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Corporate Governance in Late 19th-Century Europe and the U.S. The Case of Shareholder Voting Rights

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A century ago, American business found itself amidst the "great merger movement." In Britain, France, and Germany, in contrast, firms tended to eschew consolidation for cooperation, forming looser combinations such as cartels. At the same time, a remarkable concentration of corporate control emerged in the U.S. but not in Europe.

This essay presents preliminary research on the distribution of power among shareholders and the choice of corporate strategies at the turn of the century. It raises new questions about the capacity of firms to consolidate. What enabled American firms to merge with such ease? Did their European counterparts turn to cartels when they would otherwise have preferred to merge, because they lacked a similar capacity to merge?

The evidence presented here concerns nineteenth-century shareholder voting rights in the four countries. Traditional constraints on the power of large investors initially made corporate governance relatively democratic in all four, but such constraints—e.g., graduated voting scales—disappeared earlier in the U.S. Future research will consider whether this made mergers more feasible there and less so in Europe.

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"[I]t is noteworthy that the constitution of the joint-stock corporation and the position of shareholders in Germany are extraordinarily democratic. Every shareholder is entitled to vote and almost all the more important decisions . . .depend on the consent of the general assembly [of shareholders]. In England and—what is most peculiar—especially in America, the joint-stock corporation is much less democratically organized."

—Robert Liefmann (1912)

A. Introduction

Just a century ago, the increasing popularity of incorporation in the United States culminated in a giant wave of consolidation known as the "great merger movement." This startling development, which attracted widespread notice at home and abroad, resulted in the absorption of more than 1,800 firms into horizontal combinations in less than a decade (Lamoreaux 1985: 1-6). Though consolidation was not unknown in Britain, France, or Germany, the intensity of the movement was far less in those countries at the turn of the century (Cornish 1979; Chandler/Daems 1980: 3-7; Chandler 1990). Instead, traditional family firms or at least family control tended to persist longer, and, to differing degrees by country, European firms eschewed consolidation for cooperation, forming a variety of looser combinations. In Leslie Hannah's phrase, these constituted a "third hand" between markets and hierarchies (Hannah 1987: 32) that preserved the independent existence of larger numbers of smaller firms.

Meanwhile, a remarkable—and equally distinctive—concentration of control in the hands of a few individuals within the firm was also evident in the U.S. by the turn of the century. The earliest and in many ways most extreme case was that of the Pennsylvania Railroad (PRR), chartered in 1846 to connect Philadelphia with Pittsburgh. By the mid-1860s, its chief engineer and later president J. Edgar Thomson had wrested control from the PRR's board of directors—hence, from its shareholders. A few years later Thomson undertook a dramatic expansion of the company via consolidation or leasing of adjacent lines and by taking a stake in more distant, connecting lines. Between 1869 and 1873, the PRR expanded from a system of less than 500 miles to one of nearly 6,000 miles. The company's shareholders had little to say about this strategy of rapid expansion; the results were simply presented to them in local newspapers and in the company's annual reports. In the 1870s and 1880s, the PRR's strategy of expansion served as a model for the other trunkline railroads, which built similar "systems" on a regional and interregional scale (Ward 1975; Chandler 1977).

By the turn of the century, an extraordinary concentration of control marked American railroads generally. Two German officials, touring American railroads in 1905 or 1906, compared U.S. corporate practice with what they knew at home and remarked especially on the degree of power wielded by the largest shareholders.[1] Control within a given corporation was achieved by "single persons, families or groups of financiers," they reported, who "hold in their hands, more or less, the actual conduct of business of a railroad or at least of its policies on the strength of their ownership of shares." Such a concentration of power in the hands of a wealthy few they regarded as quite extraordinary, and the consequences for corporate governance did not escape them: "It is evident that by these means the importance of the general meeting in comparison with the board of directors is reduced to a still lower degree than is sometimes apparent with us." Citing as an example the Vanderbilt family's control over the New York Central Railroad, they concluded that its shareholders' meeting were a sham, "reduced to a mere formality." It was only for the sake of "mere appearance," they declared, that "the form of joint-stock companies is maintained" (Hoff/Schwabach 1907: 139-40).

By this time concentration of control in U.S. corporations extended far beyond the railroads. Reflecting on the concentration of wealth and power that seemed to typify American corporations in 1909, Robert Liefmann, a widely published and cited German expert on cartels and trusts, reached very similar conclusions. He attributed the pervasiveness of trusts in the U.S. principally to the influence of "large-capitalist and speculative finance people." It was they who pushed the level of concentration beyond what was desirable on technical grounds. The result in the U.S. was a concentration of capital unlike anything seen in Germany, where cartels predominated. Moreover, since cartels "keep alive" smaller enterprises, Liefmann maintained, they embodied a more "democratic principle." "It is not too much to say," he wrote, "that . . . it is possible for such finance people to control two hundred times as much capital as they possess" (Liefmann 1910: 140, 173). Thinking specifically of the extensive wealth controlled by the J. P. Morgan *Konzern*, Liefmann wondered "how Americans, in those circumstances, can speak of their country as a true democracy." Corporate practice in Germany was, in Liefmann's words, a good deal "more democratic," and this, in his view, made it much harder to carry out mergers and consolidations (Liefmann 1918: 173, 197).

[1] Since the vast majority of German railroads were state-owned (literally, *Länder*-owned) by this time, one must assume that the two observers, Senior Privy Councillor W. Hoff and his companion, Privy Councillor F. Schwabach, were comparing corporate governance on American railroads to the general practices of industrial corporations in Germany. They also found exceptional the interlocking forms of control that some large corporations exerted over others, citing the PRR's control of the Baltimore and Ohio Railroad as a prime example.

Why did such large, consolidated, tightly controlled enterprises emerge in the U.S.? James Ward's answer for the extreme case of the Pennsylvania Railroad provides a sample of the conventional thinking. Citing accelerating economic change and "the imperative need for rapid decision making, particularly in the emerging large corporations," he maintains that

> the concept of the authoritative board of directors was rapidly becoming obsolete. Practical considerations involving the volume and complexity of managerial decision *dictated* that power and authority within the corporation would become so highly centralized as to destroy the [state legislature's] carefully constructed lines of internal and ultimately external accountability (Ward 1975: 39, italics added).

This is essentially the understanding of American corporate history that one of its critics, legal scholar Mark J. Roe, terms the "economic paradigm" (Roe 1994: 1-17). Roe examines the historical origins of the distinctively American style of large-scale corporation that became dominant somewhat later: the large public corporation with "distant shareholders, a board of directors that has historically deferred to the CEO, and powerful, centralized management"—very much the model that Thomson crafted on the Pennsylvania Railroad, though it became common only after the turn of the century. Its emergence, Roe notes, is generally taken to have been the natural result of economic evolution. According to this view, technological and market changes at the turn of the century created unprecedented demand for capital. Some of it could be generated internally, but "[e]ventually these new large-scale enterprises had to draw capital from many dispersed shareholders, who demanded [portfolio] diversification"—hence, smaller holdings in larger numbers of corporations, which resulted in shareholder fragmentation (Roe 1994: ix, 3-4). This is a view of the corporation from the outside, so to speak, but Ward reaches a similar conclusion from the interior: the technological and organizational challenges thrown up by the large-scale corporation simply demanded tight administrative control.

This imperative to control—whether in its technical, organizational, or economic variant—certainly made its presence felt early on: a German authority expressed similar sentiments about railroads, especially regarding the need for rapid decision-making, as early as 1860 (Koch 1860: Anlage 1, p. 3). But, as Roe notes in the twentieth-century context, the case of Germany, in particular, raises serious doubts about the compulsion to centralize control implicit in the "economic paradigm." In Germany, control was generally less concentrated, yet industrial enterprise developed along remarkably similar lines during the last half of the nineteenth century. "In Germany as in the United States, but much more than in Britain," Alfred Chandler writes, "entrepreneurs did make the investment in production facilities and personnel large enough to exploit economies of scale and scope, did build the product-specific international marketing and distribution facilities, and did recruit the essential managerial hierarchies." In both the U.S. and Germany, they were willing to share power with salaried managers, became first-movers in the new, capital-intensive industries, expanded abroad, and diversified into related industries. In both, he concludes, "the technologically advanced, capital-intensive industries of the Second Industrial Revolution came to be managed through a system of managerial capitalism and so were driven by the same dynamics of growth" (Chandler 1990: 393). Indeed, the two economies had been so thoroughly transformed on the eve of the Great War that a German author wondered which was *Das Land der Monopole: Amerika oder Deutschland?* (Singer 1913). Yet, despite all this, German corporations generally did not consolidate and centralize administrative control to nearly the same degree. Thus neither demand for capital nor operational imperatives explain the American tendency toward consolidation and concentration of control in any straightforward way.

Beyond the economic paradigm, conventional understanding of consolidation and concentration of control at the turn of the century points to the distinctive incentives for consolidation or cartellization created by the way that courts and legislatures treated interfirm cooperation. From this perspective, industrialists faced a choice in the late nineteenth century between consolidation in giant enterprises and the voluntary cartellization of independent firms, and their decision was ultimately shaped by legal differences in the treatment of combinations. In a nutshell, courts and legislatures made cartellization a more viable strategy in European countries—above all, in Germany—but not in the U.S. Therefore, American firms, unable to cooperate, consolidated via merger instead (Chandler 1990: 395; Freyer 1992).

Yet, despite the apparent coherence of this explanation, it leaves unasked important questions about corporate governance and thus masks a large indeterminacy in our understanding of the impact of antitrust law on corporate strategies. The unasked questions concern the *underlying capacity* of American businesses to consolidate at the turn of the century when other options were foreclosed. Once American courts and legislatures made the formation of looser combinations a risky strategy, American firms turned to outright mergers instead. And it is this, their ability to merge without further ado, that has gone unquestioned.

What if American firms in the 1890s, facing courts and legislatures hostile to cartels, had not had the organizational wherewithal to pursue mergers instead? Or, to put the question the other way around, what was it that *enabled* them to merge with such ease? Would J. Edgar Thomson, for example, have been able to carry out such a rapid expansion of the Pennsylvania Railroad if he had not already seized control of the board? Posing such questions about the American experience raises fresh ones in the European context as well. Cooperation in cartels or similar arrangements was certainly a more available strategy in Britain, France, or Germany, but, if European courts or legislatures had proven as hostile to cooperation as their American counterparts, would European firms have been able to merge with comparable ease? Or, conversely, did they in fact turn more often to cartels, when they would otherwise have preferred to merge, because they lacked the underlying capacity to merge as readily?

Answers to these questions ultimately depend upon how power was distributed among shareholders in the firm. If one assumes that not all investors thought alike—for example, that their interests differed because they held shares for different reasons, that they had different time horizons or a differential tolerance for risk—then it follows that opposition to merger plans might have arisen within the ranks of the investors.[2] Who won out depended on who was more powerful, and who was more powerful depended, in turn, on the finer details of corporate governance—how voting rights were distributed, how boards of directors were chosen, how power was divided between the board and the assembly of shareholders.

Pursuing this line of thinking,[3] my current research submits the power of shareholders not to economic but to political analysis. That is, in an effort to sharpen our understanding of the impact of the law of combinations on corporate strategies, it places corporate governance front and center. In doing so, it:

- regards incorporation not only as a response to economic demand but also as the result of distinctive national *political conditions and processes*;
- conceives of the firm not merely as an economic institution but also as *legally-constructed polity* that is peopled by "citizens" (its investors);
- looks inside the "black box" of shareholders' and directors' meetings to understand how *power relations among investors* were structured; and
- explores the *impact* of these distinctive configurations of power *on the firm's choice of strategies of growth.*

2 This understanding is formulated historically, rather than on the basis of economic theory. One could imagine, for example, that an industrialist who purposefully bought a controlling interest in a railroad in order to control the transportation of raw materials to his factory had very different ideas about appropriate corporate strategy than did, say, a smaller investor who bought shares in the same company purely for the immediate return on his or her investment. I am grateful to several conference participants, especially Jeffrey Gordon and Roberta Romano, for challenging me (ever so cordially) to make this explicit.

3 The literature on the evolution of power relations in the firm is remarkably thin. The best comparative work is Horn/Kocka (1979), but it does not treat all topics as systematically or fully comparatively as one would like and the authors generally approach their subjects from the standpoint of formal law; as a result, one learns very little about the law in action. Among historically minded legal scholars, Mark Roe, as noted above, issues a powerful call for a political theory of the corporation, but he does not go far enough—or, more specifically, not far enough backward in time. His starting point is anchored fairly firmly in the early 20th century, and what he actually explores is a political *backlash* against precisely the phenomenon that he argues has historically been lacking: the deep involvement of very powerful financial intermediaries in American corporate management. Best known, of course, was J.P. Morgan, the kingpin in the so-called "Money Trust" at the turn of the century, whose men sat on numerous boards of directors.

The larger project, only a piece of which is presented here, traces changes in two measures of "democratic practice" in the firm: *suffrage* (i.e., shareholder voting rights, including proxy rights) and the *constitutional structure of the firm* (i.e., the distribution of power between the assembly of shareholders and representative institutions such as the board of directors—who has the power to make which decisions, by what majority motions must be passed, etc.).

Comparing the U.S., Britain, France, and Germany from the 1830s to the 1910s, the core question is how changes in shareholder voting rights and the power of boards of directors shaped the choice of corporate strategies during the great wave of consolidation and cartellization at the turn of the century. The hypothesis under scrutiny has two parts: 1) the characteristic American style of corporate governance on the eve of the great merger movement was the least democratic, while corporate governance was somewhat more democratic in Britain and even more so in France and Germany; and 2) more democratic styles of corporate governance made mergers more difficult to carry out and therefore increased the attractiveness of cartellization at the turn of the century; less democratic styles, conversely, made mergers easier to achieve. At stake is a new, politically grounded interpretation of the dramatic, turn-of-the-century changes in industrial organization in the U.S. and Europe.

This essay outlines the first results of the research on shareholder voting rights. To set the stage, the next section sketches out the early history of corporate suffrage, when what I call plutocratic voting rights—one vote per share, which now seems somehow so natural—were regarded as a dangerous innovation. It then suggests a conceptual framework for thinking about corporate governance in explicitly political terms. Sections C and D argue that early corporations in the United States as well as in Europe were initially governed in very similar—that is, comparably democratic—fashion. But by mid-century, as Section E shows, a rapid movement toward plutocracy had begun in the U.S. In Europe, in contrast, a more democratic mode of corporate governance persisted considerably longer (Section F), while American corporations continued their head-long movement toward plutocracy (Section G) in the last decades of the century.

B. Thinking About Corporate Suffrage: History and Theory

History. The concept of "corporate suffrage" links two spheres—the economy and the polity—that are, at least in liberal thinking, usually regarded as quite distinct from one another. But a moment's reflection on the average citizen's voting rights in the early nineteenth century makes clear that an intertangling of polity and economy was once taken for granted, where matters of suffrage were concerned. The voting rights of white, male citizens in the U.S., for example, were routinely constrained by property qualifications; a white man enjoyed the right to vote only if he also enjoyed property rights (as slaves and married women did not). The concept of "one man, one vote"—that is, the right of the white male to vote simply because of his humanity—was not at all taken for granted (Porter 1918; Williamson 1960; Smith 1990: 120-3).

In mirror-like fashion, the voting rights of investors in early corporations—the suffrage of capitalists, so to speak—were routinely constrained by political restrictions written into corporate charters or company law. This was true even in the U.S., as legal historian Lawrence Friedman observes, where "[e]arly [corporate] charters did not necessarily adhere to the principle that one share of stock was entitled to only one vote" (Friedman 1973: 168). Indeed, the Bank of North America's Congressional charter of 1781 generated enormous controversy when it did *not* follow tradition: among its offenses, it permitted shareholders one vote per share and allowed the use of proxies. The bank's many and vocal critics, as historian Pauline Maier writes, preferred "that all shareholders have equal votes and be allowed to vote only in person, not by proxy. Alternatively, they suggested that corporate voting rights be distributed under a system that favored small shareholders over large" (Maier 1993: 77).

In the revolutionary American context, aversion to plutocratic voting rights, in which a shareholder's votes are directly proportional to the number of shares owned, reflected two considerations. First of all, British tradition, as Maier explains, 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. The model here was 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." Indeed, as late as 1818, the shareholders of the Bank of England who were entitled to vote (those who had invested £500 or more) enjoyed one vote each: "no one Member of the said Corporation," read its charter, "shall . . . have, or give any more than one Vote, whatever his Share or Interest in the said Capital Stock shall be" (*Copy of the Charter* . . . 1818: 17). The flavor of this conception comes through in the language of early American charters as well (though they did not limit votes to one per person).[4] A railroad charter issued by the Rhode Island legislature in 1836, for example, likewise regarded "each proprietor or owner of one share" to be "a member of the corporation" ('An Act to Incorporate . . .' 1836: 10).

This practice—safeguarding the individuality of shareholders as members of a corporation, rather than as owners of a portion of its capital—was well supported by Anglo-American common law. In the absence of explicit arrangements to the

[4] A convenient collection of early railroad charters and other laws may be found in Gregg/Pond (1851), which, despite its title, deals only with New England.

contrary in the company's charter or by-laws, the common law regarded shareholders to be entitled to one vote each and it did not allow the use of proxies. As an expert in British corporation law reported in the early twentieth century, moreover, the common law (if the by-laws were silent on the matter) also stipulated that "questions arising at a general meeting are to be decided, in the first instance, by a show of hands." In this practice as well, the default was obviously one vote per person. Only if a "poll" was specifically requested did the shareholders vote according to their voting rights as specified in the company's articles of association (Palmer 1909: 167).[5]

The second consideration, alluded to above, was what Lawrence Friedman has described as a "typical, American fear . . . . of unbridled power, as possessed by large landholders and dynastic wealth, as well as by government" (Friedman 1973: 168). As shareholder voting rights evolved in Britain, the practice emerged in the eighteenth century of giving the larger shareholders additional votes, but only up to some maximum that was less than proportional to their share of the capital. As Maier notes, "Such checks on the power of large shareholders were designed, as a 1766 act of Parliament explained, to protect 'the permanent welfare of companies' from being 'sacrificed to the partial and interested views of a few'" (Maier 1993: 77 et seq.)

This practice, too, was put to use in the U.S. in the late 18th century, where graduated voting scales served democratic ends. Critics of the plutocratic alternative—one vote per share—sought to limit the power of capital, Maier argues, in order to secure a greater degree of democracy:

> By allowing small shareholders at least one vote and capping those of large shareholders, charters might not only limit 'aristocratic' power but build into the very structure of corporations a check on their 'vast influence and magnitude,' a democratic 'counterpoise' to corporate power such as other societies found, as William Findley observed in Pennsylvania legislative debates of 1785, in kings, nobles, and great landed families (Maier 1993: 77).

Secretary of the Treasury Alexander Hamilton made a similar argument, though for different reasons, when he laid out in 1790 his thoughts about the proper organization of a national bank. On the question of shareholder voting rights, he turned to the Bank of North America as an example of what should *not* be done. The original plan for that institution, he noted, called for "a vote for each share," while in the final charter there was "the want of a rule." This omission might have been interpreted to mean "that every stockholder is to have an equal and a single vote," Hamilton observed, but this "would be a rule in a different extreme, not less erroneous." The "rule" to govern voting rights "should be a proper one," he declared, and it should be spelled out in the bank's charter, not left to the

[5] For other references to the common law, see Morawetz (1886: 450) and Lindley (1889: 342).

company's by-laws. He then went on to discuss and reject the two extremes, reasoning on the following lines:

> A vote for each share renders a combination between 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 (Hamilton 1790: 73).

Although he sought to protect minority interests, in other words, he seemed to recognize that large investors might not find the shares attractive if their interests did not have at least some "degree of weight." As a compromise, he recommended that shareholder voting rights be ordered in an elaborate, graduated voting scale:

> 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 (Hamilton 1790: 75).

(For good measure, he suggested that only those shareholders who actually lived in the United States be allowed to vote by proxy.) When Congress chartered the first Bank of the United States on February 25, 1791, its charter contained identical language (Peters 1848: Ch. X, Sec. 7, I).

Such restrictions on the power of capital in the corporation persisted well into the antebellum years. Indeed, it speaks volumes that Congress, given an opportunity in 1816 to substitute a one-share, one-vote provision for a graduated voting scale when it chartered the Second Bank of the United States, declined to do so. On the contrary, the charter of the Second B.U.S. not only retained the graduated voting scale but restricted its use explicitly to "voting for directors" (Peters 1848: Ch. XLIV, Sec. 11, I).[6] Barring other provisions in the by-laws, this meant that Congress reverted to earlier practice: other votes, e.g., regarding policy matters, proceeded according to the common-law default, one vote per person.

Theory. Regarded in political terms, graduated voting scales sought to implement a relatively democratic form of corporate governance that, as Hamilton indicated, would balance power among investors in the firm. A knowledgeable German observer, the Prussian David Hansemann, formulated the question of shareholder voting rights in more explicitly political terms in 1837:

> The manner in which the voting rights of shareholders are fixed has a most fundamental influence on the organization of [the corporation's] management, because its members are elected in the general assembly by a majority of votes of the shareholders. The two extremes, giving each shareholder one vote and giving each share one vote, stand in relation to one another like democracy and aristocracy (Hansemann 1837: 116).

6 In the only other change of language in this provision, the "he" of 1791 became "he, she, or they, respectively" in 1816.

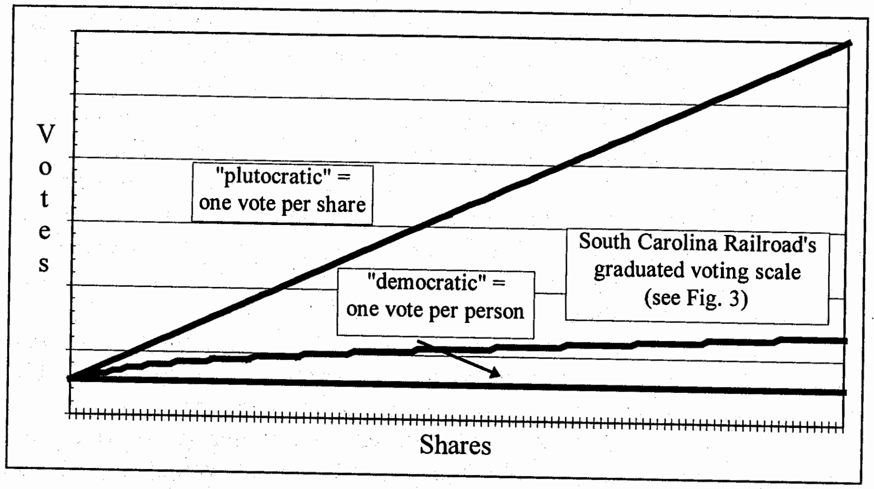
He had his own preferences, about which more will be said later, but the question here is not the normative one—which system of voting rights is better—but merely a pragmatic one: how to construct an analytical framework that will enable comparison across companies and countries. Hansemann's dichotomy offers a useful starting point, but the contrast might be more precisely defined as one between democracy and *plutocracy*, for "aristocracy" can include systems of hereditary power while "plutocracy" is linked exclusively to wealth.

At the uppermost levels of the corporation in the nineteenth and early twentieth centuries, three groups contended for power, their membership often overlapping: the owners of the firms (i.e., its shareholders); the members of the board of directors (or, in Germany, members of the supervisory board [*Aufsichtsrat*] as well as the managing board of directors [*Vorstand*]); and the professional managers (Roe 1994: vii). In theory, then, the distribution of power among these groups could take one of three forms:

- more *democratic* power relations obtained when voting rights were relatively broadly distributed and the *mass of shareholders*, voting in assembly, retained important powers of approval over company strategy;
- more *plutocratic* power relations obtained when voting rights were more narrowly distributed (e.g., only some stocks carried voting rights) and weighted in favor of the largest shareholders (e.g., one vote per share) and when the *largest shareholders*, as a result, were able to control the board of directors without the support of a majority of the individual shareholders;
- more *technocratic* power relations obtained when the third group, *professional managers*, were able to control the board of directors and determine company strategy without significant input from the shareholders (possibly even in opposition to the wishes of a majority of the individual shareholders).

These, in turn, may be taken to define a spectrum running from the more democratic to the less democratic (plutocratic) to the least democratic (technocratic). In the nineteenth century in all four countries, the general direction of change was from the more democratic alternative (in the most extreme cases, one vote per *person*) toward plutocratic power relations in which each *share* carried a vote (in the most extreme cases, the smallest shareholders had no votes and the largest stockholders were entitled to vote their wealth). At the turn of the century, corporate governance in the U.S. moved even further in the plutocratic direction, towards a kind of oligarchic plutocracy with the introduction of non-voting stock and cumulative voting (see Section G). For purposes of comparison across companies and countries, it is enough simply to situate different styles of corporate governance relative to one another along this continuum to judge which distributed power more broadly among shareholders and which did not. Figure 1 presents graphically the two extremes at issue in this essay—plutocratic and democratic voting rights—and shows how one example, the graduated voting scale of the South Carolina Canal and Railroad Company ca. 1828, compared with the two extremes.

Figure 1: Shareholder Voting Rights: Plutocratic vs. Democratic



The historical starting point for this comparison is a time when constraints were the norm: when corporate charters began to be issued in large numbers in the 1820s and 1830s, suffrage was routinely and substantially constrained, though in different ways, in both the political and economic spheres. In the political sphere, voting rights were generally restricted to those white males who could meet certain property qualifications (though, as usual, these varied by state in the U.S. and were gone by the early 1840s); in this way, *property rights were used to constrain suffrage*. In the economic sphere, as we will see, shareholders' voting rights were frequently restricted by graduated voting scales or a cap on maximum votes that effectively increased the relative power of small shareholders and diminished that of the larger shareholders; here, *suffrage was used to constrain property rights*. By the end of the century, as the sections below suggest, practice in the two spheres had diverged considerably more in the U.S. than in Britain, France, or Germany.

C. Early Democratic Practice in the U.S.

Before the advent of general incorporation in the U.S., the vast majority of corporate charters were granted by the state legislatures via special legislation,[7] and, because of the common-law default of one vote per person, these acts almost always contained some provision regarding voting rights. By the 1830s and 1840s, the state legislatures' special acts frequently subordinated newly created corporations to generic laws. Unlike general incorporation laws, these generic laws merely allowed a streamlining of legislative charters. Only in the 1850s did general incorporation begin to become important, though the details of the transition varied considerably by state. Provisions regarding voting rights could appear in any of these documents—or in none of them, in which case the common law or the company's by-laws came into play.

The railroad charters issued by the state of Massachusetts in the year 1829 offer a good sense of the diversity of early practice in charters granted via special legislation (though the grounds for the diversity found here and elsewhere are difficult to fathom). In that year the Massachusetts legislature granted four railroad charters. One contained no explicit provision regarding voting rights; barring by-laws to the contrary, this would have meant that shareholders voted as individuals. The second specified one vote for the first share, then one vote for every two additional shares, up to a maximum of ten votes; the member who held more than nineteen shares, in other words, did not gain additional voting power when total votes were capped in this way. The third charter prescribed a slightly more extensive gradation: one vote for the first share; one vote for every two additional shares under ten; and one vote for every four additional shares over ten, up to a maximum of thirty votes. The fourth charter, finally, specified one vote per share but with a proportional cap: no shareholder could cast more than one-quarter of the total votes. Through 1835 Massachusetts railroad charters that bore a restriction on voting rights (many did not) followed the latter model, though the maximum share was reduced from one-fourth to one-tenth. Then in 1836 the Revised Statutes (Ch. 39, Sec. 50) codified a limitation of one-tenth on an individual's voting power, though not on an individual's share of total investment (Gregg/Pond 1851: vol. 2, 30).

[7] The charters issued to the first and second Bank of the United States constituted two major exceptions. Another occurred in New York state, which made general incorporation—i.e., incorporation via an administrative process—available to manufacturing corporations in 1811. That legislation, unique at that early date, was also unusual in providing that "each stockholder shall be entitled to as many votes as he owns shares of the stock." *Revised Statutes of the State of New York* (1836), Ch. 67. One of the few modern works on the history of American corporations is Ronald Seavoy's (1982) study of incorporation, which is based solely on the New York experience. To the extent that present-day understanding relies on his study, it would seem to be seriously flawed, since New York's incorporation policy—at least with respect to general incorporation and voting rights—was quite unlike that in other states.

Meanwhile, the Massachusetts Revised Statutes of 1836 also distinguished among types of corporations, some of which were regulated like railroads and others, not. The shareholders of banks, however, could hold one vote per share but only up to a maximum of ten votes, while those who held shares in insurance companies were limited to thirty votes at one vote per share (Mass. *Revised Statutes* 1836: Chs. 311, 324, 329, 343; 1861: Chs. 304, 325, 350). These provisions remained in place until much later in the century.

But manufacturing corporations constituted the big exception, in Massachusetts as elsewhere, for the 1836 Revised Statutes allowed their shareholders to determine their own voting rights via their by-laws. In this, Massachusetts followed a precedent set by New York state a quarter-century earlier. In 1811, in an act extending the privilege of general incorporation to all manufacturing corporations, the New York legislature had taken the unprecedented step of providing that "each stockholder shall be entitled to as many votes as he owns shares of the stock" (*Revised Statutes of the State of New York* (1836), Ch. 67). Through the 1830s, a grant of incorporation implied that a company had passed a test of public usefulness. This loosening of restrictions on manufacturing corporations, which fit the test of public usefulness much less comfortably than did companies that provided transportation or some other public service, may have constituted an essential step in the transformation of corporations from public to private entities over the nineteenth century.

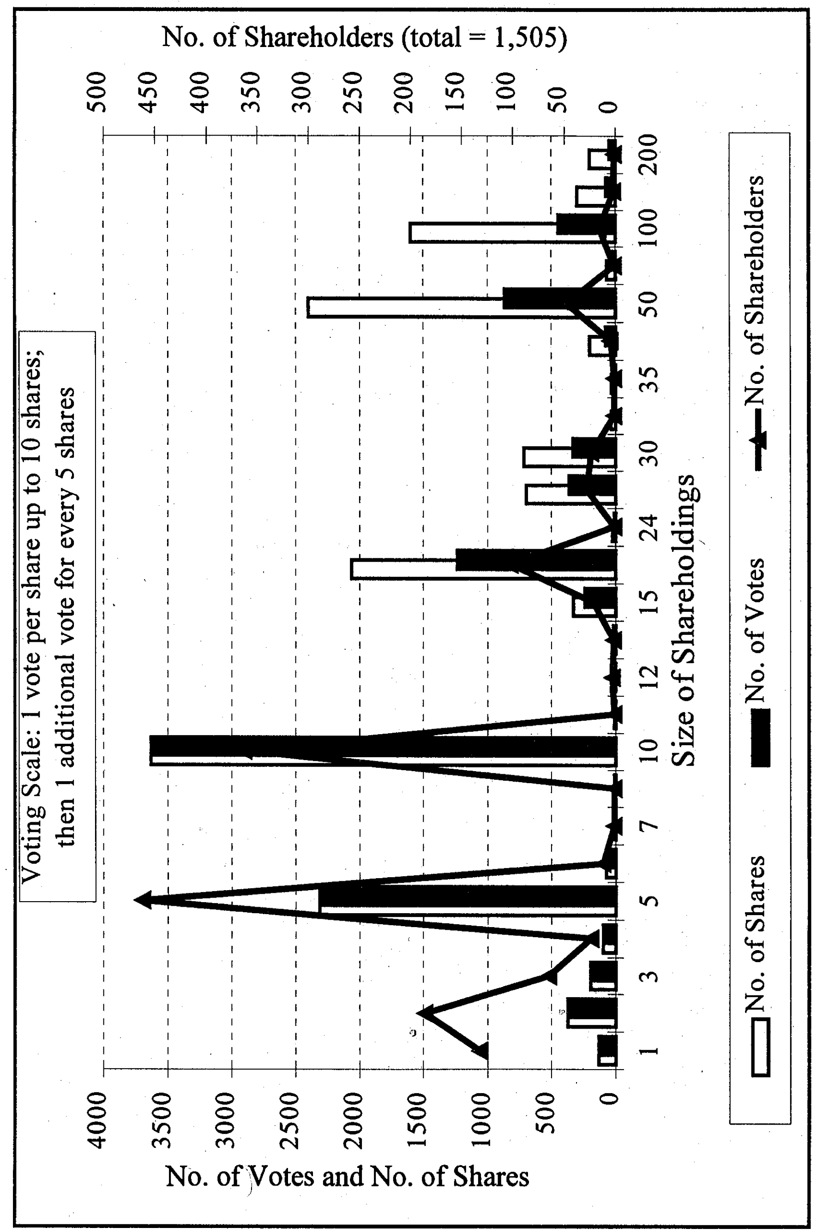
In Virginia, meanwhile, the general thrust of chartering policy during the antebellum period was to limit the power of the largest investors by means of graduated voting scales. A Virginia law of 1836 regulating all manufacturing corporations specified a fairly flat (i.e., democratic) voting scale: one vote for each share up to 15, one vote for every five shares from 15 to 100, and one vote for each increment of 20 shares above 100 shares. Under legislation passed in 1837, railroad shareholders in Virginia were allowed one vote for each share up to ten shares and then one vote for every ten additional shares. (*Laws of Virginia* 1836-37: 108; *Charter for the Richmond* . . . : 19). A dozen years later, the state legislature, in a much debated measure, approved a revised voting structure for all joint-stock companies that standardized voting on the following scale (*Code of Virginia* 1849: Tit. 18, Ch. 57, Sec. 10):

one vote for each share from 1 to 20;
one vote for every two shares from 21 to 200;
one vote for every five shares from 201 to 500; and
one vote for every ten shares above 500.

This scale remained in place until the eve of the Civil War.

How such schemes played out in practice remains a subject to be explored in company archives, but a published list of shareholdings in a Virginia company in 1834 offers a tantalizing glimpse. The shareholders of an internal improvements company, the James River and Kanawha Company, had one vote for each share

Figure 2: Shareholders, Shares, and Votes: James River and Kanawha Co. (VA), 1834



up to ten, then an additional one vote for every additional five shares. Figure 2 indicates how many shareholders (on the right y-axis) there were at each level (size) of shareholding and how shares and votes (on the left y-axis) were distributed across levels of shareholding. Of a total of some 1,500 shareholders, the vast majority of shareholders—about 1,150—held only 5 or 10 shares each. The rest of the shareholders clustered at the 20-, 50-, and 100-share levels. Because the graduated voting scale permitted one vote per share for 10 shares or less, the majority of shareholders had exactly as many votes as shares, but above the 10-share level voting power declined rapidly. The largest shareholders—those holding 200 shares each—had only 42 votes each; in other words, the graduated scale effectively reduced their voting power to 21 percent of what it would have been, had they been entitled to one vote per share.

Although practice was not as standardized in South Carolina, which generally granted fewer charters, graduated voting scales were certainly well known there, too. One of the most detailed was that of the South Carolina Railroad, the first long-distance railroad in operation in the U.S. The original charter, granted in

Figure 3: South Carolina Railroad Company's Voting Rights, ca. 1828

Manner of voting at elections.

SEC. 6. *And be it further enacted by the authority aforesaid,* That in the said election for president and directors, the vote shall be taken by the following scale: The owner of one or two shares shall be entitled to one vote; the owner of not less than three shares nor more than four shares, shall be entitled to two votes; the owner of not less than five nor more than six shares, shall be entitled to three votes; the owner of not less than seven nor more than eight shares, to four votes; the owner of not less than nine nor more than eleven shares, to five votes; the owner of not less than twelve nor more than fifteen shares, to six votes; the owner of not less than sixteen nor more than twenty shares, to seven votes; the owner of not less than twenty-one nor more than twenty-six shares, to eight votes; the owner of not less than twenty-seven shares nor more than thirty-three shares, to nine votes; the owner of not less than thirty-four shares nor more than forty shares, to ten votes; and the owner of every ten shares above forty, shall be entitled therefor to one vote. Any person being a subscriber

Source: "An Act to Amend an Act Entitled 'An Act to Authorize the Formation of a Company from Constructing Rail Roads or Canals', From the City of Charleston, to the Towns of Columbia, Camden and Hamburg," 30 January 1828, in *The Charter and Other Acts of the Legislature, in Relation to the South-Carolina Rail Road Company, . . .* (1851: 67).

1827, and an amendment the following year both spelled out a graduated voting scale with eleven steps to be used in electing the company's president and directors (see Figure 3). It began with one vote for one or two shares and specified gradually widening increments up to 10 votes for 34 to 40 shares. Thereafter, shareholders received one additional vote for every ten shares above forty. As Figure 1 indicated, this put in place a relatively democratic form of governance, a tendency enhanced by the fact that the scale came into play only in elections. Policy matters that were put to a vote of the shareholders would therefore have been decided on a one-vote-per-person basis (barring by-laws to the contrary). Archival research will help to clarify actual practice, but it is worth noting at least anecdotal evidence that some southern railroads in the U.S. as late as the late 1840s were using graduated scales in the election of directors but otherwise conducted votes by "acclamation" (see, for example, *A Convention* . . . 1847).

Not all South Carolina corporations had as elaborate a voting scale as the South Carolina Railroad, and the general pattern in the state was one of great diversity. Of 61 charters granted by the South Carolina legislature from 1825 through 1838, nearly half did not specify a system of voting rights, which meant that their shareholders had one vote per person if the by-laws specified nothing different. Only 5 of the 31 that did spell out voting rights mandated the modern system of one vote per share; none of these companies, it might be noted, had a capital higher than $500,000. The other 26 specified graduated scales, the authorized capitalization of these firms running the gamut from $6,000 to $6 million. In line with emerging practice in New York and Massachusetts, graduated scales were also more likely to be found among public-service corporations such as turnpike companies and railroads. Indeed, South Carolina legislation passed in 1827 mandated a graduated voting scale for all incorporated turnpike, bridge, and ferry companies, unless the charter explicitly provided otherwise (South Carolina *Statutes at Large* 1825-1838). Two decades later, South Carolina passed legislation mandating one vote for every share, but this applied only to manufacturing corporations (South Carolina *Statutes at Large* 1847: no. 3028). With this step, the state brought itself in line with northern practice, though at a significantly later time.

In short, the practice of placing political restrictions on the power of capital within the corporation carried over from Alexander Hamilton's time well into the nineteenth century. At mid-century, graduated voting scales were the norm only in certain states or only in certain industries in certain states. New York, moreover, was most exceptional, having granted general incorporation with one vote per share to manufacturing corporations as early as 1811. It reaffirmed its exceptional status in 1850, when it passed a general railroad law that explicitly endorsed one-share, one-vote suffrage for the election of directors (*Laws of the State of New York* 1850: Ch. 140, § 5). Nonetheless, given the overall evidence, it seems reasonable to conclude that anyone who set out to incorporate a company in the United States in the 1830s or even the 1840s would surely have recognized graduated voting scales or a cap on total votes as widely practiced techniques of corporate governance.

D. Early Democratic Practice in Europe

Efforts to limit the power of the largest investors were by no means a purely American phenomenon. As suggested above, the practice was widely known in eighteenth-century Britain, and there, too, it carried over into the nineteenth century.[8] As in the U.S., however, practice was mixed. Figure 4 offers an example of a graduated voting scale from the charter of the Great Western Railway, one of the first generation of British railroads. Its charter received official sanction in 1835, and its moderately democratic graduated scale gave shareholders one vote each for the first twenty shares and then one vote for each additional five shares. More systematic evidence regarding railroad corporations may be gleaned from Bradshaw's guide to "All the Railways in the United Kingdom,"

Figure 4: Great Western Railway's Voting Rights, 1835

And be it further Enacted, That at all general and special general meetings held by virtue of this Act, all persons and corporations who shall have duly subscribed for or bedome entitled to any share or shares (not exceeding Twenty) in the said Undertaking, and their respective successors, executors, administrators and assigns, shall have a vote for each such share; and all such persons and corporations as aforesaid, as shall have subscribed for or become entitled to more than Twenty shares in the said Undertaking, their respective successors, executors, administrators and assigns, shall, over and above the Twenty votes which they shall respectively have for or in respect of the first Twenty shares, have an additional vote for every Five shares which they shall have subscribed for or shall have become entitled to in the said Undertaking beyond the number of Twenty shares; and such vote or votes may be given by such

Directing how Subscribers shall vote at meetings.

Source: *An Act for Making a Railway from Bristol to join the London and Birmingham Railway near London, to be called "The Great Western Railway" with Branches therefrom to the Towns of Bradford and Trowbridge, in the County of Wilts*, 31 August 1835, Acts of Parliament 5. Will. IV, Sess. 1835.

8 The research on Britain is the least advanced at present and only the sketchiest of details can be presented here.

which began publication in 1851 and included "Scale of Voting" in its description of many (though not all) railroads. This source indicates that one vote per share was a well-known alternative to the common law by mid-century, as it was in the U.S.. A preliminary survey indicates, however, that many companies—perhaps the preponderance—had graduated scales that resembled the Great Western Railway's, though they differed in the details (Bradshaw's 1851).

On the Continent, meanwhile, graduated voting scales and caps on total votes seem to have been more widely in practice than was the case in either the U.S. or Britain.[9] As noted earlier, the Prussian railroad promoter David Hansemann commented in print on methods of voting in corporations. He himself favored a compromise between what he termed the democratic and aristocratic modes of governance. The compromise included a lower threshold or floor, below which a shareholder would have no votes; an upper threshold or a ceiling, beyond which a shareholder would gain no additional votes; and between the two, a graduated scale (Hansemann 1837: 116). In an appendix to the book in which he expressed these views, he reprinted the Prussian statute of the Rhenish Railroad, approved in 1835, and that of the Prussian-Rhenish Railroad from 1836. Both followed very closely the scheme that he favored. The Prussian-Rhenish Railroad's charter (see Figure 5) set a lower threshold for suffrage at three shares; the Rhenish Railroad put it at four shares. Both also set a maximum number of votes that any shareholder could cast: the Prussian-Rhenish Railroad put it at 40 votes for 1,000 or more shares, while the Rhenish Railroad granted representation only up to 100 shares, for which the shareholder was entitled to 5 votes. The Prussian-Rhenish Railroad's charter specified fourteen gradations between the two extremes; the Rhenish Railroad's statute called for four (Hansemann 1837: 141-2, 157-8).

Five years later, a German authority on the law of joint-stock corporations indicated that such scales were standard practice. First, however, Dr. Meno Pöhls explained in an 1842 legal handbook how joint-stock companies worked in theory, setting up an opposition between theory and practice that would echo through German handbooks on incorporation for the remainder of the century. "Votes [in a joint-stock corporation] are counted not according to heads but according to shares," he began, as if oblivious to current practice; "in an association of capitalists, in which the personages [of the shareholders] necessarily lie outside [the organization], the total capital specified in the charter (the total of the shares) is actually more the *socius* than the proprietor of the share. Whoever possesses more shares, therefore, is so many times *socius* as the total number of

9 Whether limitations on the power of capital in German corporations had their origins in British practice, as they did in the U.S., or perhaps in Dutch or French practice, remains to be explored. For brief comments on the Dutch and French background of the German corporation, see Lehmann (1898: 62-3).

his shares." For this reason, he continued, one share is entitled to one vote and "every member has as many votes as he possesses shares" (Pöhls 1842: 198).

Figure 5: Prussian-Rhenish Railroad's Voting Rights, 1836

Art. 32. Die Eigenthümer von weniger als drei Aktien sind nicht stimmberechtigt. Das Stimmrecht wird in folgendem Verhältniß ausgeübt: (K. §. 12.)

Für	3	Aktien	und	weniger	als	6	Aktien	1	Stimme
"	6	"	"	"	"	10	"	2	"
"	10	"	"	"	"	15	"	3	"
"	15	"	"	"	"	20	"	4	"
"	20	"	"	"	"	25	"	5	"
"	25	"	"	"	"	35	"	6	"
"	35	"	"	"	"	50	"	8	"
"	50	"	"	"	"	100	"	10	"
"	100	"	"	"	"	150	"	15	"
"	150	"	"	"	"	250	"	18	"
Für	250	Aktien	und	weniger	als	375	Aktien	22	Stimmen
"	375	"	"	"	"	500	"	25	"
"	500	"	"	"	"	750	"	30	"
"	750	"	"	"	"	1000	"	35	"
"	1000	"	"	darüber	....			40	"

Source: Hansemann (1837: 141-2).

But this, it turned out, was mere theory, for Pöhls quickly acknowledged that practice differed substantially. In particular, he noted that individual companies set a limit on the total number of votes that individual shareholders could cast. This was intended in part, he explained, to head off the disadvantages that would accrue if too great a number of votes accumulated in the hands of an individual and "especially to secure for every single share the possibility of participating in the [shareholders'] deliberations" (Pöhls 1842: 198-200). A cap on maximum votes, in other words, would both head off the dangers inherent in an accumulation of power and help to ensure a measure of representation for all shareholders (though not, of course, if a lower threshold were in place).

Other evidence indicates that graduated voting scales were widely used among Prussian railroads and banks at mid-century. In "a handbook for businesspeople, private individuals, capitalists, and speculators" published in 1853, Dr. Julius Michaelis reported in minute detail on all German railroads then in operation. Of the eleven earliest and largest Prussian railroads, eight had graduated voting scales similar to those that David Hansemann showcased in the

appendix to his book.[10] Among German banks, the practice was even more widespread at this time. Constituting what might be described as a "democracy of plutocrats," the general assembly of shareholders of the Prussian Bank, founded in 1765 and opened to private shareholders in 1846, was limited to the 200 largest shareholders, each of whom was entitled to one vote only "without consideration of the number of his shares" (Hübner 1854: 2/4). The *Disconto-Gesellschaft* in Berlin, similarly, allowed only shareholders of at least 1,000 Thaler (about $700) to vote in the general assembly and each had one vote only (Hübner 1854: 2/98).

More common among German banks, however, were voting scales like those in use on the railroads. The 1850 Prussian charter of the *Bank des Berliner Kassen-Vereins* gave shareholders one vote for every five shares up to 45, then capped total votes at 10 each for those who held more than 45 shares (Hübner 1854: 2/15). The *Leipziger Bank*, originally chartered by Saxony in 1839 and rechartered at ten-year intervals, employed a similar scale, capped at 10 votes, though much less compressed; it specified eleven levels of share ownership, the last yielding 10 votes for 201 or more shares. Other examples among joint-stock banks included the *A. Schaafhausen'sche Bankverein* in Cologne, the *Bank für Handel und Industrie* in Darmstadt, the *Rostocker Bank*, and the *Disconto-Kasse* in Bremen (Hübner 1854: 2/69, 2/100, 2/107, 2/119).

Both railroad corporations and banks in Germany sometimes adopted a lower threshold on voting rights, as Hansemann had recommended, though this was found more often in railroad companies than in banks. Nine of the eleven Prussian railroad charters mentioned earlier, for example, set lower thresholds that ranged from three to ten votes (see note 10). According to Pöhls, writing in 1842, this practice was developed by the larger companies in response to the "inconvenience" (*Unbequemlichkeit*) in voting occasioned by the division of their capital into many small shares; as he duly noted, however, this left the smallest shareholders without any representation in company affairs (Pöhls 1842: 198-9). Two German banks—the *Anhalt-Dessauische Landesbank* and the *Ritterschaftliche Privat-Bank* in Pomerania—seem to have been the only ones to impose a lower threshold (of five and four shares respectively; Hübner 1854: 2/18, 2/86). In this respect, Continental practice departed from the American, for no corporate charter in the antebellum United States, to my knowledge, ever failed to give the smallest shareholder one vote.

In neighboring France, meanwhile, a practice similar to the German prevailed in the middle decades of the nineteenth century. Indeed, charters often specified

[10] Michaelis (1854: 30, 34, 39, 49, 76, 87, 141, 189, 220, 241, 252). The eleven lines were the Berg-Mark, Berlin-Anhalt, Berlin-Hamburg, Berlin-Stettin, Cologne-Minden, Düsseldorf-Elberfeld, Magdeburg-Leipzig, Upper Silesian, Rhenish, Stargard-Posener, and Thuringian railroads. Although this book reported on conditions ca. 1853, the author was careful to note changes since the companies had first incorporated.

both a lower threshold in share ownership and an upper threshold on the number of votes a shareholder could cast (Freedeman 1979: 43). Of thirteen railroad charters issued between 1823 and 1845, all required voting members of the general assembly to hold at least three shares and most allowed a shareholder to cast no more than three or five votes (the only exception was a company that set an upper threshold of ten votes). The charters of two major lines, the Paris à Orleans (see Figure 6) and Paris à Rouen railroads, capitalized at 40 million francs and 36 million francs respectively, allowed one vote for every twenty shares (500 francs each), effectively disenfranchising those who held less than twenty shares, and set the upper threshold at five votes total (Cerclet, *passim*). At mid-century this general approach to voting rights was still actively practiced and not confined to railroad corporations. Voting rights in the *Société générale de Crédit mobilier*, chartered in 1852 and an important model of modern banking at mid-century (Kindleberger 1993: 111), were restricted to the largest 200 shareholders, and they received one vote for each forty shares up to a maximum of five votes (or ten votes, including proxies). In a moderately democratizing departure from railroad practice, however, anyone who counted among the largest 200 shareholders but owned less than forty shares also received one vote (Hübner 1854: 199).

Figure 6: Paris à Orleans Railroad's Voting Rights, 1838

46. Les déliberations de l'assemblée générale sont prises à la majorité des voix des membres présent.
47. Vingt actions donnent droit à une voix, le même actionnaire ne peut réunir plus de sinq voix. — En cas de partage, la voix du président est prépondérante.
48. Le nombre d'actions de chaque actionnaire est constaté par sa carte d'admission.

Source: Cerclet (1845: 437).

On a spectrum running from democratic to plutocratic, then, American and European methods of granting corporate suffrage seem to have been relatively democratic at mid-century. To be sure, at least two significant differences obtained between Continental and Anglo-American practice. On the one hand, the use of graduated scales seems to have been more widespread in France and Germany than in the U.S. or Britain during these years; on these grounds, Continental practice qualified as more democratic. But, on the other hand, even the smallest American shareholders routinely had the right to vote, whereas in France and Prussia the smallest shareholders were frequently disenfranchised. In

this respect, American practice might be judged more democratic. Overall, it seems pretty much a draw.

E. The Remarkably Rapid Turn Toward Plutocracy in the U.S.

From these beginnings, founded on long tradition, graduated voting scales virtually disappeared in the United States between the 1840s and the 1880s. In fact, by mid-century, practice had already begun to shift perceptibly toward the modern one-share, one-vote rule in many states. The last Connecticut charter to cap the votes of individual railroad shareholders at one-tenth of the total votes was granted in 1841; thereafter one vote per share become the rule (Gregg/Pond 1851). New Jersey passed legislation in 1846 that spelled out general guidelines for incorporation: "unless otherwise provided in their prospective charters," it read, each share would count for one vote. An observer writing in *Hunt's Merchants Magazine* (New York) in 1850, moreover, regarded the situation in which one individual owned the majority of a corporation's stock and, as a consequence, controlled the corporation to be a relatively new one. Traditional practice, he suggested, had prevented such a concentration of control: "The early corporations of our State attempted to guard against the dangers of so alarming a power, by according to large shareholders a smaller ratio of elective efficiency than was accorded to smaller stockholders," he reported. "[B]ut 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" (*Hunt's Merchants Magazine* 1850: 630). Indeed, New York, as we have seen, was the earliest to abandon traditional constraints on the power of large capitalists, and such constraints were well gone before the Civil War.

Elsewhere, however, strong vestiges remained, and the movement that made one vote per share the norm continued apace during the Civil War and accelerated afterwards. At the federal level, corporate charters granted to the transcontinental railroads in the 1860s and early 1870s uniformly specified one vote per share.[11] So, too, did the 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 (*U.S. Statutes* 1863: Ch. 58, § 38; 1854: Ch. 106, § 11).

[11] The charters for the Union Pacific, Atlantic and Pacific, and Texas Pacific railroads are found, respectively, in *U.S. Statutes* (1862), Ch. 120, Sec. 1; (1866), Ch. 278, Sec. 1; (1871), Ch. 122, Sec. 2. The 1862 charter for the Union Pacific Railroad initially limited shares to two hundred per person, but this provision was repealed two years later.

In the decades after the Civil War, almost all other states followed suit in adopting one vote per share as the rule. Virginia took a significant step away from graduated scales in 1871. In 1860, it had simplified, though not yet eliminated, the 1849 voting scale that applied to all corporations; under the revised code of 1860, each share up to ten received one vote and shareholders received one additional vote for every four shares above ten (*Code of Virginia* 1860: Tit. 18, Ch. 57, § 10). In 1871, however, it abolished graduated voting scales for corporations chartered via a judicial process (a form of general incorporation that it had established in the mid-1850s). Still, the formal requirement that corporations created via special legislation adhere to the state's standardized voting scale was not removed until the 1880s (*Laws of Virginia* 1870-71: Ch. 277). About that time, South Carolina also moved to what was rapidly emerging as the plutocratic norm, passing legislation that mandated one vote per share for railroads in 1882, for manufacturing corporations in 1886, and for most other corporations in 1891 (*General Statutes of So. Car.* 1891: Ch. 46).

To be sure, traces of the traditional practice remained throughout the nineteenth century. One of the very last states to come around was Massachusetts, which had been an early and energetic incorporator. Its manufacturing corporations, as we have seen, 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, Sec. 5), and a general revision in 1882 also left it intact. Now, however, municipalities, the Commonwealth, and other railroad corporations were allowed to vote the whole number of shares that they owned (*Mass. Public Statutes* 1862: 611), suggesting pretty clearly that the intent was to restrict the power of large *individual* investors. Only after the turn of the century, apparently, did the one-tenth restriction disappear altogether in Massachusetts.

Massachusetts was the outlier in this regard, however, for elsewhere in the United States a remarkable revolution in corporate governance had taken place as democratic constraints on the power of large capitalists in the corporation gave way by the 1880s to a plutocratic system in which the power of individual shareholders was weighted according to their investment. In some sense, this now seems "normal" to us—even more democratic, if one does not think too deeply about it. But in the nineteenth-century context, this revolution was remarkable in two ways. Stepping back to take the larger American political economy in view, we see that the removal of suffrage constraints on property rights in the corporation—that is, increasing *plutocracy*—proceeded apace with a quite opposite movement in the political sphere to remove property constraints on popular suffrage—that is, a movement toward increasing *democracy* (though still limited in law or practice to white males). Thus during the last half of the century, suffrage in the two spheres had evolved in radically different directions in the

U.S. In this sense, the revolution in shareholder control may be seen as part of a larger transformation by which the modern—distinctively American?—bifurcation of polity and economy came into being, the normative bifurcation that allowed Henry Ford to declare in the early twentieth century that "democracy stops at the factory gates." In the evolution of power at the uppermost levels of the American corporation, the shift from relatively democratic to more plutocratic forms of governance constituted an integral step in the process by which, as remarked earlier, American corporations came to be regarded as "private" and the space of the "public" in the U.S., accordingly, shrunk (cf. Mitchell 1991).

F. Persistence of Democratic Practice in Europe

The extent to which shareholder voting rights had been transformed in the U.S. seems doubly remarkable when placed in comparative perspective, for events did not progress nearly so fast or so far in Europe during these years.[12] In France, charters were initially issued individually, and an upper threshold on the number of votes that a shareholder could cast was the norm (Cellérier 1905: 98). In 1867 France shifted to a system of general incorporation, and under this legislation, according to an 1870 legal handbook aimed at a practical audience, the number of votes to which each shareholder was entitled could simply be specified in the statutes of joint-stock companies (*société anonymes*)—but with a crucial qualification: in important deliberations in the general assembly of shareholders (including the election of top administrators), no shareholder could cast more than ten votes (de Nancy 1870: 325d). An 1898 treatise on French commercial law and judicial practice, published in English, affirmed that this upper threshold remained in place (Goirand 1898: 85), while just after the turn of the century a student of joint-stock corporations in France and other European countries indicated that lower thresholds remained the rule in France. This author was less clear, however, about the extent to which upper thresholds remained the practice, though he did take the time to argue against them (Cellérier 1905: 90-1, 98).

In Britain, too, graduated scales certainly remained a familiar practice from the 1860s through the end of the century, but, interestingly, the common-law rule of one vote per person was often used in practice. Thomas Tapping published "a little Handbook on Joint Stock enterprise" in 1866, in order, as he explained, to give his readers "an accurate knowledge of 'What to do,' and 'How to do it,' in

12 The challenging question of *why* this transformation took place in the U.S. will be pursued elsewhere; central elements of an explanation will surely be the heightened competition for capital after the Civil War as well as the "shopping around" of corporate attorneys for favorable charter provisions, both artifacts of the regulatory fragmentation inherent in the chartering of corporations by a multiplicity of state governments. On antebellum manifestations of these phenomenona, see Dunlavy (1994).

order to establish a Joint Stock Company" (Tapping 1866: 2-3). Legislation recently passed by Parliament, he informed his readers, had repealed all previous acts affecting corporations and his book thus summarized the provisions of the "Companies Act 1862." The act permitted the establishment of three kinds of companies, two well known and one new: familiar were the *limited* company, in which shareholders enjoyed limited liability (i.e., limited to the amount invested or subscribed), and the *unlimited* company, in which the investors were personally liable; new under the 1862 act was the *guarantee* company, in which each investor's liability in the event of bankruptcy was specified individually in the chartering documents. In each case, the company could be formed with or without a capital divided into shares. The joint-stock corporation, then, was a limited company on a share basis. To charter any of the three forms required the company's initial subscribers to file two legal documents, a memorandum of association and articles of association. For the guidance of all companies formed on a share basis, the law carried forward from previous legislation the famous "Table A," which provided ten pages of model provisions (Tapping 1866: 63-74).

Voting rights were to be specified in the articles of association, and Table A suggested a graduated scale (see Figure 7). This entitled the shareholder to one vote per share for the first ten shares, then reduced proportionally the voting power of those who held 11 to 100 shares and reduced even further that of shareholders with more than 100 shares.

According to Tapping, the graduated scale in Table A was mandatory for unlimited companies and for guarantee companies, but optional for limited companies. If the articles of association failed to specify voting rights, however, the scale in Table A took force by default (Tapping 1866: 7, 18, 63-74). To what extent or how long such constraints actually remained in use among limited companies are questions that will yield only to archival research, but it is certainly noteworthy that the mandatory default was a graduated scale through the remainder of the century.

British practice also retained a strongly democratic thrust by other means, however. Although firms could override the common-law default easily enough by specifying something different in their articles of association, the practice described earlier of deciding resolutions in shareholders' meetings first by a show of hands—perforce, one vote per person—reportedly continued in practice. According to the 1862 law, a "poll" or vote according to actual voting rights had to be demanded by at least five members of the assembly (see Fig. 7). Several handbooks on incorporation indicate that conducting votes by a show of hands remained accepted practice through the end of the century (Chadwyck-Healey 1886: 2, 239-40; Lindley 1889: 342; Chadwyck-Healey 1894: 992-3; Palmer 1905: 145-6).

Figure 7: Model Voting Rights in "Table A," 1862-1906

(42). At any General Meeting, unless a Poll is demanded by at least Five Members, a Declaration by the Chairman that a Resolution has been carried, and an Entry to that Effect in the Book of Proceedings of the Company, shall be sufficient Evidence of the Fact, without Proof of the Number or Proportion of the Votes recorded in favour of or against such Resolution.

(43). If a Poll is demanded by Five or more Members it shall be taken in such a Manner as the Chairman directs, and the Result of such Poll shall be deemed to be the Resolution of the Company in General Meeting. In the Case of an Equality of Votes at any General Meeting the Chairman shall be entitled to a Second or Casting Vote.

Votes of Members.

(44). Every Member shall have One Vote for every Share up to Ten: He shall have an additional Vote for every Five Shares beyond the First Ten Shares up to One hundred, and an additional Vote for every Ten Shares beyond the first Hundred Shares.

(45). If any Member is a Lunatic or Idiot he may vote by his Committee, Curator bonis, or other legal Curator.

Source: Tapping (1866).

Meanwhile, the use of graduated voting scales persisted to some measure as well. Handbooks on the law and practice of incorporation in Britain continued to include graduated voting scales among the options available to prospective incorporators. For example, the second edition of C.E.H. Chadwyck-Healey's *A Treatise on the Law and Practice Relating to Joint Stock Companies Under the Acts of 1862-1890: With Forms and Precedents*, published in 1886, suggested a graduated voting scale, though it also provided a model for companies that preferred one vote per share (Chadwyck-Healey 1886: 239-40). The third edition, published in 1894, still offered the graduated scale but this time explicitly noted that the one-vote-per-share system should be used if incorporators wanted to give power to the "largest proprietors" (Chadwyck-Healey 1894: 272).

Only after the turn of the century does there seem to have been a concerted movement away from the graduated scale. The author of a French study published in 1905 acknowledged that the English law of 1862 remained in force, but he maintained that graduated voting scales had fallen out of use in England because they did not meet a "practical need" (Cellérier 1905: 99). The same year, Francis Beaufort Palmer, in *Company Law: A Practical Handbook for Lawyers and Business Men*. . ., reported that it was very common for members to receive one vote per share, though even then it was not exclusively the rule (Palmer 1905: 144). The following year—1906—the Board of Trade, which had authority over company law, finally published a new Table A, this one specifying one vote per share for the first time, though the practice of voting initially by a show of hands apparently remained the norm (Smith/Stiebel 1907: 70-1). Even as late as 1916, Palmer acknowledged in the tenth edition of *Company Law* that graduated scales were still used (Palmer 1916: 170).

In Germany, too, graduated voting scales persisted much longer than in the U.S. An expert on German railroad law, Julius Herrmann Beschorner, confirmed that the practice continued in a legal handbook published in 1858. He opened a discussion of voting rights with words practically identical to Pöhls' more than a decade earlier: "The votes are counted not according to heads"—*nach Köpfen* was the phrase that both used—"but according to shares." Then he repeated the same argument—that the basic units (*Einheiten*) of an association were bundles of capital, not individuals, that the share was the *socius*, and so on. Therefore, he concluded, each share warranted a vote "and every member [*Mitglied*] must have as many votes as he or she possesses shares." Then, like Pöhls, he promptly left theory behind and turned to practice: "Nevertheless, on the grounds of expediency and fairness, a thoroughgoing enforcement of this principle in the charters had to be forsaken." In particular, he cited the problems that arose when a single shareholder accumulated a large number of votes. "Also," he observed, "the interest of the proprietor of many shares often collides with that of the proprietor of one or only a few." For this reason, railroad companies used graduated voting scales, and he offered the reader an example of a ten-step scale that "many joint-stock corporations" used. This began with 1 vote for 1 share, then 2 votes for 2 to 5 shares, and so on through seven more steps to 9 votes for 151 to 200 shares; for 201 or more shares, the shareholder was entitled to 10 votes and no more. Beschorner also noted that a number of railroad corporations retained a lower threshold on the right to vote (Beschorner 1858: 76-7). To this date, at least, nothing had changed.

Although much research remains to be done on the years from the 1860s to the early 1880s, it is clear that a significant change came in 1884 when the German *Reichstag* passed an extensive revision of corporation law.[13] The result—in formal terms, at least—was to reinforce the more democratic thrust of governance in German corporations. The legislation did away with the threshold required to attain the right to vote: "*Jede Aktie gewährt das Stimmrecht*"—Every

[13] The legislation is reprinted, among other places, in Weyl (1896: pt. 2, 217-21).

share affords the right to vote—declared *Artikel 190* (Ring 1893: 93, 450-1).[14] At the same time, the law endorsed the one-vote, one-share rule in principle, as earlier commentators had, but it still preserved the option for incorporators to choose to limit suffrage in various ways: "In the event that a shareholder owns several shares," it read, "the corporation statutes can limit the exercise of his voting right by setting a maximum amount or in gradations [*Abstufungen*] or by type of share." As an expert on trusts and cartels pointed out some years later, this meant that a corporation could, if it wanted, even allow only one vote per shareholder (Ring 1893: 450-1). Practice did not likely go so far, but the author of a 1905 German handbook on stocks and joint-stock corporations did note explicitly that the law's provisions allowed voting rights that diminished (*sich mindert*) in a fixed manner as the amount of capital increased. This constituted a safeguard, he explained, so that the "fate of the corporation" would not easily fall "into the hands of large shareholders" (Siemens 1905: 52).

And in 1904, remarkably, the author of a German treatise on the law of joint-stock corporations repeated practically word for word the explanation of theory, then practice, that Pöhls and Beschorner had expressed in 1842 and 1858, respectively. The practice of granting votes according to the number of shares owned, Dr. Karl Lehmann explained, reflected "the nature of the joint-stock corporation as a distinctive association of property [*ausgeprägter Realassoziation*], in which the person of the shareholder takes second place to the share." Thus the appropriate form of suffrage: "So many shares, so many votes." But Lehmann then proceeded to repeat just what Pöhls and Beschorner had emphasized a half century earlier: "Since the ruthless enforcement [*radikale Durchführung*] of this principle would give too much power to the largest shareholders, laws and charters frequently limited the voting rights as shareholdings increased." Whether German firms continued to use graduated scales can only be answered with firm-level research, but Lehmann noted, as others did, too, that German law left open the possibility of limiting the power of large shareholders (Lehmann 1904: 162-3).

In all three European countries, then, limitations on the power of large investors disappeared more slowly than in the U.S.. As the century drew to a close, they were becoming less and less common, but in neither Britain nor France nor Germany, unlike the U.S., had they disappeared altogether when the great debates about cartellization and trustification got underway in the 1880s and 1890s (Maschke 1969).

[14] Ring noted that this represented a real change and that it meant, among other things, that statute provisions that allowed certain, otherwise capable shareholders (*verfügungsfähige Personen*) to cast votes only by means of a proxy would no longer be permissible. Ring (1893: 450). This elliptical statement must have referred to female shareholders, who were traditionally not allowed to attend the shareholders' meetings. Weyl (1896: pt. 2, 107, 160) makes this explicit.

G. Further Movement Toward Plutocracy in the U.S.

In the U.S., meanwhile, voting rights continued to move further toward the plutocratic end of the spectrum during the last decades of the nineteenth century. Corporations began to divide their shares into classes of stocks, the most familiar division being between common and preferred stock, the latter generally claiming prior rights with regard to corporate profits or property. But, as Thomas Conyngton, author of several early twentieth-century handbooks on American incorporation, explained to prospective incorporators in 1908, there were other ways of classifying stock, and "[m]ost of these other classifications relate to the voting right. The simplest is a division of the stock into two classes, one class voting, the other not exercising this right" (Conyngton 1908: 67). In two publications after the turn of the century, Robert Liefmann, a recognized German authority on cartels and trusts, noted the emergence of this "very widespread practice" (Liefmann 1912: 71) in the U.S. and pondered its implications for corporate governance as well as the choice of corporate strategies. An "oligarchic condition" had become the norm with American corporations, he noted in 1912: "[A]lmost routinely a corporation is dominated, 'controlled'—as the technical expression goes—by a small group of powerful shareholders" (Liefmann 1912: 71). "[B]y possessing half of [only] the voting shares," he observed a few years later, "one controls the entire enterprise" (Liefmann 1918: 168). Concerned as he was to understand why so many mergers had taken place in the U.S. at the turn of the century, he thought that the contrary movement in Germany that ensured the right of every shareholder to vote had made the mass of small shareholders relatively more powerful and made takeovers more difficult.[15]

During the same years, another legal change, according to Conyngton, enhanced the rights of minority shareholders in ways that—quite unintentionally—made it easier for a minority to gain control. This was the practice of cumulative voting, which yielded a kind of proportional representation for shareholders (Conyngton 1905: 86-96; 1908: 253-5; Gordon 1994). New York statutes defined it in the following way:

> The certificate of incorporation of any stock company may provide that at all elections of directors of such corporation, each stockholder shall be entitled to as many votes as shall equal the number of his shares of stock multiplied by the number of directors to be elected, and that he may cast all of such votes for a single director or may distribute them among the number to be voted, or any two or more of them as he may see fit, which right, when exercised, shall be termed cumulative voting (Conyngton 1908: 253-4).

[15] The difference was one of degree, not kind, for the German legislation (*Novelle*) did allow special kinds of stock to have enlarged voting rights, but it still meant that one had to contend with more shareholders and therefore that the obstacles to collective action were that much greater.

The first state to adopt cumulative voting was Illinois. Out of a major political battle at the Illinois constitutional convention in 1870 came a system of proportional representation for the Illinois House of Representatives, and this concept was then promptly extended from the political to the economic sphere. As Jeffrey Gordon explains, "The principle having prevailed [with respect to state representatives], the constitutional convention also required cumulative voting in the election of directors of private corporations." Within ten years, seven states had, like Illinois, made cumulative voting mandatory; by 1900 the group totaled eighteen and additional states explicitly permitted the practice (Gordon 1994: 142-5).[16]

The intention behind cumulative voting, as Conyngton explained, was "to secure minority representation on the board." But the practice, as Liefmann suggested, could also make it easier for a minority interest to gain control of the board of directors, which did not necessarily protect the small shareholder and could result in an outcome even less desirable than majority control. Indeed, Conyngton warned as much in a 1908 manual on incorporation. He touted cumulative voting as "one of the most effectual means of securing minority representation on the board of directors," *provided* that minority interests organized themselves before the election. Cumulative voting "must . . . be used with intelligence," he cautioned, "or the results are sometimes surprising. On occasion, an unsuspecting majority has so scattered its votes that a compact, well-handled minority has actually gained control of the board. . . . Such an election, though somewhat unexpected in its results, is legal and would be upheld wherever cumulative voting is employed" (Conyngton 1908: 253-5).

The practical effect of these developments as the twentieth century opened was that Americans—paradoxically, for a people so proud of their democracy—enjoyed a lesser degree of what William N. Parker has termed "shareholder democracy" in the corporate world than their European counterparts (Parker 1991: 961 et seq.). It was this condition—and the sharp contrast with conditions in Germany—that led Liefmann to declare the German style of corporate governance to be "extraordinarily democratic" and American corporations, by comparison, to be "much less democratically organized" (Liefmann 1912: 71). From a vantage point during the war, he returned to the German-American comparison to ponder its implications for the choice of corporate strategy. Plutocratic suffrage inside the American corporation had facilitated a concentration of wealth that astounded him and left him not only puzzled over the American concept of democracy but also convinced that the more democratic style of corporate governance that prevailed in Germany made it much harder to carry out mergers and consolidations (Liefmann 1918: 173, 197). In the plutocratic

[16] Gordon (1994: 145) thinks "the high water mark of mandatory cumulative voting was probably the late 1940s."

United States, in contrast, they certainly proved much easier to achieve. Whether the plutocratic form of corporate governance was indeed a vital, though overlooked, precondition of the great merger movement, as Liefmann thought, is the subject of ongoing research.

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