



**Shareholder Democracy on Trial:  
International Perspective on the Effectiveness of  
Increased Shareholder Power**

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## SHAREHOLDER DEMOCRACY ON TRIAL: INTERNATIONAL PERSPECTIVE ON THE EFFECTIVENESS OF INCREASED SHAREHOLDER POWER

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ABSTRACT .....	2
INTRODUCTION.....	2
I. SHAREHOLDER DEMOCRACY IN THE UNITED STATES .....	5
A. Tyranny of the Majority Vote.....	5
B. Shareholder Access to the Ballot .....	7
C. The Attack on Classified Boards .....	9
D. “Say on Pay” .....	10
II. SHAREHOLDER DEMOCRACY AROUND THE GLOBE.....	12
A. Majority Vote Revisited.....	12
B. Blocking “Share Blocking” .....	14
C. “One Share, One Vote” .....	16
D. “Say on Pay” Revisited .....	17
E. Shareholder Activism.....	18
III. SHAREHOLDER DEMOCRACY THROUGH THE LENS OF INTERNATIONAL EXPERIENCES.....	21
A. The Shareholder Democracy Debate in the United States.....	21

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B. An International Perspective.....	22
1. <i>Shareholder Democracy and Passivity</i> .....	22
2. <i>Shareholder Democracy and Corporate Value</i> .....	24
3. <i>Shareholder Democracy and Corporate Affairs</i> .....	26
4. <i>Shareholder Democracy and Special Interest Governance</i> .....	27
5. <i>Shareholders vs. Stakeholders?</i> .....	29
CONCLUSION .....	33

#### ABSTRACT:

Shareholder democracy—efforts to increase shareholder power within the corporation—appears to have come of age, both within the United States and abroad. In the past few years, U.S. shareholders have worked to strengthen their voice within the corporation by seeking to remove perceived impediments to their voting authority. These impediments include classified boards, the plurality standard for board elections, and the inability to nominate directors on the corporation’s ballot. Shareholders’ efforts have also extended to seeking a voice on the compensation of corporate officers and directors. Advocates of shareholder democracy believe that such efforts are critical to buttressing shareholder value and curbing managerial abuses of authority. However, there are many who criticize shareholder democracy, claiming that it will undermine firm value and corporate governance. Opponents also insist that shareholder democracy will undermine corporate efforts to focus on non-shareholder constituents such as employees, customers, and communities. This Article examines these and other criticisms in the context of international efforts to increase shareholder democracy, and argues that the international experience with shareholder democracy undercuts the force of such critiques. Indeed, experiences in other countries suggest that shareholder democracy can achieve its desired result of enhancing financial returns and reducing corporate misconduct. In this way, the Article relies on international corporate governance trends to provide a novel, significant perspective to the ongoing debate over the propriety of shareholder democracy in the United States.

#### INTRODUCTION:

**I**N the past few years, shareholders in the United States have engaged in an aggressive effort to enhance their voting power and authority in the corporation. Their quest for what some have characterized as “shareholder

democracy” has encompassed a variety of different issues. Probably the most high-profile issue has been shareholders’ efforts to convince corporations to adopt a majority vote standard for the election of directors.<sup>1</sup> Other issues include campaigns to abolish classified boards for directors as well as efforts to gain access to the corporation’s proxy statement in order to nominate directors.<sup>2</sup> Shareholders have also mounted campaigns aimed at securing advisory votes on executive compensation, known as “say on pay.”<sup>3</sup>

In many circumstances, these efforts have yielded positive results. Thus, a significant number of corporations have acceded to shareholder demands to institute a majority vote standard and make other changes to their corporate governance standards.<sup>4</sup> Moreover, legislatures have responded to shareholders’ efforts by amending corporate governance rules in a manner that accommodates shareholders’ ability to have a greater voice over corporate affairs.<sup>5</sup>

Although there are many who criticize shareholder democracy as inadvisable and ineffective, shareholder democracy has its proponents. In his seminal article, “The Case for Increasing Shareholder Power,” Professor Lucian Bebchuk notably argues that increasing shareholder democracy would improve corporate governance and enhance managerial accountability.<sup>6</sup> Indeed, Bebchuk and others contend that augmenting shareholder power will make directors and officers more accountable to shareholders, thereby curbing abuses of authority and the incidence of misconduct.<sup>7</sup> In Bebchuk’s view, increased shareholder democracy should translate into improved shareholder value. Other scholars and practitioners, however, are more

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1. See Thaddeus C. Kopinski, *Investor Pressure Leads to Election Reform*, INST’L S’HOLDER SERVS., 2006 POSTSEASON REPORT 16, available at <http://www.issproxy.com/pdf/2006PostSeasonReportFINAL.pdf> [hereinafter 2006 PROXY SEASON REPORT] (noting that in the 2006 proxy season shareholders submitted more proposals seeking to institute majority voting for director elections than any other proposal).
  2. See Subodh Mishra, *Support Grows for Governance Proposals*, 2006 PROXY SEASON REPORT, *supra* note 1 at 19.
  3. Kevin Drawbaugh, *Soaring Executive Pay Meets Reforms*, REUTERS, Mar. 9, 2007, <http://www.reuters.com/article/ousiv/idUSN2427533920070310>; Tomoch Murakami Tse, *Score One for Dissent: Aflac to Be 1st U.S. Firm to Allow Advisory Votes on Pay*, WASH. POST, Feb. 15, 2007, at D1 (noting that shareholders had submitted proposals at fifty different companies seeking to authorize a “say on pay”).
  4. See *infra* note 24 and accompanying text (noting the number of companies that have voluntarily converted to majority vote systems).
  5. See *infra* notes 25–26 and accompanying text (noting changes in Delaware law and the Model Business Corporation Act).
  6. See Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 836 (2005).
  7. See *id.* at 842–43.

skeptical of the benefits of shareholder democracy. Indeed, some insist that shareholders' rational apathy will prevent them from exercising their new power, making shareholder democracy relatively meaningless.<sup>8</sup> Others contend that shareholder democracy will not lead to increased shareholder value or otherwise have a positive impact on the corporate bottom line. Instead, opponents claim that shareholder democracy will not only facilitate the ability of shareholders to advance their own special self-serving agendas,<sup>9</sup> but also will undermine the corporation's ability to focus on non-shareholder constituents.<sup>10</sup>

This Article offers a new perspective on the debate regarding the potential effectiveness of shareholder democracy. It explores the likely impact of shareholder democracy by comparing shareholder efforts within the United States with campaigns to increase shareholder democracy in other countries. Indeed, the recent movement in the United States to enhance shareholder democracy is not unique: other countries have witnessed an increase in shareholder efforts to gain greater voice in the corporation.<sup>11</sup> Not only have efforts to enhance shareholder democracy increased in countries such as Germany, Japan, and Canada, but shareholder activism also is on the rise in those countries.<sup>12</sup> As many of these countries already have implemented some of the measures U.S. shareholders seek, important comparisons can be made between the United States and these other countries. This Article maintains that these international comparisons suggest that shareholder democracy can have positive repercussions on share value and corporate governance more generally.

Part I of this Article sets forth the current trend in favor of shareholder democracy within the United States. In comparison, Part II illustrates that trend among other countries. Part III critically evaluates shareholder democracy through the lens of international experiences with increased shareholder power. This evaluation reveals that critics of shareholder democracy may have underestimated its ability to benefit the corporation. Instead, while there are certainly drawbacks to augmented shareholder power, this Article insists that there are also reasons to be optimistic that shareholder

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8. See Stephen M. Bainbridge, Response, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735, 1746 (2005).

9. See Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. REV. 561, 575 (2006) (noting that increased shareholder power may lead to increased rent-seeking behavior by shareholders); Bainbridge, *Director Primacy*, *supra* note 8, at 1754–1755.

10. See Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 304–05 (1999).

11. See discussion *infra* Part II.

12. *Id.*

democracy may have a positive influence on the corporation and all of its constituents.

## I. SHAREHOLDER DEMOCRACY IN THE UNITED STATES

This Part examines the recent rise in shareholder efforts to enhance their voting power within U.S. corporations. This examination reveals not only that shareholders have become more active within recent years, but also that their activism has had an impact on corporate affairs. This Part focuses on some of the most prominent campaigns tackled by shareholders.

### A. Tyranny of the Majority Vote

The campaign for majority voting in the election of directors has become the most high-profile aspect of shareholder efforts to increase their power within American corporations. In the United States, the default rule in director elections is a plurality standard.<sup>13</sup> This means that a person will be elected to the board of directors so long as she receives a plurality of the votes cast, without regard to votes cast against her or withheld. Technically, the plurality system means that a person can be elected to the board even if shareholders cast ninety-nine percent of their votes against such a person, because the nominee needs only one vote in her favor. Shareholders and their proponents contend that the plurality system undermines shareholders' ability to impact election outcomes and hold directors accountable for their behavior.<sup>14</sup> In fact, shareholder efforts to alter the plurality standard were galvanized after shareholders sought to oust directors at The Walt Disney Co. ("Disney").<sup>15</sup> Disney shareholders believed that their ability to achieve success

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13. Forty-four states, including Delaware, operate under a plurality vote system. *See* Claudia H. Allen, *STUDY OF MAJORITY VOTING IN DIRECTOR ELECTIONS*, at 4–5 n.7 (2007), available at [http://www.ngelaw.com/files/upload/majority\\_callen\\_020707.pdf](http://www.ngelaw.com/files/upload/majority_callen_020707.pdf); DEL. CODE ANN. tit. 8, § 216(3). Plurality is also the default standard under the Model Business Corporation Act. *See* MODEL BUS. CORP. ACT § 7.28(a)(1984). By contrast, only Alaska, Illinois, Missouri, and New Mexico mandate majority voting, while Alabama and Pennsylvania have made majority voting the default rule. *See* Allen at 4–5 n.7.

14. *See* INST'L S'HOLDER SERVS., *MAJORITY ELECTIONS: QUESTIONS AND ANSWERS ON ISS 2006 VOTING POLICY 2*, available at <http://www.issproxy.com/pdf/FAQMVPolicy2006.pdf>.

15. *See* INST'L S'HOLDER SERVS., *2004 POSTSEASON REPORT: A NEW CORPORATE GOVERNANCE WORLD: FROM CONFRONTATION TO CONSTRUCTIVE DIALOGUE 5*, available at <http://www.issproxy.com/pdf/2004ISSPSR.pdf> [hereinafter 2004 PROXY SEASON REPORT] (describing the vote-no campaign waged to remove Chairman Michael Eisner, which resulted in shareholders withholding forty-five percent of their votes from Eisner). The vote-no campaign was driven by shareholders' anger over a lucrative severance

was severely hampered by the plurality system because that system made it almost impossible to successfully vote a director out of office.<sup>16</sup>

This belief prompted other shareholders to seek change in the director election system. In the proxy seasons following the Disney vote, majority voting became a critical corporate governance issue. Hence, in 2005 and 2006, shareholders submitted a record number of proposals requesting corporations to alter their default rule in elections to a majority vote system.<sup>17</sup> In fact, in 2006, majority vote proposals represented the dominant type of shareholder proposal submitted to U.S. corporations.<sup>18</sup> Moreover, these proposals garnered an increasingly greater share of shareholder votes: in 2006, majority vote proposals received an average of forty-eight percent of the shareholder vote.<sup>19</sup> This stands in contrast to the twelve-percent average vote that such proposals received in 2004.<sup>20</sup>

Shareholders' efforts have yielded impressive results. In 2004, majority voting represented the default rule in director elections at fewer than thirty companies,<sup>21</sup> but by the beginning of 2007, fifty-two percent of S&P 500 companies and forty-five percent of Fortune 500 companies had adopted some form of majority vote regime.<sup>22</sup> Many companies have adopted a "plurality plus" standard. Under this standard, first adopted by Pfizer Inc., directors who fail to receive a majority of the shareholder vote must tender their resignations, which the company must then decide whether to accept.<sup>23</sup> Other companies, however, have adopted a true majority vote policy,

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package awarded to Michael Ovitz, who was fired after a little more than a year, but received over \$140 million in severance pay. *See In re Walt Disney Co. Derivative Litig.*, 731 A.2d 342, 352 (Del. Ch. 1998). In addition to the "vote no" campaign, the payment spurred several lawsuits. *See id.*

16. *See* 2004 PROXY SEASON REPORT, *supra* note 15, at 5.

17. *See* THADDEUS KOPINSKI, BANNER YEAR FOR MAJORITY ELECTIONS, *available at* <http://www.issproxy.com/governance/publications/2006arcived/175.jsp> (revealing that shareholders submitted a record eighty-nine majority vote proposals in 2005); 2006 Proxy Season Report, *supra* note 1, at 16 (noting that more than 150 majority vote proposals were submitted in 2006).

18. *See* 2006 PROXY SEASON REPORT, *supra* note 1, at 16.

19. *See id.*

20. *See* Stephen Taub, *Investors Back Shareholder Resolutions*, CFO.COM, Aug. 23, 2006, [http://www.cfo.com/article.cfm/7826000/c\\_7826282](http://www.cfo.com/article.cfm/7826000/c_7826282).

21. *See* Brooke Masters, *Proxy Measures Pushing Corporate Accountability Gain Support*, WASH. POST, June 17, 2006, at A1.

22. *See* Allen, *supra* note 13, at iii.

23. *See* 2006 PROXY SEASON REPORT, *supra* note 1, at 16. For a discussion of Pfizer's adoption of plurality plus, see INST'L S'HOLDER SERVS., 2005 POSTSEASON REPORT: CORPORATE GOVERNANCE AT A CROSSROADS 10 (2005), *available at* <http://www.issproxy.com/pdf/2005PostSeasonReportFINAL.pdf> [hereinafter 2005 PROXY SEASON REPORT].

pursuant to which directors must receive a majority shareholder vote in order to be elected.<sup>24</sup> Notwithstanding the form, empirical evidence reveals that shareholder activism has led to significant changes in the system of voting for directors.

In addition, legislatures and other governing bodies have sought to accommodate shareholders' efforts to institute majority voting. For instance, in 2005, Delaware amended its corporate code to make irrevocable any resignation submitted as a result of the failure to receive a required percentage of votes for reelection.<sup>25</sup> The American Bar Association ("ABA") also modified the Model Business Corporation Act ("Model Act") to provide for such a rule.<sup>26</sup> This new rule ensures that once a director is ousted as a result of a failure to receive a majority vote, he cannot be reinstated. Delaware also amended its code so that directors cannot amend or repeal bylaw amendments adopted by shareholders specifying the votes necessary for election of directors.<sup>27</sup> Because many of the shareholder proposals for majority voting are embodied in bylaw amendments, this change ensures that directors cannot undermine shareholders' success by altering any amendments they have secured. Finally, the ABA amended the Model Act to allow corporations to adopt a plurality plus standard.<sup>28</sup> In this way, the ABA created a blueprint for the implementation of majority voting.

All of these changes support shareholder efforts to enhance their voting power. These changes also highlight the relative success shareholders have experienced with regard to this issue. In fact, most analysts believe that majority voting in some form will soon be the norm in U.S. corporations.<sup>29</sup>

## **B. Shareholder Access to the Ballot**

Shareholder efforts to gain access to the corporation's proxy statement or "ballot" have also taken center stage in the last few years. At present, U.S. federal law prohibits shareholders from using the corporation's proxy

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24. See 2006 PROXY SEASON REPORT, *supra* note 1, at 16 (noting more than forty companies that have adopted a true majority vote standard).

25. See DEL. CODE ANN. tit. 8, § 141(b) (2007).

26. See 1984 MODEL BUS. CORP. ACT § 8.07 (1984).

27. See DEL. CODE ANN. tit. 8, § 216 (2007).

28. See 1984 MODEL BUS. CORP. ACT § 10.22 (1984) (requiring the resignation of directors who fail to receive a majority of shareholder votes).

29. See, e.g., Martin Lipton, SOME THOUGHTS FOR BOARDS OF DIRECTORS 5 (2007), available at <http://www.realcorporatelawyer.com/pdfs/Some%20Thoughts%20for%20Boards%20of%20Directors%20in%202008.pdf> (predicting that majority voting will become "universal").



statement to nominate their own board candidates.<sup>30</sup> Thus, if shareholders want to nominate a director candidate, they must distribute their own proxy statement to other shareholders. Creating and distributing proxy statements is very expensive;<sup>31</sup> consequently, shareholders rarely nominate their own candidates, and rarely contest management's candidates.<sup>32</sup> As a result, many scholars contend that the federal proxy rules limit shareholders' ability to participate in director elections, and hence undermine shareholders' ability to impact corporate affairs.

In recent years, shareholders have made headway in their attempts to alter this regime. After the corporate governance scandals of 2002, the Securities and Exchange Commission ("SEC") proposed a new rule granting shareholders the ability to nominate candidates on the corporation's proxy statement under limited circumstances.<sup>33</sup> To its advocates' dismay, considerable resistance to the proposed rule caused the SEC to abandon efforts to implement it.<sup>34</sup> The Second Circuit, however, revitalized the shareholder campaign in this area in *American Federation of State, County, & Municipal Employees v. American International Group, Inc.*<sup>35</sup> In that case, shareholders sought to get on the corporate ballot a "shareholder access proposal" that would allow shareholders to vote on whether shareholder candidates for directors could appear on the corporation's proxy statement.<sup>36</sup> The Second Circuit held that federal law did not prohibit shareholders from

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30. See 17 C.F.R. §240.14a-8(i)(8) (2007).

31. See *Battling for Corporate America*, ECONOMIST, Mar. 11, 2006 (explaining the cost involved with nominating director candidates); see also Brief of Harvard Law Professors as Amicus Curiae Supporting Appellants at 3, AFSCME v. AIG, 361 F. Supp. 2d 344 (S.D.N.Y. 2005) (noting the cost involved with waging a proxy contest).

32. Bebchuk, *supra* note 6, at 856 (noting that from 1996 to 2002, shareholders nominated their own candidates for directors an average of eleven times a year).

33. Security Holder Director Nominations, Securities Act Release No. 34-48626, 68 Fed. Reg. 60,784, (proposed Oct. 23, 2003) (to be codified at 17 C.F.R. pt. 240, 249, and 247) [hereinafter Proposed Rule on Nominations] (noting that the adoption of the new rule stemmed from concern over "corporate scandals and the accountability of corporate directors"). Under the proposed Rule 14a-11, shareholders would be able to make use of the corporation's proxy materials to nominate a director upon the occurrence of either of two triggering events: (1) when shareholders had withheld more than thirty-five percent of their votes from at least one of the company's nominees for director; or (2) when a security holder or group of security holders owning more than one percent of the company's securities submitted a proposal that the company become subject to the security holder nomination procedure in rule 14a-11 and the proposal received more than fifty percent of the shareholder vote. *Id.* at 60, 789-90.

34. See David A. Katz & Laura A. McIntosh, *Corporate Governance Update: Proxy Access—Not Then, Not Now*, N.Y.L.J., Sept. 28, 2006, at 3.

35. See 462 F.3d 121, 123-124 (2006).

36. *Id.* at 123-24.

submitting shareholder access proposals, because such proposals related to the procedural rules governing elections generally, not a particular election or nomination of director candidates.<sup>37</sup> The Second Circuit then encouraged the SEC to clarify its stance on shareholder access.<sup>38</sup> The SEC ultimately addressed the proxy access issue by deciding to adopt a measure that would prevent shareholders from submitting bylaw proposals regarding election procedures.<sup>39</sup> However, the SEC indicated that it was open to reassessing the issue in the 2008 proxy season.<sup>40</sup>

Thus, while shareholders have not altered the status quo in this area, they have spurred the SEC to reconsider the issue of shareholder access to the ballot. At the very least, shareholders have kept this issue alive, which represents a positive development for shareholders seeking a greater voice in corporate elections.

### C. The Attack on Classified Boards

Described by one expert as the “sleeper” governance issue of 2006,<sup>41</sup> shareholder efforts to eliminate classified boards also rose to prominence in the last few election years. Classified or staggered boards are boards where shareholders elect only a portion of the directors each year, generally one-third of the board. Board members do not come up for re-election every year, and hence such members have multi-year terms. Because multi-year terms make it difficult to replace the entire board, opponents of classified boards argue that such boards undermine director accountability and promote board entrenchment.<sup>42</sup> As a result, shareholders have been pressuring corporations for more than a decade to abolish classified boards.<sup>43</sup>

In 2005 and 2006, shareholders’ efforts in this area finally yielded results. Indeed, in 2005, the average shareholder vote for the elimination of classified

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37. *Id.* at 129–30.

38. *See id.* at 130.

39. *See* Shareholder Proposal Relating to the Election of Directors, 72 Fed. Reg. 70,450 (Dec. 6, 2007).

40. *See* Karey Wutkowski, *SEC to Look Outside Ballot on Proxy Access*, REUTERS, Jan. 4, 2008, <http://www.reuters.com/articlePrint?articleId=USN1741224720080104>.

41. Barry B. Burr, *Majority Vote Issue Draws the Most Proxies: But Declassifying Boards Has Become 2006’s “Sleeper” Issue*, PENSIONS AND INV., Apr. 3, 2006, at 3 (quoting a managing director of a Virginia-based proxy advisory company).

42. *See* Bebchuk, *supra* note 6, at 853.

43. *See id.* at 854. Shareholders have been submitting proposals to eliminate classified boards since the 1990s, and the support for those proposals has steadily increased, averaging more than fifty percent approval ratings in each year since 2000. *See id.* at 853–54.

boards was sixty percent, while in 2006 the average vote reached almost sixty-seven percent.<sup>44</sup> More importantly, while corporations failed to respond to shareholder efforts in prior years,<sup>45</sup> companies have recently acceded to shareholder calls to end classified boards. Thus, by the end of 2006, a majority of directors at S&P 500 firms were elected under a declassified board system.<sup>46</sup> This means that these directors will serve annual terms on the board. As with majority voting, shareholders have experienced success in their efforts to declassify corporate boards.

#### D. “Say on Pay”

Executive compensation and investors’ desire to stem its growth has been a hot-button issue in recent years. Anecdotal evidence abounds regarding the seemingly excessive compensation of top corporate executives. One of the most notorious examples is the severance compensation granted to ousted Disney president Michael Ovtiz, who received \$140 million after being employed for only fourteen months.<sup>47</sup> Another severance package sparking outrage was that of Home Depot CEO Robert Nardelli, who received \$210 million when he was forced to step down.<sup>48</sup> Moreover, studies confirm that corporate salaries have risen dramatically over the years.<sup>49</sup> These studies also suggest that these salaries have no clear link to executive performance.<sup>50</sup> For example, at Home Depot, Nardelli’s compensation continued to rise throughout his tenure even as his company’s stock price declined.<sup>51</sup> Studies reveal that CEO salaries in the United States are significantly greater than those at comparable companies in other countries.<sup>52</sup>

Because of these factors, shareholders and legislators have launched many efforts to curb executive pay. Shareholders have submitted proposals seeking

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44. 2006 PROXY SEASON REPORT, *supra* note 1, at 19 (noting that in 2005, the average support was 60.5%, while the average support reached 66.8% in 2006).

45. *See* Bebchuk, *supra* note 6, at 854 (finding that fewer than one third of the companies in which more than fifty percent of the shareholders had voted to abolish their classified boards had actually abolished them).

46. 2006 PROXY SEASON REPORT, *supra* note 1, at 19; Masters, *supra* note 21, at D1.

47. *See generally* *In re* Walt Disney Co. Derivative Litig., 731 A.2d 342 (Del. Ch. 1998).

48. Tomoch Murakami Tse, *Morgan Stanley, Bank of N.Y. Investors Reject “Say on Pay”*; *Activist Shareholders Encouraged by Vote Totals*, WASH. POST, Apr. 11, 2007, at D1.

49. *See, e.g.*, Randall Thomas, *Explaining the International CEO Pay Gap: Board Capture or Market Driven?*, 57 VAND. L. REV. 1171, 1175–76 (2004); Lucian Bebchuk et al., *Managerial Power and Rent Extraction in the Design of Executive Compensation*, 69 U. CHI. L. REV. 751, 751 (2002).

50. *See* Thomas, *supra* note 49, at 1182–83.

51. *See* Tse, *supra* note 48, at D1.

52. Thomas, *supra* note 49, at 1182–84.

to link pay to performance, to elicit broader disclosures on compensation levels, and to require shareholder approval of severance compensation packages.<sup>53</sup> On several occasions, the SEC has altered federal rules to require more detailed disclosure of executive compensation, most recently in December 2006.<sup>54</sup>

The latest attempt to curb executive compensation focuses on encouraging corporations to allow shareholders an advisory vote on such compensation. In the 2006 proxy season, shareholders submitted the first of such proposals.<sup>55</sup> The proposals received an average shareholder support of forty-percent at seven meetings.<sup>56</sup> One result of those proposals was that in February 2007, Aflac Inc., the biggest seller of supplemental insurance in the world, became the first company to voluntarily implement a “say on pay” vote.<sup>57</sup> During that same time period, forty-one U.S. institutional investors joined together to file proposals at forty-four companies seeking an advisory vote on compensation, including Coca-Cola, Home Depot, Time Warner, and Pfizer.<sup>58</sup> In May 2007, Blockbuster Inc. became the first company at which a “say on pay” garnered a majority vote from shareholders.<sup>59</sup> Finally, in April of 2007, the U.S. House of Representatives passed a bill that would require corporations to grant shareholders a “say on pay.”<sup>60</sup> The bill also enables shareholders to vote on “golden parachute” packages that would compensate officers who are terminated as a result of a takeover or some other unplanned event.<sup>61</sup> A similar bill has been introduced in the Senate.<sup>62</sup> Hence, the “say on

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53. See 2006 PROXY SEASON REPORT, *supra* note 1, at 3.

54. See Executive Compensation and Related Person Disclosure, 71 Fed. Reg. 53158-01 (Sept. 8, 2006) (to be codified at 17 CFR pts. 228, 229, 232, 239, 240, 245, 249, and 274), available at <http://www.sec.gov/rules/final/2006/33-8732a.pdf>.

55. See Posting of L. Reed Walton to Risk & Governance Blog, <http://blog.riskmetrics.com> (May 31, 2007). See also Tse, *supra* note 48, at D1 (noting that the “say on pay” vote at the Bank of N.Y. received forty-seven percent of the shareholder vote, while the Morgan Stanley proposal garnered thirty-seven percent of the vote).

56. See Walton, *supra* note 55.

57. See Tse, *supra* note 48, at D1. Aflac’s vote will take effect in 2009.

58. Anne M. Odell, “Say on Pay” Highlighted in Upcoming 2007 Proxy Season, SOCIAL FUND, Jan. 30, 2007, available at <http://www.socialfunds.com/news/article.cgi/2216.html>.

59. Moira Herbst, *Blockbuster Gives Say on Pay*, BUSINESSWEEK.COM, May 11, 2007, [http://www.businessweek.com/bwdaily/dnflash/content/may2007/db20070511\\_96112\\_2.htm?campaign\\_id=rss\\_daily](http://www.businessweek.com/bwdaily/dnflash/content/may2007/db20070511_96112_2.htm?campaign_id=rss_daily). The Blockbuster proposal passed by fifty-seven percent of the vote. Verizon became the second company to record a majority vote with 50.2% of the vote, while Motorola was the third, recording a vote of 51.8% of shareholders in favor of “say on pay.” Walton, *supra* note 55.

60. Herbst, *supra* note 59; Tse, *supra* note 48, at D1.

61. For a discussion of golden parachutes, see Richard P. Bress, *Golden Parachutes: Untangling the Ripcords*, 39 STAN. L. REV. 955 (1987).

pay” movement appears to be gathering momentum, reflecting yet another example of shareholders’ efforts to bolster their authority within the corporation.

As this discussion reveals, the last few years have involved aggressive efforts by shareholders to increase their voting rights and influence over corporate affairs. Viewed together, these efforts have yielded positive results. While the majority-vote campaign appears to be the most successful element of the shareholder democracy movement, shareholders have achieved gains in other areas as well. As a result, shareholders have changed the procedural landscape in which corporations operate in the United States.

## II. SHAREHOLDER DEMOCRACY AROUND THE GLOBE

Recent efforts to increase shareholder voting rights are not unique to the United States. Shareholders, as well as other institutions, have sought to enhance their voting rights in many other countries. Part II begins with an analysis of the majority vote in other regions to provide a point of comparison. This Part then assesses shareholder efforts to eliminate block voting, adopt a “one share, one vote” rule for corporations, and institute “say on pay.” This Part concludes with a brief examination of shareholder activism in general, to provide a more robust picture of shareholder efforts in other countries to increase their power.

### A. Majority Vote Revisited

The quest for majority voting in the United States does not have a counterpart in most other countries, because the United States is unique in its application of the plurality standard. Indeed, most other developed markets already have a majority vote standard for director elections.<sup>63</sup> While the standards differ slightly, most countries embrace a default rule enabling shareholders to elect directors by majority vote. In the United Kingdom, the board appoints directors. Shareholders, however, must approve director appointments at the next annual general meeting, and their approval must be by a majority of shareholder votes.<sup>64</sup> Almost all other countries that have adopted or inherited an English-based legal system similarly have adopted a

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62. See Herbst, *supra* note 59; Walton, *supra* note 55. The bill is sponsored by 2008 U.S. presidential candidate Senator Barack Obama. Walton, *supra* note 55.

63. See 2006 PROXY SEASON REPORT, *supra* note 1, at 18.

64. *Id.*; see also Alex Kay & Gary Milner-Moore, *Power to the People: The Growing Influence of Shareholder Activism*, PLC CROSS-BORDER Q., Oct.–Dec. 2006, at 40.

standard that allows shareholders to elect directors by majority vote.<sup>65</sup> In France, companies have either a unitary or two-tiered board structure. In French companies with a unitary board, not only must directors (excluding employee representatives) be elected by majority vote of the shareholders, but any votes in abstention are counted as votes against a director's election.<sup>66</sup>

In some countries, including the Czech Republic, Germany, Poland, and Russia, two-tiered board systems are the norm.<sup>67</sup> Under these systems, there is both a supervisory board and a management board.<sup>68</sup> Members of the supervisory board (other than employee representatives) are elected by a majority vote of shareholders, while the management board is comprised of directors appointed by the supervisory board.<sup>69</sup> Hence, when compared to most other voting systems, the American plurality system is an anomaly. As a result, the considerable shareholder activity related to majority voting in the United States has not been mirrored in most other markets.

As in the United States, however, majority voting has recently emerged as a critical governance issue in Canada.<sup>70</sup> Thus, in the last two years, institutional investors have mounted a campaign to alter Canada's plurality voting standard by working with dozens of boards to convince them to adopt a Pfizer-like director resignation policy for those directors who fail to get a majority vote from shareholders.<sup>71</sup> As a result of their efforts, more than half of Canada's sixty largest corporations adopted a director resignation or plurality plus policy during the 2006 proxy season.<sup>72</sup> As of June 2007, at least seventy-two Canadian corporations and trusts had adopted such a policy.<sup>73</sup> Mimicking the activism in the United States, Canadian investors have not only increased their efforts to dismantle the plurality vote rule, but many Canadian

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65. PAUL LEE, MAJORITY VOTING: THE WORLDWIDE ORTHODOXY, at 1, available at [http://www.icgn.org/organisation/documents/sri/lee\\_document.pdf](http://www.icgn.org/organisation/documents/sri/lee_document.pdf). This includes countries such as Australia, Hong Kong, India, Singapore, and South Africa.

66. *Id.*; see also Kay & Milner-Moore, *supra* note 64, at 38.

67. *See id.*

68. *See* 2006 PROXY SEASON REPORT, *supra* note 1, at 18.

69. *Id.*; see also Kay & Milner-Moore, *supra* note 64, at 38–39.

70. 2006 PROXY SEASON REPORT, *supra* note 1, at 17.

71. *See id.* This campaign is spearheaded by the Canadian Coalition for Good Governance, an organization comprised of forty-eight institutional investors that invest in the Canadian market. *See* Canadian Coalition for Good Governance, About the Canadian Coalition for Good Governance, <http://www.ccg.ca/about-the-ccgg/> (last visited Mar. 24, 2008).

72. *See* 2006 PROXY SEASON REPORT, *supra* note 1, at 17.

73. *See* Canadian Corporation for Good Governance, Guidelines, Majority Voting, <http://www.ccg.ca/guidelines/majority-voting/majority-voting-adoptees/> (last visited Mar. 24, 2008).

companies have responded by altering their governance rules to be more compatible with a majority vote standard.

Along similar lines, shareholders in Japan have been active in their efforts to maintain the ability to remove directors by majority vote. In Japan, like in most other countries, shareholders can elect directors by majority vote.<sup>74</sup> Prior to 2006, however, it took a two-thirds shareholders' vote to remove directors.<sup>75</sup> In May of 2006 a new Japanese corporation law became effective permitting the dismissal of directors by a simple majority vote.<sup>76</sup> In response to the law, several corporations have sought to restore the previous two-thirds standard by seeking shareholder approval to amend their by-laws to revert back to the old default rule.<sup>77</sup> Yet Japanese investors launched efforts to oppose such changes at all of the companies where amendments were attempted.<sup>78</sup> While not always successful, such efforts were notable, given the apathy often displayed by many Japanese shareholders.<sup>79</sup> Certainly, the change in Japanese law reflects a change aimed at strengthening shareholder voting power. More importantly, Japanese shareholders' efforts to maintain such a change indicates a sign of increased activism on the part of such investors.

## B. Blocking "Share Blocking"

Shareholders in other countries have also finally managed to gain some ground on efforts to eliminate share blocking. In many continental European countries, including France, Italy, and the Netherlands, shareholders who wish to vote at an annual meeting must deposit their shares several days before the meeting.<sup>80</sup> Such shares are then effectively blocked from trading from the time of the deposit until the day of the meeting. This practice, known as "share blocking," is prohibited by American law, under which

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74. See 2006 PROXY SEASON REPORT, *supra* note 1, at 18.

75. See *id.*

76. See *id.*

77. See *id.*

78. See John Taylor, *Japanese Investors Step Up Activism*, Risk & Governance Blog, <http://blog.issproxy.com/2006/07/000114print.html> (July 7, 2006).

79. See Douglas G. Smith, *A Comparative Analysis of the Proxy Machinery in Germany, Japan and the United States: Implications for the Political Theory of American Corporate Finance*, 58 U. PITT. L. REV. 145, 171 (1995) (noting the general apathy of Japanese investors).

80. See Sofie Cools, *The Real Difference in Corporate Law Between the United States and Continental Europe: Distribution of Powers*, 30 DEL. J. CORP. L. 697, 713 (2005); Thaddeus C. Kopinski, *2006 Preview: Continental Europe*, Risk & Governance Blog, <http://blog.issproxy.com/2006/02/000021print.html> (Feb. 27, 2006).

corporations cannot block shares before a shareholders' meeting.<sup>81</sup> Instead, corporations determine the eligibility of voters by establishing a record date.<sup>82</sup>

Share blocking has been characterized as a critical barrier to the exercise of shareholder voting rights. Indeed, opponents of share blocking believe it weakens voter turnout, particularly for foreign investors, who would rather abstain from voting than risk giving up their liquidity.<sup>83</sup> As one analyst notes, share blocking serves as a powerful deterrent to voting for institutional investors.<sup>84</sup> Ultimately, opponents argue that by promoting lower voting participation rates, share blocking weakens companies' incentives to be accountable to shareholders.<sup>85</sup>

Investors have long challenged this system. Indeed, activist investors have for many years sought to encourage corporations to voluntarily abolish share blocking.<sup>86</sup> Moreover, for several years, institutional investors and corporate governance groups have submitted proposals to the European Commission urging it to prohibit the practice of share blocking among member states.<sup>87</sup> Despite these efforts, the practice persisted, while the European Commission remained silent on the issue.

Now, however, that silence has been broken. In 2005, Germany amended its corporate law to require that German companies abolish share blocking and transition to the adoption of a twenty-one-day record date system.<sup>88</sup> After several public consultations, in June 2007, the European Commission adopted a shareholder rights directive requiring corporations to abolish the practice of share blocking in favor of establishing a record date for voting.<sup>89</sup> Corporations have two years to comply with the directive.<sup>90</sup>

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81. *See id.* Under Delaware law, the board cannot block shares prior to a meeting. Instead, Delaware law only allows the board to fix a record date. *See* DEL. CODE ANN. tit. 8, § 213 (2001).

82. *See* Cools, *supra* note 80, at 713.

83. *See* Kopinski, *supra* note 80.

84. *See* Karina Litvack, *Standing Up Against Share Blocking*, EUROPEAN PENSIONS AND INVESTMENT NEWS, June 19, 2006, [http://www.epn-magazine.com/news/fullstory.php/aid/2207/Standing\\_up\\_against\\_share\\_blocking.html](http://www.epn-magazine.com/news/fullstory.php/aid/2207/Standing_up_against_share_blocking.html).

85. *See id.*

86. *See id.* (noting activism by many investors).

87. *See id.*

88. *See* 2006 PROXY SEASON REPORT, *supra* note 1, at 40.

89. *See id.* at 38. On June 12, 2007, the E.U. Commission adopted the Directive on the Exercise of Certain Rights of Shareholders in Listed Companies. *See* Vaughn Stewart, *European Commission Formally Adopts Shareholder Rights Directive*, Risk & Governance Blog, [http://blog.issproxy.com/2007/06/european\\_commission\\_formally\\_a.htm](http://blog.issproxy.com/2007/06/european_commission_formally_a.htm) (June 20, 2007). The directive abolishes share blocking, mandates the disclosure of voting results, and sets forth the rights of shareholders to ask questions of company officials. *See id.*

90. *See* Stewart, *supra* note 89; *see also* 2006 PROXY SEASON REPORT, *supra* note 1, at 38.



These changes are viewed as enhancing shareholders' voting rights. Indeed, analysts believe the abolition of share blocking will spur greater voter participation, particularly among foreign investors.<sup>91</sup> Moreover, these changes exemplify the progress being made to enhance shareholder democracy in Europe.

### C. "One Share, One Vote"

Although there is considerable disagreement about its utility, investors in various countries have encouraged corporations to adopt a "one share, one vote" rule. One share, one vote is a principle requiring that votes be allocated in proportion to the number of shares an investor holds. The NYSE and other U.S. listing agencies require that companies listed on their exchange adopt a one share, one vote rule.<sup>92</sup> As a result, one share, one vote is the norm in the United States. Advocates argue that the rule is not only democratic, but represents the optimal voting structure.<sup>93</sup> Many companies in other countries, however, do not have such a rule in place. For example, a recent study found that more than thirty percent of the companies included in the FTSE Eurofirst 300 index deviate from the one share, one vote principle.<sup>94</sup> The countries with the most deviation include France, the Netherlands, and Sweden.<sup>95</sup> The deviation stems from the adoption of various voting structures, including multiple voting rights as well as voting rights ceilings (where there is a cap on the number of shares an investor can vote, regardless of the number owned).<sup>96</sup> These and other practices ensure that investors do not get the benefit of the one share, one vote rule in many countries around the globe.

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91. See Kopinski, *supra* note 80.

92. In December 1994, the SEC approved rules proposed by the New York Stock Exchange, American Stock Exchange, and National Association of Securities Dealers that established a uniform voting standard. This new standard prohibits companies listed on the NYSE, the AMEX, or the NASDAQ system from taking any corporate action or issuing any stock that has the effect of disparately reducing or restricting the voting rights of existing common stock shareholders.

93. *But see* Shaun Martin & Frank Partnoy, *Encumbered Shares*, 2005 U. ILL. L. REV. 775 (disagreeing with the traditional view that one share, one vote is economically optimal).

94. See DEMINOR RATING, APPLICATION OF THE ONE SHARE-ONE VOTE PRINCIPLE IN EUROPE (2005), available at <http://www.deminor.com/download.do?doc=deminorratingDocs/ABIOneShareOneVoteFullReport.pdf>.

95. *See id.*

96. *See id.*

To be sure, there is disagreement about the importance of such a rule to shareholder rights. Indeed, one study concluded that the rule was not justified by economic efficiency.<sup>97</sup> Another study reached similar conclusions.<sup>98</sup>

Despite this disagreement, there has been renewed activity and focus around the issue of one share, one vote. Investors as well as the European Commission have pressured corporations to embrace such a rule.<sup>99</sup> Moreover, many companies have voluntarily adopted the rule.<sup>100</sup> While the transition to one share, one vote is uncertain, the increased attention on instituting such a rule reflects another example of shareholder efforts to protect and strengthen their voting rights in other countries.

#### D. “Say on Pay” Revisited

Shareholders in other countries have also zeroed in on executive compensation. Indeed, although executive compensation has not risen as dramatically in other countries as it has in the United States, executive salaries around the globe have gone up in recent years.<sup>101</sup> Moreover, investors in other countries have expressed sharp criticism regarding the apparent lack of connection between executive pay and company performance.<sup>102</sup>

Interestingly, as with majority voting, considerably more progress has been made in other countries with respect to “say on pay” than in the United States. In 2002, the United Kingdom became the first country to require a shareholder advisory vote on board pay.<sup>103</sup> Thus, U.K. shareholders had been casting a non-binding vote on compensation for almost five years before shareholders in the United States even began agitating for such a vote. Although the vote is not binding on U.K. companies, it gives shareholders an opportunity to express their opinion on compensation practices at their firms. U.K. law also requires disclosure on various compensation data.<sup>104</sup> Other countries have followed the U.K. example. For instance, corporations in Australia and Sweden also must allow their shareholders to cast a non-binding vote on compensation.<sup>105</sup> Moreover, in Australia, one company had its

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97. See Guido A. Ferrarini, *One Share–One Vote: A European Rule?* 3–4 (Univ. of Genoa and ECGI, Working Paper No. 58, 2006), available at <http://ssrn.com/abstract=875620>.

98. See Martin & Partnoy, *supra* note 93.

99. See Ferrarini, *supra* note 97, at 2.

100. See *id.* at 5.

101. See Thomas, *supra* note 49, at 1174–76.

102. See *id.* at 1175.

103. See 2006 PROXY SEASON REPORT, *supra* note 1, at 14.

104. See *id.*

105. See *id.*

remuneration report rejected by shareholders, while reports at several other companies received against votes as high as forty percent.<sup>106</sup> In contrast to those in Australia and the United Kingdom, corporations in the Netherlands must grant their shareholders a binding vote on executive compensation.<sup>107</sup>

These shareholder votes on compensation represent part of shareholders' ongoing struggle to curb compensation levels, and to ensure that executive compensation is more closely linked to performance. Furthermore, they reflect shareholders' quest for a greater voice in corporate affairs.

### E. Shareholder Activism

Shareholders around the globe have demonstrated increased activism over the last few years, an activism that is in sharp contrast to the apathy that many such shareholders previously exhibited.<sup>108</sup> This activism underlines the general push for shareholder democracy, as well as shareholders' efforts to have a greater role in corporate affairs.

For example, shareholders in Japan have revealed unprecedented activism over the last few years. Indeed, studies confirm that most shareholders in Japan traditionally tended towards significant apathy.<sup>109</sup> This apathy was epitomized by the fact that historically, relatively few shareholders attended annual shareholder meetings.<sup>110</sup> In fact, the percentage of investors present at shareholder meetings had been decreasing steadily.<sup>111</sup> This lack of attendance had a significant impact on shareholders' ability to exercise their voice within Japanese corporations. Indeed, because of the relatively weak market for corporate control and other non-legal factors, experts believe that shareholder involvement at annual meetings represents one of the few ways in which shareholders can express their discontent with Japanese companies and play an active role in corporate governance.<sup>112</sup>

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106. *See id.*

107. *See id.* at 15.

108. *See* Smith, *supra* note 79, at 178–79 (pinpointing significant shareholder apathy, particularly in Germany and Japan).

109. *See, e.g., In the Locust Position: Shareholder Activism in Japan*, *ECONOMIST*, June 30, 2007, at 76 [hereinafter *Shareholder Activism in Japan*]; Smith, *supra* note 79, at 171 (noting that shareholder apathy in Japan represents a “significant barrier to shareholder participation in corporate governance”).

110. *See* Smith, *supra* note 79, at 171–72.

111. *See id.*; Yoichiro Taniguchi, *Japan's Company Law and the Promotion of Corporate Democracy: a Futile Attempt?*, 27 *COLUM. J. TRANSNAT'L L.* 195, 229 (1988); Christopher Heftel, *Corporate Governance in Japan: The Position of Shareholders in Publicly Held Corporations*, 5 *U. HAW. L. REV.* 135, 169–70 (1983).

112. *See* Smith, *supra* note 79, at 170–71.

Shareholders' ability to play a role in shareholder meetings has been limited in at least two critical ways. First, the vast majority of Japanese companies hold their annual meetings on the same day, severely limiting activist shareholders' ability to participate in multiple shareholder meetings.<sup>113</sup> Second, and perhaps most problematic, the ability of shareholders to participate in shareholder meetings is undermined by the presence of *sokaiya*.<sup>114</sup> *Sokaiya* are essentially corporate extortionists who attend shareholder meetings on a company's behalf in order to quell any shareholder discontent and keep the meetings short—preferably under thirty minutes.<sup>115</sup> Apparently, corporations that do not agree to hire a *sokaiya* are subject to threats, intimidation, or worse.<sup>116</sup> One study revealed that some seventy-seven percent of Japanese corporations had admitted to paying *sokaiya*, even though such payments are illegal under Japanese law.<sup>117</sup> In fact, the rationale behind holding shareholder meetings on the same day was to limit the ability of *sokaiya* to police the bulk of such meetings.<sup>118</sup> Despite this rationale, uniform annual meetings and the presence of *sokaiya* combine to severely impede shareholders' ability to participate in meetings. This impediment underscores the general apathy historically displayed by investors in Japan.

Over the past few years, however, such investors have begun actively participating in annual meetings. Indeed, one study found that not only have meetings run longer than the traditional thirty minutes, but there also has been a rise in the number of shareholders attending meetings, as well as in the number of questions being asked at the meetings.<sup>119</sup> Moreover, shareholders have submitted more proposals at meetings. Thus, almost thirty companies faced shareholder resolutions in 2006, double the number facing such resolutions in 2005.<sup>120</sup> Some commentary suggests that this increased activism is due to an increase in the proportion of foreign investors.<sup>121</sup> Indeed, foreigners currently account for some twenty-eight percent of Japanese firm shares.<sup>122</sup> Foreign investors' willingness to be more involved in shareholder

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113. See *Shareholder Activism in Japan*, *supra* note 109.

114. See Smith, *supra* note 79, at 172; Heftel, *supra* note 111, at 170.

115. See Heftel, *supra* note 111, at 107.

116. See *id.*

117. See *id.*

118. See *Shareholder Activism in Japan*, *supra* note 109.

119. See Taniguchi, *supra* note 111, at 228–29.

120. See *Shareholder Activism in Japan*, *supra* note 109.

121. See *id.*

122. See *id.*

meetings has apparently spurred Japanese shareholders to do the same.<sup>123</sup> Given the importance of activism at shareholder meetings, the recent trend of greater involvement suggests that shareholders in Japan are beginning to play a greater role in corporate affairs.

Similarly, shareholders in Germany have displayed an increased level of activism. Like their Japanese counterparts, German shareholders historically have exhibited significant apathy.<sup>124</sup> Some contend that this apathy stems from the heightened role that banks play in the German proxy system relative to other countries.<sup>125</sup> In the last few years, however, Germany has witnessed an astonishing rise in shareholder activism.<sup>126</sup> Shareholder activists have mounted campaigns challenging a variety of governance practices, and have played a critical role in takeover battles at German companies.<sup>127</sup> Moreover, shareholders have been active in challenging directors and CEOs deemed to be underperforming.<sup>128</sup> These challenges are epitomized by shareholders' success in ousting the head of Deutsche Börse in 2005.<sup>129</sup> While many in Germany bemoan the recent rise in shareholder activism, that rise reflects shareholder efforts to gain a greater voice within German corporations.

In the United Kingdom, shareholder activism among institutional investors also has increased. Traditional shareholder activism has been rare in the United Kingdom.<sup>130</sup> Recent studies, however, reveal that shareholders, particularly institutional investors, have begun taking a more active role in governance affairs.<sup>131</sup> This increased activism is demonstrated by increased investor opposition to company resolutions, which has grown steadily in

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123. See *id.* (explaining that traditional institutional investors in Japan have taken a more active role in Japanese governance issues alongside newer shareholder activists).

124. See Smith, *supra* note 79, at 186; Carter Dougherty, *Deutsche Chief Looks at a Legacy of Change*, INT'L HERALD TRIB., Dec. 16, 2005 at 13 (noting that German companies had "languished" for years without embracing shareholder activism).

125. See Smith, *supra* note 79, at 187.

126. See Dougherty, *supra* note 126; Ben McLannahan, *Rebels with a Cause*, CFOEUROPE.COM, Feb. 2004, <http://www.cfoeurope.com/displayStory.cfm/2383150> (describing increased shareholder democracy as a "cultural shift" among German investors).

127. See McLannahan, *supra* note 127.

128. See *id.*; see also Kay & Milner-Moore, *supra* note 64, at 44.

129. See Dougherty, *supra* note 126.

130. See Marco Becht et al., *Returns to Shareholder Activism: Evidence from a Clinical Study of the Hermes U.K. Focus Fund* (Eur. Corp. Governance Inst., Finance Working Paper No. 138, 2006), available at [http://www.edebodt.net/workshop\\_2007/SupportFiles/ReturnToShareholderActivism.pdf](http://www.edebodt.net/workshop_2007/SupportFiles/ReturnToShareholderActivism.pdf); John Hendry et al., *Responsive Ownership, Shareholder Value, and the New Shareholder Activism* 8 (ESRC Centre for Bus. Res. Working Paper No. 297, 2004), available at <http://www.cbr.cam.ac.uk/pdf/wp297.pdf> (noting that shareholder activism has not been a widespread phenomenon in the United Kingdom).

131. See *id.* at 6.

recent years.<sup>132</sup> In addition, a 2006 study revealed that U.K. shareholders have played an active role in replacing CEOs and board chairs, participating in restructuring decisions, and altering investment and company policies.<sup>133</sup> The study noted that this high level of shareholder engagement was distinct from previous periods, when shareholders rarely played a role in governance matters.<sup>134</sup> The study also found that such engagement yielded positive returns for shareholders.<sup>135</sup>

Some of the recent activism in the United Kingdom has likely been spurred by investors' ability to provide an advisory vote on executive pay. Analysts maintain that the mandatory shareholder vote has contributed to shareholder activism by increasing the level of dialogue between investors and company management.<sup>136</sup> Both the required vote and increased shareholder participation in issues of executive compensation reflect the growing levels of shareholder democracy within the United Kingdom.

While not all of the increased activity has yielded results, experts agree that heightened activism represents a new worldwide phenomenon. Hence, like their U.S. counterparts, shareholders in other countries have been pushing for a greater role in corporate affairs, and have subsequently used that role to press for change in the corporate structure.

### III. SHAREHOLDER DEMOCRACY THROUGH THE LENS OF INTERNATIONAL EXPERIENCES

#### A. The Shareholder Democracy Debate in the United States

Proponents of shareholder democracy in the United States maintain that increasing shareholder power will improve firm performance and shareholder value.<sup>137</sup> In their view, shareholder democracy is an important method of ensuring that directors and officers have greater accountability. This increased accountability, then, should translate into a decrease in the amount of fraud and corporate misconduct. It also should translate into greater efficiency, and hence, increased financial returns.

Opponents express skepticism about the merits of shareholder democracy. This skepticism takes the form of four distinct, but overlapping,

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132. *See id.*

133. *See* Becht et al., *supra* note 130, at 14–16.

134. *See id.* at 8.

135. *See id.*

136. *See id.*

137. *See* Bebchuk, *supra* note 6, at 842–43.

concerns. As an initial matter, opponents question whether shareholders, who have traditionally been apathetic, will actually utilize their increased power once it is granted. Second, opponents maintain that shareholder power will not translate into increased shareholder returns, nor will it improve corporate governance.<sup>138</sup> This is because, in some scholars' views, the current system of centralized decision making by the board is optimal. By granting shareholders greater power, and thus taking power from the board, shareholder democracy threatens to undermine the efficiency and value created by American corporations.<sup>139</sup> Third, critics maintain that increasing shareholder democracy will facilitate the ability of certain shareholders to advance their own personal agendas at the expense of the overall health of the firm.<sup>140</sup> Finally, scholars contend that increasing shareholder power will have a detrimental impact on non-shareholder stakeholders, undermining the corporation's ability to pay heed to the concerns of all corporate constituents.<sup>141</sup> The next section examines the validity of these arguments by drawing on insights from experiences in other countries.

## B. An International Perspective

### 1. Shareholder Democracy and Passivity

Professor Stephen Bainbridge and other scholars have argued that shareholders' natural and rational apathy may undercut the extent to which they will use the power granted to them.<sup>142</sup> Studies by Professor Bernard Black and other scholars suggest that shareholders tend to be relatively passive, failing to exercise the voting power provided to them or otherwise engage in activism.<sup>143</sup> This relative passivity makes it unlikely that shareholders will benefit from increased power. Such an assessment gives opponents of shareholder democracy comfort, while suggesting that proponents' efforts in this area are in vain.

On the one hand, experiences in other countries would appear to confirm the view that shareholders' natural apathy will limit the extent to which they exercise any increased power they receive. For example, consider the practice

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138. See Bainbridge, *supra* note 8, at 1749.

139. See *id.* at 1746; Stephen M. Bainbridge, *The Case for Limited Shareholder Voting Rights*, 53 UCLA L. REV. 601, 624 (2006).

140. See Bainbridge, *supra* note 8, at 1754.

141. See *infra* notes 185–188.

142. See Bainbridge, *supra* note 8, at 1753.

143. See Bernard S. Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520 (1990).

of majority voting, the norm in most modern markets outside of the United States. Majority voting does not appear to have resulted in significant shareholder power in countries that observe it. To the contrary, shareholders do not appear to have used their vote to challenge directors. Thus, studies demonstrate that instances in which shareholders challenge managers' selections for directors are exceedingly rare.<sup>144</sup> This is true even in corporations that have been rocked by scandal. Moreover, this is true despite the fact that, unlike America, most other countries make it relatively easy to nominate alternative candidates for directors.<sup>145</sup> To be sure, cultural and other non-legal hurdles may explain the relative passivity of shareholders in other countries.<sup>146</sup> Studies suggest, however, that the crux of the problem may be relative apathy among shareholders.<sup>147</sup> Thus, experiences in these other countries appear to confirm the assertion that expanding shareholder democracy may have relatively little impact on the corporate governance landscape. Given that majority voting represents the signature campaign in the quest for increased shareholder democracy in the United States, these experiences do not bode well for advocates of increased shareholder power.

On the other hand, there is some evidence to suggest that shareholders may exercise their increased power in more subtle ways; hence, enhanced shareholder power may in fact have a greater influence on corporate affairs than theories about apathy would predict. Because it strengthens the impact of a withhold-the-vote campaign, majority voting structures can serve to enhance dialogue between shareholders and managers.<sup>148</sup> From this perspective, that shareholders rarely challenge manager selections may reflect greater compromise prior to such selections. Evidence also suggests that shareholders do exercise their authority during times of perceived crisis. Certainly the fact that shareholders were able to oust a key German CEO exemplifies this point. Additionally, shareholders in the United Kingdom

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144. See 2006 PROXY SEASON REPORT, *supra* note 1, at 18 (revealing that instances where U.K. directors receive less than majority support are rare).

145. See, e.g., Cools, *supra* note 80, at 745–47; Kay & Milner-Moore, *supra* note 66, at 38–40 (explaining the French, German, and U.K. systems allowing for the removal of directors); see also *Shareholder Activism in Japan*, *supra* note 109 (noting that while corporate law is more shareholder friendly in Japan—enabling shareholders to oust the entire board without cause—Japanese shareholders tend to defer to management).

146. See Smith, *supra* note 79, at 170–73, 186–89 (pinpointing extra-legal factors that hinder shareholder activism in Germany and Japan).

147. *Id.* at 186 (noting that shareholder apathy is “relatively great” in both Japan and Germany).

148. See Joseph A. Grundfest, *Just Vote No: A Minimalist Strategy for Dealing with Barbarians Inside the Gate*, 45 STAN. L. REV. 857, 866 (1993) (noting the impact that a successful withhold-the-vote campaign may have on communication).



have been known to cast a high percentage of dissenting votes for some directors.<sup>149</sup> In some cases, the dissent vote reached in excess of thirty percent, which one analyst characterized as “striking.”<sup>150</sup> In other cases, even when shareholders’ votes fall short of the majority needed to oust a director, such votes lead to the removal of directors.<sup>151</sup> A similar phenomenon occurred in the case of Disney, where even though shareholders’ “no” votes fell short of a majority, shareholders’ expression of dissent eventually prompted corporate action. In this regard, the bare statistics on shareholder voting patterns may understate the influence of shareholder voting. Here too, the fact that shareholders exercise their power of removal or dissent only in rare circumstances may reflect an optimal use of shareholder power. As Professor Bebchuk notes, the purpose of enhanced shareholder power is not to supplant managerial authority, but rather to ensure greater dialogue between shareholders and managers while ensuring that shareholders can exercise their voice under critical circumstances.<sup>152</sup> In this regard, the evidence may indicate that shareholders use their authority where appropriate.

## 2. Shareholder Democracy and Corporate Value

Professor Bainbridge and others also contend that shareholder democracy and activism will not improve firm value. In fact, U.S. studies assessing the impact of shareholder democracy and activism on firm value have yielded mixed results. At least some studies suggest that shareholder activism may have a positive impact on corporate governance structures.<sup>153</sup> Other studies indicate that shareholder activism has little to no link to share value and earnings.<sup>154</sup> Still other studies confirm the notion that shareholder activism has had a minimal impact on corporate performance.<sup>155</sup> These

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149. See ALAN BRETT, MANIFEST INFO. SERVS. LTD., VOTING SEASON REVIEW 2002–2003 (2003), at 33–34 (presenting a study of proxy data revealing that four directors received dissenting votes in excess of thirty percent, while sixteen directors received dissents in excess of twenty percent and sixty-seven received dissents in excess of ten percent).

150. *Id.* at 34.

151. *See id.*

152. *See* Bebchuk, *supra* note 6, at 876.

153. Jonathan Karpoff, *The Impact of Shareholder Value on Target Companies: A Survey of Empirical Findings* 19, 26 (unpublished manuscript, 2001) available at <http://ssrn.com/abstract=885365>.

154. *See id.* at 23, 26; *see also* Bernard Black, *Shareholder Activism and Corporate Governance in the U.S.*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW (Peter Newman ed., 1998); Stuart Gillian & Laura Starks, *A Survey of Shareholder Activism: Motivation and Empirical Evidence*, CONTEMP. FIN. DIG., Autumn 1998, at 27.

155. *See* Roberta Romano, *Less is More: Making Institutional Investor Activism a Valuable Mechanism of Corporate Governance*, 18 YALE J. ON REG. 174, 187–89 (2001).

findings suggest that shareholder agitation and increased participation do not necessarily translate into greater value for shareholders.

Interestingly, a recent study in the United Kingdom supported by the London Business School contradicts such an assessment.<sup>156</sup> The study found a high correlation between enhanced firm value and shareholder activism on the part of institutional investors.<sup>157</sup> Authors of the study cautioned that the results may not have broad application to other countries, particularly the United States.<sup>158</sup> This is because the governance mechanisms in the United Kingdom are distinct from and in many ways more expansive than those in the United States. Thus, scholars note that legal obstacles, including the restricted shareholder nomination and director election process, impede the activism of American investors.<sup>159</sup> Moreover, scholars pinpoint the lack of majority vote system in the United States as hampering the ability of shareholder activism to have a positive influence on shareholder value and returns.<sup>160</sup> Thus, as several American scholars have noted, the governance conditions in the United Kingdom may make that country a more favorable environment for activism, increasing the likelihood that such activism will have a positive impact on shareholder returns.<sup>161</sup>

At the very least, the study suggests that shareholder activism can have favorable repercussions for shareholders under the right circumstances. Many of the problems associated with the U.S. governance system that have made it less ideal for effective shareholder activism, such as the majority vote system and shareholder proxy access, are now being addressed in some fashion. Thus, to the extent that American shareholders have begun to dismantle these systems, the U.K. study raises the possibility that the altered U.S. corporate governance structure—like its U.K. counterpart—may present a more favorable environment for activism. As a result, the study also raises the possibility that shareholder democracy can have a positive impact on share value and earnings.

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156. See Becht et al., *supra* note 130, at 3, 6–7.

157. See *id.* at 6.

158. See *id.* at 3–5.

159. See *id.* at 4–5; Black, *supra* note 154, at 459; Bernard Black, *Shareholder Passivity Re-examined*, 89 MICH. L. REV. 520 (1990).

160. See Becht et al., *supra* note 130, at 4–5; Cools, *supra* note 80, at 746–48.

161. See Becht et al., *supra* note 130, at 3–5; see, e.g., Bebchuk, *supra* note 6, at 849; Bernard Black & John Coffee, *Hail Britannia?: Institutional Investor Behavior under Limited Regulation*, 92 MICH. L. REV. 1997, 2003 (1994).

### 3. Shareholder Democracy and Corporate Affairs

Some have maintained that increasing shareholder power may have little impact on corporate affairs. In fact, previous studies suggest that increasing shareholder power may not lead to greater accountability or otherwise rectify corporate governance failures. In other contexts, scholars have pointed out that shareholder activism through the shareholder proposal process represents an ineffective mechanism for altering corporate practices, particularly practices involving executive compensation schemes.<sup>162</sup> Thus, it is not clear that increasing shareholder power will prove effective.

At first, experiences in other countries appear to confirm the notion that increased shareholder power will do little to prevent corporate misconduct. Indeed, shareholders in other countries not only operate under a majority vote regime, but also have an expanded ability to remove directors from office.<sup>163</sup> This ability did not have an appreciable impact on preventing corporate misconduct. Instead, similar to the United States, those countries experienced several instances of corporate mismanagement and fraud. Proponents of majority voting have argued that a majority vote standard would increase accountability, because shareholders would have the actual ability to prevent directors from serving on the board.<sup>164</sup> This ability would serve as a powerful threat, and hence a powerful deterrent.<sup>165</sup> The fact that the majority vote regime did not appear to have such an impact in other countries, however, suggests that the threat of removal in a majority vote regime does not quell director misconduct or make directors more accountable.

Yet the United Kingdom's experience with executive compensation suggests that, in some contexts, increased shareholder power may have an impact on corporate affairs. Indeed, in 2002 the United Kingdom became the first country to require that shareholders be given an advisory vote on board pay.<sup>166</sup> Such a vote has apparently led to more significant dialogue between shareholders and managers on issues of compensation. Moreover, the vote apparently has had an impact on compensation levels. Thus, a recent study

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162. See Lori B. Morino, *Executive Compensation and the Misplaced Emphasis on Increasing Shareholder Access to the Proxy*, 147 U. PENN. L. REV. 1205, 1236–37, 1246 (1999) (noting that executive compensation continues to rise, notwithstanding shareholders' increased ability to submit proposals related to such compensation).

163. See Cools, *supra* note 78, at 746.

164. See Masters, *supra* note 21.

165. See *id.*

166. See 2006 PROXY SEASON REPORT, *supra* note 1, at 14.

revealed that the compensation of top U.K. executives rose between five and six percent in 2006.<sup>167</sup> This increase is remarkable because for the past five years such compensation levels had increased an average of fourteen percent per year.<sup>168</sup> This change suggests that shareholders' enhanced authority within the corporation has had an impact on corporate affairs. In fact, many advocates of advisory votes on compensation in the United States pinpoint the United Kingdom's experience as an example of the positive impact such a vote can have on excessive compensation.<sup>169</sup> The fact that shareholder activism in the United Kingdom has had an impact on executive compensation is important given that the issue of compensation is one of the principle impetus for the rise in shareholder activism in the United States. From this perspective, the U.K. experience, at least with regard to compensation, supports the notion that shareholder democracy can influence corporate affairs.

#### *4. Shareholder Democracy and Special Interest Governance*

Several scholars have expressed concern over the possibility that granting shareholders enhanced power will give certain investors a greater ability to advance special interests at the expense of the corporation as a whole. These critics argue that the diversity of shareholders as a collective means that they will not share common interests, and thus shifting power to them would encourage rent seeking and reduce shareholder value.<sup>170</sup> In fact, both Professor Bainbridge and Vice Chancellor Leo Strine of the Delaware Court of Chancery question whether shareholders, if given enhanced power, will act in the best interests of the firm or will advance their own narrow self-interests.<sup>171</sup>

The most active shareholders of a company are often among the most susceptible to outside influences. Professor Roberta Romano points out that public pension funds face intense political pressure to focus on narrow

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167. *See id.*

168. *See id.*

169. *See* H.R.1257, 110th Cong. (2007), *available at* [http://www.house.gov/apps/list/speech/financialsvcs\\_dem/muhr1257032107.pdf](http://www.house.gov/apps/list/speech/financialsvcs_dem/muhr1257032107.pdf).

170. *See* Anabtawi, *supra* note 9, at 575.

171. *See* Bainbridge, *supra* note 8, at 1754; Leo Strine, Jr., *Toward a True Corporate Republic: A Traditionalist Response to Bebchuk's Solution for Improving Corporate America*, 119 HARV. L. REV. 1759, 1771 (2006).

personal and social issues.<sup>172</sup> Other scholars similarly pinpoint the tendency of investors such as public pensions and labor unions to pursue their own interests without regard to how they impact the corporation as a whole.<sup>173</sup> For example, some evidence suggests that labor unions initiate shareholder proposals after failed talks with management.<sup>174</sup> In this regard, many opponents contend that increasing shareholder power will only augment the ability of certain investors to advance their narrow political or personal goals.

Moreover, the type of investors on the forefront of the movement to increase shareholder power both in the United States and abroad seem to validate this concern. Specifically, in the United States, hedge funds have been very active in the new campaign for shareholder democracy.<sup>175</sup> Here, too, hedge funds have played an increasingly greater role in other countries, galvanizing shareholder activism.<sup>176</sup> Hedge funds tend to have greater success than traditional shareholders because they have greater resources, financial innovation, and flexibility.<sup>177</sup> Additionally, hedge funds often couple their voting campaign with a threat of a proxy contests for corporate control.<sup>178</sup> This threat dramatically increases their bargaining power. Yet hedge funds often have narrow agendas that do not take into account the interests of the corporation as a whole. Hence, the presence and prominence of hedge funds in the campaign for shareholder democracy supports the notion that such democracy will not have a positive impact on the corporation as a whole.

The involvement of other investors in the new movement for shareholder democracy, however, may mitigate the problem of hedge fund activism. In the United States, institutional investors as well as pension funds also have played a major role in the new efforts to advance shareholder rights.<sup>179</sup> Similarly, many scholars have observed that the recent activism in other countries stems not only from hedge funds, but also from institutional investors. For instance, institutional investors in Germany have played a role

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172. See Roberta Romano, *Public Pension Fund Activism in Corporate Governance Reconsidered*, 93 COLUM. L. REV. 795, 811–812 (1993) (noting the distinction between public and private funds and the pressure public funds face to focus on local and social issues).

173. See Frank Partnoy & Randall Thomas, *Gap Filling, Hedge Funds, and Financial Innovation* 5, (Vanderbilt Law and Economics Research Paper No. 06-21, 2006) available at <http://ssrn.com/abstract=931254>.

174. See *id.* at 14.

175. See Partnoy & Thomas, *supra* note 173, at 22. For a definition of hedge funds, see *id.* at 23.

176. See *Shareholder Activism in Japan*, *supra* note 109.

177. See Partnoy & Thomas, *supra* note 173, at 22.

178. See *id.* at 173, at 49.

179. See 2006 PROXY REPORT, *supra* note 1, at 5, 10 (noting institutional investor and pension support for majority vote proposals).

in the recent wave of activism there.<sup>180</sup> Such investors have been focused on improving corporate governance. Thus, much of their activism has revolved around governance matters that impact all shareholders, such as CEO pay, dividends, and corporate governance codes.<sup>181</sup> From this perspective, the presence of other investors in the new push for shareholder democracy suggests that broad corporate concerns, as opposed to narrow special interests, may continue to be prominent. While this does not negate the potential for special interests governance, it does undermine the notion that increased shareholder power will inevitably lead to such governance.

Moreover, as Professor Bebchuk has suggested, investors who seek to advance their own self-interest are not likely to gain the support of other shareholders that may be necessary to capture the attention of corporate managers.<sup>182</sup> Such support is not likely to be forthcoming if an investor seeks to advance a narrow agenda.<sup>183</sup> Instead, investors will embrace issues that enhance the overall health of the corporation, or those that a broad range of shareholders otherwise find important.<sup>184</sup> This suggests that shareholder democracy may be able to weed out all but the most value-enhancing initiatives, undercutting shareholders' ability to advance personal agendas.

### 5. *Shareholders vs. Stakeholders?*

Another criticism of shareholder democracy has been that it will have a negative impact on the ability of corporations to focus on groups other than shareholders and issues beyond short-term profits.<sup>185</sup> Scholars such as Professors Margaret Blair and Lynn Stout have emphasized the importance of the board's role in mediating the interests of the many constituents within the corporation.<sup>186</sup> Critics contend that if shareholder activism shifts power away

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180. See McLannahan, *supra* note 126.

181. See *id.*

182. See Partnoy & Thomas, *supra* note 173, at 14–15; Stewart Schwab & Randall S. Thomas, *Realigning Corporate Governance: Shareholder Activism by Labor Unions*, 96 MICH. L. REV. 1018, 1035–36, 1082–83 (1998) (noting that labor initiatives cannot succeed without the support of other shareholders, which support will not emerge unless they relate to issues that have the potential to improve corporate performance); *Battling for Corporate America*, *supra* note 31, at 63 (noting that “politically motivated shareholders and hedge funds are likely to gain any real power over management only if they can persuade the usual passive majority to support them”).

183. See *id.*

184. See Schwab & Thomas, *supra* note 184, at 1041–42.

185. See Bebchuk, *supra* note 6, at 912.

186. See Blair & Stout, *supra* note 10, at 253–54, 286; John H. Matheson & Brent A. Olson, *Corporate Cooperation, Relationship Management, and the Trialogical Imperative for Corporate Law*,

from the board, it will prevent the board from focusing on these other issues.<sup>187</sup> Moreover, it will ensure that the corporation only addresses issues associated with profit-making.<sup>188</sup>

It is certainly plausible that increased shareholder power will translate into less attention to the concerns of other stakeholders. As noted above, hedge funds have been on the forefront of the push for shareholder power. Hedge funds' primary objective, however, appears to be short-term financial gain, and such funds do not appear concerned with the interests of other constituents.<sup>189</sup> Activism in other countries also seems to run counter to stakeholder interests. In Japan, for example, much of the activism is aimed at facilitating takeovers.<sup>190</sup> Such takeovers can have a negative impact on stakeholders, leading to lost jobs for employees, diminished credit, and displacement of stores and plants to the detriment of customers and the broader community. Bebchuk points out that "game-ending"<sup>191</sup> decisions, like those involving a takeover, benefit shareholders and yet often have negative ramifications for stakeholders.<sup>192</sup> Shareholders motivated by such decisions are therefore likely to take actions that negatively impact other corporate constituents.

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78 MINN. L. REV. 1443, 1446 (1994) (describing the board as a mediator for various constituent concerns).

187. See Blair & Stout, *supra* note 10, at 253–54, 286.

188. See Bebchuk, *supra* note 6, at 908; Blair & Stout, *supra* note 10, at 304–05; Lynn Stout & Iman Anabtawi, *Sometimes Democracy Isn't Desirable*, WALL ST. J., Aug. 10, 2004 at B2 (noting that boards mediate conflicts among shareholders and other corporate constituents, and ensure that corporate policy "will not be set by an anonymous, myopic, return-hungry pack of shareholders"). *But see* Stephen Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 593–605 (2003) (advancing arguments against the conception of the board as a mediator); David Millon, *New Game Plan or Business as Usual?: A Critique of the Team Production Model of Corporate Law*, 86 VA. L. REV. 1001, 1024–42 (2000) (stating that corporate law does not reflect the idea of the board as a mediator).

189. See Anabtawi, *supra* note 9, at 580; K.A.D. Camara, *Classifying Institutional Investors*, 30 J. CORP. L. 219, 239 (2005). *But see* Larry E. Ribstein, *Accountability and Responsibility in Corporate Governance*, 81 NOTRE DAME L. REV. 1431, 1445 (2006) (noting that "even the most narrowly focused shareholders" are concerned about other constituents, because by advancing the concerns of such constituents, the corporation can avoid litigation and other costs associated with inflicting social harms).

190. See 2006 PROXY SEASON REPORT, *supra* note 1, at 43 (noting that shareholder activism has been spurred by the flurry of poison pills being introduced by Japanese firms). *See also* *Shareholder Activism in Japan*, *supra* note 109 (noting that much activism is focused on unwinding poison pill measures).

191. Game-ending decisions encompass decisions to merge, sell all the corporate assets, or dissolve. *See* Bebchuk, *supra* note 6, at 837.

192. *See id.* at 910.

In many cases, however, the interests of shareholders and stakeholders converge. Indeed, many scholars recently have emphasized the notion that shareholders constitute a diverse group with different agendas.<sup>193</sup> Often these agendas dovetail with the interests of stakeholders. Thus, some shareholders invest with a view towards the long-term, which means that they have an interest in advancing concerns beyond immediate financial gain.<sup>194</sup> Indeed, these long-term investors encourage a focus on other constituents because they believe that such constituents are important to maintaining the overall health of the corporation.

More specifically, of course, many shareholders have investment goals that include supporting other constituents and broader social policies. In the United States, these so-called “social investors” include faith-based organizations, pension funds, and socially responsible investment funds.<sup>195</sup> In other countries, such as the United Kingdom, institutional investors have led the way in pressuring corporations to behave in socially acceptable ways.<sup>196</sup> Moreover, some shareholders are also stakeholders. Nowhere is this more evident than in countries like Germany and France, where employee stakeholders elect representatives to the board. In the United States, the most obvious example of this phenomenon is union pension funds, which are comprised of employees and hence presumably seek to advance the interests of employees.<sup>197</sup> The fact that some shareholders are also stakeholders

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193. See, e.g., Anabtawi, *supra* note 9, at 564 (noting the various and conflicting interests among shareholders); K.A.D. Camara, *Classifying Institutional Investors*, 30 J. CORP. L. 219, 229–42 (2005) (discussing different investors and their divergent concerns); Stout & Anabtawi, *supra* note 188 (noting that many suffer from the mistaken assumption that shareholders in public companies have a single shared interests).

194. See Ribstein, *supra* note 189, at 1459 (“A firm’s long-run profits may depend significantly on satisfying the social demands of consumers, employees and local communities.”); Anabtawi, *supra* note 9, at 579–80; Matheson & Olson, *supra* note 186, at 1487 (noting that long-term shareholders understand that a corporation’s sustained growth depends on focusing on other stakeholders).

195. See Cynthia A. Williams & John M. Conley, *Is there an Emerging Fiduciary Duty to Consider Human Rights?*, 74 U. CIN. L. REV. 75, 95–96 (2005); Lynn Stout, *Takeovers in the Ivory Tower: How Academics Are Learning Martin Lipton May Be Right*, 60 BUS. LAW. 1435, 1449 (2005) (discussing the social shareholder).

196. While social activism is generally confined to particular investors within the United States, in other countries there appears to be a broader level of shareholder support for social issues. In fact, mainstream investors in the United Kingdom have led the way in pressuring corporations to provide more robust social-responsibility disclosures. See Williams & Conley, *supra* note 195, at 97–98.

197. However, it is also possible that certain pension funds will focus on issues that are not in the best interests of employees. See Roberta Romano, *Public Pension Fund Activism in Corporate Governance Reconsidered*, 93 COLUM. L. REV. 795, 811–14 (1993) (discussing the political pressure that often motivates the advocacy of public pension funds).



undermines the proposition that shareholders will not take the interests of stakeholders into account.<sup>198</sup>

The empirical evidence on this recent wave of shareholder activism reveals that more traditional shareholders, such as institutional investors, are actually working with social investors. Accordingly, proxy data in the United States suggest that social proposals are drawing increased support from institutional and traditional investors, because these more traditional investors have begun to believe that focusing on particular stakeholder concerns, including employees, consumers, and the larger community, inures to the benefit of the entire corporation.<sup>199</sup> Data both in the United States and elsewhere reveal that social investors and traditional investors have joined forces, and it is this collaboration that is responsible for many of the successful shareholder votes.<sup>200</sup> Moreover, this collaboration has blurred the lines between governance and social issues: traditional investors have begun to view social issues as important to shareholder value while social investors have become increasingly concerned with traditional governance matters.<sup>201</sup> Here, the recent data suggest that increased shareholder power has not caused shareholders and stakeholders to be at odds. Instead, it has improved the fate of both shareholders and stakeholders. In this regard, shareholder democracy may enhance the interests of stakeholders, particularly because it may enhance the ability of social investors to collaborate with other investors to advance the concerns of all corporate constituents.

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198. *See id.*

199. *See* Olubunmi Faleye & Emery Trahan, *Is What's Best for Employees Best for Shareholders?* 1, 24 (2006), available at <http://ssrn.com/abstract=888180> (noting that the market appears to value corporate concern for workers); Williams & Conley, *supra* note 195, at 78–79 (discussing trends that have altered society's expectations regarding business).

200. Timothy Smith, *Institutional and Social Investors Find Common Ground*, J. INVESTING, Fall 2005, at 57 (noting that social and environmental issues have been integrated into concerns of institutional investors, leading such investors to support proposals related to these issues); *see also* 2006 PROXY SEASON REPORT, *supra* note 1, at 41 (noting that the most recent proxy seasons were characterized by increased collaboration between proponents of social responsibility issues and other investors); 2004 PROXY SEASON REPORT, *supra* note 15, at 28 (noting that increased support for social proposals stems from the greater support from corporate leaders who have come to view such proposals as meriting the same attention as other aspects of corporate governance).

201. *See* Smith, *supra* note 200, at 1 (noting increased collaboration between traditional shareholders and efforts by labor unions, religious investors, and socially responsible investment companies, which have blurred the lines between social and governance issues).

## CONCLUSION

Shareholders in the United States are becoming more active in asserting and exercising their voting rights. A similar phenomenon is occurring in other countries. By comparing the American experience with those of investors in other nations, this Article provides international perspective for the ongoing shareholder democracy debate in the United States.

As an initial matter, U.S. shareholders are not alone in their activism. Instead, such activism has taken root in many other countries where shareholders not only have sought to strengthen their voting power, but also have taken a more active role in overseeing corporate governance affairs.

Shareholder activism and the push for greater democracy may also have positive repercussions for shareholders. Indeed, studies in other countries reveal that shareholder activism may positively influence share value and earnings. To the extent that these results can be applied to shareholder efforts in the United States, they raise the possibility that shareholder democracy can achieve its goal of improving firm value. Other countries have experienced success in altering corporate practices through increased shareholder participation, which bodes well for shareholder engagement efforts in the United States. Finally, shareholder democracy does not have to undermine the interests of stakeholders. Instead, this Article illuminates reasons why enhanced shareholder power may prove beneficial to all corporate constituents.

Shareholder democracy is not a panacea for all of the corporation's ills. Under the right circumstances, however, it can have a positive influence on corporate governance. Given the momentum that shareholder democracy campaigns now enjoy both in the United States and abroad, the debate about its desirability may now be of limited significance—such democracy, at least in some form, appears to be a *fait accompli*. If this is true, then American scholars would do well to investigate international experiences in shareholder democracy for insights on how U.S. corporations can harness the benefits of shareholder democracy, while minimizing its shortcomings.

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