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CUMULATIVE VOTING AND CLASSIFICATION OF DIRECTORS—THE
WOLFSON AND WINOUS CASES

Historical Background

The right to vote is an incident of stock ownership¹ and therefore a valuable property right;² it affords the stockholder a means of protecting his investment.³ At common law each shareholder was limited to one vote regardless of the size of his holdings.⁴ Subsequently, statutes were enacted giving stockholders one vote for each share of stock owned.⁵ However, directors continued to be elected under the "straight voting" system which enabled a majority controlling 51% of the votes to elect the entire board of directors.⁶ This system of voting was in keeping with the theory that the majority had a "right" to control the corporation and direct its affairs.⁷

A second theory of corporate control, that of minority rights and minority representation, gained wide acceptance shortly after the Civil War, largely as a result of public indignation over the then current business scandals.⁸ This school of thought asserted that the minority had a right to representation on the board of directors in order to provide a check on the majority in control.⁹ Proponents of this view were among the members of the Committee on Corporations of the Illinois Constitutional Convention of 1870. Apparently inspired by a contemporaneous proposal for cumulative voting for the lower house

¹ See *Matter of North Shore Staten Island Ferry Co.*, 63 Barb. 556 (N.Y. Gen. T. 2d Dep't 1872); *Matter of Giant Portland Cement Co.*, 26 Del. Ch. 32, 21 A.2d 697 (Ch. 1941); *Fein v. Lanston Monotype Mach. Co.*, 196 Va. 753, 85 S.E.2d 353, 360 (1955).

² See *Steinberg v. American Bantam Car Co.*, 76 F. Supp. 426 (W.D. Pa. 1948); *Lord v. Equitable Life Assurance Soc'y*, 194 N.Y. 212, 87 N.E. 443 (1909); *Blaustein v. Pan Am. Petroleum & Transp. Co.*, 263 App. Div. 97, 31 N.Y.S.2d 934 (1st Dep't 1941), *aff'd*, 293 N.Y. 281, 56 N.E.2d 705 (1944).

³ See *Lord v. Equitable Life Assurance Soc'y*, *supra* note 2 at 228-29, 87 N.E. at 448-49; *Stokes v. Continental Trust Co.*, 186 N.Y. 285, 78 N.E. 1090 (1906).

⁴ *Matter of American Fibre Chair Seat Corp.*, 241 App. Div. 532, 535, 272 N.Y. Supp. 206, 209 (2d Dep't), *aff'd*, 265 N.Y. 416, 193 N.E. 253 (1934) (dictum); *Proctor Coal Co. v. Finley*, 98 Ky. 405, 33 S.W. 188, 190 (1895) (dictum).

⁵ *Ibid.* See, e.g., *Brooks v. State ex rel. Richards*, 26 Del. (3 Boyce) 1, 79 Atl. 790 (1911).

⁶ See BALLANTINE, *CORPORATIONS* § 177 (rev. ed. 1946); Comment, *Cumulative Voting—Removal, Reduction And Classification Of Corporate Boards*, 22 U. CHI. L. REV. 751 (1955).

⁷ See *Holcomb v. Forsyth*, 216 Ala. 486, 113 So. 516 (1927); *Luthy v. Ream*, 270 Ill. 170, 110 N.E. 373 (1915); *Fein v. Lanston Monotype Mach. Co.*, 196 Va. 753, 85 S.E.2d 353 (1955).

⁸ See WILLIAMS, *CUMULATIVE VOTING FOR DIRECTORS* 20-22 (1951).

⁹ See STEVENS, *CORPORATIONS* 530 (2d ed. 1949); Comment, *supra* note 6, at 752.

of the state legislature, the Committee recommended a provision for mandatory cumulative voting in corporate elections. This initial cumulative voting proposal, which was ultimately accepted and became part of the Illinois Constitution, reads as follows:

The General Assembly shall provide, by law, that in all elections for directors or managers of incorporated companies, every stockholder shall have the right to vote, in person or by proxy, for the number of shares of stock owned by him, *for as many persons as there are directors or managers to be elected*, or to cumulate said shares, and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock shall equal, or to distribute them on the same principle among as many candidates as he shall think fit; and such directors or managers shall not be elected in any other manner.¹⁰

Within a decade, mandatory cumulative voting provisions, modeled after that of Illinois, were incorporated into the constitutions of five states.¹¹ The general acceptance of cumulative voting is further evidenced by the fact that mandatory cumulative voting provisions are currently found in the constitutions of thirteen states¹² and in the statutes of eight others,¹³ while permissive cumulative voting is authorized in eighteen states.¹⁴

Despite the fact that nine states make no provision for cumulative voting,¹⁵ and the fact that such legislation has recently been defeated in two successive sessions of the Wisconsin Legislature,¹⁶ there are several indications that the expansion of cumulative voting is still under way. In the Banking Act of 1933, for example, Congress provided that the stockholders of those institutions covered by the act shall have the right to cumulate their votes.¹⁷ More recently, a cumulative voting provision was inserted in the corporation code of the District of Columbia.¹⁸ In addition, the SEC, through its decisions, has fostered cumulative voting in corporations subject to its juris-

¹⁰ ILL. CONST. art. XI, § 3 (emphasis added). For cumulative voting to fully effectuate its purpose, all the directors must be voted upon at one time and not in turn. See *Wright v. Central California Water Co.*, 67 Cal. 532, 8 Pac. 70 (1885).

¹¹ Nebraska (1871); West Virginia (1872); Pennsylvania (1873); Missouri (1875) and California (1879).

¹² See WILLIAMS, CUMULATIVE VOTING FOR DIRECTORS 7-8 (1951).

¹³ *Id.* at 34.

¹⁴ *Id.* at 9 (Texas adopted permissive cumulative voting this year.).

¹⁵ Alabama, Connecticut, Georgia, Iowa, Massachusetts, New Hampshire, Oregon, Vermont and Wisconsin make no provision for cumulative voting. There was no cumulative voting at common law; the right exists only by virtue of statute. See *Matter of Brophy*, 13 N.J. Misc. 462, 179 Atl. 128 (Sup. Ct. 1935). *But see* *Quilliam v. Hebbroville Utilities, Inc.*, 241 S.W.2d 225 (Tex. Civ. App. 1951).

¹⁶ See Young, *The Case For Cumulative Voting*, 1950 WIS. L. REV. 49 (The Wisconsin Senate defeated cumulative voting proposals in 1947 and 1949.).

¹⁷ 48 STAT. 186 (1933), 12 U.S.C. § 61 (1952).

¹⁸ D.C. CODE tit. 29, § 29-911(d) (Supp. 1955).

diction.¹⁹ Cumulative voting is also provided for in the Model Business Corporation Act which was drawn up by the American Bar Association,²⁰ and in a similar act proposed by the Commissioners on Uniform State Laws.²¹

Attempts to Limit Cumulative Voting

Majority stockholders, however, have succeeded in curtailing or eliminating cumulative voting through a number of devices. In states where the right to vote cumulatively is permissive rather than mandatory, the charters of certain corporations have been amended to replace cumulative voting with straight voting.²² The courts have usually upheld such amendments where the proper amending procedure has been followed. Although the minority stockholders may have the right of appraisal in this situation,²³ many text writers have criticized this power of the majority to abolish the cumulative voting right.²⁴ Cumulative voting may also be circumvented by removing minority-elected directors without cause.²⁵ This problem has been met in some jurisdictions by the enactment of statutes which prohibit the removal of a director without cause, if the removal is opposed by a number of votes sufficient to elect a director.²⁶ A third method employed to prevent effective use of cumulative voting is that of reducing the number of directors.²⁷ A reduction makes it more difficult, if not impossible, for a minority to gain representation, since a smaller board will necessitate a larger minority vote in order to elect a single director.²⁸ California has reached a partial solution to this problem by requiring that a reduction of the number of directors below five must be approved by more than an 80% vote.²⁹ Under this provision, a minority holding 20% of the voting power could prevent a reduction

¹⁹ See WILLIAMS, CUMULATIVE VOTING FOR DIRECTORS 14-15 (1951).

²⁰ ALI MODEL BUSINESS CORPORATION ACT § 31 (rev. ed. 1953).

²¹ MODEL BUSINESS CORPORATION ACT § 28(III), in 9 U.L.A.

²² See, e.g., *Maddock v. Vorclone Corp.*, 17 Del. Ch. 39, 147 Atl. 255 (Ch. 1929).

²³ See, e.g., *Matter of New York Hanseatic Corp.*, 200 Misc. 530, 103 N.Y.S.2d 698 (Sup. Ct. 1951).

²⁴ See BALLANTINE, CORPORATIONS 406 (rev. ed. 1946); PRASHKER, CORPORATIONS 488 (2d ed. 1949).

²⁵ See Bowes and De Bow, *Cumulative Voting At Elections Of Directors Of Corporations*, 21 MINN. L. REV. 351, 366-67 (1937). However, this power has not been frequently used. See WILLIAMS, CUMULATIVE VOTING FOR DIRECTORS 57 (1951).

²⁶ E.g., CAL. CORP. CODE ANN. § 810 (Deering, 1953); MICH. COMP. LAWS § 450.13(3) (1948); PA. STAT. ANN. tit. 15, § 2852-405 (Purdon, 1938).

²⁷ See, e.g., *Bond v. Atlantic Terra Cotta Co.*, 137 App. Div. 671, 122 N.Y. Supp. 425 (1st Dep't 1910). See Curran, *Minority Stockholders And The Amendment Of Corporate Charters*, 32 MICH. L. REV. 743, 764-65 (1934).

²⁸ See BALLANTINE, CORPORATIONS 404 (rev. ed. 1946); Curran, *supra* note 27, at 764-65.

²⁹ CAL. CORP. CODE ANN. § 501 (Deering, 1953).

of the board of directors below five, and, by voting cumulatively, elect at least one director. Michigan has also placed restrictions on the majority's power to reduce the number of directors.³⁰ However, in most states there are no conditions imposed on such reductions. Consequently, they have been upheld despite their harmful effect upon cumulative voting.³¹ Another device employed to dilute the stockholder's cumulative voting right is the "staggered directorate" or classification of directors. Under the classification system only a portion of the board, usually three directors, is elected at each election. The effect of such a plan is to reduce the number of directors to be elected at any given time, thereby making it more difficult for the minority to elect a director.³² Thus, for example, where there is a nine man board elected annually, a minority with 25% of the voting power could elect two directors each year. However, if that board is classified, so that only three directors are to be elected each year, the minority holding 25% of the voting power would be unable to elect a single director.³³ Despite this seemingly obvious conflict between classification of directors and cumulative voting, provision for staggered elections is made in approximately thirty-three states.³⁴ In a few jurisdictions the problem will never arise since annual election of all directors is required by statute.³⁵

The Wolfson and Winous Cases

During the eighty-five years that have passed since cumulative voting was first proposed, the classification-cumulative voting conflict appears to have been considered in only two decisions. In one case three judges were of the opinion that classification of directors was of doubtful validity, while the court in the other case denied an injunction against a staggered election.³⁶ This was the state of the law when the case of *Wolfson v. Avery*³⁷ was presented to the Supreme Court of Illinois. The plaintiff, a minority owner of common stock of Montgomery Ward & Company, had protested to the defendants that the by-law which authorized the election of only one-third of the company's nine directors each year was unlawful. Subsequently the

³⁰ MICH. COMP. LAWS § 450.13(3) (1948).

³¹ See *Bond v. Atlantic Terra Cotta Corp.*, *supra* note 27.

³² See BALLANTINE, CORPORATIONS 417 (1946); Comment, *Cumulative Voting—Removal, Reduction And Classification Of Corporate Boards*, 22 U. CHI. L. REV. 751, 754 (1955).

³³ Cf. Note, *The Wolfson Case: Cumulative Voting and Staggered Elections*, 50 NW. U.L. REV. 112, 120 (1955).

³⁴ WILLIAMS, CUMULATIVE VOTING FOR DIRECTORS 49 (1951); see text at note 44, *infra*.

³⁵ ALA. CODE tit. 10, § 23 (Supp. 1953); CAL. CORP. CODE ANN. §§ 805, 2201 (Deering, 1953); WYO. COMP. STAT. ANN. § 44-109 (Supp. 1955).

³⁶ See note 33 *supra*, at 114 n.7.

³⁷ 6 Ill.2d 78, 126 N.E.2d 701 (1955).

plaintiff filed a complaint against the company and its directors, seeking a declaratory judgment that Section 35 of the Illinois Business Corporation Act, which authorized classification of directors, and the company's by-law enacted pursuant thereto, were unconstitutional and void. The entire litigation turned upon the interpretation to be given the cumulative voting provision of the Illinois Constitution. The defendants contended that the purpose of cumulative voting is to give the minority an opportunity to obtain *some representation*, while the plaintiff asserted that the right was meant to give the minority *representation proportionate to its holdings*. The defendants claimed that the words of the constitution, guaranteeing stockholders the right to vote cumulatively "for as many persons as there are *directors or managers to be elected*,"³⁸ indicate that it was contemplated that less than all directors might be elected at each election. Moreover, it was contended that the words "to be elected" would be rendered meaningless if the court interpreted the constitution as requiring the selection of an entire board at each election. The plaintiff, on the other hand, asserted that the words "to be elected" did not relate to the number of directors up for election, but merely indicated that the framers were aware of the fact that the number of directors on a board may vary, and consequently no specific number was mentioned. Lastly, the defendants pointed out that the fact that classification increases the number of votes necessary to elect a director is no real objection to classification, since the same effect could legally be produced by reducing the number of directors to three.

The court, however, affirmed the determination of the lower court which had granted the plaintiff's motion for judgment on the pleadings, holding the statute and by-law providing for classification of directors to be repugnant to the constitutional guarantee of cumulative voting. The court adopted the view that the framers of the Illinois Constitution intended cumulative voting to give the minority an opportunity for proportional, and not merely some, representation. It stated that:

It is true, as defendants urge, that the constitutional provision does not insure a voting strength which is precisely proportionate to stock ownership, and that the actual operation of the provision in a particular situation will depend upon three variable factors: the total number of shares, the number held by the stockholder, and the number of directors. But these variable factors are inherent in the language of the constitution. Their presence does not, we think, authorize us to sanction the introduction of another variable which is not inherent,—classification of directors by terms.³⁹

....

As we have indicated, the general purpose of the provision, as disclosed in the debates of the constitutional convention and in contemporaneous com-

³⁸ ILL. CONST. art. XI, § 3 (emphasis added).

³⁹ *Wolfson v. Avery*, *supra* note 37, 126 N.E.2d at 707.

ments and explanations in the press, was to afford a minority protection in proportion to its voting strength. In the light of such purpose and the evil sought to be remedied, the section cannot be construed to authorize a method of selecting directors which results in impairing the value of the right.⁴⁰

The court resolved the difficulty caused by the vagueness of the phrase "to be elected"⁴¹ by construing it to mean the whole number of directors. In reaching the conclusion that the words "to be elected" did not authorize the election of less than the entire board, the court noted that the identical wording is found in the Illinois constitutional provision for political cumulative voting, wherein the number of representatives is permanently set at three.⁴² Accordingly, it was reasoned that the words "to be elected" were not intended to give the right to vary the number to be elected at each election, but rather were to be read in conjunction with the remainder of the provision and to apply to the entire number of directors.

Justice Hershey, in his dissenting opinion, vigorously advanced the defendants' position and asserted that "the effect of the decision is to judicially amend the Illinois constitution."⁴³ He stressed the fact that thirteen delegates to the Illinois Constitutional Convention were among the members of the legislature that enacted the classification statute. In addition he placed much emphasis on the general acceptance of the principle of classification, stating that:

The results of a survey made of 51 jurisdictions (the 48 states plus Hawaii, District of Columbia and the Federal government) disclose the following: 36 permit or require classification of directors, and 4 more probably permit such classification and election for staggered terms. 23 jurisdictions have mandatory cumulative voting for directors either by statute or by constitutional provision, and 20 more have permissive cumulative voting if the articles of incorporation so provide. And 13 States have both mandatory cumulative voting and permissive classification of directors. While this does not, of itself, support the constitutionality of this statute, it does show that classification and election for staggered terms is widely prevalent, and the Illinois statute is similar to that in force in the majority of jurisdictions.⁴⁴

While the *Wolfson* case was in progress in Illinois, a similar, though not identical case reached the Ohio Court of Appeals. In *Humphrys v. Winous Co.*,⁴⁵ minority stockholders owning more than

⁴⁰ *Id.* at 710.

⁴¹ See Ballantine, *A Critical Survey Of The Illinois Business Corporation Act*, 1 U. CHI. L. REV. 357 (1934). In this article Professor Ballantine discussed the Illinois Business Corporation Act of 1933. In commenting on the cumulative voting section, he indicated that the words "to be elected" tended to confuse and placed them in parentheses, adding a question mark. *Id.* at 385.

⁴² ILL. CONST. art. IV, §§ 7, 8.

⁴³ *Wolfson v. Avery*, 6 Ill.2d 78, 126 N.E.2d 701, 712 (1955) (dissenting opinion).

⁴⁴ *Id.* at 716.

⁴⁵ 57 Ohio Op. 44, 125 N.E.2d 204 (Ct. of App. 1955).

40% of the company's stock brought an action to determine their rights in relation to a proposed amendment of the by-laws. The amendment sought to classify the company's three-man board of directors, thereby completely nullifying cumulative voting which is mandatory in Ohio.⁴⁶ The significant portion of the court's opinion is as follows:

The right of a shareholder in an Ohio corporation to cumulate his vote has been provided by statute in this state for more than fifty years. The legislature in adopting the revision of the statute dealing with corporate organization in 1927, showed clearly that it intended to strengthen the cumulative voting provision by adding to existing law the provision that a corporation cannot restrict cumulative voting by its articles or code of regulations. And when in the same act the legislature, for the first time provides that there may be classification of directors when provided for by its code of regulations, it could not have been intended that the exercise of such right could be so used as to nullify the right of cumulative voting. When the minimum number of three directors is provided for, and their terms of office are for three years, one to be elected each year, the right to cumulative voting is, in such case, completely nullified. Such a "Code of Regulation" provision under the agreed facts in this case, is in direct conflict with Section 1701.58 and is therefore, as to The Winous Company as organized under its present code of regulations, invalid.⁴⁷

In concluding, the court held that the provision for classification of directors was general in nature and restricted in application by the more specific provision which prohibited any modification of the cumulative voting right.

Aftermath of the Wolfson and Winous Cases

Although there had been few cases on this problem prior to the instant decisions, it is probable that the question will be litigated in other jurisdictions in the near future. Accordingly, it may be worthwhile to compare the approaches taken in the *Wolfson* and *Winous* cases in order to ascertain the considerations which will be determinative of future litigation.

In the *Wolfson* case the court was faced with a constitutional-mandatory cumulative voting provision which had strong support in public policy. Precedents for the strict enforcement of the cumulative voting right were found in the cases in which the courts invalidated a statute permitting directors to fill vacancies in the board,⁴⁸ and refused to construe another to mean that a corporation could issue non-voting stock.⁴⁹ Although respect must be given to the state constitution, the court appears to have given little weight to classification

⁴⁶ OHIO REV. CODE ANN. tit. 17, § 1701.55 (Baldwin, Supp. 1955).

⁴⁷ *Humphrys v. Winous Co.*, *supra* note 45, 125 N.E.2d at 210.

⁴⁸ *People ex rel. Weber v. Cohn*, 339 Ill. 121, 171 N.E. 159 (1930).

⁴⁹ *People ex rel. Watseka Tel. Co. v. Emmerson*, 302 Ill. 300, 134 N.E. 707 (1922).

of directors and the possible benefits of such a system. The fact that classification was well established in Illinois at the time of the adoption of the constitution, and the fact that thirteen delegates to the constitutional convention were among the members of the legislature which passed the classification legislation, indicate that the two provisions may not have been considered incompatible. Ironically enough, the court in the *Wolfson* case relied largely upon legislative history to show that the two could not exist side by side. The decision in the *Winous* case reflects a more lenient attitude toward classification of directors. There, the cumulative voting provision was only statutory, but mandatory nevertheless. In addition the statute provided that such right should not be restricted or qualified by any provision in the articles of incorporation or by-laws. Under these circumstances the court could have invalidated all classification. However, it chose a middle of the road course and made an effort to reconcile the two provisions. In invalidating the classification by-law, the court was careful to point out that the decision in the instant case was based on the fact that classification would completely nullify the right to vote cumulatively. The obvious inference to be drawn was that absent such complete nullification classification would be permitted.

Both decisions are noteworthy for several reasons. The *Wolfson* case was decided by the highest court of Illinois, the state in which cumulative voting originated. Moreover, in reaching its conclusion, the court made two important determinations, *i.e.*, that the cumulative voting right was designed to give minorities *proportional representation* and that the statutory language "to be elected" did not authorize classification. Since a great many cumulative voting enactments are modeled after that of Illinois, the statutory construction and the finding as to legislative intent in the *Wolfson* case will be important factors in future cases arising in other jurisdictions.⁵⁰ In states where cumulative voting is constitutionally guaranteed, or has a strong foundation in public policy, the case may even be given controlling effect.

The *Winous* case, on the other hand, will be a valuable precedent in jurisdictions having permissive cumulative voting and in states where cumulative voting is mandatory but not based on strong public policy. In the latter two situations, the outcome would probably turn upon the relative strength of the public policy behind each of the respective provisions. Broadly speaking, policy considerations favoring the retention of the right to classify would include the benefits derived from classification as well as the difficulties involved in uprooting it. Arguments have been advanced to support classification on the grounds that it provides the corporation with experienced personnel and continuity in management.⁵¹ Moreover, many statutes prescribe

⁵⁰ Cf. Legislation, *Constitutionality Of Non-Voting Stock*, 39 W. VA. L.Q. 345, 347 (1933).

⁵¹ See *Matter of Baldwinville Fed. Sav. & Loan Assoc.*, 268 App. Div. 414, 51 N.Y.S.2d 816 (4th Dep't 1944). "Although it is true that the provision as

*mandatory classification of directors*⁵² for certain types of corporations, apparently for the purpose of obtaining these advantages. As was previously mentioned, classification antedates cumulative voting and is authorized in thirty-three jurisdictions. The unforeseeable consequences of abolishing such a well established practice may militate against such a step. The position of those who favor classification has also been enhanced by several recent proposals and enactments. In 1954, Congress inserted a *permissive* cumulative voting provision in the corporation code of the District of Columbia.⁵³ It also enacted a section authorizing classification of directors.⁵⁴ The Model Business Corporation Act drawn up by the American Bar Association provides for both mandatory cumulative voting *and* classification of directors. In addition, the 1955 revisions of this act include an alternate cumulative voting section which provides for *permissive* cumulative voting if the "statutory policy" does not favor mandatory cumulative voting.⁵⁵ Both the 1955 permissive cumulative voting revision and the Model Act's classification provision were recently adopted by Texas. Accordingly, cumulative voting is now authorized in Texas, unless the charter expressly prohibits it; and classification is permitted where the board of directors consists of nine or more members.⁵⁶ Another recent enactment on the subject is the Ohio classification provision which became effective October 11, 1955.⁵⁷ This new section specifies that

to the terms of office of the directors and their classification is phrased in rather cloudy language, the purpose is evident. Patently it is the intention that, as nearly as possible, the terms of office of the directors shall be so staggered that never more than one third will expire in any one year. This will insure to the association presence on the Board always of at least two thirds who are experienced in its business. Such a provision is not an unusual one. (2 Thompson on Corporations [2d ed.], § 1080, p. 16; Banking Law, § 376, subd. 1, par. [b].)" *Id.* at 419, 51 N.Y.S.2d at 821.

⁵² *E.g.*, 38 STAT. 255 (1913), 12 U.S.C. § 308 (1952) (mandatory staggered directorate for Directors of Federal Reserve Banks); 50 STAT. 710 (1937), 12 U.S.C. § 712 (1952) (mandatory classification in National Farm and Loan Associations); see *Matter of Baldwinsville Fed. Sav. & Loan Assoc.*, *supra* note 51.

⁵³ D.C. CODE tit. 29, § 29-911(d) (Supp. 1955).

⁵⁴ *Id.* § 29-916(b).

⁵⁵ ALI MODEL BUSINESS CORPORATION ACT §§ 31, 35 (rev. ed. 1953); *Alternate Section 31 in REVISIONS AND OPTIONAL SECTIONS APPROVED BY THE COMMITTEE ON CORPORATE LAWS OF THE AMERICAN BAR ASSOC.* (1955).

⁵⁶ Texas Business Corporation Act, arts. 2.29(D), 2.33(A), Laws of Tex. 1955, ch. 64.

⁵⁷ OHIO REV. CODE ANN. tit. 17, § 1701.57(B) (Baldwin, Supp. 1955). "The articles or regulations may provide for the classification of directors into either two or three classes consisting of not less than three directors each, and that the terms of office of the several classes need not be uniform, except that no term shall exceed the maximum period [3 years] specified in division (A) of this section." *Ibid.* The *Final Report Of The Corporation Law Committee* of the Ohio Bar Association, which accompanies the section, states that the new statute requires a minimum of three directors in each class, in order to meet ". . . the objection that has been raised to the effect that under the present [former] section the majority shareholders may fix the number of directors at

the charter or by-laws may provide for classification of directors into two or three classes, containing not less than three directors each. It is interesting to note that the Ohio mandatory cumulative voting provision remains in effect and that the new classification statute apparently codifies the law as laid down in the *Winous* case. Taken as a whole, these recent developments appear to indicate that cumulative voting and classification provisions can be reconciled and may exist side by side in a corporation's charter or by-laws.

Cumulative Voting and Classification in New York

In New York, provision was first made for cumulative voting and classification of directors in the Laws of 1892.⁵⁸ Section 49 of the New York Stock Corporation Law, the present cumulative voting statute, is permissive and grants the right only where the charter of the corporation makes provision for it.⁵⁹ Nevertheless, it has been held that where the stockholders agree to amend the charter to provide for cumulative voting and the officers of the corporation fail to effectuate the amendment, the courts will enforce the stockholders agreement if no rights of third parties or public policy is violated.⁶⁰ The New York statute which would correspond to a classification statute is Section 55 of the New York Stock Corporation Law. It provides, in part, that at least one-fourth of the directors shall be elected each year. There is some doubt as to whether this provision may be properly termed a classification statute. In *Wyatt v. Armstrong*,⁶¹ the court was of the opinion that Section 55 was intended to confer the benefits of classification. However, in *Matter of Empire*

three, each director to be in a separate class, with the result that at each annual meeting only one director is elected, and he would in all cases be elected by the majority. If at least three directors are elected at an annual meeting, the percentage of outstanding shares required to elect one director is only 25% plus an additional vote." *Comment on Section 1701.57*. The new classification provision is somewhat similar to one of the model codes which provides that the directors may be divided into two or three classes when the board of directors is composed of nine or more directors. See ALI MODEL BUSINESS CORPORATION ACT § 35 (rev. ed. 1953).

⁵⁸ Laws of N.Y. 1892, c. 687, § 20, c. 688, § 20.

⁵⁹ "The certificate of incorporation of any stock corporation or other certificate filed pursuant to law may provide that at all elections of directors of such corporation each stockholder shall be entitled to as many votes as shall equal the number of votes which (except for such provisions as to cumulative voting) he would be entitled to cast for the election of directors with respect to his shares of stock multiplied by the number of directors to be elected, and that he may cast all of such votes for a single director or may distribute them among the number to be voted for, or any two or more of them, as he may see fit. . . ." N.Y. STOCK CORP. LAW § 49.

⁶⁰ *Matter of American Fibre Chair Seat Corp.*, 265 N.Y. 416, 193 N.E. 253 (1934); see *Thistlethwaite v. Thistlethwaite*, 200 Misc. 64, 101 N.Y.S.2d 679 (Sup. Ct. 1950).

⁶¹ 186 Misc. 216, 59 N.Y.S.2d 502 (Sup. Ct. 1945).

Title & Guarantee Co.,⁶² decided two years later, it was stated that this section was not meant to be a classification statute but was intended to prevent directors from holding office for long periods of time without being subject to another election. There appear to be only two other cases in New York which shed any light on the strength of the public policy underlying the cumulative voting and classification provisions. In *Matter of American Fibre Chair Seat Corp.*,⁶³ the New York Court of Appeals stated that "[w]e find in these sections of the statute [which authorize cumulative voting] a legislative declaration that provision for cumulative voting is not against public policy. . . ." ⁶⁴ Almost twenty years later *Matter of Rogers Imports Inc.*⁶⁵ was decided. There it was held that the subsequent adoption of cumulative voting impliedly repealed a by-law which provided that directors could be removed without cause. From an examination of these cases it appears that New York's policy on cumulative voting was neutral at the time of the *American Fibre Chair Seat Corp.* case, and that a more favorable view existed at the time of the *Rogers* case. Dearth of authority prevents the making of a more definitive statement as to the present status of the law in New York.

Conclusion

There is much to be said for both cumulative voting and the classification of directors. Each provision gives to the corporation or stockholder distinct benefits that might not otherwise accrue. In recognition of this fact, the courts should adopt the approach taken in the *Winous* case wherever possible. Thus where the two provisions could be reconciled, both should be permitted to stand; where classification of directors would render the minority's cumulative voting right illusory, the right to classify should be denied or restricted. If the problem does arise in New York, it will be largely a question of possible conflict within the corporation's charter; neither a mandatory cumulative voting statute nor the state constitution would be directly involved. Such a case, if submitted, would be more akin to the facts presented in the *Winous* decision than to those before the court in the *Wolfson* case. In view of this fact, and in light of the unsettled state of New York's public policy on the matter, it is hoped that the reasoning of the *Winous* case would be followed.

⁶² 73 N.Y.S.2d 84 (Sup. Ct. 1947). "Since this section [Section 55] does not prohibit the election of more than one-fourth, or indeed of an entire new board each year, it was not intended to stagger the election of directors, but to prevent the directors from holding office for more than four years without obtaining the stockholders' renewed approval." *Id.* at 86.

⁶³ *Supra* note 60.

⁶⁴ *Supra* note 60 at 420, 193 N.E. at 255.

⁶⁵ 202 Misc. 761, 116 N.Y.S.2d 106 (Sup. Ct. 1952), 27 ST. JOHN'S L. REV. 357 (1953).