe, "A Report on Corporate Governance and Shareholder Activism" (2015) at 12–13, online (pdf): *Proxy Monitor* <www.proxymonitor.org> [perma.cc/U6PD-5U3V].

[171] See *ibid*.

[172] See Ronald J Gilson & Jeffrey N Gordon, "Agency Capitalism: Further Implications of Equity Intermediation" in Jennifer G Hill & Randall S Thomas, eds, *Research Handbook on Shareholder Power* (Cheltenham, UK: Edward Elgar, 2015) 32 at 38; Copland & O'Keefe, *supra* note 170 ("[a] small group of shareholders has dominated the process of introducing shareholder proposals for each of the last ten years" at 8).

[173] See Copland & O'Keefe, *supra* note 170.

[174] See Patrick Bolton et al, "Investor Ideology" (2019) National Bureau of Economic Research Working Paper No 25717 at 11.

[175] See *ibid*.

most optimistic reading of the empirical literature is that corporate governance best practices make no difference to firm performance.[176] There is plenty of evidence that some of those best practices, for some companies, lead to worse outcomes.[177] Among scholars familiar with the literature, this is neither controversial, nor breaking news. As two finance professors noted just over a decade ago after conducting a review of the literature around board independence, the cornerstone of modern corporate governance, "we are not aware of a body of literature in corporate governance—or elsewhere—where null results present with such consistency."[178] This was written more than a decade after the first meta-analysis on independence found no relationship between board composition and corporate performance.[179] It is not just independence that lacks support in the empirical literature (though independence is the foundation for most governance best practices) but rather the entire gamut of governance mechanisms that have been proposed and adopted over the past two decades.[180] The problematic outcomes of modern corporate governance practices extend to the one-size-fits-all executive compensation practices promoted as part of the corporate governance activities of institutional shareholders and proxy advisors.[181] As a result of this vast and, in most cases, quite established empirical literature, the mere fact that these practices appear to form the primary motivation for shareholder voting decisions is evidence of irrationality in the corporate franchise.

This irrationality persists even when empirical research has discredited the activities of specific shareholders. For example, CalPERS continues its activism around corporate governance even though a study published back in 1996 found that its interventions had only a very minor

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[176] See Tingle, "Can We Measure It", *supra* note 89 at 249; Tingle, "Corporate Governance", *supra* note 103.

[177] See Tingle, "Can We Measure It", *supra* note 89 at 258.

[178] Dan R Dalton & Catherine M Dalton, "Integration of Micro and Macro Studies in Governance Research: CEO Duality, Board Composition, and Financial Performance" (2011) 37:2 J Management 404 at 408.

[179] See Dan R Dalton et al, "Meta-Analytic Reviews of Board Composition, Leadership Structure, and Financial Performance" (1998) 19:3 Strategic Management J 269. See also Sanjai Bhagat & Bernard Black, "The Uncertain Relationship between Board Composition and Firm Performance" (1999) 54:3 Bus Lawyer 921 at 933; Benjamin E Hermalin & Michael S Weisbach, "Boards of Directors as an Endogenously Determined Institution: A Survey of the Economic Literature" (2003) 9:1 Economic Policy Rev 7 at 12–13.

[180] See Tingle, "Can We Measure It", *supra* note 89 at 252, 258; Tingle, "Corporate Governance", *supra* note 103.

[181] See Tingle, "Can We Measure It", *supra* note 89 at 234; Tingle, "Framed!", *supra* note 130 at 913, 925–26; Sharfman, "Risks and Rewards", *supra* note 73 (noting the focus of proxy advisors is "mitigating governance risk" at 856).

impact on share price and no impact at all on operating performance.[182] TIAA-CREF similarly continues its corporate governance activities notwithstanding a 1998 study that found these initiatives produced no significant changes in accounting measures of performance and even, in some cases, caused a decline in share prices.[183] More recent studies about specific funds active in corporate governance matters have found the same lack of effect, but this has not led to noticeable changes in those funds' behaviour.[184]

In contrast, the average institutional shareholder clearly understands that the corporate governance issues driving its voting decisions don't make much difference to the economic performance of its portfolios. As we have seen, most institutions—in particular those that compete for money on the basis of fund performance—don't actually engage in corporate governance activism, aside from casting votes.[185] When scholars look at the companies acquired by institutional shareholders, they "find little evidence of an association between total institutional investor ownership and corporate governance."[186] In fact, only about ten per cent of institutional investors appear to invest in ways that are at all sensitive to firms' corporate governance arrangements.[187] We saw a similar pattern in behaviour

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[182] See JB Heaton, "All You Need is Passive: A Response to Professors Fisch, Hamdani and Davidoff Solomon" (7 July 2018) at 4, n 22 citing Michael P Smith, "Shareholder Activism by Institutional Investors: Evidence from CalPERS" (1996) 51:1 J Finance 227.

[183] See Willard T Carleton, James M Nelson & Michael S Weisbach, "The Influence of Institutions on Corporate Governance through Private Negotiations: Evidence from TIAA-CREF" (1998) 53:4 J Finance 1335 at 1351–53.

[184] See Tracie Woidtke, "Public Pension Fund Activism and Firm Value: An Empirical Analysis" (September 2015), online (pdf): *Manhattan Institute* <manhattan-institute.org> [perma.cc/39YV-PGR4] (finding for the 2001–2013 period that the corporate governance activities of a sample of public pension funds had no impact on the value of portfolio companies and that the social issue activism of these funds had a negative impact. In aggregate, this means that firm value is "negatively related to public pension fund ownership and positively related to private pension fund ownership during 2001–13" at 5). See also Vinod Venkiteshwaran, Subramanian R Iyer & Ramesh P Rao, "Is Carl Icahn Good for Long-Term Shareholders? A Case Study in Shareholder Activism" (2010) 22:4 J Applied Corporate Finance 45 at 51 (a study looking at the long-term outcomes of interventions of Carl Icahn, which found that Icahn's targets that are not immediately acquired suffer very negative (negative sixty per cent) returns).

[185] See the first paragraph under Part IV, Section E, *above*. See also Romano, "Public Pension Fund Activism", *supra* note 112 at 832–39.

[186] Brian J Bushee, Mary Ellen Carter & Joseph Gerakos, "Institutional Investor Preferences for Corporate Governance Mechanisms" (2014) 26:2 J Management Accounting Research 123 at 125.

[187] See *ibid*.

around IPOs, where the decision to add a new company to an institution's portfolio appears to have little to do with the company's adherence to governance best practices.[188]

The clearest sign that shareholders generally understand the economic consequences of their voting behaviour can be seen in the kinds of governance initiatives they support. Professors Kahan and Rock describe their behaviour as "symbolic corporate governance politics."[189] They observe repeated instances where shareholders choose to invest their energy in purely inconsequential reforms of corporate governance, staying away from changes that would actually impact operations. For example, shareholders invest considerable energy in pressuring companies to remove poison pills, but their efforts do nothing to prevent a board from introducing a poison pill unilaterally and instantly in the event of a hostile takeover bid.[190] The shareholders could constrain the board's ability to adopt a pill through a charter amendment, but shareholder proposals do not ask for this. Instead, shareholders ask only for the purely symbolic removal of existing pills.

There are other circumstances which display similar patterns of shareholders denouncing certain governance structures but refraining from making proposals that would actually force a change on the company. These circumstances can be observed in relation to: proxy access (where shareholders choose not to force proxy access through bylaw amendments after Delaware made this possible), majority voting (where, as we have seen, directors are not much more likely to leave boards than under plurality voting), proposals to remove supermajority requirements in bylaws (which commonly apply only to matters that are either benign or practically irrelevant), and the scarcity of mandatory (as opposed to precatory) shareholder proposals.[191] Shareholders and their proxy advisors cannot be ignorant of the inconsequential aspects of their engagement with corporate governance, or of the stronger alternatives available to them. Yet, they often remain content with purely expressive activity in this field.

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188 See Sandler & Hall, *supra* note 137 ("[t]he fact that companies appear largely isolated from these [governance] concerns at IPO time once again raises questions about the strength of the link between corporate governance 'best practices' and perceptions of shareholder value" at 3).

189 Kahan & Rock, "Symbolic Corporate Governance", *supra* note 117.

190 See *ibid* at 1999–2001.

191 See *ibid* at 2002–21.

V. Revisiting the Academic Debate

Expressive voting provides a reason to rethink the grounds on which academic arguments about shareholder voting are conducted. To take an easy example, the extensive debate around whether the economic interests of shareholders correspond with the long-term interests of the corporation becomes, in the context of voting behaviour at least, irrelevant. As we have seen, over and over again, the reasons for shareholder voting patterns have nothing at all to do with those shareholders' economic interests.[192] Indeed, there are frequent cases when shareholders' trading decisions, which reflect their economic analysis, are entirely at odds with their voting behaviour.[193] Markets extract a user fee for irrationality; voting does not.[194]

The collective action problem, with its focus on the costs of obtaining the information to properly inform voting decisions, also seems largely beside the point. There isn't a problem with gathering information; it is the way that information is gathered, processed, and used for voting decisions that is irrational. Anti-vaxxers have access to all the information and experts available to the rest of the population, they just choose to get most of their information from other sources and to engage in highly motivated reasoning about the rest. This is why, for example, proxy advisors—whose business is to flatter the prejudices and self-regard of their clients, the institutional shareholders—continue to recommend governance best practices that have been extensively discredited in the empirical literature.[195] And it is why institutional investors continue to turn to proxy advisors for voting recommendations. It is why a peer-reviewed study can be published about the adverse consequences of an institutional shareholders' activism and its findings ignored by that very institution.[196]

Finally, if we look at the debate around the economic incentives that apply to professional fund managers, we find that this also looks less relevant than it did before. The reality is that the voting decisions of fund managers are a function of neither an economic evaluation of the costs of informed voting, nor the benefits received by that manager (through fund

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192 See the text accompanying notes 84–88, 93–100, 107, 162–63, 169, 176–91, *above*.

193 See the text accompanying notes 137–40, 167–68, 172–75, 185–88, *above*.

194 See the text accompanying note 56, *above*.

195 See Tingle, "Bad Company", *supra* note 17 at 723. See also Letter from Bernard S Sharfman to Brent J Fields, "Re: Submission in Advance of Staff Roundtable on the Proxy Process (Proxy Advisors)" (12 October 2018) at 6–12, online (pdf): *U.S. Securities and Exchange Commission* <www.sec.gov> [perma.cc/RA3R-7SMC]; Paul Rose, "On the Role and Regulation of Proxy Advisors" (2010) 109 Mich L Rev First Impressions 62 at 63.

196 See the text accompanying notes 183–84, *above*.

performance relative to benchmarks). It doesn't matter if the cost of informed voting was reduced to zero. Fund managers appear to vote their shares to express themselves, and fund performance, relative or otherwise, appears to have little to do with it. Indeed, all that has been accomplished by majority voting, the rise of activist shareholders, and the coordinating function of proxy advisors, has been a growing phenomenon of voting on purely expressive or symbolic matters.[197]

It should be noted that by focusing on the marginal value of the vote itself, we can avoid lengthy evaluations of the varying incentives and institutional features of different types of shareholders.[198] There is no "right" kind of shareholder, because all of them face exactly the same incentives to reap the psychic benefits of expressive voting. Hedge funds, index funds, pension funds, mutual funds, and retail investors all face different kinds of incentives and pressures, but the low-to-non-existent marginal value of their vote remains the same. There is no evidence in the literature, for example, that the largest institutional shareholders, or the institutional investors with the strongest interest in firm-specific governance (such as hedge funds), come to their voting decisions in materially different ways. They consume the same advice, support the same proposals and, as we have seen, they vote in broadly similar patterns.[199]

In 2013, Jana Partners launched a proxy battle against Agrium, a well-known Canadian company.[200] At stake was a fundamental difference of opinion about corporate strategy. Jana advocated for the sale of certain business divisions (and the distribution of the resulting proceeds to the shareholders), while the board was adamant that the business lines in question were essential to the long-term success of the entire company.[201] As usual, the quality of corporate governance at Agrium became an issue, with Jana Partners harshly criticizing the board, as well as specific direc-

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197 See Kahan & Rock, "Symbolic Corporate Governance", *supra* note 117 at 1998.

198 See e.g. Lucian Bebchuk & Scott Hirst, "Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy" (2019) 119:8 Colum L Rev 2029; Roger M Barker & Iris H-Y Chiu, *Corporate Governance and Investment Management: The Promises and Limitations of the New Financial Economy* (Cheltenham, UK: Edward Elgar, 2017).

199 See the text accompanying notes 109–11, 147–68, 169–75, *above*.

200 See Tingle, "Bad Company", *supra* note 17 at 719–22; Tingle, "Agency Cost", *supra* note 22 at 751–52.

201 See Institutional Shareholder Services Inc, "Proxy Paper: Agrium Inc" (26 March 2013) at 17 [ISS Proxy Paper] (for a list of key events in the contested proxy battle). See also Amanda Stephenson, "Agrium Wins Proxy Fight", *The Calgary Herald* (10 April 2013) F1.

tors.[202] Agrium's board returned the favour with criticisms of Jana's board nominees and the "golden leash" contracts these nominees accepted from Jana Partners.[203] There was even a fight over the correct valuation metric to use when evaluating corporate performance.[204] The lengthy war of words quickly became ugly. (The press characterized it as "dirty" and "vicious," noting a Jana executive's "jaw dropping rant" at the shareholder meeting.)[205]

At the shareholder meeting, a sizeable minority of Agrium's shareholders voted in favour of Jana Partner's proposal to create a "hybrid" board consisting of some of the existing Agrium directors plus several of Jana's proposed directors.[206] It is hard to understand this vote as rational. It is not a recipe for success to saddle a body that normally works on consensus, trust, and a supportive attitude toward management (on whose candour and integrity boards depend), with two groups which are at odds with each other. This is especially the case when the groups not only possess fundamental differences of opinion on strategy and how to value the

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202 See Peter Koven "Jana Predicts Two Dissident Candidates Will Join Agrium Board", *Financial Post* (8 April 2013), online: <www.financialpost.com> [perma.cc/6VBB-RFGF]; ISS Proxy Paper, *supra* note 201. The ISS Proxy Paper questions the board's capital allocation and its commitment to total shareholder value stating that "the board now points to Agrium's dividend yield as highly competitive among—though not outpacing—peers also suggests a lack of urgency" (*supra* note 201 at 23). The Paper also casts doubt on the board's management of its retail business (see *ibid* at 25), argues that there are deficiencies in the competencies of the existing board members (see *ibid* at 25–26), questions board strategy (see *ibid* at 26), refers to the board as having "a burgeoning credibility problem," and wonders whether the shareholders can trust the board going forward (*ibid* at 27). The Paper further states that "the board has taken some questionable actions, which raise questions about its credibility" (*ibid* at 30). Finally, the Paper suggests that the existing board is incapable of taking an "unbiased" look at Agrium's business (*ibid*).

203 See ISS Proxy Paper, *supra* note 201 at 29. See also Agrium, "Notice of Annual General Meeting of Shareholders and Management Proxy Circular" (9 April 2013), online (pdf): *U.S. Securities and Exchange Commission* <www.sec.gov> [perma.cc/2YFW-NJUS] ("JANA's dissident nominees have agreed to accept special incentive payments from JANA for serving on Agrium's Board. These payments are structured to incentivize short-term actions, even if they are taken at the expense of greater long-term value. This kind of 'golden leash' arrangement is unheard of in Canada" at 2).

204 See ISS Proxy Paper, *supra* note 201 at 21–25; Glass Lewis, "Proxy Paper: Agrium Inc" (26 March 2013) at 14 [Glass Lewis Proxy Paper].

205 Scott Haggett "Agrium Sweeps Proxy Vote, Jana Cries Foul", *Reuters* (9 April 2013), online: <www.reuters.com> [perma.cc/844H-DJ36] (using the word "dirty" as a descriptor); Koven, *supra* note 201 (using the word "vicious" as a descriptor). See Ronald Barusch, "Dealpolitk: Agrium Lesson for Activists: Don't Underestimate the Adversary", *The Wall Street Journal* (17 June 2013), online: <www.wsj.com> [perma.cc/A3J7-AA6Y] (a reporter from The Wall Street Journal simply referred to the executive's remarks as "not exactly gracious" and "remarkable").

206 See Tingle, "Bad Company", *supra* note 17 at 721.

business, but also a history of bad blood and publicly aired criticisms of one another. While the defects of a hybrid board are obvious to anyone who has spent much time in a boardroom, you don't have to have served as a director to understand how little chance such an arrangement has of succeeding. Has any kind of team been effective when divided by intractable disagreements and personal animosity?

As it happens, shareholders didn't need any personal experience to cast their votes wisely. By the time of the conflict, several studies had been performed looking at the performance of hybrid boards, finding their performance lagged their peers over long periods of time.[207] The underperformance effects were not small, ranging from nineteen to forty per cent over the two years following the hybrid board's installation.[208] These were not obscure studies, either. They were referenced only two years earlier in one of the most famous corporate law cases of the era, which used the Buckberg study in rejecting the Securities and Exchange Commission's proxy access rules.[209]

Nevertheless, a range of shareholders decided to vote in favour of a hybrid board for Agrium. There was no lack of information. The dispute was covered widely in Canada's business press. Both sides to the dispute were sophisticated and wielded significant resources to communicate their views. What motivated the voting in favour of a hybrid board? One possibility is that some shareholders simply followed ISS' recommendation to vote for the hybrid board, even though other proxy firms, including Glass-Lewis and Egan Jones, made contradictory recommendations.[210] Giving no independent thought to a voting decision of considerable importance to the company in the face of contradictory voting advice is not rational.

What about those shareholders who actually considered the issue? Again, we see in ISS' written voting recommendation an indication of the

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[207] See Chris Cernich et al, "Effectiveness of Hybrid Boards" (May 2009) at 27, online (pdf): *University of Delaware John L Weinberg Center for Corporate Governance* <weinberg.udel.edu> [perma.cc/YG7R-BMCE] (finding a 6.6 per cent lag against peers over three years following the adoption of the hybrid board); Buckberg & Macey, *supra* note 160 at 9 (finding a nineteen to forty per cent underperformance). See also William W Bratton, "Hedge Funds and Governance Targets: Long-Term Results" (2010) University of Pennsylvania Law School Institute for Law & Economics Research Paper No 10-17 at 2 (finding that underperformance significantly increases when hedge fund representatives enter the boardroom).

[208] See Buckberg & Macey, *supra* note 160 at 9.

[209] See *Business Roundtable*, *supra* note 12 at 1150.

[210] See Glass Lewis Proxy Paper, *supra* note 204; Egan-Jones Ratings Company, "Proxy Report #210497" (Agrium Inc) (21 March 2013); Pension & Investment Research Consultants Ltd, "Proxy Paper: Agrium Inc" (21 March 2013).

kind of expressive logic that could lead to an irrational voting decision. ISS' recommendations make a number of assumptions including: (1) that managers are often mistaken about strategy, with a strong preference for self-interested empire-building; (2) that boards are often ineffective or compromised so they can't correct management; (3) that shareholders are thus needed to identify the firm's best interests; (4) that shareholders are often better able, by reason of skill or a lack of conflicts of interest, to see what ought to be done; (5) that shareholders are entitled to have their wishes effected in the firm; (6) that monitoring management is the primary role of the board; and (7) that independence is the most important quality in a director (and what could be more independent than a director representing a hostile shareholder?).[211] These beliefs all reflect a flattering image of shareholders as the indispensable element in good corporate governance: its centre, object, and tribune. The contrast with unreliable managers and directors could not be sharper. ISS' analysts apparently believe this picture; isn't it likely many of those shareholders voting for the hybrid board believed it as well?

Conclusion: The Scope of Corporate Democracy

Political voting behaviour in democracies is not, of course, always irrational. In circumstances where the cost of a miscast vote is very high, citizens behave rationally. The empirical literature about policy outcomes in democracies has some very good news. No mass famine has ever occurred in a modern democracy, no matter how poor the country.[212] Unlike dictatorships, democratic governments almost never engage in mass murder against their citizens.[213] Systems where politicians are accountable to the public tend to do better at limiting the disruptions and harms caused by natural disasters.[214] In these sorts of cases, voters have enormous incentives to vote rationally. The actions of politicians in these areas have huge significance, are easily attributable, and are highly visible.[215] In this con-

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[211] See ISS Proxy Paper, *supra* note 201 at 23–25, 27, 30; Tingle, "Bad Company", *supra* note 17 at 724–25, 730–32, 735, 738.

[212] See William Easterly, Roberta Gatti & Sergio Kurlat, "Development, Democracy, and Mass Killings" (2006) 11:2 J Economic Growth 129 at 137; Amartya Sen, *Development as Freedom* (New York: Anchor Books, 1999) at 51.

[213] See Rudolph J Rummel, *Power Kills: Democracy as a Method of Nonviolence* (Abingdon, UK: Routledge, 2017) at 91.

[214] See Alastair Smith & Alejandro Quiroz Flores, "Disaster Politics: Why Natural Disasters Rock Democracies Less", *Foreign Affairs* (15 July 2010), online: <www.foreignaffairs.com> [perma.cc/4ZRR-89ZQ].

[215] Incidentally, the empirical literature provides, at best, mixed support for the proposition that democracies facilitate economic growth. For a comprehensive study, see John Gerring et al, "Democracy and Economic Growth: A Historical Perspective" (2005) 57:3

text, the evidence is that voters invest the resources necessary to become informed and vote in their country's best interests. Politicians in democracies know this and conduct themselves accordingly; this is why democracies do better.

It is hard to avoid the fact that traditional corporate law reserved the shareholder franchise precisely for the corporate equivalent of these major and highly-public events: mergers, wind-ups, and amendments to the charter documents. Even voting for directors served mainly as a method of ensuring accountability that only really functioned when there was a major failure. But over the past several decades, we have attempted to drive shareholder voting into areas such as corporate governance, executive compensation, business strategy, and even fine-grained assessments of the quality of individual directors. This goes well beyond the highly visible, hugely significant, and easily attributable matters that traditional corporate law reserved for shareholders.

When scholars of political voting look at the quality of votes cast in relation to matters that are complex, long-term, or require specialized knowledge, they have found that a little less democracy produces better results. Professor Garret Jones discusses this in his aptly titled book, *10% Less Democracy*.[216] His examples include the extensive empirical evidence that the outcomes produced by central banks are improved when the central bankers are made independent of the democratic process.[217] For similar reasons, when the performance of U.S. city treasurers who are appointed by their city council is compared against those treasurers who are

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World Politics 323 ("the *net* effect of democracy on growth performance cross-nationally over the last five decades is negative or null" at 323). But see Daron Acemoglu et al, "Democracy Does Cause Growth" (2019) 127:1 J Political Economy 47. One possible way of reconciling the research outcomes is by measuring what degree of democracy is associated with economic growth. Acemoglu et al do not do this (see *ibid*). But see Robert J Barro, "Democracy and Growth" (1996) 1:1 J Economic Growth 1 at 14–15 (finding growth positively correlated with some degree of democracy, but not with others).

216 This literature is discussed in Jones, *supra* note 32.

217 See *ibid*. See also Jeroen Klomp & Jakob de Haan, "Central Bank Independence and Financial Instability" (2009) 5:4 J Financial Stability 321 (countries with more independent central banks have fewer financial crises); Alan S Blinder, *Central Banking in Theory and Practice* (Cambridge, MA: MIT Press, 1998) at 32; Alex Cukierman, *Central Bank Strategy, Credibility, and Independence: Theory and Evidence* (Cambridge, MA: MIT Press, 1992); Alberto Posso & George B Tawadros, "Does Greater Central Bank Independence Really Lead to Lower Inflation? Evidence from Panel Data" (2013) 33 Economic Modelling 244 (finding an international comparison suggests that independence of a central bank is causally linked to lower inflation). But see Alberto Alesina & Andrea Stella, "The Politics of Monetary Policy" in Benjamin M Friedman & Michael Woodford, eds, *Handbook of Monetary Economics*, vol 3 (San Diego, CA: Elsevier, 2011) 1001 at 1019–20 (arguing that other factors in fact explain the correlation of lower inflation with central bank independence).

directly elected, scholars find that the appointed treasurers are able to get significantly lower interest on the city debt than their elected counterparts.[218] In particular, there are noticeable improvements when a city transitions from elected to appointed treasurers.[219]

There is also literature that compares democratically elected American judges with their appointed counterparts. It finds that compared to appointed judges, elected judges give significantly bigger awards in tort cases when the defendant is from out-of-state, a reasonable measure of bias.[220] Evaluated by citations by other courts, elected judges write lower quality opinions than appointed judges.[221] When a U.S. state changes its method of selecting judges from an election to some sort of appointment process, "compared to judges selected by voters, there is consistent evidence that judges selected by a merit commission are better at their jobs."[222]

In light of the voting patterns described in this article, there is no reason to think that the conclusions of political scientists should not apply with equal force to corporate law. The attempt to give shareholders increasing amounts of authority over increasingly fine-grained corporate decisions, such as the merits of individual directors or compensation decisions, is bound to run aground on the implacable fact that the marginal value of a vote is indistinguishable from zero and so shareholders will vote on that basis. Mostly this means that they will process information and vote in ways that are expressive, not effective.

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[218] See Alexander Whalley, "Elected versus Appointed Policy Makers: Evidence from City Treasurers" (2013) 56:1 JL & Econ 39.

[219] See *ibid*.

[220] See Alexander Tabarrok & Eric Helland, "Court Politics: The Political Economy of Tort Awards" (1999) 42:1 JL & Econ 157; Eric Helland and Alexander Tabarrok, "The Effect of Electoral Institutions on Tort Awards" (2002) 4:2 Am L & Econ Rev 341.

[221] See Elliott Ash & W Bentley MacLeod, "The Performance of Elected Officials: Evidence from State Supreme Courts" (11 September 2015), online (pdf): *HEC* <www.hec.ca> [perma.cc/S967-G6EP]. See also Rafael La Porta et al, "Judicial Checks and Balances" (2004) 112:2 J Political Economy 445 (finding that after measuring the degree of judicial independence across countries, this independence appears to be causally connected to greater protection of citizens' rights).

[222] Ash & MacLeod, *supra* note 221 at 3.