Shareholder Meetings and Freedom Rides: The Story of *Peck v. Greyhound*

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ABSTRACT

In 1947, civil rights pioneers James Peck and Bayard Rustin, members of the radical religious group, the Fellowship of Reconciliation, and its offshoot, the Congress of Racial Equality (CORE), prepared to embark on the Journey of Reconciliation, an interracial protest against segregated busing in the American South. But first, they did something else radical: they bought shares in a corporation. A year later, after their travels in the South had led to terror, death threats, beatings, and in Rustin's case, a term on a chain gang, they brought their civil rights activism to a new site of protest—the shareholder meeting of that corporation, Greyhound Bus Lines. Invoking the shareholder proposal rule adopted a few years before by the Securities and Exchange Commission (SEC), Peck and Rustin insisted that as shareholders they had a right to voice their opinions about Greyhound's segregation policies and to poll other shareholders on the issue. When Greyhound refused to send their proposal to other shareholders in its proxy statement, they brought the case that became known as Peck v. Greyhound. In 1952, to end the case and future litigation, the SEC changed its rules and held that shareholders could not use the shareholder proposal mechanism "primarily for the purpose of promoting . . . racial, religious, or social or similar causes." In this landmark case, we see the collision of race and the corporate and securities laws, as radicals attempted to use those laws to pursue social justice, while those charged with administering them insisted that race had no role to play in the corporation—in the process paradoxically writing race into the nation's securities laws.

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INTRODUCTION

In 1947, James Peck and Bayard Rustin, members of the radical pacifist group, the Fellowship of Reconciliation (FOR or Fellowship), and its offshoot, the Congress of Racial Equality (CORE), were preparing for a protest they called the Journey of Reconciliation, now remembered as the first Freedom Ride.[1] Inspired by Quaker pacifism, Gandhian nonviolence, and their own experiences as conscientious objectors during World War II, Peck, who was white, Rustin, who was African American, and other members of the Fellowship would ride as an interracial group in buses across the upper South, attempting to force bus lines to live up to the Supreme Court's 1946 decision in *Morgan v. Virginia*, holding segregation in interstate travel unconstitutional.[2] In the short run, this first Freedom Ride would meet little success, as the members of the Fellowship faced threats, beatings, and in Rustin's case a thirty-day sentence to a chain

1. JAMES PECK, FREEDOM RIDE 14 (1962) [hereinafter PECK, FREEDOM RIDE]. The 1947 protest was not called a "Freedom Ride," a term coined for a similar 1961 protest, but Peck and others later referred to the 1947 protest as a Freedom Ride and so the term is used here. *See generally* JAMES PECK, UNDERDOGS VS. UPPERDOGS 123 (1980) [hereinafter PECK, UNDERDOGS VS. UPPERDOGS]. The standard historical account on the Journey of Reconciliation is DEREK CHARLES CATSAM, FREEDOM'S MAIN LINE: THE JOURNEY OF RECONCILIATION AND THE FREEDOM RIDES 13–42 (2011); GEORGE HOUSER & BAYARD RUSTIN, WE CHALLENGED JIM CROW!: A REPORT ON THE JOURNEY OF RECONCILIATION (1947).

2. Morgan v. Virgina, 328 U.S. 373 (1946). For background on the case, see MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 264–66 (2004).

gang for their efforts.[3] In the long run, however, it would pave the way for the civil rights movement of the 1950s, the renewed Freedom Rides in 1961, and the eventual upending of state-mandated racial segregation.

Before they began their ride through the South in 1947, however, Peck and Rustin took an unexpected step that would have radical consequences of its own: they bought shares in a corporation.[4] A year later, after the Journey had ended, they went to the annual meeting of that corporation, Greyhound Bus Company, which even after *Morgan v. Virginia* continued as a matter of company policy to segregate its interstate buses in the South.[5] There they invoked a different body of federal law, the federal securities laws, to insist that Greyhound provide all its shareholders the opportunity to vote on a proposal condemning the company's continued operation of segregated bus routes. The law they invoked at the shareholder meeting was less than a decade old: in 1942, the Securities and Exchange Commission (SEC) had used its powers under § 14 of the Securities Exchange Act of 1934 to adopt a new rule, Rule X14a-7 (now 14a-8), the "Shareholder Proposal Rule," giving a shareholder under some circumstances the power to make such proposals and requiring companies to send the proposals to all their shareholders in their annual proxy solicitations—at the company's expense.[6] When Greyhound refused, Peck, with financial backing from CORE, sued Greyhound to have their proposal included in Greyhound's proxy materials.[7] To end the suit and cut off future ones, in 1952, the SEC amended the rule. Before then, the rule had allowed companies to exclude proposals "of a general political, social, or economic nature."[8] The 1952 amendment, however, specifically targeted the Greyhound proposal, and added new language to forbid proposals "primarily for the purpose of

3. CATSAM, *supra* note 1, at 40–42.

4. James Peck, *Minority Stockholders v. Jim Crow,* CRISIS MAG., June–July 1951, at 375, 375; Letter from George M. Houser to Martin A. Martin (Feb. 3, 1950), Papers of the Congress of Racial Equality, Series 3, Reel 13 [hereinafter CORE Papers] ("At the time of the Journey of Reconciliation Jim Peck and Bayard Rustin each got a share of the Greyhound stock in order to fight the jimcrow seating issue in the stockholders meeting.").

5. *See* MIA BAY, TRAVELING BLACK: A STORY OF RACE AND RESISTANCE 250–52 (2021); KLARMAN, *supra* note 2, at 264–65.

6. This Article was written in the year of COVID-19, when the National Archives, which hold the records of the SEC, were not open. My accounts of the internal workings of that agency have thus relied on SEC releases and a number of secondary sources, the most important of which was: Philip A. Nicholas Jr., The Securities and Exchange Commission and the Shareholder Proposal Rule: Agency Administration, Corporate Influence, and Shareholder Power, 1942–1988, at 103–54 and *passim* (2002) (Ph.D. dissertation, University at Albany, State University of New York). I was alerted to the existence of this source by: Dalia Tsuk Mitchell, *Shareholders as Proxies*, 63 WASH. & LEE L. REV. 1503, 1546 n.221 (2006).

7. Peck v. Greyhound Corp., 97 F. Supp. 679, 680 (S.D.N.Y. 1951).

8. Exchange Act Release No. 34-3638, 1945 WL 27415 (Jan. 3, 1945).

promoting . . . general economic, political, *racial, religious*, or social or similar causes.'"[9] In an attempt to insist that racial causes were illegitimate subjects for shareholders' concern, race had been written into the securities laws.

This is the first full-scale examination of *Peck v. Greyhound*. While earlier scholars have touched briefly on the case, they have spent little time on it, perhaps because it falls between two scholarly fields that until very recently have rarely overlapped: corporate and securities laws and the legal history of race and civil rights.[10] Corporate and securities law scholars have occasionally discussed *Peck v. Greyhound* as an episode in the evolution of the shareholder proposal rule—still an important topic[11]—but few have spotted the connection between the case and the change to the rule in 1952, or the way the change stymied shareholder civil rights activism in much of the 1950s and 1960s. Historians of the 1961 Freedom Rides and CORE have sometimes mentioned the case in passing but understandably have focused their attention on the large-scale social movements and legal campaigns that ultimately toppled legal segregation rather than on an unsuccessful securities law case.[12]

That is regrettable, because the case illustrates the sometime surprising interplay of race and American corporate and securities laws. Drawing on the records and statements of two organizations rarely

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9. Exchange Act Release No. 34-4668 (Jan. 31, 1952) (emphasis added).

10. There a few notable exceptions discussing *Peck v. Greyhound*. *See* Lisa Fairfax, *Social Activism through Shareholder Activism*, 76 WASH. & LEE L. REV. 1129–35 (2019) (discussing *Peck v. Greyhound*); Sarah Haan, *Civil Rights and Shareholder Activism:* SEC v. Medical Committee for Human Rights, 76 WASH. & LEE L. REV. 1167, 1214–15 (2019); and Mitchell, *Shareholders as Proxies,* 63 WASH. & LEE L. REV. at 1554–56. The only work I am aware of that notes Rustin's involvement with this case, and the work from which I first learned of it, is Richard Marens, *Inventing Corporate Governance: The Emergence of Shareholder Activism in the Nineteen-Forties*, 8 J. BUS. & MGMT. 365, 371–72 (2002).

11. The literature on shareholder proposals is immense, as the shareholder proposal has not only been a vehicle for social protest but also for attempts to improve corporate governance, and it is still hotly fought over. For discussion of recent developments, see, for example, Jennifer Hill, *The Trajectory of American Corporate Governance: Shareholder Empowerment and Private Ordering Conflict*, 2019 ILL. L. REV. 509, 525–27 (discussing use of shareholder proposals related to corporate governance); for data on the most recent year's shareholder proposals, see Gibson Dunn, *Shareholder Proposal Developments During the 2020 Proxy Season* (August 4, 2020), https://www.gibsondunn.com/wp-content/uploads/2020/08/shareholder-proposal-developments-during-the-2020-proxy-season.pdf [https://perma.cc/U7HH-AQDV]; on recent changes to the rule, see Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8, Exchange Act Release No. 34-89964, (Sept. 23, 2020); *see also, e.g.*, Lillian Brown, Meredith B. Cross & Alan J. Wilson, *SEC Adopts Long-Awaited Amendments to Modernize Shareholder Proposal Rule,* WILMERHALE (Sept. 24, 2020), https://www.wilmerhale.com/en/insights/client-alerts/20200924-sec-adopts-long-awaited-amendments-to-modernize-shareholder-proposal-rule [https://perma.cc/Z2GQ-6H34].

12. *See, e.g.*, CATSAM, *supra* note 1, at 57–58; *see also* AUGUST MEIER & ELLIOT RUDWICK, CORE: A STUDY IN THE CIVIL RIGHTS MOVEMENT 1942–1968, at 46 (1973).

discussed together, CORE and the SEC, this Article shows how race and the securities laws collided in *Peck v. Greyhound*. It demonstrates that the case was not, as some earlier writers have assumed, Peck's alone, but equally the work of the legendary African American civil rights leader Bayard Rustin. Their joint action was in turn a product of, and shaped by, the ethos of the Fellowship of Reconciliation, one of the nation's most notable and long-lived Christian pacifist organizations. The ensuing litigation was guided and funded by CORE, a pathbreaking civil rights organization. And eventually the case and subsequent rule change would have an impact both on the civil rights movement, as it largely precluded the shareholder proposal as a vehicle for protest during the 1950s and 1960s, and in securities laws, as it helped minimize the movement to give shareholders a voice in corporate governance—to promote "shareholder democracy"—in mid-century America.[13]

Finally, this Article contributes to a nascent movement to integrate race into the study of corporate and securities laws, areas that until recently have rarely been linked. While corporations, like almost all other American institutions, have been deeply intertwined with the United States' racial structure and attempts to change it,[14] the idea that corporate and securities laws in particular can raise racial issues has been largely absent from scholarly literature.[15] In the last few years, however, a number of articles, often focused on shareholder activism, have begun to challenge that premise, and show that the divide presumed naturally to separate the two fields has in fact been constructed by lawyers and scholars, sometimes in the face of opponents who insisted the two areas were not separate at all.[16] Here, I join those other authors in insisting on the link between race

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13 *See generally* FRANK D. EMERSON & FRANKLIN LATCHAM, SHAREHOLDER DEMOCRACY: A BROADER OUTLOOK FOR CORPORATIONS (1954); *see also* Harwell Wells, "*Corporation Law is Dead": Heroic Managerialism, Legal Change, and the Puzzle of Corporation Law at the Height of the American Century*, 15 U. PA. BUS. L.J. 305, 339–44 (2013).

14. This seems so obvious as to not need support. That said, see generally Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151 (2013); JULIET E. K WALKER, HISTORY OF BLACK BUSINESS IN AMERICA (1998); MEHRSA BARADARAN, THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP (2019); SLAVERY'S CAPITALISM: A NEW HISTORY OF AMERICAN ECONOMIC DEVELOPMENT (Sven Beckert & Seth Rockman eds., 2018); EDWARD E. BAPTISTE, THE HALF THAT HAS NEVER BEEN TOLD: SLAVERY AND THE MAKING OF AMERICAN CAPITALISM (2016).

15. There have been attempts to call scholars' attention to connection between the two areas, but they have for the most part not attracted the attention they deserve. For examples from previous decades see, for example, Aron Dhir, *Towards a Race and Gender-Conscious Conception of the Firm: Canadian Corporate Governance, Law and Diversity*, 35 QUEEN'S L.J. 569 (2010); Thomas Joo, *Race, Corporate Law, and Shareholder Value*, 54 J. LEGAL EDUC. 351 (2004); Cheryl Wade, *Attempting To Discuss Race in Business and Corporate Law Courses and Seminars*, 77 ST. JOHN'S L. REV. 901 (2003); and especially Richard R. W. Brooks, *Incorporating Race*, 106 COLUM. L. REV. 2023 (2006).

16. Recent works include Fairfax, *supra* note 10; Haan, *supra* note 10; Veronica Root Martinez, *A More Equitable Corporate Purpose*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND

and corporation law by documenting how, seventy years ago, a few radicals attempted to use the nation's corporate and securities laws to insist that a corporation face up to its role in the nation's system of racial subordination, and how the guardians of those laws defeated them.

This Article was prepared for the symposium on "Corporate Capitalism and the City of God," held at the Seattle University School of Law's Adolf A. Berle, Jr. Center on Corporations, Law and Society, and it belongs in the symposium for at least two reasons. First, Peck and Rustin acted as members of FOR when they embarked on the Journey of Reconciliation, and their campaign against Greyhound was a product of that group's radical religious commitment (and of Rustin's, at least, Quaker faith).[17] Yet, there is a second reason it belongs in a symposium named after Adolf Berle, a man best remembered as a student of the American corporation and author of the 1932 classic, *The Modern Corporation and Private Property*.[18] The title "Corporate Capitalism and the City of God" was borrowed from a chapter of Berle's 1954 book, *The 20th Century Capitalist Revolution*, where he argued that the United States had entered an era where corporations would have to "consciously take account of philosophical considerations," and ask how their operations would forward the "good life."[19] The corporation had become, Berle argued, the "conscience-carrier of twentieth century American society."[20] In *Peck v. Greyhound* we have a moment where shareholders demanded that a corporation act with a conscience, and the corporation, followed by the federal government, refused.

Part I of the Article introduces Peck, Rustin, the FOR, and the Journey of Reconciliation. Part II shifts focus to look at shareholders and their role in the corporation at the middle of the twentieth century and the shareholder proposal rule. Lastly, Part III discusses *Peck v. Greyhound* and its aftermath.

PERSONHOOD (Elizabeth Pollman & Robert Thompson eds., 2021); Evelyn Atkinson, *Frankenstein's Baby: The Forgotten History of Corporations, Race, and Equal Protection* (unpublished paper on file with author); Sarah Barringer Gordon, *The African Supplement: Religion, Race, and Corporate Law in Early National America*, 72 WM. & MARY Q. 385 (2015).

17. Ironically, even though he worked for a religious organization, Peck was an atheist. *See* JOSEPH KIP KOSEK, ACTS OF CONSCIENCE: CHRISTIAN NONVIOLENCE AND MODERN AMERICAN DEMOCRACY 204 (2009).

18. ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

19. ADOLF A. BERLE, JR., THE 20TH CENTURY CAPITALIST REVOLUTION 166–67 (1954).

20. *Id.* at 182. For an interesting reflection on this, see Nelson & Sepper in this volume. Elizabeth Sepper & James D. Nelson, *Adolf Berle's Corporate Conscience*, 45 SEATTLE U. L. REV. 97 (2021).

I. CIVIL RIGHTS, RELIGIOUS ACTIVISM, AND THE JOURNEY OF RECONCILIATION

A. FOR, CORE, Rustin, and Peck

Peck v. Greyhound had its roots in the Fellowship of Reconciliation. The Fellowship was formed in 1915 as the U.S. branch of an international network of pacifist organizations opposed to World War I.[21] It was the "the original American proponent of modern Christian nonviolence."[22] After the war, the FOR continued its antiwar efforts, but in the 1920s and 1930s members also became involved in other then-radical causes, including anti-imperialist and anti-capitalist organization and opposition to American racism.[23] Most notably, FOR members in the 1930s were the first to import the nonviolent ideals of Mohandas Gandhi into the United States.[24] While there had long been pacifists in America, "religious pacifists—and before the twentieth century virtually all pacifism was religious—tended to view their condemnation of violence as a matter of personal conviction. Its effect upon others, though sometimes profound, was ultimately irrelevant to the believer's own determination to follow God's will."[25] The direct nonviolent action pioneered by Gandhi and championed by the FOR promised something other than this quietism.[26] It aimed to produce social change, both through mass refusal to cooperate with injustice and by publicly dramatizing unjust conditions.[27] As the FOR's president, the Quaker A. J. Muste, saw it, Gandhian nonviolence would be a vehicle to "revolutionize America."[28]

Yet precisely how it would change America, and the world, posed a dilemma for FOR by the beginning of the 1940s. The Fellowship was born in opposition to the first World War, and its core commitment was always against war and militarism. As the second World War loomed, FOR was consumed with opposing the conflict by assisting men who refused conscription. Action against American racism took a back seat. In response, in early 1942 several FOR members based in Chicago, led by the African American James Farmer and the white George Houser,

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21. *See* KOSEK *supra* note 17, at 4.

22. *Id.*

23. *See* Clyde W. Barrow, *Abraham Johannes Muste*, AM. NAT'L BIOGRAPHY (1999). *See generally* JOHN D'EMILIO, LOST PROPHET: THE LIFE AND TIMES OF BAYARD RUSTIN 40–44 (2003).

24. *See* KOSEK, *supra* note 17, at 87–99.

25. *Id.* at 97.

26 SCOTT H. BENNETT, RADICAL PACIFISM: THE WAR RESISTERS LEAGUE AND GANDHIAN NONVIOLENCE IN AMERICA, 1915–1963, at xv (2003).

27. *See id.* at 85–111.

28 JAMES FARMER, LAY BARE THE HEART: AN AUTOBIOGRAPHY OF THE CIVIL RIGHTS MOVEMENT 85 (1998).

decided the best way to handle FOR's conflicting commitments was to form a new organization devoted to applying "Gandhi's methods against racial inequality."[29] They called it the Congress of Racial Equality (CORE).[30] In founding CORE they did not leave FOR, but CORE offered them a separate vehicle for combating racism.

CORE joined many other groups already devoted to civil rights, most notably the National Association for the Advancement of Colored People (NAACP). Yet, CORE saw itself as more radical than existing civil rights organizations, and as unique in its deployment of "a sophisticated form of Christian nonviolence . . . on behalf of racial equality."[31] Not for CORE was the slow, plodding (though tremendously important) work of carefully filing strategic lawsuits. Instead, CORE saw progress lying in nonviolent protests designed to generate opposition and so very publicly enact "the performance of justice," a strategy that would ultimately find its great success in the Montgomery Bus Boycott of 1956–57 and other nonviolent demonstrations against segregation, including the 1961 Freedom Rides. Early CORE actions, such as interracial "sit-downs" at Chicago restaurants that refused to serve African Americans, demonstrated this approach by not merely protesting racism but drawing attention to it. As the historian Joseph Kip Kosek described it, "[CORE] innovators dramatized existential moral action against racism by rehearsing, staging, casting, and replaying it as both ritual and spectacle."[32]

Following the end of the war, FOR and CORE were again able to turn to challenging the segregation that, even after a war fought for democracy, appeared firmly rooted in the United States. While FOR and CORE were formally distinct, during the 1940s they overlapped in ways that made it difficult to separate the two. CORE's unsalaried leaders often held paid positions at the FOR; for instance George Houser, CORE's executive secretary, and Bayard Rustin, the prominent CORE organizer, were at the same time co-heads of FOR's "Racial and Industrial Department."[33] Additionally, "CORE's national projects were jointly sponsored by FOR, with the Fellowship providing a major part of the financing."[34] In late 1946, the two organizations began planning a new push to challenge segregation and targeted segregated bus transport in the American South. This would become the Journey of Reconciliation (Journey), later remembered as the first Freedom Ride.

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29. *Id.* at 53.

30. Congress "of" rather than "for," as the founders believed the races were already equal. MEIER & RUDWICK, *supra* note 12, at 8.

31. KOSEK, *supra* note 17, at 204.

32. *Id.*

33. MEIER & RUDWICK, *supra* note 12, at 19; *see also* D'EMILIO, *supra* note 23, at 60.

34. MEIER & RUDWICK, *supra* note 12, at 20.

It is here that we encounter the two men who would play central roles in *Peck v. Greyhound*, Bayard Rustin and James Peck. Along with George Houser, Rustin was a co-organizer of the Journey. Destined to be one of the major civil rights leaders of the twentieth century, Rustin had been born in the African American community in West Chester, Pennsylvania, and at an early age embraced Quakerism,[35] which led him to pacifist circles and then to join FOR in 1941; he quickly rose to be a senior official in the organization and one of Muste's trusted lieutenants.[36] Rustin was a complicated and magnetic figure, a brilliant strategist who would play a major role in the civil rights movement, including organizing Martin Luther King's March on Washington in 1963.[37] He was also gay, and worries about this at times led other civil rights leaders unfairly to marginalize him and his contributions.[38] Like several of his FOR colleagues, Rustin served in prison during World War II for refusing any form of military service, even the alternative service offered to conscientious objectors.[39] A man of great physical and moral courage, Rustin had protested segregation well before the Journey. On a bus trip from Louisville to Nashville in 1942, for instance, he refused to sit in the back of the bus, receiving a beating from police for his stance.[40]

James Peck would later be described as "[o]ne of America's most colorful radicals."[41] He came from a very different social world than Rustin—born into wealth and a graduate of The Lawrenceville School, he dropped out of Harvard and became involved in labor radicalism in the 1930s.[42] Peck also refused military service in World War II and served a prison term, during which he organized a protest to desegregate the prison cafeteria.[43] Peck's radicalism was not derived from religion—he was an atheist—but he was active in antiwar and civil rights from the 1940s to the 1980s. After his release from prison in 1945, he soon joined both CORE and the secular War Resisters' League, working for both and splitting the time between the two without a salary.[44]

35. D'EMILIO, *supra* note 23, at 25.
36. *Id.* at 37.
37. *See id.* at 327–56.
38. *Id.* at 489–92.
39. *Id.* at 75–77.
40. *Id.* at 46–47.
41. BENNETT, *supra* note 26, at 114.
42. *See generally* PECK, UNDERDOGS VS. UPPERDOGS, *supra* note 1, 13–20 and *passim*.
43. *See id.* at 70–86
44. *Id.* at 105.

B. Segregated Bus Lines, Morgan v. Virginia*, and the Journey of Reconciliation*

An obvious target for antiracist protests in the 1940s was segregated transportation. Buses, like other forms of communal transport, were segregated across the South.[45] Shortly after they developed in the 1910s, local and intercity bus lines carrying white and African American passengers were segregated by laws borrowed from those segregating streetcars.[46] Both law and custom sent African American riders in the back of the bus, in what were the least desirable seats, directly over the back axle and, in the case of the back row, in seats unable to recline.[47] And this was when the buses would accommodate African American riders at all; when seats were oversold, African American passengers were ordered to stand in the aisles, or just told to take the next bus, which might not arrive for hours.[48] Those who did get onto the bus still faced indignities imposed by racism and heightened by the layout of the bus itself. According to the historian Mia Bay, quoting Ralph Ellison,

> "Almost *anything* could happen" to Blacks on southern buses . . . . As they made their way down the "haunted, gauntletlike passage" to the back of the bus, and even after they sat down, Black passengers were subject to aggressions that ranged "from push to shove, assault on hat, heads or aching corns, to unprovoked tongue lashing from the driver or any white passenger, drunk or sober, who took exception to their looks, attitude or mere existence."[49]

Beginning in the 1930s, the NAACP had targeted laws mandating segregation on both bus and rail lines, and in 1946, won a major victory in *Morgan v. Virginia*, a challenge to Virginia's law requiring segregated seating in interstate bus travel.[50] In 1944, Irene Morgan, an African American war worker, was traveling from Gloucester County, Virginia, to her home in Baltimore when she was ordered to give her seat up to a white passenger.[51] When she refused, police dragged her off the bus and charged her with both resisting arrest and violating the state's segregation law.[52] The NAACP took her case and appealed it to the Supreme Court, which

45. Some bus lines in Northern states were also segregated. *See* Bay, *supra* note 5, at 169–73.

46. *See id.* at 161–69. Earlier there were both African American bus lines and lines that excluded African American passengers altogether, but segregation in shared bus transport soon became the norm. *See id.*

47. *See id.* at 186–87.

48. *See id.* at 188–91.

49. *Id.* at 187.

50. Morgan v. Virginia, 328 U.S. 373 (1946). On this case, see CATSAM *supra* note 1, at 14–18, KLARMAN *supra* note 2, at 264–66.

51. *See* BAY, *supra* note 5, at 230.

52. *See id.* at 231.

held that Virginia's law as applied to interstate travel violated the Constitution, resting its decision not on the equal protection grounds that would later be invoked in many cases but on the Constitution's "dormant commerce clause" that barred states from imposing undue burdens on interstate commerce.[53] For a state to require segregation of interstate transport, the Court ruled, was to "unduly burden[] that commerce in matters where uniformity is necessary."[54] Because different state requirements might demand passengers repeatedly move their locations, "a single, uniform rule to promote and protect national travel" was required.[55] State segregation statutes, at least as they applied to individuals traveling across state lines, were thrown out.

Morgan initially gained "scant attention."[56] Barring only laws requiring segregation of interstate passengers, it left in place those imposing segregation in local transport, which was a problem because the same buses carried both local and interstate passengers. Many bus lines adopted company policies requiring segregation of all their passengers, a change permissible under *Morgan*, which struck down only state mandates.[57] Atlantic Greyhound officials, for instance, "maintained that since state laws were still in force in regard to intrastate travel, as a 'practical' matter they had to continue to segregate all [African American] passengers."[58] States leapt in to enforce these new rules; Virginia, for example, passed a new law requiring passengers to obey directions from bus drivers or be charged with "disorderly conduct."[59] One brave African American, Wilson Head, attempted to assert his rights under the case when he rode "a Greyhound bus from Atlanta to Washington, D.C., sitting wherever he chose," but he abandoned his effort in Chapel Hill, North Carolina, after finding himself arrested with police pointing guns at his head.[60] Yet a second challenge to interstate bus segregation was brewing, one devised by FOR and CORE: the Journey of Reconciliation.

In autumn 1946, CORE had been searching for a project that would, in the words of its historians August Meier and Elliott Rudwick, provide the organization "with a national image, arouse the energy of [its local]

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53. *Morgan*, 328 U.S. at 373 (citing U.S. CONST. art. I, § 8).

54. *Id.* at 377.

55. *Id.* at 386.

56. CATSAM, s*upra* note 1, at 17; *see also* BAY *supra* note 5, at 232–33.

57. *See* CATHERINE A. BARNES, JOURNEY FROM JIM CROW: THE DESEGREGATION OF SOUTHERN TRANSIT 53 (1983) ("A state statute could be declared unconstitutional as a burden on commerce, but there was apparently no precedent saying that a carrier rule could similarly violate the commerce clause.").

58. MEIER & RUDWICK, *supra* note 12, at 38.

59. *See* BAY *supra* note 5, at 252.

60. CATSAM, *supra* note 1, at 19.

chapters, and bring in money."[61] A challenge to bus segregation was particularly promising after *Morgan*, for the Supreme Court's decision had produced almost no actual change in Southern practices. "To CORE and FOR activists, this situation demonstrated the inherent limitations of legalism, and provided an excellent opportunity to prove the value of nonviolent direct action."[62] While CORE took the lead, the Journey was a joint project of both groups, whose membership overlapped so much that it made little sense to separate them out.[63]

The plan for the Journey was simple. Sixteen men, eight Black and eight white, would ride Greyhound and Trailways buses—the two lines dominating intercity bus transit[64] —across the upper South, through Virginia, North Carolina, Tennessee, and Kentucky, refusing to follow the norms and laws of Jim Crow.[65] Each had purchased an interstate bus ticket, meaning that under *Morgan* they should not be bound by state laws mandating segregation in bus transport. The expectation was that they would meet resistance, ranging from protest to arrest.

In accord with CORE and FOR's Gandhian philosophy, the Journey's intent was not merely to protest segregation, but to make visible its injustices and highlight publicly its absurdities: "The Journey dramatized the everyday occurrence of segregation on the buses and forced racism's defenders to articulate their positions, which often turned out to be hopelessly muddled or simply embarrassing."[66] To prepare the riders for expected abuse and violence, FOR convened a two-day workshop on how to respond to racial challenges and legal threats, with a carefully worked out series of steps for the riders to follow which began with "If you are a Negro, sit in a front seat. If you are white, sit in a rear seat" and concluded with what to do when arrest came.[67] The genuinely interracial nature of the Journey was essential to its organizers; the riders were equally divided between white and Black, and the point of the ride was not just for African Americans to sit in seats reserved for whites, but for whites to sit in seats usually occupied by African Americans, thereby erasing the racial hierarchy. CORE practiced, in one historian's phrase, a "fastidious interracialism."[68] In a report on the Journey, Houser and Rustin

61. MEIER & RUDWICK, *supra* note 12, at 34.

62. *Id.*

63. *See generally* HOUSER & RUSTIN, *supra* note 1.

64. *See* BAY, *supra* note 5, at 162.

65. The deep South was seen as too dangerous, and women were not included out of fear that the mixing of African American men and white women was too likely to provoke a violent reaction. *See* BAY, *supra* note 5, at 254.

66. KOSEK, *supra* note 17, at 206.

67. CATSAM, *supra* note 1, at 22.

68. KOSEK, *supra* note 17, at 206.

later wrote that they "did not allow a single situation to develop so that the struggle appeared to be between white and Negro persons, but rather that progressives and democrats, white and black, were working by peaceful means to overcome a system which they felt to be wrong."[69]

The riders left Washington on April 9, 1947, half on a Trailways bus, half on a Greyhound bus, accompanied by two reporters from African American newspapers.[70] After they entered Virginia they began to take action, with "interracial groups of two or three [sitting] in both the front and back of the buses."[71] As they moved south, Journey participants found increasing hostility from white authorities and passengers (along with some moments of sympathy). The first arrest occurred in Petersburg, Virginia, where African American Journey member and attorney, Conrad Lynn, was arrested after sitting in a section of the bus reserved for whites. When he tried to explain the *Morgan* decision to the bus driver who lodged the complaint, the driver replied that "he worked for the bus company and not the Supreme Court, and thus he followed company rules regarding segregation."[72]

Further arrests would follow until the Journey concluded back in Washington.[73] Some charges were dropped once the *Morgan* decision was brought to local courts' attention or the riders were removed from a particular bus.[74] Notably, all those arrested were traveling on Trailways buses and were arrested after complaints by Trailways bus drivers; "Greyhound officials had decided not to challenge the integrated groups."[75] This is not because Greyhound wavered on segregating its buses; Greyhound had a "notorious record when it came to segregation"[76] and segregated its southern routes through the 1950s. It may instead reflect the different organizations of the two bus lines. Trailways was a federation of locally owned lines operating under a common brand name, making adoption of a single plan difficult. Greyhound, in contrast, was a national corporation, operating through subsidiary lines, so top Greyhound management may have been able to instruct bus drivers to avoid the bad publicity generated by arrests of the riders. The only violence encountered during the Journey (though much was threatened) was in Chapel Hill,

69. HOUSER & RUSTIN, *supra* note 1, at 11.

70. CATSAM, *supra* note 1, at 24.

71. *Id.* at 24.

72. *Id.* at 25. Lynn was charged not with violating segregation laws, but disorderly conduct for refusing the bus driver's orders, as all state laws empowered bus drivers to tell passengers where to sit. *See* BAY, *supra* note 5, at 154.

73. CATSAM, *supra* note 1, at 25–26.

74. *See id.* at 32–34.

75. *Id.* at 27.

76. BAY, *supra* note 5, at 179.

where Peck was assaulted by a white bystander.[77] The riders did not all escape consequences. While charges were often dropped, some were not. Three of the riders, Rustin, Igor Roodenko, and Joseph Felmet, were eventually convicted of violating North Carolina's segregation laws after state courts concluded that because they had made stops in North Carolina they were intra-state, and not interstate, passengers, and in 1949 the men served almost a month on a chain gang.[78]

In retrospect, the Journey was an early herald of the civil rights movement of the 1950s, with its emphasis on nonviolent resistance, and the far more consequential Freedom Rides of 1961–1962, interracial bus journeys through the deep South that CORE would organize, which finally led to widespread rejection of segregated transportation (Peck was the sole participant in both the Journal of Reconciliation and the later Freedom Rides).[79] At the time, though, the Journey made little impression. Coverage was extensive in the African American press, less so in white newspapers.[80] Much later, Houser would conclude "[i]t was a creative project . . . ahead of its time."[81] The Journey had at least one surprising consequence, though, when Peck and Rustin carried their civil rights battle from Southern roads to an unexpected battlefield: a shareholder meeting. To understand how they wound up there, we need to understand the laws governing shareholders and the corporation.

II. SHAREHOLDER PROPOSALS AND SHAREHOLDER DEMOCRACY

A. The Place of the Shareholder in the Twentieth Century Corporation

In the middle of the twentieth century, shareholders held an ambiguous place in the American corporation. In corporation law, they had always been treated as the corporation's owners[82] and given a central role in governance, charged with electing the Board which in turn oversaw the corporation and named the officers who actually ran it. [83] What this

77. PECK, FREEDOM RIDE, *supra* note 1, at 20.

78. CATSAM, *supra* note 1, at 36–38, 41. A fourth rider was convicted as well but refused to return to North Carolina to serve his sentence. *See id.*

79. While *Morgan* helped chip away at the legal structure of segregated transportation, the actual elimination of segregation in busing was a complicated produce of court decisions, regulatory changes, mass civil disobedience beginning with the Montgomery Bus Boycott in 1956, and the Civil Rights Act of 1964. *See* BARNES, *supra* note 57, at 176–93 & *passim*; BAY, *supra* note 5, at 268–303.

80. CATSAM, *supra* note 1, at 43.

81. *Id.*

82. There has also been extensive academic criticism of the description of shareholders as "owners" of the corporation, but this persists as the traditional and widely held view. *See, e.g.*, Julian Velasco, *Shareholder Ownership and Primacy*, 2010 ILL. L. REV. 902, 903.

83. Though even here the rules changed somewhat; the common law's default rule had been one shareholder, one vote, but this evolved over the nineteenth century to a widespread one share, one vote

meant in practice had changed over time. In the nineteenth century, the law treated shareholders as the fundamental governors of the corporation, possessing ultimate authority and making certain essential decisions, most importantly electing directors at regular, usually annual, meetings.[84] Because it was the site where decisions were to be made, shareholders' meetings were treated by law as deliberative assemblies, and a shareholder's right to attend the meeting and participate in discussions over corporate affairs was a basic one. As one turn of the twentieth century treatise put it, "The general meeting of a corporation is a deliberative body; and hence reasonable debate must be allowed, and the minority cannot be cut short until after a reasonable opportunity for presenting their views."[85]

This view, however, presumed that a corporation had a relatively small number of shareholders mostly living in the same geographic region and with the ability and economic incentive to attend meetings and debate corporate policy.[86] By the early twentieth century this was no longer the case, at least at many large corporations.[87] Share ownership started rising at the turn of the century and exploded beginning in the 1920s, with over eight million individuals owning shares by midcentury, which meant more and more shareholders owning smaller and smaller stakes in corporations.[88] One study found that by 1928, 124 of the nation's largest 200 corporations had at least 5,000 shareholders, with 32 having over 50,000.[89] In corporations with thousands of shareholders who were often widely scattered across the country, active shareholder participation in governance was often impossible and economically irrational. A shareholder owning only a few shares in a corporation would see little benefit from taking an active interest in the corporation, much less

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default. *See generally* Colleen Dunlavy, *From Citizens to Plutocrats: Nineteenth-century Shareholder Voting Rights and Theories of the Corporation*, *in* CONSTRUCTING CORPORATE AMERICA: HISTORY, POLITICS, CULTURE 66–86 (Lipartito and Sicilia eds., 2003).

84. *See, e.g.*, 2 VICTOR MORAWETZ, TREATISE ON THE LAW OF PRIVATE CORPORATIONS 448 (1886) ("It is implied that the majority shall have supreme authority to direct the policy of the corporation in attaining its chartered purposes, and shall have the power to appoint the usual managing agents, to whom immediate control and direction of the company's business is delegated.").

85. 2 ARTHUR MACHEN, A TREATISE ON THE MODERN LAW OF CORPORATIONS 1060 (1908); *accord* 2 MORAWETZ, *supra* note 84, at 453.

86. Even in the nineteenth century this was not true of all corporations. *See, e.g.*, Eric Hilt, *When Did Ownership Separate from Control? Corporate Governance in the Early-Nineteenth Century*, 68 J. ECON. HIST. 645 (2008).

87. The growth of large corporations has been well-documented. *See generally, e.g.*, GLENN PORTER, THE RISE OF BIG BUSINESS, 1860–1920 (3d ed. 2005). That said, this development was uneven, and we can certainly find counterexamples of large corporations with controlling shareholders, or without dispersed ownership, through the twentieth century. *See* Brian Cheffins and Steven Bank, *Is Berle and Means Really a Myth?*, 83 BUS. HIST. REV. 449 (2009).

88. J.A. LIVINGSTON, THE AMERICAN STOCKHOLDER 24–25 (1958).

89. BERLE & MEANS, *supra* note 18, at 50.

traveling to the annual meeting. As a result, most shareholders stopped attending them. In 1938, for example, AT&T had 646,882 shareholders, but less than one-tenth of one percent of them attended the firm's annual meeting.[90] As a result, power in many corporations shifted from shareholders to management—a change dubbed the "separation of ownership and control" in Berle and Means's landmark 1932 work *The Modern Corporation and Private Property*.[91]

The mechanism that allowed managers to assume power was the proxy. While attendance at meetings dropped, shareholders' votes could not be dispensed with altogether, as they were needed to elect directors, and quorum requirements often required a certain percentage of shares be voted at the annual meeting.[92] To address this issue, management usually wrote and asked shareholders for the right to cast their votes *in absentia* at an upcoming meeting—for the shareholders' "proxy"—and shareholders, if they bothered to reply at all, usually gave management the right to cast the votes as it chose.[93] Before the 1930s, little regulation governed such proxy voting. Management was not required to tell shareholders the details of what was to be considered at an annual meeting nor how a proxy given to management would be voted,[94] and in a typical election the only party requesting a proxy would be management.[95] Proxy contests, in which different factions vying for control of the corporation competed for shareholders' proxies, did occur, but were rare, and while management could pay for their proxy requests from corporate funds, challengers had to pay their own expenses.[96] Through the proxy machinery, shareholders

90. Rolf Enno Wubbels, Regulation of Stockholder Proxies 3 (1949) (Ph.D. dissertation, New York University).

91. BERLE & MEANS, *supra* note 18, at 2. Berle and Means actually spoke of "control" being separated from ownership and thought that control was not always lodged in management, *see id.* at 92, but in popular understanding the idea grew that control had moved from shareholders to management, which was indeed often the case.

92. Some corporations had adopted quorum requirements, meaning a certain percentage of shares had to be cast to make an action valid, but even those without such requirements apparently sought shareholder votes. HENRY WINTHROP BALLANTINE, BALLANTINE ON CORPORATIONS 562 (1927). For an account of the evolution of the shareholders' meeting, see Janette Rutterford, *The Shareholders' Voice: British and American Accents 1890–1965*, 13 ENT. & SOC. 120, 132–34 (2012). Rutterford makes the interesting point that shareholder meetings became more important for U.S. corporations from the 1920s to the 1960s, but as public relations exercises, not governance meetings. *Id.*

93. While proxy voting was not allowed in common law, statutes and corporate bylaws generally provided for it by this period. BALLANTINE, *supra* note 92, at 576.

94. A sample proxy form "in frequent use" provided in one standard work simply stated the proxy had been granted and provided no details on how it was to be voted. *Id.* at 576–77. *See also* 2 MACHEN, *supra* note 85, at 1041 (1908) ("In the absence of any express provisions as to the form of proxies, no particular form is requisite.").

95. BERLE & MEANS, *supra* note 18, at 81–82.

96. *See id.* at 87–88.

handed over their votes and management cast them as it pleased. As Berle and Means put it, the proxy machinery became "one of the principal instruments not by which a stockholder exercises power over the management of the enterprise, but by which his power is separated from him."[97] According to another observer, "The routine conduct of corporate meetings, reelection of directors, and the like, with successful corporations, is for management of a large concern usually a matter of form. The presence and participation of shareholders directly in such corporations has of course become a thing of the past . . . ."[98] So far had power shifted from shareholders to managers that many annual meetings were planned to discourage shareholder attendance—corporations scheduled their shareholders' meetings for the same day, for instance, or held them in out-of-the-way locations.[99]

Federal law in the 1930s changed this—a bit. The Crash of 1929 and the Great Depression led Congress to adopt the Securities Act of 1933 and the Securities Exchange Act of 1934, which imposed additional rules on corporations whose operations until then had been governed almost completely by state law.[100] The Acts placed a new emphasis on detailed disclosure of corporate information to shareholders of the publicly traded corporations covered by the Acts. Section 14 of the 1934 Act empowered the new Securities and Exchange Commission (SEC) to set out rules for proxies to avoid the "common practice" where stockholders would "sign proxies blindly, thereby enabling the management of a corporation to perpetuate itself, without giving the stockholders a fair opportunity to vote intelligently on major matters of policy."[101] In 1938, the SEC used the power granted under this section to issue Regulation X-14, which required management, when requesting proxies from shareholders, to give them as well a "proxy statement" including such basic information as the issues that would be voted on by the proxy-holder and giving the shareholder for the first time the power to cast her proxy vote against a particular proposed course of action.[102] But none of these changes really altered the corporate

97. *Id.* at 129.

98. WILLIAM Z. RIPLEY, MAIN STREET AND WALL STREET 145 (1927).

99. *See* J.A. LIVINGSTON, THE AMERICAN STOCKHOLDER 83–84 (1958).

100. *See* Securities Act of 1933, 15 U.S.C. § 77 (1933); Securities Exchange Act of 1934, 15 U.S.C. § 78 (1934).

101. CHARLES H. MEYER, THE SECURITIES EXCHANGE ACT OF 1934 ANALYZED AND EXPLAINED 104 (1934).

102. Sheldon E. Bernstein and Henry G. Fischer, *The Regulation of the Solicitation of Proxies: Some Reflections on Corporate Democracy,* 7 U. CHI. L. REV. 226, 233 (1940) (including Regulation 14X and its rules as an appendix). The SEC had first adopted proxy rules under Securities Exchange Act § 14 in 1935, but these simply banned false and misleading statements, and the 1938 rules were seen as the first ones to impose significant limits on managers seeking shareholder proxies. *See id.* at

balance of power; managers still dominated and shareholders usually acquiesced. Thus, the shareholder's ambiguous role: the law still embodied a view of the corporation where shareholders were vitally involved in its operations, but the economic reality was that management controlled most large firms and shareholders' involvement was perfunctory.

B. Shareholder Democracy and the Shareholder Proposal Rule

Beginning in the late 1930s, a handful of activists appeared who aimed to revitalize the shareholder's role in the corporation, giving rise to a movement for "shareholder democracy" that briefly flourished in the 1940s and 1950s.[103] The movement can be traced to shareholder activist Lewis Gilbert.[104] In the early 1930s, Gilbert, an independently wealthy journalist, inherited shares in over 100 companies and, with time on his hands, decided to attend shareholder meetings and share with management his ideas for improving the operations of the firm.[105] He was able to do this because, while the reality of shareholder government had changed, the law had not—shareholders were still entitled to attend the annual meeting and address management and fellow shareholders (those few who attended) from the floor.[106] His ideas were not that radical; the changes he favored mainly aimed to improve oversight and management by, for example, allowing shareholders to choose the corporation's auditors, requiring all directors to own shares in their corporations, and moving annual shareholder meetings to more easily accessible locales.[107] Surprised to find managers uninterested in his input, Gilbert soon took up shareholder activism full-time, attending dozens of annual meetings each year and making proposals from the floor for shareholders to consider and vote upon, something again allowed by corporation law. These invariably went down to defeat, which is not surprising considering that, thanks to the

229; *see also* Arthur H. Dean*, Non-Compliance with Proxy Regulations*, 24 CORNELL L. Q. 483 (1939).

103. *See, e.g.*, LIVINGSTON, *supra* note 18, at 61–109; EMERSON & LATCHAM, *supra* note 13. The term "shareholder democracy" is contested; one useful article questioning the analogy of shareholder to political suffrage is Usha Rodrigues, *The Seductive Comparison of Shareholder and Civic Democracy*, 63 WASH. & LEE L. REV. 1389 (2006).

104. *See* LAUREN TALNER, THE ORIGINS OF SHAREHOLDER ACTIVISM 1–5 (1983); John Bainbridge, *The Talking Stockholder—I*, NEW YORKER, Dec. 11, 1948, at 40 [hereinafter Bainbridge, *The Talking Stockholder—I*]; John Bainbridge, *The Talking Stockholder—II*, NEW YORKER, Dec. 18, 1948, at 33 [hereinafter Bainbridge, *The Talking Stockholder—II*].

105. *See* TALNER, *supra* note 104, at 1–5.

106. BALLANTINE, *supra* note 92, at 564.

107. EMERSON & LATCHAM, *supra* note 13, at 113–14.

proxy machinery, management controlled the vast majority of votes cast at a meeting.[108]

Gilbert, however, then hit on a clever approach that ultimately created a powerful tool for dissident shareholders: the shareholder proposal. Under the SEC's rules, when management sent shareholders its proxy statement asking for power to cast the shareholders' votes, it was required to provide details about how those proxies would be voted.[109] Usually this meant simply disclosing who, for instance, management planned to elect to the Board. In 1939, however, Gilbert informed the management of Bethlehem Steel that he planned to make a proposal at its annual meeting to move future meetings from relatively inaccessible Wilmington, Delaware, to New York City.[110] When the company's management sent shareholders a proxy statement that did not mention Gilbert's proposal, he protested to the SEC. He argued that because it did not tell shareholders of Gilbert's proposal or Bethlehem's intent to vote against it, the proxy statement was misleading and so violated the SEC rules. The SEC agreed, reasoning that, because Gilbert "[h]ad notified the company of his intention in advance . . . Bethlehem Steel should have disclosed this" when soliciting proxies.[111] Henceforward, shareholders who planned to make a proposal at a corporation's annual meeting could, by informing the corporation of this in advance, compel the corporation to include the proposal in its proxy statement, in effect requiring management to circulate the shareholder proposal at management's expense.[112]

At the end of 1942, the SEC codified its informal guidance about shareholder proposals in its new "shareholder proposal rule," Rule X-14A-7 (now 14a-8), which required that, when a shareholder had notified a corporation that the shareholder intended to present a proposal at the annual meeting, management had to "set forth the proposal and provide means by which" shareholders could vote for or against it in the proxy statement.[113] If management opposed the proposal and intended to vote proxies against it, it still had to "include in [its] soliciting material the name and address of such security holder [submitting the proposal] and a statement . . . setting forth the reasons advanced by him in support of such

108. *See id.*

109. *See* Nicholas, *supra* note 6, at 109.

110. *Id.*

111. *Id.*; *see also* Dean, *supra* note 102, at 503–04; *Bethlehem Steel Adjourns Meeting*, N.Y. TIMES, Apr. 12, 1939, at 33.

112. Emerson and Latcham indicate that by 1940, the SEC had changed a definition rule to make clear that proxy solicitations had to notify shareholders of shareholder proposals expected to be made at annual meetings but provide no details. EMERSON & LATCHAM, *supra* note 13, at 92.

113. Securities Act Release No. 33-2887, Exchange Act Release No. 34-3347, Investment Company Act Release No. 35-3988, 1942 WL 34864 (Dec. 18, 1942).

proposal" not to exceed 100 words.[114] There were limits—a proposal had to be "a proper subject for action by security holders," a requirement whose meaning would be fought over in coming years—but it was still an extraordinary development.[115] Even the smallest shareholder could now have a voice in corporate governance.

Why the SEC adopted such a seemingly radical rule remains unclear. The rule was proposed in 1942, long after the heyday of the New Deal, when government efforts had moved away from domestic reform and towards winning World War II.[116] But the SEC was an outlier. It had been evacuated to Philadelphia for the duration, perhaps shielding its plans from scrutiny, and several of the five Commissioners running it were former SEC staffers who had been at the agency during its pro-shareholder zenith in the 1930s.[117] The rule was one of a package of proposed changes that would, if adopted, have remade U.S. corporate governance, all of which appear to have been the work of an attorney in the Commission's General Counsel's office, Milton V. Freeman.[118] The changes would have required more detailed disclosure of executive compensation, forbidden management from voting unmarked proxies, and, in a sharp challenge to management power, allowed shareholders to use management's proxy statements to nominate their own candidates for director.[119] The proposals produced fierce opposition,[120] culminating in Congressional hearings where Freeman was accused of having "alleged communist sympathies."[121] After this, the Commission rejected most of the proposed changes but adopted the shareholder proposal rule, perhaps because it was less threatening than the other proposed changes. Its advocates hoped it would inject a measure of democracy into corporations; in 1943, SEC Commissioner Robert O'Brien spoke of the need to "create an informed and active group of shareholders who have a voice in the councils of their own corporation."[122]

In practice, the rule did not do much. For one, it was not at first clear what proposals were allowed under the rule. According to the SEC's 1942 release adopting the rule, a proposal had to be a "proper subject for action

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114. *Id.*

115. *Id.*

116. *See id.*

117. *See* JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE 238 (3d ed. 2003).

118. A detailed account of these developments, which guides my account here, is provided in Nicholas, *supra* note 6, at 109–26.

119. Securities Act Release No. 33-2887, *supra* note 113.

120. SELIGMAN, *supra* note 117, at 236–38.

121. *Id.* at 238.

122. LIVINGSTON, *supra* note 18, at 68.

by the security holders," but it did not explain what that meant.[123] In 1945, the SEC provided further guidance when an unnamed corporation asked the agency if it could omit three shareholder proposals unrelated to its operations (one asked that dividends not be subject to the Federal income tax while another called for reform of the antitrust laws).[124] The agency responded that the rule was intended to allow shareholders "to bring before their fellow stockholders matters of concern to them as stockholders in such corporation . . . relating to the affairs of the company concerned as are proper subjects for stockholders' action . . . ," not for matters "of a general political, social or economic nature."[125] Yet the rule was still broad; shareholders could make proposals not only concerning matters clearly within their powers under corporate law, but even on matters that corporate law assigned for the Board to decide, so long as the proposals were phrased as suggestions rather than commands that the Board act.[126] In 1947 and 1948, the SEC made further minor amendments, for instance making clear that a corporation could reject a proposal to "[enforce] a personal claim . . . or grievance" against the corporation.[127] More significant, the rules were amended to require a corporation planning to omit an "improper" shareholder proposal from its proxy materials to first notify the SEC and provide "a statement of the reasons why the management deems such omission to be proper."[128]

The rule also fell short of its authors' hopes because shareholder proposals were rarely made and almost never won. One study found that from 1943 to 1947, only 91 out of the 6,380 proxy statements filed with the SEC included a shareholder proposal—1.4% of the total.[129] From 1948 to 1951, the figure was 177 out of 6,755 proxy statements—a slight rise to 2.7%.[130] The vast majority of the proposals focused on improving corporate operations.[131] 253 of the 286 proposals made in 1948–1951, 88%,[132] called for one of four classic governance reforms: shareholder selection of auditors, moving the annual meeting, post-meeting reports to

123. Securities Act Release No. 33-2887, *supra* note 113..

124. Exchange Act Release No. 34-3638, *supra* note 8.

125. *Id.*

126. EMERSON & LATCHAM, *supra* note 13, at 101; *see also* SEC v. Transamerica Corp., 163 F.2d 511, 518 (3d Cir. 1947) (requiring corporation to include in its proxy shareholder proposals that "are subjects in respect to which shareholders have the right to act under" the law of the state of incorporation).

127. Exchange Act Release No. 34-4185, 1948 WL 28695 (Nov. 5, 1948).

128. *Id.* (in 1948, the SEC renumbered the shareholder proposal rule from X-14A-7 to X-14A-8).

129. EMERSON & LATCHAM, *supra* note 13, at 102.

130. *See id.*

131. *See id.*

132. There were 286 proposals, but 177 proxy statements with proposals, because some proxy statements included multiple proposals. *See id.*

shareholders, or cumulative share voting.[133] Furthermore, most of the proposals were made by a small band of activist shareholders; since the early 1930s, Lewis Gilbert had been joined by a handful of other "gadflies," including his brother, John Gilbert, and Wilma Soss, head of the Federation of Women Shareholders in American Business, Inc., who made several proposals asking firms to name a female director.[134] 47% of all shareholder proposals in this period were made by the Gilberts.[135] Nearly all these proposals lost. Of the 232 proposals for which vote results were disclosed, only seven proposals (2.3%) received a majority shareholder vote, and most of those had gained support from management.[136]

Almost completely absent were any shareholder proposals asking corporations to take action impinging on larger social issues. Indeed, one survey could identify only one: the proposal made by James Peck and Bayard Rustin at Greyhound.[137]

III. SHAREHOLDER VOICES AND CIVIL RIGHTS

A. Going to the Meeting

Before leaving on the Journey of Reconciliation in April 1947, Peck later recalled,

> Bayard Rustin and I each bought a share of Greyhound stock at approximately $30. Purpose of the trip was to challenge the segregated seating system on interstate buses in light of the 1946 Irene Morgan decision of the U.S. Supreme Court. Purpose of our buying the stock was to carry the challenge to the Greyhound stockholders.[138]

He did not say how he and Rustin got the idea of carrying their activism to shareholders. At the time they purchased their shares the new shareholder proposal rule was barely four years old, and the shareholder

133. *Id.* at 101–03.

134. *Id.* at 104–05. Soss is a fascinating figure; contemporary accounts often mocked the idea of a woman who was interested in corporate governance, but looking back, she was perhaps the first advocate for diverse representation on corporate boards. *See* June Sochen, *Wilma Porter Soss*, AM. NAT'L BIOGRAPHY (1999); Janice Traflet, *Queen of the Corporate Gadflies: The Unstoppable Wilma Soss*, 119 FIN. HIST. 20, 21–23 (2016).

135. EMERSON & LATCHAM, *supra* note 13, at 113.

136. *Id.* at 112.

137. *See id.* at 114–17. One SEC staffer identified two other "social issues" proposals from this era, one asking that a company stop investing in liquor stocks, the other that women be given the same pension rights as men. Harry Heller, *Stockholder Proposals*, 4 VA. L. WKLY. DICTA COMPILATION 72, 73–74 (1953).

138. Peck, *supra* note 4, at 375.

gadflies had as yet attracted little media attention.[139] Perhaps Peck, who was heir to a fortune and supported by a trust fund, was exposed to the mechanics of shareholding and proxy statements—but no real evidence backs this up.[140] While we cannot know the origins of their shareholder activism, Peck was clear about why they were doing it: "'What's the use of all this effort?' The answer is—'Publicity!'"[141]

While a shareholder meeting may seem an incongruous place for a civil rights protest, Peck and Rustin had chosen a site surprisingly well suited for the kind of protests pioneered by FOR and CORE. Whatever the economic realities, shareholder meetings still retained their democratic origins as a space for every shareholder to attend and voice his or her opinion as to how the corporation was run.[142] They regularly attracted newspaper coverage, though usually in the business pages. All this made shareholder meetings ripe for the kind of activism developed by CORE, which aimed not merely to register disapproval of segregation but to create "ritual and spectacle" that would shine a harsh light on underlying injustice. While it would be absurd to compare a segregated bus or restaurant to a shareholders' meeting, the protest tactics developed for one could with modification be applied to the other. [143]

Peck and Rustin's experiences in FOR and CORE help explain one otherwise puzzling aspect of the protest: Rustin's central role. Peck was heir to a fortune and could be expected to own shares, but at the time of the protests Rustin was receiving a small salary from FOR.[144] Yet both men bought Greyhound shares. It is likely that Rustin's involvement reflects CORE and FOR's commitment to interracial activism. As shown in the Journey, the organizations' protests aimed not merely at objecting to segregation but doing so in interracial alliances that confounded racist assumptions. The group riding through the South was carefully balanced by race, and their protests involved not just African American riders sitting in the front of a segregated bus but white riders sitting in the back, and participants of different races sitting side by side.[145] Rustin's active involvement in the Greyhound shareholder protests similarly made it visibly interracial, a joint project of both men.

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139. In 1948, Gilbert would earn a long profile in *The New Yorker*, but this appeared after the two civil rights activists had already attended their first shareholder meeting. Bainbridge, *The Talking Stockholder—I*, *supra* note 104; Bainbridge, *The Talking Stockholder—II*, *supra* note 104.

140. *See* PECK, UNDERDOGS VS. UPPERDOGS, *supra* note 1, at 11.

141. Peck, *supra* note 4, at 377.

142. *See supra* Section II.A.

143. KOSEK, *supra* note 17, at 259; MEIER & RUDWICK, *supra* note 12, at 49–50.

144. Rustin's position at CORE was unpaid, and when he worked for FOR he could afford only a tenement apartment in New York. D'EMILIO, *supra* note 23, at 174.

145. *See* CATSAM, *supra* note 1, at 21.

CORE's approach explained who protested, but it was corporation law that dictated their target. The Journey's riders had traveled on both of the South's major intercity bus lines, Greyhound and Trailways, but all the riders arrested had been riding on Trailways buses.[146] The riders taking Greyhound went almost completely unscathed, as the bus line's management told its drivers not to complain when Journey members broke the corporation's rules.[147] When time came for the shareholders' protest, however, Trailways could not be a target because it was not a public corporation; Trailways was a network of some forty independently owned bus companies operating cooperatively under a common name.[148] There were no Trailways shares available on the open market, no Trailways shareholders' meeting to attend, and no public corporation bound by SEC rules. Any protest based on purchasing shares and using the shareholder proposal rule had to be against a public corporation: Greyhound.[149]

In 1948, Peck attended Greyhound's annual shareholder meeting in Wilmington, Delaware; Rustin was unable to be there so his place was taken by Louis Redding, head of the Wilmington NAACP, whose presence guaranteed that the proposal was made by an interracial team.[150] Apart from Greyhound management, only five shareholders were present including Peck and Redding.[151] The two men attempted to offer a proposal asking the company to abolish "the illegal practice of segregated seating" and to instruct its employees that "enforcement of jimcrow [sic] seating will no longer be tolerated."[152] They told the other attendees of their arrests during the Journey of Reconciliation and warned that "[m]ore and more colored passengers were standing up for their legal rights and this [would] increase the number of damage suits and expenditures by the company."[153] While management apparently listened to their speech, it refused to put their proposal up for a vote, pointing to state and federal laws to claim that "[because the] matter was not mentioned in the notice of the meeting or in

146. *See id.* at 26–27.

147. *See supra* Section I.B.

148. OSCAR SCHISGALL, THE GREYHOUND STORY: FROM HIBBING TO EVERYWHERE 54–55 (1985).

149. Greyhound operated through a network of partially- and wholly-owned regional bus lines. *See id.* at 86.

150. Peck, *supra* note 4, at 375. Redding was a major civil rights attorney and argued one of the cases consolidated in *Brown v. Board of Education*. *See* Omari Scott Simmons, *Chancery's Greatest Decision: Historical Insights on Civil Rights and the Future of Shareholder Activism*, 76 WASH. & LEE L. REV. 1259, 1273–74 & *passim* (2019).

151. Peck, *supra* note 4, at 375.

152. *Racial Discrimination Issue up at Greyhound Meeting*, WALL ST. J., May 19, 1948, at 4. While today the label for segregation is "Jim Crow," the term "jimcrow" was in common usage at the time. *See, e.g.*, *id.*

153. *Bus Line Jimcrowism Rapped*, PHILA. TRIB., May 25, 1948, at 9.

the proxy statement no formal action could be taken at the meeting."[154] Peck and Rustin skipped the next year's shareholders meeting, likely because in April 1949, Rustin was finishing a month-long sentence on a North Carolina chain gang imposed during the Journey, but they planned to return in 1950.[155]

B. The Greyhound Proposal and Peck v. Greyhound

Peck and Rustin must have spent some time studying the shareholder proposal rule after the 1948 meeting, for in the fall of 1949 they led thirteen shareholders (many apparently FOR supporters who had bought Greyhound shares) in submitting a shareholder proposal for Greyhound's 1950 meeting entitled "Compliance with the 1946 decision of the U.S. Supreme Court (in the Irene Morgan case) outlawing jimcrow seating in interstate bus travel."[156] SEC rules were clear about when a proposal should be submitted and how a corporation could respond. It had to be submitted in a "reasonable time" before the corporation mailed shareholders its proxy solicitation,[157] and the corporation could reject it only if it fell into one of the categories defined by the SEC, such as if it involved a "personal grievance" or involved matters of a "general political, social, or economic nature."[158] If a corporation did decide to exclude a proposal, it had to notify both the SEC and the shareholder by the day the proxy statement was filed with the SEC—at least ten days before it was to be sent to shareholders—and provide "a statement of the reasons why the management deems such omission to be proper in the particular case."[159]

So began a long tug-of-war over the proposal. After submitting their proposal in late 1949, Peck and Rustin began negotiations with Greyhound over its exact wording, but following several exchanges Greyhound in early 1950 decided to exclude the proposal from its proxy statement as "not a proper subject for action by the stockholders, or upon which the stockholders could vote."[160] Greyhound then notified the SEC of its decision and SEC staff responded with a letter informing Greyhound that the proposal could be excluded.[161] The SEC only agreed with Greyhound's

154. *Racial Discrimination Issue up at Greyhound Meeting*, *supra* note 152.

155. *See* D'EMILIO, *supra* note 23, at 169–70.

156. CORE Press Release, December 22, 1949, CORE Papers (quoting letter from Greyhound Secretary Merrill Buffington). No copy of the entire text of the proposal has been located, though its title is quoted in CORE materials.

157. The rule included a safe harbor defining this as at least sixty days before the date of the previous year's shareholder meeting.

158. *See* Exchange Act Release No. 34-4185, 1948 WL 28695 (Nov. 5, 1948).

159. *See id.*

160. *Stockholders Picket Greyhound Bus Meet*, N.Y. AMSTERDAM NEWS, May 20, 1950, at 34.

161. Letter from George M. Houser to Martin A. Martin, *supra* note 4; *see also* SEC Minutes, Mar. 22, 1950 (quoted in Nicholas, *supra* note 6, at 183). Such letters authored by SEC staffers, later

decision, however, because it found Peck and Rustin had filed their final proposal too late; Peck reported receiving a letter from the SEC in March 1950 stating the proposal was "a proper subject for action by stockholders."[162] Peck and Rustin still showed up to the Greyhound annual meeting in May 1950, however, this time using the civil rights strategy of leafleting and picketing to draw attention, holding signs that read "Greyhound Corp. unfair to Negroes" and "Greyhound Follows the Dixiecrat Party Line."[163]

In October 1950, well in advance of Greyhound's 1951 shareholders' meeting, Peck and Rustin again submitted their proposal to the company. Greyhound responded as expected, notifying Peck and Rustin, as well as the SEC, that it planned to exclude the proposal, relying on the earlier SEC pronouncement allowing omission of proposals of a "general political, social, or economic nature."[164] Greyhound's letter is revealing. The company argued that the proposal was not just improper under the rules, but threatened to create terrible publicity for the bus line:

> If the proposal should be adopted, it is apparent it could and would be used by Mr. Peck and his organization as propaganda to bring pressure to bear to force the management to act on the recommendation . . . and institute a social reform . . . .
>
> If the proposal should be voted down, Mr. Peck could use that fact as propaganda to discredit Greyhound . . . .
>
> We feel that to permit Mr. Peck to submit this proposal to our stockholders would be likely to cause irreparable damage to our business, because whatever action is taken would place Mr. Peck and the Congress of Racial Equality in a position to charge that Greyhound is opposed to the abolition of segregation.[165]

This time, the SEC staff changed its mind. In a March 8, 1951 letter to Greyhound, Henry Heller, an assistant director at the SEC and a specialist on the shareholder proposal rule, wrote that normally, stockholders "should not be denied the right of making suggestions and recommendations for consideration by the management of a company . . . . On this basis, we previously advised Mr. Peck that a proposal regarding

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called "no action letters," were not formal rulings by the Commission but still had, and have, significant weight. *See* Donna Nagy, *Judicial Reliance on Regulatory Interpretations in SEC No-Action Letters*, 83 CORNELL L. REV. 921 (1998).

162. Peck, *supra* note 4, at 375–76. There was later some dispute as to whether the SEC agreed that the proposal was a "proper subject" for shareholders, but Peck's report is supported by SEC records. *See* Nicholas, *supra* note 6, at 183 & n.66.

163. N.Y. AMSTERDAM NEWS, *supra* note 160.

164. Exchange Act Release No. 34-3638, *supra* note 8. (Jan. 3, 1945).

165. Peck, *supra* note 4, at 378 (quoting Greyhound's letter).

segregated seating on buses would appear to be a 'proper subject for action.'"[166] Since then, however, the Commission's lawyers had reconsidered. "[S]ome proposals may be improper under the rule, particularly if they are in fact urged for propaganda purposes or to require the management to in effect to take consensus of stockholders in respect to what is essentially a general political, social or economic problem."[167] Based on this analysis, Heller told Greyhound, "the Commission has asked me to advise you that it agrees with your position that the proposal . . . need not be included in your proxy statement."[168]

This about-face was an early sign that the SEC had begun to sour on the shareholder proposal rule. When the Commission first adopted the rule in 1942, the Commission was still headed by a high-caliber group of former staffers who retained some commitment to corporate reform, but by 1950, its leadership had changed. President Truman's appointees to the five-member Commission tended to be his cronies—men with little knowledge of the securities laws.[169] Harry MacDonald, for instance, chair of the SEC from 1949 to 1952, was a friend of Truman's who was in the dairy business before joining the Commission.[170] Such men lacked an appetite for using the securities laws to change how corporations were run. Nor were their successors during the more conservative, pro-business Eisenhower years any more likely to embrace reform. Thus, even as the gadflies attracted press attention and a small academic industry sprang up around "shareholder democracy,"[171] serious proposals to alter the balance of power within the corporation and rein in managerial authority became ever less likely.

The letter also showed the SEC adopting a new and narrower conception of what actions were proper for shareholders.[172] It agreed that

166. Press Release, Cong. Racial Equal., SEC Reverses Self; Backs Greyhound's Taboo on Jimcrow Issue (Mar. 22, 1951) (quoting letter from Henry Heller to Merrill Buffington, secretary, Greyhound Corporation). I have found no copy of Heller's letter, and as of this writing the National Archives, which houses SEC records, is closed due to COVID-19. I therefore rely on quotations from the letter in this press release. Because the SEC's responses to a corporate request to exclude a proposal were sent to both the corporation and the proposal's proponents, I believe CORE had a copy of the letter itself at one time.

167. *Id.*

168. *Id.* After receiving the Greyhound letter, it appears Peck also wrote to Baldwin Bane, director of the SEC's Division of Corporate Finance, and was rebuffed. *See* Letter from George M. Houser to Martin A. Martin, *supra* note 4. Brief quotations from the Greyhound and SEC letters appear in Peck v. Greyhound Corp., 97 F. Supp. 679, 680 (S.D.N.Y. 1951).

169. *See* Seligman, *supra* note 117, at 243–44.

170. *Id.*

171. *See* Wells, *supra* note 13, at 339–45.

172. While Heller had signed the letter, he wrote that he had been asked to do so by "the Commission," and SEC records indicate it was discussed by at least two Commissioners when sent.

the proposal could be excluded because it addressed "a general political, social or economic problem." But that misdescribed Peck and Rustin's proposal. The men had been careful to target their proposals not at segregation in general, but at the segregation policy adopted by Greyhound, which they argued harmed that corporation by opening it up to lawsuits by riders illegally discriminated against.[173] They were right; as the historian Catherine Barnes reports, after *Morgan* and other cases, African American plaintiffs began suing bus and train lines alleging:

> unequal conditions on public transit . . . segregation itself if they were interstate passengers . . . for damages if segregation policies were enforced in a discriminatory or abusive manner; and . . . [for] breach of contract when forced to move from their reserved seats on buses or trains to Jim Crow sections.[174]

"In February 1944, for example, a black aviation plant worker won a $1,500 judgment in a federal district court because she had refused to move to the rear of a Dixie Greyhound bus in Arkansas . . . ."[175] The problem with the Greyhound proposal, it seems, is that while it targeted Greyhound's policies it also touched on a broader social issue. Under the SEC's approach, a proposal would be acceptable only if it were completely unrelated to such issues. Writing in a law school publication in 1953, SEC attorney Harry Heller acknowledged as much. "[T]he purposes [of the letter] appeared germane to the business of the company, ..." Heller wrote, but he defended the Commission's decision by saying that "the Commission determined that the primary motive of the stockholder was the advancement of a cause with which the stockholder had a close association, rather than the solution of a problem pertinent solely to the corporation itself."[176]

Having been rebuffed by Greyhound and the SEC, Peck and Rustin decided to turn to the courts. This raised further problems. Most importantly, they didn't know any securities lawyers. Here, Peck called on an unlikely ally, Waties Waring, at that time a federal judge in South Carolina and a staunch opponent of segregation (driven out of his home

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Nicholas, *supra* note 6, at 183–84 (quoting SEC Minutes, March 7, 1951). Only two Commissioners were recorded as being present at the meeting where this was discussed.

173. *See supra* text accompanying note 153.

174. BARNES, *supra* note 57, at 57.

175. *Id.*

176. Harry Heller, *Stockholder Proposals,* 4 VA. L. WKLY. DICTA COMPILATION 72, 74 (1953). Heller was writing here about both the Greyhound proposal and two other proposals that the SEC allowed excluded from corporate proxies. *See id.*

state, Waring would move to New York in 1952).[177] Waring sent Peck to Nathan Kogan, a New York corporate lawyer active in the liberal American Jewish Congress (AJC), who provided a legal opinion that Peck and Rustin's proposal had been a proper subject for shareholder action and who recommended seeking an injunction against Greyhound in federal court.[178] In April 1951, Peck, represented by Conrad Lynn, a civil rights attorney and fellow rider on the Journey of Reconciliation, sued Greyhound in the Southern District of New York.[179] The suit was bankrolled by CORE; while Peck paid some of Lynn's initial fees, he was eventually reimbursed by CORE, which also paid Lynn directly.[180]

Peck v. Greyhound was argued at the beginning of April 1951.[181] Peck was the sole plaintiff, which led some later commentators to miss the deep involvement of Rustin and CORE in the litigation. (It is not known why Peck was the only plaintiff.) He sought an injunction prohibiting Greyhound from issuing its proxy statement without the proposal, arguing that in excluding the proposal Greyhound was violating the proxy rules by sending shareholders a misleading proxy statement.[182] In front of the court, Lynn argued that the proposal was appropriate under Rule X-14A-8 because it targeted Greyhound's segregation policy and not segregation in general. According to Peck, the judge

> questioned our bringing a civil-rights matter under the Securities and Exchange Act.
>
> Lynn then pointed out that it is a business as well as a civil-rights matter, since as a result of its jim-crow seating system in the South Greyhound needlessly spends thousands of dollars to pay damage suits brought by Negroes illegally segregated on interstate buses.[183]

Yet his case foundered on an issue of administrative law. Peck was challenging Greyhound's decision, but he also had to contend with the SEC's letter agreeing with Greyhound, which he had not yet appealed the to the five-member Commission. As the Court put it, "plaintiff has not pursued before it the available administrative remedies to obtain a revision or review of the interpretation . . . ."[184] Without a record created by an

177. Memorandum from the Cong. of Racial Equal. on Greyhound Situation (Apr. 3, 1951), CORE Papers. Waties was an extraordinary figure. *See generally* TINSLEY YARBROUGH, A PASSION FOR JUSTICE: J. WATIES WARING AND CIVIL RIGHTS (2001).

178. Memorandum from the Cong. of Racial Equal. on Greyhound Situation, *supra* note 177.

179. Peck v. Greyhound Corp., 97 F. Supp. 679, 680 (S.D.N.Y. 1951).

180. Letter from George M. Houser to Jim Peck (Apr. 17, 1952), CORE Papers.

181. *Peck*, 97 F. Supp. at 679–80.

182. *Id.*

183. Peck, *supra* note 4, at 377.

184. *Peck*, 97 F. Supp. at 681.

appeal to the Commission, the court refused to grant the preliminary injunction, "unaided as it is by the vast experience of daily contact with the practical workings of this rule (which the Commission has had) . . . ."[185]

Peck and Rustin skipped the Greyhound annual meeting that year but geared up to challenge Greyhound once more in the fall.[186] First, Peck appealed Heller's letter to the full Securities and Exchange Commission. At the end of 1951, Lynn sought a meeting with the Commission to make a direct appeal but was rebuffed.[187] In February 1952, the Commission wrote CORE and informed it the application for review was denied.[188] An appeal was probably doomed in any case. Before Heller had sent his letter to Greyhound in March 1951 supporting the company's decision, it was discussed at a meeting of the Commission. The *SEC Minutes* for that month specifically, and incorrectly, identify Peck as "founder and moving spirit behind the Congress of Racial Equality."[189] The SEC had already pigeonholed Peck as a social activist.

With the decision by the Commission in hand, CORE then prepared an appeal to the U.S. Court of Appeals for the Second Circuit.[190] This was not an appeal of the district court's decision in *Peck v. Greyhound*, but of the SEC's refusal to provide Peck an in-person hearing. In *Peck v. SEC*, Peck argued that the refusal violated the agency's own rules of practice, which provided that "upon written request for any party a matter to be decided by the Commission will be set down for oral argument before the Commission unless exceptional circumstances make oral argument impracticable or inadvisable."[191] This somewhat roundabout approach was dictated by the then-state of administrative law and shadowed by uncertainty over whether courts even had the ability to hear appeals of the SEC's decisions concerning shareholder proposals.[192] Peck's brief also

185. *Id.*

186. At least no record of a protests exists, even in the African American newspapers that usually covered them.

187. *See* Nicholas, *supra* note 6, at 183–85.

188. *Id.* at 184 (citing SEC Minutes for January 5 and January 15, 1952); Draft Brief for Petitioners, Peck v. SEC, Civil No. 22,289 (2d Cir. April 2, 1952), CORE Papers [hereinafter Draft Appeal].

189. Nicholas, *supra* note 6, at 183–84 (quoting SEC Minutes, March 7, 1951). Only two Commissioners were recorded as being present at the meeting where this was discussed.

190. *See* Draft Appeal, *supra* note 188.

191. *Id.* at 4.

192. *See generally* Med. Comm. for Hum. Rts v. SEC, 432 F.2d 659 (D.C. Cir. 1970), 404 US 403 (1972) (vacated as moot). On this case, see generally Haan, *supra* note 10. CORE's draft brief also, however, cited recent court developments supporting its claims, notably *Whiteside v. Southern Bus Lines*, where the Sixth Circuit Court of Appeals held that a carrier's rules requiring segregated seating also violated the dormant commerce clause. Whiteside v. S. Bus Lines, Inc., 177 F.2d 949, 950 (6th Cir. 1949); *see also* BARNES, supra note 57, at 64–65.

pressed the argument that the proposal was a proper subject for a shareholder vote and was not solely of a "political, social, or economic nature":

> The Greyhound Corporation has sole discretion on the subject of segregating its passengers on the basis of color. So far that discretion has been exercised to compel segregation. To change its rule the corporation does not have to appeal to any outside legislature, it does not have to run counter to any existing law. Indeed, the petitioner believes that a discussion of his question in the stockholders annual meeting may persuade the Directors of the Corporation to change the corporate practice to bring it in accord with existing law. His question is not general, it pertains to the specific practice of segregated seating on the company's buses. It partakes of a social, economic and political nature only insofar as any change of policy by a great common carrier affects these spheres.[193]

Peck lost the appeal. In a brief per curiam opinion, the appellate court dismissed his petition for "lack of jurisdiction," apparently reasoning that the letter was not an "order" and so the SEC's action concerning it was not appealable to the courts under the relevant statutes.[194] If Peck wished to challenge Greyhound's decision, the agency later stated, he could return to court and file another suit against the company.[195] He never did so, because before he had the chance the SEC changed the rule.

C. Writing Race into the Securities Laws

At the end of January 1952, before *Peck v. SEC* was even heard by the Second Circuit, the SEC issued a release proposing a number of changes to the proxy solicitation rules.[196] Buried in the release was a change that would cut off not only the Greyhound campaign but all future attempts to use the shareholder proposal rule to forward African American civil rights.[197] As shown above, since 1945 the SEC had allowed proposals to be excluded if they promoted general "social, economic, or political causes."[198] The 1952 amendments proposed to change that language and allow corporations to exclude shareholder proposals "promoting general

193. Draft Appeal, *supra* note 188, at 7.

194. Peck v. SEC, Civil No. 22,289 (2d Cir. April 2, 1952); *see also* 18 SEC ANN. REP. 75–76 (1952) (discussing the case and claiming it held that the letter was neither an "order" subject to judicial review under the Exchange Act nor an "administrative action" subject to review under the Administrative Procedures Act).

195. *Id.* at 76.

196. *See* Exchange Act Release No. 34-4668 (1952), *supra* note 9.

197. While "civil rights" has a broader meaning today, at the time at the time it applied to the movement to end discrimination against African Americans.

198. *See supra* Section II.A.

economic, political, *racial, religious*, social or similar causes."[199] For the first time, race would become an independent ground for excluding a proposal, and thus an element in the federal securities laws.

Why the SEC changed the wording is unclear, though given the timing, it must have been in response to the Greyhound case. It may be that the SEC feared it could lose the case, were the question of whether Peck and Rustin's proposal a proper subject for shareholder action ever squarely presented to a court.[200] As we've seen, the SEC apparently concluded that, because Peck was linked to CORE, his proposal must have aimed to promote a general "social, economic, or political" cause. But Peck and Rustin's proposal addressed a specific policy adopted by Greyhound: maintenance of segregation on its interstate buses after the *Morgan* decision. They also identified specific harms to the corporation: the settlements paid to African American riders who suffered illegal discrimination.[201] Peck and CORE had lost their two court cases, *Peck v. Greyhound* and *Peck v. SEC*, but both turned largely on the issue of court review of administrative decisions by the SEC; neither addressed the question of whether the shareholders' proposal was actually excludable under the existing proxy rules. Two 1950s experts on the shareholder proposal rule, Frank Emerson (a former SEC staffer) and Franklin Latcham, speculated that a slightly amended proposal would have passed muster under the pre-1952 rule. "[W]hat if the proposal were limited to the corporation's policy of segregated seating on its own interstate buses? It would not then be 'general' in nature. Certainly such a policy consideration is 'proper subject for action by security holders.'"[202] In other words, had Peck returned to court and again sued Greyhound following the SEC's final refusal to consider his appeal, he may have won. The new rule assured he would never do so.

Available records make it difficult to discern how the new rule was formulated or who pushed for it.[203] The SEC's two releases, the January 1952 one proposing the new language and the December 1952 one adopting it, do little more than recite the amendments and do not provide the kind of explanation for the changes common in present-day rulemaking.[204] Other changes to the proxy process had already been in the works, and it may have been convenient to fold the new language banning

199. *See* Exchange Act Release No. 34-4668 (1952), *supra* note 9 (emphasis added). It's not clear why "religious" was added to the rule, as there appear to have been no shareholder proposals promoting a "religious" cause made during this period.

200. *See* Nicholas, *supra* note 6, at 185 n.72.

201. *See supra* text accompanying notes 173–75.

202. EMERSON & LATCHAM, *supra* note 13, at 115.

203. *See generally* Nicholas, *supra* note 6, at 192–200

204. *See id.*; *see* Exchange Act Release No. 34-4775, 1952 WL 5254 (1952).

racial and religious proposals into broader reforms. After the first release was issued there was little lobbying for or against the changes. Most comments received by the Commission focused on a different part of the proposal dealing with how corporations should handle unmarked proxies[205] Only ten comment letters were received on the insertion of "racial" into the grounds for excluding a proposal.[206] One law firm, three corporations, and the American Society of Corporate Secretaries (ASCS) wrote in to support the change.[207] The ASCS's support mattered; it had become influential within the SEC over the last few years, and it represented the corporate officials running the proxy machinery, whose work would be directly affected by changes in the proxy rules.[208]

Those writing in to oppose the change, including Lewis Gilbert, Wilma Soss, the AJP, and the NAACP, recognized how consequential the addition of the one word would be. They pointed out that the proposed language, if adopted, would not just ban general proposals touching on race, it would ban any proposal addressing race, even if it targeted specific company policies—precisely what Peck and Rustin's proposal did. Gilbert urged the SEC not to bar "proposals that may be of general interest to many of the owners on a matter pertaining to the affairs of the corporation,"[209] while the AJC suggested the proposal be reworded to bar only proposals on a "general matter[] on which [the] corporation cannot act."[210] The AJC's letter echoed Peck and Rustin by pointing out the ways in which segregationist policies could impact a corporation's bottom line, as it frustrated passengers and created litigation.[211] To the opponents, it was clear that the proposal would shut down shareholder discussions about a corporation's policies dealing with race. A corporation's racial policies might remain in place, but the securities laws would henceforward deny shareholders any voice about them.

The amendments to proxy rules forbidding proposals of a racial and religious nature were adopted in December 1952.[212] The changes attracted only minor attention, perhaps because the civil rights movement was still in its infancy, and journalists and corporate leaders did not foresee that African Americans' civil rights would be the defining issue of the next two decades. CORE did issue a news release which accurately predicted that the changes would "prevent such cases [as Greyhound] from ever getting

205. *See* Nicholas, *supra* note 6, at 183–94.
206. *See id.*
207. *Id.* at 193.
208. *See id.* at 170–71.
209. *Id.* at 193.
210. *Id.*
211. *See id.* at 194
212. Exchange Act Release No. 34-4775, *supra* note 204.

started."[213] It pointed out that "[t]hey also make it impossible for minority stockholders to protest a corporation's lily-white employment policy or anti-union labor policy—even though such practices may result in business reverses at the expense of corporations with fair employment and labor policies."[214]

The consequences of the rule change were minor and immeasurable. Minor, because all the rule change did was lock in the status quo; apart from the Greyhound proposal there had been no other shareholder proposals targeting civil rights, and the rule change ensured this state of affairs would continue.[215] Immeasurable—literally—because we cannot now tell if anything would have been different were shareholders at other corporations allowed to file proposals like Peck and Rustin's. It is possible that such proposals would have done little; almost all shareholder proposals offered during this era failed, even those asking for anodyne corporate governance reforms.[216] But such proposals could also have been a valuable tool for challenging corporate policies that colluded with segregation, as was the case at Greyhound. Recall the 1951 letter Greyhound's corporate secretary Merrill Buffington wrote the SEC arguing that Peck and Rustin's proposal should be omitted.[217] In it, he sounded almost panicked at the possibility that the proposal would be sent to shareholders, the result of which would be to "place Mr. Peck and the Congress of Racial Equality in a position to charge that Greyhound is opposed to the abolition of segregation."[218] To Buffington the proposal was not merely an annoyance but a significant threat to Greyhound's business, promising to give real power to activists such as Peck and Rustin. After the rule change, corporations would be safe from such threats, no longer in danger of their own shareholders calling them to account for segregationist policies.

D. Aftermaths

The new proxy solicitation rules effectively ended attempts to use shareholder proposals to put civil rights on the corporate agenda. Indeed, the rule was soon read to allow exclusion of other proposals that touched

213. Press Release, Cong. Racial Equal., Race and Labor Issues Outlawed at Stockholders Meetings (Dec. 29, 1952), CORE Papers.

214. *Id.*

215. I have found only one reference to an attempt to file a race-related shareholder proposal before the 1970s. In 1959, a shareholder filed a proposal requesting that CBS allocate more time to "negro programs and performers," which it was allowed to exclude from its proxy. Nicholas, *supra* note 6, at 239 n.70.

216. *See* EMERSON & LATCHAM, *supra* note 13, at 112–13.

217. *See supra* text accompanying note 165.

218. Peck, *supra* note 4, at 378.

on broader social issues even if they lacked a "racial" aspect. In 1953, the SEC cited the revised rule when it allowed corporations to exclude proposals asking that a woman be named to a corporate board. These proposals, made chiefly by Wilma Soss, had been like the Greyhound proposal crafted to speak not only of societal discrimination but of the specific benefit a corporation would gain from changing a discriminatory policy, in this case by electing a female director.[219] At American Radiator, for example, Soss argued for a female director by observing that a large proportion of the company's products "go into the home or are used by women in a competitive market. Company research and development work should benefit by woman's angle."[220] Despite this, following the 1952 rule changes the SEC allowed corporations to exclude such proposals from their proxy statements, apparently adopting an expansive view of what constituted a "social" issues proposal.[221] Additional changes in 1954 further curbed shareholder proposals, allowing them to be excluded from the corporate proxy statement if they related to a firm's "ordinary business" or of they were repeat proposals and had failed to gain a rising percentage of shareholder votes over time.[222]

Even after the SEC barred "racial" shareholder proposals, Peck did not give up on the idea that a shareholder meeting could be a forum for civil rights protests.[223] He and Rustin picketed the Greyhound annual meeting until 1956, drawing newspaper coverage to Greyhound's segregationist policy.[224] Also, while the shareholder proposal was no longer available for racial protest, the SEC's rule change had not altered the state corporate law rules which still allowed shareholders to attend meetings and speak from the floor, and a few took advantage of this. In 1953, two minority shareholders at United Cigar-Whelan stores attended the annual meeting to ask that the Whalen Soda Fountain in Washington, D.C., be desegregated.[225] In 1954, Peck attended the annual meeting of W. T. Grant Company, holding a proxy for thirty shares recently left to the

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219. It is striking how Soss's proposals were at the time seen as easily excludable as chiefly dealing with a "social issue," whereas contemporary proposals for board diversity recognize what Soss knew—that claims for diversity can also be demands for improved corporate performance. *See, e.g.*, Darren Rosenblum, *When Does Sex Diversity on Boards Benefit Firms?*, 20 U. PA. BUS. L.J. 429, 430–31 & *passim* (2018) (critically reviewing claims that sex diversity produces greater corporate value).

220. EMERSON & LATCHAM, *supra* note 13, at 105.

221. Nicholas, *supra* note 6, at 192–93.

222. *See* Tsuk Mitchell, *supra* note 6, at 1558.

223. *See* Haan, *supra* note 10, at 1215–16.

224. In November 1955, the Interstate Commerce Commission had directly barred bus lines from adopting segregation policies as a violation of the Interstate Commerce Act. Keys v. Carolina Coach Co., 64 M.C.C. 769 (ICC 1955). This justified halting picketing of Greyhound, s*ee Picketing Halted at Greyhound Corp*., AFRO-AMERICAN, May 19, 1956, at 13, though the ruling was resisted and segregation on bus lines persisted. *See generally* BAY, *supra* note 5, at 262–67.

225. *Greyhound Bus Bias Issue Hit at Meet*, PHILA. TRIB., May 23, 1953, at 9.

War Resisters League, and asked management to desegregate its soda fountain in Baltimore (reflecting CORE's approach, while Peck was at the meeting other CORE members picketed it).[226] As he reported, while the new SEC rule "made it impossible for me to get the question on the printed agenda . . . I . . . raised it during the part of the meeting allotted to miscellaneous matters."[227] Shortly afterwards Grant desegregated the store.[228]

CORE appears to have abandoned the tactic of protesting at shareholders meetings after the mid-1950s, but briefly revived it in 1960 and 1961 during the sit-in movement. The civil rights movement had enjoyed success and public acclaim following the decision in 1954's *Brown v. Board of Education* and the Montgomery Bus Boycott of 1956–1957, but successes slowed over the next few years. In February 1960 the movement gained new life when students at North Carolina A&T University decided to take seats at the all-white Woolworth's lunch counter in Greensboro, North Carolina, and refuse to move until they were served.[229] Other students joined them and sit-ins, and arrests following sit-ins, spread across the South.[230] To support the students, Peck and CORE returned to shareholders' meetings.[231] In spring 1960, Peck bought shares in several of the chain stores whose Southern branches refused to serve African Americans. That May, he attended three stockholders' annual meetings, protesting segregation policies at S.H. Kress, W.H. Grant, and Woolworths', with CORE picketers again outside.[232] In a moment that brought home the events occurring in the South, Woolworths' annual shareholders' meeting was addressed by Barbara Braxton, an African American university student who had been jailed after attempting to integrate the Woolworth's lunch counter in Tallahassee. She had the right to speak because she held a Woolworth's proxy obtained for her by CORE.[233] A year later the protests at the shareholders' meetings were repeated, albeit without Peck, who was in the South traveling on the Freedom Rides.[234]

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226. James Peck, *Minority Shareholders vs. Jim Crow*, CRISIS MAG., Dec. 1954, at 640.

227. *See id.* at 590.

228. *See id.*

229. *See* WILLIAM CHAFE, CIVILITIES AND CIVIL RIGHTS 70–72 (1981).

230. *See id.*

231. The sit-ins marked a revival of the civil rights movements, and all the established organizations, including CORE, were "attempting to get in on the sit-in bandwagon." MEIER & RUDWICK, *supra* note 12, at 106.

232. Haan, *supra* note 10, at 1214–15. My understanding of Peck's 1960 activism draws on unpublished work generously shared by Sarah Haan.

233. Haan, *supra* note 10, at 1215.

234. *See id.*

Shareholder social activism began to tick upwards in the late 1960s as a few radicals learned what Peck and CORE already knew: ownership of shares opened the door to the shareholders meeting. In 1967, the radical Saul Alinsky purchased shares of Kodak as part of an ongoing campaign against that corporation to, as he put it, "gain entrance to the annual stockholders' meeting for harassment and publicity."[235] But shareholder proposals were not attempted, as confusing case law and SEC guidance left it unclear whether a proposal linked to a social issue could ever make it onto a corporation's proxy.[236]

At the end of the 1960s public pressure and then SEC rule changes reopened the door for shareholders to protest corporate policies via the corporate proxy. In 1968, the Medical Committee for Human Rights (MCHR), an organization linked to the civil rights movement, was given five shares of Dow Chemical.[237] It then sent the company a shareholder proposal for inclusion in its proxy, asking Dow's Board to "amend its certificate of incorporation to prohibit Dow from selling napalm 'to any buyer unless that buyer gives reasonable assurance that the substance will not be used on or against human beings.'"[238] Dow refused, citing the provisions of Rule 14a-8 allowing it to omit proposals "primarily for the purpose of promoting general economic, political, racial, religious, social, or similar causes," or that related to a company's "ordinary business," and the SEC agreed.[239] MCHR sued. The resulting case, *SEC v. Medical Committee for Human Rights*, was inconclusive, but while it was still in the courts Dow folded and included the shareholders' proposal in its proxy statement.[240] In the face of Congressional pressure the SEC soon retreated from its hardline opposition to social proposals, changing Rule 14a-8 in 1972 to make it easier to make such proposals.[241] The rule's blanket prohibition on "proposals promoting general economic, political, racial, religious, social, or similar causes" was replaced with a ban on proposals with "respect to any matter, including a general economic, political, racial, religious, social, or similar cause, *that is not significantly related to the business of the issuer or is not within the control of the issuer*."[242] Following these changes the early 1970s saw a wave of shareholder

235. LAUREN TALNER, THE ORIGINS OF SHAREHOLDER ACTIVISM 6 (1983); *see also* TERRY ANDERSON, THE NEW AMERICAN REVOLUTION: THE MOVEMENT AND BUSINESS, IN THE SIXTIES: FROM MEMORY TO HISTORY 138 (David Farber ed., 1994).

236. *See generally* Note, *The SEC and 'No-Action' Decisions Under Proxy Rule 14a-8: The Case for Direct Judicial Review*, 84 HARV. L. REV. 835, 844–45 & n.55 (1971).

237. Haan, *supra* note 10, at 1174.

238. *Id.* at 1177 (discussing SEC v. Med. Comm. for Hum. Rts, 404 U.S. 403 (1972)).

239. *Id.* at 1182.

240. *Id.* at 1206 n.178

241. Nicholas, *supra* note 6, at 290.

242. Exchange Act Release No. 34-9432, 1971 WL 126135 (Dec. 22, 1971) (emphasis added).

proposals relating to social issues. While there were only six in 1972,[243] there were well over a hundred by mid-decade.[244]

Only in 1976 did the SEC scrub race from the securities laws. On July 7, 1976—three days after the nation's Bicentennial celebrations—the Commission proposed to change Rule 14a-8 again by replacing the language banning proposals concerning "a general economic, political, racial, religious, social or similar cause, that is not significantly related to the business of the issuer" with a general, color-blind ban allowing corporations to omit proposals that "deal[] with a matter that is not significantly related to the issuer's business."[245] The release adopting the new language insisted it was a matter of form—that the "substance of the rule has been retained" and that the "illustrative reference[s] to various general causes have been deleted on the ground they are superfluous and unnecessary."[246] One doubts that Peck or Rustin would have agreed.

The Greyhound shareholder proposal campaign would occupy only a few lines in the history of the civil rights movement, as its proponents understandably turned their energies elsewhere. FOR would remain perhaps the most important pacifist organization in postwar America,[247] while CORE would become a major civil rights organization in the 1960s. The histories of these organizations barely mention the Greyhound suit.[248] Peck and Rustin would have extraordinary careers and would number in that small group of men and women who genuinely influenced the nation's history. Peck would continue as an activist who was seemingly everywhere from the 1950s to the 1980, battling racism, militarism, and toward the end of his career nuclear power.[249] He gained greatest fame as a rider on the Freedom Rides in 1961, which ended with burning buses in northern Alabama and Peck being beaten by a white mob.[250] Rustin would become a towering figure in the civil rights movement, strategizing behind

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243. Susan W. Liebeler, *A Proposal to Rescind the Shareholder Proposal Rule*, 18 GA. L. REV. 425, 431 (1983).

244. D. A. Jeremy Telman, *Is the Quest for Corporate Social Responsibility a Wild Goose Chase? The Story of* Lovenheim v. Iroquois Brands, Ltd., 45 AKRON L. REV. 291, 311 n.154 (2012). The data as to exactly how many social proposals there were varies; studies found more than 100 social issues proposals in 1976.

245. Exchange Act Release No. 34-12598, 1976 WL 160410 (1976) (Proposed Amendments to Rule 14a-8).

246. Exchange Act Release No. 34-12999, 1976 WL 160347 (1976) (text of Rule 14a-8 as amended).

247. *See generally* KOSEK, *supra* note 17, at 146–227.

248. *See* sources cited *supra* note 12.

249. *See* Derek Catsam, *Peck, James,* AM. NAT'L BIOGRAPHY (Feb. 2005), https://www.anb.org/view/10.1093/anb/9780198606697.001.0001/anb-9780198606697-e-1501306. [https://perma.cc/BYS2-D59G].

250. *See id.*

the scenes in the Montgomery Bus Boycott, organizing the March on Washington in 1962, and ending his life as an icon of both African American and gay rights.[251] Neither Peck's autobiography nor Rustin's biography mention *Peck v. Greyhound*.

CONCLUSION

The history of civil rights and of the nation's corporation and securities laws rarely overlap, and the assumption seems to be that the two areas are far removed. This Article recounts one time where they did overlap and joins a small body of work aiming to connect race and corporation law. In 1948, the civil rights pioneers James Peck and Bayard Rustin each bought a share in Greyhound Bus Lines, then used their rights as shareholders to try to call that company to task for its policies mandating segregation on its buses. They first spoke up at Greyhound's annual shareholder meeting and then tried to place a shareholder proposal opposing its policies on the company's proxy statement, as the existing securities laws appeared to allow. Greyhound fought back, but Peck and Rustin only lost when Greyhound was joined in opposition by the Securities and Exchange Commission. To cut off their campaign against Greyhound and ensure no future civil rights protest was made using shareholder power, the SEC changed its rules, holding that "racial" issues were improper subjects for shareholder action. In effect, the new rule held that race was out of bounds as a subject for shareholder concern. Paradoxically, in an attempt to expel racial activism from the corporate arena, the SEC had written race into the securities laws.

251. *See generally* D'EMILIO, *supra* note 23.