Social Conceptions of the Corporation: Insights from the History of Shareholder Voting Rights

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Abstract

The diversity of voting rules in today's corporations indicates that power is distributed among shareholders in a great variety of ways, but current theories of the corporation have little to say about this diversity. For insight into the significance of different ways of distributing power among shareholders and the social conceptions of the corporation that they imply, this Article develops a historically-grounded framework for evaluating the political import of shareholder voting rights. Sketching out the history of shareholder voting rights since the early nineteenth century, it shows how the distinctive meaning of the twentieth-century term "shareholder democracy" grew out of the vertical power relations that had come to characterize American corporations by mid-century. To recalibrate our understanding of horizontal power relations, this Article explores a handful of controversies over voting rules in the nineteenth century. Finally, it applies this more nuanced understanding to present-day voting rules and suggests that competing social conceptions of the corporation are as alive as they were in the nineteenth century.

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I. Introduction[1]

Power is distributed among the shareholders of today's corporations in a great variety of ways. Evidence of this diversity is readily apparent in shareholder voting rights, which, by their very nature, define relations of power among shareholders. A study of voting rights in 300 large European corporations in mid-2004, commissioned by the Association of British Insurers (ABI), found that more than one-third of these companies had something other than a one-vote-per-share voting rule.[2] An official of the ABI, which advocates one-vote-per-share voting rules, summarized the "deviations" in these words:

> European companies use an extraordinary cocktail of devices to restrict the voting rights of their shareholders. For example, one in 20 imposes an ownership ceiling, limiting the stake of individual owners; one in 10 companies impose[s] a voting right ceiling limiting the right of individual

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1. I am grateful to the organizers of the symposium on "Understanding Corporate Law through History" and its participants for many helpful comments—altogether they may well find that I have not done justice to them. This research would not have been possible without generous support from the University of Wisconsin Graduate School, the German Marshall Fund of the United States, the Alfred P. Sloan Foundation, the Russell Sage Foundation, and the Charles Warren Center for Studies in American History at Harvard University, or without the aid of a number of research assistants, especially that of Cynthia R. Poe.

2. ASS'N OF BRITISH INSURERS, DEMINOR RATING, APPLICATION OF THE ONE SHARE-ONE VOTE PRINCIPLE IN EUROPE (Mar. 2005), http://www.deminor.be/download.do?doc=deminorratingDocs/ABIOneShareOneVoteFullReport.pdf. The report analyzed the voting rights of the 300 companies composing the FTSE Eurofirst 300 index as of July 1, 2004. Institutional Shareholder Services acquired Deminor Rating in mid-2005. *See also infra* note 75 and accompanying text (discussing the introduction to the study, authored by Director-General Mary Francis and entitled "Shareholders' Democracy in Europe").

> holders to register their opinion by voting at annual meetings. Then there are priority shares, granting specific powers to their holders. A fifth of companies analyzed issue shares with multiple voting rights, which give additional rights to selected shareholders.[3]

Deviations from one-vote-per-share have multiplied in the last two decades in the United States as well. For much of the twentieth century, the New York Stock Exchange refused to list the shares of companies that issued non-voting common stock, but it dropped this restriction in 1985, and dual-class shares have become increasingly common since then. Between 1994 and 2001, according to Marco Becht and J. Bradford DeLong, the number of listed firms with dual or multi-class shares more than doubled to 215. Typically, such firms issue one class of shares bearing one-vote-per-share and a second class bearing ten votes per share—the latter held by a small group of individuals, often family members, that do not circulate freely in the market. "The United States today," they observe, "is not exceptional in its rules. The law of many states allows corporations to issue shares with no voting rights, limited voting rights, contingent voting rights, or multiple voting rights."[4] In the United States as well as Europe, in short, voting rights are used to apportion power among shareholders in a variety of ways.

Current theories of the corporation have little to say about this diversity, no matter how one draws lines to distinguish among them.[5] The contractarian

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3. Peter Montagnon, *One Share, One Vote*, THE BUS., Oct. 23, 2005 (advocating the adoption of one-share, one-vote throughout the European Union).

4. Marco Becht & J. Bradford DeLong, *Why Has There Been So Little Block Holding in America?*, *in* A HISTORY OF CORPORATE GOVERNANCE AROUND THE WORLD: FAMILY BUSINESS GROUPS TO PROFESSIONAL MANAGERS 613, 653–57 (Randall K. Morck ed., 2005) (examining how and why corporations in the United States have moved away from the control of powerful family groups once common in the United States and still prevalent in Europe); *see also* Michale Klausner & Jason Elfenbein, *The United States*, *in* SHAREHOLDER VOTING RIGHTS AND PRACTICES IN EUROPE AND THE UNITED STATES 353, 355 (Theodor Baums & Eddy Wymeersch eds., 1999) (describing the rules of shareholder voting and how they help to limit the negative effects of the separation of ownership and control found in the United States). Of the companies included in the S&P 500 index, as of February 2006, 1 in 26 had dual-class shares. Joann Muller, *Henry Ford's Will*, FORBES, Feb. 27, 2006, at 48 (providing a list of S&P 500 companies with dual-class shares, and describing how Ford Motor Company's special class of voting stock, set up by Henry Ford in 1936, has allowed the Ford family to control forty percent of the company while only owning five percent).

5. *See, e.g.*, William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1476–82 (1989) (distinguishing between managerialists and contractualists); David Millon, *Communitarianism in Corporate Law: Foundations and Law Reform Strategies*, *in* PROGRESSIVE CORPORATE LAW 1, 2–4 (Lawrence E. Mitchell ed., 1995) (dividing the literature into contractarian and communitarian positions); Julian Velasco, The Fundamental Rights of the Shareholder 19–59 (Feb. 6, 2006) (Notre Dame Law School Legal Studies Research Paper No. 05-16, 2006), *available at* http://ssrn.

model, which has dominated legal scholarship for the last couple of decades, envisions the corporation as a "nexus of contracts" and imagines the contracting parties (managers, shareholders, employees, suppliers, customers) as acting individually as equals in the bargaining process (aside from differences in information and other resoures). At most this may imply a pluralist distribution of power between bargaining parties, but it has little to say about what I call *horizontal* power relations: in this case, power relations within the category of shareholders. Other theories acknowledge *vertical* power relations within the corporation, both in the principal-agent relationship that links shareholders to managers and in the managerial hierarchies characteristic of the modern corporation. But here, too, shareholders are assumed to have identical interests—all cut from the same cloth, all intent on maximizing profits or share values. In Daniel Greenwood's phrase, they are "fictional shareholders," fundamentally alike and "fundamentally different from the human beings who ultimately stand behind the fiction."[6] Although the interests of managers and shareholders, or of managers and employees, may diverge, no divergence of interest among shareholders is theoretically possible. The notion of power relations among shareholders, therefore, has little relevance.

For insight into the significance of different ways of distributing power among shareholders, this essay turns to history and analyzes shareholder voting rights in political terms. My underlying assumption is that the corporation is a social entity—that it is substantively as well as nominally a "body politic."[7] Voting rights are foundational in creating an initial distribution of power among shareholders, and in this sense they may be interpreted as a marker of an implicit social conception of the corporation. Part II draws analogies between suffrage in the civic and corporate polities and sketches out briefly the history of shareholder voting rights in the United States. The goal is to develop a historically-grounded framework for evaluating the political import of

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Com/Abstract=761904 (discerning three competing theories: the traditional view that "the corporation is a separate entity, with an identity distinct from its owners and managers," the contractarianism view, and the corporate social responsibility theory). One can perhaps infer something about shareholder voting rights from these theories, but in none are voting rights a central concern.

6. Daniel J.H. Greenwood, *Fictional Shareholders: For Whom are Corporate Managers Trustees, Revisited*, 69 S. CAL. L. REV. 1021, 1025 (1996) (examining the role of the fictional shareholder in corporate legal theory, which characterizes shareholders as interested only in profit maximization). Thanks to Eric Guthey for this reference.

7. "Body politic" was a common term for the collectivity created by nineteenth-century acts of incorporation. For one example among many, see ch. 336, § 1, 1855–56 Va. Acts 234, authorizing certain named individuals to "become a body corporate and politic by the name of the Red Sulphur Springs Company."

shareholder voting rights. Part III takes up the twentieth-century term "shareholder democracy" and shows how its distinctive meaning arose out of the vertical power relations that had come to characterize American corporations by the mid-twentieth century. Part IV teases out historical visions of the corporation as a polity and gleans insights into horizontal relations of power among shareholders from a handful of controversies over shareholder voting rights in the nineteenth century. Part V returns to the present. Reinterpreting the results of the ABI-commissioned study of European shareholder voting rights, it suggests that competing social conceptions of the corporation are as alive today as they were in the nineteenth century.

II. Shareholder Suffrage and Its History

As an economic institution, a corporation is also necessarily a political institution, for it is peopled by individuals—shareholders, managers, employees—whose relations are structured by the particular distributions of power that have come to characterize the enterprise.[8] In the generic multidivisional corporation (Figure 1), one set of relations links managers and employees along a vertical dimension. In large American corporations since the mid-nineteenth century, as Alfred Chandler and others have shown,[9] these relations have tended to be hierarchical, or of a command-and-control nature. A second set of relations, also vertical, links shareholders and managers as principals and agents, respectively. Although neither shareholder-manager relations, nor the governance of the firm more generally, has been a central concern of business historians, they have been studied in detail by business and legal scholars, especially after Adolph Berle and Gardiner C. Means highlighted a growing separation of ownership and management in their 1932 book, *The Modern Corporation and Private Property*.[10] Closely related is a third set of relations—those along a horizontal dimension (Figure 1)—that link

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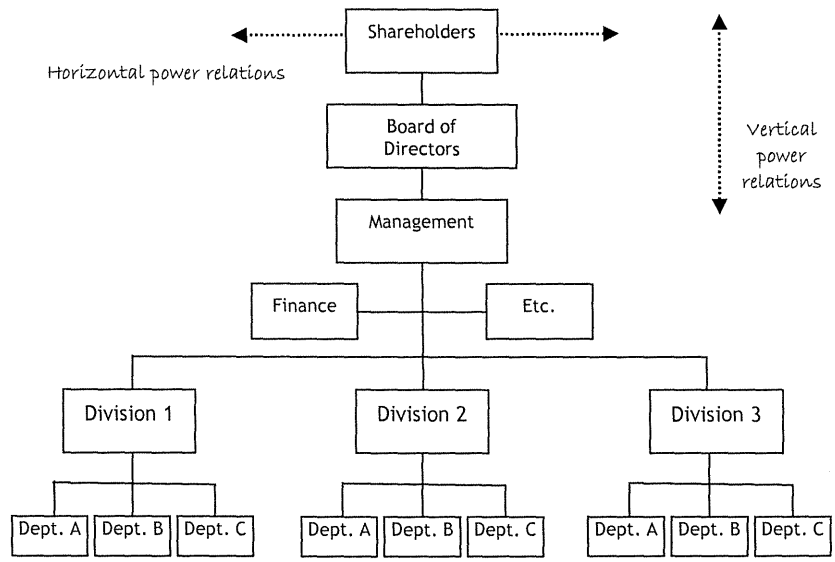
8. My focus is on the interior of the corporation. On the external political relations of the corporation, see, for example, Millon, *supra* note 5.

9. The classic work is ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS (1977), which describes the rise of the modern business enterprise and explains how the visible hand of management replaced Adam Smith's invisible hand of market forces. On Chandler's influence, see THE ESSENTIAL ALFRED CHANDLER: ESSAYS TOWARD A HISTORICAL THEORY OF BIG BUSINESS (Thomas K. McCraw, ed., 1988); William J. Hausman, *Business History in the United States at the End of the Twentieth Century*, *in* BUSINESS HISTORY AROUND THE WORLD 83, 91–96 (Franco Amatori & Geoffrey Jones eds., 2003); and Richard R. John, *Elaborations, Revisions, Dissents: Alfred D. Chandler, Jr.'s, The Visible Hand After Twenty Years*, 71 BUS. HIST. REV. 151 (1997).

10. ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND

Figure 1. Power Relations in the Modern American Corporation



the shareholders (or any other individuals situated at the same level) of the corporation to each other. Even less is known about the history of shareholder relations; indeed, the arena where they are regularly on view—the annual shareholder meeting—is the quintessential "black box" of business history.[11] A first step in conceptualizing relations among shareholders is to note that every corporation, every "body politic," has a constitutional structure, spelled out in statute law and in the company's bylaws.[12] As the vice president of the English

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PRIVATE PROPERTY (1932). For a retrospective assessment by a business historian, see Thomas K. McCraw, *In Retrospect: Berle and Means*, 18 REV. AM. HIST. 578 (Dec. 1990).

11. Colleen A. Dunlavy, *Corporate Governance in Late Nineteenth-Century Europe and the U.S.: The Case of Shareholder Voting Rights*, *in* COMPARATIVE CORPORATE GOVERNANCE: THE STATE OF THE ART AND EMERGING RESEARCH 5, 10 (Klaus J. Hopt et al. eds., 1998) [hereinafter *Shareholder Voting Rights*] (examining the distribution of power among shareholders and the choice of corporate strategies during the wave of firm consolidation at the end of the nineteenth century). It is telling that illustrations like Figure 1 are commonly used in business history to represent corporate structures—except that they routinely omit shareholders. The uppermost level is typically the board of directors. *See, e.g.*, CHANDLER, *supra* note 9, at 458 (describing the rise of the modern business enterprise).

12. On analogies between civic and corporate governance, see Michael J. Duffy, *Shareholder Democracy or Shareholder Plutocracy? Corporate Governance and the Plight of Small Shareholders*, 25 U. NEW S. WALES L.J. 434, 438–42 (2002). Duffy notes that corporate governance differs from civic governance in several significant ways: not all "stakeholders" of

Board of Trade observed in 1856, nineteenth-century corporations were in essence "little republics."[13] Power was distributed among their citizens—the shareholders—via suffrage, electoral, and other rights that were inscribed in the corporation's constitution (in French, also *constitution*; in German, *Verfassung*). In elections that, as a *Wall Street Journal* writer observed in the 1930s, resembled those of "representatives to Congress and to all similar legislative bodies,"[14] shareholders selected representatives (directors) to sit in a representative assembly (the board of directors) to which the corporation's constitution ascribed certain powers.[15] Until the last half of the nineteenth century in the United States, the board's powers were relatively circumscribed; by the 1860s, however, critics had become alarmed by the overweening power exercised by directors, particularly of large railroad corporations.[16]

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the corporation are enfranchised; those who are enfranchised—the shareholders or a portion of them—usually have unequal voting power; and a higher degree of mobility characterizes the corporation's constituency, encouraging a separation of ownership and management on the one hand, and, on the other, placing a premium on the quality of information available to shareholders. Until about 1870, most American corporations were created by special acts of state governments. Thereafter, general incorporation, an administrative process regulated by statutory law, predominated. Before the Civil War, Congress incorporated the first and second Bank of the United States (as well as companies in the District of Columbia—a much neglected topic). During and after the war it passed individual acts of incorporation for the transcontinental railroads—Act of July 1, 1862, Ch. 102, 12 Stat. 489; Act of July 27, 1866, ch. 278, 14 Stat. 292; Act of Mar. 8, 1871, ch. 122, 16 Stat. 573—as well as a general incorporation law for national banks—Act. of Feb. 25, 1863, ch. 58, 12 Stat. 665; Act of June 2, 1864, ch. 106, 13 Stat. 99—and for the District of Columbia—Act of May 5, 1870, ch. 80, 16 Stat. 98.

13. 140 PARL. DEB., H.C. (3d ser.) (1856) 134, *quoted in* BISHOP CARLETON HUNT, THE DEVELOPMENT OF THE BUSINESS CORPORATION IN ENGLAND, 1800–1867, at 135 (1936).

14. *Brothers Under Their Skins*, WALL ST. J., Dec. 18, 1937, at 4 (comparing the inability of stockholders to effectively manage their corporate interests to the inability of voters to effectively manage their political interests).

15. In that the member of the board directors, in turn, elected the president, a closer analogy might be the American electoral college, rather than a legislature. However, unlike in the electoral college, the directors, as elected representatives, fulfilled other functions as well. Thanks to Usha Rodrigues for suggesting this analogy.

16. On boards of directors, see Dennis Karjala, *The Board of Directors in England and American Companies Through 1920*, *in* RECHT UND ENTWICKLUNG DER GROßUNTERNEHMEN IM UND FRÜHEN JAHRHUNDERT: WIRTSCHAFTS-, SOZIAL- UND RECHTSHISTORISCHE UNTERSUCHUNGEN ZUR INDUSTRIALISIERUNG IN DEUTSCHLAND, FRANKREICH, ENGLAND UND DEN USA (LAW AND THE FORMATION OF BIG ENTERPRISES IN THE 19TH AND EARLY 20TH CENTURIES: STUDIES IN THE HISTORY OF INDUSTRIALIZATION IN GERMANY, FRANCE, GREAT BRITAIN AND THE UNITED STATES) 204 (Norbert Horn et al. eds., 1979). For criticism of the growing power of boards in the late 1860s, see *The Powers and Responsibilities of Directors*, 58 THE MERCHANTS' MAG. & COM. REV., Jan.–June 1868, at 432; and John D. Sherwood, *Stockholders—Their Rights and Wrongs*, 7 HOURS AT HOME; A POPULAR MONTHLY OF INSTRUCTION AND RECREATION, June 1868, at 97.

Like civic governance, corporate governance has many dimensions, but there are good reasons to single out voting rights as its foundation stone.[17] Voting rights necessarily define a baseline of power relations. In and of themselves, of course, they do not do so completely or sufficiently, but in the first instance they structure relations among individuals. Universal suffrage, for example, sets individuals equal to one another—all other things being equal. The property, race, and gender qualifications on voting that typified the United States at times in the nineteenth century, in contrast, arrayed Americans in a three-dimensional social matrix that privileged the few over the many.[18] It is usually on the basis of existing suffrage rights, moreover, that these same rights and all others can be changed. This is the practical sense in which they are foundational. The National American Woman Suffrage Association put this basic truth succinctly in 1918 when it declared suffrage to be "the right protective of all rights."[19]

Particular voting rules, moreover, can be interpreted as markers of social preference for particular types of governance. For much of the nineteenth century, as I have shown elsewhere,[20] shareholder voting rights spanned a spectrum that ranged from democratic to plutocratic. The American and English common law defined the democratic end of the spectrum. It regarded shareholders—like the members of a partnership—to have only one vote per person, if no other voting rules were specified in a corporation's charter or other statute law.[21] More than a third (38%) of a sample of some 1,200

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17. Velasco, *supra* note 5, at 17 (arguing that the right specifically to elect directors is foundational, along with the right to sell shares). But, even though election of directors may be the only practical use of voting rights in the contemporary United States, this is no reason to limit their scope *a priori* to elections; historically, their application was broader.

18. *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 54–62 (2000) (discussing the barriers to universal suffrage before equal voting was achieved).

19. Julianne Unsel, Woman's Hour: Suffrage and American Citizenship in War and Reconstruction, 1914–1924, at 204 (May 2, 2005) (unpublished Ph.D. dissertation, University of Wisconsin-Madison) (discussing the impact of World War I on the women's suffrage movement).

20. *See* Colleen A. Dunlavy, *From Citizens to Plutocrats: Nineteenth-Century Shareholder Voting Rights and Theories of the Corporation*, *in* CONSTRUCTING CORPORATE AMERICA: HISTORY, POLITICS, CULTURE 66, 72–86 (Kenneth Lipartito & David B. Sicilia eds., 2004) [herinafter *From Citizens to Plutocrats*] (examining the development of shareholder voting rights and their implications for legal theories of the corporation in the late nineteenth century).

21. *Id.* at 73. On the relative advantages of partnerships and corporations in the 1850s, see Naomi R. Lamoreaux, *Partnerships, Corporations, and the Limits on Contractual Freedom in U.S. History: An Essay in Economics, Law, and Culture*, *in* CONSTRUCTING CORPORATE AMERICA: HISTORY, POLITICS, CULTURE 29 (Kenneth Lipartito & David B. Sicilia eds., 2004).

corporate charters granted by American state legislatures from 1825 through 1835 fell into this category.[22] The common law had even wider scope, moreover, depending on how a voting rights provision was written. If a charter described a voting rule as applying specifically to elections, then all other decisions (e.g., regarding strategy) were to be made according to the common law—one vote per person.[23]

Voting rules that gave shareholders one vote for every share defined the plutocratic end of the spectrum. Plutocracy, government by the wealthy,[24] best

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22. Corporate Charters Database, compiled by the author with funding from the Alfred P. Sloan Foundation (forthcoming). For preliminary information on the database, see History of Capitalism: Corporate Charters Database, *available at* http://history.wisc.edu/dunlavy/Corporations/c_database.htm.

23. *See From Citizens to Plutocrats*, *supra* note 20, at 74 ("If voting rights were described as applying specifically in the election of directors, then the common law continued to govern other decision-making processes."). In antebellum American practice, non-electoral decisions were usually taken by voice vote ("by acclamation") or a show of hands, but a vote according to the shareholders' voting rights ("stock vote") was always taken by ballot and necessitated a break in the proceedings, the appointment of a committee of shareholders to receive and count ballots, and occasionally adjournment to the next day or week while shareholders voted.

This assessment is based on review of various shareholder meeting minutes in Special Collections Department, University Libraries, Virginia Polytechnic Institute and State University (Blacksburg, Virginia); Historical Collections, Baker Library, Harvard Business School (Boston, Massachusetts); and the Hagley Museum and Library (Wilmington, Delaware). On occasion, the minutes of shareholder meetings were published. PROCEEDINGS OF THE CONVENTION OF STOCKHOLDERS OF THE CHARLOTTE AND SOUTH CAROLINA RAIL ROAD COMPANY, HELD AT CHESTERVILLE, S.C., ON THURSDAY AND FRIDAY, JANUARY 13 AND 14, 1848, ALSO, REPORT OF THE EXPERIMENTAL SURVEYS, FROM COLUMBIA TO WINNSBOROUGH (Columbia, South Carolina, A. G. Summer, State Printer 1848); PROCEEDINGS OF THE STOCKHOLDERS OF THE VERMONT CENTRAL RAILROAD, AT A SPECIAL MEETING HOLDEN AT NORTHFIELD, VERMONT, MAY 4, 5, 1852: PRINTED BY ORDER OF THE CORPORATION (Montpelier, Vermont, E. P. Walton & Son 1852). By the turn of the century, charter provisions regarding voting in elections were viewed as applying to all decisions of shareholders. *See, e.g.*, Walker v. Johnson, 17 App. D.C. 144, 160 (D.C. Cir. 1900) ("The adoption and amendment of by-laws that determine the conduct of all the affairs of the corporation would seem as important to the interests of members in general, as the election of managers from year to year, and it is reasonable to presume that the method of voting prescribed in one case was intended to furnish the rule of the other."); McKee v. Home Savings, 98 N.W. 609, 611 (Iowa 1904) ("[T]he word 'election,' used in Code, Section 1900, refers to the action of the stockholders in adopting a proposition submitted to them, and is not to be limited to the election of officers . . . ."); *see also* ARTHUR W. MACHEN, JR., A TREATISE ON THE MODERN LAW OF CORPORATIONS WITH REFERENCE TO FORMATION AND OPERATION UNDER GENERAL LAWS 1013 n.5, 1015 (Boston, Little, Brown & Co. 1908) (referencing *Walker* and *Home Savings*).

24. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 896 (10th ed. 1999). The term came into increasing use in the mid-nineteenth century. OXFORD ENGLISH DICTIONARY 1094 (2d ed. 1989). The earliest example I have found comes from the abolitionist minister Henry Ward Beecher, who condemned slavery in 1863, among other reasons, for its tendency to concentrate wealth and therefore power in the hands of a few. "Slavery makes not only aristocracy, but plutocracy," he wrote, "which is the most dangerous kind of aristocracy. . . . What would you

describes the social conception of the corporation embodied in this voting rule because it apportioned power among the shareholders according to their investment in the company. In the absence of other restrictions, moreover, it implied—and paved the way for—a social conception of the corporation itself, rather than merely its shares, as a commodity, because one-vote-per-share rules made it much easier to buy control of a corporation than did other types of rules.[25] By the end of the nineteenth century, one-vote-per-share had become so familiar in the United States as to make it seem timeless and natural,[26] but in the early nineteenth century, many Americans were still leery of the power that it put in the hands of large investors.[27] Little more than a third (35%) of the corporations in the 1825–1835 sample had voting rights provisions defining a plutocratic polity.[28]

Between these two ends of the spectrum lay a great multiplicity of voting rights that sought a balance between persons and property. As Secretary of the U.S. Treasury Department in 1790, Alexander Hamilton neatly captured the characteristics of this class of voting rights in discussing an appropriate rule for what became the first Bank of the United States. He rejected one-vote-per-share for fear that it would enable large shareholders "to monopolize the power and benefits of the bank;" at the same time, he thought one vote per person gave insufficient weight to large shareholders. "A prudent mean," he concluded, "is to be preferred," and he went on to specify a voting rule that embodied his principle.[29] Following his lead, I call voting rules that sought (or

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think of voting, if one man could cast a thousand votes? . . . Where this disproportioned power exists, even in the Free States, it is dangerous . . . ." HENRY WARD BEECHER, FREEDOM AND WAR: DISCOURSES ON TOPICS SUGGESTED BY THE TIMES 380–81 (Boston, Ticknor & Fields 1863).

25. *See Shareholder Voting Rights*, *supra* note 11, at 11 (discussing the relationship between voting rules and corporate strategies).

26. *See id.* at 83 (citing evidence that one-vote-per-share voting rules had come to dominate popular understanding of corporate suffrage).

27. *See* Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 WM. & MARY Q. 77–78 (3d ser., Jan. 1993) (describing late-eighteenth and early-nineteenth-century fear of large investors' power).

28. Corporate Charters Database, *supra* note 22.

29. ALEXANDER HAMILTON, REPORT ON A NATIONAL BANK, COMMUNICATED TO THE HOUSE OF REPRESENTATIVES, 1st Cong, 2d Sess. (Dec. 14, 1790), *reprinted in* 2 THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES, app. 2032, 2049 (Washington, Gales & Seaton 1834). The 1791 charter of the first Bank of the United States (BUS) included the voting rule that Hamilton proposed (a graduated scale, capped at thirty votes), and it was carried over unchanged in the 1816 charter of the second BUS, except that it was now specifically to apply to elections and explicitly included female shareholders. Charter of the First Bank of the United States, ch. 10, § 7, 1 Stat. 191, 193 (1791); Charter of the Second Bank of the United States, ch. 44, § 11, 3 Stat. 266, 271 (1816).

seek) to balance the rights of persons and property "prudent-mean" voting rights.

Prudent-mean rules are difficult to describe in detail because their particulars varied so much, but some examples will convey a flavor of the way that they distributed power among shareholders. At their simplest, prudent-mean rules gave shareholders one-vote-per-share, but only up to a certain maximum or ceiling, which could be either an absolute number of votes (for instance, ten or twenty) or a proportion of total votes (often, ten percent). At their most complicated, they specified multiple and sometimes irregular levels of shares and corresponding votes. For example, a number of Virginia mining companies were incorporated in 1834 with the following prudent-mean scale: 1 vote for 5 shares; 2 votes for 10 shares; 3 votes for 15 shares; 4 votes for 20 shares; 5 votes for 30 shares; 6 votes for 40 shares; 7 votes for 60 shares; 8 votes for 80 shares; 10 votes for 100 shares; 11 votes for 140 shares; 12 votes for 180 shares; and 15 votes for 200 or more shares.[30] An 1837 Virginia law simplified matters—one can see the grounds for doing so—by specifying the following scale for the incorporation of mining and manufacturing companies:

> [I]n . . . elections, and in all other meetings, the stockholders shall be entitled to one vote for every share owned by them respectively, up to the number of fifteen inclusive, and to one additional vote for every five shares from fifteen to one hundred, and to one additional vote for every twenty shares over and above one hundred.[31]

Whatever the particular details, prudent-mean voting rules defined a polity in which the balance of power was tilted toward large shareholders, more so than in a common law or democratic corporation, yet much less so than in a plutocratic polity. More than a quarter (27%) of the corporations in the 1825–35 sample of American charters contained prudent-mean voting rules.[32]

When the second BUS was reincorporated in Pennsylvania in 1838 (after President Andrew Jackson vetoed a renewal of its Congressional charter), its charter included the same voting scale except that it omitted the last step ("for every ten shares above one hundred, one vote"), while retaining an overall maximum of thirty votes. An Act to Incorporate the Stockholders of the Bank of the United States, by the State of Pennsylvania § 4, art. 1 (1836–1841); *see also* Richard Sylla, Comment, *Why Has There Been So Little Block Holding in America?*, *in* A HISTORY OF CORPORATE GOVERNANCE AROUND THE WORLD: FAMILY BUSINESS GROUPS TO PROFESSIONAL MANAGERS 660, 662–65 (Randall K. Morck ed., 2005) (discussing Hamilton and the voting rights of the shareholders of early American banks).

30. 1833–1834 Va. Acts 210. Notice that there was no provision for 9, 13, or 14 votes.

31. An Act Prescribing General Regulations for the Incorporation of Manufacturing and Mining Companies, ch. 84, § 5, 1836–37 Va. Acts 74, 76.

32. Corporate Charters Database, *supra* note 22.

Overall, then, the thrust of early nineteenth-century American practice—and, implicitly, the dominant social conceptions of the corporation—limited the voting power of large shareholders in some manner. Taken together, democratic and prudent-mean voting rights accounted for nearly two-thirds (65%) of the corporations in the 1825–35 American sample. Plutocratic voting rights were familiar but decidedly not the norm.

Whose preference or concerns this configuration of voting rights expressed is largely an empirical question, depending on who had the power to specify or alter voting rights. They could be written into corporate law at the state level, for example, in which case they may be taken to express the preferences of those who had the power to shape state legislation. Otherwise they were specified in individual charters when companies were incorporated by special act or, if statute law permitted, they were set in the corporation's bylaws. In the former case they may be taken to express the preferences of the founding shareholders, the legislators who approved them, or some combination of the two; in the latter, the preferences of the shareholders, or the directors, or whoever was empowered to establish bylaws. Although attributing preferences to specific individuals or groups may be difficult, voting rights, viewed in this way, nonetheless offer clues to the social meaning of the corporation in a particular historical context.

Over the course of the nineteenth century, the dominant pattern of shareholder voting rights in the United States changed dramatically, signaling a pronounced change in the social (and economic) meaning of the corporation in America. The change came in the middle decades of the century when the voting rights of American shareholders shifted decisively toward plutocracy. To be sure, democratic and prudent-mean voting rights did not disappear abruptly—for example, they still accounted for two-thirds (68%) of a sample of charters (130) granted by special act in 1855.[33] Partnerships and co-operatives, moreover, remained bastions of democracy.[34] But state statutes, particularly those making general incorporation increasingly the norm, either mandated one-vote-per-share or permitted corporations to set their own rules in their bylaws. Practice in almost all the American states had fallen in line by the

33. *Id.*

34. *See* Naomi Lamoreaux, *The Partnership Form of Organization: Its Popularity in Early-Nineteenth-Century Boston*, *in* ENTREPRENEURS: THE BOSTON BUSINESS COMMUNITY, 1700–1850, at 269, 273 (Conrad Edick Wright & Kathryn P. Viens eds., 1997) (comparing legislative restrictions on corporate voting to the freedom of partnerships); *see also* Timothy B. Thering, Co-Operative Capitalism: The Story of the Minneapolis Co-Operative Coopers, 1868–90 (Dec. 14, 2001) (unpublished Ph.D. dissertation, University of Wisconsin-Madison) (examining co-operative capitalism through the business practices of Minneapolis coopers in the late 1800s).

1880s.[35] The state of Virginia, for example, which had long limited the power of large shareholders, passed a law in 1886 consisting of a single substantive section that swept away such restrictions for all its corporations:

> [I]n a meeting of stockholders in all incorporated companies heretofore or hereafter chartered under the laws of this state, each stockholder may, in person or by proxy, give the following vote on whatever stock he may hold in the same right, to-wit: one vote for each share of such stock.[36]

By then plutocratic voting rights had become so widespread in the United States that they seemed natural; indeed, public memory of constraints on the voting power of large American shareholders had already faded.[37] By making it so much easier to buy control of corporations, plutocratic voting rights, in turn, prepared the ground for the Great Merger Movement, which absorbed some 1,800 firms between 1895 and 1904 and was accompanied by a tremendous surge in incorporations.[38]

The plutocratic turn in the United States set American corporations on a very different developmental path from that of their European counterparts. The French general incorporation law of 1867,[39] in effect for nearly a century thereafter, left it to corporations to determine their own voting rights, but with several crucial differences from American practice. If a corporation's articles of association were silent on the question of voting rights, shareholders were assumed to have one vote per person.[40] This was the same as the Anglo-

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35. *See From Citizens to Plutocrats*, *supra* note 20, at 79–83 (describing the development of plutocratic voting and how it became commonplace among the states).

36. An Act to Give to Each Stockholder a Vote for Each Share He Holds in Incorporated Companies, Feb. 26, 1886, ch. 233, 1886 Va. Acts 246.

37. *See From Citizens to Plutocrats*, *supra* note 20, at 83–84 (citing evidence that one-vote-per-share voting rules had come to dominate popular understanding of corporate suffrage); *see also infra* note 168 and accompanying text (describing the lack of memory of earlier American practice).

38. *See* NAOMI LAMOREAUX, THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS, 1895–1904, at 2 (1985) (providing statistical data regarding the Great Merger Movement). The number of new incorporations in the United States in 1905, for example, totaled more than 20,000; compared with 4,253 in Britain, 836 in France, and 192 in Germany. *See* COLLEEN A. DUNLAVY, SHAREHOLDER DEMOCRACY: THE FORGOTTEN HISTORY (Harvard University Press, forthcoming) [hereinafter SHAREHOLDER DEMOCRACY] (comparing the history of incorporation and shareholder voting rights in the United States, Britain, France, and Germany in the nineteenth century).

39. Loi sur les sociétés, 24 July 1867, Tome XXX *BULLETIN DES LOIS*, sér. XI, partie principale, Titres I–IV, no. 1513.

40. A. VAVASSEUR, TRAITÉ DES SOCIÉTÉS CIVILES ET COMMERCIALES (AVEC FORMULES)[:] SOCIÉTÉS FRANCAISES ET ÉTRANGÈRES—ASSURANCES—ASSOCIATIONS ET SYNDICATS PROFESSIONELS—TAXES FISCALES, vol. 2, ¶ 896, 168 (Paris, Marchal et Billard 5th ed. 1897–1904).

American common law, but statute law generally overruled it in the United States, while in France it remained an option. Moreover, in the first constitutive meeting of the shareholders, which included the first election of directors, an individual shareholder's votes were limited to ten, while the phrasing of the voting rights provision that governed ordinary shareholder meetings implied that voting rights would be limited. Legal experts on incorporation made this expectation quite explicit.[41] In the German Empire, similarly, a major revision of company law in 1884 gave each share a vote, but the provision—"Jede Aktie gewährt das Stimmrecht" (Article 190, roughly translated as "Every share grants the right to vote")—was phrased to rule out non-voting shares, rather than to ensure, as American laws did, that shareholders would have one vote for each share that they owned. There, too, legal experts continued to recommend that the voting rights of large investors be limited.[42] In Britain, meanwhile, the default voting rule for incorporated companies, which came into effect if their articles of association did not specify differently, was a three-step prudent-mean scale from 1845 until 1905, when it was changed to one-vote-per-share.[43] But even after that, the default in British company law continued to be the common law practice of requiring that votes be taken in the first instance by a show of hands, the democratic rule: Only if a certain minimum number of shareholders requested a "poll"—the equivalent of

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41. Note that *From Citizens to Plutocrats*, *supra* note 20, at 84, erred in its description of the voting rule in the French general incorporation law of 1867; total votes, as indicated here, were capped at ten only in the first, constitutive meeting of shareholders. Loi sur les sociétés, *supra* note 39, at 27. However, legal authorities such as Parisian lawyer A. Vavasseur made clear that the law left room for—in his view, indeed, "prudence" called for—a limit on total votes so that large shareholders would not be able to dominate shareholder meetings. Vavasseur, *supra* note 40, at 168.

42. *See* Gesetz, betreffend die Kommanditgesellschaften auf Aktien und die Aktiengesellschaften, 18 July 1884, *REICHS-GESETZBLATT*, Berlin, 31 July 1884 (stating that a corporation's founders can limit the maximum votes granted to large shareholders); *see also* VIKTOR RING, DAS REICHSGESETZ BETREFFEND DIE KOMMANDITGESELLSCHAFTEN AUF AKTIEN UND DIE AKTIENGESELLSCHAFTEN VOM 18. JULI 1884, at 624, 293 (Berlin, Carl Heymann's Verlag 1886) (emphasizing the "freedom" [*Freiheit*] given by the 1884 law to limit shareholders' voting rights and discussing alternative ways of doing so).

43. The default voting rights scale first appeared in the Companies Clauses Consolidation Act, 1845, 8 & 9 Vict., c. 16, §§ 75–80 (Eng.), which encompassed provisions "usually inserted" in charters. It was included in the Joint Stock Companies Act, 1856, 19 & 20 Vict., c. 47, Table B §§ 38–43 (Eng.); and in the Companies Act, 1862, 25 & 26 Vict., c. 89, Table A §§ 44-51, sched. 1 (Eng.). In 1906 the Board of Trade published a new Table A, in which the voting rights provision was changed to one-vote-per-share. *See* T. EUSTACE SMITH & ARTHUR STIEBEL, A SUMMARY OF THE LAW OF COMPANIES 71 (9th ed. 1907) (summarizing the main principles of the law then governing joint stock companies and noting that "[t]he old graduated scale of votes on a poll is abandoned [in the new Table A], and one vote for every share is given").

a "stock vote" in the United States—was a decision to be made according to their statutory voting rights.[44] The plutocratic conception of the corporation was a distinctively American phenomenon at the turn of the century.[45]

The upshot, as the twentieth century got underway, was that social conceptions of the corporation in the United States had a decidedly less democratic flavor than practice suggested in Europe. Robert Liefmann, a well-known German expert on the institutional forms of enterprise, summed up the contrast this way in 1912:

> It is noteworthy that the constitution of the joint-stock corporation and the position of stock-holders in Germany are extraordinarily democratic. Every stockholder is entitled to vote and almost all the more important decisions . . . depend upon the consent of the general assembly. In England and—what is most peculiar—*especially in America*, the joint-stock corporation is much less democratically organized.[46]

A few years later, astounded (*verwundert*) at the concentration of wealth and power that typified large American corporations, Liefmann wondered "how Americans, in those circumstances, can speak of their country as a true democracy."[47]

Yet, by the second decade of the twentieth century, the plutocratic corporation in the United States, with its hallmark concentration of power in the hands of large shareholders, was already being transformed into the "modern" corporation that Berle and Means would put in the spotlight in their 1932 book.[48] This kind of corporation, also distinctively American, was still marked by plutocratic voting rights, but the large shareholders who had used one-vote-per-share rules (or the issuance of non-voting shares) to wield power at the turn of the century were rapidly disappearing. As this happened, shareholdings became dispersed among a multitude of smaller holders, creating, in turn, an opening for the centralization of power in the hands of management. As this new distribution of power came to characterize large American corporations in the 1920s,

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44. Companies Consolidation Act, 1908, 8 Edw. 7, c. 69, Table A §§ 56, 60, sched. 1 (Eng.).

45. Why this was so is a question that I take up in SHAREHOLDER DEMOCRACY, *supra* note 38. For a brief preview, see Sylla, *supra* note 29. On the term "stock vote," see *supra* note 23.

46. R. LIEFMANN, DIE UNTERNEHMUNGSFORMEN 71 (Ernst Heinrich Moritz, 1912) (my translation) (emphasis added). On Liefmann's influence in the United States, see U.S. INDUSTRIAL COMM'N, REPORT OF THE INDUSTRIAL COMMISSION ON INDUSTRIAL COMBINATIONS IN EUROPE, H.R. Rep. Doc. 57-187, at 1 (1901).

47. ROBERT LIEFMANN, KARTELLE UND TRUSTS UND DIE WEITERBILDUNG DER VOLKSWIRTSCHAFTLICHEN ORGANISATION 173 (1918) (my translation).

48. *See supra* note 10 and accompanying text (discussing the changing relationship between the ownership and management of American corporations).

plutocratic governance gave way to the technocratic governance of salaried managers—that is, individuals who governed by virtue of their managerial expertise rather than their shareholdings.[49]

In this context, concerns about the fate of "minority shareholders" escalated. First voiced in the mid-nineteenth century, such concerns led many states between 1870 and 1900 to permit or require the use of cumulative voting rights, intended to give small shareholders better access to information.[50] Even so, concerns intensified during the Great Merger Movement at the turn of the century. "If we may judge from the letters which come to The Wall Street Journal," the newspaper reported in 1904, "there is no subject in which investors are taking a keener interest than the question of the rights of minority stockholders."[51] "By minority stockholders," the writer quickly added, "is meant practically all stockholders."[52] Already, shareholders numbered about a half million, shareholdings in large public companies had reportedly taken on a transient character as shares churned rapidly on Wall Street, and directors with little investment themselves were using their control of the proxy system or creation of voting trusts to consolidate their power.[53]

Public awareness of the new power wielded by professional managers and the increasingly passive role of shareholders in modern capitalism crystallized in the 1930s. In the intervening years, Americans had witnessed a variety of

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49. *See Shareholder Voting Rights*, *supra* note 11, at 15 (describing three theoretical models of corporate governance). On the political conditions that encouraged the dispersion of shareholding in the United States, see MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE (1994) and Becht & DeLong, *supra* note 4.

50. The practice of cumulative voting, modeled on proportional representation in civic governance, permitted shareholders to distribute their total votes (that is, the number of their shares multiplied by the number of directors to be elected) among the candidates as they saw fit—for example, by casting all of their votes for a single candidate—so that they might at least have representation on the board and thereby, at least in theory, gain better access to information. *See, e.g.*, Jeffrey N. Gordon, *Institutions as Relational Investors: A New Look at Cumulative Voting*, 94 COLUM. L. REV. 124, 127 (1994) (arguing for a return to the cumulative voting practices used before the 1950s); *Shareholder Voting Rights*, *supra* note 11, at 34–35 (explaining the purposes of cumulative voting). Manufacturing companies kept the tightest rein on information, but some large firms in lines of business more closely regulated by the states also managed to disclose little information, even to their shareholders. *See* David F. Hawkins, *The Development of Modern Financial Reporting Practices Among American Manufacturing Corporations*, 37 BUS. HIST. REV. 135, 142–45, Autumn 1963 (discussing several reasons for the lack of adequate disclosure procedures).

51. *How to Make Corporations Honest*, WALL ST. J., July 26, 1904, at 1.

52. *Id.*

53. *The Seat of Evil*, WALL ST. J., Jan. 21, 1904, at 1; *The Equitable Voting Trust*, WALL ST. J., June 21, 1905, at 1. On the number of shareholders, see Hawkins, *supra* note 50, at 145.

investigations into monopolies and trusts, including the Pujo investigation of the "Money Trust" in 1912,[54] and the first steps had been taken toward federal regulation of business practices. Then came the financial exuberance of the 1920s, culminating in the stock market crash of 1929. In the depths of the Great Depression, Lewis D. Gilbert, a New Yorker who had inherited small numbers of shares in thirty corporations, began to build a popular following, as he and his brother John attended shareholder meetings and challenged boards of directors to respect the rights of small investors. "One share is as good as a thousand," he insisted,[55] at a time when shareholders numbered some ten million.[56] The following year, the publication of Berle and Means's book,[57] which was immediately declared "epoch-making" and "epoch-shattering,"[58] attracted widespread attention to the new power of managers and to the increasing separation between ownership and control in American business—in short, to a social conception of the corporation as a commodity in and of itself.

III. "Shareholder Democracy" in the Twentieth Century

Out of this context—increasingly dispersed shareholdings, widening separation of ownership and management, and growing managerial power—came a peculiarly American definition of "shareholder democracy" by the mid-twentieth century. Indeed, the same year that Berle and Means's book was published and as the U.S. Senate's Pecora investigation was examining Wall Street practices, its twin, "corporate democracy," appeared for the first time in the pages of the *New York Times*—used to characterize a reported rise in the numbers of small shareholders since the stock market crash in 1929.[59] Five

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54. VINCENT P. CAROSSO, INVESTMENT BANKING IN AMERICA: A HISTORY 137–155 (Harvard Univ. Press, 1970).

55. *Stockholder Gilbert Goes to Meetings and Raises Roof*, NEWSWEEK, Mar. 13, 1937, at 27.

56. *See* Hawkins, *supra* note 50, at 145 (describing the increase in U.S. stockholders from 500,000 in 1900 to an estimated 10,000,000 by 1930).

57. BERLE & MEANS, *supra* note 10.

58. McCraw, *supra* note 10, at 579.

59. Anne O'Hare McCormick, *As Wall Street Sees a Changing World*, N.Y. TIMES, Oct. 9, 1932, at SM3. The first academic use of the term appears to have been in Sheldon E. Bernstein & Henry G. Fischer, *The Regulation of the Solicitation of Proxies: Some Reflections on Corporate Democracy*, 7 U. CHI. L. REV. 226, 226 (1939–1940), which discussed the recently amended Securities and Exchange Commission regulations concerning the solicitation of proxies and how they relate to the separation of management and ownership in the modern corporation. Another variant of the term is "stockholder democracy." Neither of these terms should be confused with "industrial democracy," a goal of labor relations reform at the turn of the century that sought significant participation by labor in the management of corporations and

years later, it made its way into the *Wall Street Journal* as well, now in the sense that would prevail until very recently: It was used to describe the governance of corporations in which armies of small shareholders attended annual meetings, were empowered with adequate information, and exercised their voting rights.[60]

"Shareholder democracy" in this more developed sense emerged as the rallying cry of a popular movement to empower small shareholders after World War II. Lewis Gilbert broadened his campaign, attending hundreds of shareholder meetings and becoming known as "Minority Shareholder No. 1" by the late 1940s.[61] Then in 1954 came a benchmark publication: *Shareholder Democracy: A Broader Outlook for Corporations*, authored by law professors Frank D. Emerson and Franklin C. Latcham.[62] They shared the same starting point as that stressed by Berle and Means in 1932: the growth in numbers of shareholders, widespread dispersion of share ownership, and de facto management control. "[N]ot only is the voting power of the largest individual stockholder fairly meaningless," they observed, "but so also is the voting power of any significant group of stockholders."[63] How, in those circumstances, did managers gain and retain control? Through their control of "the proxy machinery."[64] The authors probed in great detail the workings of the SEC's proxy rules and regulations, which they regarded as "the cornerstone of shareholder democracy."[65] Two years later, Gilbert, now known variously as "America's leading minority stockholder" and "the nation's corporate conscience,"[66] published his own book, *Dividends and Democracy*.[67] Gilbert

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was itself a reaction against the rise of the large-scale industrial corporation. *See* INDUSTRIAL DEMOCRACY IN AMERICA: THE AMBIGUOUS PROMISE 2 (Nelson Lichtenstein & Howell John Harris eds., 1993) (presenting the results of a symposium organized by the Woodrow Wilson Center's Division of U.S. Studies).

60. *See Brothers Under Their Skins*, *supra* note 14 (comparing the inability of stockholders to effectively manage their corporate interests to the inability of voters to effectively manage their political interests).

61. *See* Keith Hutchison, *Everybody's Business: Corporate Democracy*, THE NATION, Feb. 21, 1948, at 215 (noting the passivity of small shareholders, which enables "self-perpetuating oligarchies" of managers, and reviewing Gilbert's recent activities).

62. FRANK D. EMERSON & FRANKLIN C. LATCHAM, SHAREHOLDER DEMOCRACY: A BROADER OUTLOOK FOR CORPORATIONS (1954). The book was based on articles that they had published since 1950. *Id.* at ix.

63. *Id.* at 4.

64. *Id.*

65. *Id.* at 145.

66. LEWIS D. GILBERT, DIVIDENDS AND DEMOCRACY viii (1956).

67. *Id.*

declared himself "a proponent of a new democratic people's capitalism,"[68] and the title of his memoir encapsulated the pragmatic argument that he had been making for a quarter century: "more corporate democracy means more corporate dividends."[69] Within a decade, the term "shareholder democracy" joined "corporate democracy" in the pages of the *Wall Street Journal* and the *New York Times*.[70]

What is striking about these discussions of "democracy" in the twentieth-century corporation is that plutocratic voting rights went unquestioned. They were implicitly accepted, one has to conclude, as just and natural and, indeed, democratic. In other words, advocates of "shareholder democracy" in the twentieth century did not seek to make the horizontal relations among shareholders more democratic. Given the imbalance of power between managers and shareholders, this would have seemed irrelevant; their core concern was surely with the vertical relations linking shareholders and managers. In the context of the American style of technocratic capitalism, with its attendant separation of management and control, "democracy" meant ensuring that interested shareholders were sufficiently informed (through improved publicity) and able to vote their shares (through proxy reforms). This was a quite different social conception of the corporation than that implicit in democratic or prudent-mean voting rights: As long as shareholders were enfranchised and well informed, it did not matter if those who owned ten shares cast ten votes, while those who owned a million shares cast a million votes. In the context of the times, of course, empowering shareholders even to this limited extent was intended to correct a balance of power that had tilted dangerously toward salaried managers since the early twentieth century. But the underlying social conception of the corporation was still fundamentally plutocratic.

This conception of shareholder democracy, defined in terms of vertical relations between shareholders and managers, has persisted to the present day. "Who's afraid of shareholder democracy?" asks *New York Times* reporter

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68. *Id.* at 6.

69. *Id.* at 3.

70. *See* Victor J. Hillery, *Stricter Listing Rules on American Exchange Urged*, WALL ST. J., Jan. 31, 1962, at 24 (outlining the more stringent standards for listing on the American Stock Exchange as proposed by a committee of exchange members); *Holder Sues to Bar Meeting of Comstat*, N.Y. TIMES, Sept. 12, 1964, at 28 (reporting on a stockholder suit against the Communications Satellite Corporation alleging that the company's management thwarted a stockholder's effort to stand for election as a director); Edward Cowan, *Proxies Studied for Thrift Units*, N.Y. TIMES, Jan. 24, 1965, at F1 (commenting on the threat shareholder democracy would pose to savings and loan associations).

Gretchen Morgenson in a column on majority elections of corporate directors.[71] SEC commissioner Annette Nazareth recently used the same term to characterize the potential consequences of permitting companies to distribute proxy statements via the Internet: "If the result of these proposals is enhanced shareholder democracy at reduced costs," she observed, "American corporations and their shareholders will be the better for it."[72] As has been the practice since at least the 1950s, neither of these individuals questioned the prevailing horizontal distribution of power among shareholders established by one-vote-per-share rules. These examples could easily be multiplied.

What has changed since the mid-1980s, however, is that the coupling of "shareholder democracy" with one-vote-per-share voting rules has become tighter and more explicit. This seems to have happened in reaction to the advent of an oligarchic conception of the corporation, a conception implicit in the issuing of shares that carry multiple or unequal voting rights (also called dual-class shares). As a *New York Times* reporter explained in 1985, "one class of common stock, usually controlled by management, may allow 10 votes per share, while another class, owned by nonmanagement investors, may have just one vote per share or perhaps none at all."[73] He explicitly associated "shareholder democracy" with one-vote-per-share voting rules, as did bills introduced that year in the U.S. Congress.[74]

Very recently, this sense of the term has been taken up in Europe as well. The introduction to the ABI-commissioned study of deviations from one-vote-per-share among European companies, authored by Director-General Mary Francis, placed the study squarely in this context, for it was entitled

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71. Gretchen Morgenson, *Who's Afraid of Shareholder Democracy?* N.Y. TIMES, Oct. 2, 2005, § 3, at 1.

72. Andrew Parker, *Use Internet for Proxy Statement Says SEC Regulation*, FIN. TIMES (London 1st Ed.), Nov. 30, 2005, at 29 (quoting Commissioner Nazareth).

73. Steven Greenhouse, *Business and the Law: Unequal Rights in Voting Stock*, N.Y. TIMES, Mar. 19, 1985, at D2.

74. *Id.*; *see also* Timothy K. O'Neil, Comment, *Rule 19c-4: The SEC Goes Too Far in Adopting a One Share, One Vote Rule*, 83 NW. U. L. REV. 1057, 1059 n. 10, 1065–78 (1989) (giving the titles of bills introduced in the House and Senate and criticizing the SEC rule which restricts listing of stocks for corporations not abiding by the "one-share, one-vote" rule). The first explicit association of shareholder democracy and the one-vote-per-share rule that I have been able to find came in a letter to the editor of *Business Week* in 1975. Anthony M. Lamport, *Readers Report: On Going Private*, BUS. WEEK, Mar. 31, 1975, at 4. Greenhouse, *supra* note 73, at D2, marked its second appearance. On dual-class shares and the issue of restricted shares, see generally Jeffrey Kerbel, *An Examination of Nonvoting and Limited Voting Common Shares—Their History, Legality, and Validity*, 15 SEC. REG. L.J. 37 (1987); Becht & DeLong, *supra* note 4, at 653–57 (analyzing dual-class shares as they relate to shareholder voting rights).

"Shareholders' Democracy in Europe."[75] The study attracted the attention of *The Economist* in March, 2005, which ran a story under the headline *What Shareholder Democracy? Corporate Governance in Europe*.[76] In the fall of 2005, the European Union's internal market commissioner Charlie McCreevy, apparently with the ABI study in mind, called on companies across the European Union to "eliminate discriminatory treatment of shareholders" by adopting one-vote-per-share voting rules.[77] Under the headline "Equality in equity," a *Financial Times* editorial lauded the commissioner's initiative as a step toward "greater shareholder democracy."[78] Meanwhile, economic historian Caroline Fohlin, surveying the history of corporate governance in Germany, deemed one-vote-per-share rules to be consistent with "[d]emocratic intuition [and] liberal tradition."[79]

The result is conceptual confusion arising, in essence, from a failure to distinguish between vertical and horizontal relations of power in the corporation. From the standpoint of relations among shareholders, Commissioner McCreevy is mistaken to think that one-vote-per-share rules would "eliminate discriminatory treatment of shareholders."[80] They would eliminate discriminatory treatment of *shares*, but, like every other kind of voting rule, except the Anglo-American common law default of one vote per person, they necessarily discriminate among *shareholders*. Nor do plutocratic rules accord with "democratic intuition," if one thinks of relations among shareholders. Compared with oligarchic rules, however, they do certainly tilt the vertical balance of power back toward shareholders and in that sense may be seen to restore a semblance of "popular" control. Sorting out the politics of shareholder voting rules, in short, requires due

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75. DEMINOR RATING, *supra* note 2, at 1.

76. *What Shareholder Democracy? Corporate Governance in Europe*, ECONOMIST, Mar. 26, 2005, at 62 (highlighting the weaknesses of European shareholder democracy as highlighted in DEMINOR RATING, *supra* note 2).

77. Tobias Buck, *EU Seeks to End Bias Among Investors—Commission Wants 'One Share, One Vote' Principle*, FIN. TIMES (London 8th Ed.), Oct. 17, 2005, at 1 (quoting Commissioner McCreevy).

78. *Equality in Equity: New Push for the One Share, One Vote Campaign in Europe*, FIN. TIMES (London 1st Ed.), Oct. 18, 2005, at 18 (endorsing Commissioner McCreevy's "campaign for shareholder rights in Europe").

79. Caroline Fohlin, *The History of Corporate Ownership and Control in Germany*, *in* A HISTORY OF CORPORATE GOVERNANCE AROUND THE WORLD: FAMILY BUSINESS GROUPS TO PROFESSIONAL MANAGERS 223, 262 (Randall K. Morck ed., 2005).

80. Buck, *supra* note 77, at 1 (quoting Commissioner McCreevy).

attention to horizontal as well as vertical relations of power in the corporation.

IV. Visions of the Nineteenth-Century Corporate Polity

To recalibrate our understanding of one-vote-per-share voting rules along a horizontal dimension, this part listens in as nineteenth-century American shareholders grappled with different kinds of voting rules. Public discussions were extraordinarily rare, even as American practice was being transformed in the middle decades of the nineteenth century. But in a few instances, traces of controversies over shareholder voting rights have survived, offering tantalizing glimpses of the social conceptions of corporations implicit in voting rules. The first instance concerns a New Jersey Supreme Court decision in 1834; the second, events in the shareholder meetings of a Massachusetts railroad in the 1830s and 1840s; and the third, a commentary that appeared in the *New York Times* in 1878.

A. Taylor v. Griswold *(1834)*

The New Jersey Supreme Court's decision in *Taylor v. Griswold* stemmed from a suit brought by shareholders of a bridge company in a dispute over an election of directors.[81] Twenty-six individuals (and "their heirs and assigns") had been incorporated by the New Jersey legislature in 1797 as "[t]he proprietors of the bridges over the rivers Passaic and Hackinsack."[82] The incorporating act, as was typical of the time, spelled out rather detailed rules to govern the convening of shareholder meetings and authorized "the said corporation, or *a majority thereof*,"[83] to appoint officers and directors as it saw fit. It also gave "the said corporation, or *a majority thereof* . . . full power to make such bylaws, resolves and regulations for their government as they shall deem proper . . . provided they be not repugnant to any part of this act, nor to the constitution or laws of this state."[84] Aside from these references to "a majority thereof," the charter was silent on voting rights. Under the common

81. Taylor v. Griswold, 14 N.J.L. 222, 252–53 (N.J. Sup. Ct. 1834) (affirming the common law voting rule of corporations of one-vote-per-shareholder, rather than one-vote-per-share). The case is summarized briefly in *From Citizens to Plutocrats*, *supra* note 20, at 77–79.

82. *Taylor*, 14 N.J.L. at 240, 242.

83. *Id.* at 239 (emphasis added).

84. An Act to Incorporate the Stockholders of the Bridges Over the Rivers Passaic and Hackinsack §§ 1, 3–4, 1797 N.J. Laws 201, 201–02 (emphasis added).

law, therefore, the shareholders would have had one vote per person. But even before incorporation (that is, while the firm was organized as a partnership), the company had adopted a bylaw that gave each shareholder one-vote-per-share on all decisions, electoral or otherwise.[85]

The suit arose when something—never explained in the court's opinion—prompted a committee of shareholders supervising an election of directors in 1833 to ignore the bylaw and revert to the common law default of one vote per person. Since it was evidently a contested election, the supervising committee may simply have changed the rules to favor one slate of candidates over the other. In any case, the committee members abruptly set aside the one-vote-per-share rule, which had been established company practice for more than thirty years, because they now deemed it "contrary to the charter."[86] This prompted the defeated candidates to sue to have the election set aside. Among other things, the plaintiffs charged that the elections committee had "erred, in allowing to each stockholder but one vote, instead of a vote for each share owned by him."[87]

The case ended up before the New Jersey Supreme Court. Despite its name, the Supreme Court did not serve as the court of last resort in New Jersey at the time; that function belonged to the Court of Appeals, which was composed of the Governor and the members of the Legislative Council. Instead, the court had original and appellate jurisdiction over causes at law (as opposed to causes at equity). Also, an 1825 "act to prevent fraudulent elections by incorporated companies" gave the court original jurisdiction over challenges to elections of corporate officers.[88] The court was composed of three justices, who were appointed by the state legislature and "commissioned" by the governor. They also served on the county Circuit Courts, the Courts of Common Pleas, and the Court of Oyer and Terminer.[89]

When *Taylor v. Griswold* arrived on the docket, Joseph C. Hornblower was the court's chief justice. It is not impossible that Chief Justice Hornblower

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85. *Taylor*, 14 N.J.L. at 240. The company's bylaws also permitted the use of proxies.

86. *Id.* at 251.

87. *Id.* at 224. The plaintiffs also asked that the election be set aside on two additional grounds: 1) that the election had been improperly called and 2) that the election "inspectors" had wrongly rejected proxies (also a reversion to the common law). *Id.* at 223–24. Chief Justice Hornblower regarded the issue of voting rights to be "certainly the most important, though by no means, the most difficult question" at issue in the case. *Id.* at 237.

88. An Act to Prevent Fraudulent Elections by Incorporated Companies, and to Facilitate Proceedings Against Them § 4, 1825 N.J. Laws 81, 82.

89. N. J. Const. of 1776, §§ 9, 12; TRENTON: SUPREME COURT OF NEW JERSEY, THE SUPREME COURT OF NEW JERSEY 1 (1970). The Supreme Court became the court of last resort in the new constitution that New Jersey adopted in 1844.

was personally acquainted with some of the individuals involved in the case, since he was a New Jersey native, born near the Passaic River in 1777.[90] In 1798, a year after the bridge company was chartered, moreover, he began his legal career in the practice of Newark lawyer David B. Ogden,[91] and the first five individuals named in the charter granted to the bridge company in 1797 bore the family name Ogden.[92] In any case, after serving briefly in the Legislative Assembly, Hornblower was appointed to a seven-year term as Chief Justice of the Supreme Court in 1832 and reappointed to a second term in 1839.[93] A Whig, a Presbyterian, an advocate of tariff protection for manufacturing, an abolitionist, and a president of the New Jersey Colonization Society, he was also an active member of the New Jersey Constitutional Convention of 1844.[94]

Chief Justice Hornblower found the question of proper voting rights—one vote per person, as required by the common law, or one-vote-per-share, as set in the company's bylaw—not the least bit troublesome: "To my mind," he wrote, "the answer to this question is perfectly plain, whether it is considered upon general and common law principles, or upon the terms of the charter itself."[95] On both counts, he found the bylaw granting one-vote-per-share to be void. As a general rule, he argued, "[e]very corporator, every individual member of a body politic, whether public or private, is, *prima facie*, entitled to equal rights."[96] Even if the charter did not specify one vote per person, "yet in its spirit and legal intendment," Justice Hornblower maintained, it "gives each member the same rights, and consequently, but one vote."[97] He elaborated in the following terms:

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90. WILLIAM NELSON, JOSEPH COERTEN HORNBLOWER, 1777–1864: CHIEF JUSTICE OF NEW JERSEY, 1832–1846, A BIOGRAPHICAL SKETCH 3 (Cambridge, Mass., John Wilson & Son, 1894).

91. *Id.* at 7.

92. An Act to Incorporate the Stockholders of the Bridges Over the Rivers Passaic and Hackinsack §§ 1, 3–4, 1797 N.J. Laws 201, 201.

93. NELSON, *supra* note 90, at 10–11.

94. *Id.* at 16, 20, 22–23, 26; ADDRESS OF THE FRIENDS OF DOMESTIC INDUSTRY, ASSEMBLED IN CONVENTION, AT NEW-YORK, OCTOBER 26, 1831, TO THE PEOPLE OF THE UNITED STATES 43 (1831); PROCEEDINGS OF THE NEW JERSEY STATE CONSTITUTIONAL CONVENTION OF 1844 at 640 (1942) (compiled and edited by the New Jersey Writers' Project of the Works Projects Administration). On an 1836 fugitive slave decision by Hornblower that became very influential in abolitionist circles by the 1850s, see Paul Finkelman, *Chief Justice Hornblower of New Jersey and the Fugitive Slave Law of 1793*, *in* SLAVERY AND THE LAW 113 (Paul Finkelman ed., 1997).

95. Taylor v. Griswold, 14 N.J.L. 222, 237 (N.J. Sup. Ct. 1834).

96. *Id.*

97. *Id.* at 238.

> [A] bylaw excluding a member from office, or from the right to vote at all, unless he owns five, or ten, or twenty shares, would not be a more palpable, though it might be a more flagrant violation of the charter. A man with one share, is as much a *member*, as a man with fifty; and it is difficult to perceive any substantial difference between a bylaw, excluding a member with one share from voting at all, and a bylaw reducing his one vote to a cipher, by giving another member fifty or a hundred votes.[98]

His words leave little doubt that he conceived of the corporation as a community of equals.

Clinching the matter, in Justice Hornblower's view, were "the very terms of the charter"[99] itself, which pointed to the same conclusion. Following common practice, the charter incorporated individuals by name and spoke of them and their successors as "collectively constitut[ing] 'the corporation,' 'the body,' politic and corporate."[100] And to what did "that 'body'" refer, Justice Hornblower queried? "The aggregate amount of property? Or the collective number of individual proprietors who were incorporated? Manifestly the latter."[101] By this route he reached the same conclusion—reluctantly, because he hesitated to overturn the company's long-established practice of allowing one-vote-per-share—that he had on general principles: "There is nothing then in this charter to change the common law rights and relative influence of the individual corporators."[102] In fact, he went further, cautioning that such a bylaw might have pernicious effects, whether intended or not:

> [T]he tendency, at least, the *apparent* tendency, of the bylaw in question is to encourage speculation and monopoly, to lessen the rights of the smaller stockholders, depreciate the value of their shares, and throw the whole property and government of the company into the hands of a few capitalists; and it may be, to the utter neglect or disregard of the public convenience and interest.[103]

The court's decision, a ringing affirmation of the common law voting rule, was clearly grounded in a conception of the corporation as a democratic polity.

But how much weight should we give this decision? Was it idiosyncratic? Was Chief Justice Hornblower simply a crank? Or did his opinion represent widespread sentiment at the time? In some ways, the court's decision stood alone. Hornblower did not cite previous cases regarding voting rights, nor did

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98. *Id.*
99. *Id.*
100. Taylor v. Griswold, 14 N.J.L. 222, 239 (N.J. Sup. Ct. 1834).
101. *Id.*
102. *Id.*
103. *Id.* at 241.

this case spawn a rich collection of case law on the subject.[104] Seven years later, moreover, the New Jersey legislature passed an act that overruled the common law default in company elections.[105] "[U]nless otherwise provided in their respective charters," the 1841 Act declared, "at every such election [of managers or directors] each stockholder shall be entitled to one vote for each share . . . held by him or her."[106] Five years later, the legislature acted again. This time, in authorizing general incorporation of manufacturing companies, it permitted such firms to determine their own voting rules for all decisions, electoral or otherwise.[107] In a new general incorporation law passed in 1849, the legislature extended this liberty to companies in several lines of business: any kind of manufacturing, mining, mechanical, agricultural, or chemical business as well as inland navigation.[108]

But Chief Justice Hornblower certainly was not an "anti-corporation" crank—or at least he was not some ten years later, when he participated in the New Jersey constitutional convention of 1844—although there was a hint that concentrations of economic power troubled him. There he opposed a constitutional provision that would have set a high bar to incorporation by requiring the legislature to pass acts of incorporation by a two-thirds majority, charging that the provision "owed its origin to a sort of political feeling or phrenzy [sic] against corporations" that he did not share.[109] He also argued against a proposal that the officers of corporations be held personally liable, maintaining that it would discourage "the mechanic and the laborer" from

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104. *See* David L. Ratner, *The Government of Business Corporations: Critical Reflections on the Rule of 'One Share, One Vote,'* 56 CORNELL L. REV. 1, 9–10 (1970) (noting that *Taylor v. Griswold* did not cite previous case law). Ratner holds the minority view that a common law rule did not exist and suggests that the court was upholding a traditional practice of governing business corporations according to democratic principles. *Id.* at 10.

105. A Supplement to the Act Entitled "An Act to Prevent Fraudulent Elections by Incorporated Companies, and to Facilitate Proceedings Against Them," passed Dec. 8, 1825, 1841 N.J. Laws 116, 117 (1825).

106. *Id.*

107. An Act to Authorize the Establishment, and to Prescribe the Duties of Manufacturing Companies, 1846 N.J. Laws 64, 66.

108. An Act to Authorize the Establishment, and to Prescribe the Duties of Companies for Manufacturing and Other Purposes, 1849 N.J. Laws 300, 302–03.

109. PROCEEDINGS OF THE NEW JERSEY STATE CONSTITUTIONAL CONVENTION, *supra* note 94, at 320, 536. The New York constitution of 1821 required special acts creating corporations to be approved by two-thirds of elected legislators and was still in effect at that time. It would be replaced by the constitution of 1846, which permitted the passage of general incorporation laws. RONALD E. SEAVOY, THE ORIGINS OF THE AMERICAN BUSINESS CORPORATION, 1784–1855: BROADENING THE CONCEPT OF PUBLIC SERVICE DURING INDUSTRIALIZATION 18, 95, 180 (1982).

participating in corporations and would encourage "the aristocracy of wealth."[110]

There are other reasons to think, moreover, that the sentiments underlying Hornblower's decision were widely held at the time. First of all, Chief Justice Hornblower was not alone in the views he expressed. His colleague on the court, Justice Ford, shared his reasoning. "This claim of having one vote for each share, neither rests on the common law of the land, or any of its principles," Ford wrote in a concurring opinion.[111] "It wholly depends on the *grant* of the legislature."[112] Because the bridge company's charter did not grant one-vote-per-share, Ford agreed that the common law would not allow them to grant it to themselves via their bylaws.[113] Also, the New Jersey Court of Appeals reviewed *Taylor v. Griswold* in 1835 and affirmed it.[114] To the extent that the Court of Appeals was more of a political than a disinterested judicial body, as critics (including Justice Hornblower) charged,[115] its affirmation of *Taylor v. Griswold* also suggests that the decision may have enjoyed rather broad support at that time. As indicated above, moreover, the practice of constraining the power of large shareholders, which Hornblower endorsed, was quite consistent with the tenor of voting rights provisions in corporate charters in these years. Finally, it bears emphasis that, after *Taylor v. Griswold*, one vote per person was widely recognized as the common law rule in legal literature (although from the 1880s it was generally regarded as outmoded or having been superseded by statutory law).[116] In short, what the New Jersey

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110. PROCEEDINGS OF THE NEW JERSEY STATE CONSTITUTIONAL CONVENTION, *supra* note 94, at 327–29.

111. Taylor v. Griswold, 14 N.J.L. 222, 251 (N.J. Sup. Ct. 1834) (Ford, J., concurring).

112. *Id.* (Ford, J., concurring).

113. *Id.* (Ford, J., concurring). The third member of the court when this decision was issued, Justice Ryerson, "gave no opinion, as the cause was argued before his appointment." *Id.* at 253.

114. *See* Warren v. Pim, 66 N.J. Eq. 353, 357, 388 (N.J. 1904) (indicating that *Taylor v. Griswold* was affirmed on appeal). As was its custom, the Court of Appeals did not report an opinion.

115. *See* John Bebout, *Striking a Balance: Demand for Independent Judiciary*, *in* JERSEY JUSTICE: THREE HUNDRED YEARS OF THE NEW JERSEY JUDICIARY 119, 119–25 (Carla Vivian Bello & Arthur T. Vanderbilt II eds., 1978) (describing the politics of the New Jersey judicial branch).

116. *See generally* Annotation, *Stockholders Required for Quorum or Vote as Determined by Number of Stockholders or Number of Shares*, 63 A.L.R. 1106–13 (1929); WILLIAM W. COOK, A TREATISE ON THE LAW OF STOCK AND STOCKHOLDERS AS APPLICABLE TO RAILROAD, BANKING, INSURANCE, MANUFACTURING, COMMERCIAL, BUSINESS, TURNPIKE, BRIDGE, CANAL, AND OTHER PRIVATE CORPORATIONS § 608 (1887); 2 ARTHUR W. MACHEN, JR., A TREATISE ON THE MODERN LAW OF CORPORATIONS: WITH REFERENCE TO FORMATION AND OPERATION UNDER GENERAL LAWS § 1216 (1908); Kerbel, *supra* note 74, at 47–50.

Supreme Court discerned in the common law and in the charter of the Passaic and Hackensack Bridge Company was a social conception of the corporation that apparently had widespread legitimacy at the time, although it was already beginning to give way to the plutocratic corporation.

B. Western Railroad

During these same years, events at the shareholder meetings of a Massachusetts railroad provide another window onto competing social conceptions of the corporation, although the window is sufficiently foggy that the events themselves remain somewhat perplexing. With an authorized capital of two million dollars, the Western Railroad was incorporated by the Massachusetts legislature in 1833 to extend the Boston and Worcester Railroad from Worcester to the New York state line in the direction of the Hudson River.[117] The directors of the Boston and Worcester Railroad were the incorporators of the Western, but dissension between the two companies soon erupted (over fares and rates) and plagued their relations until they finally merged in 1867 to form the Boston and Albany Railroad. Politically, the history of the Western was also exceptionally turbulent both because its construction through the hilly western reaches of Massachusetts during financially troubled times proved more costly than expected and because the company turned repeatedly to the legislature for financial aid.[118]

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117. An Act to Establish the Western Railroad Corporation, Mass. Gen. Laws ch. 116, §§ 1–15 (1833), *in* 2 W. P. GREGG & BENJAMIN POND, THE RAILROAD LAWS AND CHARTERS OF THE UNITED STATES, NOW FOR THE FIRST TIME COLLATED, ARRANGED IN CHRONOLOGICAL ORDER, AND PUBLISHED WITH A SYNOPSIS AND EXPLANATORY REMARKS 164–71 (1851) [hereinafter WRR Charter]. The Boston and Worcester Railroad had been incorporated two years earlier. An Act to Establish the Boston and Worcester Railroad Corporation, Mass. Gen. Laws ch. 72, §§ 1–15, *in* 2 GREGG & POND, RAILROAD LAWS AND CHARTERS 101–07. The Western Railroad, however, did not begin to take subscriptions to its stock until August 1835. STEPHEN SALSBURY, THE STATE, THE INVESTOR, AND THE RAILROAD: THE BOSTON & ALBANY, 1825–1867, at 136 (1967). For much of the nineteenth century, it should be noted, shares were generally not bought outright. Instead, shareholders "subscribed" shares by signature (often making a small down payment of five or ten percent) and agreed to pay in the nominal value of their shares in installments ("assessments"), as the company called for them. This assessment is based mainly on my reading of hundreds of charters. EDWIN MERRICK DODD, AMERICAN BUSINESS CORPOPRATIONS UNTIL 1860 WITH SPECIAL REFERENCE TO MASSACHUSETTS (Harvard Univ. Press, 1954). The Western Railroad's charter called for equal assessments on shares up to a maximum of $100 per share. WRR Charter § 3, *in* GREGG & POND, 2 RAILROAD LAWS AND CHARTERS 166.

118. For a history of the two companies up to their merger, see SALSBURY, *supra* note 117, who included in his bibliography the outpouring of pamphlets published by or about the Western Railroad in these years. On the early years, see also Charles J. Kennedy, *The Early*

Except for recurrent investigations into the company's affairs by committees of shareholders or legislators, proceedings in the shareholder meetings of the Western Railroad were typical of the time. The voting rule in the Western's charter gave its shareholders one-vote-per-share, but only up to one-tenth of the total shares. This voting rule, moreover, was included in its charter specifically for the election of directors, so the shareholders generally made all other decisions by acclamation, a show of hands or, in cases of serious disagreement, by ballot, but in any case on the basis of one vote per person.[119]

The minutes of the 1837 meeting illustrate the Western shareholders' usual manner of proceeding:[120] They convened the meeting at 3:30 p.m. on February 8 at the Old Court House in Boston and began with a reading of the directors' report. They then accepted the report and ordered it to be printed for the stockholders. Next came the Treasurer's report, which was committed to a committee of two shareholders for auditing. Then the shareholders authorized the directors to print the "Report of the Engineers" whenever they deemed it useful to do so. Finally, the meeting moved to the election of directors. The first step was the appointment of a committee of six shareholders to nominate six members to stand for election. The nominating committee apparently deliberated and reported on the spot, for its report was immediately read and accepted, and the shareholders voted to proceed with the election. The next step was the appointment of a committee of three shareholders (sometimes called "inspectors" or, in Britain, "scrutineers")"to receive[,] assort & count the votes for Directors".[121] When the balloting concluded, the committee reported the total votes given (3,094), the number that a successful candidate needed to receive (1,548), and the number of votes that various individuals received. The

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Business History of Four Massachusetts Railroads, 25 BULL. BUS. HIST. SOC'Y 52 (Mar. 1951); Charles J. Kennedy, *The Early Business History of Four Massachusetts Railroads-II*, 25 BULL. BUS. HIST. SOC'Y 84 (June 1951); Charles J. Kennedy, *The Early Business History of Four Massachusetts Railroads-III*, 25 BULL. BUS. HIST. SOC'Y 188 (Sept. 1951); and Charles J. Kennedy, *The Early Business History of Four Massachusetts Railroads-IV*, 25 BULL. BUS. HIST. SOC'Y 207 (Dec. 1951).

119. WRR Charter § 10, *in* GREGG & POND, *supra* note 117, at 168. Although shareholders in other kinds of Massachusetts corporations were gradually permitted to determine their own voting rights over the middle decades of the nineteenth century, the votes of individual railroad shareholders were restricted to one-tenth through the end of the century. *From Citizens to Plutocrats*, *supra* note 20, at 83.

120. Western Railroad Shareholder Meeting Minutes (Feb. 8, 1837), vol. B1, Corporation Records, Mar. 8, 1833–Sept. 4, 1867, Boston & Albany Railroad Co. Collection, Historical Collections, Baker Library, Harvard Business School [hereinafter WRR Minutes]. All WRR Minutes cited hereinafter are archived in Historical Collections, Baker Library, Harvard Business School. Notes of these minutes are on file with the author.

121. *Id.*

six nominees won, although seven other shareholders received between 2 and 552 votes each. Following a couple of other items of business, the meeting adjourned to the following Wednesday, at which time the stockholders acknowledged notice that the legislature had elected its three members of the board (a quid pro quo for $1,000,000 in state aid granted the previous year), and they accepted the audit committee's report.[122] All decisions were apparently made by acclamation or a show of hands, except for the balloting for directors.[123]

This was the standard course of events at subsequent annual meetings—except that in two years, 1838 and 1841, the shareholders, for reasons that remain obscure, cast only one vote each in the election of directors.[124] At the 1838 meeting,[125] the first items of business were the usual ones: accepting the directors' report, which was ordered to be printed and distributed to the shareholders, and committing the treasurer's report to a committee of two shareholders for auditing. Then they resolved to "proceed to choose by ballot six directors." This time, the minutes do not record that a nominating committee was appointed. Instead, they immediately appointed a committee of three shareholders "to receive[,] assort and count the votes." This committee reported that "[t]he whole number of votes given" was 35 and therefore the successful candidates needed 18 votes. Six men won election with 32 votes each.[126] At their annual meetings in 1839 and 1840, as well as at a special meeting in the spring of 1840 to fill two vacancies on the board, they reverted to their statutory voting rights, casting a total of 2,460; 5,306; and 5,249 votes at those meetings, respectively.[127]

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122. In April of 1836, the Massachusetts legislature had authorized the company to increase its capital by one million dollars and empowered the state treasurer to subscribe those shares. One of its conditions was that the legislature elect three of the nine directors on the company's board. An Act in Aid of the Western Railroad Corporation, Mass. Gen. Laws ch. 131, §§ 1–3 (1836), *in* 2 GREGG & POND, RAILROAD LAWS AND CHARTERS 171; SALSBURY, *supra* note 117, at 143.

123. WRR Minutes (Feb. 8, 1837).

124. WRR Minutes (Feb. 14, 1838); WRR Minutes (Feb. 10, 1841).

125. WRR Minutes (Feb. 14, 1838).

126. *Id.*

127. WRR Minutes (Feb. 13, 1839), adjourned to Feb. 27, Mar. 13, and Mar. 27 (when they accepted an act passed a few days earlier granting $1.2 million in state aid and increasing the states' directors to four); An Act to Aid Construction of the Western Railroad, Mass. Gen. Laws ch. 70, §§ 1–6 (1839), *in* 2 GREGG & POND, RAILROAD LAWS AND CHARTERS 177–80; WRR Minutes (Feb. 12, 1840), adjourned to Mar. 12 and Apr. 8. In the spring of 1840, a joint legislative committee as well as a committee of the Western's shareholders investigated the company's operations. Mass. H.R. Doc. No. 62 (Mar. 1840) (report of joint legislative committee); PROCEEDINGS OF THE ANNUAL MEETING OF THE WESTERN RAIL-ROAD CORPORATION, HELD, BY ADJOURNMENT, IN THE CITY OF BOSTON, MARCH 12, 1840, INCLUDING THE REPORT OF

Then again, at the 1841 annual meeting, the vote totals indicated that they voted on the basis of one vote per person. This meeting began on February 10, following a special meeting on January 27 that had been called by shareholders ("the proprietors of two thousand shares") to initiate another request to the legislature for aid.[128] At their regular meeting on February 10, the shareholders took care of routine business and adjourned, first to March 3 and then to March 10, March 16, and March 18. On the 18th, the legislature did indeed approve another financial aid package ($700,000 in thirty-year, five-percent sterling bearer bonds or "scrip" to be issued by the state),[129] and they accepted the terms of this legislation at their meeting the same day. They then turned immediately to the election of directors, appointing a committee of five shareholders "to receive, sort & count the votes."[130] Five directors were elected with 80 to 84 votes each, while a scattering of votes was cast for four other shareholders.[131]

Why did the Western's shareholders suddenly, on two occasions three years apart, vote according to the common law? The minutes themselves provide no clues; they give no indication that the matter was even discussed.[132] One possibility, though less than satisfactory, is that in 1838 they construed the legislative act of April 1836, by which the state had increased the company's share capital by $1,000,000 and subscribed those shares itself, as effectively repealing the voting rights provision of their charter. One provision of the act, Section 3, changed the time of the annual meeting to the second Wednesday in February and declared the number of directors to be nine, "three of whom shall be annually chosen by the legislature, by joint ballot of the two houses, and the residue by the stockholders, at their annual meeting."[133] If this was viewed as a wholesale replacement of Section 10 of the company's charter, which had set the time of the annual meeting as the second Monday of June and also specified the stockholders' voting rights in elections of directors, then the charter would now have been silent on voting rights and the common law rule would have prevailed. But the new provision took effect after the 1836 annual meeting, so,

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THE COMMITTEE OF INVESTIGATION APPOINTED BY THE STOCKHOLDERS (Boston, Dutton and Wentworth's Print 1840) (copy on file with author).

128. WRR Minutes (Jan. 27, 1841).

129. An Act to Complete the Construction of the Western Railroad, Mass. Gen. Laws ch. 131, § 1 (1841), *in* 2 GREGG & POND, RAILROAD LAWS AND CHARTERS 180.

130. WRR Minutes (Jan. 27, 1841 and Feb. 10, 1841), adjourned to Mar. 3, Mar. 10, Mar. 16, and Mar. 18.

131. *Id.*

132. Neither GEORGE BLISS, HISTORICAL MEMOIR OF THE WESTERN RAILROAD (1863), nor SALSBURY, *supra* note 117, mentions these events at all.

133. An Act in Aid of the Western Railroad Corporation, Mass. Gen. Laws ch. 131, §§ 1–3 (1836), *in* 2 GREGG & POND, RAILROAD LAWS AND CHARTERS 171.

if this was their thinking, they should have abided by the common law rule in electing directors at their 1837 meeting, which they did not. So perhaps they recognized the implications only belatedly? If so, the recognition proved fleeting, for, as noted above, they quickly reverted to the original voting rule at their 1839 meeting. In 1841, too, an act had been passed two years before that election, granting additional aid and affecting the election of directors. One of its provisions increased to four the number of directors to be elected by the state, with "the residue [to be chosen] by the stockholders, at their annual meeting." Did they see this provision as overriding the voting rights in their original charter? If so, they again did so belatedly and fleetingly, for they returned to voting by shares when they elected directors in 1842 and continued to do so thereafter.[134]

A more promising possibility is that they saw some advantage in reverting to the common law rule in the particular political context in which these meetings occurred. A financial panic hit the country in the spring of 1837, and as one of their supporters put it to the legislature in 1838: "The [financial] storm that has been sweeping over the land, prostrating alike the mighty and the feeble, has not spared this enterprise."[135] The estimated cost of constructing their line was rising, and assessments on their shares had dried up, leading the directors to halt the process of soliciting bids for grading a portion of the line.[136] In November 1837, a group of shareholders (not the directors) had called a special meeting to formulate an appeal for more state aid. The company's appeal had been before the legislature when they elected directors on the basis of one vote per person, and they had adjourned the meeting to February 21, the day on which legislation was approved that granted $2.1 million in aid.[137] In the legislature at this time, the radical Democrats were a growing force. Headed by an early promoter of the Western Railroad, David Henshaw, they had made a good showing in the election of 1836 and would take the

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134. WRR Minutes (Feb. 9, 1842).

135. Emory Washburn, of Worcester, Speech Delivered in the House of Representatives of Massachusetts, on the Bill to Aid the Construction of the Western Rail Road, at 6 (Feb. 14, 1838).

136. *See* SALSBURY, *supra* note 117, at 144–45 (describing the impact of the financial panic on the corporation and discussing the more than $1 million increase in estimates for laying the rail between Worcester and the New York state line).

137. WRR Minutes (Feb. 21, 1838); An Act to Aid the Construction of the Western Railroad, Mass. Gen. Laws ch. 9 (1838), *in* 2 GREGG & POND, RAILROAD LAWS AND CHARTERS 173. Aid took the form of five percent state bonds to be sold in London; in exchange the state received a mortgage on the road. Interest rates on private loans were running eight to twelve percent at this time. SALSBURY, *supra* note 117, at 147.

governorship in 1840.[138] Suffrage was one of the points on which the Democrats differed sharply with the Whigs, as the editor of the *Boston Quarterly Review* made abundantly clear in an 1840 critique of the Whigs' response to the new Democratic governor's inaugural address. "There seems to be no doubt entertained by our whig friends that men of property have a right, or should have the right, to vote," he observed.[139] He then endorsed universal suffrage in no uncertain terms:

> [W]hy have they this right rather than the poor? . . . Why is the right to regulate this matter [of suffrage] inherent in the one class, any more than it is in the other? Is the right of suffrage an incident of property, or of Humanity? In other words, is government instituted for the protection of property, or of man? . . . In political matters we recognize no distinction between rich and poor. We know only men; and all who can make good their claim to be called men, human beings, we regard as equals and fellow-citizens.[140]

If the political context were similar in 1838, when the Western Railroad was awaiting news about additional state aid, one could imagine that reverting to the democratic common law rule might have been a way to gain Democratic support in the legislature, where the Democrats usually opposed state aid to the Western Railroad.[141] In 1841, circumstances in the Massachusetts legislature were virtually the same. Indeed, the question of state aid was even more controversial by then. The legislative debate that year, in the words of the company's biographer, "was long and bitter."[142] The title of the act granting aid

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138. *See* SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN 420, 464 (2005) (discussing Henshaw's role in Democratic politics). Henshaw was one of the nine men who issued the call for the Western Railroad's first shareholder meeting, once its initial shares had been subscribed. WRR Minutes (Dec. 13, 1835). On Henshaw's career, see SALSBURY, *supra* note 117, at 48–51. For his views on the relative power of corporations and legislatures, see A CITIZEN OF BOSTON [DAVID HENSHAW], REMARKS UPON THE RIGHTS AND POWERS OF CORPORATIONS, AND OF THE RIGHTS, POWERS, AND DUTIES OF THE LEGISLATURE TOWARD THEM (1837).

139. [Review of] *Answer of the Whig Members of the Legislature of Massachusetts, constituting a Majority of Both Branches, to the Address of His Excellency, Marcus Morton, delivered in the Convention of the two Houses, Jan. 22, 1840*, B. Q. REV. 3:2, Apr. 1840, at 253–54.

140. *Id.* at 253–54. Edited by Orestes Brownson, the *Boston Quarterly Review* "became a successful outlet for the radical Democracy." WILENTZ, *supra* note 138, at 500.

141. *See* BLISS, *supra* note 132, at 54 (describing opposition to state aid for the Western Railroad at the Democratic convention in 1839 and in "electioneering lectures" of Democrats around the state in 1840–41); *see also* SALSBURY, *supra* note 117, at 224–25 (describing Democratic gubernatorial candidate Marcus Morton's criticisms of state aid to the Western Railroad).

142. BLISS, *supra* note 132, at 54.

that year—An Act to *Complete* the Construction of the Western Railroad,[143] rather than to "aid" it—signaled growing impatience with the cost and management of the project and the company's repeated trips back to the legislature.[144] Even more so in this context than in 1838, a "democratically" conducted election of directors might have had some political value.

Whatever their reasons for twice voting according to the common law, events over the next two years hint at substantive differences among the shareholders about the proper distribution of power among themselves. When the entirety of the Western Railroad was set to open for traffic in late 1841, dissension among the Western's shareholders (and between it and the Boston and Worcester Railroad) emerged with full force, centering on the level of rates to be charged and when the company would be able to pay a dividend.[145] By 1842, the pressure to pay dividends was intense, both from the company's two thousand private shareholders and from the state, which not only owned one-third ($1,000,000) of its shares but also had loaned the company a total of $4,000,000 by then.[146] Tensions simmered in the company's 1842 annual meeting. The size of the committee to nominate directors was expanded to twelve; 8,548 votes were cast, signaling an unusually high turnout; and one of the nominated candidates failed to be elected.[147] Then, in January of 1843, disgruntled shareholders—"the proprietors of two thousand shares"—called a special meeting to consider appointing a committee to investigate company affairs.[148]

At this special meeting, an undercurrent of distrust and of concern about the distribution of power among shareholders surfaced. It began with the

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143. WESTERN RAILROAD CORPORATION, 11 ANNUAL REPORT OF THE DIRECTORS OF THE WESTERN RAILROAD CORPORATION TO STOCKHOLDERS, Jan. 1842, at 27–29 (reprinting the Act to Complete the Construction of the Western Railroad) (emphasis added).

144. *Id.*; *see* SALSBURY, *supra* note 117, at 224–25 (describing how a Whig, John Davis, had won the governorship in 1841, but Democrat Marcus Morton took the governorship in 1842, in part by emphasizing that the state had contributed the majority of the Western's capital, yet its board was controlled by private individuals); *see also* OSCAR HANDLIN & MARY FLUG HANDLIN, COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1774–1861 (1969) (describing the antebellum Massachusetts political economy).

145. *See* SALSBURY, *supra* note 117, at 206–44 (describing at length the controversy over fares).

146. *Id*; *see also id.* at 155 (describing sources of the Western Railroad's capital as of 1842).

147. *See* WRR Minutes (Feb. 9, 1842) (stating that P.P.F. Degrand was the successful candidate who had not been nominated); SALSBURY, *supra* note 117, at 152, 209 (describing Degrand as a low-fare advocate and founder of the Boston Stock Market).

148. WRR Minutes (Jan. 10, 1843).

adoption of a motion to appoint an investigating committee of thirteen shareholders. In a departure from the informal practice of the past, the motion required that the investigating committee be "elected by ballot," rather than merely appointed by consensus. They proceeded to the election in the usual fashion, appointing a committee of four shareholders "to receive[,] sort and count the votes for said committee." Because this was not an election of directors, they voted according to the common law, casting a total of 107 votes.[149]

Although the results of the election of committee members were nearly unanimous, comity quickly evaporated amid a struggle over the power of large shareholders. Boston lawyer James Savage, who had just been elected to the investigating committee, moved that a committee be appointed to nominate candidates for the next election of directors and that the members of the committee be selected by lot from a list of the forty to fifty "largest shareholders." A motion was made to postpone consideration until the next meeting, but this lost on a vote of 48 to 58 (also the first time that the minutes recorded the outcome of a non-electoral vote). Mr. Savage then changed his motion, now proposing that a nominating committee of forty be selected "by lot from all the stockholders of five or more shares." Shareholder Charles Stearns of Springfield proposed raising the bar to fifty or more shares, but his amendment failed, as did a motion "that the whole subject be laid upon the table." A third shareholder then proposed to strike out altogether the reference to five or more shares, and the motion finally passed in this form. The nominating committee members would be selected by lot from the entire body of shareholders.[150]

The issue of large shareholders' power was still in the air when the Western's shareholders reconvened for their annual meeting on February 8, followed by two adjourned meetings in mid-March, 1843. At the February

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149. *Id.*

150. *Id*; *see also* SALSBURY, *supra* note 117, at 234 (discussing the meeting briefly but failing to notice the departure from past practice in electing members of the investigating committee and omitting altogether the controversy about the composition of the nominating committee). Salsbury characterized Savage as "a wealthy Boston lawyer." *Id.* Of the company's initial 20,000 shares, Savage subscribed 20 shares, and Stearns, 75, while the third shareholder's name did not appear on the list of the initial subscribers. Western Railroad, Vol. B7, Stock Journal, Feb. 1, 1836–Feb. 28, 1842, Boston & Albany Railroad Co. Collection, Historical Collections, Baker Library, Harvard Business School. The largest initial holdings were 200 shares, but this must have changed rapidly as the company's shares were actively bought and sold, and William Savage was an active buyer in 1836. WRR Minutes (Jan. 10, 1843). Savage's motion also included a proviso that the nominating committee publish its nominations in Boston newspapers two days before the annual meeting; in modifying his motion, he changed this to four days, and on amendment it was changed to six days. *Id.*

meeting, the investigating committee's report was heard, printed for the stockholders, and recommitted to the committee for a further report. The clerk also reported the results of his selection by lot of the nominating committee's forty members. Then the shareholders adjourned, while the two committees deliberated.[151] When they met again on March 15, the investigating committee's report was laid upon the table, and they proceeded to the election of directors. In a sign of growing distrust, the balloting committee, which had in recent years expanded from two or three members to five, was now composed of nine, and the clerk was "authorized to attend the session of said Committee as solicitor of the Corporation."[152] While the balloting was in process, the meeting took up other items of business. The investigating committee's report was referred to the board with instructions to use its discretion in responding to the committee's suggestions. Thanks were voted to the members of that committee (as well as to Baring Brothers of London "for the confidence evinced by them, in the unstained credit of the Commonwealth of Massachusetts"). Then came a brief exchange that spoke volumes. One shareholder offered a motion to authorize the treasurer to issue one round-trip ticket from Boston to Albany to each shareholder. Another shareholder quickly countered "that the Treasurer should be required to grant to every Stockholder as many tickets, as he may own shares"—a patently ludicrous proposal that could only have been meant as a jab at the plutocratic leanings on display at the January meeting. Abruptly, "the whole subject" was tabled, and the meeting adjourned to the next day.[153]

When the shareholders reconvened,[154] the election results indicated that the ongoing controversies had stimulated an exceptionally large turnout and that differences of opinion, if not suspicions of foul play, were running strong. The balloting committee reported that a total of 13,922 votes had been cast, two to five times as many as at the 1839 and 1840 meetings. Moreover, the votes were more widely distributed than in the past. Only one candidate received more than 13,000 votes, while eight others garnered between 6,227 and 7,676 votes each. After the election results were reported, at least one shareholder apparently suspected that someone among the corporation's employees had influenced the outcome by soliciting the proxies of absent shareholders. He proposed a motion "that all persons in the employ of the Corporation, who may

151. WRR Minutes (Feb. 8, 1843).

152. EIGHTH ANNUAL REPORT OF THE DIRECTORS OF THE WESTERN RAIL-ROAD CORPORATION TO THE STOCKHOLDERS, PRESENTED FEBRUARY 8, 1843, COMPRISING A COPY OF THE SEVENTH REPORT TO THE LEGISLATURE (Boston, Dutton and Wentworth's Print 1843).

153. *Id*; WWR Minutes (Feb. 8, 1843 & Mar. 15, 1843).

154. WWR Minutes (Mar. 16, 1843).

be hereafter found or known to be obtaining proxies of the Stockholders be dismissed from holding any office or employment of the Corporation." A counter-motion to adjourn was defeated, as was one to lay the motion on the table, and it was finally agreed that "further consideration" of the motion would be "indefinitely postponed."[155]

As these events suggest, competing social conceptions of the Western Railroad divided its shareholders. The more democratic conception was initially strong but under challenge by the early 1840s from those who believed that larger shareholders should have a larger say in the company's affairs. Which conception would prevail remained uncertain for some time. At their 1844 annual meeting, the Western's shareholders adopted a bylaw requiring candidates for the board of directors to hold at least ten shares,[156] but they repealed it the following year.[157] Thereafter, while controversies with the Boston and Worcester Railroad over joint rates and fares continued to rage, attendance at the Western's annual meetings declined. After less than 2,000 votes were cast at the 1847 meeting, one concerned shareholder proposed that "all shareholders . . . be allowed a free passage over the road to attend the next election of the officers."[158] But his motion was "postponed indefinitely," and attendance, reflected indirectly in numbers of votes cast, did not pick up (except in 1851, when the company's president, having indicated that he would resign, died a few months before the meeting).[159] Balloting committees were again composed of a handful of shareholders, and the company clerk apparently no longer attended their meetings. Directors were elected unanimously, and, the minutes suggest, the board became increasingly autonomous.[160]

A turning point occurred in 1855 when the shareholders convened in a special meeting to consider whether to accept a legislative act authorizing the company to issue $1.5 million in bonds on its own account.[161] They needed the funds to construct a second track and, given the state of financial markets at the time, could not raise the capital by selling more stock. The legislature,

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155. *Id.*

156. WRR Minutes (Feb. 14, 1844).

157. WRR Minutes (Feb. 12, 1845).

158. WRR Minutes (Feb. 10, 1847).

159. *Id.*

160. For example, the directors were requested at the 1851 annual meeting to call a special meeting of the shareholders when a committee appointed to investigate the company's "system of pecuniary accountability" and to examine its property and assets was ready to report, but no special meeting was called. WRR Minutes (Feb. 11, 1851). At the 1855 meeting, the shareholders gave their *post hoc* approval to the board's purchase of an adjoining railroad. WRR Minutes (Feb. 14, 1855).

161. WRR Minutes (June 5, 1855).

moreover, had turned back their request to issue more state-backed bonds. When it came time officially to accept the legislature's act, however, a resolution to do so "was rejected" on a voice vote or show of hands. A shareholder promptly moved that the vote be reconsidered and that the motion to reconsider be subject to a "stock vote." The shareholders apparently assenting, the minutes recorded the results of the stock vote: 666 votes against and 1,119 votes in favor of reconsideration. So they voted again on the motion to accept the legislation—doing so by acclamation or voice vote, apparently—and this time the motion passed.[162] Gradually and subtly, the balance of power in the Western Railroad's shareholder meetings—and the prevailing social conception of the corporation—had come to be predicated on shares, not persons, by the mid-1850s.

C. "The Contest Against Corporations"

If one needs to read between the lines to discern the significance of events in the Western Railroad's shareholder meetings, this is not the case in the third instance of shareholder voting controversy. In the late 1870s, as plutocratic voting rights were becoming the norm in American corporations, an unidentified writer in the *New York Times* articulated with unusual force a social conception of the corporation that drew explicitly upon norms of civic governance and roundly condemned the rise of plutocracy in corporate governance.[163] In an outcry of opposition to the concentration of power in the hands of large shareholders, the writer issued a spirited call to democratize voting rights and thereby equalize power relations among shareholders.

Under the headline *The Contest Against Corporations*, the commentator warned that "there is a strong feeling of hostility, not unmingled with fear, toward the vast power that has grown up in the hands of great corporations," and that it extended well beyond the working classes:

> A large part of the community is beginning to look upon this concentration of enormous wealth under the control of a few men as fraught with danger, and to apprehend that the time is at hand when vigorous measures to resist or curtail their growing power will have to be adopted.

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162. *Id*; *see also* SALSBURY, *supra* note 117, at 286–91 (detailing the Western Railroad's raising of capital). The bonds were to be issued at six percent and sold in London, but they failed to find buyers. *Id.* at 287. The company finally began construction of a second track with internal funds during the prosperous years of the Civil War and issued new shares as the war ended, completing a second track along the entire line in 1867. *Id.* at 290–91.

163. *See The Contest Against Corporations*, N.Y. TIMES, Aug. 14, 1878, at 4 (depicting this concentration of power as "fraught with danger").

The problem was most urgent in the companies "that control the principal lines of internal communication"—the railroads. As he saw it, the critical issues were vastly different shareholdings and the nature of corporate voting rules. Because shareholders enjoyed one-vote-per-share, "[a] few large shareholders are enabled to direct these great corporate bodies mainly in their interest," disregarding the interests of small shareholders or the public. "People are beginning to ask where this thing will end," warned the commentator, "and to make up their mind that there must be a struggle to regain the mastery, or a few huge corporations will practically control the affairs of the country."[164]

The surest remedy, as the *Times* writer saw it, lay in a reordering of shareholding and voting rights: on the one hand, "a limitation of the number of shares to be held by one person;" on the other, "an equal suffrage among the shareholders."[165] "It is obvious," he continued, "that this latter provision breaks at one blow the power of large owners to control and direct at their own will and for their own profit, a franchise in which others are supposed to have rights." The small shareholder, he maintained, had a claim on governance equal to that of the large shareholder:

> Is not the interest of the man who owns a few shares in which all his savings are invested, in the careful, economical and efficient management of the concern really equal to that of him who has put some superfluous thousands in it, and are not his rights commensurate with his individual interest?

Equal voting rights, he believed, would "prevent some of the worst evils of the system of share-voting."[166]

Only when universal suffrage among shareholders became the norm, moreover, would the polity of the corporation be safe for a democratic country—this, the *Times* writer suggested, was the "one consideration that ought to have weight with the American mind." As he saw it, the same principles of governance ought to apply to the civic and corporate spheres alike: "This method of equal voting among the sharers in a corporate franchise and corporate property is in strict analogy with our political system," the writer declared, "while that of voting by shares and distributing suffrage to property and not men, is altogether inconsistent with those principles."[167]

As it happened, however, the *Times* writer's outcry came just as the plutocratic corporation was becoming the norm in the United States and

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164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*

attention was turning to the plight of minority shareholders. Indeed, corporate practice had already shifted so decisively to the one-vote-per-share principle that America's own democratic tradition had already faded from historical memory. For a model of democratic corporate governance in 1878, the *New York Times* commentator looked to corporations in Britain, "monarchical and aristocratic as she is,"[168] not to past practice at home.

In all three of these instances, then, the key issue was the horizontal relations of power that bound shareholders in the corporation. Different voting rules implied different social conceptions of the corporate polity. Attuned as we are to the conception of "shareholder democracy" bequeathed to us by the twentieth century, these voices from the American past alert us that we should attend to horizontal as well as vertical power relations in the corporation. Corporate voting rules, they remind us, distribute power among shareholders, and reasonable people can hold very different conceptions of the proper distribution of power.

V. The Politics of One-Vote-Per-Share

How useful is it to think about voting rules as a reflection of social conceptions of the corporation today? Doing so enables us, I would suggest, to see fundamental differences among voting rules that escape the notice of those who, influenced by twentieth century developments in the United States or by the predominant thrust of economic theory, focus on vertical relations between shareholders and managers and ignore the horizontal relations that bind shareholders. To see how this is so, let me return to the results of the ABI-commissioned study of the voting rights of firms included in the FTSE Eurofirst 300 index in 2004.

As noted at the outset, the ABI study grouped voting rights in two broad classes—one-vote-per-share rules and "deviations" from one-vote-per-share. Overall, 65 percent of companies had one-vote-per-share rules, although there were significant differences among countries: All Belgian, nearly all German, and 88 percent of U.K. companies had one-vote-per-share rules, while only 14 percent of Dutch, 25 percent of Swedish, and 31 percent of French companies had such rules.[169] Accordingly, there was significant variation by country

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168. *The Contest Against Corporations*, *supra* note 163, at 4. Although British corporate governance, as indicated above, was indeed less plutocratic at this time, the writer overstated the degree to which the rights of large shareholders were constrained by British law at that time.

169. *See* DEMINOR RATING, *supra* note 2, at 6 (graphically depicting the percent of companies in each country that apply the "one share-one vote" principle).

among the 35 percent that had some other kind of rule, with Dutch, Swedish, and French companies leading the way in "deviations." Switzerland, Spain, Italy, and several other countries with only a few companies in the Eurofirst 300 index fell between the two extremes.[170]

But, evaluated in light of the history recounted here, what is striking is that the "deviations" from one-vote-per-share were actually of two diametrically opposed types that imply radically different social conceptions of the corporation. On the one side, in the terms of the ABI report, were the *multiple voting rights* granted when two or more classes of shares are issued, bearing different voting rights. These, as noted above, constituted a twentieth century innovation that concentrated power in the hands of a small group of individuals, often family members, and expressed an oligarchic conception of the corporation. Some 20 percent of the corporations in the Eurofirst 300 index had oligarchic voting rules.[171] On the other side were *voting right ceilings*, ranging from 2 to 30 percent of votes, and their functional equivalent, *ownership ceilings*, ranging from 0.5 to 50 percent of shares, both of which serve to disperse power among the shareholders. In the Eurofirst 300 index, 15 percent of companies had voting rights of this type.[172] As we have seen, their history extends back to the nineteenth century (and beyond), and they express a more democratic conception of the corporation.

Overall, then, the voting rights of companies surveyed in the ABI-commissioned study fall into three broad categories, reflecting three distinctly different social conceptions of the corporation. Two of these—the prudent-mean rules as well as the plutocratic rules that are being advocated today in the European Union—are familiar to those who know the history recounted above, while the oligarchic rules represent a relatively recent departure from historical trends. To be sure, oligarchic and prudent-mean rules share the characteristic that they, unlike plutocratic rules, impede the development of a market for corporations as commodities. For this reason, the ABI study regards them as a single class. But they imply very different social conceptions of the corporation. Oligarchic rules bear a closer affinity to plutocratic (one-vote-per-share) rules because both put control in the hands of a minority—either those who own shares with multiple voting rights or those who simply own a larger number of shares—while the thrust of prudent-mean rules is to disperse control.

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170. *Id.* This summary understates the diversity of voting rules, which often combined several practices. Company-by-company data is given in the report's appendix.

171. *Id.*

172. *Id.*

Do voting rights matter today? The ABI report's overall conclusion—that today's voting rules distribute power among shareholders in a "striking variety" of ways[173]—suggests that they matter to someone. The distinctive social conceptions of the corporation that they imply are as varied today as in the nineteenth century and merit the consideration of scholars, jurists, and investors alike.

173. *Id.*