Cumulative Voting and Classified Directorates

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The modern business corporation has reached its present position as an integral part of the American scene through a continuous process of growth and expansion. The first American general incorporation law was enacted in New York in 1811 and with the passage of time, the privilege of self-incorporation under general laws became prevalent. As an increasing number of states created the general right to incorporate, many corporations were formed and brought with their formation numerous complexities in carrying out corporate business. The board of directors became the vehicle of management in which was vested the supreme and original authority in directing matters of ordinary business.

A corporate body can act only by agents and the board of directors of a corporation, being duly constituted by the law as the agency for the doing of corporate acts, has the power to do all things proper to be done by the corporation when not inhibited by statute, charter, or by-law. It is universally recognized that the directors ascend to their positions of authority only by virtue of stockholder elections held expressly for that purpose.

In wrestling with the problem of electing these directors, several methods have been devised, each attempting to alleviate inequities in election procedure which may have developed as the years progressed.

The two major methods of electing directors are by "straight voting" and by "cumulative voting." Though we are not here concerned with the "straight voting" method, a comparison of these two basic methods will enlighten and explain the ultimate result achieved by use of either or both of them. Under straight voting, the more common method, a stockholder group with a majority of votes at the annual election can elect its full slate of directors. In comparison, cumulative voting is a method wherein each voting shareholder is entitled to votes equal to the number of his shares

1 Ballantine, Corporations 37 (rev. ed. 1946).
4 Ballantine, op. cit. supra note 1, at 391.
5 Williams, Cumulative Voting for Directors 6 (1951).
6 Ibid. If the straight voting method is used, in a contest for the election of a board of nine directors, a group holding 51% of 10,000 shares voting, each share being entitled to one vote, could cast 5,100 votes for each of its nine candidates. An opposition group of stockholders with 4,900 votes could muster only 4,900 for each of its candidates, and could elect no one.
multiplied by the number of directors to be elected. Once this number of votes is determined, the holder may cast all these votes for a single director or distribute them among two or more candidates as he sees fit.\textsuperscript{7} When cumulative voting is provided for,\textsuperscript{8} it brings to the corporate system a means by which a significant group of stockholders, though in the minority, can elect candidates of its choice to the board of directors.

It was John Stuart Mill,\textsuperscript{9} who, in 1861, recognized that an essential part of democracy requires that minorities be adequately represented. It was not his theory that the minority should prevail, but that a governmental body would be a better one for having heard the views of the minority. This principle of "personal representation" or "equal representation of minorities" did not originate with him, but it was he who caused the political thinkers in the United States to consider the principle of minority representation.\textsuperscript{10}

Legislators also subsequently recognized the need for affording the minority an opportunity for representation. Prior to the mandates of the constitutional convention which met in Illinois in 1869, no state of the United States had enacted or adopted any laws providing for cumulative voting.\textsuperscript{11} By adopting the Illinois Constitution of 1870, the state of Illinois provided cumulative voting not only for the election of members of the House of Representatives of its General Assembly, but also for the election of directors by shareholders of private business corporations.\textsuperscript{12}

Thirteen states,\textsuperscript{13} including Illinois, now have constitutional provisions on cumulative voting for directors of private corporations. Cumulative voting is mandatory under each of these provisions.

\textsuperscript{7} Iblid. With cumulative voting, if nine directors are to be elected and with 10,000 shares voting, a group with 5,100 shares would be entitled to a total of 45,900 votes and the group with 4,900 shares to 44,100 votes. By distributing its 44,100 votes among only four candidates, the minority stockholders group could give each of the four members 11,025 votes. No matter how the majority distributes its votes, it can elect no more than five directors, since it cannot give its sixth man as many as 11,025 votes.

\textsuperscript{8} Unless expressly provided for, there is no common law right to cumulative votes. Proctor Coal Co. v. Finley, 98 Ky. 405, 33 S.W. 188 (1895).

\textsuperscript{9} MILL, REPRESENTATIVE GOVERNMENT (1861).

\textsuperscript{10} Campbell, The Origin and Growth of Cumulative Voting for Directors, 10 BUS. LAW 3 (1955).

\textsuperscript{11} Id. at 4.

\textsuperscript{12} ILL. CONST. art. XI § 3.

\textsuperscript{13} Campbell, supra note 10, at 7. Arizona, Idaho, Kentucky, Mississippi, Missouri, Montana, Nebraska, North Dakota, Pennsylvania, South Carolina, South Dakota, and West Virginia.
Seven states\textsuperscript{14} have mandatory cumulative voting for directors by reason of statutory law alone. There are now seventeen states,\textsuperscript{16} plus the District of Columbia, which have express statutory provisions making cumulative voting for directors permissive. The remaining states,\textsuperscript{16} eleven in number, have no express provision either in their constitutions or their statutes on the subject of cumulative voting for directors.

Cumulative voting, while designed to provide minority representation, is not designed to guarantee minority representation. Whether the minority will be able to achieve representation at any meeting of shareholders depends upon two factors:\textsuperscript{17} (1) the number of directors to be elected, and (2) the total number of shares represented at the meeting, rather than the total number of shares entitled to vote.

The arguments for the principle of providing for minority representation are set forth as follows:\textsuperscript{18} (1) a board of directors, regardless of its size, should represent as many shareholders as possible; (2) cumulative voting is the only means by which the minority may conceivably gain some representation on the board of directors; (3) although the majority will continue to control under cumulative voting, better management will result if the entire board hears the views and opinions of the minority on all matters considered by it; and (4) the presence of at least one minority representative on the board of directors will serve to restrain the tendency of those who comprise the majority to operate the corporation for their own benefit.

Those opposing the principle of cumulative voting present the following arguments:\textsuperscript{19} (1) to operate effectively, the board of directors must be comprised of members chosen only by the majority, for otherwise, there will be no teamwork on the board; (2) minority representation on a board often results in an unwieldy and ineffective

\textsuperscript{14}Campbell, infra note 10 at 8. Arkansas, California, Kansas, Michigan, Ohio, Washington, and Wyoming.
\textsuperscript{15}Campbell, infra note 10, at 9. Colorado, Delaware, Indiana, Louisiana, Maryland, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, Rhode Island, Tennessee, Vermont, and Virginia.
\textsuperscript{16}Campbell, infra note 10, at 10. Alabama, Connecticut, Florida, Georgia, Iowa, Maine, Massachusetts, New Hampshire, Texas, Utah, and Wisconsin.
\textsuperscript{17}Campbell, infra note 10, at 11.
\textsuperscript{18}Campbell, infra note 10, at 15.
\textsuperscript{19}Campbell, infra note 11, at 15.
coalition of directors; and (3) cumulative voting affords the means by which a shareholder can readily harrass the management.

Despite what may appear to be valid arguments against it, cumulative voting has been overwhelmingly adopted throughout the United States. As can readily be seen, cumulative voting does afford the minority an opportunity to gain representation on a board of directors which they obviously would not have without it.

Those comprising the majority have naturally sought some method by which to curb the ambitions of the minority groups of shareholders. An effective device to limit the use of cumulative voting is classification of directors.\textsuperscript{20} Classified or "staggered" boards are usually established through enactment of a by-law normally dividing the directors into three classes. Generally, under the classified provision,\textsuperscript{21} the first class of directors are elected for three-year terms, those of the second class for two-year terms, and those of the third class for a one-year term. Thereafter each class is elected for full three-year terms, so that the directors of only one class come up for election each year.

By reducing the number of candidates to be elected each year, classification effectively limits the ability of minority groups to gain any advantage by voting cumulatively. Though it does not eliminate the right to vote in this manner, it dilutes the effect that it may have for all but the very strong minority groups.\textsuperscript{22}

Classification of directors is expressly authorized by statute in thirty-eight states and the District of Columbia.\textsuperscript{23} In four other states\textsuperscript{24} classification is permitted by clear implication from the language of the statutes. Four additional states have no statutory provision, which, if followed, would be inconsistent with classified directorates. Only Alabama and California seem to prohibit classification.\textsuperscript{25} Statutes expressly permitting classification of directors

\textsuperscript{20} \textit{Williams}, \textit{op. cit. supra} note 5, at 48.
\textsuperscript{21} \textit{Ibid.} To elect one director to a nine-man board which was not classified, the majority would need only one more than 10\% of the votes at the meeting. By reducing the number of directors to be voted on to just three, classification has raised the number of votes needed to elect a minority candidate from 10\% plus one to 25\% plus one.
\textsuperscript{22} \textit{Williams}, \textit{op. cit. supra} note 5, at 49.
\textsuperscript{24} \textit{Ibid.}
\textsuperscript{25} \textit{Ibid.}
are of ancient vintage, indicating that classification has long been permissible.

Just as pros and cons have been presented and debated over cumulative voting, many arguments both for and against classified directorates may be presented. Foremost among those in favor of classification is that it will assure a director that he will be a member of the board for longer than one year. This in turn will permit him to become more familiar with the affairs of the corporation and gain a sense of continuity of policy which he could not have acquired if he had just been elected for a single year. Certainly the advantages gained by continuity of management are important. Recognizing that classification makes it much harder for persons seeking to obtain control of management to do so, an important question in deciding whether classification should be retained is whether the process of ousting management from control should be made easier or harder for a group of "insurgents." When considering this, it should be remembered that many attempts to unseat management are not brought to benefit the corporation, but merely to benefit those attempting to gain control. Classification, to an extent, is an effective means of discouraging these attempts.

An analysis of the major cases concerned with the coexistence of cumulative voting and classified directorates will explain the intricacies of the problem involved. In the celebrated case of Wolfson v. Avery, the board of directors of Montgomery Ward & Company was composed of nine members divided into three classes of three directors each. At each annual meeting of the stockholders one class was elected for a term of three years. An action was brought to have that section of the Illinois Business Corporation Act pur-

26 Ibid. at 32. The Maryland statute was enacted in 1868; the Illinois statute in 1871, and the Pennsylvania statute in 1887.
27 Ibid.
28 6 Ill. 2d 678, 126 N.E.2d 701 (1955).
29 Ill. Rev. Stat. ch. 32, § 157.35 (1959), provides as follows: "When the board of directors shall consist of nine or more members, in lieu of electing the whole number of directors annually, the by-laws may provide that the directors be divided into either two or three classes, each class to be as nearly equal in number as possible, the term of office of directors of the first class to expire at the first annual meeting of shareholders after their election, and that of the third class, if any, to expire at the third annual meeting after their election. At each annual meeting after such classification the number of directors equal to the number of the class whose term expires at the time of such meeting shall be elected to hold office until the second succeeding annual meeting, if there be two classes, or until the third succeeding annual meeting, if there be three classes.
porting to authorize the classification of corporate directors and the election of only one class annually, declared violative of the rights granted by the Illinois Constitution30 and therefore unconstitutional.

The position of the Wolfson group, advocating the unconstitutionality of the Illinois statute, was that the purpose of cumulative voting is to give minority shareholders the right to proportional representation on corporate boards, and that representation in proportion to the holdings of the minority group is defeated if the entire board is not elected at one time.31 The Avery group, in control of management at the time this action was instituted, contended that the purpose of cumulative voting is not to guarantee proportional representation but simply to enable minority groups to conceivably secure some representation on corporate boards of directors.32 In construing Article XI, § 3, the Supreme Court of Illinois found no implication from the words “to be elected,” appearing in the first clause, that less than the entire board may be elected at one time. The court held that the second clause dealing expressly with cumulative voting, indicates that all directors must be elected at each regular election. That part of the constitutional provision confers on each shareholder the right “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.”33 The court held that the words “candidate,” “candidates,” and the phrase “number of directors” should be given their ordinary meaning, namely, the whole number of directors of the corporation. The bases for declaring the statute unconstitutional is that cumulative voting is authorized on the basis of the “number of directors” rather than “the number of directors to be elected,” and that cumulative voting is to provide for proportional representation, rather than just some representation for the minority.

30 Ill. Const. art. XI, § 3, 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 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.”
31 Wolfson v. Avery, 6 Ill. 2d 678, 126 N.E.2d 701, 705 (1955).
32 Ibid.
33 Ill. Const. art. XI, § 3.
In a well-reasoned dissent, Mr. Justice Hershey pointed out that the words "candidate" and "candidates" in the second clause mean an aspirant for an office, and that the office to which the candidate is aspiring is that of a director. From this, he reasons, it is clear that cumulative voting exists only for voting upon those directors on the board who are to be elected. Another valid argument is predicated upon the fact that if the number of votes is to be computed, as decided in the majority opinion, this would only increase the number of votes allotted to each side in proportion to their stockholdings and would not alter the ultimate number of directors which either group could elect to the board of directors.

In Humphrys v. The Winous Co., the Ohio Court of Appeals for Cuyahoga County held that a board consisting of only three directors could not be classified into three classes where a statute expressly permitted such classification and another statute provided for cumulative voting. The court pointed out that the right of a shareholder in an Ohio corporation to cumulate his vote had been provided in the state of Ohio for more than fifty years. It further stated that the legislature could not have intended that the passage of a subsequent statute authorizing classification of directors could be so used as to nullify the right of cumulative voting. It is interesting to note that this case was not concerned with a constitutional provision and a subsequent statutory enactment, but dealt with two statutes instead.

Classification of a three-man board into three classes would definitely remove whatever opportunity a minority group had to gain any representation on the board. A resolution to elect seven directors, one at a time at the same meeting, was declared invalid under the constitutional requirement of cumulative voting in Wright v. Central Calif. Water Co. This tactic, also employed by the majority shareholders in the Humphrys case, eliminated any possibility of minority representation. If but one director is to be elected at a time, there can be no cumulation of votes, either by the majority or the minority.

34 Wolfson v. Avery, 6 Ill. 2d 678, 126 N.E.2d 701, 712 (1955).
35 125 N.E.2d 204 (Ohio 1954); aff'd, 164 Ohio St. 254, 129 N.E.2d 822 (1955).
36 Id. at 210.
37 Adkins, supra note 23, at 36.
38 67 Cal. 532, 8 Pac. 70 (1885).
The Pennsylvania Constitution provides for cumulative voting and the Pennsylvania Business Corporation Act further clarifies and interprets the constitution. Two Pennsylvania decisions, Janney v. Philadelphia Trans. Co.,42 and Cohen v. A. M. Byers Co.,43 appear to relate cumulative voting to the number of directors to be elected, and in both, no conflict was found between classification of directors and the provision for cumulative voting. In the Janney case, the smallest class was composed of four directors and in the Cohen case the smallest class was composed of three directors. Hence, though proportional representation was not afforded the minority groups in either of these corporations, at least some representation was afforded them.

In the New York case of Bond v. Atlantic Terra Cotta Co.,44 the appellate division of the supreme court clearly indicated that cumulative voting and classification were not incompatible partners.

In a recent Arizona decision, Bohannan v. The Corporation Comm'n,45 the Supreme Court of Arizona held that provisions of corporation articles authorizing a nine-man board, classified into three classes, did not impair the rights of minority shareholders guaranteed by constitutional and statutory provisions allowing cumulative voting. Although the provision of the Arizona Constitution also uses the words "to be elected," as does the Illinois constitu-

40 Pa. Const. art. XVI, § 4, reads as follows: "In all elections for directors or managers of a corporation each member or shareholder may cast the whole number of his votes for one candidate, or distribute them upon two or more candidates, as he may prefer."

41 Pa. Stat. Ann. tit. 15 § 2852-505 (1954), provides: "... In each election for directors, every shareholder entitled to vote shall have the right, in person or by proxy, to multiply the number of votes to which he may be entitled by the number of directors to be elected, in the same election by the holders of the class or classes of shares of which his shares are a part, and he may cast the whole number of such votes for one candidate or he may distribute them among any two or more candidates. The candidates receiving the highest number of votes from each class or group of classes entitled to elect directors separately up to the number of directors to be elected in the same election by such class or group of classes shall be elected."


44 122 N.Y.S. 425 (1910).


46 Ariz. Const. art. XIV, § 10, provides: "In all elections for directors or managers of any corporation, each shareholder shall have the right to cast as many votes in the aggregate as he shall be entitled to vote in same company under its charter multiplied by the number of directors or managers to be elected at such election; and each shareholder may cast the whole number of votes, either in person or by proxy, for one candidate, or distribute such votes among two or more such candidates; and such directors or managers shall not be elected otherwise."

Ariz. Rev. Stat. § 10-271 (1956), is merely a restatement of this article and has no further bearing on the problem.
tional provision on the same matter, the Arizona Supreme Court was unable to conclude, as did the Illinois Supreme Court, that it was the intention of the framers of the Arizona Constitution to require that minority shareholders be represented on corporate boards in proportion to the percentage of shares owned or controlled by them. The purpose behind the constitutional provision, the court held, was to make it possible that the minority will have "a member on the board so that he knows what is going on." 

The Model Business Corporation Act, prepared by the Commission on Uniform State Laws, provides both for cumulative voting and for permissive classification of directors and election for staggered terms. Thus the Commission apparently has found merit in the reasoning of the Arizona and Pennsylvania Supreme Courts and has apparently rejected the contention of the Illinois Supreme Court that the purpose of cumulative voting is to provide proportional representation for the minority shareholders.

The basic problem which confronted the Illinois, Pennsylvania, and Arizona Supreme Courts has been considered in a recent West Virginia Supreme Court decision. The West Virginia Constitution provided for cumulative voting as early as 1872. The constitutional provision, amended in 1958, has remained the same insofar as the provision for cumulative voting is concerned. This

47 ILL. CONST. art. XI, § 3.
51 Campbell, supra note 10, at 7.
52 W. Va. CONST. art. XI, § 4, prior to its amendment, read as follows: "The Legislature 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."

W. Va. CONST. art. XI, § 4, as amended, provides: "The Legislature shall provide by law that every corporation, other than a banking institution, shall have power to issue one or more classes and series within classes of stock, with or without par value, with full, limited or no voting powers, and with preferences and special rights and qualifications, and that in all elections for directors or managers of incorporated companies, every stockholder holding stock having the right to vote for directors, 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
constitutional provision and subsequent legislative enactments based upon it were upheld by the court in *Cross v. West Virginia Cent. & Pa. Ry.*, and were further commented upon in *Germer v. Triple-State Natural Gas & Oil Co.* The provision of the constitution precisely allows the cumulation of shares, the number of votes to be determined by multiplying the number of directors by the number of shares of stock owned. The statutory provision, subsequently enacted to interpret the constitutional mandate, provides that each shareholder, in all elections of directors of a corporation, "may cumulate such votes and give one candidate as many votes as the number of directors ‘to be elected’ multiplied by the number of his shares of stock shall equal . . . ." This modification found in the language of the statutory provision allows it to be construed in a manner different from that construction which may be applied to the constitutional provision.

A clause of another legislative enactment once conferred and perhaps still does confer the power on a corporation, by an amendment to its charter or by a proper meeting of stockholders called to consider the matter, to divide its board of directors into one, two, or three classes, the term of each class of directors not to extend beyond three years.

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54 35 W. Va. 174, 12 S.E. 1071 (1891).
55 60 W. Va. 143, 54 S.E. 509 (1906). Judge Poffenbarger, at p. 190, states: "... by which a statute authorizes a minority stockholder to cumulate his shares in voting for the election of officers, was held to be applicable to a corporation organized before the passage of that statute. It was a mandatory statute. It granted to the minority stockholder a privilege which he was authorized to exercise. As to him it was permissive. He was not bound to claim it, but he was given the right to do so. As to the majority stockholders it was mandatory. It compelled them to submit to the exercise of the privilege allowed the minority stockholder. It was not a permission extended to the corporation. . . . It did not deprive them (the majority) of the control of the corporation. They could still elect a majority of the directors. All that it did do was to give the minority stockholder a chance for representation on the board of directors, so that he could have a voice in the management of the business in which he was interested . . . . it (the statute) said to the majority, 'you must allow the minority stockholder to vote in your meetings in a certain way if he desires to do so.'"
In *State ex rel Syphers v. McCune*, petitioner were the holders of shares of stock of a West Virginia corporation whose by-laws provided for a board of five directors, the board being divided into three classes. Two directors were to be elected in one year, two in two years thereafter and one in four years thereafter, each to serve for six years. Petitioners, at the stockholders annual meeting, were only permitted to vote the common stock which they owned or for which they held proxies, and to cast their votes only by voting one vote for each share for each of two candidates or to cumulate the shares which they owned or for which they had proxies by casting two votes for each share for one candidate. As a result, petitioners could not elect a single director. Had five directors been elected and had petitioners cumulated their votes and cast five votes for each of the shares for which they owned or held proxies, they could have gained representation on the board in proportion to the percentage of shares which they owned or had proxies to vote.

The court, in declaring classification invalid in the instant case, made no direct reference to any other cases on the subject, nor did it expressly invalidate our statutory provision for classification of directors. Two of the five directors of the corporation were given long-term contracts as directors which were also invalidated by the court. However, it is not clear from the court's opinion, whether the court took this into consideration when invalidating the by-law classifying directors. The court, in its opinion, stated that during the period provided by the two long-term contracts, there could only be three other directorate positions to be filled, yet it subsequently declared these contracts invalid and held that these other two directors would also have to be elected to the position of director if they were to serve as such. If so, then in some years there would be at least two directors elected, rather than just one, as would be the case if the long-term contracts were upheld. Did the court merely mean that if only one director was to be elected each year, classification would vitiate the rights of the minority to vote cumulatively? If so, then it has held in accord with prior California and Ohio decisions. However, once again, this cannot be ascertained from the opinion. In its decision, the court further stated at p. 323, 101 S.E.2d at 838:

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59 67 Cal. 532, 8 Pac. 70 (1885); Humphrys v. The Winous Co., 125 N.E.2d 204 (Ohio 1954).
“Regardless of the motives or purposes of the management of the corporation or whether such by-law provisions have proved beneficial, it is readily observable that such limitation gives a majority of the stockholders the power to elect all directors of the corporation with no power in a lesser percentage of the votes to elect a single director, and thus deprives entirely the minority of representation on the board and a voice in the management of the affairs of the company. As stockholders have the right to vote cumulatively, a plan which prevents the full enjoyment of that right is to that extent, an effectual and substantial denial of the right and illegal. Accordingly, we are of the opinion that the stockholders had the right to vote on all five positions of directors of the corporation and they could not be limited to the selection of any lesser number.”

It is recognized that there are instances where cumulative voting will not even conceivably afford the minority group “some” representation on the board of directors. The first of these is where only one director is to be elected at a time. Another is where the minority is so small in number that it cannot muster enough voting strength, even if voting cumulatively, to gain membership. Here it becomes a mathematical impossibility to gain representation, not because the minority group is not afforded the opportunity to vote cumulatively, but because they are weak in voting strength. With these principles in mind, when speaking of gaining “some” representation, it must henceforth be assumed that the minority group is of sufficient size in number to be able to gain at least “some” representation if permitted to vote cumulatively.

It is not clear from the above-quoted portion of the opinion whether the court means that classification of directors to be invalid, must give the power to the majority to elect “all directors” and thereby “entirely deprive” the minority of any representation on the board, or whether classification would be valid if it does not “entirely deprive” the minority of “some” representation. The question thus becomes one of proportional representation for the minority or just “some” representation for the minority. Perhaps all the court means is that if some representation is afforded the minority, then classified directorates can coexist with cumulative voting. Hence, a nine-man board divided into three classes of three members per class would allow “some” representation to the minority and would be valid. The court goes a step further and speaks of a plan which prevents the “full enjoyment” of the right of cumulative voting.
Does the court indicate that "full enjoyment" can only be had by the minority when the opportunity to gain proportional representation is afforded them? It seems that a stockholder can "fully enjoy" his right to vote cumulatively when he has an opportunity to gain "some" representation on the board of directors and that to "fully enjoy" this right it is not necessary that the minority be afforded an opportunity for representation in proportion to their stockholdings.

Though our constitutional provision on cumulative voting\(^{60}\) is, with the exception of the word "managers" in the second clause, identical to that of the state of Illinois,\(^{61}\) little of the reasoning used by the Illinois Supreme Court in the \textit{Wolfson} case\(^{62}\) was pronounced in the \textit{Syphers} case. Both decisions apparently arrive at the same basic conclusion: that classified directorates do vitiate the right of cumulative voting and are invalid, if, by its decision, the West Virginia Supreme Court meant to apply its ruling to all cases involving both cumulative voting and classified directorates.

If cumulative voting is to provide proportional representation, rather than just some representation to the minority shareholders, its effect is inconsistent with that of classified directorates. Cumulative voting, when provided for and when used by the minority shareholders, results in proportional representation on the board of directors. If classified directorates are also permitted, the minority will not gain proportional representation, but normally will, if more than one director is to be elected, gain some representation on the board. It is apparent from scrutinizing the constitutional provisions adopted on the subject of cumulative voting that none expressly sets forth whether proportional representation is to be afforded the minority or whether the constitutional mandate merely calls for some representation for this group. Until precise language defining this problem is placed in the constitutions of those states providing for cumulative voting, hopeless conflict will result. Until that time when it is expressly mandatorily provided that proportional representation is to be given the minority, it seems that classification should be permitted to coexist with cumulative voting. For when both are permitted, the minority still is afforded some representation on the board of directors and does enjoy its right to be represented through the means of voting cumulatively.

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\(^{61}\) \textit{Ill. Const.} art. XI, § 3.