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CHAPTER

2

From Citizens to Plutocrats: Nineteenth-century Shareholder Voting Rights and Theories of the Corporation

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INTRODUCTION

Although corporate governance attracts widespread interest in business circles today,[1] its history before the twentieth century remains largely unexplored.[2] Much of what we know about nineteenth-century American corporations yields an exterior, not an interior, view. In one line of research, historians have charted changes in the process by which corporations were created, highlighting the shift from incorporation by special acts of the state legislatures to "free" or general incorporation, a bureaucratic procedure governed by statute law.[3] A second line of research has centered on theories or conceptions of the corporation.[4] Yet, these two strands of scholarship tell us virtually nothing about the goings-on in the interior of the corporation.

This chapter is based on research for a history of nineteenth-century corporate governance in the United States, Britain, France, and Germany, tentatively entitled *Shareholder Democracy: The Forgotten History.* I am grateful to a team of research assistants, especially Cynthia Poe, for their unflagging energy and to the Alfred P. Sloan Foundation, the Center for World Affairs and the Global Economy and the Graduate School of the University of Wisconsin, the Russell Sage Foundation, and the German Marshall Fund of the United States for financial support. Many thanks to the conference participants (especially Naomi Lamoreaux) as well as to Alfred Chandler, Shane Hamilton, Gregory Mark, and Cynthia Poe for constructive criticism; the remaining deficiencies are mine. A very early version of the third through fifth sections appeared as "Corporate Governance in Late 19th-Century Europe and the U.S.: The Case of Shareholder Voting Rights," in Klaus J. Hopt, Hideki Kanda, Mark J. Roe, Eddy Wymeersch, and Stefan Prigge (eds.), *Comparative Corporate Governance – the State of the Art and Emerging Research* (Oxford: Clarendon Press, 1998), pp. 5–39.

To complicate matters, Alfred Chandler's enormously influential work on the rise of managerial capitalism, paradoxically, has diverted attention away from the corporation.[5] His historical typology of capitalisms moves from entrepreneurial or *family capitalism,* in which firms were controlled personally by proprietors; to *financial capitalism,* in which representatives of financial institutions wielded power; to *managerial capitalism,* in which manager-led firms predominated.[6] Shareholders are absent. Missing, even as a logical possibility, is *shareholder capitalism,* in which the shareholders collectively controlled firms. This is not an oversight on Chandler's part, for he distinguishes carefully in *The Visible Hand* between the rise of the corporation and the rise of managerial capitalism. Although he regards the emergence of the corporation as "the most significant institutional development" in American business to the 1840s, it did not mark a turning point in the rise of managerial capitalism, because, in his words, it "did not lead to new ways of doing business between or within enterprises."[7] His focus is on the enterprise, in other words, whether organized as a partnership or a corporation. Its legal status matters little and is often difficult to discern in his work. In this sense, the Chandlerian paradigm invites historians to overlook the corporation and its constituents, the shareholders.

Lacking concrete knowledge of corporate governance in the nineteenth century, historians rely on assumption rather than fact. Nearly every historian, I suspect, takes it for granted that the power of individual shareholders has always been proportional to their investment and, therefore, that large shareholders have always had more power and small shareholders, less. The assumption underlying this (usually unarticulated) view is that large shareholders held the preponderance of power because American corporate governance has always been based on one vote per share.

This essentially timeless view of the distribution of power among shareholders, as this chapter shows, is simply wrong. Shareholder power was not always "plutocratic," that is, directly proportional to the amount of investment. Through the early decades of the nineteenth century, corporate governance was much more "democratic" than it came to be by the end of the century. Early norms put relatively little weight on the amount a shareholder had invested, and instead they tended to treat shareholders more like citizens in a relatively egalitarian polity. It was only at mid-century that democratic norms began to be pushed aside in the United States (but not elsewhere) by the modern practice of apportioning power among shareholders on the basis of their investment. This essentially historical process was an indispensable prelude to the great concentration of control that marked American corporations in the era of financial capitalism at the end of the century. In overlooking it, historians have inadvertently naturalized a particular, twentieth-century, and distinctively American form of corporate governance.[8]

This tendency to treat plutocratic governance as natural, moreover, has impoverished our understanding of nineteenth-century debates about corporations. A good case in point, explored in detail below, is the dramatic transformation in thinking about the nature and origins of corporations that occurred in the last two decades of the century. The transformation remains poorly understood, in part, I suggest, because historians have overlooked these very real changes inside corporations, which preceded and deepened the intellectual turmoil of the late nineteenth century. Viewed from the interior, in other words, corporations and shareholders had *become* something very different by the 1880s. Appreciating this change and its timing helps to explain more persuasively why theories of the corporation underwent dramatic change in the 1880s and 1890s.

The argument unfolds in four steps. The next section lays out the now-conventional understanding of this transformation in theories of the corporation and probes its weaknesses. The third section offers an analytical perspective on the spectrum of voting rights found in corporate charters in the antebellum period. These ranged from democratic (one vote per person) to plutocratic (one vote per share), while the middle portions of the spectrum were occupied by what I call prudent-mean voting rights. The fourth section draws on a database of corporate charter provisions to show that the preponderance of shareholder voting rights fell on the democratic-to-prudent-~~mean~~ end of the spectrum in the early to mid-antebellum period. The fifth section documents the shift toward plutocratic voting rights that became visible in the U.S. in the 1850s. This signaled the demise of the shareholder as citizen of the corporation and ushered in the plutocratically governed corporation, thus fundamentally altering the nature of the corporation on the eve of a thoroughgoing transformation in thinking about its nature and origins. Why this change took place in the United States is a question beyond the scope of this chapter,[9] but, in order to underline the specific, historical nature of this transformation in American corporate governance, the section demonstrates briefly that more democratic forms of governance persisted in Britain, France, and Germany as American practice took a plutocratic turn.

PROBING THE CONVENTIONAL UNDERSTANDING

As Morton J. Horwitz, Gregory A. Mark, and others have argued,[10] the early American business corporation was understood as a "body politic" or "political person."[11] As the legal terms suggest, it enjoyed a quality of "personhood" distinct from that of the shareholders who composed it. It was viewed an "artificial entity" – in Mark's words, as inherently "unnatural." Brought into being by a special act of a state legislature, moreover, it was regarded as a state-created entity, which, after *Dartmouth College* v. *Woodward* (1819), was understood to enjoy only the rights specified in its charters (e.g. to hold certain kinds of property, to sue and be sued, and so on).[12] In short, the early corporation was a state-created, legal "person" with well-defined powers. In the famous words of Chief Justice Marshall in the Dartmouth College case: "A corporation is an artificial being, invisible, intangible and existing only in contemplation of law."[13]

Its shareholders, finally, were regarded not as passive investors (as they would be later) but as active owners or "members" of the corporation, trustees of its capital. This conception of the nature of the corporation, its origins, and its shareholders dominated thinking through the middle decades of the nineteenth century.

Then, in the last two decades of the nineteenth century, a momentous change occurred: the corporation came to be regarded, on the one hand, as intrinsically private – that is, as arising not out of state action but out of the private actions of individuals – and ultimately, on the other hand, as a "natural person." Two new theories of the corporation surfaced in succession, both rejecting altogether the notion of a state-created entity and instead envisioning the corporation as arising naturally out of private economic relations. On its inherent "personhood," however, they differed. An "aggregate" or partnership theory in the 1880s retained the earlier conception of members, now conceiving of the corporation as nothing more than an aggregation of those members – "as a creature of free contract among individual shareholders," in Horwitz's words, "no different, in effect, from a partnership." Then in the 1890s an opposing view – the natural-entity or natural-person theory – challenged the partnership view. This theory also regarded the corporation as the outcome of private action but envisioned it to have the attributes of "a real person," in Mark's words, the character of "an autonomous, self-directed entity in which rights adhered."[14] These competing views of the corporation also implied radically different conceptions of the shareholder. The partnership theory clearly carried forward the traditional view of the shareholder as an active member of the corporation. But alongside of – and validated by – the natural-person theory of the corporation, Horwitz suggests, a new vision of the stockholder arose: the once active member became merely a passive investor in the corporation, while the power of action now largely inhered in the board of directors. The natural-person theory, with its associated conception of shareholders as passive investors, ultimately triumphed and went on to dominate thought about the corporation through the early decades of the twentieth century.[15]

Why did this momentous, multifaceted transformation in thinking about the nature of corporations and shareholders occur? A two-stage explanation emerges from the literature. The first centers on the shift from special to general incorporation and its consequences for theories of the origin of corporations. By the 1870s, the practice of chartering corporations by special legislative act had largely given way to "general" or "free" incorporation, which enabled private parties to incorporate merely by meeting general requirements set in statute law. "Gradually," Horwitz writes, "by making the corporate form universally available, free incorporation undermined the grant [or state-creation] theory." The advent of general incorporation – so his story goes – made it increasingly difficult to maintain the notion that incorporation was "a special state-conferred privilege."[16] General incorporation, thus, opened up conceptual space for the corporation as the partnership and natural-entity theories viewed it: as essentially private in nature. This was the conceptual terrain on which advocates of the partnership and natural-person theories sparred over the nature of corporations in the 1890s.

A second stage of change, itself two-sided, made the partnership theory increasingly less tenable, giving the edge to the natural-person theory and its associated conception of shareholders as passive investors. On the one side, the rise of a national market for industrial securities reinforced a long-term process by which the courts had eroded the trust-fund doctrine; that is to say, as stock ownership became increasingly dispersed, it became correspondingly more difficult to regard individual stockholders as trustees of the corporation's capital. On the other side, as stockholding became fragmented, turn-of-the-century corporate boards of directors, supported by the courts, assumed increasing power.[17] And, as the corporation came to resemble, in the words of the legal scholar Ernst Freund in 1897, more "an aggregation of capital than an association of persons,"[18] the stockholder, by extension, became more an owner of a portion of its capital than a member of the corporation; or, as Mark puts it: "The reality of the corporation apart from its members was becoming clearer as the relationship of the shareholders to the operations of the business became increasingly distant."[19]

On closer inspection, however, neither stage in this two-stage explanation is entirely persuasive. In explaining how the nature of the corporation was thrown open to redefinition in the 1880s, Horwitz gives great causal weight to the shift from special to general incorporation, but his argument seems to be based largely on inference; he cites no evidence.[20] Why incorporation under general acts should somehow not count as "state creation" is simply unclear. As David Millon observes, "the switch to general incorporation statutes during the last third of the nineteenth century could have been interpreted as a continuation of the states' traditional constitutive and regulatory role in the creation of corporations." [21] After all, incorporation still required a charter from the state, even though it was now granted administratively rather than legislatively, and this, he notes, "continued to reinforce the idea that corporations (in contrast to unincorporated business associations such as general partnerships) were artificial creations of the state." Citing J. Willard Hurst's work, moreover, he points out that general-incorporation statutes through the 1880s imposed significant restrictions on corporations.[22] The general statutes, rather strictly enforced by the courts, continued to define corporate purposes and powers, limiting, for example, the corporation's ability to hold stock in other corporations, its total capitalization or the value of the assets it could hold, and the duration of its life.[23] "The pervasive adoption of general incorporation statutes by many states during the latter half of the 19th century," Millon maintains, "did not signal abdication of the regulatory notion of corporate law."[24]

Instead, both Hurst and Millon locate the crucial change not in the shift from special to general incorporation but in New Jersey's holding-company laws in the late 1880s. These, Hurst writes, constituted "[t]he first signal of a new trend" that would reach maturity in the 1930s. New Jersey's laws and those that followed in Delaware and elsewhere permitted the corporation's structure and business to be largely self-defined, "in effect" deeming the corporation to be essentially private in nature.[25] Citing New Jersey in particular, Millon, too, sees the turning point in "the last years of the 19th century, [when] state legislatures eliminated several significant restrictions" in general-incorporation laws. But if the legal changes that opened up conceptual space to redefine the corporation as private occurred, not in the widespread shift to general incorporation in the 1870s, but in the laxer laws of the late 1880s and 1890s, what prompted the intellectual turmoil of the 1880s?

The second stage of the explanation, which locates the emergence of the shareholder as passive investor at the turn of the century, also proves to have a timing problem, though subtler in nature. The critical step in this stage of the explanation centers on the emergence of the national market for industrial securities, which Horwitz emphasizes repeatedly. "[D]uring the 1880s," he writes, "it was beginning to become clear that the managers, not the shareholders, were the real decision makers in large, publicly owned enterprises."[26] "[T]he rise of a national stock market," he argues, "definitively converted shareholders into impersonal investors," thus encouraging the "courts beginning in the 1890s [to] gradually [erode] the trust fund doctrine."[27] Trading of industrial securities expanded dramatically during the turn-of-the-century merger movement, he observes: "It is perhaps at this point that we can clearly identify the beginning of the shift away from 'the traditional point of view' of shareholders as 'the ultimate owners, the corporate equivalent of partners and proprietors.' "[28] Again: "The root of the problem was that the relationship of the shareholder to the corporation had begun to change fundamentally during the 1890s."[29]

Lurking behind these statements is the growing separation of ownership from control that marked "managerial capitalism" and would agitate public debates in the 1930s. In suggesting why the aggregate theory did not take hold in the late nineteenth century, Millon is more explicit on this point:

> Growth in the size of corporations and dispersal of share ownership resulted in the phenomenon later described as the separation of ownership and control in Adolf Berle and Gardner Means' famous book, *The Modern Corporation and Private Property*. One of the most salient features of this development was the prevention of active participation by shareholders in the management of the business. As a practical matter, dispersed share ownership, small individual holdings, and increasingly complex operations transformed shareholders from entrepreneurs into passive investors who placed their economic interests in the hands of professional managers.

"[R]ender[ing] the partnership analogy untenable" and the natural-person theory more plausible, these changes "in the internal relationship between management and shareholders," he argues, turned the shareholder into a passive investor.[30]

The problem with this explanation lies in the erroneous assumption that professional managers, not shareholders, sat on boards of directors by the 1890s. In fact, routinely with the very important exception of railroads, boards of directors did not succumb to managerial control this early – certainly not in the 1880s and not even when great horizontal combinations initially formed during the "Great Merger Movement" (1895–1904). The new techniques of managerial capitalism were first worked out by the new vertically integrated firms of the 1880s and 1890s in the ranks of *middle* management. Because their growth was largely internally financed, according to Chandler, they remained "entrepreneurial enterprises" – that is, firms owned by single proprietors or by partnerships.[31] At the uppermost levels of the corporation, as he explains in a separate chapter in *The Visible Hand* on "Top Management," it was the great horizontal combinations that begot separation of ownership and control by putting salaried managers on their boards – but they did so only after the turn of the century, when they began to integrate forward and backward. "The shift in strategy from horizontal combination to vertical integration," in Chandler's words, "first brought the managerial *enterprise* to American industry."[32] Through the turn of the century, all but a handful of boards of directors (again, excepting railroads) continued to be dominated by shareholders. Why, then, did shareholders generally come to be seen as passive investors by the 1890s?

Both the roiling debates about the nature of the corporation of the 1880s and the growing perception of shareholders as passive investors in the 1890s need to ~~be~~ reconsidered in light of prior changes in the balance of power among shareholders. The remaining sections outline the key change in corporate governance – a shift from democratic to plutocratic voting rights – that put in place radically new power relations in the corporation, centralizing control in boards of directors dominated by the largest shareholders and turning the mass of smaller shareholders into mere investors by the 1870s.

SHAREHOLDER VOTING RIGHTS – THE ANTEBELLUM SPECTRUM

An antebellum shareholder's voting rights depended on the provisions of the corporation's charter or, failing an explicit provision or generic legislation regarding voting rights they were determined by the common law. The vast majority of American corporate charters, as noted earlier, were granted in special acts of legislation passed by the state legislatures and published along with other laws.[33] By the 1830s and 1840s these special acts frequently subordinated newly created corporations to generic laws, whose boilerplate provisions offered a means of streamlining charters. As reliance on general incorporation became widespread in the 1870s, finally, corporations could be formed simply by means of an administrative process as long as one met the statutory requirements and paid the necessary fees.[34] Special acts and generic legislation almost always included detailed provisions regarding the governance of the corporation. Only during the era of general incorporation did it become common for the legislatures to permit corporations to determine their own rules of governance, although this, too, required explicit provision. In the absence of a provision, the common law set the default.

Though remarkably diverse in practice, shareholder voting rights in the antebellum period may be arrayed along a spectrum ranging from democratic to plutocratic. A description of shareholder voting rights in overtly political terms may jar the modern reader, accustomed to thinking of corporations in economic terms, but doing so is consistent with antebellum practice. At a time when Americans still thought in terms of political economy, thinking of the corporation as a polity came easily. Thus, as Pauline Maier notes, "[corporate] charters and constitutions were understood as essentially the same." Debates about the governance provisions of corporate charters, she suggests, had much in common with debates about the governance provisions of state and federal constitutions.[35] Americans discussed them within a common framework of understanding.

Thinking about shareholder voting rights in terms of democracy and plutocracy would also have accorded well with nineteenth-century practice. Writing in 1837, the Prussian railroad promoter David Hansemann defined the endpoints of a spectrum in virtually the same terms: "The two extremes, giving each shareholder one vote and giving each share one vote, stand in relation to one another like democracy and aristocracy."[36] But "aristocracy" could include systems of hereditary power, so "plutocracy" seems a more accurate description. The term came into wider use in the U.S. after mid-nineteenth century, moreover, just as one vote per share was becoming more common. One of the grounds on which the abolitionist minister Henry Ward Beecher condemned slavery in 1863, for example, was 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 think of voting, if one man could cast a thousand votes? . . . Where this disproportioned power exists, even in the Free States, it is dangerous."[37] Since shareholder voting rights based solely on the number of shares one owned yielded a similarly "disproportioned power," plutocracy and its counterpoint, democracy, seem apt descriptions of the two extremes of antebellum voting rights.

The American common law, which required fully equal voting rights, defined the democratic end of the spectrum. In the absence of an explicit provision, shareholders were treated like citizens, entitled to only one vote each, no matter how much they invested. This tradition, which has largely escaped historical memory,[38] derived from seventeenth-century Britain. As Pauline Maier explains, British tradition regarded the shareholder not as the owner of a portion of capital, but as a "member" of the corporation and therefore as an equal among equals. This was the model embodied in the English trading company. "Voting in early English profit-seeking corporations such as the East India Company," Maier writes, "allowed all shareholders single votes since 'the units of which the corporation was composed were still considered to be the members, as is the case in municipal corporations and guilds,' not shares."[39] Linking suffrage to human beings rather than to an amount of capital, the common law prescribed the most democratic form of shareholder voting rights.

The democratic default could be overridden in legislation and, as will become evident, usually was, but even then the common law could still have significant scope. It all depended on how the provisions were worded. 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 such cases, when the shareholders made strategic decisions, they did so democratically: each shareholder, large and small alike, cast only one vote. This practice can be discerned between the lines, so to speak, of the minutes of shareholders' meetings. The minutes usually reported events in very terse terms, noting merely that this or that action was "resolved." But decision by ballot always required the appointment of a committee to determine who was ~~entitled~~ to how many votes, to examine proxies, to collect the ballots, and to report the results. All this was duly noted in the minutes and often required adjournment during the balloting. Thus, when decisions were made without appointing such a committee, they were clearly being made on the basis of a voice vote or a show of hands – necessarily one vote per person. In the terminology of the day this was known as a "vote by acclamation," in contrast to a "stock vote," that is, a vote according to the prescribed voting rights.[40]

The other end of the spectrum was defined by the modern, plutocratic practice of ~~granting~~ one vote per share. In the late eighteenth and early nineteenth century, distributing power among shareholders in direct proportion to their investment was widely viewed as an unwise, if not dangerous, practice. Critics of the one-vote-per-share rule stressed the political as well as economic dangers of permitting the concentration of control in the hands of the largest shareholders. As Maier and others have shown, "anti-corporate" sentiment was rampant in the antebellum period and centered on fears that corporations, necessarily privileged in some degree and widely viewed as a remnant of monarchical privilege, posed a threat to the republican nature of American society. At the same time, critics of plutocratic voting rights feared that large shareholders, left to their own devices, would attend only to their own financial interests, thereby undermining the general welfare of the enterprise.[41] Early corporations, it should be noted, were usually assumed to provide a public service, and some (especially in transportation) attracted considerable public investment. Manufacturing was an exception and perhaps for this reason New York's 1811 general incorporation law for manufacturing permitted plutocratic voting rights – "Each stockholder," it declared, "shall be entitled to as many votes as he owns shares of stock in said company."[42] But, as the next section shows, plutocratic voting rights were exceptional.

Occupying the middle portion of the spectrum was a great variety of voting-rights schemes that struck a balance between democracy and plutocracy by limiting the power of larger investors. Some charters, for example, limited a shareholder's total votes to a certain number or to a certain proportion of the total votes cast (e.g. one-tenth). More common, however, were graduated voting scales that diminished voting power relative to shareholdings as shareholdings increased. One of the more elaborate was that of the first Bank of the United States (BUS), chartered in 1791:

> The number of votes to which each stockholder shall be entitled, shall be according to the number of shares he shall hold, in the proportions following, that is to say: For one share, and not more than two shares, one vote; for every two shares above two, and not exceeding ten, one vote; for every four shares above ten, and not exceeding thirty, one vote; for every six shares above thirty, and not exceeding sixty, one vote; for every eight shares above sixty, and not exceeding one hundred, one vote; and for every ten shares above one hundred, one vote; but no person, co-partnership, or body politic, shall be entitled to a greater number than thirty votes.[43]

The scale apportioned votes over six, increasingly wider steps, ending with one for every ten shares. Graduated scales could also be combined with a cap on total votes, as this one was; no BUS shareholder could cast more than thirty votes. This provision was carried over to the 1816 charter of the second BUS, except that its use was restricted explicitly to "voting for directors," which meant that the common law default would have applied to other decisions.[44]

Following Alexander Hamilton, I call these "prudent-mean" voting rights. As Secretary of the Treasury, Hamilton laid out his thoughts about the proper organization of a national bank in 1790. Pondering whether Congress should create a new institution or renovate the Bank of North America (BNA), he raised a series of objections to the constitution of the BNA, one of which centered on its shareholder voting rights. Its Congressional charter of 1781, he noted, called for "a vote for each share," which he deemed an "improper rule." The company's 1787 Pennsylvania charter, on the other hand, said nothing about voting rights. "[T]he silence of it, on that point, may signify that every stockholder is to have an equal and a single vote," but this he regarded as "a rule in a different extreme, not less erroneous." Instead, the voting-rights provision should be explicit and "a proper one," he declared. In arriving at a proper rule, he reasoned on the following lines:

> A vote for each share renders a combination of a few principal stockholders, to monopolize the power and benefits of the bank, too easy. An equal vote to each stockholder, however great or small his interest in the institution, allows not that degree of weight to large stockholders which it is reasonable they should have, and which, perhaps, their security and that of the bank require. A *prudent mean* is to be preferred.[45]

As a "prudent mean" for a national bank, he went on to suggest exactly the graduated voting scale that appeared in the charter of the first BUS the following year. "Prudent-mean" is used here in a Hamiltonian spirit for voting rights that accorded some weight to the amount that a shareholder invested, but also limited the power of large shareholders.

To understand how these three types of shareholder voting rights – democratic, prudent-mean, and plutocratic – affected voting power, they may be represented graphically, as in Fig. 2.1. Along the *x*-axis is the number of shares; along the *y*-axis, the number of votes. The horizontal line represents democratic voting rights – always and only one vote, no matter how many shares one owned. The diagonal line represents plutocratic voting rights, in which the number of votes exactly equals the number of shares. The slightly curved line represents Hamilton's graduated scale for the first BUS, while the line that crosses it represents a straight linear scale (one vote for every five shares). As a glance easily confirms, the use of a prudent-mean voting scale,

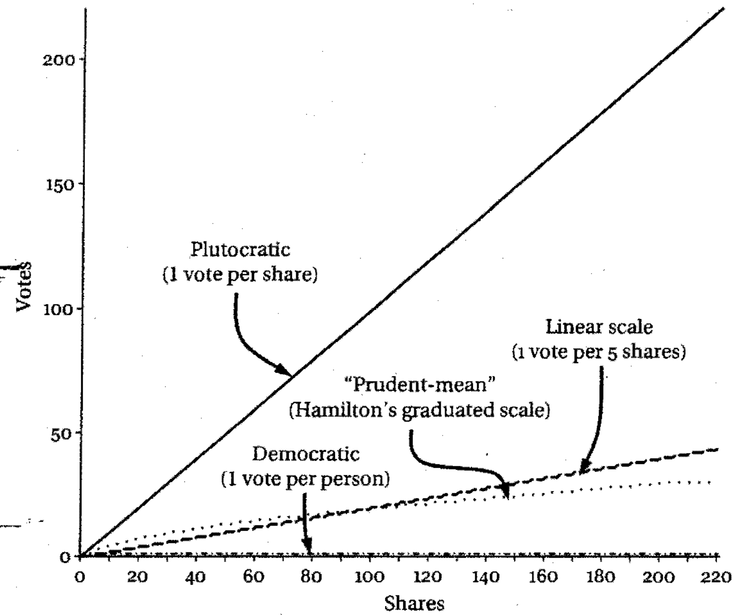

Fig. 2.1. Types of voting rights

whether a graduated scale like that of the BUS or a simple linear scale, shifted the shareholders' voting rights visibly towards the democratic side of the spectrum.

It is worth emphasizing that this insight applies only to formal voting rules. How votes played out in practice, of course, may have been another matter altogether. Rational-choice theorists who study voting rights would point out that the effective power of a vote can vary widely, depending on the overall configuration and balance of interests. Consider the simplest of scenarios: if two shareholders each had forty-nine votes and a third had only two, formation of a winning coalition would obviously depend on the shareholder with two votes, who therefore could be said to wield the most power.[46] Nonetheless, analysis of formal voting rights establishes a baseline for understanding real voting power. It seems fair to think that prudent-mean voting rights established an initial distribution of power among shareholders that was broader – hence, more democratic – than did plutocratic voting rights, and this is what the graphic representation illustrates.

AMERICAN SHAREHOLDER VOTING RIGHTS, 1825–35

In what proportions were these various kinds of voting rights actually used in the antebellum period? Some conclusions may be drawn from the corporate charters that were granted by special act from 1825 to 1835. The data reported

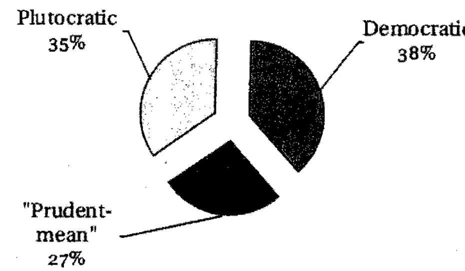

Fig. 2.2. Voting rights, 1825–35, $N = 1{,}233$

here encompass all charters granted by all states in 1825, by seven states from 1826 through 1834 (Connecticut, Massachusetts, New Jersey, Virginia [except for 1829 and 1831–33], South Carolina, Louisiana, Ohio), and by all states in 1835.[47] Altogether they totaled 1,233: eighty-six corporations chartered in nineteen states in 1825, 790 in the seven states from 1826 through 1834, and 357 in nineteen states in 1835.

The voting-rights provisions in these 1,233 charters are classified in Fig. 2.2 according to the three types of voting rights described above – plutocratic, prudent-mean, and democratic. The plutocratic group includes only those charters that granted shareholders one vote per share without any limit on the total number of votes that they could cast. In the prudent-mean group fall those that specified graduated scales with or without an absolute or proportional cap on total votes, linear scales with or without a cap, and one vote per share with an absolute or proportional cap on total votes. Classified as democratic, finally, are those instances in which the charter said nothing about voting rights, since the common law would have required equal votes, as well as seven cases in which the charter explicitly permitted only one vote per person.

As the data clearly demonstrate, the state legislatures did not routinely grant plutocratic voting rights between 1825 and 1835. They did so for little more than one-third of these corporations (35 percent). Much more commonly – in two-thirds of the cases – charters specified some kind of limitation that shifted voting rights towards the prudent-mean side of the spectrum, or they said nothing at all, which put them in the domain of the common law. Year to year, moreover, the proportions fluctuated (see Fig. 2.3) but without a clear direction of change. The traditional limitations on the power of large shareholders, in short, remained the norm in American corporate governance through the middle 1830s.

The common-law default, moreover, received a ringing affirmation from the New Jersey Supreme Court in 1834. In *Taylor* v. *Griswold*, shareholders of a bridge company asked the court to set aside the results of an election of directors two years earlier. Among other things, they charged, those in charge of

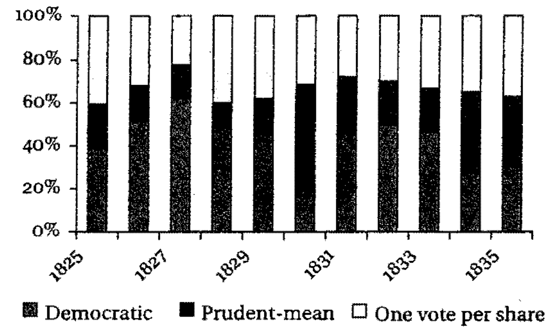

Fig. 2.3. Types of voting rights, 1825–35

the election had "erred, in allowing to each stockholder but one vote, instead of a vote for each share owned by him." In fact, the company's 1797 charter was silent on voting rights, but even before incorporation the company had adopted a bylaw that gave each shareholder one vote per share on all decisions. Contrary to established practice, however, the election inspectors in 1833 had suddenly allowed each shareholder only one vote each in the disputed election.[48]

Chief Justice Joseph Hornblower found this issue 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." 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." 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." He elaborated in the following terms:

a by-law 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 by-law, excluding a member with one share from voting at all, and a by-law reducing his one vote to a cipher, by giving another member fifty or a hundred votes.[49]

Clinching the matter, in Justice Hornblower's view, were "the very terms of the charter" itself. 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." 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." 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." 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 by-law in question," he maintained, "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."[50]

The sentiments expressed in this New Jersey Supreme Court decision, one of few pieces of surviving evidence in which shareholder voting rights were discussed explicitly,[51] seem entirely consistent with the evidence gleaned from the corporate charters themselves. In specific instances, the state legislatures granted one vote per share, but this was not at all the norm and many corporations, it seems, remained subject to the common-law default that Justice Hornblower and his colleagues defended so vigorously.

FROM DEMOCRACY TO PLUTOCRACY

Within a few years, however, state legislation trumped the New Jersey Supreme Court's decision in *Taylor* v. *Griswold*, signaling that a transformation in the norms of corporate governance was underway. In 1841 the New Jersey legislature passed an act that substantially overruled the common-law default of one vote per person, at least in company elections. "[U]nless otherwise expressly provided in their respective charters," the 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."[52] Five years later, the legislature acted again. This time, in authorizing general incorporation of manufacturing companies, it permitted them to determine their own voting rules, entirely privatizing the matter. In 1849 the legislature extended this practice to other lines of business (any kind of manufacturing, mining, mechanical, agricultural, or chemical business as well as inland navigation).[53]

New Jersey's action was not without precedent; rumblings of change had been heard earlier elsewhere. The 1811 New York law permitting "free" or general incorporation of manufacturing companies, as mentioned earlier, specified one vote per share. The Massachusetts *Revised Statutes* of 1836 retained various caps on the voting power of shareholders in railroad, banking, and insurance corporations, but manufacturing corporations were permitted to set their own voting rights in their bylaws.[54] In 1837, the Connecticut legislature passed a general incorporation law for mining and manufacturing that entitled shareholders to one vote per share.[55]

In the late 1840s and early 1850s, the New York legislature endorsed plutocratic voting across the board. Between 1847 and 1855, it passed general incorporation laws for most organizations, from villages and benevolent societies through toll bridge and chemical companies to railroads. Where applicable, it was "characteristic" of these laws, Ronald Seavoy writes, that "[e]ach share had one vote." [56] Indeed, plutocratic voting rules had become the norm in New York State by then. As A. B. Johnson, president of the Ontario (Branch) Bank, noted in an 1850 article,

> The early corporations of our State [New York] attempted to guard against the dangers of so alarming a power [i.e., control by large shareholders], by according to large shareholders a smaller ratio of elective efficiency than was accorded to smaller stockholders; but the guard is abandoned in modern corporations from indifference to the consequences on the part of Legislatures, or from an opinion that every guard can be easily evaded, and that stockholders had better be presented with a known evil, than deluded with a fallacious remedy.[57]

Whether Johnson was right in the reasons he cited, the prevailing norms were clearly in the midst of a transformation.

New York was not alone in coupling general incorporation with one-vote-per-share voting rights, if not privatizing voting rights altogether. Louisiana took the latter route in 1848, having pioneered three years earlier in adopting a constitutional prohibition on special charters.[58] California passed a comprehensive general corporation law in 1850, according to which shareholders in insurance, manufacturing, mining, mechanical, chemical, and steam navigation companies were entitled to one vote per share. All other companies could determine their voting rules themselves in their bylaws. In 1853, further acts affirmed one vote per share in elections of directors of corporations engaged in a broad range of businesses.[59] The state of Ohio also passed a comprehensive general incorporation law in 1852, authorizing one vote per share for transportation and utility companies but permitting manufacturing and magnetic telegraphic companies to determine their own voting rights.[60]

Yet, through the 1850s, change proceeded unevenly and in piecemeal fashion. Some corporations apparently tried to buck the trend emerging elsewhere. It is probably significant that five of the seven charters granted between 1825 and 1835 that explicitly gave each shareholder only one vote were granted not in the early years but at the end of the period (in 1835 – one in Kentucky, four in Ohio). Since these provisions merely recapitulated the common-law default, their existence may be read as a sign that it could no longer be taken for granted. Writing the common-law rule explicitly into a charter would have served to quiet any looming uncertainty.

The general thrust of Virginia's chartering policy for many years, moreover, was to limit the power of the largest investors by means of graduated voting scales. A Virginia law of 1837 regulating all manufacturing corporations specified a voting scale that was relatively flat (i.e., democratic). It gave one vote for each share up to fifteen, one additional vote for every five shares from sixteen to 100, and one vote for each increment of twenty shares above 100. Under legislation passed in the same year, railroad shareholders in Virginia were allowed one

Table 2.1. *Voting scale adopted by the State of Virginia for all corporations, 1849*

Shares	Votes
1–20	1 per share
21–200	1 for every 2 shares
201–500	1 for every 5 shares
501+	1 for every 10 shares

Source: Virginia Code, Title 18, ch. 57, sec. 10 (1849).

vote for each share up to ten shares and then one vote for every ten additional shares.[61] A dozen years later, the state legislature approved a standard voting scale (Table 2.1) for all joint-stock companies. For shareholdings under 200, this was a more plutocratic scale than those adopted in 1836 and 1837, but it was more democratic at higher levels of shareholding. This scale remained in place until the eve of the Civil War.

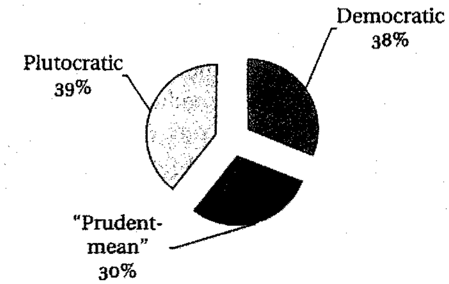

Fig. 2.4. Voting rights, 1855, $N = 130$

Interestingly, another arena where evidence of substantial change does not emerge is in the special acts of incorporation that some states continued to grant. Of the seven states included in Fig. 2.3 for the years 1826–34, five were still granting special charters in 1855. Together, they incorporated 130 companies by special act that year. As Figure 2.4 shows, the proportions of voting rights in 1855 fell within the range of the earlier period. Thirty-nine percent specified plutocratic voting rights, but 61 percent still placed some limitation on the power of large shareholders, virtually the same as in 1825 and 1828.

Evidence that the turn to plutocracy proceeded very unevenly also surfaced in the shareholder meetings of existing companies (although this kind of evidence is scarcer). In 1847 the shareholders of the Greenville and Columbia

Railroad met in Columbia, South Carolina. The company's 1845 charter contained an elaborate voting scale of eleven steps to apply in the election of officers, in amending bylaws, and "in determining on measures involving the interests of the Company." This was the first official meeting of the stockholders, apparently called at that time because the company had only just attracted sufficient stock subscriptions to permit it to organize. Among the first set of resolutions offered for consideration was one that read: "*Resolved,* That until otherwise ordered, the vote on all questions before this meeting be taken by acclamation or count." The proposal to vote by voice or show of hands, according to the proceedings, gave rise to "some explanations" among the shareholders. After discussion, however, they approved the resolutions unanimously – "by acclamation or count," apparently, since a committee was formed to verify proxies and collect ballots only later in the meeting.[62] In this case, then, the shareholders agreed among themselves to ignore their charter provision and to proceed under the common-law rule.

A similar incident occurred in Vermont in 1852, but with the opposite outcome. In May of 1852 the shareholders of the Vermont Central Railroad met to confront a recently erupted scandal: their treasurer, the well-connected Boston citizen Josiah Quincy, had pledged the company's bonds to settle his private debts. According to the company's 1835 charter, shareholders enjoyed one vote per share specifically in the election of directors, and their practice had apparently been to make other decisions – such as what to do about Josiah Quincy – on the basis of one vote per person. Yet, when a disagreement emerged at the outset of the meeting, one of the shareholders, W. H. Gregerson of Boston, "called for a stock vote." Another, G. W. Benedict of Burlington, objected "that a stock vote cannot be called as a matter of right, under the charter, except upon the election of Directors." But the president demurred: "according to common usage, and to the rule established, as he conceived, by the charter, the call for a stock vote must be sustained." Benedict again protested, the question was put to a vote – one vote per person, it must be assumed – and the shareholders upheld the president: the decision would be made on the basis of a stock vote. In this instance, plutocratic governance won out, having already, in the president's view, come into "common usage."[63]

During and after the Civil War, the movement that would soon make one vote per share the norm accelerated at the national and the state level. Congressional charters granted to the transcontinental railroads in the 1860s and early 1870s specified one vote per share.[64] So, too, did Congressional legislation creating a national currency and nationally chartered banks. In elections of directors and at all their meetings, shareholders of the national banks were to have one vote per share.[65] Most states that had not done so earlier now followed suit. Virginia had simplified its mandated scale in 1860, giving one vote to each share up to ten and an additional vote to every four shares above ten.[66] Then in 1871 it abolished graduated voting scales for certain corporations – those chartered via a judicial process, a form of general incorporation that it had established in the mid-1850s. Finally, in 1886, the legislature mandated one vote per share for all corporations chartered "heretofore and

hereafter."[67] The South Carolina legislature endorsed plutocratic voting rights in the same year, mandating one vote per share in its general incorporation law of 1886.[68]

One of the last states to come around was Massachusetts, which had been an early and energetic incorporator. Its manufacturing corporations, as noted earlier, were allowed to determine their own voting rights from the 1830s, but the state continued to restrict the voting power of individual railroad investors to one-tenth of the total votes. This restriction was carried forward in the Revised Statutes of 1860 (ch. 63, sect. 5), and a general revision in 1881 also left it intact. But the latter permitted municipalities, the Commonwealth, and other railroad corporations to vote the whole number of shares that they owned.[69] For individual railroad investors, voting rights were limited to one-tenth of all votes through the turn of the century.

Massachusetts was clearly exceptional in the 1880s, for legal scholars regarded plutocratic voting rights as the norm by then. In an 1884 treatise, Henry O. Taylor noted the old common-law rule, then stressed that it no longer applied to "stock corporations": "by statute and by-laws, and by custom so general, as to amount to accepted law, a shareholder is entitled to as many votes as he holds shares."[70] Three years later, William W. Cook took the same position. The old common-law rule, he noted, had been "[a]lmost universally" superseded by the provisions of individual charters, statutes, or state constitutions. "[A]t the present day," in his judgment, "it is probable that no court, even in the absence of any such provision, would uphold a rule which disregards, in the matter of voting, the number of shares which the shareholder holds in the corporation."[71]

Indeed, the transformation had progressed so far by then that plutocratic voting rights came to seem natural, fair, and right. This is the conception that one G. J. Greene voiced in an entirely different context – an expression noteworthy precisely because it was not concerned with *corporate* governance at all, but merely drew analogies with what he understood as the common practice in American corporations. In a letter on recent election frauds published in the *Keowee Courier* in Walhalla, South Carolina, in 1882, Greene proposed "A New Plan to Govern South Carolina." Declaring himself "a Republican outright, downright," and therefore "opposed to universal suffrage, that is, Democracy," he also argued against an electoral system organized along racial lines. (His reasons were surprisingly pragmatic: "It is so difficult with us to tell just where the negro begins and the white man ends." He also feared that it would put South Carolina in a bad light abroad.) Instead, he wanted to see representation organized "in an honest, just and impartial way" that would simultaneously ensure white control. In words worth quoting at length, he explained why he thought the large corporation offered an appropriate model:

> I would govern South Carolina on the same principle on which all great corporations are governed. I would give to each man, white or black, precisely that power in the government of the State that each individual stockholder in a great corporation possesses, for what else is the State of South Carolina but a great corporation, with a taxable capital of say $100,000,000. How is a corporation governed? By the stock or capital being divided

out among a large number of people in various amounts, from a single share to many thousands, and in the management of that corporation *each individual exercises precisely the power that his interest in or ownership of such shares entitles him to.* If he has one share he casts one vote. If he has ten shares he casts ten votes, and so on, according to the number of shares he holds. He has a vote for every share he owns. *Nothing could be fairer.* Nobody denies him this right. Everybody will admit that this is right and the law guarantees it to him.[72]

In the half-century since Chief Justice Hornblower of the New Jersey Supreme Court had so adamantly defended the common-law understanding of a democratic corporate governance, American practice had turned thoroughly plutocratic.

That this was a distinctively American, not a universal or natural, movement toward plutocracy is worth emphasizing. In the antebellum period, voting rights were at least as likely to limit the power of large shareholders in the European industrial powers as they were in the United States but, unlike in the United States, this seems to have held true throughout the century.[73] Indeed, plutocratic voting rights were virtually unknown in France and quite rare in the German states until late in the century. In a generous sample of French charters granted from 1825 through 1835 (74 out of a total of 107 companies chartered), only 3 percent had plutocratic voting rights; nearly complete samples for 1845 (twenty-six of twenty-eight) and 1855 (seventeen of eighteen) show no plutocratic voting rights at all. A general incorporation law adopted in 1867, moreover, officially limited a shareholder's total votes to ten; this restriction remained in place through the turn of the century. A sample of German corporations chartered from 1825 through 1870 (207 of 638 known corporations) yields a similar result: only 2 percent had plutocratic voting rights. A major revision of German law in 1884 endorsed the one-share, one-vote rule in principle, but it noted explicitly that voting rights could be limited by capping total votes or with graduated scales. Because of the "freedom" it gave companies to adopt limitations on voting rights, legal expert Viktor Ring emphasized in 1886, this provision of the new law left ample room to preserve the "personal element" in the corporation.[74] Although legal experts emphasized a large gap between theory and practice by the early twentieth century they, nonetheless, regarded German corporate law to be exceptionally "democratic," particularly in the powers it accorded to the shareholders' assembly and by comparison with American law.[75]

Shareholder voting rights in Britain, in contrast, more closely resembled those in the United States in the antebellum years, but certain features of British practice appear to have staved off a wholesale turn to plutocracy later in the century. A preliminary sample of charters granted under general incorporation laws between 1845 and 1865 suggests a pattern much like in the United States: 35 percent specified plutocratic voting rights.[76] But from 1845, the government offered a simple graduated scale that served as a default if a company's articles of association did not provide differently.[77] This provision remained in force through a revision of company law in 1900 and seems to have been widely adopted. In 1883, one Norman Pearson, like G. J. Greene of South Carolina,

found in the corporate world what he regarded as a serviceable model for political suffrage – but a different model than Greene's. A declared opponent of universal manhood suffrage, he thought voting power should be distributed as he understood it to be in British corporations. Everyone with at least a minimal income should have one vote; no one should have more than twenty votes; and "the intermediate votes should be distributed on the same principle" as in the default provision. This clause "is very generally adopted by limited companies," he noted, "is specially designed for the protection of small shareholders, is found to work extremely well, and I do not see why its principle should not be applied with equal success to the franchise."[78] As late as 1894, C. E. H. Chadwyck-Healey's manual on incorporation recommended a graduated voting scale similar to the default scale. A footnote indicated that incorporators should opt for one vote per share if they wanted to give power to the "largest proprietors," but even then it added that total votes could be capped at a specific number. By the turn of the century, however, British corporations were apparently making greater use of plutocratic voting rights; a company-law expert reported in 1901 that companies "[v]ery commonly," though not exclusively, adopted one vote per share.[79] In 1906, the government finally revised its default provisions to specify one vote per share.[80] (see Table 2.2).

Even so, another feature of British governance continued to ensure a strongly democratic thrust. This was the common-law practice of requiring that all votes at shareholder meetings be taken by a show of hands unless at least five shareholders (later reduced to three) demanded a "poll" – the equivalent of a "stock vote" in the United States. Only then did the shareholders vote according to their prescribed voting rights. This manner of proceeding was included in the default regulations from at least 1856 on. When the graduated scale was eliminated as the default in 1906, the new wording read: "On a show of hands every member present in person shall have one vote. On a poll every member shall have one vote [in person or by proxy] for each share of which he is the holder." A 1911 manual with a practical bent advised matter-of-factly: "Unless the articles otherwise provide, questions arising at a general meeting are to be decided, in the first instance, by a show of hands. This is the common law rule

Table 2.2. ***Default voting scale in Britain, 1845–1905***

Shares	Votes
1–10	1 per share
11–100	1 for every 5 shares
101+	1 for every 10 shares

Sources: 8 & 9 Vict. 16 (1845), 19 & 20 Vict. c. 47 (1856), 25 & 26 Vict. c. 89 (1862).

which, unless excluded, applies automatically." The author acknowledged that a poll often conveyed a better sense of "the wishes of the whole constituency of the company," but he gave no indication that a show of hands "in the first instance" had fallen into disuse.[81]

Although the difference may have been a matter of degree, not of kind, corporate governance in Britain, France, and Germany did not move as sharply towards plutocracy in the late nineteenth century as it did in the United States. Plutocratic corporate governance was not a natural consequence of industrial growth; in short, it was a distinctively American way of distributing power in the corporation.

CONCLUSION

As plutocratic voting rights superseded prudent-mean and democratic voting rights in the United States, the power of the small shareholder inevitably declined, turning him (or her) into a passive investor. Only after this had happened did the concentration of power in the hands of large shareholders – a precondition of the rise of financial and managerial capitalism at the turn of the century – become possible.

In the process, it seems reasonable to think, the spread of plutocratic voting rights – and the consequences that followed – may well have encouraged the notion that corporations were essentially private in nature. Foremost among the corollaries of plutocratic voting rights was the all-powerful board of directors. With large enough holdings, the largest investors could handily control the board of directors and turn this power to their advantage, just as Alexander Hamilton feared in the late eighteenth century. The premier example of this immediately after the Civil War was surely the Erie Railroad. As one observer, urging action by the New York legislature (or "Chamber of Commerce," as he called it), observed in 1868:

> The present theory of the railroad law of this State is that the directors are not agents at will, and subject to consultation and instruction from their principals the stockholders, but that, for the period of their office, they are, with but slight qualification, absolute masters of affairs. Without the consent of the stockholders they can buy property or roads, lease other lines, guarantee the loans of other companies, extend the road, make what they may deem improvements at discretion, contract loans upon their own terms, and increase the capital stock through the issue of convertible bonds. What more absolute powers could be conferred upon them? That such prerogatives are dangerous to the interests of the corporation and of stockholders is too evident from the recent doings of directors in cases which have attracted much public attention.[82]

The same year another commentator, writing in the popular periodical *Hours at Home*, described the overweening power of boards of directors in more colorful terms:

> [The stockholders'] rights in the management, control and even to the profits of the very works which his own capital has created have, in various ways come to be, in practice at least, not only essentially restricted, abridged and fettered, but even threatened at last with virtual extinction . . . the Stockholder is fast becoming only an embarrassing recollection to ambitious, scheming and self-willed Boards of Directors . . . Stockholders' rights are no more considered by the managers of some of our colossal railway corporations than the squeezed rind of the lemon whose juice has given a passing flavor to the fluid which stands in the Directors' private room.[83]

Or as Charles F. Adams Jr. put it more sedately in 1871, "the idea of [corporate] management through representation has already given way to the one-man power."[84] This state of affairs – the concentration of great power in boards of directors – made the post-Civil War corporation into an entity very different from its antebellum counterpart.

In such circumstances – when plutocratic voting rights had enabled the largest shareholders to control boards of directors, when small shareholders had been reduced to "ciphers," as Chief Justice Hornblower feared, when colossal corporations seemed to be "as masters of affairs" – is it too much to think that the corporation appeared more private than public and that the multitude of stockholders seemed more like passive investors than citizens of the corporate polity?

NOTES

1. For a cross-national introduction, see Hopt *et al.*
2. Important exceptions are John W. Cadman Jr., *The Corporation in New Jersey: Business and Politics, 1791–1875* (Cambridge, MA: Harvard University Press, 1949), pp. 301–26; Edwin Merrick Dodd, *American Business Corporations until 1860: With Special Reference to Massachusetts* (Cambridge, MA: Harvard University Press, 1954), pp. 65–122, 188–94; and selected essays in Norbert Horn and Jürgen Kocka (eds.), *Recht und Entwicklung der Großunternehmen im 19. und frühen 20. 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)* (Göttingen: Vandenhoeck & Ruprecht, 1979). Lawrence M. Friedman, *A History of American Law* (New York: Simon and Schuster/Touchstone, 1973), pp. 168–9, also touches on the subject, as does Pauline Maier, "The Revolutionary Origins of the American Corporation," *William and Mary Quarterly* 3rd ser. 50 (1993), 76–79.
3. Classic works include George Heberton Evans Jr., *Business Incorporations in the United States, 1800–1943* (New York: National Bureau of Economic Research, Inc., 1948); and J. Willard Hurst, *The Legitimacy of the Business Corporation in the Law of the United States, 1780–1970* (Charlottesville: University Press of Virginia, 1970). For a useful analysis of the literature, see Gregory A. Mark, "The Role of the State in Corporate Law Formation," *International Corporate Law Annual* 1 (2000), 5–9.
4. R. Kent Newmyer, "Justice Story's Doctrine of 'Public and Private Corporations' and the Rise of the American Business Corporation," *Depaul Law Review* 25 (1976), 825–41; Herbert Hovenkamp, *Enterprise and American Law, 1836–1937*

(Cambridge, MA, and London: Harvard University Press, 1991); Gregory A. Mark, "The Personification of the Business Corporation in American Law," *University of Chicago Law Review* 54 (1987), 1441–83; and Morton J. Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992), pp. 65–107. Horwitz's chapter was originally published as "*Santa Clara* Revisited: The Development of Corporate Theory," *West Virginia Law Review* 88 (1985), 173 *ff.* For further discussion, see below.

5. Alfred D. Chandler Jr., *The Visible Hand: The Managerial Revolution in American Business* (Cambridge, MA: Harvard University Press/Belknap Press, 1977); and idem, *Scale and Scope: The Dynamics of Industrial Capitalism* (Cambridge, MA: Harvard University Press, 1990). On Chandler's influence, see Richard R. John, "Elaborations, Revisions, Dissents: Alfred D. Chandler Jr.'s, *The Visible Hand* After Twenty Years," *Business History Review* 71 (Summer 1997), 151–200.
6. Chandler, *The Visible Hand*, 9–10. *Scale and* Scope, his comparative study of industrial capitalism, is oriented around personal capitalism (Britain) and two variants of managerial capitalism, competitive (U.S.) and cooperative (Germany).
7. Chandler, *The Visible Hand*, 48.
8. A growing literature that seeks, like this chapter, to denaturalize the "big business" model of American business history includes: Charles Sabel and Jonathan Zeitlin, "Historical Alternatives to Mass Production: Politics, Markets and Technology in Nineteenth-Century Industrialization," *Past and Present* 108 (August 1985), 133–76; Gerald Berk, *Alternative Tracks: The Constitution of American Industrial Order* (Baltimore: Johns Hopkins University Press, 1994); Colleen A. Dunlavy, *Politics and Industrialization: Early Railroads in the United States and Prussia* (Princeton: Princeton University Press, 1994); Mark J. Roe, *Strong Managers, Weak Owners: The Political Roots of American Corporate Finance* (Princeton: Princeton University Press, 1994); Charles F. Sabel and Jonathan Zeitlin (eds.), *World of Possibilities: Flexibility and Mass Production in Western Industrialization* (New York: Cambridge University Press, 1997); and Philip Scranton, *Endless Novelty: Specialty Production and American Industrialization, 1865–1925* (Princeton: Princeton University Press, 1998).
9. Dunlavy, *Shareholder Democracy*, will take up this question.
10. Except as noted otherwise, the following account relies on two standard sources on the nineteenth and early twentieth centuries – Horwitz, *Transformation*, 65–107; and Mark, "Personification" – as well as on David Millon, "Frontiers of Legal Thought I: Theories of the Corporation," *Duke Law Journal* (1990) 201–51, which brings the story into the 1980s.
11. Joseph K. Angell and Samuel Ames, *A Treatise on the Law of Private Corporations Aggregate* (Boston: Hilliard, Gray, Little & Wilkins, 1832), pp. 1, 3 (quoting Mr. Kyd). The term "body politic" appeared in most American (special) charters, which may be consulted in the published laws of the states.
12. Early corporations were often characterized as public rather than private, but the public–private dichotomy has been used in so many different senses (see, for example, Newmyer; Horwitz, *Transformation*, 206–8; and Millon, 201–2) that I prefer to avoid it. Business corporations were a subset of the broader class of corporations that also included municipal, educational, religious, and charitable corporations; see Friedman, 459–63; Ronald E. Scavoy, *The Origins of the American Business Corporation, 1784–1855: Broadening the Concept of Public Service During Industrialization.* (Westport, CT, and London: Greenwood Press, 1982), pp. 9–38, 231–6; and Maier, 53–73.

13. Quoted in Angell and Ames, 2.
14. Mark, "Personification," 1442.
15. This literature, it should be noted, ignores an alternative conception of corporations that continued to regard them as inherently the creation of public policy. See Colleen A. Dunlavy, "How Did American Business Get So Big?" *Audacity, The Magazine of Business Experience* (Spring 1994), 41–9. For a similar, contemporary viewpoint, see Lawrence E. Mitchell (ed.), *Progressive Corporate Law* (Boulder: HarperCollins/Westview Press, 1995).
16. Horwitz, *Transformation*, 73. See also Mark, "Personification," 1453–7.
17. Horwitz, *Transformation*, 106, also emphasizes the functional attractions of the natural-person or entity theory for the new industrial combinations at the turn of the century.
18. Ernst Freud, *The Legal Nature of Corporations* (Chicago: University of Chicago Press, 1897), 60, quoted in Horwitz, *Transformation*, 100.
19. Mark, "Personification," 1472.
20. Horwitz, *Transformation*, 73, 75.
21. Millon, 211.
22. Millon, 206.
23. Millon, 208–210; Hurst, 44–45, 69–70.
24. Millon, 208.
25. Hurst, 69–71. Hurst's phrase "in effect" is significant, for it signals that he is drawing a conclusion (as he does throughout the book) based on the outcome rather than on evidence of intention.
26. Horwitz, *Transformation*, 93.
27. Horwitz, *Transformation*, 94.
28. Horwitz, *Transformation*, 95.
29. Horwitz, *Transformation*, 96.
30. Millon, 214–15. See also Horwitz, *Transformation*, 93.
31. Chandler, *The Visible Hand*, 381. On turn-of-the-century mergers, see Naomi Lamoreaux, *The Great Merger Movement in American Business, 1895–1904* (Cambridge: Cambridge University Press, 1985).
32. Chandler, *The Visible* Hand, 415 (emphasis added). His case studies in this chapter are Standard Oil, General Electric, United States Rubber, and Du Pont. Of these, Standard Oil was the earliest trust, but its trust certificates did not circulate publicly. Thomas R. Navin and Marian V. Sears, "The Rise of a Market for Industrial Securities, 1887–1902," *Business History Review* 29 (1955), 113. The trust was declared illegal and dissolved in 1893; it incorporated as a New Jersey holding company only in 1899.
33. Congressional charters granted to the Bank of North America and to the first and second Bank of the United States constituted the major exceptions in the antebellum period; the federal government did not charter corporations again until the transcontinental railroad and national banking acts in the 1860s. An early exception to the practice of incorporating by special acts occurred in New York State, which made general incorporation available to manufacturing corporations in 1811 (ch. 67, 1811 N.Y. Laws 111).
34. During the middle decades of the century, some states permitted chartering both by special act and under general incorporation laws. On New Jersey, for example, see Cadman, 111–82.
35. Maier, 79.

36. David Hansemann, *Die Eisenbahnen und deren Aktionäre in ihrem Verhältniß zum Staat* (Leipzig and Halle: Renger'sche Verlagsbuchhandlung, 1837), 116.
37. Henry Ward Beecher, *Freedom and War. Discourses on Topics Suggested by the Times* (Boston: Ticknor and Fields, 1863), 380–1.
38. Though legal scholars are aware of the common law on voting rights (see Jeffrey Kerbel, "An Examination of Nonvoting and Limited Voting Common Shares – Their History, Legality, and Validity," *Securities Regulation Law Journal* 16, no. 1 [Spring 1987], 47), business historians are largely unaware of it. One exception is Cadman, 307.
39. Maier, 77n, quoting Samuel Williston, "History of the Law of Business Corporations before 1800," *Harvard Law Review* 2 (1888), 156.
40. This description is based on a reading of minutes of shareholders' meetings, for example, those of the Boston and Worcester Railroad in the Boston and Albany Archive, Historical Collections, Baker Library, Harvard Business School. For a published reference to the practice, see *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, VT.: E. P. Walton & Son, 1852), p. 4. This case is discussed further below.
41. On anti-charter agitation regarding business corporations, see Maier, 64–81. The idea that shareholders could have different interests is squarely at odds with contemporary law. In practice and theory today, as Daniel J. H. Greenwood writes, "the shareholder is reduced to the shares" – becomes, in his turn of phrase, a "fictional shareholder" – and all shareholders are assumed to be interested only in "shareholder value" (i.e. the value of their shares). See Daniel J. H. Greenwood, "Fictional Shareholders: For Whom Are Corporate Managers Trustees, Revisited," *Southern California Law Review* 69 (1996), 1021–1104. Thanks to Eric Guthey for this reference.
42. Ch. 67, 1811 N.Y. Laws 111.
43. Charter of first Bank of the United States, ch. 10, §7, 1 Stat. 191, 193 (1791).
44. Charter of Second Bank of the United States, ch. 44, §11, 3 Stat. 266, 271 (1816). The 1816 law also referred to the stockholder not as "he" but as "he, she, or they, respectively."
45. Alexander Hamilton, "National Bank. Communicated to the House of Representatives, Dec. 14, 1790," *American State Papers*, vol. 5, 1st Cong., 3rd sess., no. 18 (1790), 73 (emphasis added); on the Bank of North America Bray Hammond, *Banks and Politics in America* (Princeton: Princeton University Press, 1957), pp. 40–64. Whether both charters were still valid was an open question, Hamilton noted, and not one that he ventured to settle, but public opinion, he reported, considered the Bank of North America to have become a Pennsylvania bank.
46. For an introduction to this approach, see Dan S. Felsenthal and Moshé Machover, *The Measurement of Voting Power* (Cheltenham: Edward Elgar, 1998). I am indebted to Steven J. Brams for alerting me to this literature.
47. This is based on a database of corporate charters granted in the United States, Britain, France, and Germany between 1825 and 1865/70. Information from the charters has been augmented by provisions of generic laws if it is clear that they applied to individual companies (usually this was indicated in the charter itself). Construction of the database has required many hours of locating and combing through published laws and, of course, a massive amount of data-entry, which would have been impossible without generous funding from the Alfred P. Sloan Foundation. Once this research is completed, I will make the database available for public use on the Internet.

48. *Taylor* v. *Griswold*, 14 N.J.L. 222, 223–224, 240 (N.J. sup. ct., 1834). It is not clear from the judges' opinions what prompted this departure from the company's long-standing practice. For the company's charter, see 89:5 1797 N.J.L. 201 SB An act to incorporate the stockholders of the bridges over the rivers Passaick and Hackinsack, ch. 653, 1797 N.J. Laws 201.
49. *Taylor* v. *Griswold*, 237–8 (original emphasis).
50. *Taylor* v. *Griswold*, 238–9, 241 (original emphasis). Judge Hornblower's colleague on the court, Justice Ford, essentially agreed: "This claim of having one vote for each share, neither rests on the common law of the land, nor any of its principles. It wholly depends on the *grant* of the legislature." Since the bridge company's charter did not grant one vote per share, the common law would not allow them to grant it to themselves via their bylaws. *Taylor* v. *Griswold*, 251 (Ford, J., concurring; original emphasis).
51. Although the Hornblower opinion did not cite previous cases and the subsequent antebellum case law is very thin, one vote per person was recognized as the common-law rule in cases and legal treatises through the remainder of the century (although from the 1880s it was generally regarded as outmoded or having been superceded – see below). See, for example, 63 A.L.R. 1106–7; William W. Cook, *A Treatise on the Law of Stock and Stockholders* (New York: Baker, Voorhis & Co., 1887), §608; Arthur W. Machen Jr., *A Treatise on the Modern Law of Corporations*, vol. 2 (Boston: Little, Brown, and Company, 1908), §1216.
52. §2, 1841 N.J. Acts 116, 117.
53. §11, 1846 N.J. Acts 64, 66; §11, 1849 N.J. Acts 300, 302–3.
54. mass. rev. stat. Tit. 13, ch. 36, §23, ch. 37, §5, ch. 38, §7, ch. 39, §50 (1836).
55. Ch. 63, §9, 1837 Conn. Pub. Acts 49, 50–51.
56. Seavoy, 191–3. The single limitation occurred in its general railroad law of 1850, which specified one vote per share explicitly for the election of directors. Under the understanding articulated by Justice Hornblower in 1834, this would have required railroad companies to adhere to the common-law default for all other decisions.
57. A. B. Johnson, "Advantages and Disadvantages of Private Corporations," *Hunt's Merchants' Magazine* 23 (December 1850), 630.
58. No. 100, §3, 1848 La. Acts 70, 71.
59. Ch. 128, 1849–50 Cal. Stat. 347; ch. 65, §5, 1853 Cal. Stat. 87, 88; ch. 72, §11, 1853 Cal. Stat. 99, 102; ch. 121, §7, 1853 Cal. Stat. 169, 170.
60. 1852 Ohio Acts 274.
61. Ch. 84, §5, 1836–37 Va. Acts 74, 76; ch. 118, §18, 1836–37 Va. Acts 101, 108.
62. *A Convention of the Stockholders of the Greenville and Columbia Rail Road, for the Purpose of Organization, Held at Carolina Hall, Columbia, Tuesday and Wednesday, May 11, 12, 1847* (Columbia, SC: South Carolinian Office, 1847). Eighty-one shareholders attended the meeting, holding 19,813 shares and 4,155 votes. For the charter, see no. 2953, 1845 S.C. Acts 324 or *An Act to Authorize the Formation of the Greenville and Columbia Railroad Company* (Columbia, SC: J. G. Summer, 1846). The company's voting-rights provision was identical to that of the South Carolina Canal and Railroad Company, which dated from 1828. The latter is reproduced in Dunlavy, "Corporate Governance," 20.
63. *Proceedings of the Stockholders of the Vermont Central Railroad, at a Special Meeting Holden at Northfield Vermont, May 4, 5, 1852* (Montpelier: E. P. Walton & Son, 1852).

The proceedings were printed on a motion by the dissident Mr. Benedict. Quincy maintained that he had acted within his rights. See Josiah Quincy, *Letter to the Shareholders of the Vermont Central Railroad: From Josiah Quincy, Jr., March, 1852* (Boston: Eastburn's Press, 1852). To complicate matters, the charter specified voting rights only for the *first* election of directors. The charter is included in W. P. Gregg and Benjamin Pond, *The Railroad Laws and Charters of the United States*, vol. 1 (Boston: Little and J. Brown, 1851), pp. 707.

64. Ch. 120, 12 Stat. 489 (1862); ch. 278, 14 Stat. 292 (1866); ch. 122, 16 Stat. 573 (1871). The 1862 charter of the Union Pacific Railroad initially limited ownership to 200 shares, but the limit was removed in an 1864 amendment. ch. 216, 12 Stat. 356 (1864).
65. U.S. Statutes (1863), ch. 58, §38; (1854), ch. 106, §11.
66. va. code Tit. 18, ch. 57, §10 (1860).
67. ch. 277, §4, 1870–71 va. Laws 367, 369; ch. 233, 1885–86 Va. Acts 246.
68. No. 288, §11, 1886 S.C. Acts 540, 543.
69. Ch. 112 §53, 1882 Mass. Pub. Stat. 598, 611.
70. Henry O. Taylor, *A Treatise on the Law of Private Corporations Having Capital Stock* (Philadelphia: Kay & Brother, 1884), §580.
71. William W. Cook, *A Treatise on the Law of Stock and Stockholders* (New York: Baker, Voorhis & Co., 1887), §608. See also Victor Morawetz, *A Treatise on the Law of Private Corporations*, 2nd ed., vol. 1 (Boston: Little, Brown, and Company, 1886), 450.
72. *Keowee Courier* (Walhalla, SC), May 11, 1882 (emphasis added). I am grateful to Lisa Tetrault and Stephen Kantrowitz for this reference.
73. Except as noted otherwise, the remainder of this section is based on Dunlavy, "Corporate Governance," 22–7, 29–33, and on the charters database (see note 47). Each of the countries poses unique problems of data collection. France is the least troublesome; a nearly complete list of charters to 1867 appears in Charles E. Freedeman, *Joint-Stock Enterprise in France, 1807–1867: From Privileged Company to Modern Corporation* (Chapel Hill: University of North Carolina Press, 1979), pp. 145–97, and the charters were published in the *Bulletin des lois*. For the German states, they appear in the published laws of the states. For Britain, I have been unable to locate published charters before 1844; for companies formed under general incorporation laws after 1844 (with limited liability for most lines of business from 1856), the largest collection of their articles of association is in the Public Record Office in London.
74. Viktor Ring, *Das Reichsgesetz betreffend die Kommanditgesellschaften auf Aktien und die Aktiengesellschaften vom 18. Juli 1884* (Berlin: Carl Heymanns Verlag, 1886), p. 293.
75. Richard Passow, *Die wirtschaftliche Bedeutung und Organisation der Aktiengesellschaft* (Jena: Gustav Fischer, 1907), p. 201; Robert Liefmann, *Die Unternehmungsformen* (Stuttgart: Ernst Heinrich Moritz, 1912), p. 71.
76. The sample encompasses fifty-five charters granted in 1845 (5), 1850 (2), 1855 (6), 1860 (10), and 1865 (32); since some 1,643 companies were incorporated in these years, this amounts to a 3.3 percent sample (it will be expanded to 5 percent).
77. Francis Beaufort Palmer, *Company Law: A Practical Handbook for Lawyers and Business Men*, 3rd. edn. (London: Stevens and Sons, 1901), p. 11. The 1844 act applied to England and Ireland; the 1856 and 1862 acts applied to Scotland as well (see sources in Table 2.2). The default voting rights first appeared in the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), which encompassed provisions "usually inserted" in charters; in "Table B" of the 1856 act; and in "Table A" of the 1862 act. The tables spelled out extensive provisions for the management of companies that served as default articles of association for companies with limited liability.

78. Norman Pearson, "Manhood Suffrage on the Principle of Shareholding," *The Nineteenth Century* 82 (December 1883), 1083–4.
79. C. E. H. Chadwyck-Healey, Percy F. Wheeler, and Charles Burney, *A Treatise on the Law and Practice Relating to Joint Stock Companies Under the Acts of 1862–1890*, 3rd. enl. edn. (London: Sweet and Maxwell, 1894), p. 272; Palmer, 11.
80. T. Eustace Smith and Arthur Stiebel, *A Summary of the Law of Companies*, 9th edn. (London: Stevens and Haynes, 1907), p. 70.
81. Francis Beaufort Palmer, *Company Law: A Practical Handbook for Lawyers and Business Men*, 9th edn. (London: Stevens and Sons, 1911), pp. 171, 516.
82. "The Powers and Responsibilities of Directors," 58 *The Merchant's Magazine and Commercial Review* 58 (Jan.–June 1868), 435.
83. "Stockholders – Their Rights and Wrongs," *Hours at Home: A Popular Monthly of Instruction and Recreation*, J. M. Sherwood (ed.), 7 (May–Oct. 1868), 100.
84. Charles F. Adams Jr., "The Government and the Railroad Corporations," *North American Review* 112 (1871), 47.