Unbundling the Dynamics of MV Implementation: Voluntary versus Reluctant Adoption of MV as a Source of an Omitted-Variable Bias

A Response to Stephen J. Choi, Jill E. Fisch, Marcel Kahan, and Edward B. Rock, *Does Majority Voting Improve Board Accountability?*, 83 U Chi L Rev 1119 (2016).

Michal Barzuza†

INTRODUCTION

In an important and intriguing Article, Professors Stephen Choi, Jill Fisch, Marcel Kahan, and Edward Rock examine the replacement of the traditional plurality voting rule (PVR) in board director elections with majority voting (MV) terms.[1] The Article makes significant contributions to the study of MV implementation and effects and, more generally, to the study of governance changes that are driven by shareholder proposals. To begin with, the Article finds that MV is associated with a significant reduction in the likelihood of "withhold" votes in annual director elections.[2] Second, importantly, the Article finds evidence for a causal effect of MV on the rate of withhold votes.[3] The Article's most interesting and important finding, however, concerns differences in causes and effects of MV adoption be-

† Professor of Law and Nicholas E. Chimicles Research Professor of Business Law and Regulation, University of Virginia School of Law.

1 See generally Stephen J. Choi, et al, *Does Majority Voting Improve Board Accountability?*, 83 U Chi L Rev 1119 (2016).

2 Id at 1122, 1129–31 ("A striking finding from our data is that under plurality voting, the likelihood that a director fails to receive a majority 'for' vote is nineteen times higher than under majority voting."). See also Yonca Ertimur, Fabrizio Ferri, and David Oesch, *Does the Director Election System Matter? Evidence from Majority Voting*, 20 Reven Acctg Stud 1, 27–32 (2015).

3 Choi, et al, 63 U Chi L Rev at 1123 (cited in note 1) (explaining that Part II of the Article is dedicated to detailing four hypotheses, while Part III is dedicated to testing and analyzing the results of the data in the context of the hypotheses).

tween early and late adopters. The Article finds that early adopters, which adopted MV by 2009, were more shareholder responsive—having shareholder-friendly governance and a lower likelihood of receiving an International Shareholder Services (ISS) recommendation to withhold votes in directors' elections—even prior to MV implementation.[4] Accordingly, for these adopters, MV did not matter much, if at all.[5]

Late adopters, on the other hand, were statistically different from nonadopters only in that they were less likely to exhibit abnormally high returns in the year prior to MV adoption, an indication that they adopted MV under pressure.[6] For these late adopters, there is evidence that MV resulted in improved board accountability[7] and a significant decline in the likelihood of directors garnering less than 70 percent of the votes.[8]

The importance of the differences between early and late adopters cannot be overstated. Assumptions have been routinely made as to how firms self-select into governance terms, but little has been done to test them empirically. The aforementioned self-selection effect, which the authors are the first to report, not only has important implications for empirical interpretation and policy, but also suggests that a rigorous examination of firms' self-selection should be a part of every study that examines governance changes.

This Response explores whether management resistance to MV, in the years prior to MV eventual implementation, could

---

4 Id at 1139–47.

5 For early adopters, the Article finds evidence for a decline in withhold votes only for those votes in which withhold votes were 40–50 percent of the total. Id at 1153. The Article finds little evidence that MV affected early adopters' responsiveness to shareholders. Id at 1119 ("These firms seem to have adopted majority voting voluntarily, and the adoption of majority voting has made little difference in their responsiveness to shareholders going forward.").

6 Id at 1146:

> For late adopters, by contrast, the variables that were significant [for early adopters] . . . —the prior record of ISS "withhold" recommendations and the presence of a poison pill—are now insignificant. By contrast, the variable that may reflect reduced outside pressure to adopt majority voting or the ability to resist such pressure—positive abnormal returns—is significant, which is consistent with lower pressure or a higher ability to resist pressure making the adoption of majority voting less likely.

7 Id at 1123–24 (cited in note 1) ("[W]e find the adoption of majority voting by late adopters led to more shareholder-friendly governance.").

8 Id at 1157 ("Overall, these results provide strong support for the proposition that the adoption of an MVR by late adopters reduced the likelihood of getting a 'withhold' vote of 30 percent or above.").

have caused an omitted-variable bias in testing MV effects on votes withheld—in that management resistance could have both delayed late adopters' MV adoption, and frustrated shareholders, who, in turn, withheld votes from management. In other words, this Response argues that a shift in late adopters' resistance to MV, could be the very reason for the reported decline in withhold votes rates following MV implementation.

Part I of this Response argues that management resistance to MV proposals could have been a significant source of delay for MV implementation. While the Article identifies late adopters as resisting firms, it attributes their delay in adoption to shareholders' targeting choices.[9] Yet this Part demonstrates that by resisting informal shareholder requests, attempting to exclude shareholder proposals, relying on strict counting rules, and refusing to implement a shareholder proposal that passed, managers could have delayed, and have delayed MV implementation.

Part II argues that management resistance to MV, not only delayed MV implementation, but also could have caused high withhold vote rates in the years prior to MV implementation, thus causing an omitted-variable bias in testing MV effects on votes withheld. To the authors' credit, they attempt to address the concern that variations in firms' resistance to MV are driving the results. Yet, as this Part argues, the methods they employ to that end primarily address management resistance as a source for nonadoption, and less so the case in which a firm resisted for several years, and then eventually succumbed. For example, by using firm-fixed effects, the Article compares the withhold rates at the same firm pre-MV and post-MV. Yet, since a fixed effects model addresses only time-invariant selection effects, it does not address firms' temporary resistance to MV. Similarly, the Matched Sample Model and the model that includes only firms that implemented MV do not solve the potential omitted-variable bias caused by changes over time in firms' responsiveness to MV. Finally, excluding data from the two years subsequent to adoption of a shareholder resolution, as the Article does, does not address other potential triggers of punishment, such as exclusion of shareholder proposals by managers, supermajority requirements, or negative counts of absten-

9 Id at 1147–48 ("A plausible interpretation of these results is that shareholder activists first pushed for the adoption of an MVR at firms where an MVR may have been largely costless (or at least low-cost) because these firms were already responsive to shareholders.").

tions.[10] Thus, further unbundling of the process by investigating variations in managers' resistance is needed in order to get to the bottom of the source of differences between early and late adopters, and in order to arrive at the correct interpretation with respect to the effect of MV on withhold votes.

Unbundling the reasons for delay in MV adoption is also relevant for policy implications. For example, a recent study has found that managers were more likely to attempt to exclude proxy access proposals in firms that investors believed would have benefited most from proxy access implementation.[11] In examining the trade-offs between private ordering and mandatory corporate law, policymakers should consider self-selection patterns, the types of firms that adopted a governance change, and the factors that contributed to their adoption.

I. THE SOURCE OF THE DIFFERENCE BETWEEN EARLY AND LATE ADOPTERS

The Article attributes the differences in time of adoption to shareholder targeting choices. Shareholders, the Article hypothesizes, may have targeted the easier firms first,[12] in order to create pressure on other firms to conform.[13] Yet, shareholders' targeting choices are not necessarily the primary reason for a delay in MV adoption. Rather, this Part explains that managers' responsiveness to shareholders' preferences, or the lack of it, has significant influence on whether and when a governance change is adopted. And variations in managers' resistance to MV, this Part demonstrates, have played a role in whether a firm was an early or a late adopter.

---

10 See id at 1150. In addition, punishment for nonimplementation may linger for more than two years. See Part II.

11 See Tara Bhandari, Peter Iliev, and Jonathan Kalodimos, *Governance Changes through Shareholder Initiatives: The Case of Proxy Access* *22 (SEC Working Paper, Jan 17, 2017), archived at http://perma.cc/C8XH-CD24 ("Interestingly, we find that firms that chose to challenge the proposal in this relatively extreme way are exactly the firms that were expected to benefit more from mandatory proxy access or more from being targeted with a shareholder proposal for proxy access.").

12 Choi, et al, 83 U Chi L Rev at 1124, 1147–48 (cited in note 1) ("These findings suggest that investors, perhaps counterintuitively, may have employed a strategy of targeting shareholder-responsive firms first, rather than focusing on those companies most in need of governance reform.").

13 See id at 1147–48 ("As time went by and MVRs became accepted as a best practice, firms for whom an MVR was more costly—because they were less shareholder responsive—began to adopt it as well.").

There are several different stages throughout the process of a governance change via shareholder proposals at which managers have influence on whether and when an MV is implemented. To begin with, because most firms' managers have the power to change the bylaws unilaterally, when a governance change is taking off, some firms do not wait for a shareholder proposal to arrive, and instead, managers implement it themselves. Managers may also implement an MV semivoluntarily, as a result of informal negotiations with shareholders, or in response to a shareholder proposal that was submitted. For example, after Intel was hit by an MV shareholder proposal in 2004, rather than bringing it to a shareholder vote, Intel management voted to change the bylaws to implement an MV unilaterally.[14]

Second, once a proposal is submitted, managers may attempt to exclude it from the firm's proxy materials, in which case it will not be brought to a shareholder vote. Relying on one of the exceptions to the shareholder proposals rule, Rule 14a-8, management could ask the Securities and Exchange Commission (SEC) for a letter stating that the SEC staff will not act against it for excluding the proposal (a "no-action letter").[15] Between 2003 and 2013, according to a recent study, managers asked for permission from the SEC to exclude around 40 percent of all shareholder proposals.[16] Managers were more likely to contest proposals in firms with weak governance, and strong performance (conditioned on being targeted).[17] Because the SEC provided a no-action letter in 72 percent of the cases, almost 30 percent of the proposals submitted were not brought to a shareholder vote.[18] Indeed, MV proposals were excluded on different bases, including eligibility,[19] late submission,[20] vagueness,[21] and an existing conflicting management proposal.[22]

---

14 See Phyllis Plitch, *Intel Changes Bylaws to Adopt Majority Vote* (Wall St J, Jan 21, 2006), archived at http://perma.cc/ZS3A-QH9X.

15 See 17 CFR § 240.14a-8. By adding the proposal to the firm's proxy materials, shareholders save on costs of filling and distribution and mitigate confusion that could arise when shareholders receive different packages.

16 Eugene Soltes, Suraj Srinivasan, and Rajesh Vijayaraghavan, *What Else Do Shareholders Want? Shareholder Proposals Contested by Firm Management* *2–3 (Harvard Business School Working Paper No 16-132, Apr 2016), archived at http://perma.cc/XRR2-6REV.

17 Id at *19.

18 Id.

19 See, for example, SEC No-Action Letter to Marathon Petroleum Corp, *4 (Jan 30, 2014) (available at 2014 WL 556038); SEC No-Action Letter to ID Systems Inc, *32–33 (Mar 30, 2011) (available at 2011 WL 1250115); SEC No-Action Letter to Green Bankshares Inc, *9 (Feb 7, 2011) (available at 2011 WL 380991); SEC No-Action Letter to Fastenal Co, *5 (available at Jan 4, 2011) (available at 2010 WL 4953158).

Finally, if managers do not attempt to fight a proposal, or if the SEC denies management's request for a no-action letter, the proposal will be brought to a shareholder vote. Yet, receiving a majority of the votes cast is still not a guarantee that the proposal will be implemented. To begin with, in some companies, due to limitations on shareholders' voting power—such as a supermajority requirement to amend the bylaws, or a rule that counts abstentions and broker non-votes as against votes—a simple majority is not sufficient for a proposal to pass.[23] Furthermore, even if a proposal passes, most of the proposals are nonbinding (in order to minimize the risk of exclusion) and therefore do not mandate implementation. Indeed, in some companies, managers have ignored MV proposals that received support from a majority of the shareholders repeatedly, year after year. For example, the management of First Energy did not implement MV proposals that received support from a majority of the shareholders in 2008–2010.[24] Similarly, Vornado Realty Trust management took no action to implement MV proposals, despite them receiving support from a majority of the shareholders in 2008 and 2010–2014 (the vote was short by less than 1 percent in 2007).[25] Thus, management's choice not to

[20] See, for example, SEC No-Action Letter to Orrstown Financial Services Inc, *6 (Jan 14, 2013) (available at 2013 WL 1717733).

[21] See, for example, SEC No-Action Letter to SunTrust Banks Inc, *5 (Jan 13, 2010) (available at 2010 WL 170250).

[22] See, for example, SEC No-Action Letter to Herley Industries Inc, *3 (Nov 20, 2007) (available at 2007 WL 4172627).

[23] See, for example, David F. Larcker, Allan L. McCall, and Gaizka Ormazabal, *Outsourcing Shareholder Voting to Proxy Advisory Firms*, 58 J L & Econ 173, 181 (2015) ("[E]xchange rules prevent broker nonvotes from being counted as votes in favor.").

[24] See *2007 Annual Corporate Governance Review* *36 (Georgeson, 2007), archived at http://perma.cc/6T72-FQQ5; *2008 Annual Corporate Governance Review* *25 (Georgeson, 2008), archived at http://perma.cc/A8AM-6762; *2009 Annual Corporate Governance Review* *25 (Georgeson, 2009), archived at http://perma.cc/RX3R-UB6C; *2010 Annual Corporate Governance Review* *29 (Georgeson, 2010), archived at http://perma.cc/2DRX-HJ9T; *2011 Annual Corporate Governance Review* *24 (Georgeson, 2011), archived at http://perma.cc/3W75-EKYR; *2013 Annual Corporate Governance Review* *26 (Georgeson, 2013), archived at http://perma.cc/ZJ3X-9DAF; *2014 Annual Corporate Governance Review* *24 (Georgeson, 2014), archived at http://perma.cc/3W75-EKYR; *2016 Annual Corporate Governance Review* *25 (Georgeson, 2016), archived at http://perma.cc/ZJ3X-9DAF.

[25] See *2007 Annual Corporate Governance Review* at *40 (cited in note 23); *2008 Annual Corporate Governance Review* at *27 (cited in note 23); *2010 Annual Corporate Governance Review* at *32 (cited in note 23); *2011 Annual Corporate Governance Review* at *26 (cited in note 23); *2012 Annual Corporate Governance Review* at *24 (cited in note 23); *2013 Annual Corporate Governance Review* at *28 (cited in note 23); *2014 Annual Corporate Governance Review* at *26 (cited in note 23).

implement a proposal could have contributed to a firm becoming a late adopter, or a nonadopter.

To summarize, some late adopters implemented late not because they were targeted late, but because their management either resisted shareholder informal pressure to implement MV voluntarily, contested MV shareholder proposals, or did not implement MV proposals that received shareholder support. Take Apple, for example. CalPERS first tried to convince Apple management to implement the proposal voluntarily.[26] After these negotiations failed, CalPERS submitted an MV proposal to Apple in 2011.[27] The proposal received support from more than 70 percent of the votes, but management chose not to implement it.[28] CalPERS submitted an additional proposal in 2012, which received support from a majority of the votes, and was eventually implemented in 2014.[29]

Or take the case of Omnicom, which was first targeted in 2009.[30] Omnicom's management contested the proposal, seeking a no-action letter from the SEC on the basis of eligibility under Rule 14a-8(f).[31] The SEC supplied a no-action letter based on management's representation that the United Brotherhood of Carpenters Pension Fund, which submitted the proposal, did not provide documents that proved minimum ownership requirements for one year, within fourteen days of receipt of the company's request for such documentation.[32] The fund then submitted a similar proposal for the subsequent 2010 annual meeting.[33] Management again contested the proposal, arguing again that the fund failed to satisfy eligibility requirements.[34] In addition, management argued that the company lacked the

[26] See Joann S. Lublin, *Calpers, Apple at Odds on Governance* (Wall St J, Dec 21, 2010), archived at http://perma.cc/8QRP-3XVM.

[27] See April Dembosky and Dan McCrum, *Calpers Wins Apple Shareholder Vote* (Financial Times, Feb 23, 2011), archived at http://perma.cc/E2FW-NALQ.

[28] See *CalPERS Calls On Apple to Adopt Majority Voting Proposal for Board Seats*, (Mondovisione, Mar 3, 2012), archived at http://perma.cc/PTS9-KSB3.

[29] See James McRitchie, *Apple Improves Governance* (The Shareholder Activist), archived at http://perma.cc/D387-6J7Y; Robert Udall Glazier, Brad Pacheco, and Joe DeAnda, *CalPERS Moves Motion for Majority Voting Standards at Apple Annual Meeting, Shareowners Approve* (CalPERS, Feb 28, 2014), archived at http://perma.cc/Y3QM-73L3.

[30] SEC No-Action Letter to Omnicom Group Inc, *18–19 (Mar 16, 2009) (available at 2009 WL 772864) ("Omnicom No-Action Letter").

[31] Id at *6.

[32] Id at *2.

[33] Id at *9–10.

[34] Omnicom No-Action Letter at *5 (cited in note 30).

authority to implement the proposal.[35] This time the SEC did not award the no-action letter.[36] The proposal received support from a vast majority of the votes and was subsequently implemented.[37]

Or take Caterpillar, which was included in one of the earliest waves of MV proposals.[38] When Caterpillar received its first shareholder proposal in 2005 from the Carpenter Pension Fund, unlike several other companies that chose to reach a compromise with shareholders it submitted the proposal to a shareholder vote.[39] The proposal received support from 43 percent of the shareholders, less than a majority of the votes cast.[40] The following year, however, the same proposal received a support of 52 percent of the shareholders who voted for or against it, but did not pass since the company counts abstentions and broker nonvotes as against votes, and accordingly was not implemented by management.[41] Following this proposal, the other proposals were short of receiving majority support from the votes cast. Finally, in 2013 Caterpillar eventually implemented MV.[42] Had

---

35 Id at *6.

36 Id at *2:

> We are unable to concur in your view that Omnicom may exclude the proposal under rules 14a-8(b) and 14a-8(f). Accordingly, we do not believe that Omnicom may omit the proposal from its proxy materials in reliance on rules 14a-8(b) and 14a-8(f). We are unable to concur in your view that Omnicom may exclude the proposal under rule 14a-8(i)(6).

37 Id.

38 See *2005 Annual Corporate Governance Review* *20 (Georgeson, 2005), archived at http://perma.cc/THP6-Q7AL; *2006 Annual Corporate Governance Review* *19 (Georgeson, 2006), archived at http://perma.cc/NM8G-TM9F; *2007 Annual Corporate Governance Review* at *22 (cited in note 23); *2008 Annual Corporate Governance Review* at *23 (cited in note 23); *2009 Annual Corporate Governance Review* at *24 (cited in note 23); *2011 Annual Corporate Governance Review* at *23 (cited in note 23); *2012 Annual Corporate Governance Review* at *21 (cited in note 23); *2013 Annual Corporate Governance Review* at *25 (cited in note 23). See also generally *2010 Annual Corporate Governance Review* (cited in note 23).

39 See Sundeep Tucker, *Caterpillar Caught in Activist Crossfire* (Financial Times, Apr 4 2005), archived at http://perma.cc/VSS4-D37H ("[A] dozen companies including ChevronTexaco and Intel opted to seek compromise with shareholders on the issue. All have had the resolution withdrawn."). See also Plitch, *Intel Changes Bylaws to Adopt Majority Vote*, (Wall St J, Jan 21, 2006) (cited in note 14).

40 See *2005 Annual Corporate Governance Review* at *20 (cited in note 37).

41 See *2006 Annual Corporate Governance Review* at *19 (cited in note 38). Caterpillar Inc, *Schedule 14A: Proxy Statement Pursuant to Section 14(a) of the Securities Exchange Act of 1934* (SEC, Jun 14, 2006), archived at http://perma.cc/5RGF-MP9T.

42 Caterpillar Inc, *Form 8-K: Current Report pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934* (SEC, Oct 9, 2013), archived at http://perma.cc/5ACH-SMXL.

management adopted the MV voluntarily, as some other companies did, or had management implemented the 2006 proposal, Caterpillar would have been an early adopter.[43] Yet, due to management's relative reluctance Caterpillar became a late adopter.

As these examples show, for late adopters, there could be a history of several years of unresponsiveness that were followed by a shift to responsiveness. These cases of resistance followed by implementation, the next Part will show, if common enough, could have implications for the interpretation of the Article's other empirical results. In particular, as the next Part argues, management resistance could have driven the main results of a decline in withhold votes following MV implementation.

II. Manager Resistance as a Source of an Omitted-Variable Bias

The Article arguably finds that for late adopters, MV caused a reduction in the likelihood of directors receiving support from fewer than 70 percent of the votes in subsequent annual elections.[44]

Yet, this Part will argue that management resistance to MV could be an omitted variable with respect to the effect of MV on the rate of votes withheld in annual elections. In particular, during the years that management resisted MV implementation—either by not implementing MV proposals voluntarily as some firms did, or, by contesting submitted shareholder proposals, or not implementing proposals that received shareholder support—late adopters may have been punished by shareholders for their unresponsiveness to shareholder preference for MV with a high rate of withhold votes.[45] When they eventually implemented MV, shareholders ceased punishing them. Thus, firms that resisted for a long period of time would both appear to be late adopters and will exhibit a shift in the withhold vote rate as a result of MV implementation.

---

[43] Choi, et al, 83 U Chi L Rev at 1119 (cited in note 1) (defining early adopters as companies who adopted majority voting rules by 2009).

[44] Id at 1157 ("Overall, these results provide strong support for the proposition that the adoption of an MVR by late adopters reduced the likelihood of getting a 'withhold' vote of 30 percent or above.").

[45] ISS considers management responsiveness as a factor in its voting recommendations. See *2017 U.S. Summary Proxy Voting Guidelines* *15 (ISS, Dec 22, 2016), archived at http://perma.cc/YR4W-6T3P.

To the authors' credit, they attempt to deal with the potential effects of management responsiveness, or the lack of it, on votes withheld, in numerous ways. Yet, while these models address differences in responsiveness between firms that eventually adopted MV and firms that did not, this Part will argue that they do not fully address variations in responsiveness over time for the same firm—namely, for firms that resisted for several years and eventually succumbed to the pressure.

To begin with, to "distinguish between selection and causation" in regards to the effect of MV on withhold votes, the authors ran an ordinary least squares regression with firm-level fixed effects that "compare[s] the record of each company after the adoption of majority voting to the firm's own record prior to the adoption."[46] Yet, as the authors note, controlling for firm-level fixed effects eliminates only time-invariant unobserved effects—that is, self-selection that is based on factors that are stable over time, but could not address *time-variant* omitted variables. Thus, if the self-selection is based on some changes over time, as could be the case with firms' temporary unresponsiveness to shareholders' preference for MV, the fixed effect method will not capture that. Including firms' fixed effects, thus, does not address the case in which the same firm was not responsive to shareholders' desire to implement a MV term for several years prior to implementation.

The Article employs additional models that are more directly designed to address firms' responsiveness as an omitted variable, but nevertheless do not fully address the particular problem of firms resisting MV for several years as a potential omitted variable. To begin with, Model 2 excludes observations for the two years after the adoption of a shareholder resolution calling for MV.[47] And because some firms might have been rewarded for implementing MV voluntarily—that is, not in response to a formal shareholder proposal—Model 3 excludes one year after any implementation of a MV term, including voluntary ones.[48] These models together arguably account "for the possibility that shareholders may 'punish' directors for a failure to implement majority voting—or 'reward' them for implementing majority voting—following the adoption of such a resolu-

46 Choi, et al, 83 U Chi L Rev at 1148 (cited in note 1).

47 Id at 1149.

48 Id.

tion."[49] Yet, for several reasons, the exclusion of data from the two years after a shareholder resolution was passed addresses the effects of reward or punishment only partially. To begin with, while this model addresses only punishment for nonimplementation of a shareholder proposal that passed, shareholders could punish firms for other forms of resistance. First, shareholders may punish management that excluded a proposal prior to a shareholder vote. Second, firms vary in the majority required in order for a proposal to pass and in how they count abstentions and broker nonvotes.[50] Shareholders may be frustrated if a proposal that received a majority of the "Yes/No" votes does not pass due to supermajority rules, or due to counting abstentions as voting against the proposal.

In addition, the effect of management resistance might expand beyond the two years that the model excludes, especially since firms may take more than two years to become responsive. For example, seven years after the management of Caterpillar refused to implement an MV that received a majority of the Yes/No votes, until they finally adopted an MV.[51] Further exploration of the time period in which shareholder punishment might have effected withhold rates, by including different dummies for different years, for example, could provide more accuracy. More generally, measures for firms' resistance that account for different factors, such as the number of years in which the firm received MV proposals, the level of support for the proposals, whether management attempted to contest the proposals, and whether management refused to implement proposals that were voted favorably, could contribute to drawing correct interpretations from the results.

Finally, Model 4, which excludes all firms that never implemented MV, does not solve the omitted-variable problem, either.[52] This model would include Omnicom, Caterpillar, and other examples in which the same firm switched from being unresponsive for several years, during which it was punished by shareholders, to eventually implementing MV. And a similar

49 Id.

50 See Daniel E. Wolf and Michael P. Brueck, *Voting Standards Are Not That Standard* (Harvard Law School Forum on Corporate Governance and Financial Regulation, Oct 20, 2016), archived at http://perma.cc/V6W2-JGU6.

51 To be sure, shareholder support for following MV proposals did not reach the required majority for five years. Yet this low support could have reflected shareholder skepticism due to the counting rules and to managers' unresponsiveness. See note 38 and accompanying text.

52 Choi, et al, 83 U Chi L Rev at 1149 (cited in note 1).

problem arises with respect to the Matched Sample Model, which matches firms that switched to MV and firms that did not. Firms' unresponsiveness in the years prior to implementation could have driven the results for the matched sample.

The Article also addresses, to some extent, self-selection that is based on time-variant factors. In particular, to address the possibility "that a firm suffered from an exogenous shock that decreased [the] probability [of withhold votes] and, due to that shock, also decided to adopt majority voting,"[53] Model 5 includes only firms that adopted an MV in response to a shareholder proposal—that is, firms that "adopted majority voting under significant pressure, rather than by choice."[54] This model has additional value, as it excludes firms whose responsiveness led them to adopt early and voluntarily. Yet, again it includes firms whose resistance for several years could have led to high withhold votes prior to MV adoption.

In sum, while the methods that the Article employed address some variations in management resistance as a potential source of an omitted-variable bias, these methods are targeted primarily at addressing firms that as a result of management resistance have not implemented MV at all or at firms that adopted MV voluntarily even in the absence of shareholder proposals. These models, however, only partially address the case in which firms' responsiveness to MV has changed over time. Yet, as the foregoing examples demonstrated, at least some firms have shifted from vigorously fighting these proposals to eventually implementing them.

CONCLUSION

The Article makes significant contributions to the study of governance changes via shareholder proposals in general, and MV proposals in particular. Most significant are the findings with respect to the differences between early and late adopters, and the finding of a causal connection between MV adoption and a decline in the rate of withhold votes.

As this Response argues, however, variations over time in firms' responsiveness to shareholder preferences for a MV implementation could have delayed MV adoption *and* could have caused a decline in withhold votes post-MV. Thus, in order get to

[53] Id at 1150.
[54] Id.

the bottom of the difference between early and late adopters, and to draw the right interpretation from the data with respect to the effect of MV on voting outcomes, the shareholder proposal process needs to be further unbundled.

Unbundling the reasons for late implementation is essential also for drawing appropriate policy implications. Assumptions have been routinely made about how firms self-select, but little has been done to test these assumptions empirically.[55] In particular, a general assumption holds that firms self-select efficiently, choosing the right "size" of governance.[56] What we learn from the Article is that the firms that were first in line to adopt MV were the ones for whom it did not matter much. Firms that were threatened by MV implemented it only when they were pressured to do so.

If MV reduces firm value, then the self-selection the Article finds, where firms that were more likely to be affected by it resisted it, is an efficient one (one might wonder, though, whether a result that firms adopt governance terms when they are mostly not affected by it is what private ordering was designed to achieve). If, however, MV adds value, an agency problem may have affected private ordering. Consistent with the latter inefficient self-selection account, a recent study finds that managers are more likely to contest proposals in firms with weak governance.[57] Similarly, another recent study found that managers were more likely to attempt to exclude proxy access proposals in firms that investors believed would have benefited most from proxy access implementation.[58]

[55] Michal Barzuza, *The Private Ordering Paradox in Corporate Law* *3 (Virginia Law and Economics Research Paper No 2017-05, Mar 13, 2017), archived at http://perma.cc/X5Y8-GHVW, citing Jonathan R. Macey, *Corporate Governance: Promises Kept, Promises Broken* 103 (Princeton 2008) ("An advantage of private sector ordering in determining the composition of boards is that private ordering can adjust board composition to reflect the efficacy of complementary corporate governance mechanisms.").

[56] Barzuza, *The Private Ordering Paradox* at *4 (cited in note 55).

[57] See Soltes, Srinivasan, and Vijayaraghavan, *What Else Do Shareholders Want?* at *19–20 (cited in note 16) (studying all shareholder proposals between 2003 and 2013).

[58] Bhandari, Iliev, and Kalodimos, *Governance Changes through Shareholder Initiatives* at *5 (cited in note 11).