

the alternative credits.¹⁰⁴ So basic, however, are the deficiencies of the Act as a means of curtailing war profiteering, marshalling funds for the federal treasury, preserving competitive relationships, and maintaining the national defense effort that sound discretion appears to demand a fundamental overhauling of its principles and the subsequent adoption of a new approach.

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DISTRIBUTION OF VOTING POWER UNDER THE PUBLIC UTILITY HOLDING COMPANY ACT

UNDER Section 11(b)(2) of the Public Utility Holding Company Act of 1935¹ it is the duty of the Securities and Exchange Commission to require holding companies and their subsidiaries to "take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system."² A definite criterion for simplification of corporate pyramids within utility systems is set up by the clause prohibiting more than two holding companies above an operating subsidiary.³ A less specific standard for recapitalization or reorganization within individual corporations is offered by the statute's implication that the ideal structure includes but one class of bonds and one class of voting stock.⁴ But aside from the statute's general statement of policy against control "exerted through disproportionately small investment"⁵ and the consequent emphasis on voting power in the election of directors

104. N. Y. Times, April 23, 1941, p. 16, col. 2.

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1. 49 STAT. 803 (1935), 15 U. S. C. § 79 (Supp. 1939). See Comments (1936) 45 YALE L. J. 468, (1935) 30 ILL. L. REV. 509, 648. The constitutionality of the registration provisions of the Act [§§ 4(a) and 5] is established. *Electric Bond & Share Co. v. Securities and Exchange Comm.*, 303 U. S. 419 (1938). Section 11(b)(2) has been held constitutional. *In re Community Power & Light Co.*, 33 F. Supp. 901 (S. D. N. Y. 1940), (1941) 8 U. OF CHI. L. REV. 372.

2. Section 11(b)(1), the other component of the so-called "death sentence," orders the Commission to create geographically integrated public utility systems. See Comment (1941) 50 YALE L. J. 1045.

3. This so-called "great-grandfather" clause has been declared not a limitation, but a minimum criterion for simplification. *United Light & Power Co., Holding Company Act Release No. 2636*, March 20, 1941, p. 12.

4. § 7(c)(1). See Meck and Cary, *Regulation of Corporate Finance and Management under the Public Utility Holding Company Act of 1935* (1938) 52 HARV. L. REV. 216, 219.

5. §§ 1(b)(3) and 1(c).

the Commission is provided with no guide toward a fair and equitable distribution of voting power.⁶

While the requirements for protective and equitable voting rights had been formulated in theory before passage of the Holding Company Act,⁷ their practical application to specific corporate structures had remained an academic problem. Confronted with this problem and wary of setting precedents, the Commission has invoked its power to redistribute as a threat to induce voluntary compliance, but has postponed affirmative action under Section 11(b) (2).⁸ In the exercise of other broad powers, however, it has been forced to consider voting rights. Under Section 7(e) no company may "alter the priorities, preferences, voting power, or other rights of the holders of an outstanding security" if the Commission finds that the change will "result in an unfair or inequitable distribution of voting power." Where corporations have voluntarily enfranchised previously voteless preferred stockholders, the Commission has promptly found that the consequent dilution of common stock rights does not result in an inequitable distribution.⁹ Where the distribution is already unfair to senior interests, however, and the contemplated action might increase the inequity, the application of Section 7(e) has been doubtful. The problem has arisen where proposed reductions in capital would give common-controlled directors renewed power to declare dividends without the consent of unprotected preferred stockholders. Reluctant to concede that an exaggeration of an existing inequitable distribution is not within the prohibition of Section 7(e), the Commission has sidestepped a decision of the question by reserving control of subsequent action and conditioning its approval on a favorable class vote of the preferred stockholders.¹⁰ In all cases, moreover, it has emphasized its reservation of full authority to act under Section 11(b) (2).

Over the voting rights of new issues, the Commission has maintained an increasingly vigilant supervision. The Act imposes a "heavy presumption" against issuing any but common stock having at least equal voting rights

6. For the questions left unanswered by similar criteria in the Chandler Act, see Krottinger, *Management and Allocation of Voting Power in Corporate Reorganizations* (1941) 41 COL. L. REV. 646, 649, n. 17.

7. See especially Stevens, *Stockholders' Voting Rights and the Centralization of Voting Control* (1926) 40 Q. J. ECON. 353. For recent treatment of the problem, see Stevens, *Voting Rights of Capital Stock and Shareholders* (1938) 11 J. BUS. OF U. OF CHI. 311; Comment (1939) 52 HARV. L. REV. 1331.

8. Section 11(b) itself demands action only "as soon as practicable after January 1, 1938." The Commission has encouraged the submission of voluntary plans for compliance under § 11(e). See *American Water Works and Electric Co., Inc.*, 2 S. E. C. 972, 987 (1937).

9. See, e.g., *West Penn Power Co.*, 5 S. E. C. 376, 387 (1939).

10. *Securities Corporation General, Holding Company Act Release No. 2301*, Sept. 23, 1940; *Philadelphia Co.*, 6 S. E. C. 752 (1940); *Columbia Gas & Electric Corp.*, 4 S. E. C. 406 (1939).

with any outstanding security.¹¹ The purposes, however, for which exceptions may be made are so broad¹² that preferred stock issues have been frequently approved.¹³ The Commission derives power under Section 7(d)(6) to pass on the terms and conditions of issue or sale, and under Section 7(f) to attach terms and conditions to its approval.¹⁴ Despite these powers it has authorized preferred stock without requiring "at least the modicum of protection which flows from the right to elect a majority of directors in case of dividend defaults."¹⁵ Since Commissioner Douglas' dissent in the *International Paper and Power* case,¹⁶ however, new preferred shares have uniformly been accorded contingent majority voting rights. Moreover, the inadequacy of the safeguards afforded by voting rights contingent solely on dividend defaults¹⁷ has been considered. Foreseeing future pressure bargains imposed on preferred stockholders through common stock dominance, Commissioner Frank in the *North American* case¹⁸ vainly suggested provisions for shifting control to the senior securities when a special capital surplus is reduced below some substantial stated amount.¹⁹

More recently, however, the terms and conditions of new preferred issues, although not providing for shifts of control in the election of directors except in case of dividend defaults, have assumed a consistent pattern in affording purchasers substantially more voting protection.²⁰ Under the usual provisions, mergers and consolidations, for example, must be approved by the new preferred holders voting as a class.²¹ Similarly, prejudicial charter amendments must have the consent of two-thirds of the preferred class.²² But more sig-

11. *Community Power and Light Co.*, 6 S. E. C. 182, 194, n. 4 (1939).

12. § 7(c)(2). See Comment (1939) 52 HARV. L. REV. 1331, 1342.

13. See *Security Issues of Electric and Gas Utilities 1935-1940*, REP. OF S. E. C., P. U. DIV. (1941) 11.

14. For the Commission's interpretation of § 7(d), see *Federal Water Service Corp., Holding Company Act Release No. 2635*, March 24, 1941; *Engineers Public Service Co., Holding Company Act Release No. 2535*, Feb. 4, 1941. The power to impose conditions under § 7(f) is defended against the charge of intrusion on managerial discretion in *Northeastern Water and Electric Corp., Holding Company Act Release No. 2314*, Oct. 2, 1940.

15. *International Paper and Power Co.*, 2 S. E. C. 274 (1937), 2 S. E. C. 580, 584 (1937) (Commissioner Douglas dissenting).

16. 2 S. E. C. 580, 584 (1937).

17. For discussion of the need for other contingencies for shifting control to preferred stockholders see Stevens, *supra* note 7, 40 Q. J. ECON. at 388.

18. *The North American Co.*, 4 S. E. C. 434, 462 (1939), 87 U. OF PA. L. REV. 744.

19. 4 S. E. C. 434, 490, 494 (1939). See Comment (1939) 52 HARV. L. REV. 1331, 1339.

20. For the influence of Commissioner Frank's views, compare the *North American Co.*, 4 S. E. C. 434, 462 *et seq.* (1939) with *West Penn Power Co.*, 5 S. E. C. 376 (1939). See also *Utilities Power & Light Corp.*, 5 S. E. C. 483, 517, n. 54 (1939).

21. Mergers or consolidations made upon order, approval, or permission of the Commission are excepted. See, *e.g.*, *Wisconsin Gas & Electric Co.*, 5 S. E. C. 418, 424 (1939).

22. Typical provisions making a notable advance in corporate practice are the requirements that no new preferred shares may be issued without the consent or over the veto

nificantly, unless elaborate conditions aimed at preserving a capital cushion are satisfied, the approval of two-thirds is also required for dividend payments on outstanding junior shares and for subsequent issues of preferred stock or debt securities.²³ Furthermore, in corporate elections they have won increased recognition through permanent voting rights share-for-share with the common stock.²⁴ After defaults aggregating one year's dividends, moreover, they may vote as a class for two directors and, after the accumulation of twelve quarterly dividends, they may elect a majority of the board.²⁵ From this norm the variations, usually involving earlier shifts of control, have been slight.²⁶ The Commission has expressly admitted its responsibility for these provisions.²⁷ Its satisfaction with them as providing a fair and equitable distribution of voting power may be inferred from the failure specifically to reserve the right to redistribute under Section 11(b)(2).

While policing voting rights under other sections of the Act, the Commission has made few direct references to the fair and equitable distribution required by Section 11(b)(2). From isolated statements of policy it has indicated that for going concerns with satisfactory security ratios the formula applied to new issues is adequate. In the early *American Water Works* case,

of the preferred stockholders unless (a) net earnings available for dividends in the preceding year have been twice the proposed annual preferred dividend requirement; (b) gross income has been one and one-half times the sum of interest on funded debt and long-term notes plus the annual preferred dividend requirement; (c) the aggregate par value after the issue is less than a stipulated figure and less than twice the sum of surplus plus capital represented by junior stock. Without similar consent no dividends may be declared on junior stock unless surplus plus capital represented by the junior stock exceeds a stipulated figure measured in terms of the annual preferred dividend requirement, nor may unsecured indebtedness be increased if after the issuance the total principal amount of unsecured securities would exceed 10 per cent of the total principal amount of secured debt plus stated capital and surplus. See, *e.g.*, Wisconsin Electric Power Co., 7 S. E. C. 138, 147 (1940).

23. See, *e.g.*, The Kansas Power and Light Co., 7 S. E. C. 113, 121 (1940); Southwestern Gas and Electric Co., 6 S. E. C. 806, 811 (1940).

24. In very recent issues the preferred stock's one vote per share has been strengthened by a reduction of the common's vote to one-tenth of a vote per share. See The Ohio Power Co., Holding Company Act Release No. 2660, March 29, 1941; Appalachian Electric Power Co., Holding Company Act Release No. 2430, Dec. 14, 1940.

25. The once prevalent requirement that defaults be consecutive has been sanctioned in rare instances. See Appalachian Electric Power Co., Holding Company Act Release No. 2430, Dec. 14, 1940, p. 7; American Gas and Power Co., 3 S. E. C. 911, 926 (1933); McKesson & Robbins, Inc., Corporate Reorganization Release No. 41, March 29, 1941, p. 20; La France Industries, 5 S. E. C. 917, 923 (1939).

26. See, *e.g.*, Central Ohio Light & Power Co., 5 S. E. C. 651, 662 (1939). Commissioner Frank in the *North American* case declared that twelve quarterly defaults postponed the shift of control too long, 4 S. E. C. 434, 490, n. 36, 494 (1939). In reorganizations the preferred have gained the greatest rights. See Utilities Power & Light Corp., 5 S. E. C. 483 (1939) (permanent minority representation; two-thirds of the directors when arrears equal \$1.87½).

27. The Narragansett Electric Co., Holding Company Act Release No. 2213, Aug. 7, 1940, p. 3.

moreover, it hinted that higher standards would be followed in the case of new issues than in a redistribution of voting power among outstanding securities.²⁸ Companies with long uninterrupted dividend records and substantial common stock equities have been excused from conferring permanent voting rights upon preferred stockholders; in such cases the Commission has insisted only on more adequate protection in the event of continued dividend defaults.²⁹ But indicative of the extent to which a complete realignment of corporate elections may be developed, sterilization of common stock voting power, giving exclusive voting rights to the preferred, has been emphatically urged as a device for divestment of subsidiaries unretainable in integrated utility systems under Section 11(b)(1).³⁰ In corporations weakened by misdirected use of predominant voting power³¹ and presently ripe for reorganization, moreover, drastic redistributions have been threatened. Preferred stockholders with unpaid dividends accrued will be enfranchised,³² and in extreme cases of topheavy structures voting rights will be given to debt securities.³³

Furthermore, the Commission's belated program for enforcing Section 11(b)(2)³⁴ has been directed at corporations where valueless common stock constituting only a small percentage of capital stock liability and surplus controls a large percentage of the voting power. In the first move under the program, the voting trust dominating the International Hydro-Electric System has been directed to surrender for cancellation the valueless stock through which the system was controlled.³⁵ In a more recent case, the New England Public Service Company has been ordered to recapitalize on a

28. American Water Works and Electric Co., Inc., 2 S. E. C. 972, 986 (1937). See Meck and Cary, *supra* note 4, at 225.

29. American Water Works and Electric Co., Inc., 2 S. E. C. 972, 986 (1937).

30. Frank in (1940) 113 ELECTRICAL WORLD 1133. See Comment (1941) 50 YALE L. J. 1045, 1047; Gay, *Managerial Suicide* (1940) 25 P. U. FORT. 707.

31. The manner in which control has been used will have an important bearing on the form of redistribution required. Columbia Gas & Electric Corp., 4 S. E. C. 406, 414 (1939).

32. See Northern Indiana Power Co., 6 S. E. C. 910, 922 (1940).

33. Public Service Co. of Colorado, 5 S. E. C. 788, 823 (1939).

34. In conjunction with its enforcement of § 11(b)(1) [See Comment (1941) 50 YALE L. J. 1045] the Commission began its program for the administration of § 11(b)(2) early in 1940. See Electric Bond and Share Co., Holding Company Act Release No. 2051, May 10, 1940; Standard Power and Light Corp., Holding Company Act Release No. 2095, June 7, 1940; International Hydro-Electric System, Holding Company Act Release No. 2122, June 20, 1940; Northern New England Co., Holding Company Act Release No. 2291, Sept. 16, 1940; The United Light and Power Co., Holding Company Act Release No. 2407, Dec. 6, 1940; The Middle West Corp., Holding Company Act Release No. 2411, Dec. 9, 1940.

35. International Hydro-Electric System, Holding Company Act Release No. 2494, Jan. 17, 1941. For the Commission's antipathy to voting trusts as restrictions on voting power, see The United Illuminating Trust, Holding Company Act Release No. 2245, Aug. 20, 1940. Voting trusts, however, have been sanctioned in reorganizations as devices for protecting creditors. See Meck and Cary, *supra* note 4, at 226-229.

common stock basis or liquidate on the dual grounds that its structure is complicated by numerous series of preferred stocks on which tremendous dividend arrearages have accumulated and that its voting power is controlled by the common stock.³⁶ By jointly invoking its powers to decree corporate simplification and voting power redistribution,³⁷ therefore, the Commission is forcing vulnerable corporations into involuntary reorganization.

While the Commission has thus geared its active administration of Section 11(b)(2) to the reorganization of structurally deficient corporations, its policy toward voting rights in going concerns with satisfactory corporate structures has been redefined in a recent opinion.³⁸ Columbia Gas & Electric Corporation sought to defend a distribution of voting rights in which preferred stockholders are entitled to vote for directors only when four dividends are in default and then only on a share-for-share basis with the numerically superior common.³⁹ The Commission ignored the claim that dividend records were good⁴⁰ and the general contention that enfranchising the preferred would impair the rights of the common stockholders who had assumed the risks in return for control.⁴¹ Recognizing the inadequacies of cumulative voting as a substitute for class voting⁴² and rejecting the argument that most of the preferred stock had an effective voice through ownership by common stockholders,⁴³ it refused to find the distribution fair and equitable. Regardless of existing fortuitous protection,⁴⁴ therefore, and aware of the possibilities that its own jurisdiction over many companies is not permanent,⁴⁵ the Commission has shown itself resolved to allow no exceptions to the formula it has devised.

36. Northern New England Co., Holding Company Act Release No. 2737, May 3, 1941.

37. The Commission has also invoked the "great-grandfather" clause (*supra* note 3) in the dissolution of the top holding company in the United Light and Power System. Holding Company Act Release No. 2636, March 20, 1941.

38. Columbia Gas & Electric Corp., Holding Company Act Release No. 2477, Jan. 10, 1941, pp. 23-24. The application, filed under § 11(e), sought a declaration by the Commission that the system conformed to the standards of § 11(b). See Comment (1941) 50 YALE L. J. 1045, 1050.

39. In the three companies in which the distribution of voting power was under scrutiny, provisions for cumulative voting after the requisite defaults are supplied by charter or statute.

40. Brief for Applicant, p. 64, Columbia Gas & Electric Corp., Holding Company Act Release No. 2477, Jan. 10, 1941. The argument was probably inspired by the *American Water Works* case. See *supra* note 29.

41. Brief for Applicant, pp. 63, 64.

42. The Commission emphasized the illusory nature of this form of protection where the common stock is all held by one stockholder. Holding Company Act Release No. 2477, Jan. 10, 1941, p. 24. See Peoples Light and Power Co., 5 S. E. C. 557, 560 (1939).

43. Holding Company Act Release No. 2477, Jan. 10, 1941, p. 24, n. 26a.

44. The Commission sanctions deviations from its pattern only in exceptional cases. See Charles True Adams, Trustee, 7 S. E. C. 36, 53 (1940).

45. See The North American Co., 4 S. E. C. 434, 486 (1939) (Commissioner Frank dissenting), 87 U. OF PA. L. REV. 744; *cf.* Utilities Power & Light Corp., 5 S. E. C. 483, 517, n. 54 (1939).

More significant than the implications of the *Columbia Gas* opinion is the Commission's affirmative declaration that an effective vote within the meaning of Section 11(b)(2) must afford preferred stockholders "recognition in the corporation in an amount substantially corresponding to the proportion of their investment."⁴⁶ The generality of the definition conforms with the Commission's evident policy in voting rights cases of avoiding the establishment of precedents which might later have to be discarded. It may, in addition, be designed to serve as a basis for raising the standards as the program for enforcing Section 11 develops. If the Commission intends to require initial voting rights for preferred stock on a dollar-for-dollar, rather than a share-for-share, basis with the common, it can look for authority to the framers of the statute.⁴⁷ But so revolutionary a requirement would deny to common stockholders the control which they traditionally obtain in return for the risk they assume.⁴⁸ Moreover, the conditions which the Commission has admittedly attached to preferred stock suggest that recognition in proportion to investment will be required only in the event of dividend defaults. With voting rights initially share-for-share, and contingently dollar-for-dollar, with the common, the Commission will apparently be satisfied. The result of the dictum in the *Columbia Gas* case, therefore, may be merely the acceleration of shifts of control to preferred stock.

Despite such vague threats of progressive action and the increasingly high standards that the Commission is requiring of preferred stock voting provisions, its powers are being frugally employed. If effective protection and participation are to be achieved, a more decisive therapeutic is needed. Preferred stock, voting as a class,⁴⁹ should have permanent minority representation,⁵⁰ not so large as to block action, but assuring consideration of senior interests. On stated contingencies, the representation

46. Holding Company Act Release No. 2477, Jan. 10, 1941, p. 24. See also the Commission's statement that "where there is a substantial preferred stock investment in relation to the common stock equity, the preferred stockholders should have an effective voice in the direction of the company's affairs." *American Water Works and Electric Co., Inc.*, 2 S. E. C. 972, 986 (1937). Cf. *McKesson & Robbins, Inc.*, Corporate Reorganization Release No. 41, March 29, 1941, p. 25; *Appalachian Electric Power Co.*, Holding Company Act Release No. 2430, Dec. 14, 1940, p. 7 (voting rights considered "in relation to investment").

47. See *Hearings before Committee on Interstate Commerce on S. 1725*, 74th Cong., 1st Sess. (1935) 209.

48. For the view that enfranchising outstanding non-voting stock would be a taking of property without due process, see *Hearings before Subcommittee of the Committee on the Judiciary on S. 10 and S. 3072*, 75th Cong., 3d Sess. (1938) 571.

49. Cumulative voting, a possible device for corporate democratization, would afford less assurance that the preferred holders could elect their own nominees. See *supra* note 42.

50. Section 18(a)(2)(C) of the Investment Company Act of 1940 requires such a provision. For a reorganization plan which included permanent minority representation, see *Utilities Power & Light Corp.*, 5 S. E. C. 483 (1939).

should be increased to achieve the Commission's standard of recognition in proportion to investment. The traditional contingency—accumulation of dividend arrearages—is appropriate for this formula. Its exclusive use, moreover, has been approved in recent federal legislation. The Investment Company Act of 1940 requires provision for preferred stockholders to elect a majority of directors when dividends are unpaid for two years.⁵¹ Chapter X of the Bankruptcy Act, demanding fair and equitable distribution of voting power within a reorganized company, specifies for preferred stock that the charter include provisions for the election of representative directors in the event of dividend defaults.⁵² But to insure a shift of control before damage becomes irreparable, other contingencies, such as the failure of earnings or assets to maintain stated levels, should be considered for inclusion.⁵³ Complemented by class voting rights in proposed action materially affecting their interests, this permanent participation by preferred stockholders would help to break down their indifference and to prevent repetition of the abuses to which they have been subjected.⁵⁴

The development of class representation in corporate directorates,⁵⁵ however, must be checked by consideration of potential impairments of common stock rights.⁵⁶ The shift of control must be timed to give common stockholders an opportunity, commensurate with their assumption of risk, to achieve successful management. Adequate judicial and statutory remedies must be developed to afford them protection after control has passed and to insure their reinstatement when assets have increased or preferred dividend arrearages have been eliminated.⁵⁷ The fiduciary duties of directors must be doctrinally adjusted to arbitrate new legal relations. Since conflicts between allegiance to constituents and duty to the corporation as a whole would

51. § 18(a)(2)(C). PUB. L. No. 768, 76th Cong., 3d Sess., 15 U. S. C. A. § 80a-18(a)(2)(C) (Supp. 1940).

52. BANKRUPTCY ACT § 216(12)(a), 52 STAT. 897, 11 U. S. C. § 616 (Supp. 1938). Differing conspicuously from the wording of § 216(12)(b), § 216(12)(a) fails to specify that the requirement for preferred stock is not a limitation on the generality of the term "fair and equitable distribution." For the unanswered questions which the section presents, see Krotinger, *loc. cit. supra* note 6.

53. See GRAHAM AND DODD, SECURITY ANALYSIS (1934) 221.

54. The Commission recognizes the apathy of public preferred stockholders. A class vote for a minority on the directorate, therefore, will not justify omission of other protective devices to preserve the capital cushion and to prevent impairments of preferred rights. See Northeastern Water and Electric Corp., Holding Company Act Release No. 2314, Oct. 2, 1940, p. 12.

55. A trend toward extensive representation by classes in reorganized corporations has been observed and approved by Krotinger, *supra* note 6, at 680. The Commission recognizes the restraining power of a vocal minority. See Penn Timber Co., 4 S. E. C. 630, 643 (1939).

56. Unrestrained efforts to protect senior interests might lead to an era in which the common stockholders would be subjected to worse abuses than those inflicted in the past upon the preferred. See Legis., (1939) 27 GEO. L. J. 1092, 1106.

57. See Tracy, *The Problem of Granting Voting Rights to Bondholders* (1935) 2 U. OF CHI. L. REV. 208, 224-226.

inevitably arise, the priority of the latter must be established, and directors must be immunized from liability for approving salutary corporate action involving sacrifices by the class they represent.⁵⁸ In addition, however, to enforcing responsibility to the corporate entity, the courts must hold the director as fiduciary for all stockholders.⁵⁹ The immediate result of expanded corporate suffrage and class representation, compensating for new difficulties in balancing the relationships within corporations, would be closer scrutiny of the conduct of directors and higher standards of trusteeship.⁶⁰

The success of a program of redistributing voting power, however, ultimately depends on adequate procedure for the nomination and election of directors.⁶¹ No shift of control, moreover, is possible unless disclosure requirements and proxy machinery divorced from domination by the vested management can be geared to arouse American investors from their traditional inertia.⁶² The objective of the program must be the return of control from entrenched minorities to the actual owners, newly aroused and educated for intelligent participation.⁶³ With the powers it derives from the Holding Company Act to regulate and reform corporate elections, the Commission can test the potentialities of permanent representation for all security holders. If the experiments fail to give adequate protection, the need would be proved for abandoning the existing forms of stockholder participation and for establishing quasi-public protective committees.⁶⁴

58. Decisions on dividend policies or preferred stock retirements would raise such problems.

59. See BERLE AND MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932) 226; cf. *Federal Water Service Corp., Holding Company Act Release No. 2635*, March 24, 1941, p. 21.

60. The provisions of the Holding Company Act "afford a starting point from which the Commission is proceeding to impose new fiduciary responsibilities on the part of those participating in public utility finance and management." Meck and Cary, *supra* note 4, at 237. See *The Higbee Co., Corporate Reorganization Release No. 39*, March 25, 1941, p. 23.

61. For an example of the Commission's emphasis on procedural adequacy, see *La France Industries*, 5 S. E. C. 917, 937 (1939). Section 216(11) of Chapter X of the Bankruptcy Act requires that the reorganized company's charter include provisions for the selection of directors which are equitable, compatible with all interests and consistent with public policy. Compare § 725 of the Railroad Adjustment Act, 53 STAT. 1138, 11 U. S. C. § 1225 (Supp. 1939). See GRAHAM AND DODD, *SECURITY ANALYSIS* (1934) 223 for a possible procedure.

62. The Commission's able administration of securities legislation has not solved the problems, possibly insuperable, connected with shareholder participation through proxies. See Comments (1940) 49 YALE L. J. 492, 508; (1940) 53 HARV. L. REV. 1165.

63. The divorce of control from ownership is probably the fundamental vice in the modern corporation which the S. E. C. must eliminate. See Drucker, *Must a War Economy be Permanent?* (1941) HARPERS 569, 574.

64. "No program can be effective unless the scattered, disorganized, lethargic, and impotent stockholders have some one to think and act for them." Douglas, *Directors Who Do Not Direct* (1934) 47 HARV. L. REV. 1305, 1334.