CORPORATE GOVERNANCE AND THE FEMINIZATION OF CAPITAL

BY SARAH C. HAAN*

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Abstract

At the start of the twentieth century, women constituted a small proportion of shareholders in American publicly-traded companies. By 1956, women were the majority of individual shareholders. Although this change in shareholder gender demographics happened gradually, it was evident early in the century: Before the 1929 stock market crash, women shareholders had come to outnumber men at some of America's largest and most influential corporations, including AT&T, General Electric, and the Pennsylvania Railroad. This Article synthesizes information from a range of historical sources to reveal an overlooked narrative of history, the feminization of capital—the transformation of American public company shareholders from majority-male to majority-female. It charts the growing proportion of women shareholders over the first half of the century, describes the business community's response to this trend, and explores the impact of the rise of intermediation on the gender politics of corporate control.

Corporate law scholarship has never before acknowledged that the early decades of the twentieth century, a transformational era in corporate law and theory, coincided with a change in the gender composition of the shareholder class. Scholars have not considered the possibility that shareholders' gender—which was being tracked internally at companies, disclosed in annual reports, and publicly reported in the press—might have influenced business leaders' views about corporate organization and governance. This Article considers the implications of this history for some of the most important ideas in corporate law theory, including the "separation of ownership and control," shareholder "passivity," stakeholderism, and board representation. It argues that early-twentieth-century gender politics helped shape foundational

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* Professor of Law, W&L Law School; B.A., Yale College, J.D., Columbia Law School. For generous and thoughtful comments, the author thanks Afra Afsharipour, Alexandra Andhov, Margaret Blair, Naomi Cahn, June Carbone, Carliss Chatman, Christine Sgarlata Chung, Richard Chused, Larry Cunningham, Aaron Dhir, Jill Fisch, Carola Frydman, Charlotte Garden, Jeff Gordon, Joan Heminway, Jennifer Hill, Eric Hilt, Andrew Jennings, Kristin Johnson, Nancy Levit, Ann Lipton, Greg Mark, Veronica Root Martinez, Martha McCluskey, Ben Means, Bill Nelson, J. S. Nelson, Chuck O'Kelley, James Park, Elizabeth Pollman, Mark Roe, Darren Rosenblum, Noah Rosenblum, Laura Rosenbury, Dan Sokol, Faith Stevelman, Jan Traflet, Andrew Verstein, Harwell Wells, Bob Wright, and Larry Zacharias. The author gratefully acknowledges the financial support of the Frances Lewis Law Center, the research expertise of Franklin Runge, and the research assistance of law student Sasha Hoyt.

ideas of corporate governance theory, especially ideas concerning the role of shareholders. Outlining a research agenda where history intersects with corporate law's most vital present-day problems, the Article lays out evidence showing that the feminization of shareholding was an influence on changing ideas about the role of shareholders in corporate governance, and invites the corporate law discipline to begin a conversation about gender, power, and the evolution of corporate law.

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INTRODUCTION

In 1951, the American Telephone and Telegraph Company (AT&T) became the first corporation in America with a million stockholders.[1] The company celebrated the milestone with a publicity campaign, flying the one-millionth stockholder—a Michigan couple who bought the stock jointly—to New York for a publicity tour.[2] Photos from the campaign showed the company's president, Leroy Wilson, presenting a stock certificate to a young automobile salesman, Brady Denton, as the couple's school-age sons looked on. Behind them all, partly obscured by Wilson's arm as it reached past her, stood Dorothy Denton, Brady's co-owner, gazing into the camera lens with a strained smile.[3] The image celebrated a young couple's entrance into the stockholder class, but it also depicted Dorothy as marginalized from the transaction. Newspapers around the country printed the photograph and proclaimed the "democratization" of AT&T's shareholder class: It had become "a cross section of America, including farmers, businessmen, clerks, mechanics, clergymen, merchants, teachers, housewives, doctors, lawyers, Civil Service workers, people who have retired, widows, home-town folks and neighbors."[4]

But this picture—the staged photo, the list of shareholder occupations that emphasized "farmers" and "businessmen," even AT&T's choice of a married couple as its millionth stockholder—was misleading. In 1951, most of AT&T's individual stockholders were women.[5] They outnumbered male stockholders by almost two to one.[6] In fact, women stockholders had outnumbered male stockholders at AT&T since at least 1910.[7] As recently as 1948, AT&T had disclosed that 43% of its stock was owned by women, considerably more than the 26% owned by men.[8] In 1951, individual women stockholders held 12 million

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[1] Thomas P. Swift, *Million Mark Near in A.T. & T. Holders*, N.Y. TIMES, April 22, 1951, at 131.

[2] *AT&T Fetes 1,000,000th Stockholder*, L.A. TIMES, May 16, 1951, at 39.

[3] *See, e.g.*, *A Certificate to the A. T. & T.'s Millionth Stockholder*, N.Y. TIMES, May 16, 1951, at 42.

[4] Harold Walsh, *March of Finance: AT&T Milestone Points Up Democracy of Ownership*, L.A. TIMES, May 17, 1951, at 40.

[5] *See* AT&T 1950 Annual Report at 15; Lewis H. Kimmel, SHARE OWNERSHIP IN THE UNITED STATES 15 n.13 (Washington: The Brookings Institution, 1952).

[6] Wayne Oliver, *AT&T To Make History With Millionth Holder*, DAYTON DAILY NEWS, April 10, 1951, at 27 (reporting that 244,200 of AT&T's shareholders were men, and 483,700 were women); Harold Walsh, *March of Finance: AT&T Milestone Points Up Democracy of Ownership*, L.A. TIMES, May 17, 1951, at 40. This did not include joint husband-and-wife accounts, which comprised roughly 22% of AT&T's stockholders. *Id.*

[7] AM. TELEPHONE & TELEGRAPH CO., ANNUAL REPORT 1910, at 17 (1911); *Women Stockholders: Feminine Army of 310,000 Holds Stock in 252 Corporations*, BROOKLYN DAILY EAGLE, Feb. 1, 1914, at 21; *see also* JULIA C. OTT, WHEN WALL STREET MET MAIN STREET: THE QUEST FOR AN INVESTORS' DEMOCRACY 154 (2011) (describing the "feminization of the AT&T stockholder" by the 1920s).

[8] AM. TELEPHONE & TELEGRAPH CO., ANNUAL REPORT 1948, at 9 (1949) (noting that another 12% was held by joint husband-and-wife accounts); *see also Purely Gossip*, WALL ST. J., March 17, 1941, at 15 (at the end of 1940, 42% of AT&T's stock was held by women, 30% by men, 5% in joint accounts, and 21% by trustees and institutions, with the balance held in the name of brokers).

shares, about 41% of AT&T's stock—more if you included stock held jointly.[9] Women comprised AT&T's largest stockholder demographic whether you counted shareholders by the head or by the share.[10]

That year, the *New York Times* described AT&T's April stockholder's meeting, held at the company's Manhattan headquarters, as "Ladies Day."[11] At least half of the stockholders who attended were women.[12] During the meeting, Wilma Soss, a well-known shareholder activist and the founder of the Federation of Women Stockholders in American Business, gave a short speech.[13] She pointed out that women comprised not only the majority of AT&T's stockholders, but also more than sixty percent of its nearly 650,000 employees.[14] Soss argued that women deserved representation on AT&T's board of directors, and that the company would benefit from it. She nominated to the board a Nevada businesswoman who owned half as much AT&T stock as all seventeen of AT&T's directors combined.[15] Soss's nomination was a protest gesture. There was no way for a floor nomination to succeed, because there weren't enough shares represented at the meeting to win a vote.[16]

When Soss was done speaking in favor of her nominee, a second woman, Catherine Curtis, who headed a different organization of women investors, rose.[17] She nominated a second woman candidate to the board.[18] Like Soss, Curtis understood that her candidate

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[9] This statistic about women's share ownership was widely reported in May 1951 and probably originated in AT&T's promotional materials about its millionth stockholder. *See, e.g.*, *Bell Telephone Fetes Millionth Stockholder*, ARLINGTON HEIGHTS HERALD (Arlington Heights, Il.), May 18, 1951, at 2; *Private Ownership*, DAILY REPUBLICAN (Kane & Mt. Jewett, Pa.), May 21, 1951, at 4. Jointly-held stock was typically assumed to be stock held by a married couple, which in the 1950s meant one man and one woman. *See* Wayne Oliver, *AT&T Shortly Expects Its Millionth Stockholder*, AUSTIN STATESMAN (Austin, Tex.), Apr. 10, 1951, at A-8 (describing joint holdings as "man and woman").

[10] As explained more fully *infra*, AT&T was one of several large, public companies that celebrated a milestone stockholder in the early 1950s. In each case, the company organized a public relations campaign around a milestone stockholder who was young, white, male, married, and a middle-class wage earner. *See infra* nn.__-__ and accompanying text. In fact, in 1952, American stockholders were evenly divided between men and women, and most were 50 or older. *See* LEWIS H. KIMMEL, SHARE OWNERSHIP IN THE UNITED STATES 89-92 (Washington: The Brookings Institution, 1952) (presenting demographic data). These celebrations presented idealized images of shareholders, not accurate ones.

[11] *Women Enliven Meeting of A.T.&T.*, N.Y. TIMES, April 19, 1951, at 58 ("It was 'Ladies Day' at the annual meeting of stockholders of the $12,000,000,000 American Telephone and Telegraph Company yesterday, but they came off second best.").

[12] *Id.*; Charles F. Speare, *Stock Market Shows Vitality in Face of Unsettled News*, THE STAR PRESS (Muncie, IN), April 22, 1951, at 31 (noting that "the presence of women was a conspicuous feature" at the meeting). At the preceding year's meeting, some newspapers reported that women stockholders had "far outnumbered" the men. *See, e.g., Pride of Ownership*, KNOXVILLE NEWS-SENTINEL, April 30, 1950, at 36.

[13] For general background on Soss, see Janice Traflet, *Queen of the Corporate Gadflies: The Unstoppable Wilma Soss*, 119 FIN. HIST. 20 (2016).

[14] J. R. Nevarez, *A Few 'Firsts' That Russia Won't Claim*, L.A. TIMES, July 17, 1951, at 29 (AT&T had 650,000 employees; more than 20% of AT&T stock was owned by roughly 250,000 of its employees); *Women Enliven Meeting of A.T.&T.*, N.Y. TIMES, April 19, 1951, at 58.

[15] *Nomination of Grandmother To AT&T Board Defeated*, DAYTON DAILY NEWS, April 20, 1951, at 40. The nominee, Theresa Noble, had formerly served as the chair of the board of directors of the American Silk Spinning Company. *Id.; see also Women Stockholders Want Board Member*, MIAMI NEWS, April 5, 1952, at 22 (describing Noble as treasurer of a textile firm).

[16] *Women Enliven Meeting of A.T.&T.*, N.Y. TIMES, April 19, 1951, at 58.

[17] *Id.* (reporting that Curtis represented the Women's Investors of America).

[18] Fred Klann, *Off the Beaten Path: From 2 Employees to 602,466*, THE DISPATCH (Moline, IL), March 22, 1951, at 19.

stood no chance of election. Ballots were circulated while the company's president moved on to other subjects, and then the defeat of the women candidates—and the successful election of seventeen men—was confirmed.[19]

But the meeting wasn't over. President Wilson invited another investor, Ella Aronstam, to present a proposal she had submitted for the shareholders' consideration.[20] Taking advantage of a rule enacted by the SEC only nine years earlier, Aronstam had asked the company to add her resolution to the materials the company sent to its million stockholders in advance of the meeting.[21] The company had included Aronstam's proposal in its proxy statement, alongside its instruction that stockholders vote against her.

Tiny and white-haired, Aronstam was a retired school teacher from Brooklyn, and owner of 100 shares.[22] AT&T's charter authorized a board with nineteen directors; the company had, until recently, operated with an eighteen-man board, and this year there was a vacancy. Aronstam's proposal asked the company to expand the board to its full size—nineteen members—in order to add a woman. "I don't expect the resolution to pass," she told a reporter before the meeting, "but we will put up a good fight."[23] When the votes were tallied, more than a million shares of AT&T stock were voted in favor of Aronstam's proposal—just over 5% of all the shares that were voted.[24] Management had voted all of the proxies it had collected against the proposal.[25]

AT&T's vibrant 1951 annual meeting—alive with women, the dominant stockholder demographic, rising up to give speeches, propose resolutions, and demand representation—was, in many ways, typical for its time, although it defies our present-day understanding of corporate history.[26]

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[19] *Increase Earnings and Reduce Debt: AT&T Fiat*, SAN FRANCISCO EXAMINER, April 19, 1951, at 30.

[20] Fred Klann, *Off the Beaten Path: From 2 Employees to 602,466*, DISPATCH (Moline, IL), March 22, 1951, at 19.

[21] *See* SEC Rule X-14A-7, Exchange Act Release No. 3347 (Dec. 18, 1942), 7 Fed. Reg. 10, 655-56 (1942) (requiring reporting companies to print shareholder proposals in proxy statements).

[22] *See* Robert H. Prall, *Ella Girds for the Second Round: Little Woman Vs. Big Business*, N.Y. WORLD-TELEGRAM & SUN, April 17, 1951, at 22 (reporting that Aronstam was 4 feet 9 inches tall and 103 pounds). The article noted that after Aronstam's proposal was published in the proxy, a "Connecticut farmer" sent her a letter telling her to stick to knitting, since AT&T's officers were doing a good job "without any women to mess up the works." *Id.*

[23] *See* Robert H. Prall, *Ella Girds for the Second Round: Little Woman Vs. Big Business*, N.Y. WORLD-TELEGRAM & SUN, April 17, 1951, at 22.

[24] *Increase Earnings and Reduce Debt: AT&T Fiat*, SAN FRANCISCO EXAMINER, April 19, 1951, at 30. More than 18 million shares were voted against. *Id.*

[25] *AT&T Shies From Women As Directors*, CHICAGO TRIBUNE, March 17, 1951, at F5.

[26] *See, e.g.*, Sam Dawson, *Influence of Women in Business Increasing*, L.A. TIMES, March 14, 1950, at 25 ("The womenfolk have discovered recently what fun they can have at a stockholders' meeting, just by asking questions."). Women were active in shareholder governance throughout this period. For example, among the first 13 individuals to utilize the SEC's shareholder proposal rule in 1943 was Harriett K. Skipwith, who owned 3,700 shares of common stock of the White Sewing Machine Company and submitted proposals on six subjects regarding the company's corporate governance. *See* Rolf Enno Wubbels, Regulation of Stockholder Proxies: A thesis presented to the faculty of the Graduate School of Business Administration, New York University (1949), at Table IV [hereinafter, Wubbels, Stockholder Proxies]. Women board candidates were nominated from the floor of the annual meetings of several companies around this time, including Radio Corporation of America, General Motors, and U.S. Steel. *See* Andy Logan, *Hoboken Must Go!*, NEW

Over the first half of the twentieth century, the percentage of women stockholders at American public companies grew until, sometime between 1952 and 1956, women became a majority.[27] The trend was documented over six decades in ad hoc studies conducted by government agencies, journalists, investment firms, and eventually the New York Stock Exchange (NYSE). In 1956, the NYSE published the first comprehensive study finding that women constituted a majority of stockholders across the U.S. public capital markets. Yet the trend received almost no recognition in the academic literature—not in economics, corporate law, or business management, the three academic disciplines in which scholars studied and published information about the expanding stockholder class and the role of stockholders in corporate organization. The lack of attention stands in contrast to the scholarly attention lavished on the rise of institutional holders starting in the 1950s, at a time when women's shareholding was reaching a high point.

Women's mid-century ascension to the majority may have been less important than the feminization of shareholding at particular companies. Before the 1929 stock market crash, women shareholders outnumbered men at some of America's largest and most influential public companies, including AT&T, General Electric, and the Pennsylvania Railroad—the "blue-chip" companies whose CEOs and directors formed an elite cadre of business leaders. As the gender of their companies' shareholders changed, these men watched their managerial leadership become accountable to an expanding population of women. This change would have been apparent not only from stockholder lists, but in real-world shareholder meetings where women's increasing presence was visible to the eye, and where women's voices could be heard. Yet the feminization of shareholding occurred during a period in American history in which, due to then-prevailing gender bias, women were widely regarded as unsuited to participate in business management.

Throughout the first half of the twentieth century, a number of large, public companies tracked and disclosed the gender of their own stockholders, and the financial press wrote numerous articles proclaiming the growing number, and common stockholding power, of women investors. Business experts expressed anxiety about women's growing role, sometimes suggesting that the influx of women to shareholding had significance for corporate organization. Corporate law scholarship has never before acknowledged that this

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YORKER, March 17, 1951, at 48; *U.S. Steel Annual Meeting Covers Girth, Mirth, Women—and Upturn in Business*, WALL ST. J., May 4, 1954, at 11. At other companies, stockholders made demands from the floor of meetings for women directors. *See, e.g.,* STANDARD OIL CO. (N.J.), STENOGRAPHIC REPORT OF THE ANNUAL MEETING OF THE STOCKHOLDERS 25-26, (1947); *950 at Its Stockholders' Meeting, A Record in History of AT&T*, N.Y. TIMES, April 20, 1950, at 49. Shareholder proposals demanding female representation on corporate boards were published in the proxy statements of Alex Smith & Sons Carpet Co. in 1950, the American Radiator & Standard Sanitary Corp. in 1950 and 1951, Bayuck Cigar, Inc. in 1950 and 1951, Borden Co. in 1951, and AT&T in 1951. *See* Frank D. Emerson & Franklin C. Latcham, *The SEC Proxy Proposal Rule: The Corporate Gadfly*, 19 U. CHI. L. REV. 807, 817 (1952) (summarizing the proposals). In 1966, Wilma Soss was forcibly removed from the annual meeting of IBM after she "stubbornly continued to try to nominate a woman director" from the floor. Janice Traflet, *Queen of the Corporate Gadflies: The Unstoppable Wilma Soss*, 119 FIN. HIST. 20, 21-22 (2016).

[27] *See infra* notes __-__ and accompanying text.

early period, in which control of widely-held corporations shifted from shareholders to managers, coincided with a change in the gender of the stockholder class. This Article tells the forgotten story of the feminization of capital[28]—the transformation of public company stockholders from majority-male to majority-female—and argues that early-twentieth-century gender politics played a role in shaping corporate governance theory.[29] The Article lays out the evidence and invites the corporate law discipline to begin a conversation about gender, power, and the evolution of corporate law.

During the early decades of the twentieth century, ownership of the nation's biggest corporations became "widely scattered."[30] In the conventional narrative, the dispersion of stockholding caused "passive" shareholders to lose the power of control, and a new and growing cadre of technocratic managers to gain it.[31] The "separation of ownership and control" reflected the triumph of centralized corporate management over the dispersed, small shareholder. The separation framework introduced a "separate spheres" dichotomy to corporate governance theory that not only survives to this day, but became the basis of modern corporate law. In recent years, some scholars have questioned the timing of the separation of ownership from control.[32] Virtually everyone agrees, however, that ownership

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[28] The claim of this Article that capital "feminized" during the early twentieth century is, implicitly, a claim about what "capital" means. Though an economist may think of capital merely as an input—as assets put to productive use—this Article presents capital as a group of human actors, in the same way that we sometimes use "labor" to refer to workers in a firm, and "management" to mean the people managing the enterprise. Using "capital" to refer to human actors in corporate organization is useful because it allows legal theorists to focus on the *social relations* that shape collective enterprise through the corporate form. This Article describes the "feminization" of a major category of corporate actors during a period in which sex discrimination against women was pervasive. In order to discern how corporate law and theory were grappling with this change, this Article gives attention to the human identities behind these categories. Indeed, the slight-of-hand in legal scholarship that has transformed human shareholders (i.e., risk-bearers) into de-personalized interests, has obscured how power is expressed through corporate organization. *Cf.* MARTIN J. SKLAR, THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916, at 7 (1988) ("Property in its capitalist form … is a complex social relation … that involves a system of authority inextricably interwoven with the legal and political order as well as with the broader system of legitimacy, the prevailing norms of emulative morality and behavior, and the hierarchy of power").

[29] At the end of the twentieth century, an important article in the *Columbia Law Review* investigated "the interrelation of social norms and corporate law," including "cultural attitudes," and concluded that "[c]hanges in the belief-systems of corporate actors cause shifts in norms. These shifts, in turn are translated into the fabric of corporate institutions and corporate law." Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1287, 1291 (1999). Though Eisenberg's work did not consider gender as a source of social norms, this Article shows that cultural attitudes about gender difference have been relevant to the evolution of modern corporate law. *See generally* Patricia Yancey Martin, *Gender As Social Institution*, 82 SOC. FORCES 1249, 1266 (2004) (arguing that using gender to construct social relations is useful "primarily because of its extensive pervasiveness and intertwining with other social realms").

[30] ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS (Harvard 1977) at 9-10; *see also* Frederick H. Wood, *The Small Investor and Railroad Ownership and Management*, 11 PROCEEDINGS OF ACAD. OF POL. SCI. IN THE CITY OF N.Y. 79, 79 (April 1925) ("In each of the last two decades the number of stockholders [in eighteen companies] has approximately doubled.").

[31] *See, e.g.*, ADOLF A. BERLE, JR., & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY, 59 (New York: MacMillan, 1932) (describing the separation of ownership and control).

[32] *See, e.g.*, Eric Hilt, *The Berle and Means Corporation in Historical Perspective*, 42 SEATTLE U. L. REV. 417 (2019) ("ownership was separated from control to a lesser extent among 1930s corporations studied by Berle and Means than among the public companies of the 1870s and even the 1820s"); Brian Cheffins & Steven Bank, "Is Berle and Means Really a Myth?" *in* THE HISTORY OF MODERN U.S. CORPORATE GOVERNANCE (Brian Cheffins, ed., 2011), at 45-46.

did eventually separate from control—and that reducing the resulting "agency costs" has become the singular focus of modern corporate law.[33] Indeed, the choice to view the separation of ownership and control as naturally occurring and inevitable has, for nearly a hundred years, led corporate law to operate within a framework of perpetually warring camps of "strong managers" and "weak owners."[34] This Article is the first work of corporate law scholarship to suggest that the study of shareholder *gender* sheds light on these narratives.

The idea of the passive stockholder took off after Adolf A. Berle, Jr., and Gardiner C. Means presented it in their 1932 book, *The Modern Corporation and Private Property*.[35] This Article argues, among other things, that the shareholder passivity thesis relied on gender stereotypes—and may have misrepresented the desire of small stockholders, including many women, to *actively* participate in shareholder governance. In the first half of the twentieth century, the typical stockholder held stock in only a few companies.[36] With governance rights in only a handful of firms, shareholders had the time and resources to attend to corporate governance matters. Evidence suggests that shareholder *interest* was there as well.[37] However, during this period, corporate law evolved in a direction that de-emphasized mechanisms for shareholder collective action. The choice to view shareholder passivity as natural and inevitable helped turn corporate law away from control-based reforms, which would have empowered shareholders, toward market-based solutions, a trend that was formalized in New Deal securities legislation.[38] And it helped justify the much-celebrated

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[33] *See, e.g.*, Jan Fichtner et al., *Hidden Power of the Big Three? Passive Index Funds, Re-Concentration of Corporate Ownership, and New Financial Risk*, 19 BUS. & POLS. 298, 301 (2017) (describing "an overwhelming consensus that since the second half of the twentieth century corporate ownership in the United States is by and large fragmented and dispersed"); Michael Klausner, *Fact and Fiction in Corporate Law and Governance*, 65 STAN. L. REV. 1325, 1326 (2013) (describing agency-cost analysis as "the dominant framework of analysis for corporate law and corporate governance today"); Lyman Johnson & David Millon, *Corporate Law After Hobby Lobby*, 70 BUS. LAW. 1, 14 (2014) (asserting that a "fixation on agency costs [has] taken root and flourished within the corporate law academy"). For an early and important contribution to the agency-cost genre, see Michael C. Jensen and William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

[34] *See, e.g.*, MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE (1994).

[35] ADOLF A. BERLE, JR., & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY, 59 (New York: MacMillan, 1932) [hereinafter, BERLE & MEANS, MODERN CORPORATION].

[36] *See, e.g.*, TEMP. NAT'L ECON. COMM., 76RH CONG., INVESTIGATION OF CONCENTRATION OF ECONOMIC POWER: THE DISTRIBUTION OF OWNERSHIP IN THE 200 LARGEST NONFINANCIAL CORPORATIONS, Monograph No. 29, at XVII (3d. Sess. 1940) (stating that the average stockholder held shares in "about two and one-half corporations"). Almost twenty years later, the NYSE found that the average stockholder held stock from only 3.5 different stock issues—fewer than in 1956, when the average was 4.25. SHARE OWNERSHIP IN AMERICA: 1959 5 (NYSE, 1959). *But see Who Are a Company's Stockholders? Utility Company Survey Discloses Wide Ownership in All Classes*, 87 TR. & EST. 9 (1948) (showing that a 1948 survey of stockholders of the Consolidated Edison Company of New York found that 5% owned no other stocks; 12% owned two or three other stocks; 37% owned three to 10; and 51% owned over 10).

[37] *See infra* notes __ and accompanying text.

[38] Morton Horwitz dates to 1907 "the beginning of the shift away from 'the traditional point of view' of shareholders as 'the ultimate owners, the corporate equivalent of partners and proprietors.'" MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960 95 (Oxford U. Press, 1992); *see also id.* at 100 (*quoting* Howard Holton Spellman writing in 1931 that "modern decisions tend toward an emphasis of the directors' absolutism in the management of the affairs of large corporations"). Ariela Dubler has argued that New York's legislature abolished common law marriage in 1933 in part because the "socio-legal conventions of female dependency" upon which the doctrine was premised had become "out of sync" with women's changing position in the economy. Ariela R. Dubler,

shift in corporate power away from stockholders, a group that included many women, to corporate managers, a group that was exclusively male.

Although today most stock is owned by large institutions, such as insurance companies, pension funds, and mutual funds, this was not true in the first half of the twentieth century, when most stock was held by individuals.[39] During these decades, *human* shareholders—individual women and men, and joint husband-and-wife accounts—made up the vast majority of stockholders.[40] At AT&T, for example, in 1951, ninety-six percent of the company's million stockholders were individuals.[41] The human identity of stockholders, who were viewed as members or "owners" of the corporation, was important to contemporaneous ideas about stockholders' rights and interests within corporate organization. Thus, although women never collectively owned more stock than men during this period—though women *did* own more common stock than men at particular companies—shareholders' human (and gender) identities mattered to corporate organization.[42] As late as the 1950s, some companies were reporting the results of shareholder voting on *both* a pro rata (share) and a per capita (shareholder) basis, reflecting a continuing adherence to the traditional view in which shareholders were cognizable as *people*.[43] Most experts peg the shift to institutional stockholding to the 1970s or later, even though it was recognized earlier as a development on the horizon.[44] The intermediation of

Wifely Behavior: A Legal History of Acting Married, 100 COLUM. L. REV. 957, 997-98 (2000). Dubler's work shows how, in the 1920s and 30s, women's evolving social and economic roles were reshaping family law—a process that was similar to, and contemporaneous with, the corporate law shifts discussed in this Article.

[39] *See* Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255, 1275 (2008) (in 1932 "most shareholders were individuals"); Janette Rutterford, *The Shareholder Voice: British and American Accents*, 1890-1965, 13 ENTERPRISE & SOC. 120, 121 (2012) ("Up to the 1960s and 1970s, individual shareholders were far more numerous than institutional investors and in many companies owned the vast majority of shares."); MARK J. ROE, STRONG MANAGERS, WEAK OWNERS 6 (1994) ("[i]n the Berle-Means era, shareholders were mostly individuals"); EDWIN BURK COX, TRENDS IN THE DISTRIBUTION OF STOCK OWNERSHIP 1 (1963) [hereinafter, COX, TRENDS] ("At the end of 1957 individuals owned directly 70 per cent of the corporate stock outstanding and not owned by another corporation.").

[40] For example, a 1948 survey of major manufacturing corporations found that 91% of common stockholders were individuals, and that individuals (men, women, and joint accounts) held a combined average of 59% of outstanding issues. *Who Owns "Big Business"? Analysis of Stockholdings in Largest Corporations, Part 1: Manufacturing*, 87 TR. & EST. 5, 6 (1948) (analyzing data from 62 companies).

[41] AM. TELEPHONE & TELEGRAPH CO., ANNUAL REPORT 1951, at 21 (1952).

[42] Women did own more stock than men at individual companies, however. *See infra* notes __-__ and accompanying text (describing how women's pro-rata shareholding exceeded men's at AT&T and U.S. Steel).

[43] *See, e.g.*, STANDARD OIL CO. (N.J.), STENOGRAPHIC REPORT OF THE ANNUAL MEETING OF THE STOCKHOLDERS 45 n.*, 46 (1948) (providing vote totals on both a pro rata and per capita basis). In addition, some companies continued to use a voice vote to decide substantive motions brought at shareholder meetings, effectively giving each shareholder a single vote. In 1946, for example, when a shareholder of Standard Oil (New Jersey) moved for a vote to switch from semi-annual dividends to quarterly dividends, a floor vote of shareholders resolved the matter. *See* STANDARD OIL CO. (N.J.), STENOGRAPHIC REPORT OF THE ANNUAL MEETING OF THE STOCKHOLDERS 24 (1946). The motion failed. *Id.* at 25.

[44] *See, e.g.*, David M. Kotz, *The Significance of Bank Control Over Large Corporations*, 13 J. OF ECON. ISSUES 407, 409 (June. 1979) ("Whereas in 1929 less than one-tenth of outstanding U.S. corporate stock was held by financial institutions, by 1974 financial institutions held over one-third."); COX, TRENDS, at 2 (noting "the emphasis which has been placed on the growing importance of institutional investors in the market during the 1950s" but observing that "in 1960 individual owners continue to represent the most important group of holders of equities"); J. A. LIVINGSTON, THE AMERICAN

stockholding after the mid-century was itself gendered in effect. By rechanneling retail stockholding through intermediary holders, which were managed by men, it restored male voting control over women's stock.

What explains the rise of women's stockholding in the first half of the twentieth century?[45] Although many factors likely played a role—including the fact that women could and did participate in shareholder governance in big companies at a time when their participation in political governance was limited—this Article highlights an economic explanation. Women experienced sex discrimination in labor markets, but the dividends paid on a share of stock did not vary with the identity of the share's owner.[46] That is, the return on women's capital was not discounted for their sex. The fact that women could expect equitable returns for their investment of capital in stock, but not for their labor, may have encouraged women to save and invest in stock when possible.[47] The dynamic effects of sex discrimination across labor and capital markets may help explain why, over the first half of the twentieth century, women came to outnumber men as common stockholders in the United States.[48]

Shareholders' race is also relevant to this story. In the first half of the twentieth century, the great majority of American shareholders probably were middle-income and wealthy white women and men. Some women shareholders were the beneficiaries of inherited wealth, while others were investors of income earned in labor markets that were segregated not only by sex, but also by race.[49] Unfortunately, data on shareholders' race and ethnicity during this period is thin. However, it is fair to assume that the feminization of shareholding was shaped by racial discrimination and bias.

STOCKHOLDER 246 (Philadelphia & New York: J. B. Lippincott Co., 1958) (recognizing the significance of institutional investors).

[45] This Article is only a preliminary effort at answering this important question, which is deserving of a book-length treatment. A longer work would help explain where twentieth-century American women obtained wealth (for example through inheritance, wage labor, or other means), and how and why women saved or invested that wealth, particularly in light of then-existing gender norms, legal constraints on women's property ownership, differences between the life expectancies of men and women, and the exclusion of women from politics.

[46] *See generally*, ALICE KESSLER-HARRIS, OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES (1982) (describing sex discrimination in the labor market in the United States).

[47] *See, e.g., infra* note __ (describing a 1929 financial-advice article in *Good Housekeeping* that revealed some pressures on women in holding onto and growing wealth). Stock, of course, provided a better return than bonds. The fact that women had fewer options than men to bring in income over a lifetime—because women were essentially excluded from high-wage jobs—may have encouraged some women to rely on the high returns to stock as their primary means of growing wealth.

[48] *See, e.g., Women Outrank Men Stockholders*, N.Y. TIMES, Aug. 12, 1927, at 26; *Woman's Investment Invasion: Overtopping Facts and Figures*, WALL ST. J., Aug. 12, 1927, at 15.

[49] The transmission of wealth from one generation to the next in white families would, of course, have reflected economic advantages conferred by centuries of American racial discrimination as well as the institution of slavery. *See, e.g.*, STEPHANIE E. JONES-ROGERS, THEY WERE HER PROPERTY: WHITE WOMEN AS SLAVE OWNERS IN THE AMERICAN SOUTH (2019) (exploring the ways in which "slave-owning women invested in, and profited from their financial ties to, American slavery and its marketplace").

Part I synthesizes information from a range of historical sources to present a history of twentieth-century shareholding that pays attention to gender. It offers an original and important contribution to the fields of business history, women's history, corporate law, socio-economics, and the study of capitalism, and a fascinating "lost history" that may surprise readers because, until now, there has been little recognition that women played any kind of significant role in early-twentieth-century corporate capitalism.[50]

Part II considers the implications of this history for some of the foundational ideas in corporate law theory. These include the "separation of ownership and control," the "passive" shareholder, stakeholderism, the law's reliance on the archetype of the "average"/"reasonable" investor, and board composition. As the Article shows, women became the majority of American public company stockholders not only at a crucial time in the development of corporate theory, but also at a time when American culture viewed women as "ill-fitted" to play a role in the management of business.[51] Considered together, these facts suggest a new interpretation for the intellectual foundations of modern corporate law.

I.

THE FEMINIZATION OF CAPITAL

"We are in a period of wide distribution of stock," one Wall Street lawyer wrote in 1929.[52] "Many thousands of new holders are persons of moderate means."[53] Today, the growth of stockholding is mostly remembered this way: as a socio-economic transition that expanded shareholding beyond the wealthiest classes to middle-income Americans.[54] But it was also significantly about the mobilization of women's wealth. Though historians of business have not presented it this way, the expansion of shareholding reflected a decades-long transformation of the gender of shareholding—the *feminization* of capital, years before labor or management reflected similar proportions of women.

Relying on a range of historical sources, including corporate reports, government reports, newspaper articles, and transcripts and photos of stockholder meetings, this Part sketches the gender demographics of American public company shareholding from the turn of the twentieth century until the rise of institutional investing after the mid-century. The

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[50] *See* Debora L. Threedy, *Feminists & Contract Doctrine*, 32 IND. L. REV. 1247, 1252-53 n.28 (1999) ("One of the projects of feminism has been to recover women's 'lost' history.").

[51] WILLIAM Z. RIPLEY, MAIN STREET AND WALL STREET 129-30 (1927) (asserting that women "are ill-fitted by training—begging the moot point of sex—to govern" corporations).

[52] JOHN H. SEARS, THE NEW PLACE OF THE STOCKHOLDER 215 (1929).

[53] *Id.*

[54] The historian Julia C. Ott has documented the mass investment movement of the early decades of the twentieth century. *See* Julia C. Ott, "What *Was* the Great Bull Market," *in* AMERICAN CAPITALISM: NEW HISTORIES 63-83 (Sven Beckert & Christine Desan, eds., 2018) (describing a "new narrative about the promise of mass investment" after World War I); JULIA C. OTT, WHEN WALL STREET MET MAIN STREET: THE QUEST FOR AN INVESTORS' DEMOCRACY (Harvard U. Press 2011) (exploring the "phenomenon of mass investment" and its political significance).

history of women as corporate shareholders could go back much further than this. Stockholding by women is evident in the historical record long before 1900.[55] For example, when it was chartered in 1791, twelve of the 194 stockholders of the Bank of New York were women.[56] Collectively they owned only 6.7 percent of the bank's total stock, but a woman, Temperance Green, was the bank's second-largest shareholder.[57] One early American corporate law treatise noted that a corporation "may consist of both men and women, provided, its institution is not repugnant to the condition and modesty of women."[58] An 1849 Pennsylvania statute forbade stockholders who lived within ten miles of the meeting place from voting by proxy, "females excepted."[59] In 1877, the *Bankers Magazine and Statistical Register* published a small survey of the sex of stockholders in ten national banks in central New York, reporting that women were almost 41% of stockholders and held 31% of shares.[60] By 1878, there were already so many women stockholders of the Pennsylvania Railroad that the corporation distributed dividends by gender; women stockholders could receive their payments a day before the men.[61]

It may surprise some readers to learn that some public companies tracked the gender of their own stockholders and disclosed it in their annual reports. Some government agencies also tracked and reported on the gender of stockholders in the early twentieth century, particularly for the manufacturing industry and national banks. Leading financial journalists reported on stockholders' sex, going so far as to conduct investigative reporting. These practices suggest that business leaders believed that shareholders' sex *mattered*—and that information about shareholders' sex shed light on business itself.

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[55] For a good summary of evidence from the 1700s and 1800s, see ROBERT E. WRIGHT, FINANCIAL EXCLUSION: HOW COMPETITION CAN FIX A BROKEN SYSTEM 233-46 (AIER, 2019).

[56] ALLAN NEVINS, HISTORY OF THE BANK OF NEW YORK AND TRUST COMPANY (Privately Printed: New York, March 1934), at Appendix at xi-xiii (listing women stockholders at the time of the Bank of New York's 1791 incorporation: Julia Bunyan (2.5 shares); Jane Byrne (1.5 shares); Mary Daubney (3 shares); Temperance Green (25 shares); Maxwell & Berry, Attorneys for Ann Robertson (5 shares); Unus McIvers (1 share); Ann Mullen (3 shares); Mary Phillips (1 share); Sarah Robinson (3 shares); Helena Scott (1.5 shares) Ann Van Horne (1 share); Cornelia Van Horne (1 share)).

[57] *Id.* at xi. Green held 25 shares; only one stockholder, "Alex. Robertson," held more stock—34 shares. (Note I am assuming Alex. Robertson was a man.).

[58] JOSEPH KINNICUT ANGELL & SAMUEL AMES, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE 51 n.1 (Boston: Hilliard, Gray, Little & Wilkins, 1832); *see also* A. B. Johnson, Esq., *Advantages and Disadvantages of Private Corporations*, XXIII HUNT'S MERCHANTS MAGAZINE & COMM. REV. 626, 630 (Dec. 1850) (noting that "some" stockholders "are women").

[59] An Act to Encourage Manufacturing Operations in This Commonwealth ch. DCCCCIX, 1849 Pa. Laws 368 at 1174.

[60] This was the earliest published study of stockholder gender discovered in the research for this article. *See Females as Stockholders in National Banks*, BANKERS MAG. & STAT. REG., June 1877, at 987. By the 1870s, women were common enough among stock speculators to be described with their own monikers. *See* John T. Flynn, *How to Make Money in Wall Street*, WOMAN'S HOME COMPANION, Jan. 1930, at 26 (referring to woman speculators as "ladybulls"); *"Mudhens": How the Brokers' Clerks Designate the Female Stock-Operators*, CHI. DAILY TRIB., Nov. 15, 1876, at 2 ("'Mudhens' is the euphonious and rather peculiar epithet applied by the brokers' clerks to that class of females that engage in the fascinating but uncertain game of stock speculations.").

[61] *See Giving Women Stockholders Precedence*, N.Y. TIMES, Dec. 1, 1878, at 2; *see also* Advertisement, N. AM. (Phila., PA), Jan. 8, 1884, at 3 (advertising a dividend for the Little Schuylkill Navigation Railroad and Coal Company to "be paid to women stockholders in person" on an upcoming date).

A. Women Stockholders in the New Century

At the turn of the twentieth century, several government agencies were tracking and reporting on the gender of corporate shareholders. Both Massachusetts and New Jersey tracked the gender of stockholders of manufacturing companies in those states[62]; in Massachusetts, women constituted nearly a third of stockholders[63], while in New Jersey, women's percentage started lower, at 16% in 1900, and grew to 21% by 1905.[64] From 1904 to 1921, the Office of the Comptroller of the Currency occasionally reported on the sex of shareholders in national banks.[65] In 1904, for example, it reported that around a third of stockholders in national banks were women.[66]

In November 1909, when sugar trust investigations were making headlines, reports surfaced that half of the stockholders of American Sugar Refining Company were women.[67] A few months later, when railway rates were under fire, newspapers published similar reports about women's stockholding at the New York, New Haven and Hartford Railroad.[68] One

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[62] *See, e.g.,* MASS. BUREAU OF STAT. OF LAB., THE ANNUAL STATISTICS OF MANUFACTURES 1898, at 5, 9 (13th ed., 1899); TWENTY-FIFTH ANNUAL REPORT OF THE BUREAU OF STATISTICS OF LABOR AND INDUSTRIES OF NEW JERSEY FOR THE YEAR ENDING OCTOBER 31ST, 1902, at 18 tbl.1 (1903)

[63] Women constituted not a third of individual stockholders, but a third of *all* stockholders, including trusts and other institutional investors. From 1898 to 1905, the percentage of female stockholders ranged from 31.65% to 33.35%. *See* MASSACHUSETTS BUREAU OF STATISTICS OF LABOR, ANNUAL REPORT ON THE STATISTICS OF MANUFACTURERS, for the years 1898 – 1905. These statistics included both privately-held and publicly-traded manufacturing firms incorporated in Massachusetts.

[64] ANNUAL REPORT OF THE BUREAU OF STATISTICS OF LABOR AND INDUSTRIES OF NEW JERSEY, for the years 1902-1906.

[65] *See* Off. of the Comptroller of the Currency, *Report of the Comptroller of the Currency, Dec. 5, 1904*, in BANKERS' MAGAZINE, January 1905, at 62, 63; Ellen M. Henrotin, *Women in Finance*, 7 NAT'L MAG., October 1897, at 51, 53-54 (showing that the Comptroller of the Currency was tracking the sex of stockholders in national banks as early as 1897). After 1921, the Comptroller's Office issued reports on the national banks that no longer broke out male versus female stockholders. The reports are available online at: https://fraser.stlouisfed.org/title/annual-report-comptroller-currency-56?browse=1920s#19147. Comparing the 1904 and 1921 reports, it is interesting to note that women constituted 32.8% of national bank stockholders in July 1904, but only 30.58% at the end of 1920. However, women's pro rata stockholding had grown; women owned 21.04% of shares in 1904 and 22.15% in 1920.

[66] *See* Annual Report of the Comptroller of the Currency to the Third Session of the Fifty-Eighth Congress of the United States at 17 (1904). The 1904 data showed that women were a much greater proportion of national bank stockholders in some regions than in others. For example, women were almost 43% of stockholders in the New England states (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont). *See id.* at 86 T.11

[67] *American Sugar Refining Co.*, WALL ST. J., November 20, 1909, at 5 (women were 50.20% of stockholders); *Sugar Probing Spreads*, N.Y. TIMES, November 16, 1909 (describing an upcoming trial of sugar company executives on November 29 in federal court in Manhattan). Two years later, Edwin F. Atkins, American Sugar's acting president, told the Hardwick Committee that ten thousand of the company's 18,000 New England shareholders were women, many of them "school marms." *Sugar Trust Good Now: Committee Also Told Women Are Principal Owners*, BALT. SUN, June 13, 1911, at 11. George Robb has estimated that "around 20-25%" of American shareholders were women in 1910. ROBB, WOMEN OF THE TICKER, at 58.

[68] *See, e.g.*, *More Women Than Men*, BOSTON GLOBE, June 21, 1910 ("There are more women than men shareholders in the New York, New Haven & Hartford railroad company, according to an official compilation made by that corporation under date of May 1, 1910."); *Women Holding New Haven Stock*, BRIDGEPORT TIMES & EVENING FARMER, June 16, 1910, at 5 (same). The managers of the railroad may have issued the data in an effort to influence the Mann-Elkins Act, or Railway Rate Act of 1910, which was enacted on June 18 and impacted railroad companies' ability to increase rates. *See* 36 Stat. 539 (June 18, 1910). For later data on the New Haven Road's women shareholders, see 1914 Annual Report, New York, New Haven & Hartford Railroad Co., at 33 (data going back to 1912); *New Haven Shows Broad Distribution of*

wrote that officials of the railroad were "said to be considerably alarmed over the last report which shows that women stockholders outnumber the men by 5 per cent."[69] The editors noted that it was "a time when the railroad would like to have none but the hardest-headed business men concerned in its affairs, and privately the officials admit that the large percentage of female holders constitute a menace."[70]

The first major investigative reporting on women's shareholding appeared in 1913, when both the *New York Times* and the *Wall Street Journal* published sex-disaggregated data from surveys of the stockholder lists of major companies.[71] That year, a *New York Times* study found nearly as many women stockholders as men in 200 companies listed on major U.S. stock exchanges; women held almost a sixth of the companies' stock.[72] The influx of

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its Shares, WALL ST. J., April 13, 1914, at 2 (women still outnumbered male stockholders in 1914); *Women As Shareholders*, N.Y. TIMES, March 22, 1912, at 11 (60% of the 22,106 shareholders of the New York, New Haven & Hartford Railroad Company were "women, trusts, and guardians").

[69] *Railroads Fears Women*, TIMES (Montgomery, Al), June 30, 1910, at 2.

[70] *Id.* Another newspaper, reporting on the same issue, wrote that there was "good cause for excitement" among the New Haven Railroad's officials "as to what might happen if the women should demand a seat in the directors' meeting." Untitled, Daily Republican-Register (Mount Carmel, Il.), July 1, 1910, at 4.

[71] *How American Stocks Are Owned: Corporations Representing Eight Billion in Capital Give Details About the Holdings of Investors, the Speculative Supply of Stocks, and Amounts Held Here and Abroad*, N.Y. TIMES (Ann. Fin. Rev.), Jan. 5, 1913, at AFR4 (asserting that, from 1900 to 1912, "the number of blocks of stock held in women's names" among 200 large corporations had "quadrupled"); *Owners in Six Companies Increased 12.3% This Year: In Twelve Years Capitalization Increased 81.5 Per Cent and Number of Stockholders 204.7 Per Cent*, WALL ST. J., Oct. 4, 1913, at 1 (providing data for American Sugar Refining, Standard Oil of New Jersey, the Pennsylvania Railroad, American Telephone & Telegraph Co., and United States Rubber); *In 63 Corporations, Women Own Nearly 166,000 Shares: The Hand That Rocks the Cradle Already Has the Siffrage at the Corporation Polls*, WALL ST. J., Oct. 25, 1913, at 2. Both newspapers had published earlier articles on women shareholders, but those articles provided only ad hoc numbers. *See, e.g.*, *Giving Women Stockholders Precedence*, N.Y. TIMES, December 1, 1878, at 2 (reporting that, according to the Pennsylvania Railroad Company's Assistant Treasurer, "probably $500,000" in dividends was paid to women shareholders on a day set aside for payments to women exclusively); *Many Holders of Stocks: Shares of Various Corporations Very Widely Distributed*, N.Y. TIMES, July 14, 1899, at 1 (reporting that "[a]bout one-half of the stockholders" of Western Union were women; "about 30 per cent. of the shareholders" of Consolidated Gas Company of New York were "women and children"; and that a "goodly proportion of the Harlem Railroad stockholders" were "women, savings banks, and trustees of estates"); *Many New Holders of Railroad Stock: Recent Depression in Prices Brought Many Buyers of Railway Securities*, N.Y. TIMES, Sept. 23, 1907, at 12 (reporting that the Pennsylvania Railroad had 25,100 men shareholders and 22,400 women shareholders); *28,000 Women Stockholders: They Own $148,000,000 of Pennsylvania Road Shares-6,117 Since Last Year*, N.Y. TIMES, Nov. 28, 1908 (reporting that women shareholders of the Pennsylvania Railroad numbered "about 28,000"); *Women in Wall Street*, N.Y. TIMES, Dec. 12, 1909, at SM2 (Mag.) (reporting "nearly 25,000" women shareholders in the Pennsylvania Railroad and 104,000 women shareholders of National Bank stock); *Who Are the Real Railroad Owners of the United States*, WALL ST. J., April 4, 1907, at 2; *Country's Shareholders Show Heavy Increase in 10 Years: Since 1901, Shareholders of Railroad and Industrial Corporations Have Been Trebled*, WALL ST. J., July 29, 1911, at 2 (asserting that "from 30% to 50% of the shareholders of the great corporations are women"); *Heavy Gains in Shareholders Are Reported By Corporations: Great Northern Shows Remarkable Increase and Has 6,263 Women Share-Holders as on List*, WALL ST. J., Aug. 3, 1911, at 1 (reporting that women stockholders at the Great Northern Railway Co. had grown by 1,000% since 1901); Shareholders of Corporations Continue to Show Increases, Wall St. J., Aug. 4, 1911, at 1 (stating that in 1901, Boston Wharf Co. had 50,000 shares of stock that was "largely held by trustees and women"); *Corporation Shareholders Now Nearing the One Million Mark*, WALL ST. J., Aug. 11, 1911, at 2 ("[I]t is estimated that women own 35% of the outstanding shares of the leading corporations"); *Railroad and Industrial Corporations with $9,000,000,000 Capitalization Owned by 873,000 Shareholders*, WALL ST. J., Aug. 31, 1911, at 6 (noting, among other statistics, that "[a]bout 50 per cent of the shareholders of the American Sugar Refining Co. are of the so-called weaker sex").

[72] *How American Stocks Are Owned*, N.Y. TIMES, January 5, 1913, at 92. The *N.Y. Times*'s first major report on women stockholders was published nine days before New Jersey's Governor Woodrow Wilson, then President-Elect of the

women to shareholding was viewed skeptically by some investors; as one explained, the fact that "women, proverbially poor investors, are now more numerous than ever before on the stock books of the companies," meant that those companies' stocks were "out of the hands that used to protect them in the market."[73]

The next year, the *Wall Street Journal* published the results of a large study of stockholders at American companies.[74] At 199 industrial and utility companies for which sex-disaggregated data was available, women were 40% of holders.[75] At 54 railroad companies (and one airline), women were 39.5% of stockholders.[76] The *Journal*'s data revealed that women constituted a higher percentage of holders at companies with large numbers of stockholders: at industrial companies with fewer than 500 stockholders, women were 29.7% of the total, while at companies with more than 2,000 stockholders, women were 42.2%.[77] When the *Journal* published an update for 1914 (covering a mostly overlapping set of 200 industrial, utility, and railroad companies), the percentage of women holders had risen to 41%.[78]

The railroad industry, in particular, had high numbers of women investors.[79] At the Pennsylvania Railroad, the largest and most influential American railroad company, forty

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United States, gave his January 14, 1913 address calling for major changes to New Jersey's corporate law; after Wilson's speech, New Jersey's legislature worked swiftly to "drastically tighten[] its law relating to corporations and trusts with a series of provisions known as the seven sisters." William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L. J. 663, 664 (1974). Wilson did not mention women stockholders in his speech and this timing may have been coincidental.

[73] *Of Interest to Investors*, INVESTMENT: A MONTHLY MAGAZINE, Dec. 1913, at 278.

[74] *In 252 Corporations Women Shareholders Number 310,000*, WALL ST. J., Jan. 31, 1914, at 8; *Tabulation of Corporation Stockholders*, WALL ST. J., Feb. 28, 1914, at 8 (Table No. 1—Railroad Corporations); *Tabulation of Corporation Shareholders*, WALL ST. J., April 4, 1914, at 6 & 7 (Table No. 2—Industrial, Public Utility and Miscellaneous Corporations).

[75] *Tabulation of Corporation Shareholders*, WALL ST. J., April 4, 1914, at 6 & 7 (Table No. 2—Industrial, Public Utility and Miscellaneous Corporations) (data for 1913). Women were a majority of holders at 16 companies, almost 8% of companies that reported sex-disaggregated data: Adams Express (55%), American Bank Note (51.1%), American Express (51.1%), American Sugar Refining (52.9%), AT&T (52.5%), Cambridge Gas Light (55.2%), D. L. & W. Coal (50.7%), Eastman Kodak (65.2%), Kings Co. Electric Light & Power (50.5%), Mergenthaler Linotype (53.8%), National Biscuit (51.9%), Newark Consolidated Gas (50.7%), Otis Elevator (52%), Pennsylvania Salt Manufacturing (60%), Union Natural Gas Corp. (51.5%), and United Fruit (50.2%).

[76] *Tabulation of Corporation Stockholders*, WALL ST. J., Feb. 28, 1914, at 8 (Table No. 1—Railroad Corporations). Women were a majority of stockholders at the Cleveland, Cincinnati, Chicago & St. Louis Railway. Sex-disaggregated data was available for a smaller set of 40 companies for 1912; women made up 40.1% of stockholders.

[77] *See Tabulation of Corporation Shareholders*, WALL ST. J., April 4, 1914, at 6 & 7 (Table No. 2—Industrial, Public Utility and Miscellaneous Corporations). A similar, though less pronounced pattern was evident for railroads. Women were 33.5% of stockholders at railroads with fewer than 500 stockholders, but 40% of stockholders at railroads with more than 2,000 stockholders. *See Tabulation of Corporation Stockholders*, WALL ST. J., Feb. 28, 1914, at 8 (Table No. 1—Railroad Corporations).

[78] *European Holdings of American Securities*, WALL ST. J., November 9, 1914, at 7 (providing data on women holders as of June 30, 1914). In addition to companies mentioned in supra note 63, the 1914 data identified ten more companies where women were a majority of stockholders: American Book (56%), American Telephone & Cable (56.5%), Massachusetts Electric Company (52%), National Carbon (53%), Northwest Yeast (55%), Standard Oil of California (65%), Standard Oil of Indiana (65%), Standard Screw (55%), Union Oil of California (53%), and Western Union (51%).

[79] One of the earliest railroad companies in which women stockholders were reported to outnumber men was the Georgia Railroad & Banking Co., which had 494 women shareholders and 345 men shareholders in 1908. *See* Frank Fayant, *The Real Owners of America*, APPLETON'S MAGAZINE, Dec. 1908 at 668 (suggesting that more women held stock

percent of stockholders were women by 1903.[80] Women moved into the majority temporarily in 1913 and again in 1927.[81] By the late 1920s, they also outnumbered men at the Southern Pacific Railway[82], and were nearly half of holders at the Union Pacific, the Southern, and the Norfolk & Western railroads.[83] The high proportion of women among railroad stockholders was recognized early on as having implications for railroad companies' corporate governance: It raised the "fiduciary burden" on managers, because of women's dependence on men to run the business.[84] The *Railway Age-Gazette* argued that women constituted a "large dependent class" of railroad shareholders.[85] Women were "a dependent class in two senses—financial and mental," it asserted.[86]

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in railroads than industrials because "very few industrials are considered desirable as women's investments"); Frank M. Fayant, *Real Owners of America Shown in Stock Holdings*, WALL ST. J., Nov. 21, 1908, at 6. In the late nineteenth century, the largest shareholder of the Baltimore & Ohio Railroad was a woman. *See Editorial Notes*, WOMAN'S JOURNAL, December 31, 1898, at 417; *see also James Chief Owner of Northern Roads*, N.Y. TIMES, June 12, 1927, at E11 (identifying Emma B. Kennedy as the largest individual stockholder of both the Northern Pacific Railroad and the Great Northern Railway Co.).

[80] *See The Distribution of Stockholdings in American Railways*, 22 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 63, 74 (Nov. 1903) ("the Pennsylvania Railroad Company reported that 40 per cent of its shareholders were women"). A quarter of stockholders of the Atchison, Topeka & Santa Fe Railroad were women by 1900. *See Women as Stockholders*, POTTSVILLE MINERS J., June 18, 1900, at 2. These percentages are roughly consistent with the findings of a recent study of U.K. railroad companies over the same period. *See* Graeme Acheson et. al., *Independent Women: Shareholders in the Age of the Suffragettes*, Queen's University Centre for Economic History Working Paper, No. 2018-09 (Sept. 2018), at 3 (finding that "women represented about 30 to 40 per cent of shareholders in each railway company in our sample" during the U.K. suffragette movement).

[81] The percentage of women holders fell again in 1929. *See Women Hold Less Stock in Pennsylvania Road*, TIMES HERALD (Olean, New York), November 25, 1929, at 8 (attributing the fall to a "recent employes stock allotment"). The rise and fall of women stockholders at the Pennsylvania Railroad can be traced through newspaper coverage: *See Pennsylvania Dividends*, WALL ST. J., May 17, 1907, at 6; *28,000 Women Stockholders*, N.Y. TIMES, November 28, 1908, at (47% women a year later); *Wide Distribution of Pennsylvania Railroad Stock*, INDEPENDENT, September 21, 1911, at 667 (47.02% women in 1911); *In 63 Corporations, Women Own Nearly 166,000 Shares*, WALL ST. J., October 25, 1913, at 2 (over half of holders were women); *Foreign Liquidation in Railroad Securities*, WALL ST. J., January 28, 1916, at 2; *Woman's Ownership of Corporations*, CURRENT OPINION (April 1914) at 304; *Pennsylvania Railroad Shareholders 105,630*, WALL ST. J., Dec. 2, 1918, at 2 (49.3% women in 1918); H. W. SCHOTTER, THE GROWTH AND DEVELOPMENT OF THE PENNSYLVANIA RAILROAD COMPANY, 1846 TO 1926 441 (1927) (49.85% women at the end of 1926); *Woman's Investment Invasion: Overtopping Facts and Figures*, WALL ST. J., Aug. 12, 1927, at 15 (50.38% women in 1927); A. K. Darby, *Union Trust Company Directors To Consider Increasing Capital Stock*, BALT. EVENING SUN, December 16, 1927, at 50 (50.68% women by the end of the year); *see also* WRIGHT, FINANCIAL EXCLUSION, at 239 (noting how the Pennsylvania Railroad "became known as the 'Petticoat Line' because more than half of its shareholders were female").

[82] *Women Outrank Men Stockholders*, N.Y. TIMES, Aug. 12, 1927, at 26 (45.53% of stockholders of the Southern Pacific were women; 44.99% were men).

[83] *See, e.g.*, *Union Pacific Stockholders*, WALL ST. J., April 25, 1924, at 4 (women accounted for 43% of shareholders); *Women Outrank Men Stockholders*, N.Y. TIMES, Aug. 12, 1927, at 26 (48.66% of stockholders of Norfolk & Western Railroad were women); Advertisement, Southern Railway System, ATLANTA CONSTITUTION, Feb. 21, 1929, at 6 ("[n]early one-half" of stockholders were women).

[84] *Broadening Basis of Confidence*, WALL ST. J., Nov. 30, 1908, at 1 (at the Pennsylvania Railroad, "the fiduciary burden is all the greater, because its holders … are women"). This notion was expressed by corporate managers for many years. *See, e.g., Traction Control Plan to be Revised*, N.Y. TIMES, December 13, 1921, at 5 (*quoting* H. Hobart Porter, vice president of the Brooklyn city Railroad Company, stating that "[a]bout half of the stockholders are women, and we [the directors and officers], therefore, have an unusual responsibility").

[85] *Half the Stockholders Are Women*, ST. LOUIS GLOBE-DEMOCRAT (St. Louis, Missouri), February 26, 1912, at 7 (summarizing undated statements in the *Railway Age-Gazette*).

[86] *Id.*

Louis D. Brandeis mentioned women stockholders three times in his 1914 book, *Other People's Money*.[87] The dependence of the investor upon bankers had been growing, Brandeis wrote, "since women and others who do not participate in the management, have become the owners of so large a part of the stocks and bonds of our great corporations."[88] Later he emphasized a connection between the proliferation of women stockholders and the general lack of aptitude of small investors. He wrote:

> The small investors, particularly the women, who are holding an ever-increasing proportion of our corporate securities, commonly buy on the recommendation of their bankers. The small investors do not, and in most cases cannot, ascertain for themselves the facts on which to base a proper judgment as to the soundness of securities offered. And even if these investors were furnished with the facts, they lack the business experience essential to forming a proper judgment.[89]

Around the same time, William W. Cook, author of the popular legal treatise *Cook on Corporations*, then in its seventh edition, offered a similar assessment. Years earlier, Cook had declared that the "corporation problem" was "one of the great social questions of the age," and argued that the solution lay in reinvigorating the role of the shareholder in corporate governance.[90] This idea—that shareholder empowerment was the key to solving the corporation problem—was commonly expressed by business experts at the beginning of the twentieth century; the *Wall Street Journal* proclaimed on its front page, in 1905, that "[a]nything that could be done to increase the interest of stockholders in the active management of the corporations" was worth trying.[91]

By the 1910s, however, Cook and other experts were changing their minds about the value of shareholder empowerment. In 1914, around the time that Brandeis published *Other People's Money*, Cook argued that reformers of the corporation should *not* rely on more active participation by stockholders. "You might as well ask the clouds in the air to propel the railroad locomotives," he wrote dismissively.[92] "The stockholders are multitudinous, widely scattered, many of them women and estates. They give their proxies to whomsoever is in control—blindly and automatically. Even when their confidence is abused they are helpless and take their losses."[93] The writing of both Brandeis and Cook in the 1910s connected the

[87] LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 8, 133 & 199 (1914).
[88] *Id.* at 8.
[89] *Id.* at 199-200. Brandeis went on to point out that women were a majority of stockholders at American Sugar Refining and nearly half at two major railroads.
[90] WILLIAM W. COOK, THE CORPORATION PROBLEM: THE PUBLIC PHASES OF CORPORATIONS, THEIR USES, ABUSES, BENEFITS, DANGERS, WEALTH, AND POWER, WITH A DISCUSSION OF THE SOCIAL, INDUSTRIAL, ECONOMIC, AND POLITICAL QUESTIONS TO WHICH THEY HAVE GIVEN RISE 118 (G. P. Puttnam's Sons, 1891).
[91] *The Old Colony Way*, WALL ST. J., June 3, 1905, at 1 (proposing that shareholders select regional delegates to attend the annual shareholders' meeting or that "important questions of policy might be submitted to the stockholders who could cast their ballots by mail").
[92] William W. Cook, *Plan for the Nationalization of the Railroads*, 24 YALE L. J. 370, 374 (1914-1915).
[93] *Id.*

rise of women's stockholding to stockholders' subordination and helplessness.[94] Both men suggested that corporate law should strive not to empower shareholders, but to shift power elsewhere.[95]

Around this time, newspapers also popularized a "war of the sexes" metaphor for shareholding that alluded to women's claims for political citizenship. The *Wall Street Journal* observed on its front page that "[w]ere the holders of the shares of the American Sugar Refining Co. marshalled together, the women on one side and the men on another, the latter would find themselves considerably outnumbered."[96] The sentence, which imagined female and male stockholders positioned like opponents on a battlefield, captured something of the gender politics of the era.[97] At the time, women were fighting, against significant opposition, for the right to vote as citizens in political elections.[98] Women would not win that right until 1920, and then only on the basis of a single vote.[99] They would, however, continue to be excluded from juries in some states until 1968, reflecting continuing limits on women's authority in the public sphere.[100]

By the 1910s, business writers were already contemplating the control implications of a large body of women shareholders. The *Wall Street Journal* observed that it was "unusual" for women stockholders to attend stockholder meetings, but reported "a number of women in attendance" at the 1912 annual meeting of an unidentified, "well-known company," and

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[94] *See also, e.g., Natl. Conduit Shareholders Missed Opportunity*, WALL ST. J., Oct. 27, 1922, at 8 (asserting that stockholders were "gradually losing their equity through failure to take concerted action to protect their interests" and that "[o]f total stockholders, slightly less than 50% were women with small holdings"); A. B. Johnson, Esq., *Advantages and Disadvantages of Private Corporations*, XXIII HUNT'S MERCHANTS MAGAZINE & COMM. REV. 626, 631 (Dec. 1850) (when a corporation had many "corporators," "[s]ome also are women, some infants, and not a few are superannuated rich men, who desire relief from the management of their property").

[95] In at least two documented instances, companies took steps to eliminate women stockholders—and, in one of the two, Asian stockholders as well. *See Adams Express Company Wants Its Own Stock*, N.Y. TIMES, December 12, 1901, at 1 (describing a stock buyback scheme at Adams Express targeting only women shareholders); *"Freeze Out" Charged Against Big Oil Co.*, L. A. TIMES, January 16, 1904, at 3 (describing a shareholder lawsuit alleging that officers and directors of the Hercules Oil Refining Company initiated a scheme to "get rid of all of the women and Chinamen stockholders").

[96] *Million and a Quarter Owners in 327 Companies*, WALL ST. J., April 4, 1914, at 1.

[97] *See* ROBB, WOMEN OF THE TICKER, at 59. "The rapidity of increases" in women's stockholding "is such as to suggest the presence soon of women in corporation Directorates," the *New York Times* predicted in 1913, and "suggests reasons for the recent development of more generous policies in the treatment of employe[e]s." *How American Stocks Are Owned*, N.Y. TIMES, January 5, 1913, at 92.

[98] *See generally*, OLIVIA COOLIDGE, WOMEN'S RIGHTS: THE SUFFRAGE MOVEMENT IN AMERICA, 1848-1920 (1966) (describing the history of the suffrage movement before 1920).

[99] *See* Sandra Day O'Connor, *The History of the Women's Suffrage Movement*, 49 VAND. L. REV. 657, 668 (1996) (describing how women's suffrage was won by a single vote cast by a 24-year-old Tennessee state representative, Harry Burn).

[100] The Nineteenth Amendment did not make women eligible for jury service; some states continued to exclude them. For example, women became eligible to serve as jurors in New Jersey in 1921, and were excluded from federal juries in the state until 1937. *See Women Jurors*, 71 U.S. L. REV. 61, 76 (1937). When Berle and Means published *The Modern Corporation* in 1932, women were still excluded from juries in state courts in Illinois, Florida, Massachusetts, Vermont, Virginia, Georgia, Texas, and many other states. *Id.* Women did not become eligible to serve as jurors in Mississippi until 1968. *See Women on Mississippi Juries*, N.Y. TIMES, June 15, 1968, at 33. Only in 1994 did the Supreme Court make it clear that striking a juror solely on the basis of sex violated the Equal Protection Clause. *See* J.E.B. v. Alabama el rel., 511 U.S. 127 (1994) (holding that it violated the Equal Protection Clause to peremptorily strike a juror solely on the basis of sex in a case concerning the exclusion of men from a jury).

noted that the women had "manifested an unusual amount of interest in the company's affairs."[101] "Women Could Control Public Utilities of Capital," announced a headline in the *Washington Herald* in 1914.[102] The article stated that women owned "sufficient shares of the Washington Railway and Electric Company, Capital Traction Company, and Washington Gas Company to overturn the present managements."[103]

The *Wall Street Journal* focused again on stockholders' sex in a series of nine articles beginning in early 1916, when it produced another large study of stockholder demographics.[104] The *Journal* reported that, at the beginning of 1916, women were 35% of stockholders at major copper companies[105] and major oil companies[106], 37% of stockholders at industrial and miscellaneous companies[107], 40% of the holders of stock in tobacco companies[108], and 55% of stockholders of wire companies.[109] Women were 48% of the common stockholders of General Electric[110], 51% of stockholders at American Express[111], 59% of the common stockholders at Western Union[112], and 62% of stockholders at Eastman Kodak.[113] Though only three years had passed since the *Journal*'s 1913 study[114], this data showed meaningful growth in the percentage of women shareholders—and confirmed a continuing interest among the *Journal*'s readers in the gender of shareholding.

B. Women as Shareholder Activists

Louise de Koven Bowen, the daughter of a Chicago banker, became an early pioneer of shareholder activism by leveraging her considerable stockholding at several big companies

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101 *Women Stockholders*, WALL ST. J., April 26, 1912, at 3. Smoking was prohibited at a 1917 duPont Company stockholders meeting because women attended. *See Seventy-One Per Cent of duPont Stock Voted Today Against Purchase of Disputed Shares*, WILMINGTON EVENING J., Oct. 10, 1917, at 10.
102 *Women Could Control Public Utilities of Capital*, WASH. HERALD, March 1, 1914, at 20.
103 *Id.*
104 An earlier pair of articles reported on the gender of railroad stockholders. *See Foreign Liquidation in Railroad Securities*, WALL ST. J., January 28, 1916, at 2; *Europeans Holding the American Rails*, WALL ST. J., February 4, 1916, at 2. The year before, the *Journal* had also published data on the gender of stockholders at companies like Pure Oil Co., Intercontinental Rubber, International Paper, and Wells Fargo & Co. *See, e.g.*, *European Holdings of American Securities*, WALL ST. J., January 18, 1915, at 5; *European Holdings of American Securities*, WALL ST. J., January 23, 1915, at 5.
105 *Stock Ownership of the Copper Companies*, WALL ST. J., February 5, 1916, at 2. Some companies did not report the number of women stockholders for 1916. The *Journal* nonetheless included those companies' total stockholders in the calculation of the percentage of total stockholders who were women—so the reported percentage was lower than the true percentage for companies reporting sex-disaggregated data. In the text above, I use the *Journal*'s reported percentages; in Appendix I, I provide accurate calculations for only those companies that reported sex-disaggregated data.
106 *Oil Companies Stock Ownership Off 6%*, WALL ST. J., February 8, 1916, at 6.
107 *Stock Ownership in Industrial Companies*, WALL ST. J., March 20, 1916, at 7.
108 *Stock Ownership of the Tobacco Companies*, WALL ST. J., February 7, 1916, at 3.
109 *Stock Ownership in the Wire Companies*, WALL ST. J., February 9, 1916, at 5.
110 *Stock Ownership in Industrial Companies*, WALL ST. J., March 20, 1916, at 7.
111 *Stockownership Figures for 12 Industrials*, WALL ST. J., March 6, 1916, at 2.
112 *Stock Ownership in the Wire Companies*, WALL ST. J., February 9, 1916, at 5.
113 *Stock Ownership in Industrial Companies*, WALL ST. J., March 20, 1916, at 7 (appears to include both common and preferred shareholders).
114 *See supra* notes __ and accompanying text.

to improve the companies' labor policies.[115] Bowen was a social reformer and leader in Illinois's women's suffrage movement when, around 1911, she began making demands on behalf of workers at the Pullman Company, where she was a stockholder. Bowen's memoirs, published in 1926, provide a unique, first-hand account of her shareholder activism.[116] Bowen organized other Pullman shareholders to "object to … [a] share of the profits because conditions were bad" for workers.[117] Pullman's management responded by spending a large sum to build a hospital and hire physicians for its workers; Bowen reported that workers' health improved and she found the results of her activism "gratifying."[118]

"Flushed with my victory," as she put it, she began a new activism campaign at the International Harvester Company, whose women employees worked all night in the company's twine mills.[119] When Bowen protested the practice in a letter to the president, she was told that the president "felt they should not employ women at night but that all the other directors did not feel the same way, and now that a stockholder had objected he would take [the matter up] with the board of directors."[120] International Harvester ended the practice, so Bowen made another demand: a "minimum wage for women."[121] The company implemented one. Bowen went on to join a shareholder campaign at U.S. Steel that sought to eliminate the 12-hour workday, but reported that the campaign foundered when the United States entered World War I. In her memoir, Bowen described her philosophy of shareholder activism:

> Stockholders are partners in a business in which they own shares; if they are indifferent to the conditions under which their employees work they are as culpable as if they were the actual employer, and while it is difficult to know the details of a business in which one owns stock, it is always possible to acquire this knowledge and to protest or approve at the annual meeting of the company to which all stockholders are bidden.[122]

Bowen's own activism took place behind the scenes rather than at shareholder meetings. The press reported that Pullman's management had asked her "why, if she thought so badly

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[115] Today we would call Bowen's activism "ESG activism" because it related to "social" goals. Information about Bowen's activism is taken from three sources: Alice Hamilton, *What a Pullman Stockholder Did*, MERIDEN RECORD-JOURNAL, June 3, 1912, at 7; *What One Woman Did*, INTER OCEAN, November 24, 1912, at 6, and LOUISE DE KOVEN BOWEN, GROWING UP WITH A CITY 166-67 (N.Y.: MacMillan Co., 1926).
[116] Indeed, the chapter of Bowen's book that described her shareholder activism expressly linked political and corporate suffrage; it was titled "Suffragists and Stockholders." *Id.* at __-__.
[117] *Id.* at 167.
[118] *Id.*
[119] *Id.*
[120] *Id.* at 168.
[121] *Id.*
[122] *Id.* at 170 & 165 ("I could not help but feel that, as a stockholder and deriving my income from the profits of these corporations, I was at least partially responsible for the grievances of which I was constantly aware, and it seemed to me that as a stockholder I ought to bring about better conditions among working people.").

of the company, she did not sell her stock and free her conscience?"[123] Rejecting this early articulation of the Wall Street Rule, Bowen replied that she would keep her stock "and do something to better the conditions for the men who were working for her."[124]

C. The Expansion of Stockholding and the Great Bull Market

The bull market of the 1920s galvanized investors and placed Wall Street at the center of the popular imagination.[125] By all accounts, women participated eagerly as investors.[126] Prestigious New York hotels, including the Plaza and the Waldorf-Astoria, had suites reserved for women investors.[127] A "women-in-the-market trope" became popular and brokerages began hiring women to sell stock, bonds, and investment advice to female clients.[128] As the historian Julia C. Ott has explained, the idea of women as investors underscored the "modernity and inclusivity of the Great Bull Market."[129] But, she points out, those who deployed the women-in-the-market trope "sought to defuse any radical implications" it might present, presumably because the role of women as stockholders remained controversial.[130] Henry Clews, who founded the Wall Street brokerage Henry Clews & Co. in the nineteenth century, expressed "militancy against women's participation in business" until the end of his life, when, in 1923, he professed that he had erred.[131] "The woman investor has become not only a reality," he asserted "but … before long I expect to see her a factor in national corporation management."[132]

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[123] *What One Woman Did*, INTER OCEAN, November 24, 1912, at 6.
[124] *Id.*
[125] Stockholding grew significantly during the 1920s; Julia Ott has written that "[t]he number of U.S. households owning equity may have increased as much as *sixteen*fold" over the decade. *See* Julia C. Ott, "What *Was* the Great Bull Market," *in* AMERICAN CAPITALISM: NEW HISTORIES 63-64 (Sven Beckert & Christine Desan, eds., 2018). Several factors account for the steep rise in the number of Americans who owned public company stock after World War I. These include the Liberty Bond movement, which introduced millions of Americans to securities investment; the end of the bucket shop industry, which freed up money to be invested on national stock exchanges; and the proliferation of employee stock purchase plans. *See* ROBB, WOMEN OF THE TICKER, at 67-70; *see also* Julia C. Ott, "What *Was* the Great Bull Market," *in* AMERICAN CAPITALISM: NEW HISTORIES (Sven Beckert & Christine Desan, eds., 2018), at 82 ("During the Great Bull Market, corporate stock distributors launched marketing, advertising, and public relations initiatives that drew upon war loan precedents to associate share ownership with political and economic liberty."); Harwell Wells, *The Modernization of Corporation Law, 1920-1940*, 11 U. PA. J. BUS. L. 573, 586-88 (2009) (discussing the rise of stock investing in the 1920s). In addition, the enactment of a federal income tax in 1913 helped encourage Americans to purchase stocks and bonds. ROBB, WOMEN OF THE TICKER, at 69.
[126] *See* ROBB, WOMEN OF THE TICKER, at 67 (during World War I, from 1914 to 1918, and over the next decade, "women's importance as investors continued apace").
[127] Eunice Fuller Barnard, *Ladies of the Ticker*, 227 N. AM. REV. 405, 406 (April 1929) (describing women investors as "stenographers, heiresses, business women, housewives"); *see also* GORDON THOMAS & MAX MORGAN-WITTS, THE DAY THE BUBBLE BURST: THE SOCIAL HISTORY OF THE WALL STREET CRASH OF 1929 (Doubleday 1979) at 71-73 (describing a women's suite at the Waldorf-Astoria); 205 (same at the Plaza); ROBB, WOMEN OF THE TICKER, at 74-75 (providing detailed descriptions of women's trading rooms).
[128] OTT, WHEN WALL STREET MET MAIN STREET, at 186-88; ROBB, WOMEN OF THE TICKER, at 71.
[129] OTT, WHEN WALL STREET MET MAIN STREET, at 187.
[130] *Id.*
[131] *Henry Clews, 65 Years, Notable in Wall Street*, WALL ST. J., Feb. 2, 1923, at 9.
[132] *Id.*

That year, Owen D. Young visited the headquarters of General Electric Company with its president, Gerard Swope, and addressed a group of the company's foremen.[133] A journalist later recounted how Young spoke about the apparently well-known fact that more than half of General Electric's stockholders were women.[134] Young "provoked laughter" by pointing out "that all the men in the Company were working for women, both in the shop and at home."[135] The anecdote is revealing not only because it evidenced widely-shared knowledge within General Electric that women were major holders of its stock. It also suggested that male business leaders sometimes openly joked about women's stock ownership as subverting traditional gender roles. The punchline, of course, was that women were supposed to express authority in the home, but not in business.

Other business leaders asserted that women stockholders were a problem for corporate capitalism. Clarence W. Barron, the founder of *Barron's* magazine, opined that "[w]idows and orphans, as shareholders, are the curse of enterprise."[136] The same year, Alfred P. Sloan, Jr., the head of General Motors, wrote of his worry that, at some point, the "diffusion of stock ownership must enfeeble the corporation by depriving it of that virile interest in management upon the part of some one man or group of men to whom its success is a matter of personal and vital interest."[137] Although Sloan did not mention women directly, his word choice suggest a gendered meaning. He would have known, in 1926, that women stockholders were surging into his own company. A few years earlier, the *Wall Street Journal* had reported that approximately one out of every four GM stockholders was a

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[133] Herman Bernstein, *Owen D. Young: The New Type of America's Industrial Genius, An Interview*, MCCLURE'S MAGAZINE (Jan. 1926), at 385. Young had recently become the chairman of General Electric's board of directors.
[134] General Electric was disclosing sex-disaggregated data about its shareholders in its annual reports around this time. According to this data, women stockholders outnumbered men for the first time in 1921, but the percentage of women stockholders had dropped to 43% by the end of 1923. *Compare* General Electric 1921 Annual Report at 8 *with* General Electric 1923 Annual Report at 10. 1921 was the last year that General Electric disclosed the exact number of women stockholders in its annual report; thereafter it reported only percentages or ballpark estimates. *See, e.g.*, General Electric 1933 Annual Report at 14 ("On December 29, 1933, there were 188,316 holders of common and special stock, of which number approximately one-half (exclusive of corporations, institution, etc.) were women.").
[135] Bernstein, *Owen D. Young*, at 385.
[136] C. W. Barron's, *Wall Street Sermons: Orphanitis, or the Disease that Kills Big Corporations*, WALL ST. J., Aug. 18, 1926, at 1. Barron argued that the dispersion of stockholding put companies into the "morgue for widows and orphans." "It was this morgue that swallowed up the New England railroads," he argued. "Had business men owned [the New York, New Haven & Hartford Railroad] they would have fought for their property and their profit." *Id.*
[137] Alfred Pritchard Sloan, Jr., *Modern Ideals of Big Business: An Article on the New Leadership*, WORLD'S WORK (Oct. 1926) at 697.

woman.[138] By 1928, thirty-eight percent of GM's shareholders were women and, by the late 1940s, women had become a solid majority of the company's individual shareholders.[139]

It was "readily understandable" that women would invest in companies like National Biscuit, American Sugar, and AT&T, which produced products and services used by women, asserted the *Wall Street Journal*.[140] "But by what call do the ladies roam into air brakes, steel mills, lead manufacture?"[141] A recurring theme was that women only had legitimacy as shareholders when the company produced products and services used by women—a view that seemed to presume a role for shareholders in the company's business. One author of an early book on stockholders wrote that "[t]he woman stockholder should be given prominence in the classification for some companies, particularly corporations dealing in household products, food stuffs, and clothing, where such companies desire to develop the stockholder-customer idea."[142] Yet women remained prevalent as equity investors in *all* major American industries, fundamentally challenging stereotypes about gender, business, and economy.[143]

The influential Harvard economist, William Z. Ripley, was particularly direct in his critique of women stockholders.[144] In his view—expressed only seven years after the Nineteenth Amendment gave women the right to vote in political elections—shareholder

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[138] *General Motors Stockholders*, WALL ST. J., Nov. 30, 1921, at 8 (women were 22% of common stockholders and owned almost 8% of common stock). The *New York Times* reported a significant surge in stockholders at GM between October 1920 and April 15, 1921. According to the *Times*, the number of women common stockholders more than doubled over that period, from 3,459 to 8,110. *Gen. Motors Common Now Owned by 37,787*, N.Y. TIMES, June 29, 1921, at 19; *see also Many Women in General Motors*, WILMINGTON NEWS JOURNAL, November 30, 1920, at 12 (between April and October 1921, 2,114 new women stockholders bought shares of common, preferred, and debentures at GM, increasing the total number of women shareholders to 17,230).

[139] *See Women Hold Stock*, L.A. TIMES, April 22, 1928, at 92 (noting that women held "over 13 per cent of the entire outstanding capitalization of" GM); *Big Concerns' Stockholders All Over U.S.*, CHICAGO TRIB., May 1, 1932, at 29 (40% of GM's common stockholders were women at the end of 1930); *Many Women Holders of Stocks in Big Business*, L.A. TIMES, March 26, 1936, at 14 (at the end of 1935, women were 47% of all GM stockholders); General Motors 1948 Annual Report at 22 (noting that at the end of 1948, 83% of GM's stockholders were individuals, and 56% of these were women).

[140] *Woman's Investment Invasion: Quality Preferences/Article V*, WALL ST. J., September 9, 1927, at 14.

[141] *Id.*

[142] JOHN H. SEARS, THE NEW PLACE OF THE STOCKHOLDER 61 (1929).

[143] The same idea surfaced in connection with calls for women directors. "[Q]ualified women" could make "valuable contributions to corporate earnings" on the boards of companies, "like the foodstuff and textile companies, which make products which are sold largely to women," the *San Francisco Examiner* argued in 1931. *Who Owns American Business?,* SAN FRANCISCO EXAMINER, June 16, 1931, at 24. In remarks at Standard Oil (New Jersey)'s 1951 stockholders meeting, a stockholder said, "[t]hey also tell you that the National Dairy has put a woman on the board. I think, since it is a national milk business, it is splendid to put a woman on the board. I don't think the petroleum business has any use for women directors." Standard Oil Company, Incorporated in New Jersey, Annual Meeting, June 7, 1950, at 20. Three years later, a stockholder of U.S. Steel opposed the nomination of a woman to the board: "Until U.S. Steel has a nylon-making subsidiary, steel working is no job for the petticoats." *U.S. Steel Annual Meeting Covers Girth, Mirth, Women—and Upturn in Business*, WALL ST. J., May 4, 1954, at 11.

[144] Though prominent as a scholar of the corporation, Ripley remains a troubling figure in American corporate law. His writings on racial anthropology were as influential as his work on economics; Ripley developed the "cephalic index," a modern version of phrenology, in his 1899 book, *The Races of Europe*. Madison Grant acknowledged Ripley's influence in his book, *The Passing of the Great Race* (1918). *See* ALLAN CHASE, THE LEGACY OF MALTHUS: THE SOCIAL COSTS OF THE NEW SCIENTIFIC RACISM 96 (Knopf 1977).

governance was *less* appropriate for women's participation than political governance. Ripley wrote,

> The average stockholder is entirely unqualified to engage actively in management. For a surprisingly large number of great corporations more than half of the shareholders are women—in American Telephone for 1926, 200,000 of the 366,000 were on the distaff side. Such a multitude are ill-fitted by training—begging the moot point of sex—to govern directly, less so than in politics. These business issues are far less simple, far less moral, and they make less appeal to the imagination than those in the field of government.[145]

Contrary to the opinion Ripley was expressing, however, women had won the right to vote in shareholder elections *before* they were granted the right to vote in political elections.[146] Ripley's opinion that women were suitable to "govern directly" only matters that were "simple" and "moral" reflected common gender stereotypes of the era.[147]

That same year, the *Wall Street Journal* published a five-part series under the headline "Woman's Investment Invasion," extending the gender battle metaphor from its reporting a decade earlier.[148] In some detail, the articles documented the growing proportion of female stockholders at particular companies.[149] For example, U.S. Steel told the *Journal* that in the ten years from 1917 to 1927, its male stockholders had increased by 10.6%, while its women

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[145] WILLIAM Z. RIPLEY, MAIN STREET AND WALL STREET 129-30 (Boston: Little, Brown & Co. 1927). The "distaff side" was a (now obscure) reference to women. *See* OED (2nd Ed.) (1989) (defining "distaff" as, *inter alia*, "symbolically, for the female sex, female authority or dominion"); *see also, e.g.,* WILLIAM SHAKESPEARE, RICHARD II, iii. ii. at 118 ("Against thy State Yea Distaffe-Women manage rustie Bills").

[146] For example, New York had, by statute, given married women the right to vote their stock since 1851. *See* "An act authorizing married women who may be members or stockholders of any incorporated company, to vote at elections of directors and trustees," N.Y. Session Laws of 1851, Ch. 321.

[147] *See, e.g.*, SARA M. EVANS, BORN FOR LIBERTY: A HISTORY OF WOMEN IN AMERICA 154 (1989).

[148] In the years leading up to the New Deal, the idea that women were "invading" business was a recurring theme of writings on business. *See, e.g.*, Louis D. Brandeis, "Our New Peonage," *in* BUSINESS—A PROFESSION 71 (1914) (1996 reprint) (describing "the invasion of women into industry"); Carol Bird, *Women to Rule in the Financial World*, WASH. POST, Feb. 26, 1928, at SM10 (quoting Bessie Q. Mott as saying that "[m]en always felt that woman . . . would never invade" the field of finance, "[a]nd yet she has, and is."); *Women Invading Every Business: Even Professions Thought Sacred to Males Find Feminine Job Seekers*, TRIBUNE (Scranton, Pa.), July 22, 1924, at 3 (observing that "[b]usiness sanctums of men barricaded against feminine intrusion these many years are being . . . invaded on every hand today by pioneering women."); Alice E. Cutter, *Bond Houses Aid Women Investors: Entry of Fair Sex into World of Business Compels Special Service to Cater to Needs*, S.F. EXAM'R, Oct. 6, 1924, at 16 (stating that "today from every walk of life we find women invading the business world"); *Each Career an Individual Problem: Mrs. Charles Stephenson*, AUSTIN STATESMAN, Mar. 9, 1924, at 8 (quoting a prominent woman stating "I do not approve of women invading the business world unless it is financially necessary.").

[149] *See Woman's Investment Invasion: Pioneering Picturesqueness*, WALL ST. J., August 11, 1927; *Woman's Investment Invasion: Overtopping Facts and Figures*, WALL ST. J., August 12, 1927; *Woman's Investment Invasion: Outstanding Personalities/Article III*, WALL ST. J., August 27, 1927; *Woman's Investment Invasion: Ownership Distribution*, WALL ST. J., August 31, 1927 (noting, for example, that 43% of the stockholders of Union Pacific Railroad were women); *Woman's Investment Invasion: Quality Preferences/Article V*, WALL ST. J., September 9, 1927, at 14 (noting, for example, that at American Tobacco, women constituted 40% of common stockholders and outnumbered men as preferred stockholders).

stockholders had increased by 25.4%.[150] From March 1923 to March 1927, National Biscuit Company saw its stockholder list grow by 3,359, of whom 2,030 were women.[151]

Robert S. Lovett, the chairman of the Union Pacific Railroad, told the *Wall Street Journal*'s financial editor that he suspected that published reports *undercounted* women stockholders.[152] This was because companies and journalists determined the gender of stockholders from stockholder lists; they simply counted up the number of feminine names.[153] However, Lovett pointed out, many names on the typical stockholder list gave initials in place of a first name, and initialed first names were "always, uniformly" assumed to be a man's name.[154] Since some women used initials in place of their first names, too, Lovett believed that women dominated the stockholder rolls in greater numbers than published statistics suggested.[155]

In response to the *Wall Street Journal* series, the *Waterbury Republican* noted that if the trend continued, "we shall reach a point where our largest industries are controlled by women."[156] *Barron's* magazine scoffed at this suggestion. "There is not the least prospect or

[150] *Women Outrank Men Stockholders*, N.Y. TIMES, Aug. 12, 1927, at 26 (quoting U.S. Steel's management as disclosing that "[w]hile men increased 7,921, women increased 10,950" over the ten-year period); *Woman's Investment Invasion: Overtopping Facts and Figures*, WALL ST. J., Aug. 12, 1927, at 15. An even more dramatic story had played out at General Motors, where more than 6,000 women became stockholders in one year, from October 1920 to October 1921. *See General Motors Stockholders*, WALL ST. J., Nov. 30, 1921, at 8.

[151] *Women Outrank Men Stockholders*, N.Y. TIMES, Aug. 12, 1927, at 26.

[152] *Woman's Investment Invasion: Quality Preferences/Article V*, WALL ST. J., September 9, 1927, at 14.

[153] On naming practices for the registration of stock, see Frederick A. Wiseman, *Stock Issue Problems*, 1 CORP. PRAC. REV. 12, 22 (1929) (noting that women stockholders should be registered with a prefix of "Miss" or "Mrs." and that a married woman should be identified by her own name, not her husband's).

[154] *Id.* ("When a stock certificate is entered by initials in lieu of the full 'first name' of its owner," Alloway wrote, paraphrasing Lovett, "always, uniformly, that certificate is officially taken to be in the name of a man—and thus it comes about …. That while a list of women stockholders is bound to be a list in which the given names are women indisputably, only, a list of male stockholders is a list of men certain plus all the initialed, uncertain ones."). Business law professor J.S. Nelson confirmed to the author, based on personal experience, that this gendered assumption endures in the twenty-first century. *See, e.g.*, Hannah Sparks, *Microsoft Patents New Software that Can Detect When Employees Are Lazy*, N.Y. POST (updated Dec. 3, 2020, 3:04 PM) (assuming erroneously that professor J.S. Nelson is a man).

[155] In addition, it is possible that women were the primary beneficiaries of stock held in trust. Although this seems to have been a widespread assumption at the time, I have found no empirical studies of the sex of trust beneficiaries from this period. Since stock held in trust was voted by the trustee, not the beneficiary, companies categorized it separately from stock owned by individuals. *See* LILLIAN DORIS & EDITH J. FRIEDMAN, CORPORATE MEETINGS, MINUTES, AND RESOLUTIONS 21 (Rev. ed. 1947) (discussing how shares held in trust were voted). Even if the beneficiaries of stock held in trust were mostly women, the trustees empowered to vote the stock were likely to be men. In some jurisdictions, as late as the 1940s, the law required trustees to vote stock in person—proxies were not valid—which likely meant that many shares held in trust were never voted at all. *See id.* at 26-27 (citing cases).

[156] *Stock and Votes for Women*, BARRON'S, August 29, 1927, at 35 (*quoting* the Waterbury *Republican*); *see also* A. K. Darby, *Union Trust Company Directors to Consider Increasing Capital Stock*, BALT. EVENING SUN, December 16, 1927, at 50 (women "are in position to wield tremendous influence in the election of directors if they choose to pool their holdings" at various companies). The *Independent* argued that the *Wall Street Journal*'s findings about women stockholders had "social import": "Women are much more sentimental than men. Conscious of their control of American industry they might effect some interesting changes in the relationship of capital and labor." *The Sexes in Industry*, INDEPENDENT: A WEEKLY JOURNAL OF FREE OPINION, Sept. 3, 1927, at 221. In contrast, a corporate lawyer at Sullivan & Cromwell, who opposed non-voting common stock, acknowledged that "recognition of voting rights of all common stockholders may lead to greater control by employees or customers," but argued that "the social consequences of changing the law … will be

likelihood of any such petticoat majority as the *Waterbury Republican* assumes," *Barron's* wrote, deploying a common, pejorative term for women.[157] Women's stockholding was "not likely to be a decisive voting factor in the lifetime of any reader of these notes."[158] Representation of women among shareholders was "rather like the exercise of the franchise," *Barron's* argued. "Not 25% of them take the trouble to register."[159]

On the eve of the Great Crash, women were active as brokers, as investors, and as shareholders.[160] Twenty-two brokerage houses in New York had women partners, nine in Los Angeles, three in San Francisco, and two in Philadelphia.[161] Women of modest means were moving into common stock.[162] Women were also active in shareholder governance, participating in stockholder meetings, especially in defense of workers.[163] One writer predicted that when the history of the bull market was written, it would recognize that

beneficial." Eustace Seligman, *Relation of Law to the Modern Developments in Property Ownership*, 11 PROCEEDINGS ACAD. POL. SCI. IN THE CITY OF N.Y. 442, 443 (1925).

[157] *Stock and Votes for Women*, BARRON'S, August 29, 1927, at 35.

[158] *Id.*

[159] *Id.*

[160] In 1931, the *N.Y. Evening Post* published an original study of stockholders' gender at 44 large corporations, a group that included railroads, industrial companies, and utilities, for the four years from 1928 to 1931. The study concluded that women were 41% of stockholders at these companies. *See* Otto W. Heilbig, *Women's Influence in Corporate Families Grows as Number Reaches 41 P.C. of Total*, N.Y. EVENING POST, June 13, 1931, at 1 (Financial Section).

[161] ROBB, WOMEN OF THE TICKER, at 75 & 76 ("The number of women stockbrokers more than quadrupled during the 1920s"); John T. Flynn, *How to Make Money in Wall Street*, WOMAN'S HOME COMPANION (Jan. 1930), at 26. This was a change from just a decade earlier, when, for example, the Consolidated Stock Exchange of New York, the primary competitor of the New York Stock Exchange, specifically banned its members from "in any way cater[ing] or encourag[ing]" securities dealing by women. Article III, Sec. 15, By-Laws of the Consolidated Stock Exchange of New York (*reprinted in* REGULATION OF THE STOCK EXCHANGE, HEARINGS BEFORE THE COMMITTEE ON BANKING AND CURRENCY U.S. SENATE (Washington: Government Printing Office, 1914), at 184-85).

[162] *Good Housekeeping*, which offered advice to a young widowed mother about how to invest her savings of $15,000, provided a snapshot of the trend. *See* Ruth Boyle, *Your Money's Worth: A Widow's $15,000*, GOOD HOUSEKEEPING, Jan. 1929, at 96. The magazine consulted two investment advisers—one a man, the other a woman. The male adviser, emphasizing preservation of capital, recommended only bonds; his proposed investments would have yielded $775 annually. The woman adviser, concerned about the widow's future economic prospects and independence, proposed greater risk in "promise of increasing value." *Id.* She advocated including preferred and common stock in the widow's portfolio, a mix that would have yielded $805. The article revealed how gender politics were shaping both the advice given to investors and investors' choices, and how the economic reality of 1920s womanhood related to women's investment risk tolerance.

[163] *See, e.g.*, *Fight Is On: Fitchburg Stockholders in Session*, BOSTON GLOBE, March 21, 1900, at 5 (describing nearly 20 women present among 300 at a special meeting of the stockholders of the Fitchburg Railroad, and describing a woman stockholder, Mrs. French, taking the floor to give remarks and making and later withdrawing a motion); *Women Stockholders of Steamboat Company Remember Faithful Employes*, NEW-YORK TRIBUNE, October 15, 1904, at 1 (describing two women stockholders insisting that merger proceeds be set aside for workers who lost their jobs); *supra* note __ and accompanying text (describing activism of Louise de Koven Bowen); *Make Appeal For Carmen*, BOSTON GLOBE, June 25, 1912, at 10 (describing a woman stockholder of the Boston Elevated Company criticizing management decisions related to labor relations, and demanding that the company allow its employees to unionize); *B. & M. Holds Its Annual Meeting*, BOSTON GLOBE, October 10, 1917, at 11 (describing two women stockholders at the Boston & Maine Railroad's annual meeting); *Am. Tel. & Tel. Develops Along Normal Lines*, WALL ST. J., March 29, 1923, at 2 (describing "a big sprinkling of women" at AT&T's 1923 annual meeting); *Stalemate Ends Final Parley*, CINCINNATI ENQUIRER, February 9, 1924, at 16 (describing a "protective organization" of more than 4,000 "women stockholders" formed to "look after the rights" of the Cincinnati Street Railway Company); LOUISE DE KOVEN BOWEN, GROWING UP WITH A CITY 166-67 (1926) (describing the author's own activism efforts at the Pullman Company, sometime before 1912, to improve labor conditions for workers).

"women for the first time in this country on a large scale financially became *people*," that is, an acknowledged part of the "vast new trading capitalist class."[164]

D. *THE MODERN CORPORATION AND PRIVATE PROPERTY*

In 1932, Adolf A. Berle, Jr., a law professor, and Gardiner C. Means, an economist, published what would become the single most influential book in American corporate law: *The Modern Corporation and Private Property*.[165] The pair collaborated on the book from 1927 to 1932.[166] A core insight of the book was that, as America's productive wealth was being concentrated into large, publicly-held corporations, ownership of corporations was separating from control.[167] "Economic power," they wrote, was "tending more and more to concentrate in the hands of a few corporate managements."[168] No company better exemplified the separation of ownership and control than AT&T, "perhaps the most advanced development of the corporate system."[169] *The Modern Corporation* also repeatedly characterized small, dispersed shareholders as "passive agents," "passive owners," and owners of "passive property."[170]

1. Gender and Companies Under "Management Control"

A major section of their book was devoted to classifying "control" at the 200 largest American companies at the beginning of 1930.[171] (Some other important contributions of Berle and Means's book are explored at greater length in Part II of this Article.) As part of

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[164] Eunice Fuller Barnard, *Ladies of the Ticker*, 227 N. AM. REV. 405, 406 (April 1929) (emphasis added).

[165] ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932) (The Macmillan Co. 1948 reprint). In 1991, Peter Drucker called *The Modern Corporation* "arguably the most influential book in U.S. business history." Peter F. Drucker, *Reckoning with the Pension Fund Revolution*, HARV. BUS. REV., at 114 (March-April 1991).

[166] Thomas K. McCraw, *The Modern Corporation and Private Property by Adolf A. Berle and Gardiner C. Means*, 18 REV. AM. HIST. 578, 581 (1990).

[167] *See, e.g.*, BERLE & MEANS, MODERN CORPORATION, at 3.

[168] *Id.* at 9.

[169] *Id.* at 3; *see also, id.* at 4 ("Separation of ownership and control becomes almost complete when not even a substantial minority interest exists, as in the American Telephone and Telegraph Company whose largest holder is reported to own less than one per cent of the company's stock."). Berle and Means's "favorite example" of the trends they memorialized in the book was AT&T, which between 1927 and 1932 was among the American companies with the highest proportion of women stockholders. McCraw, *The Modern Corporation, supra* note __ at 582 (describing AT&T as Berle & Means's "favorite example").

[170] *Id.* at 66 ("passive agent"); 346, 347, 348 ("passive property"); 348 ("passive wealth"); 354, 355 ("passive property owner"); 355, 356 ("owners of passive property" and "passive owner"). Part II(B), *infra*, discusses Berle and Means's use of the word "passive," the origin and gendered meaning of the term, and its continuing influence on corporate law theory. *Accord* Jennifer G. Hill, "Images of the Shareholder—Shareholder Power and Shareholder Powerlessness," *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER (Jennifer G. Hill & Randall S. Thomas, eds., 2015) at 57 (describing the "classic Berle and Means image of shareholders as powerless").

[171] Berle and Means found that "ultimate control" resided with the management of 44% of the two hundred companies they analyzed. This group included "management control—no single important stock interest" (the group analyzed in Table 1 herein), "majority of stock believed to be widely distributed and working control held either by a large minority interest or by the management, presumably the latter," and a subset of companies drawn from three categories: "minority control through ownership of an important minority block of stock—remaining stock believed to be widely distributed," "joint control by two or more minority interests—large public interests," and "jointly controlled by other companies—virtually no public interest." *See* BERLE & MEANS, MODERN CORPORATION, at 390-118.

their empirical analysis, Berle and Means identified 21 companies "known to be" under management control because their stock was so widely dispersed.[172] Table 1 provides data on the gender of stockholders at these twenty-one companies. For twelve of the twenty-one, data on stockholder gender was published on at least one date between 1920 and 1932. Among these twelve, women stockholders outnumbered men at six, and six had large proportions of women stockholders, ranging from 37% to "nearly half."[173] For seven of the remaining nine companies, data on stockholder gender was published at least once before 1920 (but not after 1920); at all seven, significant proportions of women stockholders were reported before 1920, ranging from 25.34% at the Missouri-Kansas-Texas Railroad Company (1913), to 45.7% at the New York Central Railroad Company (1916).

Table 1:

Berle & Means's 21 Companies under "Management Control"

Company Name	Women Stockholders
AT&T	Women outnumber men in 1910
Western Union Tel. Co.	Women outnumber men in 1914
General Electric Co.	Women outnumber men in 1921
Atchison, Topeka & Santa Fe Railway Co.	Women outnumber men in 1926
Pennsylvania Railroad Co.	Women outnumber men in 1927
Southern Pacific Co.	Women outnumber men in 1927
Baltimore & Ohio Railroad Co.	44% women in 1929
Great Northern Railway Co.	44% women in 1931
Northern Pacific Railway Co.	43% women in 1931
Union Pacific Railroad Co.	43% women in 1931
Southern Railway Co.	"[n]early one-half" women in 1929
U.S. Steel Corp.	37% women in 1930
New York Central Railroad Co.	45.7% women in 1916
Delaware & Hudson Co.	45.67% women in 1913
Boston Elevated Railway Co.	40.48% women in 1901
Chicago & North Western Railway Co.	39.18% women in 1913
Chicago, Milwaukee, St. Paul & Pac. RR Co.	39% women in 1914
Consolidated Gas Co. of New York	37.8% women in 1913
Missouri-Kansas-Texas Railroad Co.	25.34% women in 1913
Electric Bond & Share Co.	Insufficient data
St. Louis-San Francisco Railway Co.	Insufficient data

[172] *Id.* at 107-109 Table XII(G).
[173] Although women stockholders outnumbered men at General Electric in 1921, the percentage of women stockholders later dropped. *See supra* note __ (describing data on stockholder sex published in GE's annual reports).

The data establishes a coincidence between companies under management control and those with a high proportion of women shareholders, but Berle and Means did not note this. Indeed, though data on women's growing role as shareholders was widely available at the time, the whole subject of women's stockholding is missing from their book.[174] The omission of women is particularly noteworthy in light of Berle and Means's admonition that "[t]he passing of ownership from the hands of the managing few to the hands of the investing many raises the question of who these multitudinous investors may be, from what income classes they are drawn—in other words, who the owners of the nation's industries now are."[175] Berle and Means did not answer their own question.[176] Who were these "multitudinous investors"? An increasing proportion were women.

2. **The Customer Stockholder**

Berle and Means *did* opine, briefly, that "two comparatively new developments" had "contributed in very large measure to the increase in the number of stockholders—ownership by customers and ownership by employees."[177] Their discussion of customer stock ownership may have been an oblique reference to women stockholders.[178] Evidence from the 1910s and 1920s suggests that some business experts consigned women shareholders to the category of "customer-stockholders," or perhaps used the term

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[174] Berle and Means did identify two women among the 20 largest stockholders of the Pennsylvania Railroad. *See* BERLE & MEANS, MODERN CORPORATION, at 85 (Table X). They would certainly have been aware of the growing proportion of women stockholders. For example, in April of the year that *The Modern Corporation* was published, the *Corporate Practice Review* asserted that women constituted "30 to 50% of the aggregate shareholders of most listed corporations." William H. Crow, *Some Aspects of Extensive Stock Distributions*, 4 CORP. PRACTICE REV. 46 (April 1932). The preceding year, the *Wall Street Journal* had published articles revealing that most stockholders at I.B.M. were women, that 48% of the stockholders of General Foods were women (including individual and joint stockholding), and that more than 100,000 women stockholders at the Pennsylvania Railroad owned one-third of its stock. *See I.B.M. Holders Gain*, WALL ST. J., January 30, 1931, at 7; *General Foods Holders*, WALL ST. J., June 19, 1931, at 17; *Pennsylvania Average Holdings*, WALL ST. J., October 27, 1931, at 9. Berle and Means noted that they used newspapers as a primary source for information on stock holdings of the companies they studied, which suggests that they would have seen these articles. *See* BERLE & MEANS, MODERN CORPORATION, at 91.

[175] BERLE & MEANS, MODERN CORPORATION, at 59.

[176] One might think that legal realists of the 1920s and 30s—a group to which Berle and Means are sometimes assigned—would have noted the "social reality" of women's rise as stockholders. However, as William W. Bratton points out, there is disagreement in the literature about whether Berle and Means truly were legal realists. *See* William W. Bratton, *Berle and Means Reconsidered at the Century's Turn*, 26 J. CORP. L. 737, 741 (2001). To a large extent, the corporate law literature's depiction of the expansion of stockholding in the 1920s—which overlooked women completely—traces back to the work of a few economists, including Gardiner Means, who studied the diffusion of stock ownership in the 1910s and 20s. *See, e.g.*, Gardiner C. Means, *The Diffusion of Stock Ownership in the United States*, 44 Q. J. OF ECON. 561 (1930). For his part, Means presented the expansion of stock ownership in terms of socio-economic class, and never directly discussed women stockholders. *See, e.g., id.* at 571 (contrasting stock ownership "by the rich" with ownership "by the less well-to-do"). Means's study expanded on an analysis published by H. T. Warshow in 1924, which only briefly discussed women stockholders. *See* H. T. Warshow, *The Distribution of Corporate Ownership in the United States*, 39 Q. J. OF ECON. 15 (1924).

[177] *Id.* at 56.

[178] *But see* BERLE & MEANS, MODERN CORPORATION, at 59 (discussing how "a new market for corporate securities was sought in the man of smaller income, the employee and the local customer").

euphemistically to mean women. After all, it was as *customers*, rather than as *shareholders*, that women's participation in business conformed to gender stereotypes.[179] The value of women shareholders to a corporation was often framed in terms of their consumer purchasing, rather than in terms of shareholder governance or business oversight. For example, in 1918, Ward & Mackey Biscuit Co. ran ads proclaiming that "We Want *Women* Stockholders," because women "do 90 per cent of the buying." The ads explained,

> It is women who say what should be bought and what should not be bought for the home. Hence it is that we want women as our stockholders as well as men, because women choose and buy the family Bread—and if they own an interest in this Company they will naturally always demand its Superior Bread Products.[180]

National Biscuit Company took a similar view a decade later. Its corporate secretary asserted that "[t]here is only one class of stockholder we are really interested in keeping track of and that is, the number of women stockholders, as they are the real purchasers of this company's product."[181] And a decade after that, one scholar wrote that business executives were "quick to realize the importance" of women's shareholding "in view of the fact that about 85% of the retail purchasing is done by women."[182] Berle and Means discussed "customer ownership" in a few paragraphs without ever mentioning women, asserting that customer ownership did not "appear likely to affect an appreciable proportion of all stock ownership."[183]

E. Women Move into the Majority

The feminization of the stockholder class continued, unabated, after the publication of *The Modern Corporation and Private Property*. Studies in the 1930s and 1940s continued to find that women were a growing proportion of shareholders.[184] In 1938, Monsanto Chemical

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[179] *See, e.g.,* OTT, WHEN WALL STREET MET MAIN STREET, *supra* note __, at 166 (customer ownership programs "associated stockownership with consumption and all its traditionally feminine connotations").

[180] Ward & Mackey Biscuit Co. advertisement, PITTSBURGH PRESS, March 12, 1918, at 12.

[181] H. T. Warshow, *The Distribution of Corporate Ownership in the United States*, 39 Q. J. OF ECON. 15, 33 n.2 (1924); *see also* JOHN H. SEARS, THE NEW PLACE OF THE STOCKHOLDER 61 (1929) ("The woman stockholder should be given prominence in the classification for some companies, particularly corporations dealing in household products, food stuffs, and clothing, where such companies desire to develop the stockholder-customer idea.").

[182] William H. Crow, *Some Aspects of Extensive Stock Distributions*, 4 CORP. PRACTICE REV. 46 (April 1932).

[183] BERLE & MEANS, MODERN CORPORATION, at 56.

[184] For example, a 1936 study by Frazier Jelke & Co. found that 48% of the stockholders of 27 "representative" companies were women. *Half of Stockholders of 27 Companies Women*, BOSTON GLOBE, March 24, 1936, at 15; *see also* MARY SYDNEY BRANCH, WOMEN AND WEALTH: A STUDY OF THE ECONOMIC STATUS OF AMERICAN WOMEN 54-55 (1934) ("[o]n the average, women constitute about 43 per cent of the number of stockholders"). A 1948 study of major manufacturing corporations reported that women stockholders outnumbered men at 23 of 31 companies that had sex-disaggregated data for their common stockholders; estimating from this data, the survey's authors extrapolated that "women comprise 51% of all common stockholders" in a survey sample of 120 corporations. *Who Owns "Big Business"? Analysis of Stockholdings in Largest Corporations, Part 1: Manufacturing*, 87 TR. & EST. 5, 7 (1948). A study published the following year found similar results for major banks. Women stockholders outnumbered men at 31 of 66 banks with sex-disaggregated data on stockholding; among 62 banks that had sex-disaggregated data on pro rata shareholding,

Corporation published a detailed study of its holders in the "typical American city" of Cincinnati, Ohio, home to sixty women and forty-three men shareholders.[185] Among the women shareholders were teachers, secretaries, retirees, homemakers, a physician, a musician, a photographer, and the treasurer of a local corporation.[186] Although the women shareholders outnumbered the men, the article featured more male shareholders, and even showed a photo of one shareholder's husband in her place.[187]

The "ladies" had been "moving into the spotlight in many corporate sessions" the *Wall Street Journal* reported in 1949.[188] Throughout this era, when corporate managers attended the annual meetings that put them face-to-face with the company's "bosses," they were confronted with numerous women's faces.[189] Contemporaneous photos of annual meetings of big companies—AT&T, General Motors, U.S. Steel—show significant attendance by women, confirming first-hand accounts that depicted women as active participants, not only on board representation but all matters of business.[190]

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women owned more stock than men at 11. *Who Owns Big Business? Analysis of Stockholdings in Largest Corporations, Part 2: Banking*, 88 TR. & EST. 208, 209-210 (1949). An additional 1949 study of utility companies found that "most" reported that women owned "between 40% and 50% [of] the common stock issued," and estimated that women were 44% of individual stockholders of utilities. *Who Owns Big Business? Analysis of Stockholdings in Largest Corporations, Part 3: Utilities; Transportation*, 88 TR. & EST. 599, 601 (1949). A study of Merrill Lynch's Los Angeles branch in 1939 and early 1940 found that 25% of its 2,828 customer accounts belonged to women. EDWIN J. PERKINS, WALL STREET TO MAIN STREET: CHARLES MERRILL AND MIDDLE-CLASS INVESTORS 153 (Cambridge U. Press 1999).

[185] Howard A. Marple, *Who Owns Monsanto*, MONSANTO MAGAZINE, Jan. 1939, at 4 (Monsanto had 4,300 men and 4,084 women shareholders and 2,708 "other stockholders," including 387 joint holdings); *Who Owns Monsanto in Cincinnati*, MONSANTO MAGAZINE, Jan. 1939, at 18.

[186] *Id.* at 20-30. All the shareholders shown in photos appeared to be white; the descriptions suggested that all were middle-class or wealthy.

[187] One example was Louise Gamble, whose husband, Cecil H. Gamble, appeared in a photo in her place. The photo caption made clear that it was Louise, and not Cecil, who owned stock in Monsanto. *Id.* at 29.

[188] *Owners Arise! Annual Meetings Draw Record Attendance and Pointed Questioning*, WALL ST. J., April 27, 1949, at 1. The authors of a 1948 survey on stockholders in manufacturing companies expressed surprise at the high proportion of women stockholders "not only in the more lady-like type of business but in such rugged and sometimes variable enterprises as copper mining, oil refining, steel, tobacco and aircraft manufacture." *Who Owns "Big Business"?: Analysis of Stockholdings in Largest Corporations, Part 1: Manufacturing*, 87 TR. & EST. 5, 7 (1948).

[189] A number of accounts during this period reported that women equaled or outnumbered men at annual meetings. *See, e.g.*, *Also Rationed: Gen. Foods Head Cites Policy on Dividends*, WASH. POST, April 15, 1943, at 16 (General Foods Corporation's 1943 annual meeting "was attended by about as many women as men"); *Women of Steel Give Top Brass a Hard Time*, TIME, March 13, 1950 at 46 (women made up more than half of attendees at a 1950 shareholders meeting of U.S. Steel); *see also Even GM's Directors Have Bosses: The Stockholders*, LOOK MAGAZINE, Jan. 7, 1958, at 23 (characterizing stockholders as directors' "bosses").

[190] *See, e.g.*, *Salaries of Rail Heads Attacked*, OAKLAND TRIBUNE, April 13, 1933, at 21 (describing women stockholders of the Pennsylvania Railroad "heckling" managers over executive pay); *Feminine Delegation Turns Borden Meeting Into Labor Forum But Stockholder's Request Brings News of Big Gain in Earnings*, WALL ST. J., April 16, 1936, at 8; *Gifford Assails A. T. & T. Report*, EVENING STAR (Wash. D.C.), April 20, 1938, at 17 (describing statements by a woman stockholder at AT&T's annual meeting referencing AT&T's "400,000 women stockholders"); *Woman Investor, A.T.&T. at Odds on Equipment Sale*, WASH. POST, March 15, 1945, at 14*;* *Even GM's Directors Have Bosses: The Stockholders*, LOOK MAGAZINE, Jan. 7, 1958, at 23 (accompanying photos show numerous women in the audience at General Motors's 1957 annual meeting).

In 1954, the Chair of the SEC likened the pace of investment—and its social impact—to "the rush to settle the West."[191] When G. Keith Funston took the helm of the New York Stock Exchange in 1951, one of his first acts was to commission a census of stockholders.[192] This grew into a series that documented changes in the gender and class demographics of stock ownership. The first census reported that, in 1952, roughly the same number of men and women owned public company stock in the United States, across the market.[193] Every successive census—in 1956, 1959, 1962, and 1965—found that women stockholders outnumbered men.[194] After the publication of the first stockholder census, a University of California economist, William L. Crum, recommended in the *Harvard Business Review* that companies standardize public disclosures of sex-disaggregated data about their shareholders.[195] Crum offered no explanation for the recommendation and, in an accompanying article, did not discuss the recommendation.[196] Apparently, the usefulness of sex-disaggregated information about stockholders was self-evident to a reader of the *Harvard Business Review.*

Writers tended to assume that women came to stock ownership mainly through inheritance, or that men were putting stock in their wives' names for tax reasons.[197] As late

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[191] Address by Ralph H. Demmler, Chairman, Securities and Exchange Commission before the Pittsburgh Chapter, American Society of Corporate Secretaries, Pittsburgh, Pennsylvania, January 13, 1954, at 2.

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[193] LEWIS H. KIMMEL, SHARE OWNERSHIP IN THE UNITED STATES 90 (Washington: The Brookings Institution, 1952) (in the United States, there were 3,230,000 female stockholders, and 3,260,000 male stockholders); *id.* at 75 ("Of the estimated 27.4 million shareholdings in common stocks, about 10.3 millions or 37.5 per cent are in the names of women. The comparable figures for men are 10.2 millions and 37 per cent."); *see also* Rolf Enno Wubbels, Regulation of Stockholder Proxies: A thesis presented to the faculty of the Graduate School of Business Administration, New York University (1949), at 3 (discussing an unidentified "recent survey" which found that 51% of all stockholders were women).

[194] WHO OWNS AMERICAN BUSINESS? 1956 CENSUS OF SHAREOWNERS, NYSE (1956), at 6 (in 1956, women were 51.6% of individual stockholders); SHARE OWNERSHIP IN AMERICA: 1959 9 (NYSE, 1959) (in 1959, women were 52.5% of individual stockholders); New York Stock Exchange, THE 17 MILLION: 1962 CENSUS OF SHAREOWNERS IN AMERICA 6 (1962) (in 1962, women were 51% of individual stockholders); New York Stock Exchange, SHAREOWNERSHIP U.S.A.: 1965 CENSUS OF SHAREOWNERS 6 (1966) (in 1965, women were 51% of individual stockholders). Starting in 1954, the NYSE created an advertising campaign with "advertisements frequently featuring husbands and wives talking together about stocks, with wives explicitly looking to their seemingly more knowledgeable spouses to make investing decisions." JANICE M. TRAFLET, A NATION OF SMALL SHAREOWNERS 153 (2013).

[195] W. L. Crum, *Analysis of Stock Ownership*, HARV. BUS. REV. (May-June 1953), at 36; Editors, *A Proposal to American Business*, HARV. BUS. REV. (May-June 1953), at 33.

[196] *See id.*

[197] *See, e.g.*, *Who Owns American Business?*, SAN FRANCISCO EXAMINER, June 16, 1931, at 24 ("Women bulk so large on the [stockholder] list today because of inheritances and gifts."). In an early study of the diffusion of stock ownership, Gardiner Means considered the matter of wealthy men putting stock in their wives' names for tax purposes. Gardiner C. Means, *The Diffusion of Stock Ownership in the United States*, 44 Q. J. OF ECON. 561 (1930). Means's study, based on income-tax returns, proclaimed a "shift of almost revolutionary proportions" in stock ownership from 1916 to 1921: he found that the very wealthy owned 57.2% of corporate stock in 1916, but only 36.8% in 1921, while "individuals with small to moderate incomes" increased their ownership from 21% to 44% over the same period. *Id.* at 573-74. In producing his analysis, Means considered whether the income tax data was distorted because men were distributing their stock among members of their families, including their wives, to save on taxes. *See id.* at 582. He concluded that less than one-eighth—and "probably" not more than one-twentieth—of the shift in ownership was attributable to married couples splitting their incomes and filing separate tax returns. *Id.* at 584. Means attributed the rise in stock ownership by low- and

as 1978, the head of AT&T's stock and bond division told the *New York Times* that "[a]ll the women owners would suggest a lot of widows."[198] The implication was that women were not "real" stockholders with the aptitude and interest to participate in corporate affairs.[199] But these assumptions relied on gender stereotypes and ignored the changing role of women as economic actors.[200] Among other factors, the "rise of the independent business woman, who is buying investment securities out of her own earnings," contributed to women's growing participation in business as shareholders.[201]

In its censuses, the NYSE surveyed stockholders to learn how they first came to acquire stock. In 1952, it found that fewer than a third of women stockholders had acquired stock primarily by inheritance or gift; most women cited profit-driven reasons for buying stock, like most men.[202] The 1959 stockholder census surveyed new stockholders—those who had acquired stock for the first time since 1956—and found that only 17% of new women stockholders had inherited their shares.[203] A full quarter had gotten stock through their employers[204]; the greatest proportion had purchased stock through a broker.[205]

A different reason may help explain why a large number of women were investing in common stock. Due to sex discrimination, women's wage labor was poorly compensated; women were paid about half the wages of men for the same work.[206] However, the

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middle-income Americans during and immediately after World War I to several factors: a surtax on the highest-earning taxpayers, the receipt by lower-income workers of greater income, and the Liberty Bond campaigns. *Id.* at 585.

198 N.R. Kleinfeld, *A.T.&T. Stockholders: Valuing Stability and Yield*, N.Y. TIMES, April 17, 1978, at D1.

199 For an example, see J. A. Livingston, *Funston Abets Myth That Women Control Wealth*, WASH. POST, June 26, 1959, at B8 (conceding the "statistical side of the story" but arguing that "[m]any women own stock in name only" because "women in our society have a big enough job—raising children and running the household"). The academic statistician Edwin Burk Cox, who published a major study of shareholder demographics using 1960 data, openly refused to recognize married women as legitimate stockholders. Cox wrote, "Women are often the legal owners of stock only because their husbands chose to register the stock that way. It would be misleading to infer that in any real sense such women are stockholders." COX, TRENDS, at 13. Cox wrote that he believed that, for joint husband-wife stockholdings, "perhaps only the characteristics of the husband should be used in allocating the holding to a category." *Id.* Cox went on to erase women and gender from his statistical analysis; he presented companies' data about stockholder age, income, and occupation only. When Cox fashioned his own surveys, he requested age, income, and occupation data about the "head of household," not about the stockholder him/herself. *See id.* at 171-172. Stock owned by a woman in the household would have been attributed to the male head of household, if there was one.

200 For example, historians have noted that, during World Wars I and II, savings bonds introduced millions of Americans to the securities markets, encouraging both women and men to invest in big companies by "equat[ing] investment with the obligations and rights of citizenship." OTT, WHEN WALL STREET MET MAIN STREET, *supra* note __, at 76; *see id.* at 55-99 (describing America's War Loan program during World War I and noting, at 77, that "women's, labor, African American, and ethnic associations" "proved particularly important in the financial mobilization of the home front").

201 *Who Owns American Business?*, SAN FRANCISCO EXAMINER, June 16, 1931, at 24.

202 KIMMEL, SHARE OWNERSHIP, at 121.

203 SHARE OWNERSHIP IN AMERICA: 1959 9 (NYSE, 1959).

204 It is hardly surprising that a significant proportion of new women stockholders obtained stock through their employers; women were moving into the workforce at a high rate. *See* Barbara R. Bergmann, *The Economics of Women's Liberation*, CHALLENGE (May 1, 1973), at 12 ("Between 1950 and 1970, the number of men working increased by 15 percent, while the number of women working increased by 70 percent.").

205 SHARE OWNERSHIP IN AMERICA: 1959 9 (NYSE, 1959).

206 For a history of women's wage labor in the U.S., see generally ALICE KESSLER-HARRIS, OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES (1982); SHENNETTE GARRETT-SCOTT, BANKING ON FREEDOM:

dividends paid on a share of stock were the same for all owners, regardless of their sex. The fact that women could expect equitable returns for their investment of capital in common stock may have encouraged women to save and invest when possible. Thus sex discrimination itself may have played a role in the feminization of capital. Although little historical work has been done to understand *why* women moved into stock in large numbers at this time, it seems likely that a significant part of the trend can be attributed to the working, saving, and investing habits of American women during this period.[207]

After World War II, women shareholders began publicizing the feminization of capital in an attempt to harness its power. A shareholder campaign to put women on boards of directors began in the late 1940s and continued for many years, though it suffered a setback in 1954 when the SEC narrowed the Shareholder Proposal Rule.[208] Wilma Soss described herself as the leader of the "women's economic suffrage movement,"[209] and spoke of women's "*right* to be represented on the boards of large corporations" because of their domination of stockholder rolls.[210] Yet women's efforts to translate their significant shareholding into managerial power met with resistance.

An exchange on the floor of the 1953 annual meeting of Standard Oil of New Jersey sheds light on the gender dynamics of corporate power during this era. At every annual meeting from 1947 to 1952, shareholders had risen to ask the company to add a woman to the board of directors.[211] Every year, Standard Oil's executives had given the same response: The company did not discriminate against women, but no qualified woman had ever presented herself.

When the subject was raised again at the 1953 meeting, an exasperated shareholder pointed out that there were "109,000 women shareholders and 90,000 men" at the company. "It looks ridiculous that there isn't at least one woman with enough sense to be on the

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BLACK WOMEN IN U.S. FINANCE BEFORE THE NEW DEAL 79 (Columbia U. Press, 2019) (discussing women's lower wages); Barbara R. Bergmann, *The Economics of Women's Liberation*, CHALLENGE (May 1, 1973), at 14 ("discrimination against women is an important factor in keeping women segregated by occupation and earning low pay").

[207] *Accord* Christine Sgarlata Chung, *From Lily Bart to the Boom-Boom Room: How Wall Street's Social and Cultural Response to Women Has Shaped Securities Regulation*, 33 HARV. J.L. & GENDER 175, 201 (2010) (noting that "the limited statistics that are available" from the 1930s "raise questions about whether the widow/orphan storyline captured all women's stock market experiences"). Another possible factor was the rise of the "woman's club movement" at the turn of the century. One writer suggested that, by putting women in charge of woman's club investments, the trend "educated many women to a broader view of financial conditions and in the ethical questions involved, in handling the money of others." Ellen M. Henrotin, *Women in Finance*, 7 NATIONAL MAGAZINE (1897) at 54.

[208] *See* Adoption of Amendments to Proxy Rules, Exchange Act Release No. 34-4979 (Jan. 6, 1954) [19 FR 246 (Jan. 14, 1954)].

[209] *Id.*

[210] Andy Logan, *Hoboken Must Go!*, NEW YORKER, March 17, 1951, at 34.

[211] In addition to the 1953 transcript quoted in the text and cited below, the author has reviewed condensed stenographic transcripts of Standard Oil Company (New Jersey)'s annual stockholder meetings for 1945, 1946, 1947, 1948, 1949, 1950, 1951, and 1952.

Board."[212] Standard Jersey's chairman, Frank W. Abrams, repeated the company's pat response: "[W]hen we find a woman who can contribute to the problems we have to face on the Board and help us in their solution we will be glad to get her help." Then he said:

> I know that there are lots of things that we don't see that women wouldn't miss. I was going to say that first they would start with our interior decorating which may not be good—but I know there are lots of things they would be helpful with. But on the average, I don't think, in all fairness to us, that we have found a woman who could make the contribution of a man.[213]

His words revealed not only blatant sexism, but the confidence of a corporate leader who knew that his own control over the levers of firm power—control granted to him by corporate law—allowed him to insult a major group of stockholders with impunity.

Indeed, the presumption remained that women were low-quality shareholders. One male writer observed in 1949 that "many" American investors were "women unversed in finance and with little understanding of industry or its problems. If they are to become members of the corporate family in any real sense, they must be 'educated.'"[214] The board chair of General Foods, Clarence Francis, used the company's *Stockholder News* to scold its women stockholders. Francis acknowledged that "[o]n the record," women were "the owners" of the company.[215] But, he asked women stockholders, "just how interested are you really in the success of your company?"[216] Francis said he's been "disturbed and shocked" to learn the results of a survey "made recently among you women shareholders" that showed that the average female stockholder could name only three General Foods products.[217] Francis had apparently overlooked the survey's implicit finding that women stockholders were mainly interested in the company as an investment rather than as a source of consumer products.

"You read that women are the majority owners of our enterprises," financial columnist J. A. Livingston wrote in his 1958 book, *The American Stockholder*.[218] "And so, we

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[212] The transcript of this exchange was published in the company's condensed stenographic transcript of the 1953 annual meeting, which it sent to its stockholders. 71st Annual Meeting, Standard Oil Company (New Jersey), Linden, New Jersey, May 27, 1953, at 19-20.

[213] *Id.* at 20.

[214] John Beachy Slocum, The Use of Public Relations Activities by Management as a Means of Securing Stockholders' Cooperation, a Thesis Presented to the School of Commerce, The University of Southern California, August 1949, at 10. As another example, a 1948 Associated Press article described female stockholders "weigh[ing] one tidbit of gossip against another" to form views about a business, and quoted one woman saying that "[t]he pictures and colors in [annual] reports 'are nice, but there are just too many different figures for me.'" *Women Stockholders Ignore Annual Reports*, DESERET NEWS, July 8, 1948, at 8.

[215] At the time, women stockholders outnumbered men three to two. *See* John Beachy Slocum, The Use of Public Relations Activities by Management as a Means of Securing Stockholders' Cooperation, a Thesis Presented to the School of Commerce, The University of Southern California, August 1949, at 86.

[216] *Id.* at 67 (quoting the Spring 1948 issue of General Foods Stockholder News).

[217] *Id.*

[218] J.A. LIVINGSTON, THE AMERICAN STOCKHOLDER 14 (J.B. Lippincott Co., 1958).

are told never to underestimate the financial power of the female. But neither, it must be said in a quiet aside, should we overestimate women."[219] Livingston was a "personal friend" of the prominent Yale corporate law professor Bayless Manning, who published a noted review of Livingston's book in the *Yale Law Journal*.[220] In his review, Manning sharply criticized the movement for corporate democracy, noting that "[n]early all" of its "planks," including "more representation for women" on boards of directors, "find their analogues in the reform agitations of 1900," such as "women's suffrage."[221] "One would be brave indeed at this date to raise any question about the nineteenth amendment," Manning quipped, referring to the constitutional amendment that gave women the right to vote. Otherwise, he said, "the success of these political reforms," such as the referendum and proportionate representation, "has been at best debatable."[222] By signaling his approval of Livingston's sharp words for women shareholders and adding his own aside about women's suffrage, Manning gave credence—and an academic patina—to the view that women shareholders were not important.[223]

Wilma Soss, pioneer of the "economic suffrage" movement for women, held a different view.[224] "It's a shameful fact that women own companies but can't get top jobs in them," Soss asserted.[225] Soss's activism emphasized the *economic power* of women and sought to organize women shareholders for collective action.[226] She recruited prominent women as officers and trustees for her organization, the Federation of Women Shareholders in American Business, Inc. They included Ruth Bryan Owen, the former Congresswoman (and daughter of William Jennings Bryan), Nellie Tayloe Ross, the former governor of Wyoming (and the director of the U.S. Mint until 1953), and Georgia Neese Clark, the first woman Treasurer of the United States. In the early 1950s, the membership of the Federation was estimated at 1,500 men and women.[227]

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[219] *Id.*; *see also id.* at 33 ("Housewife-shareholders will be more interested in souffles and garbage disposals than in the movement toward corporate democracy.").
[220] Bayless Manning, *Review: The American Stockholder*, 67 YALE L. J. 1477, 1477 (1958); MELVIN A. EISENBERG, THE STRUCTURE OF THE CORPORATION: A LEGAL ANALYSIS (1976) at 26.
[221] Bayless Manning, *Review: The American Stockholder*, 67 YALE L. J. 1477, 1486-87 (1958).
[222] *Id.*
[223] Manning's book review spent several pages detailing the results of the 1952 and 1956 NYSE shareowner surveys, but omitted any mention of women—neatly sidestepping the surveys' findings that roughly half of all stockholders in 1952 were women, and that, in 1956, a majority of stockholders were women. The surveys themselves treated these as headline findings. In 1964, Manning became the dean of Stanford Law School.
[224] Michael Norman, *Wilma Porter Soss, 86, A Gadfly at Stock Meetings of Companies*, N.Y. TIMES, October 16, 1986.
[225] *Pressure Group*, NEW YORKER, June 25, 1949, at 16. Soss asserted that her goal was not only to get women on corporate boards, but "in executive and managerial positions" as well. *Mouthpiece For Women: Organization Formed To Promote Interests of Feminine Shareholders In Industry*, CINCINNATI ENQUIRER, June 14, 1947, at 12.
[226] *Federation Leader Wants More Say For American Women in Business*, BILLINGS GAZETTE, June 18, 1950, at 14 ("Women have great economic power now through their shareholding in American industry, and men know it. The trouble is that women don't know it and when they do find out, they are afraid to use their power. It's time they did.").
[227] Andy Logan, *Hoboken Must Go!*, NEW YORKER, March 17, 1951, at 45.

Soss's feminist brand of shareholder activism inspired a Broadway play, *The Solid Gold Cadillac*, co-authored by the Pulitzer Prize-winning playwright George S. Kaufman.[228] It began and ended with a shareholder's meeting, and centered on a character named Laura Partridge, modeled on Soss, who owned ten shares of stock in General Products Corporation of America. In the play's opening moments, Partridge appears at the company's annual meeting to challenge the high salaries of its top executives. The board adjourns the meeting and offers Partridge a high-paying executive position. She accepts, and becomes the company's first head of Stockholder Relations. The play's final moments reveal that Partridge had charmed thousands of women shareholders to send her their proxies, effectively putting her in control of the firm. In 1956, Columbia Pictures released a movie version of *The Solid Gold Cadillac*, starring Judy Holliday, who resembled a young Wilma Soss; it was nominated for a Golden Globe. Though the movie marked a high point for the cultural recognition of women as shareholders, it ended with Partridge marrying an executive of the company, and turned a story about women's shareholding power into a happily-ever-after romance.

F. **Pro-Rata Shareholding and the Feminization of Capital**

Data that was published about women's shareholding mainly disclosed the percentage of shareholders who were women, rather than the percentage of shares that women owned. Thus, unfortunately, we have only a partial picture of gender differences in pro rata shareholding before the mid-century. From the data that exists, it seems likely that women never owned more stock than men across the market. However, evidence shows that women *did* own more stock than men at some companies at certain points in time.

Information about women's holdings of stock is sparse but available for some companies. For example, a unique snapshot of sex-disaggregated holdings at the Pennsylvania Railroad exists for 1919, when monthly data was published.[229] Over twelve months, the proportion of women stockholders at the Pennsylvania Railroad fell slightly while the percentage of shares held by women rose; at the end of the year, women owned 30.15% of stock.[230] Some holdings data was published in major newspapers for General Motors in the 1920s; in 1921, women were almost 22% of common stockholders at General Motors, but owned only 7.7% of common stock.[231]

[228] The play was published as HOWARD TEICHMANN & GEORGE S. KAUFMAN, THE SOLID GOLD CADILLAC (Random House 1954).

[229] *Women Buy More Stock, Own 30.15 Per Cent of Capital of Pennsylvania Railroad*, PHILADELPHIA EVENING PUBLIC LEDGER, January 7, 1920, at 22.

[230] *Id.*; *see also Atchison Stockholders*, PITTSBURGH DAILY POST, September 11, 1926, at 18 (among individual shareholders, 25,939 were men, owning 1,375,934 shares; women numbered 30,083 but owned only 995,357 shares (common and preferred combined).

[231] *General Motors Stockholders*, WALL ST. J., November 30, 1921, at 8. Women's shareholding in preferred stock was more significant—women were 45% of holders, and owned 37.6% of preferred shares. *Id. See also American Smelting Control Rests with Smaller Owners*, WALL ST. J., Aug. 3, 1922, at 7 (women held 20% of common and preferred shares (combined) at the American Smelting & Refining Co.).

Studies of women's pro rata stockholding before 1952 analyzed relatively small data sets. A study published in 1934 provided data for 20 industrial and railroad companies.[232] Women's holdings ranged from 9.4% of shares at Walgreen Co. to 35% at Swift & Co.; overall, women owned 20.9% of shares.[233] A 1948 survey of manufacturing corporations, which analyzed data for common stock holdings for 18 companies, found that women held, collectively, 28% of the common stock of these companies, including both individual and joint holdings.[234]

The 1952 NYSE census found that the average woman shareholder owned less stock than the average man, and that women, as a group, owned less stock than men as a group.[235] The shareholding of General Mills in 1954 may have been typical of blue-chip public companies during that decade: more of General Mills's stockholders were women than men, but men owned more shares of stock. Women's share ownership constituted 20.9% of General Mills's total, while men owned 26.9%—a difference of six percentage points.[236]

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[232] *See* MARY SYDNEY BRANCH, WOMEN AND WEALTH: A STUDY OF THE ECONOMIC STATUS OF AMERICAN WOMEN 54-55 (1934).
[233] *Id.*
[234] *Who Owns "Big Business"? Analysis of Stockholdings in Largest Corporations, Part 1: Manufacturing*, 87 TR. & EST. 5, 7 (1948). The statistician Edwin Burk Cox reported that, between 1947 and 1957, men's pro rata stockholding fell "about twenty per cent," women's pro rata stockholding dipped "slightly," and joint stockholding increased (by an undisclosed proportion), so that the total percentage of individual stockholding (men, women, and joint accounts combined) was "only slightly smaller" in 1957 than it was in 1947. COX, TRENDS, at 92-93. This suggests that married men were gradually holding less stock in their individual names, and more stock jointly with their wives. Cox's results came from individual company data received from 50-60 companies with at least 50,000 shareholders of record. *See id.* at 73. Cox clearly possessed comparative data for the stockholdings of men and women at the companies he studied, but he did not disclose it. He did not present his data as representative of large companies overall.
[235] KIMMEL, SHARE OWNERSHIP, at 75 ("for every four shares [of common stock of publicly owned companies], held or owned by men, a little less than three shares are held by women"); *id.* at 76 (estimating the "average number of shares per shareholding" for men was 167, while the average number for women was 121). From 1952 to 1965, the NYSE censuses provided some data on the relative stock holdings of women versus men, but the data cannot be usefully compared from one census to another because they covered different sets of companies and used different approaches. The 1952 NYSE census estimated that women stockholders of record owned 27% of common stocks, while men owned 36.7%. (Another 7.6% of total shares were held by joint accounts.) *Id.* at 76. The 1956 census found that women stockholders owned 22.6% of common stock, while male stockholders owned 27.8%. (Joint accounts owned another 7%.) WHO OWNS AMERICAN BUSINESS? 1956 CENSUS OF SHAREOWNERS, NYSE (1956), at 27. In 1959, the NYSE census provided data for common and preferred issues combined, and found a narrower gender gap: women owned 19.7% of shares and men owned 22.7%. (Joint accounts were 7.2% of total combined shares.) SHARE OWNERSHIP IN AMERICA: 1959 34 (NYSE, 1959) ("Shares Held By Type of Stockholder *Common and preferred issues combined"). By the 1960s, many wealthy Americans were moving their equity investments into mutual funds. A 1966 study of corporate stock held directly by men and women who *also* invested in mutual funds found that the market value of the median holding of men was nearly double the value of the median holding of women. *See* INVESTMENT COMPANY INSTITUTE, THE MUTUAL FUND SHAREHOLDER: A COMPREHENSIVE STUDY 46 (1966) ("Market Value of Corporate Stocks Held Directly—Regular Account Holder"). The study also broke out gender for "Accumulation Plan Holders," which similarly showed a greater market value of the median holding of men compared to women. *See id.* at 47.
[236] Charles B. Forbes, *Who Owns General Mills?*, MIAMI NEWS, August 29, 1954, at 56 (General Mills was owned by 9,963 shareholders, of whom 42.3% were women, holding 20.9% of the stock; Men represented 37.3% of stockholders, owning 26.9% of stock). Banks and firms (4.7% of stockholders) owned 36.6% of shares; trustees and guardians (31.2% of stockholders) owned 10.5% of stock. *Id.* These data underscore how blue-chip public companies, like General Mills, not only tended to have high proportions of women stockholders, but also significant share ownership by institutional

However, at particularly large companies, women did sometimes own more stock than men. We know that, in 1948, women owned more AT&T stock than men because the company published this information in its annual report.[237] At U.S. Steel, women first outnumbered men as stockholders in 1950, and women's holdings of common stock first exceeded the holdings of men in 1956.[238] Women would continue to hold more common stock at U.S. Steel than men until 1978.[239] However, even at companies where they collectively held more stock, women struggled to translate their holdings into managerial power—a subject taken up in more detail in Part II(E).

G. Race and the Feminization of Capital

Although many parties were tracking and publishing data about stockholders' gender, none made similar study of stockholders' race.[240] As a result, the evidentiary record on race and stockholding in the first half of the twentieth century is thin.[241] However, we know two things—first, that racial discrimination significantly reduced the financial resources of non-white Americans to invest in securities, especially in comparison to whites[242]; and, second, that some non-white Americans *did* own corporate stock during this period, including some

investors. At these big companies, the story about shareholding starts to shift in the 1950s from "women stockholders are taking over" to "institutional shareholders are taking over."

[237] AT&T 1948 Annual Report at 9.

[238] *Compare* U.S. Steel 1949 Annual Report to 1950 Annual Report; *compare* U.S. Steel 1955 Annual Report to 1956 Annual Report.

[239] *See generally*, U.S. Steel Annual Reports, 1956 to 1978.

[240] Some of the earliest estimates of stockholders' race were published in the 1960s. *See, e.g.*, *¼-Million Negroes Own Stock Shares*, PITTSBURGH COURIER, July 10, 1965, at 5.

[241] At least one Black stock brokerage operated on Wall Street in the 1930s; by 1949, a member of the New York Stock Exchange, Abraham and Co., had opened an office in Harlem. *See* JULIET E.K. WALKER, THE HISTORY OF BLACK BUSINESS IN AMERICA: CAPITALISM, RACE, ENTREPRENEURSHIP 259 (1998). A national organization of Black shareholders, the Negro and Allied Shareowners of America, was formed in 1964. *See Shareholders' Unit Maps Rights Drive*, ALABAMA TRIB., January 17, 1964, at 3. Its founder, New Yorker John D. Silvera, asserted that Black Americans owned millions of shares of stock. *Id*. In 1965, a Black-owned investment brokerage in Cleveland, Ohio told the *Pittsburgh Courier* that about 25,000 Black Americans had owned shares of stock in 1952, and that this number had increased to more than 250,000 by the end of 1964. *See ¼-Million Negroes Own Stock Shares*, PITTSBURGH COURIER, July 10, 1965, at 5. Harwell Wells has documented how Civil Rights leader Bayard Rustin owned stock in the Greyhound Bus Company in the late 1940s. See [draft on file with the author]. In addition, photos published by Standard Oil Company (New Jersey) in 1951 show three Black men among the shareholders touring the company's research center. Annual Meeting, Standard Oil Company (New Jersey), June 8, 1951 (unnumbered glossy page at the end of the publication). A *New Yorker* reporter who attended AT&T's 1966 shareholders meeting wrote that he had observed "just two" Black stockholders in attendance. John Brooks, *A Reporter at Large: Stockholder Season*, NEW YORKER, Oct. 8, 1966, at 162.

[242] *See, e.g.*, Francine D. Blau & John W. Graham, *Black-White Differences in Wealth and Asset Composition*, 105 Q. J. Econ. 321, 333 (May 1990) (1970s data); VICTOR PERLO, ECONOMICS OF RACISM U.S.A.: ROOTS OF BLACK INEQUALITY 53 Table 11 (Int'l Publishers Co., 1975) (estimating that Black median family income in 1945 was 55.3% of the income of the median white family, and fell thereafter); James D. Smith, "White Wealth and Black People: The Distribution of Wealth in Washington, D.C. in 1967," *in* THE PERSONAL DISTRIBUTION OF INCOME AND WEALTH (James D. Smith, ed.) (New York: Columbia University Press, 1975) (noting that intergenerational transfers helped explain racial differences in wealth); *see also One in Every Nine Montgomerians is a Stockholder*, MONTGOMERY ADVERTISER, January 2, 1963, at 20 ("Despite the large Negro population in the [Montgomery, AL area], the number of Negro stock customers here is minute."); *see also,* Angel Kwolek-Folland, *The African American Financial Industries: Issues of Class, Race and Gender in the Early 20th Century*, 23 BUS. & ECON. HIST. 85, 91 (1994) (noting that "[u]ntil the 1920s, it is difficult to distinguish a separate [B]lack economic middle class").

Black women.[243] Intersections of race- and sex-based discrimination would have made it particularly challenging for most non-white women to buy and hold stock.[244] At AT&T, for example, where thousands of women stockholders obtained stock through programs designed to encourage employee stockholding, Black women were not hired as telephone operators until the 1950s.[245] Racial discrimination in employment thus helped shape the race of shareholding and thus the race of corporate organization.

This Article argues that stockholder *identity* influenced corporate theory and business leaders' views about the appropriate role of shareholders in corporate organization. A stockholder's gender was often discernible from the stockholders' list; although this was probably less true for race, it may have been discernible for some groups.[246] There is no reason to think that stockholders' racial identities did not *also* influence business leaders' views about shareholder governance, to the extent that they were known to business leaders.[247] Further study of the race of shareholders during this period would shed important light on the expression of racial power through corporate law.[248]

H. The End of the Feminization of Capital

By the 1960s, the major story in business was the growing power of institutional investors.[249] One contemporaneous expert suggested that the "emphasis which has been

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[243] In 1936, when the Securities and Exchange Commission went after a broker, Howard M. Roberts, for securities fraud, one investor who testified against him was "a colored elevator girl, employed [by a] department store." In the Matter of Charles C. Willson, Exchange Act Release No. 564 (April 2, 1936), 1936 SEC LEXIS 885 at *7. A photo published in a brochure by Standard Oil Company (New Jersey) in 1957 includes an image of a Black woman shareholder. Standard Oil Company New Jersey, 75th Annual Meeting, May 22, 1957, at 23.

[244] As Shennette Garrett-Scott has explained, race and gender "mutually reinforce each other as categories of exclusion and difference … in U.S. capitalism." SHENNETTE GARRETT-SCOTT, BANKING ON FREEDOM: BLACK WOMEN IN U.S. FINANCE BEFORE THE NEW DEAL 4 (Columbia U. Press, 2019).

[245] *See* VICTOR PERLO, ECONOMICS OF RACISM U.S.A.: ROOTS OF BLACK INEQUALITY 134 (Int'l Publishers Co., 1975) (discussing AT&T's discriminatory employment practices and noting that it only hired Black women as telephone operators in the 1950s in northern metropolitan centers).

[246] Names and personal titles or honorifics may have given clues about a stockholder's race, ethnicity, or religion.

[247] The race of some stockholders might have been known to corporate managers, for example, because big corporations commonly sold stock to their own employees; we can assume that companies had racial information about their own employees. *See infra* note __ (describing how the officers and directors of one California corporation sought to eliminate Asian shareholders).

[248] For scholarship at the intersection of race and corporate law, see Veronica Root Martinez, A More Equitable Corporate Purpose, (Jan. 25, 2021) at https://ssrn.com/abstract=3772872; Richard R.W. Brooks, *Incorporating Race*, 106 COLUM. L. REV. 2023 (2006); Thomas W. Joo, *Race, Corporate Law, and Shareholder Value*, 54 J. LEGAL EDUC. 351 (2004); Cheryl L. Wade, *Racial Discrimination and the Relationship Between the Directorial Duty of Care and Corporate Disclosure*, 63 U. PITT. L. REV. 389 (2002).

[249] The first major work on institutional investing was published in 1965: DANIEL JAY BAUM & NED B. STILES, THE SILENT PARTNERS: INSTITUTIONAL INVESTORS AND CORPORATE CONTROL 6 (1965) (noting that "Institutional holdings of common stocks listed on the New York Stock Exchange have risen from approximately 12 per cent of all stocks listed on the Exchange in 1949 to over 20 percent at the end of 1963"). The SEC issued its first study report on institutional investors in 1971. *See* Securities and Exchange Comm'n, Institutional Investor Study Report, H. R. Doc. No. 64, 92nd Cong., 1st Sess. 2345 (1971). Since then, the rise of institutional investing has been a major narrative in corporate law. Works documenting the rise across the decades include Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863 (2013); Roberta

placed on the growing importance of institutional investors" seemed out of step with the data, which showed a rather small increase in institutional shareholding through 1957.[250] Yet this same expert, who published a detailed demographic study of stockholders using data from 1960, gave little consideration to stockholders' gender. It remains unclear why academics who wrote about stockholders during the 1950s and 60s mostly ignored the rise of women stockholders, even as women's percentage among shareholders, and women's shareholdings at some companies, reached a zenith.

Institutional investing became an early interest among scholars and has held their attention ever since. The gendered effect of intermediation has received less attention. As American women shifted their equity investments into funds, as did their male counterparts, voting control over their shares became exercisable by fund managers, who were almost exclusively male.[251] Likewise, pension funds increased in number after 1950 and invested increasing proportions of their growing assets in corporate stock.[252] Though many of their beneficiaries were women, the managers of pension funds were men.[253]

Although the rise of institutional investing has never before been understood as a realignment of power along gender lines, it was exactly that. In addition to restoring voting control over women's stock to men, it caused the feminization of capital to recede from public consciousness and, eventually, from memory. For a short time, women were a majority of American public company stockholders, if not the holders of a majority of public company stock.[254] With the rise of intermediation—what one SEC official called the "deretailization" of the stock market[255]—women went back to being a minority among

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Romano, *Less is More: Making Institutional Investor Activism a Valuable Mechanism of Corporate Governance*, 18 YALE J. ON REG. 174 (2001); and Bernard S. Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520, 567 (1990).

[250] COX, TRENDS, at 2. Cox, a statistician at Boston University, wrote: "Between 1949 and 1957 the holdings of institutional investors, including insurance companies, investment companies, non-profit institutions, non-insured pension funds, and mutual savings banks, increased from 12.4 per cent to 15.3 per cent of the value of shares listed on the New York Stock Exchange. This eight-year period was one of extremely rapid growth for the institutions most often credited with increasing the relative importance of institutional investments, investment companies and pension funds. Yet the relative importance of institutional ownership rose less than three percentage points." *Id.*

[251] *See* Peter H. Huang, *How Do Securities Laws Influence Affect, Happiness, and Trust*, 3 J. BUS. & TECH. L. 257, 274 (2008) ("The U.S. mutual fund industry grew from just 73 funds in 1945 to 8,000 funds by 2002."). Fund managers remain overwhelmingly male to this day. *See e.g.*, Amrutha Alladi & Gabrielle Dibenedetto, The Percentage of U.S. Female Fund Managers Is Exactly Where It Was in 2000, Morningstar.com, March 16, 2021, at https://www.morningstar.com/articles/1029482/the-percentage-of-us-female-fund-managers-is-exactly-where-it-was-in-2000; Jeff Sommer, *Who Runs Mutual Funds? Very Few Women*, N.Y. TIMES, May 4, 2018.

[252] *See, e.g.*, John H. Matheson & Brent A. Olson, *Corporate Law and the Longterm Shareholder Model of Corporate Governance*, 76 MINN. L. REV. 1313, 1355 (1992) ("Investments in common stock by state and local pension systems ballooned from $10.1 billion in 1970 to $150.2 billion in 1986 and to an estimated $240 billion" in 1990).

[253] *See supra* note 240.

[254] *See supra* notes __ and accompanying text (describing the NYSE stockholder censuses establishing this in the 1950s and 60s).

[255] *See* Donald C. Langevoort, *The SEC, Retail Investors, and the Institutionalization of the Securities Markets*, 95 VA. L. REV. 1025, 1026 (2009) (*quoting* Brian G. Cartwright, General Counsel, Sec. & Exch. Comm'n, The Future of Securities Regulation, Speech at the University of Pennsylvania Law School Institute for Law and Economics (Oct. 24, 2007) (transcript available at http://www.sec.gov/news/speech/2007/spchl02407bgc.htm)).

stockholders. Indeed, when the NYSE conducted a stockholder census in 1980, it found that the gender of the stockholder class had reverted to majority-male, albeit by a small margin.[256]

The corporate law literature has extensively documented the rise of institutional investing and the re-concentration of stockholding in a small number of institutional holders.[257] According to the latest figures, institutional investors own about 80% of the outstanding stock at U.S. public companies.[258] Although the corporate law literature has spilled much ink exploring the power and control implications of the "institutionalization of capital,"[259] it never described or explored the rise of women's stockholding, nor has it acknowledged that this re-concentration had a gendered effect.[260]

The rise of institutional investing also *obscured* the gender of stockholding, which may have helped erase the feminization of capital from memory. When individuals hold stock through an intermediary, the stockholder list no longer identifies the beneficial holder of stock, making that person's gender unknowable. Institutional investors were not either male or female, so their growing significance tended to make questions of stockholder gender obsolete. Overall, the rising importance (and voting power) of institutional investors marginalized human investors, regardless of gender. When Berle and Means's blameworthy, passive shareholder was reworked through the lens of law and economics—to emerge, in the 1970s and 1980s, as the *rationally passive* shareholder—its gendered origin had been lost. Until now, these gendered aspects of corporate history have been hiding in plain sight.

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[256] NEW YORK STOCK EXCHANGE, INC., REPORT ON DIRECT SHAREOWNERSHIP IN SIXTEEN U.S. OIL COMPANIES: A STUDY OF THEIR DEMOGRAPHIC CHARACTERISTICS, Vol. I (June 1981) at 7 (referring to the NYSE 1980 Census) (51% of individual stockholders were men).

[257] For some examples, see Lucian Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B.U. L. REV. 721, 725-26 (2019); Edward B. Rock, "Institutional Investors in Corporate Governance," *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE (Jeffrey N. Gordon & Wolf-Georg Ringe, eds., 2018). If we look at pro rata stockholding, the trend is clear. In 1940, institutional investors held just 5.9% of public company stock. Raymond A. Enstam, *Control and the Institutional Investor*, 23 BUS. LAW. 289, 297 (1968). By the end of 1966, the percentage had risen to 17% and, by the end of 1990, institutions owned 53%. Bernard S. Black, *Agents Watching Agents: The Promise of Institutional Investor Voice*, 39 UCLA L. REV. 811, 827 (1992).

[258] *See* Patrick Jahnke*, Ownership Concentration and Institutional Investors' Governance Through Voice and Exit*, 21 BUS. & POL. 327, 328 (2019); Fiona Scott Morton & Herbert Hovenkamp, *Horizontal Shareholding and Antitrust Policy*, 127 YALE L.J. 2026, 2029 (2018) (putting the figure at 70%).

[259] Donald Langevoort coined the phrase "the institutionalization of the securities markets" in 2009 in Donald C. Langevoort, *The SEC, Retail Investors, and the Institutionalization of the Securities Markets*, 95 VA. L. REV. 1025, 1026 (2009) (describing institutionalization as "a shift toward investment by mutual funds, pension funds, insurance companies, bank trust departments, and the like" in "[t]he last thirty years or so").

[260] For example, one of the largest institutional investors in the U.S., the California State Teachers Retirement Fund System (CalSTRS), invests the retirement savings of nearly 1 million public school teachers in California, 70% of whom are women. CalSTRS Demographic Study Survey Fact Sheet (April 10, 2019) at 1. However, in 2018, only 36% of CalSTRS non-administrative investment staff was female. *See* CALSTRS, 2019 ANNUAL PROGRESS REPORT ON DIVERSITY IN THE MANAGEMENT OF INVESTMENTS, at 11; *accord* Kristin N. Johnson, *Banking on Diversity: Does Gender Diversity Improve Financial Firms' Risk Oversight*, 70 S.M.U. L. REV. 327, 363 (2017) (noting that institutional shareholders represent "diverse constituencies").

II.

IMPLICATIONS OF THE FEMINIZATION OF CAPITAL

Part I synthesized evidence from various sources to produce a new history foregrounding women's role as shareholders in the development of modern corporate capitalism. The evidence establishes that women started the twentieth century as a minority of stockholders but became the majority, first at leading public companies like AT&T and then, around mid-century, across the equity capital market.[261] Women's "invasion" of shareholding became a subplot in newspaper coverage of corporate America[262], and leading business thinkers of their eras, including Louis Brandeis, Owen Young, William Z. Ripley, Alfred P. Sloan, Jr., and J.A. Livingston, considered the growing proportion of women shareholders relevant to their broader views on the American corporation. Yet, the twentieth century's most influential monograph of corporate theory, *The Modern Corporation and Private Property*, omitted any mention of women.[263] In part due to this important omission—and in part because the feminization of capital ceased to be discernible once institutional investors began their swift rise—the corporate law discipline has never treated gender as relevant to the evolution of its important ideas. Yet, as any corporate law expert knows, corporate law's foundational ideas were forged during the first half of the twentieth century—the era of the feminization of capital.

This Part presents some of the foundational ideas in corporate law in relation to the new history provided in Part I, exploring how the reality of women's significant shareholding—and early-twentieth-century views about women and gender difference—might have played a role in shaping them.[264] The five sections that follow are more of a survey than a deep examination; in a work the length of an article, it is not possible to explore every idea from every angle. This Part examines the "separate spheres" of corporate governance (the "separation of ownership and control"), the idea that shareholders are naturally "passive," stakeholderism, the idea of the "average" or "reasonable" investor in corporate law, and women's role in corporate control. It sketches the contours of a twenty-first-century research agenda at the intersection of history, gender, and corporate law. That research agenda points us toward a more accurate view of our past and a long-overdue perspective on power as expressed by corporate law.

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[261] *See supra* notes __ and accompanying text.
[262] *See supra* notes 142 & 143 and accompanying text.
[263] BERLE & MEANS, MODERN CORPORATION, at 59 ("[t]he passing of ownership from the hands of the managing few to the hands of the investing many raises the question of who these multitudinous investors may be").
[264] As John C. Coffee, Jr. put it, "history matters, because it constrains the way in which institutions can change." John C. Coffee Jr., *The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control*, 111 YALE L. J. 1, 3 (2001).

A. Gender and the "Separation of Ownership and Control"

One of the central problems in corporate law is the "separation of ownership and control," an idea commonly credited to *The Modern Corporation and Private Property*.[265] Berle and Means used the separation metaphor to argue that the "old property relationships" of the corporation were broken and the "atom" of private property was splitting into two opposing camps.[266] In the organizational structure of the large corporation, Berle and Means observed the "surrender and regrouping of the incidence of ownership" itself.[267] Corporate ownership was dissolving into "its component parts, control and beneficial ownership."[268] One group of persons represented "control," while a different group of persons represented "ownership."

The "separation of ownership and control" has been called the "foundational instability of American corporate governance."[269] Its widespread acceptance in the fields of law and economics put corporate law on the path to agency-cost theory, which viewed agency problems arising between "strong" managers and "weak" owners as the main inefficiency of corporate organization.[270] In the 1980s, Eugene Fama and Michael C. Jensen recharacterized the paradigm as the "separation of decision and risk-bearing functions" in which agency problems arose between "decision agents" and "residual claimants."[271] Both scholars who subscribe to Berle and Means's formulation, and those preferring Fama and

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[265] *See, e.g.*, Eric W. Orts, *Corporate Law and Business Theory*, 74 WASH. & LEE L. REV. 1089, 1091 (2017) ("Great numbers of articles in academic corporate law take 'the separation of ownership and control' famously identified by Adolf Berle and Gardiner Means as a central starting point for analysis."). For an overview of the influence of *The Modern Corporation* on the intellectual development of corporate law, see generally William W. Bratton, *Berle and Means Reconsidered at the Century's Turn*, 26 J. CORP. L. 737 (2001) (exploring the "endurance" of ideas articulated in *The Modern Corporation and Private Property*, especially the separation of ownership and control).

[266] BERLE & MEANS, MODERN CORPORATION, at 2; Mark J. Roe, The Inevitable Instability of American Corporate Governance, *in* THE HISTORY OF MODERN U.S. CORPORATE GOVERNANCE (Brian Cheffins, ed., 2011), at 3. The atomic metaphor was Berle and Means's own. *See* BERLE & MEANS, MODERN CORPORATION, at 8 (describing the "dissolution of the atom of property").

[267] *Id.* at 7.

[268] *Id.* at 8 (noting that corporate ownership had previously "bracketed full power of manual disposition with complete right to enjoy the use, the fruits, and the proceeds of physical assets").

[269] Mark J. Roe, The Inevitable Instability of American Corporate Governance, *in* THE HISTORY OF MODERN U.S. CORPORATE GOVERNANCE (Brian Cheffins, ed., 2011), at 3; *see also* Harwell Wells, *The Birth of Corporate Governance*, 33 SEATTLE U. L. REV. 1247, 1252 (2010) ("essential to almost all definitions [of corporate governance] is the need for mechanisms to minimize problems created by the separation of ownership and control").

[270] *See generally*, ROE, STRONG MANAGERS (employing the strong managers/weak owners frame); *see also, e.g.*, Jan Fichtner et al., *Hidden Power of the Big Three? Passive Index Funds, Re-Concentration of Corporate Ownership, and New Financial Risk*, 19 BUS. & POLS. 298, 301 (2017) (describing how Berle and Means's work "led to the recognition of the principal-agent problem that underlies modern corporate governance theory"); Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism*, 113 COLUM. L. REV. 863, 870 (2013); Herbert Hovenkamp, *Neoclassicism and the Separation of Ownership and Control*, 4 VA. L. & BUS. REV. 373, 376 (2009) ("within neoclassical economics … separation of ownership and control has become an essential part of the analysis of the business firm and its financial structure").

[271] Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J. L. & ECON. 301, 312 (1983). "This," they concluded, "is the problem of separation of ownership and control that has long troubled students of corporations." *Id.*

Jensen's contractarian approach, have presented the reduction of agency costs as the core purpose of corporate law.[272]

Berle and Means did not introduce the separation premise to corporate governance.[273] In fact, business thinkers had been discussing the relationship of corporate ownership to control for decades before Berle and Means published their book.[274] In 1904, for example, Talcott Williams wrote about the "diffusion of ownership" in corporations and observed that "[c]ontrol and ownership are no longer wedded."[275] Metaphors about the "marriage" and "divorce" of ownership and control, like the one deployed by Williams, were common throughout the first half of the twentieth century, analogizing corporate control to spousal relationships.[276] Nearly thirty years after Williams wrote that control and ownership were decoupling, Berle and Means reinvigorated the idea by using empirical data to show how corporate control was concentrating in a small number of hands. Importantly, Berle and Means also popularized the notion that control and ownership were separating because "passive" shareholders were "surrendering" control over the firm, ascribing a moral valence to the changes they observed.[277]

Although the separation premise has been widely accepted in corporate law as a conceptual framework for understanding corporate organization, Berle and Means had critics.[278] From the book's publication to the present, critics have asserted that no bona fide

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[272] *See, e.g.*, George W. Dent Jr., *Toward Unifying Ownership and Control in the Public Corporation*, 1989 WIS. L. REV. 881, 881 (1989) (making this claim).
[273] *See, e.g.*, Harwell Wells, *The Birth of Corporate Governance*, 33 SEATTLE U. L. REV. 1247, 1255 (2010) ("It is around 1900 that we first find stirring the popular idea that ownership and control were separating in the modern corporation."); Harwell Wells, *The Modernization of Corporation Law, 1920-1940*, 11 U. PA. J. BUS. L. 573, 588 (2009); McCraw, *The Modern Corporation, supra* note __, at 578-79. Indeed, Jerome Frank alluded to this in his 1933 review of the book. Jerome Frank, *Book Review: The Modern Corporation and Private Property*, 42 YALE L. J. 989, 990 (1933).
[274] Some have traced the origin of the separation of ownership and control to *The Wealth of Nations*. *See, e.g.*, Herbert Hovenkamp, *Neoclassicism and the Separation of Ownership and Control*, 4 VA. L. & BUS. REV. 373, 374 (2009); Wells, *Birth of Corporate Governance*, at 1251 ("In *The Wealth of Nations*, Adam Smith identified divergent interest between managers and owners as an, in his eyes, insuperable dilemma for the efficient operation of the corporation."); DAVID FINN, THE CORPORATE OLIGARCH 14 (1969). Alexander Bryan Johnson, a wealthy banker in Utica, New York, was another early thinker who identified the "natural antagonism" between "the interest of a corporation and the interests of its managers," as "the most inveterate danger that attends corporations." A. B. Johnson, Esq., *Advantages and Disadvantages of Private Corporations*, XXIII HUNT'S MERCHANTS MAGAZINE & COMM. REV. 626, 631 (Dec. 1850). Neither Smith nor Johnson used a separation metaphor to describe the problem they observed, however.
[275] Talcott Williams, "The Corporation," *in* ORGANIZED LABOR AND CAPITAL: THE WILLIAM L. BULL LECTURES FOR THE YEAR 1904, at 122-23 (1904). For other, early examples, see Kavanaugh v. Kavanaugh Knitting Co., 226 N.Y. 185, 194 (1919); Eustace Seligman, *Relation of Law to the Modern Developments in Property Ownership*, 11 PROCEEDINGS OF THE ACAD. POL. SCI. IN THE CITY OF N.Y. 442, 442 (1925) ("The salient characteristic of the corporate form of conducting business is the separation of control from the other attributes of ownership.").
[276] *See, e.g.*, Frank, *Book Review, supra* note __, at 991 n.5 (describing "the divorce of stock-ownership from corporate control").
[277] BERLE & MEANS, MODERN CORPORATION, at 355; *id.* at 355-56 (the control groups "have placed the community in a position to demand that the modern corporation serve not alone the owners or the control but all society").
[278] *See, e.g.*, Brian Cheffins & Steven Bank, Is Berle and Means Really a Myth? *in* THE HISTORY OF MODERN U.S. CORPORATE GOVERNANCE (Brian Cheffins, ed., 2011), at 45-46 (noting "considerable criticism" of Berle and Means's separation premise). A year after winning the Nobel Prize in Economics, George Stigler co-authored a critique of *The Modern Corporation* and its separation premise with Claire Friedland. George J. Stigler & Claire Friedland, *The Literature of*

"separation" or bright line ever emerged between those who controlled big companies and those who owned stock in them.[279] To the contrary, critics argued, stockholders and controllers were overlapping groups. Marxist economists in particular rejected the separation premise; for example, Paul Sweezy argued that what "actually happens" is that "the great majority of owners is stripped of control in favor of a small minority of owners."[280] Other critics have broadly challenged corporate law's myopic focus on the "shareholder-management nexus."[281]

The separation of ownership and control framework itself resembles the "separate spheres" of gender difference that would have been familiar to all Americans of Berle and Means's era, dividing nearly everything into "public" (for men) and "private" (for women).[282] "Separate spheres" ideology imagines a bilateral division of things into masculine versus feminine: strong versus weak, active versus passive, rational versus emotional, etc.[283] The Supreme Court itself endorsed separate spheres ideology in 1872, asserting that it was an "axiomatic truth" that "God designed the sexes to occupy different spheres of action."[284] As

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Economics: The Case of Berle and Means, 26 J. L. & ECON. 237 (1983). Stigler and Friedland argued that "[t]he majority of the voting stock is the ultimate control over a corporation even if that stock is diffused among many owners. …[I]n an ultimate sense ownership and control cannot be separated." *Id.* at 248. They also concluded that the data showed "no clear evidence that the management-dominated corporations differed much from owner-dominated companies" in the ways suggested by Berle and Means's separation premise. *Id.* at 259.

[279] S*ee, e.g.,* Dalia Tsuk Mitchell, *Shareholders as Proxies: The Contours of Shareholder Democracy*, 63 WASH. & LEE L. REV. 1503, 1520 n.52 (2006). A few years after *The Modern Corporation* was published, the Temporary National Economic Committee (TNEC) conducted a major study of the concentration of economic power at American public companies and concluded, contrary to Berle and Means's findings, that "[i]n the average corporation the majority of the voting power is concentrated in the hands of not much over 1 percent of the stockholders." TNEC Monograph #29, The Distribution of Ownership in the 200 Largest Nonfinancial Corporations (1940) at XVII.

[280] PAUL M. SWEEZY, THE THEORY OF CAPITALIST DEVELOPMENT 267-68 (1942).

[281] Margaret M. Blair, *Rethinking Assumptions Behind Corporate Governance*, CHALLENGE, Nov. 1, 1995, at 17 ("corporate governance discussions that … focus only on the power relationship between shareholders and managers have the emphasis wrong").

[282] *See* SARA M. EVANS, BORN FOR LIBERTY: A HISTORY OF WOMEN IN AMERICA 183 (1989) (describing the corporate office of the 1920s as "a public environment in which males and females were accorded separate and unequal roles analogous to their traditional roles in the home"); Sandra Day O'Connor, *The History of the Women's Suffrage Movement*, 49 VAND. L. REV. 657, 658 (1996) ("The notion of gender-specific spheres had its roots in the belief that women were subordinate to men by nature, almost certainly less intelligent, and biologically less suited to the rigors of business and politics. Even at the turn of the century, the law still firmly enshrined the separate-spheres theory of gender relationships."); Henry Clews, "Woman in Politics, Nature, History, Business and the Home," *in* FINANCIAL, ECONOMIC, AND MISCELLANEOUS SPEECHES AND ESSAYS 315 (N.Y.: Irving Pub. Co., 1910) (asserting that "man and woman were created to perform separate and distinct functions in life" and criticizing women for participating in business and politics) (Clews, the founder of a New York brokerage firm, was one of the oldest and most venerated members of the New York Stock Exchange). Chuck O'Kelley has suggested that our understanding of corporate theorists, like Berle, is obscured by our "general lack of historical knowledge" about the milieu in which they wrote. Charles R. T. O'Kelley, *Berle and the Entrepreneur*, 33 SEATTLE U. L. REV. 1141, 1171 (2010). Though most Americans would recoil from "separate spheres" ideology today, there is no question that it was a dominant societal framework during the lives of Berle and Means.

[283] As one writer put it: "In all things since the beginning of time there will be found the two principles, the one primary, the other secondary; the one active, the other passive, the 'pair of opposites' that manifest as sun and moon, day and night, fire and water, energy and substance, man and woman, and so forth; man the active principle, woman the passive principle." Elizabeth E. Goldsmith, *Suffrage Unnatural*, N.Y. TIMES, February 21, 1915, at 1.

[284] Bradwell v. State, 83 U.S. (16 Wall.) 130 132 (1872).

presented by Berle and Means, the separation of ownership and control reimagined corporate governance as similarly divided. On one hand were the "active" male managers who ran the business. On the other were "passive" shareholders who served little purpose other than to collect dividend checks, and who included large numbers of women. Later in his career as a corporate law professor, Berle switched to using the term "passive-receptive" to describe the function of shareholding.[285] Writing the year after the NYSE published its first survey results establishing that most public company stockholders were women, Berle asserted that the "'passive receptive' side of the corporation" was "functionless."[286]

After the publication of *The Modern Corporation*, the political theorist James Burnham made a direct connection between the separation thesis and the gender of stockholding. In an influential 1941 book, *The Managerial Revolution*, Burnham claimed that the rise of women's stock ownership suggested that capitalists were withdrawing from "active and direct participation of any sort in the economic process."[287] Burnham's claim echoed Berle and Means's suggestion that stockholder passivity involved the choice to "surrender" control.[288] Women's stock ownership underscored a growing "gap" between the "legal owners" of business (i.e., shareholders) and the "instruments of production," Burnham wrote, because "whatever the biological merits, it is a fact that women do not play a serious leading role in the actual economic process."[289]

The separation premise helped justify the shift in corporate power away from common stock, owned by an ever-expanding group of women (and workers), to male managers. In the period from 1900 to 1930, a number of leading corporate theorists had argued that empowering shareholders was the key to reforming corporate governance and resolving the "corporation problem."[290] At the beginning of his career, Berle himself had

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[285] A. A. Berle, Jr., ECONOMIC POWER AND THE FREE SOCIETY 7 (1957) ("The business of stockholders is primarily to receive."). "Receptive" referred to shareholders' receipt of dividends, but it also has a sexual connotation. In its third edition, the Oxford English Dictionary included, as a historic definition of "passive," "designating, relating to, or characteristic of a person who takes a passive sexual role..." OED (3rd Ed.) (2005).
[286] *Id.* Later generations of corporate law scholars did not agree that "passive" shareholders were functionless. Rather, a generation of law-and-economics scholars characterized shareholders as residual claimants who played an important risk-bearing function within a firm structure characterized by specialization. *See, e.g.*, Ronald J. Gilson & Charles K. Whitehead, *Deconstructing Equity: Public Ownership, Agency Costs, and Complete Capital Markets*, 108 COLUM. L. REV. 231, 231 (2008); Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J. L. & ECON. 301, 308 (1983). Mark Roe summarized it this way: "The distinctive governance structure of the large American firm … is usually seen as a natural economic outcome arising from specialization: shareholders would specialize in risk-bearing but wanted diversification, and firms needed specialized, professional management." MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE ix (Princeton U. Press, 1994).
[287] JAMES BURNHAM, THE MANAGERIAL REVOLUTION: WHAT IS HAPPENING IN THE WORLD 100-101 (NY: John Day Co., 1941).
[288] BERLE & MEANS, MODERN CORPORATION, at 338 ("The stockholder has surrendered control over his wealth.").
[289] BURNHAM, MANAGERIAL REVOLUTION, at 101. Burnham minimized women's stockholding as instrumental, asserting (without evidence) that the registration of stock in women's names was "often a legal device to aid in the preservation of wealth." *Id.*
[290] *See, e.g.*, WILLIAM W. COOK, THE CORPORATION PROBLEM: THE PUBLIC PHASES OF CORPORATIONS, THEIR USES, ABUSES, BENEFITS, DANGERS, WEALTH, AND POWER, WITH A DISCUSSION OF THE SOCIAL, INDUSTRIAL, ECONOMIC, AND POLITICAL QUESTIONS TO WHICH THEY HAVE GIVEN RISE 87 (G. P. Puttnam's Sons, 1891); *see also* Harwell

advocated strategies, such as cumulative voting, that would have empowered shareholders to act collectively in order to curb managerial power.[291] By the time he published *The Modern Corporation* with Means, however, Berle had changed his view.[292] In that book, Berle and Means asserted that, for companies with liquid stock, the stock market—and not shareholders—would discipline corporate management.[293] Management expert Walter Werner argued that Berle and Means's book made "a radical departure from earlier views" by suggesting that "shareholders' rights in the market were integral to their rights in the corporation," thus making the stock market "the key to shareholder protection."[294] Here we see the genesis of the New Deal securities laws, enacted only a few years later, which made market regulation and corporate disclosure—instead of shareholder empowerment—the key to reforming big business.[295] The market, of course, was introduced as an apolitical—even *egalitarian*—mechanism to discipline managers, while simultaneously rendering the human identity of individual stockholders invisible and stockholders' changing gender irrelevant.

In the 1990s, Mark J. Roe offered a new, political explanation for America's unique corporate structure that was grounded in the history of this period.[296] In his retelling, American law and politics "fragmented" intermediaries such as banks, insurers, and mutual funds, preventing them from accumulating large blocks of stock and exercising control in firms.[297] Roe argued that Americans made these political choices, in part, because they mistrusted private accumulations of power, and he argued that these political choices help

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Wells, *A Long View of Shareholder Power: From the Antebellum Corporation to the Twenty-First Century*, 67 FLA. L. REV. 1033, at 1057-58 (2015) (describing the movement for cumulative voting, which started in the late 1800s).

[291] *See, e.g.,* William W. Bratton, *Berle and Means Reconsidered at the Century's Turn*, 26 J. CORP. L. 737, 751-52 (2001) (outlining Berle's early work, including his suggestion that trust companies gather "many small holdings into an institution commanding a block so large that [shareholder] protection" was feasible) (*quoting* ADOLF A. BERLE, JR., STUDIES IN THE LAW OF CORPORATE FINANCE 39 (1928)); Richard S. Kirkendall, *A. A. Berle, Jr.: Student of the Corporation, 1917-1932*, 35 BUS. HIST. REV. 43, 48 (1961) ("At the age of twenty-six, [Berle's] mind had wandered to thoughts of changing the location of power in industry."); WILLIAM Z. RIPLEY, MAIN STREET AND WALL STREET 133 (Boston: Little, Brown & Co. 1927) (describing Berle as having proposed reforming corporate governance by creating committees "representative exclusively of shareholders' interests").

[292] *See id.* at 752 (describing how Berle's "attitude toward regulation" changed through his collaboration with Means; Berle "abandon[ed] a self-regulatory approach in favor of government control of corporate activity").

[293] BERLE & MEANS, MODERN CORPORATION, at 287 ("Economically, the various so-called 'legal rights' or the economic pressures which may lead a management to do well by its stockholders, in and of themselves are merely uncertain expectations in the hands of the individual. Aggregated, interpreted by a public market, and appraised in a security exchange, they do have a concrete and measurable value; and it is to this value that the shareholder must and in fact does address himself.").

[294] Walter Werner, *Management, Stock Market and Corporate Reform: Berle and Means Reconsidered*, 77 COLUM. L. REV. 388, 397 (1977).

[295] The historian Dalia Tsuk Mitchell has argued that, in the 1920s, corporate law scholars like Berle and Ripley chose "using the goal of protecting shareholders" over "trusting shareholders as active agents." *See* Dalia Tsuk Mitchell, *Shareholders as Proxies: The Contours of Shareholder Democracy*, 63 WASH. & LEE L. REV. 1503, 1511 (2006) ("The first attempt to give meaningful voice to shareholders ended with protection but not empowerment."). Then, "[t]he securities acts of 1933 and 1934 did not try to empower or protect shareholders. Their goal was to reinforce the ideal of a healthy free market." *Id.* at 1512.

[296] MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE xiii (Princeton U. Press, 1994).

[297] *Id.* at 286.

explain why American corporations ended up with large numbers of dispersed stockholders.[298] Roe's work was path-breaking for its acknowledgment that political choices influenced the evolution of American corporate structures. His ideas contravened then-popular "natural selection" theories that presented corporate structure as the product of naturally-occurring, "organizational adaptation" to economic pressures.[299] Roe's book, titled *Strong Managers, Weak Owners*, assumed the separation premise and did not explore individual shareholders' identities as relevant to his political story. Lacking a historical narrative recognizing women as an important subgroup of stockholders, Roe provided only a partial explanation for how "politics created the fragmented Berle-Means corporation."[300]

Gender politics plausibly operated as another political factor contributing to the emergence of the "fragmented Berle-Means corporation." Part I showed how the dispersion of stockholding in the early decades of the twentieth century was driven, at least in part, by demand for corporate stock among women. The political and legal status of women at the time helps explain this. For example, although women were excluded from political citizenship until 1920, even married women were embraced as voting corporate "citizens" by the mid-nineteenth century. Thus, to the extent that women wished to participate in public-sphere decision-making on an equal footing with men, stockholding offered that opportunity. Indeed, evidence suggests that some women actively participated in shareholder governance at big companies before 1920, at a time when they would have been excluded from participation in other forms of organizational governance dominated by men, and after 1920, when women's expanded role in public life remained controversial.[301] In addition, women's wages were discounted for their gender, while their return on a share of stock was not.[302] This may have encouraged women, especially wage-earning women, to view shareholding as a uniquely attractive form of economic activity. Finally, some married women's property laws, enacted in the mid- and late-nineteenth century, empowered married women to hold and vote stock held in their names, and may have encouraged women and their families to channel women's wealth into stockholding.[303] All of these factors, combined, present a story that is complementary to the one described by Roe. At the same time that American law and politics were evolving to prevent institutional investors from accumulating blockholding power, they were also developing in ways that made stockholding a particularly attractive investment for generations of American women. The result was a trend in which the stockholder class not only grew, but also feminized.

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[298] *See id.* at 26.
[299] *Id.*
[300] *Id.* at 287.
[301] *See infra* notes __ and accompanying text.
[302] *See, e.g.*, Barbara R. Bergmann, *The Economics of Women's Liberation*, CHALLENGE (May 1, 1973), at 12 ("The economic results of occupational segregation for women are low wages.").
[303] *See, e.g.,* "An act authorizing married women who may be members or stockholders of any incorporated company, to vote at elections of directors and trustees," N.Y. Session Laws of 1851, Ch. 321 (stating that married women could own and vote corporate stock held in their names).

The changing identity of American stockholders infused questions of corporate structure—and especially the "separation of ownership and control"—with gender politics. It encouraged business leaders to perceive a conceptual "separation" in corporate structure that reified two elements—owners and managers—who were, in fact, divided by gender. Owners included women, but managers were exclusively male.

In addition, the changing identity of the stockholder class also likely shaped business leaders' views about the best way to curb managerial power, one of the leading issues of the day. Stereotypes about women's lack of aptitude for business, emotion-based decision-making, and submissive personalities contributed to a trend in which business leaders gradually changed their thinking about shareholder governance of big companies.[304] By the mid-1930s, few corporate law academics were arguing in favor of shareholder collective action;[305] rather, the neutral mechanism of the stock market, regulated through New Deal securities laws, was gaining favor as a means to discipline managers.[306] Now, in the twenty-first century, the "mythical battle" between owners and managers has come under increasing criticism in the corporate law academy, suggesting that it may be time to reevaluate the separation premise, its origin, and its continuing value to corporate law and theory.[307]

B. The Pathology of Passivity

Central to Berle and Means's separation theory was the idea that shareholders were becoming "passive."[308] The cause of this change, they wrote, was the dispersion of stock ownership.[309] The inability to pressure or control management, due to the small size of a holder's stock, was presented as the *condition* of passivity. Thus, while the word "passive" might suggest to the modern reader that the holder was *choosing to do nothing*, Berle and Means

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304 The emergence of large numbers of women stockholders corresponded with a smaller but still significant rise in employee-stockholders, as companies created employee stock purchase programs and gave bonuses in stock. Thus, demographic changes in stockholding from 1900 to 1960 brought not only women into shareholding but also a growing chorus of labor voices. *See, e.g.*, Matthew T. Bodie, *Labor Interests and Corporate Power*, 99 B.U. L. REV. (2019).

305 Among the last to do so was William O. Douglas, who, three years before he became Chair of the SEC, argued that "some method must be devised to mobilize scattered and disorganized stockholders and other investors into an active and powerful group so that there maybe a competent and respectable patrol of the field of finance." William O. Douglas, *Directors Who Do Not Direct*, 47 HARV. L. REV. 1305, 1307 (1934).

306 Another idea that gained traction was the "independent director." Instead of a person chosen from the ranks of ordinary shareholders, he was to be a businessman—typically an executive at another company, or a banker—who would represent the interests of small shareholders.

307 *See, e.g.*, J. B. Heaton, *Corporate Governance and the Cult of Agency*, 64 VILL. L. REV. 201 (2019) (describing the separation as a "mythical battle" and arguing for an end to the "cult of agency").

308 BERLE & MEANS, MODERN CORPORATION, at 66 ("the position of [stock] ownership has changed from that of an active to that of a passive agent"); *see also id.* at 346-7 ("Passive property … gives its possessors an interest in an enterprise but gives them practically no control over it, and involves no responsibility"; it consists "of a set of relationships between an individual and an enterprise, involving rights of the individual toward the enterprise but almost no effective powers over it").

309 BERLE & MEANS, MODERN CORPORATION, at 84 ("When the largest single interest amounts to but a fraction of one per cent," they asserted, "no stockholder is in the position through his holdings alone to place important pressure upon the management or to use his holdings as a considerable nucleus for the accumulation of the majority of votes necessary to control.").

used it to describe the condition of dispersed shareholding itself.[310] In their depiction, ownership of a small amount of widely-held stock was "passive" virtually by definition, and this passivity was the reason that stockholders were losing power in firms, and corporate managers were gaining it.[311]

When Berle and Means used the word "passive" to describe dispersed stockholders, they were not reiterating a common characterization of the 1920s and 30s.[312] Berle and Means were among the first scholars to present dispersed shareholding in the academic literature as inherently passive, and they were also reviving an old trope about women as inactive stockholders.[313] In 1907, for example, the *Cincinnati Enquirer* reported that bankers in the city had a "tough problem": too much stock was in "passive hands."[314] The article described Cincinnati bankers "perusing the lists of stockholders" only to discover that some banks were "'waterlogged' with a class of stockholders" who wished only to collect dividends and "take no active interest in" the bank.[315] In one bank,

> which has about 300 stockholders, it was found that women constitute nearly half of the stockholders. The division was made into resident and nonresident women, resident active business men, nonresident men, retired resident men, estates, other banks (competitors) and corporations. The showing proved that the holdings of the active stockholders were relatively very small compared with the holdings of the passive stockholders. There is hardly a bank in the city but that has a large number of women and estates holding stock.[316]

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[310] *Accord* Bernard S. Black, *Agents Watching Agents: The Promise of Institutional Investor Voice*, 39 UCLA L. REV. 811, 813 (1992) ("In the Berle and Means paradigm, shareholder passivity is inevitable."); Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J. L. & ECON. 395, 397 (1983) ("Berle and Means thought that shareholders' powerlessness is a necessary result of the diffusion of ownership.").

[311] *See, e.g.,* BERLE & MEANS, MODERN CORPORATION, at 338 ("The stockholder has surrendered control over his wealth. He has become a supplier of capital, a risk-taker pure and simple, while ultimate responsibility and authority are exercised by directors and 'control.'"). Years later, Berle expanded upon his views on "the American passive-property system" in a solo-authored book, THE AMERICAN ECONOMIC REPUBLIC 36-59 (Harcourt, Brace & World, 1963). Though he never mentioned women in that discussion, he opined that the "price" of the wide distribution of "passive property" was "intolerable loss of individual liberty and individual capacity for self-realization." *Id.* at 55. Another group of scholars has suggested that the Berle-Means corporation "created relationships of economic and political dependency" for stock owners. ALLEN KAUFMAN, LAWRENCE ZACHARIAS, & MARVIN KARSON, MANAGERS VS. OWNERS: THE STRUGGLE FOR CORPORATE CONTROL IN AMERICAN DEMOCRACY 3 (Oxford 1995).

[312] In fact, in finance, the word "passive" had traditionally been used to mean a bond or debt upon which no interest was paid. OED, Entry for "passive," (1989) (2nd Ed.).

[313] The idea of the "passive" stockholder had appeared sporadically in various writings before *The Modern Corporation* was published. For examples, see State v. North Shore Boom & Driving Co., 55 Wash. 1, 17 (1908) (Mount, J., dissenting). In 1926, W. H. S. Stevens referred to the "passive attitude" of shareholders who did not attend the annual meeting, were "unable to interpret accurately the meaning or significance of the corporation's income statement and balance sheet," and paid "little or no attention to the corporation's affairs," at least as long as it was paying dividends. W. H. S. Stevens, *Stockholders' Voting Rights and the Centralization of Voting Control*, 40 Q. J. OF ECON. 353, 384-85 (May 1926). Like other writers of the time, Stevens presented passive shareholders as *both* unintelligent and disengaged.

[314] *Bankers Have a Tough Problem*, CINCINNATI ENQUIRER, Feb. 19, 1907, at 5.

[315] *Id.*

[316] *Id.*

The passage suggested that male stockholders could be "active" in business, but women were always "passive," and that business leaders ascribed meaning to the difference. It underscored how passivity was not only associated with women, but also characterized as bad quality for shareholders, and ultimately bad for business.[317]

The influence of their mentor and former professor at Harvard, William Z. Ripley, was evident in Berle and Means's construction of the passive stockholder.[318] In his 1927 book, *Main Street and Wall Street*, Ripley had contrasted shareholder voting by proxy with shareholders' "passive participation in management" and lamented how "the wide distribution of stock to employees and the consumers of the corporation's product"—a possible reference to women[319]—"accentuate[d]" the "nullification" of the "ordinary shareholder."[320] In the same book, Ripley openly disparaged women stockholders, judging them "ill-fitted by training—begging the moot point of sex—to govern" businesses "directly."[321] Berle and Means did not express the same open contempt for women stockholders, but they described small stockholders as "irresponsible" and contrasted the modern, widely-held corporation with an earlier version of corporate capitalism in which "[t]he number of stockholders was few; they could and did attend meetings; they were business-men; their vote meant something."[322]

Of course, contemporaneous readers probably understood the use of the word "passive" to mean "feminine."[323] At the time, passivity was closely associated with stereotypes about women, often offered in contradistinction to the "active" character of men.[324] "To be passive is woman's great force," one speaker argued in an address published

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[317] Indeed, the "passive" quality of stockholding is often characterized in negative terms. *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1172 n.27 (1981) ("shareholders' self-interest has led them to be ignorant and passive").
[318] At least one reviewer characterized Berle and Means's book as an extension of Ripley's work. *See* Robert S. Stevens, *Book Review*, 18 CORNELL L. Q. 634, 634 (1933) (describing *The Modern Corporation* as "fundamentally a further, more detailed and up-to-date study, based upon collected data, of [the] same problem" explored by Ripley in *Main Street and Wall Street*, and noting Berle and Means's acknowledged "indebtedness" to Ripley).
[319] *See supra* notes __ - __ and accompanying text.
[320] WILLIAM Z. RIPLEY, MAIN STREET AND WALL STREET 94, 108 (Boston: Little, Brown & Co. 1927); *see also id.* at 97 (describing the "docility of corporate shareholders")
[321] *Id.* at 129-30.
[322] BERLE & MEANS, MODERN CORPORATION, at 135 n.14, 354. For an earlier, moral critique of shareholders, *see* Samuel Untermyer, Reasons and Remedies For Our Business Troubles: An Address Delivered Before the Commercial Club and the Pittsburgh Industrial Development Commission at Pittsburgh, May 22, 1914, at 15 (arguing that shareholders "deserve just the kind of treatment they have been receiving at the hands of the men who dominate these corporations" because of their "supineness" and "criminal inertia").
[323] *See, e.g.*, Earl Barnes, *Woman's Place in the New Civilization*, 56 ANNALS AM. ACAD. POL. & SOC. SCI. 9, 10 (1914) ("women are more passive than men").
[324] For one example, see KENNETH E. BOULDING, THE ORGANIZATIONAL REVOLUTION: A STUDY IN THE ETHICS OF ECONOMIC ORGANIZATION 92 (N.Y.: Harper & Bros., 1953) (contrasting "the 'feminine' passive element in the industrial process" with "the 'masculine,' more active element"); s*ee also, e.g.*, Nikki Mandell, *Will the Real Businessman/Businesswoman Stand Up?: The Historical Implications of Regendering Business Success in the Early Twentieth Century*, 15 ENTERPRISE & SOC. 499, 501 (Sept. 2014) (noting how the presumption that "women were inherently passive" played a role in channeling women into particular types of jobs). It was also common, from the nineteenth century through at least the middle of the twentieth century, to find women described as the "weaker sex" in discussions of them as

in the *Washington Post* in 1922.[325] As late as 1989, the Oxford English Dictionary expressly defined "passive" as, among other definitions, "[o]f, relating to or characteristic of the female."[326] Throughout the early decades of the twentieth century, the idea that women were *naturally passive* played an important role in defining the types of paying work available to women and the career paths they could follow.[327]

Certainly it is true that in the 1910s, 1920s, and 1930s, shareholders of major companies often did not attend annual meetings, send in their proxies, or otherwise participate in shareholder governance. Before Berle and Means, this was commonly described as "absentee" shareholding, and it was attributed to corporate laws and practices, such as the in-person stockholder meeting and the proxy, that made stockholder participation exceedingly difficult.[328] Berle and Means conflated the rising tide of "passive" shareholders (i.e., women) with the *governance problem* of absentee shareholding.

At any rate, there are many reasons to doubt that small stockholders had made a choice not to participate in corporate governance. Evidence from the period shows that small stockholders *tried* to participate. When only a single person—a woman shareholder—showed up for the 1913 annual meeting of U.S. Reduction and Refining Company, the *Wall Street Journal* published a short article that described her wandering the venue, searching for a meeting that the company's own officers and directors had "forgotten" to hold.[329] As shareholding expanded over the decades that followed, attendance at shareholders meetings

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shareholders. For an example, see Charlotte A. Cleveland, *Report of the Finance Committee*, WOMAN'S J. (Nov. 25, 1876) at 379 (*quoting* Judge Carr, president of the Farmer's National Bank of New Jersey, using the term).

[325] *Woman's Work Passive Says Mrs. M'Cormick*, WASH. POST, Jan. 26, 1922, at 3 (*quoting* Edith Rockefeller McCormick as stating, "The work of the world is accomplished by two forces, the positive and the negative. Women represent the rails of a railroad—the negative force—and man the engine, or positive force.").

[326] OED (2d ed. 1989). An earlier edition, published in 1933, omitted reference to "the female" but included definitions, similar to those in the second edition, defining "passive" to mean "[s]uffering or receiving something without resistance or opposition; readily yielding or submitting to external force or influence, or the will of another; submissive." OED 1933 (1st Ed.) at 536 (entry for "passive"); *see also* THE CENTURY DICTIONARY AND CYCLOPEDIA (1914) at 4319 (defining "passive" as, inter alia, "[r]eceptive, unresisting; not opposing; receiving or suffering without resistance: as, passive obedience").

[327] As one historian put it, "[g]ender analysis has exposed the processes that naturalized women's positions on the lower rungs and men's domination of the upper rungs of [workplace] hierarchies." Nikki Mandell, *Will the Real Businessman/Businesswoman Stand Up?: The Historical Implications of Regendering Business Success in the Early Twentieth Century*, 15 ENTERPRISE & SOC. 499, 502 (Sept. 2014).

[328] *See, e.g.*, Louis D. Brandeis, *Cutthroat Prices—The Competition that Kills*, HARPER'S WEEKLY, Nov. 15, 1918 (describing "the huge corporation with its myriad of employees, its absentee ownership, and its financial control," as presenting "a grave danger to our democracy"); THORSTEIN VEBLEN, ABSENTEE OWNERSHIP AND BUSINESS ENTERPRISE IN RECENT TIMES: THE CASE OF AMERICA (N.Y. 1923); JOHN H. SEARS, THE NEW PLACE OF THE STOCKHOLDER 216 (1929) (noting "the absentee and apathetic attitude of the typical stockholder"); *id.* at 8 (quoting a social scientist, Henry W. Ward, using the phrase); *Cf.* Lucian Bebchuk & Assaf Hamdani, *Federal Corporate Law: Lessons from History*, 106 COLUM. L. REV. 1793, 1804 (2006) (attributing shareholder "passivity" in part to "background legal rules that often make it difficult for shareholders to intervene"). Even in his epic dissent in Louis K. Liggett Co. v. Lee, in which he repeatedly cited and endorsed Berle & Means's ideas about the separation of ownership and control, Brandeis continued to resist the language of "passivity." *See* Louis K. Liggett Co. v. Lee, 288 U.S. 517, 568-69 (1933) (Brandeis, J., dissenting) (retaining the term "absentee ownership"); *see also* William O. Douglas, *Directors Who Do Not Direct*, 47 HARV. L. REV. 1305, 1317 (1934) (using "absentee ownership" but not "passive ownership").

[329] *U.S. Reduction & Refining*, WALL ST. J., April 28, 1913, at 6.

climbed. As early as 1945, stockholders of AT&T were being turned away at the door for a lack of space.[330] Meetings also grew in length, as more shareholders sought to participate actively in debate.[331] In 1952, a *Wall Street Journal* reporter interviewing three random stockholders who had turned up for the Standard Oil (Indiana) annual meeting spoke with a woman who had driven 350 miles to attend.[332] In 1961, *twenty thousand* stockholders showed up to AT&T's annual stockholders meeting in Chicago, more than attended the opening of baseball season.[333] Many similar stories suggest that, especially after the Great Depression, shareholders were trying to figure out how to participate in the governance of big companies, but no clear method presented itself.[334] During this period, most small stockholders did not hold diversified portfolios of stock.[335] With governance rights in few firms, it would have been possible for shareholders to devote attention to the obligations of economic citizenship. They were stymied by corporate governance practices that

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[330] *See Labor Group's Plans Lose at A.T.&T. Meet*, WASH. POST, April 19, 1945, at 14 (describing how "about 50 to 100" stockholders "were unable to enter the AT&T assembly room—so great was the crush"). AT&T's meetings, which had involved as few as 900 stockholders in 1949, were sending hundreds of stockholders into overflow rooms by 1953, where they had to watch the proceedings on a television. *A.T.&T. Holders View Annual Meeting on TV*, WALL ST. J., April 16, 1953, at 20. Reports of attendance in 1953 ranged from 1,200 to more than 1,800. *Compare id. with Wish You Were Here*, COUNCIL COMPASS (May 1953) at 1. International Telephone & Telegraph Corp. held its 1953 annual meeting in circus tents in Nutley, N.J. *See I.T.&T. Takes Annual Meeting to Stockholders*, WALL ST. J., May 6, 1955, at 9. That same year, American Air Lines held its annual meeting in a hangar at LaGuardia Field; it was attended by 1,800 shareholders. *The Stockholder's Voice*, WALL ST. J., May 22, 1953, at 4. "Each year we get more and more stockholders at the annual meeting," an executive of General Electric said in 1954; the company's "mammoth" meeting welcomed 2,455 shareholders that year. Alfred R. Zipser, Jr., *G.E. Profits Set Peak in Quarter At $48,029,000, Up 42% in Year*, N.Y. TIMES, April 21, 1954, at 45; Doyle F. Smee, *Mr. Stockholder: Encouraged by Industry, He Plays a Bigger Part At Annual Meetings*, WALL ST. J., April 19, 1954, at 1. Although some meetings were attended by thousands of shareholders, those present represented only a fraction of the overall shareholder population. And in 1949, the *Wall Street Journal* noted that "[s]parse attendance and scant comment still typify most corporate meetings." *Owners Arise! Annual Meetings Draw Record Attendance and Pointed Questioning*, WALL ST. J., April 27, 1949, at 1.

[331] For example, AT&T's 1948 annual stockholders meeting was two hours long. *Corporate Democracy*, COUNCIL COMPASS (May 1948) at 1. Its 1949 meeting was 4 ½ hours. *See Owners Arise! Annual Meetings Draw Record Attendance and Pointed Questioning*, WALL ST. J., April 27, 1949, at 1. Its 1950 annual meeting lasted almost 7 hours. *950 at Its Stockholders' Meeting, a Record in History of A.T.&T.*, N.Y. TIMES, April 20, 1950, at 45.

[332] *Pickets Bar Holders of Indiana Standard From Annual Meeting*, WALL ST. J., May 2, 1952, at 2.

[333] Sylvia Porter, *Sylvia Porter Says: Annual Meetings Taking On More Serious Aspect*, RICHMOND TIMES-DISPATCH, March 28, 1963, at 43.

[334] For example, shareholder activists pushed for regional shareholder meetings to encourage greater shareholder participation. General Mills held the first such meetings in 1939 and 1940, in major cities like Manhattan, San Francisco, Detroit, and Los Angeles; the company reported that about half of its stockholders in the San Francisco area attended the meeting in that city. *See* Lon Hughes, *General Mills, Inc., Stockholders Meet Here*, SAN FRANCISCO EXAMINER, December 12, 1939, at 29 (noting that more than half of General Mills's shareholders were women); *Owners Invited*, TIME, Jan. 29, 1940, at 59 (concluding that "[t]he experiment seemed much more likely to prove that modern stockholders, although the beneficiaries of a company, are mostly a total failure in the old-fashioned role of proprietors").

[335] *See, e.g.*, TNEC, INVESTIGATION OF CONCENTRATION OF ECONOMIC POWER, Monograph No. 29: The Distribution of Ownership in the 200 Largest Nonfinancial Corporations (1940) at XVII (the average stockholder held shares in "about two and one-half corporations"). Almost twenty years later, the NYSE found that the average stockholder held stock from only 3.5 different stock issues—fewer than in 1956, when the average was 4.25. SHARE OWNERSHIP IN AMERICA: 1959 5 (NYSE, 1959). *See also Who Are a Company's Stockholders? Utility Company Survey Discloses Wide Ownership in All Classes*, 87 TR. & EST. 9 (1948) (1948 survey of stockholders of the Consolidated Edison Company of New York found that 5% owned no other stocks; 12% owned two or three other stocks; 37% owned three to 10; and 51% owned over 10).

discouraged their participation, and by the lack of transportation and communication technology that might have allowed distant shareholders to attend meetings.

The passivity thesis has had an enduring influence on the evolution of American corporate governance theory and law.[336] By characterizing dispersed stockholding as *inherently passive*, Berle and Means's popularization of the "passive stockholder" trope foreclosed serious consideration of how corporate law discouraged small shareholders from participating in governance.[337] The word "passive" itself has been widely deployed in legal scholarship on corporate and securities law with a range of meanings applied to corporate boards, shareholders, and investment strategies. For example, Frank Easterbrook and Daniel Fischel famously argued for a "rule of managerial passivity" in takeover law.[338] A recent trend in scholarship has described index investing as "passive" investing.[339] In a thoughtful article, Adriana Z. Robertson has argued that describing stock market indices as "passive" obscures important things about them.[340] Some scholars, including Bernard Black, have suggested that "the standard model [of corporate governance] overstates the case for passivity."[341]

When the law and economics movement emerged in the 1970s, it embraced shareholder passivity and refashioned it as "rational apathy." In this view, the "natural" passivity of dispersed stockholders evidenced a "free rider problem" and could be explained by incentives operating on *homo economicus*.[342] In the 1980s, Frank Easterbrook and Daniel Fischel explained that:

> Most shareholders are passive investors seeking liquid holdings. They have little interest in managing the firm and less incentive to learn the details of management. … Because other shareholders take a free ride on any one

[336] After the 1932 publication of *The Modern Corporation and Private Property*, shareholder passivity became an important theme in corporate law and theory. *See, e.g.*, CHESTER ROHRLICH, LAW AND PRACTICE IN CORPORATE CONTROL 8 (1933) (describing "the separation between those who actively controlled and operated the corporation and those who passively awaited dividends").
[337] In the book, Berle and Means discussed changes to corporate law that disempowered stockholders. *See* BERLE & MEANS, MODERN CORPORATION, at 153-88. However, they did not argue in favor of changing corporate law to re-empower shareholders.
[338] *See* Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1177-78, 1198-99 (1981).
[339] *See, e.g.*, Jill Fisch, Assaf Hamdani & Steven Solomon, *The New Titans of Wall Street: A Theoretical Framework for Passive Investors*, 168 U. PA. L. REV. 17 (2019) ("passively managed funds" are funds "that do not make information-based trading decisions"); Dorothy S. Lund, *The Case Against Passive Shareholder Voting*, 43 J. CORP. L. 493 (2018); Jan Fichtner et al., *Hidden Power of the Big Three? Passive Index Funds, Re-Concentration of Corporate Ownership, and New Financial Risk*, 19 BUS. & POLS. 298 (2017).
[340] *See* Adriana Z. Robertson, *Passive in Name Only: Delegated Management and "Index" Investing*, 36 YALE J. REG. 795 (2019) ("Far from being passive, [U.S. stock market] indices represent the deliberate decisions made by their managers.").
[341] Bernard S. Black, *Agents Watching Agents: The Promise of Institutional Investor Voice*, 39 UCLA L. REV. 811, 813 (1992).
[342] *See* Bernard S. Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520, 522 (1990) ("Most modern corporate scholars, especially those with a law-and-economics bent, accept shareholder passivity as inevitable.").

> shareholder's monitoring, each shareholder finds it in his self-interest to be passive.[343]

Berle and Means had problematized passivity, presenting it as a blameworthy debasement of stockholding that justified stockholders' loss of prerogatives. The law-and-economics movement reimagined passivity as rational decision-making by overextended, welfare-maximizing investors.[344] Passivity had ceased to be a *problem*, and had become a *solution* to a problem—the problem of "bounded resources." Once reconceived this way, passivity seemed rational, even desirable.[345] Corporate law no longer had to worry about fixing shareholder passivity, and could focus on reducing agency costs. Business law scholars began writing reflexively about "rationally passive" shareholders.[346] In turn, shareholders' rational passivity caused them to devalue control rights, law-and-economics scholars explained; the only thing a rational shareholder cared about was stock price.[347]

The rise of intermediation in the 1960s and 70s, which shifted investment away from retail stockholding, didn't just obscure the gender of stockholding and return voting control to male investment managers. It also encouraged the use of diversification as an investment strategy, which turned the "rationally passive" shareholder into a self-fulfilling prophesy. Whereas, before 1960, most stockholders held stock in relatively few companies, diversified investors held equity interests in many companies. As the number of companies in their stock portfolios grew—and in the absence of mechanisms that would have made collective action possible—the average investor did eventually hold a portfolio of stock in too many companies to participate actively in shareholder governance in all of them.[348] Thus,

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[343] Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1171 (1981).

[344] *See, e.g.*, John C. Coffee, Jr., Robert Jackson, Jr., Joshua R. Mitts & Robert E. Bishop, *Activist Directors and Agency Costs*, 104 CORNELL L. REV. 381, 443 (2019) ("Passive investors are passive because they logically prefer liquidity to control.").

[345] *See, e.g.*, Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1430 n.20 (1993) (to "require shareholders to actively participate in firm management" in a "large firm" would "result in chaos").

[346] *See, e.g.*, Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 895 (2013) ("As in the standard Berle-Means analysis, beneficial owners are rationally passive; governance rights are of little value to them.").

[347] Ralph K. Winter told a Senate subcommittee in 1977 that "the great bulk of shareholder in the United States do not regard shareholder power as being a very important issue to them and certainly do not regard it as anything directly related to the yield on their investments." Testimony of Ralph K. Winter, Jr., Professor of Law, Yale University, *in* "The Role of the Shareholder in the Corporate World," Hearings before the Subcommittee on Citizens and Shareholders Rights and Remedies of the Committee on the Judiciary, United States Senate, Ninety-fifth Congress, First Session, Part 1 (June 27, 28, 1977), at 80; *see also* James D. Nelson, *The Freedom of Business Association*, 115 COLUM. L. REV. 461, 497 (2015) (shareholder passivity "leads individual shareholders to value the corporations in which they invest primarily, if not exclusively, for the instrumental financial returns they promise").

[348] One articulation of the standard view is found in Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1430 n.20 (1993) ("Shareholders want to be passive investors holding a diverse portfolio of many stocks. Fully diversified shareholders have neither the time nor the resources to monitor actively the conduct of a particular corporation's business or the solvency of their fellow shareholders.").

inattentiveness to company-level governance did eventually become a feature of modern investment.

Today, business law scholars describe managerial capitalism as a time when small shareholders lacked both "the aptitude" and "the inclination" to participate in corporate affairs.[349] This version of history elides how gender bias may have influenced views about stockholders—what they were capable of, and their suitability for shareholder governance—in the early development of corporate governance theory. Ideas about how small stockholders were "irresponsible,"[350] "docile,"[351] "supine,"[352] "weak,"[353] in need of education[354], and "not qualified to challenge the judgment of managers"[355] drew on negative stereotypes about women, who made up a significant proportion of small stockholders. Evidence establishes that the powerful passive woman/active man stereotype has distorted even scientific understandings about molecular physics.[356] It is not much of stretch to consider that gender bias, common to this period in history, may have influenced male business leaders to view small shareholders as unsuited to a role in shareholder governance in part *because* they included so many women.

Today, there is little to suggest that the trope of the passive shareholder retains gender-coded meaning. It is unlikely that twenty-first-century corporate law scholars who write about "passive shareholders" intend to vest the phrase with sexist meaning. However, corporate law theory would benefit from deeper thinking about the passive/active dichotomy so prevalent in the literature. That dichotomy may have obscured an interest on the part of some shareholders to actively participate in the management of public companies. Consideration of the trope's gendered origin may, in fact, shed light on the current (and rising) popularity of shareholder activism, a trend that undermines the traditional view, typically asserted as a fact, that shareholders care only about stock price.

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[349] Brian R. Cheffins, *The Rise and Fall (?) of the Berle-Means Corporation*, 42 SEATTLE U. L. REV. 445, 447 (2019); Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J. L. & ECON. 395, 397 (1983) (Berle and Means believed "the passive investors have neither the willingness nor the ability to manage").

[350] BERLE & MEANS, MODERN CORPORATION, at 355.

[351] JOHN H. SEARS, THE NEW PLACE OF THE STOCKHOLDER 62 (1929).

[352] *Id.*

[353] Eugene V. Rostow, To Whom and For What Ends Is Corporate Management Responsible?, *in* THE CORPORATION IN MODERN SOCIETY (Edward S. Mason, ed.) (Harvard 1959), at 54.

[354] John Beachy Slocum, The Use of Public Relations Activities by Management as a Means of Securing Stockholders' Cooperation, a Thesis Presented to the School of Commerce, The University of Southern California, August 1949, at 10.

[355] *Corporate Democracy*, COUNCIL COMPASS, Jan.-March 1954, at 4.

[356] For example, biologists misunderstood the process of fertilization for years because they assumed that (male) sperm was the "aggressor" in fertilization and the (female) egg was merely a "passive" recipient. Research in the 1980s disproved this characterization, which attributed stereotypes about human behavior to molecular processes. *See* Evelyn Fox Keller, *Gender and Science: Origin, History and Politics*, 10 OSIRIS 26, 34-35 (1995); Emily Martin, *The Egg and the Sperm: How Science Has Constructed a Romance Based on Stereotypical Male-Female Roles*, 16 J. WOMEN CULT. & SOC. 485, 492 (1991) (the erroneous narrative was "rewritten in a biophysics lab at Johns Hopkins University—transforming the egg from the passive to the active party").

C. Gender and Stakeholderism

At the end of their book, Berle and Means asked: who should receive the profits of industry? Their answer gave voice to a developing trend in business law that cast corporate leaders as "industrial statesmen" and empowered them to operate the corporation in the best interests of society, according to their own views about what that meant.[357]

Berle and Means not only argued that passive stock ownership was "irresponsible," but that "the owners of passive property, by surrendering control and responsibility over the active property, have surrendered the right that the corporation should be operated in their sole interest."[358] In other words, Berle and Means believed that stockholders' passivity justified a move away from treating shareholders' interests as primary, opening up the possibility that shareholders' interests would be subordinated to those of other groups, such as labor and consumers. As punishment for their passivity, Berle and Means would have removed shareholders from the center of the enterprise to the periphery, and given corporate managers the power to balance their interests against those of other stakeholders. This was a significant loss of shareholders' rights, and Berle and Means acknowledged as much.

The demotion of shareholders' interests from primacy to equal footing with the interests of labor and other stakeholders would, today, be called "stakeholderism."[359] Although the word "stakeholderism" was not in use during managerial capitalism, many business leaders and corporate law scholars of that era endorsed ideas that would be described today as "stakeholder values."[360] Berle and Means wrote that it was "almost essential" for control of public companies to "develop into a purely neutral technocracy, balancing a variety of claims by various groups in the community and assigning to each a portion of the income stream on the basis of public policy rather than private cupidity."[361]

Once we bring the feminization of capital to the foreground, Berle and Means's depiction of "passive" stockholding—that it debased stockholding, and that stockholders'

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[357] *See* Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 444 (2001) (describing "an important strain of normative thought from the 1930s through the 1960s that extolled the virtues of granting substantial discretion to the managers of large business corporations" who would "guide business corporations to perform in ways that would serve the general public interest").

[358] BERLE & MEANS, MODERN CORPORATION, at 355; *id.* at 355-56 (the control groups "have placed the community in a position to demand that the modern corporation serve not alone the owners or the control but all society").

[359] For a discussion of stakeholderism and its meanings, see generally, Kevin V. Tu, *Socially Conscious Corporations and Shareholder Profit*, 84 G.W. L. REV. 121, 127-131 (2016) (defining stakeholderism to mean that, since corporations have "broader obligations to society," "directors should consider the interests of nonshareholder stakeholders such as employees, customers, creditors, the environment, and the community, and balance those interests with profit goals").

[360] For an early articulation, see Howard A. Marple, *Who Owns Monsanto*, MONSANTO MAGAZINE (Jan. 1939) at 12 ("the management of Monsanto, or of any other company owned by thousands of persons and organizations, functions just as the management, or government, of a democracy functions—in the interests of everyone concerned"). For an example of the term "stakeholder values" in recent use, see Jayne W. Barnard, *At the Top of the Pyramid: Lessons from the Alpha Women and the Elite Eight*, 65 MARYLAND L. REV. 315 (2006) (developing and discussing a "Stakeholder Sensitivity Index").

[361] BERLE & MEANS, MODERN CORPORATION, at 356.

passivity justified the subordination of their interests—appears to echo themes of gender bias that were common in that era.[362] Over the next decades, the passivity thesis justified both the assumption of corporate control by managers, and the shift of corporate resources away from stockholders to other groups, such as labor. In both instances, power and surplus were transferred away from a group that included many women to groups that included few of them.

In August 2019, the Business Roundtable returned stakeholderism to the national conversation with a public statement signed by 181 leading CEOs.[363] The statement expressed a commitment to deliver value to all of a business's stakeholders, not merely shareholders. In response to the Business Roundtable statement and subsequent events, including the Covid-19 pandemic and the stock market crash of 2020, a growing literature has examined the stakeholder theory of corporate governance.[364] What the literature makes clear is that, like the version of stakeholderism that was popular during managerial capitalism, this new stakeholderism expresses power through corporate governance.[365] It advances a theory about how the corporate surplus should be allocated, and whose interests within the corporation should predominate. In evaluating new claims about the benefits of stakeholderism, corporate theorists should recall the feminization of capital and consider the *gendered* nature of power expressed through corporate governance. Even today, women make up a small proportion of corporate managers[366]—though the gender implications of changing the balance of power between shareholders and managers is not well theorized, particularly in light of the fact that institutional investors are also dominated by male managers.

D. Gender and the "Average" Shareholder

Much of the earliest economic reasoning applied to corporate law built upon assumptions about the interests of the "average" stockholder. Bayless Manning typified this when, in 1958, he asserted that "the average investor" "is an economic investor," and "[t]he appeal of common stock to the average investor lies in its peculiar economic features—

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[362] *Cf.* Nikki Mandell, *Will the Real Businessman/Businesswoman Stand Up?: The Historical Implications of Regendering Business Success in the Early Twentieth Century*, 15 ENTERPRISE & SOC. 499, 503 (Sept. 2014) (noting the reconfiguration of "the Victorian equivalency between manhood and entrepreneurial independence into a twentieth-century equivalency between manhood and managerial status").

[363] *See* Business Roundtable, Statement on the Purpose of a Corporation (Aug. 19, 2019), at https://opportunity.businessroundtable.org/ourcommitment/; *see also* Cathy Hwang & Yaron Nili, *Shareholder-Driven Stakeholderism*, 2020 U. CHI. L. REV. ONLINE 1 (April 15, 2020).

[364] *See, e.g., id.*; Colin Mayer, *Shareholderism Versus Stakeholderism—A Misconceived Contradiction*, ECGI Law Working Paper No. 522/2020 (SSRN); Lucian Bebchuk and Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, __ CORNELL L. REV. __ (*forthcoming*, 2021).

[365] *See, e.g.*, GRANT M. HAYDEN & MATTHEW T. BODIE, RECONSTRUCTING THE CORPORATION: FROM SHAREHOLDER PRIMACY TO SHARED GOVERNANCE 159 (2020) (observing that "stakeholder theory seems content with the current power structure").

[366] *See* AARON A. DHIR, CHALLENGING BOARDROOM HOMOGENEITY: CORPORATE LAW, GOVERNANCE, AND DIVERSITY 37 (2015) ("Women, who make up a slim majority of the population, occupy slightly less than 17 percent of spots in Fortune 500 boardrooms and just 3.1 percent of board chair positions.").

greater return, speculative potential and inflationary hedge."[367] In addition, the archetype of the "reasonable investor" casts a long shadow over financial regulation.[368] Where do women fit into these paradigms? As the number of women in the shareholder class grew to exceed the number of men, business experts side-stepped the "statistical side of the story" to perpetuate a myth that stockholding was predominantly male.[369] To the extent that leading business experts, like Manning, reasoned from their own assumptions about the identity of "the average investor," we might ask: did it matter that women were left out of the equation?

1. Curating the Image of Stockholding as Male

In the 1950s and 60s, many important business organizations portrayed shareholding–falsely—as the business of men. Examples abound. In 1955, three important companies publicly celebrated a milestone stockholder, just as AT&T had celebrated its millionth shareholder in 1951. The companies were General Motors, Standard Oil of New Jersey, and General Electric. All three chose a male stockholder to celebrate, even though all three had more women shareholders than men. In fact, the milestone shareholder at all three companies shared the exact same demographic characteristics: he was white, married, young, and middle-class, and, in at least two of the three cases, a father of young children.[370] Standard Oil of New Jersey celebrated its 300,000th shareholder—whom it identified as a 23-year-old, white, male employee at an Oklahoma subsidiary—and showed him with his unidentified wife in photos taken at the annual meeting[371]:

[367] Bayless Manning, *Review: The American Stockholder*, 67 YALE L. J. 1477, 1492 (1958).
[368] *See* Tom C. W. Lin, *Reasonable Investor(s)*, 95 B.U. L. REV. 461, 466-67 (2015); Joan MacLeod Heminway, *Female Investors and Securities Fraud: Is the Reasonable Investor a Woman?,* 15 WM. & MARY J. WOMEN & L. 291 (2009).
[369] J. A. Livingston, *Funston Abets Myth That Women Control Wealth*, WASH. POST, June 26, 1959, at B8 (conceding the "statistical side of the story" but arguing that "[m]any women own stock in name only" because "women in our society have a big enough job—raising children and running the household").
[370] General Motors's 500,000th stockholder was recognized at the annual meeting with his unnamed wife and son. *See* General Motors Corporation, Summary of Proceedings, 47th Annual Meeting of General Motors Stockholders, May 20, 1955, at 8. The 300,000th stockholder of Standard Oil of New Jersey was recognized at that company's annual meeting, where the chairman specified that his nineteen-month-old daughter had stayed with a grandparent. *See* 73rd Annual Meeting, May 25, 1955, Standard Oil Company (New Jersey), at 12. General Electric promoted its celebration of its 300th stockholder, William Roesch, in an ad campaign, but did not include information about whether he and his wife had any children. The ads ran in the July-December 1955 issue of the *Atlantic Monthly*, and in the May 29, 1955 *New York Times.*
[371] 73rd Annual Meeting, May 25, 1955, Standard Oil Company (New Jersey), at 12.

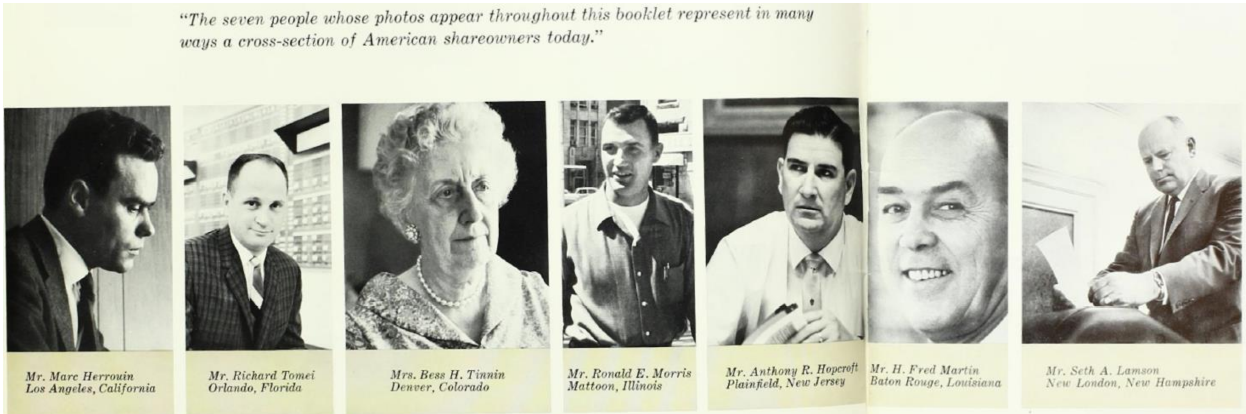
Jersey's 300,000th shareholder, P. A. Morris, Jr., of Tulsa, Oklahoma, and his wife.

Later in the same meeting, however, Standard Oil's president acknowledged that more women than men were shareholders of the company, "by a considerable majority."[372] All of these companies were actively curating their public images by presenting their "average" stockholder as male.

The New York Stock Exchange's 1962 *Shareowner Census* provides another example. One of the headline findings of the *Census* was that women shareholders outnumbered men. A reader who opened the glossy pages of the *Census* would have found the photographs of seven individuals whose images recurred throughout the publication, with a caption explaining that "[t]he seven people whose photos appear throughout this booklet represent in many ways a cross-section of American shareowners today."[373] But six of the seven stockholders pictured were men:

[372] 73rd Annual Meeting, May 25, 1955, Standard Oil Company (New Jersey), at 15. General Electric ran print advertisements identifying its 300,000th stockholder as William Roesch, "operator of a meat market in Buffalo." Roesch was pictured in the ad, with his unnamed wife, being greeted by GE's president at the company's annual meeting. General Electric Advertisement, ATLANTIC MONTHLY (July-Dec. 1955), at unnumbered page.

[373] NEW YORK STOCK EXCHANGE, THE 17 MILLION: 1962 CENSUS OF SHAREOWNERS IN AMERICA i (1962).



The images powerfully distorted the readers' impression of the gender of American stockholding. The idea, apparently, was to present shareholding as something that *men* did, even though the publication's own study proved empirically that most individual shareholders were women.

2. Women's Economic Interest in Gender Equity

It is likely that women's interests as stockholders were (and are) similar to men's.[374] However, in at least one documented area, we know that women stockholders expressed a special interest: corporate policies concerning gender equality. Especially after World War II, women stockholders used shareholder activism to try to open up corporate management opportunities for women. The widespread economic discrimination experienced by women in the early twentieth century prompted them, as "owners" of enterprise, to pursue what are today widely viewed as "social" goals within firms.[375]

In addition to her campaign to put women on boards of directors, for example, activist Wilma Soss challenged corporate policies that required women employees to retire at age 55—ten years before men were required to retire, and five years before the age at which a woman was eligible for Social Security benefits. Although women's efforts ultimately failed to open up corporate boards to women, there is evidence that they succeeded at changing some companies' retirement age policies for women.[376]

Assumptions about the "average" stockholder that erased women also erased these "social" interests from shareholder governance. Bayless Manning might have been correct when he asserted that "the average investor" was "an economic investor," but he was wrong

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[374] This is supposition; I am aware of no sex-disaggregated study of shareholder interests from this period.

[375] *See, e.g.*, Virginia Harper Ho, *Risk-Related Activism: The Business Case for Monitoring Nonfinancial Risk*, 41 J. CORP. L. 647, 650 (2016) (describing board diversity as one of several "topics generally considered to be 'social' goals of niche investors").

[376] *See Women Stockholders Ready for New Fight*, DAYTON DAILY NEWS, September 2, 1951, at 2 (describing a fight over women's mandatory age of retirement at Standard Oil Company of New Jersey that ended with the company raising the age to 60); 70th Annual Meeting, Standard Oil Company (New Jersey), May 28, 1952, at 15-17 (memorializing a discussion at the stockholders meeting about raising women's mandatory age of retirement to 65).

to the extent that he assumed this interest was limited to stock price.[377] Inequitable gender-based corporate policies of the era were economic matters for women.

E. Women and Corporate Control

This Article opened with an account of AT&T's 1951 shareholders meeting, where women shareholders demanded board representation, citing women's significant shareholding and employment at the company. Women shareholders had outnumbered men at AT&T since at least 1910, and had been demanding board gender diversity since at least 1933.[378] Yet women shareholders would wait almost forty years, until 1972, for the first woman candidate to be nominated by management for election to AT&T's board—and only then in apparent response to high-profile sex discrimination charges against the company.[379] AT&T's story reveals the enduring resistance that women shareholders faced when they sought to translate their significant shareholding into managerial power at public companies.

In 1949, Sidney J. Weinberg, the chairman of Goldman Sachs and a director at more than thirty big companies, including General Electric, wrote in the pages of the *Harvard Business Review* that he saw "no reason why a competent woman should not be elected to the board, especially now when some companies have more women than men as stockholders."[380] Weinberg had served for years on the board of General Foods alongside Marjorie Post Davies, one of the first women directors of a major U.S. company.[381] Davies, credited with leading General Foods to become (to great profit) a pioneer in frozen food, had gained a seat on the board of General Foods in 1936 because she was the company's largest stockholder.[382]

In the early 1950s, two big public companies, Western Union and Radio Corporation of America (RCA), responded to the demands of women stockholders by adding a woman to their boards. Western Union, whose shareholders had been evenly divided by gender since the nineteenth century, was experiencing serious investor dissatisfaction.[383] The

[377] Bayless Manning, *Review: The American Stockholder*, 67 YALE L. J. 1477, 1492 (1958).
[378] Merryle Rukeyser, Women Would Aid Business as Directors, Pittsburgh Sun-Telegraph, April 18, 1933, at 25.
[379] The first woman nominated by AT&T's management to its board of directors was Catherine B. Cleary. See Woman Nominated to A.T.&T. Board, N.Y. Times, February 18, 1972, at 47. At the time, AT&T was fighting high-profile charges that it discriminated against women in employment. See EEOC Bias Report Calls AT&T 'Largest Oppressor of Women,' Wash. Post, Dec. 2, 1971, at A1; FCC Orders Hearing On Charges That AT&T Discriminates in Hiring, Wall St. J., January 22, 1971, at 10.
[380] Sidney J. Weinberg, *A Corporation Director Looks at His Job*, 27 HARV. BUS. REV. 585, 587 (Sept. 1949). Weinberg continued, "In fact, it would be desirable to get a woman's point of view, particularly for corporations dealing directly with women as customers." *Id.* According to Weinberg's obituary, he was "in such demand that at one time he sat of 31 boards of directors, most of them the bluest of the blue chip companies." Alden Whitman, *Sidney J. Weinberg Dies at 77; 'Mr. Wall Street' of Finance*, N.Y. TIMES, July 24, 1969, at 1.
[381] The Annual Reports of General Foods in 1936 and 1951 show both Marjorie Post Davies and Sidney J. Weinberg as directors.
[382] *See Sales and Earnings of General Foods Gain in 1st Quarter*, WALL ST. J., April 9, 1936, at 1. The announcement that Davies had joined the General Foods board as its first woman ran on the front page of the *Wall Street Journal*.
[383] *See Many Holders of Stocks,* N.Y. TIMES, July 14, 1899, at 1 ("[a]bout one-half of the stockholders [of Western Union Telegraph Co.] are women"); *European Holdings of American Securities*, WALL ST. J., September 7, 1914, at 5 (reporting that

company added Madeleine Edison Sloane, the daughter of Thomas A. Edison, to its board in 1950, shortly after a relatively young new president, Walter P. Marshall, took the helm.[384] That same year, after being targeted for activism by women investors[385], RCA added Mildred McAfee Horton, the former president of Wellesley College, to the board of its subsidiary, the National Broadcasting Company (NBC).[386] After Horton's tenure was judged a success, RCA added Horton to its own board in October 1951.[387]

Thus, by 1951, three major companies had women on their boards of directors: one as a result of sheer shareholding power (General Foods), one at a company with a significant number of women stockholders and stockholder dissatisfaction (Western Union), and one at a company that had apparently acted to preempt an activist campaign by women stockholders (RCA).[388]

In the 1950s, two other major American companies ended up with women directors as a result of proxy fights. In both cases—the New York Central Railroad proxy fight of 1954, and the Montgomery Ward proxy fight of 1955—an insurgent trying to gain control of the company put a woman on his board slate to attract votes from women stockholders. At New York Central, the insurgent won, and Lila Bell Acheson Wallace became the first woman director of that company.[389] At Montgomery Ward, the incumbent president kept control through a last-minute deal with the Teamsters union, which pledged to vote its shares for management. Nonetheless, the insurgent group won three seats on the nine-person board.[390] Bernice Fitz-Gibbon, an advertising executive, was elected to one of those seats, but served only a single year.[391]

Around this time, the term "Aunt Janes" became common slang for small stockholders, reflecting the significant proportion of small stockholders who were women.[392] Although the term would eventually be used pejoratively, it originated in the New York Central proxy fight. To win control in what would be a very close race, Robert R. Young

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on June 30, 1914, Western Union had 14,144 stockholders registered on its books, 7,175 of whom were women); *Shouting Enlivens Annual Meetings of Nation's Firms*, DES MOINES REGISTER, May 8, 1949, at 55 (leading with a description of the "[f]ireworks" at Western Union's annual meeting).

384 *See Owners Arise! Annual Meetings Draw Record Attendance and Pointed Questioning*, WALL ST. J., April 27, 1949, at 1 (describing how, at Western Union's 1949 annual meeting, shareholder activist Lewis Gilbert "asked why Western Union should not be liquidated").

385 Andy Logan, *Hoboken Must Go!*, NEW YORKER, March 17, 1951, at 48 (describing how Soss targeted RCA for activism).

386 *R.C.A. Elects Woman to Board of Directors*, BALTIMORE SUN, October 6, 1951, at 16.

387 *Id.*

388 *Madam Director*, TIME, Oct. 15, 1951, at 114.

389 DAVID KARR, FIGHT FOR CONTROL 26-27 (N.Y.: Ballantine, 1956).

390 *Id.* at 166.

391 *Id.* at 168; Richard J. H. Johnston, *3 of 9 Ward Seats Won By Wolfson*, N.Y. TIMES, May 4, 1955, at 23.

392 *See, e.g.*, DAVID KARR, FIGHT FOR CONTROL (N.Y.: Ballantine, 1956) at pg. 15; 27; 35; and 38 (discussing the role of Aunt Janes in the New York Central Railroad proxy fight); *Aunt Janes and Millionaires*, LIFE, June 7, 1954, at 34; Lewis D. Gilbert, DIVIDENDS AND DEMOCRACY (1956). By the 1980s, Aunt Jane," and the related "Aunt Millie," were recognized as derogatory terms. *See, e.g.*, JOHN DOWNES & JORDAN ELLIOT GOODMAN, BARRON'S FINANCE & INVESTMENT HANDBOOK 205 (2003) (defining "Aunt Millie" as a "derogatory term for an unsophisticated investor").

needed the Central's women shareholders to vote for his takeover bid.[393] So, he added a woman to his slate of board candidates, and he won the vote. "Robert R. Young's victory proved that it is often the Aunt Janes who hold the key to victory," one writer acknowledged.[394]

The story of how women gained board seats at some of the nation's most important public companies in the early 1950s reveals something important about gender and corporate power. In the middle of the twentieth century, women were able to gain representation on corporate boards only by leveraging their shareholding power; contests for corporate control were an opening for women, but only through the decisions of male business leaders to nominate women to board slates in the first place. Outside these circumstances, women's demands for representation were met with resistance rooted in gender bias.[395]

Indeed, evidence suggests that women's demands for board representation at AT&T led the company to cease its longstanding practice of disclosing sex-disaggregated data about its shareholders in its company reports. AT&T published information about the percentage of women shareholders in its annual reports every year from 1910 to 1950, with only a few exceptions. However, after AT&T's April 1951 shareholders meeting, where women activists cited such data to support their claim for board gender diversity, AT&T ended the practice.[396] The company's decision to *stop* disclosing the sex of its shareholders may have reduced the ability of shareholder activists to make claims for women's board representation.

In the twenty-first century, a growing literature has puzzled over the lack of women on public company boards. That literature has proposed a range of explanations and solutions, but it has rarely plumbed history for clues about the problem. The feminization of capital adds a new dimension to this story, by showing that even when women were widely recognized as a significant—even a dominant—demographic among shareholders, social forces and gender politics limited their ascension to corporate control. The feminization of capital, and its subsequent erasure from memory, point us at persistent problems with the gendered nature of corporate power. They also reveal that we still have important, even surprising, lessons to learn from our own history.

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[393] *See* Gerald M. Loeb, *It Is The Time Of The Proxy*, BALTIMORE EVENING SUN, April 22, 1968, at 31.
[394] DAVID KARR, FIGHT FOR CONTROL 38 (N.Y.: Ballantine, 1956).
[395] For examples of gender bias regarding women board candidates, *see supra* notes __, __, and __.
[396] After it produced its 1950 annual report, which was published right before the 1951 annual shareholders meeting, AT&T did not again disclose the percentage of its women shareholders in its annual report except for one year, 1960.

CONCLUSION

From its start, modern corporate capitalism involved meaningful participation by women in share ownership. Among the three groups whose interrelation defined twentieth-century corporate capitalism—labor, capital, and management—*capital* was the first to show significant female participation.[397] By comparison, women did not become a major part of the wage-earning labor force until the second half of the twentieth century, and achieved parity of numbers with men in the work force only at the century's end.[398] Over the same period, women *never* held a significant proportion of managerial jobs, particularly at the top of the corporate hierarchy.[399] By synthesizing a history of modern corporate capitalism that recognizes a role for women as a major stockholder demographic, this Article has made an important, original contribution to the literature of several fields. It has shown that the emergence and growth of stock markets transformed women's roles as economic actors, providing them not only with opportunities to invest and finance businesses, but to participate in the management of business through share voting—and that women's growing numbers and *active* participation in shareholder governance was an influence on contemporaneous business leaders.

Women's significant role in public company stockholding likely influenced the path of American corporate governance. This Article has not attempted to catalog every dimension of that influence, but only to pose some fundamental questions that cut to the heart of modern corporate law theory. In light of the new historical evidence presented in this Article, corporate law must revisit some familiar ideas. Is a "separation of ownership and control" really the core division of corporate organization? Do owners have to be "weak," and managers "strong"? In the midst of changing shareholder demographics, why did corporate law move in a direction that favored market-based solutions rather than collective action by shareholders as a means to curb managerial power? Is the condition of stockholding really inherently *passive*? And, nearly seventy years after women first outnumbered men as stockholders at American public companies, why are women still largely excluded from *control* of public companies?

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[397] Women were also early owners of retail bonds, but bondholders exercised little power within corporations.
[398] *See* VICTOR R. FUCHS, WOMEN'S QUEST FOR ECONOMIC EQUALITY 12 (Harvard U. Press, 1988) ("Women's share of persons employed has increased every year since 1947 with the single exception of 1953, when it declined a trivial two-tenths of a percentage point. Starting from a proportion of 28 percent in 1947, it rose to 32 percent in 1957, 36 percent in 1967, 41 in 1977, and 45 in 1987."); U.S. Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey, 1948-2020 Annual Averages, Civilian Labor Force by Sex* (women made up 46.5% of the civilian labor force in the U.S. in 2000).
[399] *See* Terry Morehead Dworkin & Cindy A. Schipani, *The Role of Gender Diversity in Corporate Governance*, 21 U. PA. J. BUS. L. 105, 108 (2018) (in 2017, women held only 19.8% of board seats of companies in the Fortune 1000); VICTOR R. FUCHS, WOMEN'S QUEST FOR ECONOMIC EQUALITY 14 (Harvard U. Press, 1988) (noting that "[o]ver two-thirds" of women's gain in "higher-level professional and managerial occupations" occurred after 1975).