THE YALE LAW JOURNAL

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The Evolution of Shareholder Voting Rights: Separation of Ownership and Consumption

ABSTRACT. The nineteenth century saw the standardization and rapid spread of the modern business corporation around the world. Yet those early corporations differed from their contemporary counterparts in important ways. Most obviously, they commonly deviated from the one-share-one-vote rule that is customary today, instead adopting restricted voting schemes that favored small over large shareholders. In recent years, both legal scholars and economists have sought to explain these schemes as a rough form of investor protection, shielding small shareholders from exploitation by controlling shareholders in an era when investor protection law was weak.

We argue, in contrast, that restricted voting rules generally served not to protect shareholders as investors, but to protect them as consumers. The firms adopting such rules were frequently local monopolies that provided vital infrastructural services such as transportation, banking, and insurance. The local merchants, farmers, and landholders who used these services were the firms' principal shareholders. They commonly purchased shares not in the expectation of profit, but to finance collective goods. Restricted shareholder voting assured that control of the firms' services would not fall into the hands of monopolists or competitors. In effect, the corporations had much the character of consumer cooperatives. This perspective also sheds light on the unusual importance given to the doctrine of ultra vires in the nineteenth century.

While current legal and economic scholarship has focused incessantly on the separation between ownership and control, the prior separation between ownership and consumption, accomplished by the late nineteenth century, was another fundamental but generally overlooked turning point in the history of the business corporation. Understanding this transformation throws light not just on historical practices, but also on contemporary debates over deviations from the rule of one-share-one-vote.

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INTRODUCTION

Adam Smith, an early critic of business corporations, identified two principal shortcomings of that form of organization. The first was that corporations were commonly monopolies, to the disadvantage of their consumers.[1] The second was what we would now label as agency costs.[2] Today, the latter problem—the costs imposed by managers acting opportunistically toward shareholders, or by controlling shareholders acting opportunistically toward non-controlling shareholders—dominates discourse about corporate governance.[3] Recently, scholarship in both economics and law has also come to view agency costs as the major element shaping the historical evolution of the corporate form, interpreting the peculiar features of corporate law and practice in earlier periods as means to protect small shareholders from exploitation by managers or controlling shareholders.[4] This is particularly true of the nineteenth century—the era that established the principal forms of enterprise organization in their modern garb, including conspicuously, the business corporation.[5] Some scholars have even suggested that corporate governance practices from the early nineteenth century might usefully be adopted today in developing economies that, like even the most advanced economies of the nineteenth century, lack strong legal institutions for shareholder protection.[6]

This approach, however, is anachronistic. In the late eighteenth and early nineteenth century, the main economic evil linked to the corporate form was not managerial or controlling-shareholder opportunism toward small shareholders, but rather Adam Smith's first concern: monopoly. Prior to 1860, most corporate charters were granted by special acts of the state legislature, and

1. 1 ADAM SMITH, THE WEALTH OF NATIONS 116-17 (P.F. Collier & Son 1909) (1776).

2. 3 *id.* at 111-12.

3. *See, e.g.*, John Armour, Henry Hansmann & Reinier Kraakman, *Agency Problems and Legal Strategies*, *in* THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 35 (Reinier Kraakman et al. eds., 2d ed. 2009) [hereinafter ANATOMY OF CORPORATE LAW].

4. *See infra* notes 14-15.

5. After more than a century of relative stability, we are now in the midst of another period of rapid change in legal forms of enterprise organization. *See* Henry Hansmann, Reinier Kraakman & Richard Squire, *The New Business Entities in Evolutionary Perspective*, 2005 U. ILL. L. REV. 5 (describing the trend in new business forms as "extending strong entity shielding to unrestricted types of entities").

6. *See, e.g.*, ALDO MUSACCHIO, EXPERIMENTS IN FINANCIAL DEMOCRACY: CORPORATE GOVERNANCE AND FINANCIAL DEVELOPMENT IN BRAZIL, 1882-1950 (2009).

as a consequence often had a degree of monopoly power conferred on them.[7] More importantly, many corporations were natural monopolies due to economies of scale. The peculiar features of early corporate law and practice were frequently designed to minimize the abuse of that market power. They did not seek to protect the corporation's shareholders as investors, as is conventionally assumed today, but rather to protect them as *consumers*.

To understand this, it is important to recognize a critical but underappreciated feature of corporate enterprise in the early Republic—namely, the lack of separation between ownership and consumption. In many corporations of the time, the principal shareholders were also the firm's principal customers. These customers were the owners of businesses—farmers, merchants, and manufacturers. And the corporations were commonly providing infrastructural goods and services that were critical for the success of those local businesses.

There were two reasons for this pattern of ownership. First, for many corporations, local merchants and farmers were apparently the most effective source of capital at a time when capital markets were poorly developed and governmental financing was not generally available. Second, by controlling their service providers, the consumers protected themselves from monopolistic exploitation. Early American business corporations were often, in effect, consumer cooperatives. And, as is generally the case with cooperatives,[8] they served to protect their consumer-owners from the exercise of monopoly power.

Appreciation of this ownership pattern illuminates important features of early business corporations that have recently attracted attention from scholars in both economics and law. Most prominent in this respect are the peculiar rules of shareholder voting in this era. In the late eighteenth century and much of the nineteenth century, U.S. corporations frequently had schemes of shareholder voting that deviated from the one-share-one-vote rule that subsequently became the norm.[9] In particular, many nineteenth-century corporations restricted voting in ways that made it difficult for a single shareholder to obtain control of the firm. Such voting schemes were of three types: *graduated voting*, in which the number of votes exercisable by a single

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7. As Justice Scalia has recently noted, "[m]ost of the Founders' resentment towards corporations was directed at the state-granted monopoly privileges that individually chartered corporations enjoyed." Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 387 (2010) (Scalia, J., concurring).

8. HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE 24-25, 122-25, 150 (2000).

9. There is, to be sure, deviation from that norm again today, for reasons not universally understood. These modern deviations are progressive rather than regressive.

shareholder increased less than proportionately with the number of shares owned; *capped voting*, in which a ceiling was imposed upon the total number of votes that a single shareholder could exercise regardless of the amount of stock he or she held; and *per capita voting*, which is the rule of one shareholder, one vote.

These restricted voting rules first came clearly to the attention of legal scholars through the work of David Ratner[10] and Colleen Dunlavy,[11] both of whom documented the frequency of the phenomenon and offered a similar interpretation of it. That interpretation did not focus on economic factors such as agency costs and monopoly, but instead saw restricted corporate voting rights as driven by, as Dunlavy put it, a "social preference for particular types of governance."[12] In particular, they reflected a "social conception of the corporation" that was more "democratic" than the "plutocratic" approach to governance represented by the rule of one-share-one-vote.[13] We will call this "the democracy theory."

Subsequently, the reasons for the restricted voting rules have been taken up by a number of other scholars, all of whom have—in contrast to Ratner and Dunlavy—emphasized explanations rooted in economic considerations. Specifically, reflecting the contemporary emphasis on agency costs, these authors almost uniformly interpret restricted voting rules as "designed to attract the participation of small shareholders by offering them some measure of protection from dominance by large shareholders."[14] Under this view, restricted voting—which was usually imposed by the corporation's own individual charter—was "the most important protection offered to early-

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10. David L. Ratner, *The Government of Business Corporations: Critical Reflections on the Rule of "One Share, One Vote,"* 56 CORNELL L. REV. 1 (1970).

11. Colleen A. Dunlavy, *Social Conceptions of the Corporation: Insights from the History of Shareholder Voting Rights*, 63 WASH. & LEE L. REV. 1347 (2006).

12. *Id.* at 1354.

13. *Id.* at 1354-56 (suggesting that early Americans saw one-vote-per-share constructions as allowing shareholders to buy control of the company, a dangerous exercise of power); *see also* Colleen A. Dunlavy, *Corporate Governance in Late 19th-Century Europe and the U.S.: The Case of Shareholder Voting Rights*, *in* COMPARATIVE CORPORATE GOVERNANCE 5, 12-13 (Klaus Hopt et al. eds., 1998) (attributing the "aversion to plutocratic voting rights" both to the prevailing view that shareholders were "members" of the corporation, rather than providers of capital, and to the characteristic American fear of concentrated power).

14. Eric Hilt, *When Did Ownership Separate from Control? Corporate Governance in the Early Nineteenth Century*, 68 J. ECON. HIST. 645, 660 (2008); *see also* MUSACCHIO, *supra* note 6 (arguing that voting restrictions compensated for the weak institutional environment in early twentieth-century Brazil).

nineteenth-century small investors," thus compensating for the weakness of the corporate law of the time in affording adequate minority shareholder rights.[15] We will call this "the investor protection theory."

However, both the democracy theory and the investor protection theory have difficulty explaining two important elements of corporate voting patterns in the nineteenth century. First, why did restricted voting appear in certain industries—such as turnpikes, canals, railroads, banks, and insurance companies—while they were largely nonexistent in other industries, such as manufacturing? Second, why did restricted voting largely disappear from all types of corporations by roughly the end of the nineteenth century?[16]

We seek to shed light on these questions by offering an alternative explanation for the observed pattern of restricted voting in the nineteenth century. Our interpretation is essentially economic in character, attributing changes in shareholder voting schemes to the different economic purposes and problems associated with business corporations in the early nineteenth century compared to their present-day counterparts. In short, we argue that voting

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15. Hilt, *supra* note 14, at 648; *see also* Yoshiro Miwa & J. Mark Ramseyer, *Corporate Governance in Transitional Economies: Lessons from the Prewar Japanese Cotton Textile Industry*, 29 J. LEGAL STUD. 171, 199 (2000) (describing the adoption of similar voting restrictions by early nineteenth-century corporations in Japan and regarding these arrangements as minority protection devices against misbehavior by controlling shareholders); Aldo Musacchio, *Laws Versus Contracts: Shareholder Protections and Ownership Concentration in Brazil, 1890-1950*, 82 BUS. HIST. REV. 445, 449 (2008) (describing the maximum voting provisions and graduated, regressive voting scales in Brazil as mechanisms to balance voting power across investors of different sizes); Robert E. Wright & Richard Sylla, *Corporate Governance and Stockholder/Stakeholder Activism in the United States, 1790-1860: New Data and Perspectives*, *in* ORIGINS OF SHAREHOLDER ADVOCACY 231, 240 (Jonathan G.S. Koppell ed., 2011) (arguing that capped and graduated voting schemes in nineteenth-century U.S. corporations were "designed to mitigate agency problems between large and small shareholders"); Pedro Neves & Jaime Reis, Corporate Law vs. Company Charter: Shareholder Protection and Corporate Governance in Late Nineteenth Century Portugal (Aug. 2010) (unpublished manuscript) (on file with authors) (interpreting restricted voting provisions in Portuguese corporate charters as an investor protection device); Gonzalo Islas Rojas, Finance Without Law? An Analysis of Corporate Charters in a Laissez-Faire Environment (July 3, 2009) (unpublished manuscript), https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=SECHI2009&paper_id=65 (finding that charters for Chilean corporations included provisions favorable to outside investors during a period when Chilean corporate law was silent on such matters).

16. Both of these questions are well documented but so far unexplained in the literature. *See, e.g.*, Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 WM. & MARY Q. 51, 78 (1993) (noting that voting "[r]estrictions were sometimes applied to certain types of corporations but not to others, or they might be abandoned in a process of change that has never been fully traced or explained").

restrictions generally served as a consumer protection device in corporations that were, in a rough sense, consumer cooperatives.

This "consumer protection theory" goes far to explain the relative incidence across different industries and firm ownership structures. Nineteenth-century transportation companies (turnpikes, canals, and railroads), as well as banks and insurance companies, commonly had substantial market power; manufacturing firms, by contrast, did not. Moreover, the firms adopting voting restrictions were typically local monopolies that provided vital ancillary services to local merchants. With surprising frequency, those merchants were at the same time the principal customers and the principal shareholders of early business corporations, for two important reasons. First, local merchants had an interest in helping form and finance an element of economic infrastructure that would be important to the success of their businesses.[17] Second, this ownership pattern served to ensure that control over such an infrastructure element did not fall into the hands of profit-oriented investors who would charge the merchant monopoly prices for its use, or into the hands of one of the merchant's competitors, who would use their control to discriminate in favor of their own businesses and against others in terms of the price, quantity, or quality of services provided.

The consumer protection theory also helps explain why voting restrictions effectively disappeared from business corporations in the late nineteenth century. By then, local and state governments had taken on the primary responsibility for constructing and maintaining physical infrastructure such as roads and bridges. Railroads had become too long and capital intensive to be financed and controlled by essentially voluntary organizations, while capital markets developed to provide the necessary financing for private enterprise. Improvements in transportation and communication increased competition in banking and insurance, while governmental regulation made investor-owned firms increasingly viable. Exploitation of market power came to be managed by separate bodies of antitrust and rate regulation law rather than by corporate law. Separate statutes for cooperative corporations were adopted and used to organize, in a more viable form, the cooperatives that were employed in subsequent decades to deal with monopolies not well controlled by the state, as in agriculture. And restricted voting rules were easy to avoid over time, making them only a crude and temporary form of consumer protection, and one whose

17. *See, e.g.*, ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 28 (1977) (describing the creation of early U.S. corporations by merchants interested in obtaining "essential specialized ancillary services to support their profit-making commercial activities").

costs—in terms of weak governance and limited access to capital markets—did not need to be borne after superior substitutes were developed.

The consumer protection theory that we offer to explain nineteenth-century voting restrictions is strongly at odds with the investor protection theory. When a firm is a monopoly, there is a clear conflict of interest between the firm's investors and the firm's customers. The investors benefit most by having the firm charge monopoly prices, while the customers are best served by having the firm charge competitive prices—or, in fact, even prices that do no more than cover marginal cost, so that the firm effectively provides no return at all to the shareholders' investment. Consequently, if the firm is controlled by shareholders who are also major customers of the firm, the shareholders may prefer to keep the firm's prices low, and get the return on their investment in the form of low prices rather than high dividends. But this policy will not be attractive to shareholders who are not also customers of the firm. From the perspective of an investor in the corporation, the customer-shareholders of the firm are tunneling out its (potential) profits through their other transactions with the company.

In contrast to the substantial literature offering the investor protection theory of restricted voting rules, two authors, both writing in the legal literature, have suggested something analogous to the consumer protection theory. One is Donald Smythe, who, in a short but insightful comment on Dunlavy, proffers without further investigation the hypothesis that the restricted voting rules in corporations providing amenities such as bridges and turnpikes might be explained by their character as suppliers of local public goods.[18] The other is Joseph Sommer, who, in a thoughtful article on the historical development of banking in the first decades of the American Republic, observes that the banks of that era frequently had the character of merchants' "utilit[ies]," "clubs," "credit union[s]," or "cooperatives."[19]

It is a familiar notion that the twentieth century brought the separation of ownership and control in large U.S. business corporations. Less familiar, but surely as fundamental, was the prior separation of ownership and consumption that characterized the evolution of corporations in the nineteenth century. Appreciation of this separation and its causes helps us understand the differentiation of the corporate form, in the course of the nineteenth century,

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18. Donald J. Smythe, *Shareholder Democracy and the Economic Purpose of the Corporation*, 63 WASH. & LEE L. REV. 1407, 1416-18 (2006).

19. Joseph H. Sommer, *The Birth of the American Business Corporation: Of Banks, Corporate Governance, and Social Responsibility*, 49 BUFF. L. REV. 1011, 1021, 1034-45 (2001).

into the various distinct types that governed enterprise organization for most of the twentieth century: the business (joint-stock) corporation, the cooperative corporation, the nonprofit corporation, and the municipal corporation. The early chartered corporations that we focus on here, with restricted voting rules, in effect combined elements of each of these latter forms: formal ownership by virtue of capital investment as in a joint stock company, de facto consumer ownership as in a cooperative corporation, philanthropic funding as in a nonprofit corporation, and provision of local collective goods and services as in a municipal corporation.

After restricted voting gave way to one-share-one-vote, the latter rule dominated publicly held corporations in the United States for the following century, and in fact was a requirement for listing on the New York Stock Exchange from 1926 to 1985. In recent years, however, the consensus in favor of that rule in the United States has become frayed. Highly prominent firms, such as Google and Facebook, have adopted—via dual-class stock—voting allocations that are effectively the opposite of restricted voting, with substantially more votes per share allocated to the largest shareholders than to smaller shareholders—a pattern we might call "augmented voting." If this trend continues, then shareholder voting rules in U.S. publicly-traded business corporations will have followed what appears to be a continuous shift, over two centuries, from restricted voting to pro rata voting to augmented voting. But there is no consensus on the reasons for the recent embrace of augmented voting—or on whether it will last or whether it might be beneficial for society in general.[20] Moreover, a prominent proposal for a return to restricted voting

20. Most of the existing economic literature underscores the superior incentives generated by the one-share-one-vote rule. *See, e.g.*, Renée Adams & Daniel Ferreira, *One Share-One Vote: The Empirical Evidence*, 12 REV. FIN. 51, 52 (2008) ("The idea that the 'one share-one vote' principle is desirable is what might be considered the dominant view in the literature."); Paul A. Gompers, Joy Ishii & Andrew Metrick, *Extreme Governance: An Analysis of Dual-Class Firms in the United States*, 23 REV. FIN. STUD. 1051 (2010) (finding an association between dual-class shares and lower firm value); *see also* Mike Burkart & Samuel Lee, *One Share-One Vote: The Theory*, 12 REV. FIN. 1, 41 (2008) (describing the tradeoffs associated with the one-share-one-vote rule, and concluding that "mandating one share-one vote may not improve overall efficiency"). For recent works defending the potential benefits of augmented voting, see Zohar Goshen & Assaf Hamdani, *Concentrated Ownership Revisited: The Idiosyncratic Value of Corporate Control* (Columbia Univ. Ctr. for Law & Econ. Studies, Working Paper No. 444, 2013), http://ssrn.com/abstract=2228194, which interprets dual-class shares as a mechanism that allows entrepreneurs to retain uncontested control over the firm and, therefore, to pursue the idiosyncratic value related to their business ideas; and Ronald J. Gilson & Alan Schwartz, *Contracting About Private Benefits of Control* (Yale Program for Studies in Law, Econ. & Pub. Policy, Research Paper No. 461, July 1, 2013), http://ssrn.com/abstract=2182781, which argues that dual-class shares allow controlling has recently been made, advocating in particular a system of "square-root voting" for publicly traded corporations, under which votes would increase as the square root of the number of shares that a shareholder owns in a corporation (so that, for example, one share would bring one vote, one hundred shares would bring ten votes, etc.).[21] And investor protection is the principal objective of the proposal.

We will not pursue these contemporary developments here. But, in seeking to understand the patterns of corporate control that might be appropriate in the twenty-first century, it is helpful to understand how and why other patterns developed in the nineteenth and twentieth centuries.

The remainder of this Article explores the potential of the consumer protection theory of restricted voting by examining more closely the economic properties of different voting schemes and the available data on shareholder voting rights in nineteenth-century corporations. Part I describes the schemes of shareholder voting rights adopted by U.S. corporations in the late eighteenth and early nineteenth centuries. We break down our analysis by industry and show that voting restrictions appeared with far greater frequency in firms that had market power and were owned by their principal customers. In Part II, we suggest that the consumer protection account sheds light on another feature of early corporation law for which conventional explanations seem unsatisfying: the doctrine of ultra vires. Part III then explores the reasons for the progressive abandonment of restricted voting schemes in the latter part of the nineteenth century. Part IV explores the potential of the consumer protection account to explain the foreign experience with restricted voting in early business corporations.

I. CORPORATE OWNERSHIP AND VOTING RIGHTS IN EARLY U.S. HISTORY

We begin by examining the ownership structure and voting patterns of U.S. business corporations in the late eighteenth and early nineteenth century. For ease of exposition, we divide our analysis by industry sector, focusing first on corporations promoting physical infrastructure projects, second on financial firms, and finally on manufacturing corporations.

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shareholders to extract private benefits of control that compensate for their monitoring efforts.

21. Eric Posner & E. Glen Weyl, *Quadratic Vote Buying as Efficient Corporate Governance*, 81 U. CHI. L. REV. (forthcoming 2014), http://ssrn.com/abstract=2264245.

A. Physical Infrastructure

Today, much of society's basic physical infrastructure, and particularly major elements of transportation networks such as roads and bridges, are financed—and commonly owned and operated—by one or another level of government. In the early decades of the American republic, however, the situation was quite different. Municipal corporations in the American colonies, like their English counterparts of the seventeenth and eighteenth centuries, were generally dominated by local tradesmen, and served largely to establish and protect the monopolistic guild-like powers of the various trades.[22] Municipalities sometimes constructed and operated facilities such as market halls and wharves, though apparently in large part for the sake of reinforcing the market power of the various trades and of the municipalities themselves, for which the facilities provided a source of income through user charges.[23]

The American Revolution brought substantial democratization to local government,[24] but, as we explain below, this did not result in broad expansion of local (or state or national) governmental provision of physical infrastructure. Not only was the historical precedent for much activity of this sort lacking, but so was the popular will. Strong suspicion of government and resistance to taxes—particularly conspicuous in the Jacksonian era—were accompanied by fierce regional rivalries that blocked agreement on governmental development projects.[25]

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22. JON C. TEAFORD, THE MUNICIPAL REVOLUTION IN AMERICA: ORIGINS OF MODERN URBAN GOVERNMENT 1650-1825, at 16-34 (1975).

23. *See id.* at 28.

24. *Id.* at 64-78.

25. *See, e.g.*, LOUIS HARTZ, ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776-1860, at 11-12, 42-43 (1948); *see also* GEORGE ROGERS TAYLOR, THE TRANSPORTATION REVOLUTION, 1815-1860, at 98-99 (1951) (positing that regional rivalries accounted for the local nature of early railroads' financing sources); Paul Chen, *The Constitutional Politics of Roads and Canals: Inter-Branch Dialogue over Internal Improvements, 1800-1828*, 28 WHITTIER L. REV. 625 (2006) (arguing that the failure to establish a coherent system of federally funded infrastructure during the early nineteenth century was due to the strong "constitutional scruples" of Republican Presidents during the period and the corruption of sectional influences within Congress); Smythe, *supra* note 18, at 1416 (attributing the lack of governmental funding of public improvements to prevailing fears of higher taxes). One example of such opposition came in 1816 when President Madison vetoed a federally funded internal improvements bill for state infrastructure, arguing that without amending the U.S. Constitution, Congress lacked the power to pass such a bill. *See* Pamela L. Baker, *The Washington National Road Bill and the Struggle to Adopt a Federal System of Internal Improvement*, 22 J. EARLY REPUBLIC 437, 442-43 (2002).

State governments of the early nineteenth century were, however, prepared to give corporate charters to groups of citizens who wished to finance and manage publicly beneficial improvement projects on their own. The result was the widespread resort to private organization and financing. And the internal governance structures given these corporations reflected their role as private producers of public goods.

1. *Turnpikes*

Turnpikes provide a paradigmatic example of the use of voting restrictions in firms that were principally owned by their customers. In the late eighteenth and early nineteenth centuries, turnpikes were almost invariably undertaken by business corporations.[26] Turnpikes were in fact one of the most common forms of business corporation throughout this period. Over one-fifth of all corporate charters granted in the late eighteenth century concerned turnpike companies, which remained one of the leading forms of business corporation in the East Coast through the early nineteenth century.[27] Turnpikes made up one-third of all New York incorporations between 1800 and 1830.[28]

Restricted voting schemes were particularly prevalent in turnpikes. Joseph Stancliffe Davis notes that voting caps were "well-nigh universal" in eighteenth-century turnpike companies.[29] Other surveys of voting patterns in nineteenth-century business corporations find that turnpikes displayed the highest incidence of voting restrictions across all industries. In his study of early New York corporations, Eric Hilt finds that a striking 98% of turnpike charters included voting restrictions and only 1% of them specified a one-share-one-vote scheme.[30] Hilt estimates that turnpikes had a significantly

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26. TAYLOR, *supra* note 25, at 24 ("The corporate form of organization appears to have been used for the turnpikes practically without exception.").

27. RONALD E. SEAVOY, THE ORIGINS OF THE AMERICAN BUSINESS CORPORATION, 1784-1855, at 39-40 (1982); TAYLOR, *supra* note 25, at 25 ("From 1815 to 1830 probably more charters were granted for this type of business than for any other.").

28. Daniel B. Klein & John Majewski, *Economy, Community, and Law: The Turnpike Movement in New York, 1797-1845*, 26 LAW & SOC'Y REV. 469, 470 (1992).

29. 2 JOSEPH STANCLIFFE DAVIS, ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS 323 (1917).

30. Hilt, *supra* note 14, at 658 tbl.1. Hilt's sample reflects the prevalence of turnpike companies in New York, as they make up 304 of the total sample of 812 business corporations. *Id.* New York's general incorporation law for turnpikes of 1807 provided for one vote per share up to ten shares, and one additional vote per five shares beyond that. An Act Relative to Turnpike Companies, ch. 38, § 2, 1807 N.Y. Laws 50, 50.

lower level of voting concentration than corporations in other industries (a score of 0.23 in his index, compared to the next lowest score of 0.70 for bridge companies).[31] Similarly, John W. Cadman reports that, even though the "vast majority" of early New Jersey corporations granted one vote per share, a significant number of turnpikes adopted either voting caps or a graduated voting scale.[32]

To confirm and extend these statistics, and others we report below, we undertook our own analysis of a large database—assembled and generously made available to us by economic historians Richard Sylla and Robert Wright[33]—that contains the voting rules of nearly all (more than 22,000) business corporations that obtained a legislative charter in any of the states of the United States between 1790 and 1859. A more extensive description of that database, as well as tables with statistics we have derived from it, appears in the Appendix. To simplify interpretation, we focus only on corporations formed in the original thirteen states. Moreover, we exclude from our analysis the states of Massachusetts and South Carolina, for which there are indications that the original data contain systematic omissions or miscoding. This leaves us with a sample of 6,387 corporations. We will refer to our work with this sample as our "multistate analysis."

As shown in Table 1 in the Appendix, our multistate analysis reveals that 65% of corporations undertaking turnpikes or plank roads (which we combine under the heading of "roads" in the tables) had restricted voting regimes over the period 1790-1859. Confirmation that this percentage is significantly higher than those for manufacturing is provided in Table 2, which contains the results of a regression analysis showing that, controlling for state and decade of incorporation, turnpikes and roads were significantly more likely to have a restricted voting rule than were manufacturing corporations.

Consistent with the consumer protection account, turnpikes were the industry in which the interests of shareholders in the firm's output (the road), rather than in the firm's profits, were most conspicuous. Turnpike stockholders were commonly merchants and landowners who were located

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31. Hilt, *supra* note 14, at 658 tbl.1.

32. JOHN W. CADMAN, JR., THE CORPORATION IN NEW JERSEY: BUSINESS AND POLITICS 1791-1875, at 308-09 (1949). And although a higher proportion of bank charters than turnpike charters made use of graduated voting schemes, the reverse was true of voting caps. *Id.*

33. The dataset has been used in earlier work by Richard Sylla and Robert E. Wright. *See* Wright & Sylla, *supra* note 15; *see also* Robert E. Wright, Corporation Nation: Rise and Demise of the American Economic Juggernaut (2011) (unpublished manuscript) (on file with author).

along the path of the turnpike and would benefit from its presence.[34] As put by Ronald Seavoy, "[t]urnpikes were popular investments, not necessarily because they were expected to be profitable, but because they improved access to markets, raised local land values, and lowered the costs of goods that had to be teamed in. Shares were of low par value and were widely held."[35]

In fact, turnpikes rarely paid dividends to their investors, and were not expected to.[36] Purchasing a share resembled a voluntary payment of taxes toward a public good.[37] Social pressure to contribute to this community improvement was an inducement to subscriptions, and the unlikely prospect of a financial return on the stock might have served as a form of "selective incentive[]."[38] But the most effective marketing tool in attracting shareholders was the recurring emphasis on the expected financial benefits that the road would bestow upon them as local merchants and landowners.[39]

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34. *See* TAYLOR, *supra* note 25, at 25.

35. SEAVOY, *supra* note 27, at 41; *see also* JOSEPH AUSTIN DURRENBERGER, TURNPIKES: A STUDY OF THE TOLL ROAD MOVEMENT IN THE MIDDLE ATLANTIC STATES AND MARYLAND 104 (1931) (analyzing numerous turnpike shareholder lists and concluding that "subscribers were usually more interested in the possible benefits the new lines of communication would bring than in the profitableness of their investment"); Klein & Majewski, *supra* note 28, at 469 ("Landowners, merchants, and farmers struggled to finance turnpikes, not so much in hopes of company dividends but in hopes of improved transportation, stimulated commerce, and higher land values.").

36. *See, e.g.*, Essex Tpk. Corp. v. Collins, 8 Mass. 292, 297 (1811) ("It is well known that in this country enterprises of this description have not been productive of profit to those who have engaged in them; nor is this generally a primary object of consideration with the subscribers."); *see also infra* notes 43-44 and accompanying text.

37. Daniel B. Klein, *The Voluntary Provision of Public Goods? The Turnpike Companies of Early America*, 28 ECON. INQUIRY 788 (1990).

38. *Id.* at 802-03 (stating that mechanisms of social pressure served as drivers of turnpike investments).

39. *Id.* at 804; *see also Essex Tpk. Corp.*, 8 Mass. at 297 ("[T]he benefit contemplated to accrue individually to the new subscribers from this new direction of the turnpike formed another valuable consideration. . . . [The subscribers] are well aware that the community is benefited by them, and they agree to take a share of the burden."); Klein & Majewski, *supra* note 28, at 501 (excerpting a newspaper article encouraging subscriptions for the New Paltz Turnpike that argues that the enterprise "can only be done by the stock being distributed very generally among the inhabitants of the village—each finding a motive to take a little, not from an expectation of its being productive (though it no doubt would pay something) but from an expectation that the investment would be returned with treble interest, in the addition which would be made to business and the value of property" (internal quotation marks omitted)).

That the principal interests of turnpike shareholders lay in the firm's output, not in its profits, was apparent from the turnpike litigation in the early nineteenth century. Indeed, some courts went as far as to allow shareholders to renege on their subscription commitments if a subsequent alteration of the turnpike's route made the road less useful to them as prospective users. For example, in *Middlesex Turnpike Corp. v. Locke*,[40] a shareholder successfully defended an action for payment of assessments made after his subscription precisely because a later act of the legislature had altered the planned course of the turnpike road. Defendant's counsel successfully argued that his client

> never consented to become a proprietor in the turnpike, as it was in fact located and made. He was induced to subscribe originally, on account of the particular convenience to him of the turnpike as originally directed. He would perceive no such convenience in the other route. He would have never subscribed to aid the latter . . . .[41]

The court agreed and let the shareholder off the hook.[42]

Even the courts that refused to invalidate subscription obligations due to later changes of route understood full well the nature of the interests of turnpike shareholders in the enterprise. In *Irvin v. Susquehanna & Phillipsburg Turnpike Co.*,[43] counsel for the aggrieved shareholder contended that "it was not at all contemplated that the profits of the road would compensate the individuals for their money subscribed; it was the facilities and benefits which would result to their property: and it was upon this consideration that Ir[v]in entered into the engagement to pay."[44] The Court agreed that while the indirect benefits to owners provided a "very powerful incitement" to turnpike subscriptions, it refused to equate "the motive for entering into the contract, with the consideration of it."[45]

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40. 8 Mass. 267 (1811).

41. *Id.* at 270-71.

42. *Id.* at 271 ("The defendant may truly say, *Non haec in foedera veni*. He was not bound by the application of the directors to the legislature for the alteration of the course of the road, nor by the consent of the corporation thereto.").

43. 2 Pen. & W. 466 (Pa. 1831).

44. *Id.* at 469; *see also id.* at 470 ("That an expectation of benefit from a rise in the value of property near the route has been a powerful spring, in putting these incorporated bodies in motion, is not to be denied. Yet though reliance has been placed on the effect of it, the legislature has never encouraged it so far as to recognize it as a condition of the contract of subscription.").

45. *Id.* at 470-71.

In this context, restricted voting helped ensure that nobody—and, in particular, nobody who was not a major user of the turnpike—would accumulate enough shares to give him or her both the interest and the authority to set the tolls at a price much higher than marginal cost, much less to monopoly pricing levels.[46] It was evidently understood that economic development would advance most rapidly and most advantageously toward all adjacent merchants and landowners if tolls on the turnpikes were kept low. Toll prices were kept very low indeed (almost to the point of undermining the firms' viability) and underwent little change under the period. It is telling that, despite the well-known lack of profitability, petitions to the legislature for toll increases seemed to be very rare.[47]

The notion that voting restrictions favored the interests of consumers at the expense of investors was well understood at the time. This point is clear from the 1846 Report of the Revisors of the Civil Code of Virginia, a rare piece of evidence of legislative intent on the reasons for abandoning restricted voting schemes. This work noted that the financial interests of the state government as a shareholder in many public improvement corporations counseled in favor of the one-share-one-vote rule.[48] The Revisors showed concern that excessively stringent voting restrictions were allowing shareholder-consumers to exercise disproportionate influence over corporate management so as to favor low

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46. To be sure, toll prices were typically set by corporate charters and were subject to legislative scrutiny. Nevertheless, charter amendments were common, hence leaving open the possibility that a dominant shareholder with a financial interest in the firm would lobby the legislature for toll price increases. *See* Wright & Sylla, *supra* note 15, at 237 (describing the high frequency of charter amendments in the nineteenth century).

47. Klein & Majewski, *supra* note 28, at 499 ("To what extent companies even petitioned for [toll] increases we do not know, but it appears to have been little."). Interestingly, the typical toll pricing structure seemed to privilege productive over leisurely transportation; by far the most expensive tolls rates applied to "pleasure carriages" (as opposed to the transportation of commercial and farm products). *Id.* at 484. Furthermore, English turnpikes in the same period were commonly constructed by nonprofit corporations rather than business corporations, with adjacent landowners and small investors purchasing bonds issued by the nonprofit corporation. Those bonds paid a reasonable rate of interest, and tolls were kept high enough to pay the interest. Thus, English turnpikes were effectively profit-making ventures in nonprofit form, while the U.S. turnpikes were essentially nonprofit ventures in profit-making form. *See, e.g.*, William Albert, *The Turnpike Trusts*, *in* TRANSPORT IN THE INDUSTRIAL REVOLUTION 31 (Derek H. Aldcroft & Michael J. Freeman eds., 1983) (on turnpike trusts in England); Dan Bogart, *Did Turnpike Trusts Increase Transportation Investment in Eighteenth-Century England?*, 65 J. ECON. HIST. 439 (2005) (same).

48. REPORT OF THE REVISORS OF THE CIVIL CODE OF VIRGINIA MADE TO THE GENERAL ASSEMBLY AT DECEMBER SESSION 1846, at 335 n.* (1847).

prices to the detriment of profitability. According to the Report, "[t]he private stockholder who has a large amount invested will be apt, when he gives his vote, to consider the effect of that vote upon his investment, and go for such a course as seems best calculated to make his stock productive . . ."; by contrast, "the man who has but one or two shares will often be either indifferent as to the measures that are adopted, or be *less alive to the interest of a stockholder looking for dividends, than to the interest of one using the work, that the tolls should be low*."[49]

2. *Bridges*

Voting restrictions were present in bridge companies incorporated in some states but not in others. Hilt finds that 42% of all bridge companies chartered in New York through 1825 adopted a restricted voting scheme.[50] Voting restrictions also appeared in some early bridge companies in Massachusetts and in many bridge company charters in New Jersey.[51] Conversely, bridge corporations chartered in Connecticut only rarely adopted restricted voting.[52] In our own multistate analysis, 38% of bridge corporations formed between 1790 and 1859 had restricted voting.

Two of the most important nineteenth-century cases involving business corporations concerned bridge companies: the landmark Supreme Court decision in *Charles River Bridge v. Warren Bridge*,[53] which held that a corporate charter does not imply a grant of monopoly privileges, and *Taylor v. Griswold*,[54] the most cited case for the proposition that one-member, one-vote was the

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49. *Id.* (emphasis added) (noting additionally that the large voting power of small shareholders and their considerations "foreign to the interests of the stockholders, *as such*" had often "conduced to the bad success which has attended so many of [Virginia's] works of internal improvement"). The Report ultimately proposed the adoption of a more flexible graduated voting scale that gave far greater voice to large shareholders. *Id.* at 336 n.*.

50. Hilt, *supra* note 14, at 658 tbl.1. The 42% figure may be a slight underestimation, as Hilt reports no information on voting rules for 3% of bridge companies. *Id.*

51. CADMAN, *supra* note 32, at 309; EDWIN MERRICK DODD, AMERICAN BUSINESS CORPORATIONS UNTIL 1860 (WITH SPECIAL REFERENCE TO MASSACHUSETTS) 243 (1954).

52. Alex Dreier, Shareholder Voting Rules in 19th Century American Corporations: Law, Economics and Ideology 22 tbl. (Apr. 24, 1995) (unpublished manuscript) (on file with author) (showing that only one out of nineteen bridge companies chartered in Connecticut between 1789 and 1836 adopted a voting cap).

53. 36 U.S. (11 Pet.) 420 (1837).

54. 14 N.J.L. 222 (1834).

common law rule on shareholder voting rights in business corporations.[55] These influential decisions notwithstanding, bridge corporations have received far less scholarly attention than their counterparts in other industries.

This dearth of historical studies translates into less information on the ownership patterns of early bridges and the driving forces behind their incorporation. Like turnpikes, bridges commonly have an important degree of monopoly power, which would naturally be expected to encourage consumer ownership. In describing the incorporation of Charles River Bridge, the first such company to be chartered in Massachusetts, Joseph Davis observes that "expectations of improvements in local business and in land values played a large part in the promotion, besides the prospects of revenue from tolls."[56] However, by the time the *Charles River Bridge* case was decided (more than fifty years after the establishment of the company), the Supreme Court consistently referred to the interests of its shareholders as those of investors.[57]

In *Taylor v. Griswold*, the question before the New Jersey Supreme Court was whether a bridge corporation could adopt bylaws permitting voting by proxy and providing for a one-share-one-vote rule in shareholder meetings when the company's charter was silent on the issue. The court ruled in the negative, concluding that only the corporation's charter, not the bylaws, could permit departures from the common law rule of one vote per member. In doing so, the court emphasized the "public nature" of corporations operating turnpikes, bridges, and railroads, as opposed to corporations it deemed to be "strictly private," such as banks and insurance companies.[58] Colleen Dunlavy pointed to the argument that "[e]very corporator, every individual member of a body politic, whether public or private, is, *prima facie*, entitled to equal rights"[59] as paradigmatic of a different social conception of the corporation.[60]

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55. *But see* Ratner, *supra* note 10, at 9 (arguing that "there is no real indication that any common law rule of one vote for each member of a business corporation ever existed" and highlighting that the *Taylor* court failed to cite any precedent on this issue).

56. 2 DAVIS, *supra* note 29, at 187. The charter of Charles River Bridge itself was silent as to shareholder voting rights, but bridges subsequently incorporated in Massachusetts usually adopted voting caps.

57. *Charles River Bridge*, 36 U.S. at 470 (acknowledging that the chartering of Warren Bridge "has ruined the property of subsequent innocent stockholders [of Charles River Bridge], who have made their investments at a high price").

58. Taylor v. Griswold, 14 N.J.L. 222, 234 (1834).

59. *Id.* at 237.

60. Dunlavy, *supra* note 11, at 1370-71.

Nonetheless, a closer reading of the *Taylor* opinion suggests that the adoption of restricted voting schemes in the nineteenth century was at least partially motivated by economic considerations. The New Jersey court's decision, in particular, explicitly hints at a connection between voting restrictions and the interests of the consuming public in the face of a monopolistic firm. As put by Chief Justice Hornblower,

> the apparent tendency, of the by-law in question [adopting a one-share-one-vote rule], 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. I do not say, that such was the design, or that such has been the effect; but only, that the natural or probable tendency of the by-law in question, is to produce such a result.[61]

The Court reasoned that because bridges "partake more of a public nature . . . the public have a more direct and immediate interest in their management," an objective that would be arguably best achieved by a one-member-one-vote rule—a voting scheme that gives primacy to the interests of consumers and the public vis-à-vis those of providers of capital.[62]

3. *Canals*

The incidence of voting restrictions in canal corporations varied across time and place. Early canal charters in Massachusetts frequently provided for voting caps.[63] Restricted voting schemes were also present in New Jersey canals, but were entirely absent from the corporate charters of the four canals incorporated in Connecticut through 1856.[64] Our own multistate analysis indicates that 43%

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61. *Taylor*, 14 N.J.L. at 241 (emphasis added and omitted).

62. *Id.* at 234. The Revisors of the Civil Code of Virginia expressly discussed the link between regressive voting rules and consumers' interests. *See supra* notes 48-49 and accompanying text; *see also* Ratner, *supra* note 10 (proposing the adoption of a one-shareholder, one-vote rule in order to implement a stakeholder-oriented model of corporate governance).

63. DODD, *supra* note 51, at 249-51. Some of these proposed canals, however, never came into being.

64. CADMAN, *supra* note 32, at 309; 2 DAVIS, *supra* note 29, at 174 (giving three examples "of which charters were secured but upon which no work was done" in Massachusetts); Dreier, *supra* note 52, at 22-23.

of canal corporations formed between 1790 and 1859 had restricted voting, with a peak of 66% having restricted voting in the 1790s.

The impetus behind the creation of the first canals in the United States was essentially the same as that for turnpikes. Local merchants and landowners whose business would benefit from improved means of transportation pooled resources and incorporated some of the early canals.[65] Other eighteenth-century canals, however, attracted foreign investments from the beginning.[66]

The Middlesex Canal, one of the few early canals to be successfully constructed and operated, though unprofitable, provides an example of this type of locally owned and financed enterprise. Its founders were merchants, professional men, and landholders of Medford, the locality which, as the natural terminus of the canal, stood to benefit most from the new enterprise.[67] Christopher Roberts attributes the significant stability of the canal's shareholder base in its early years to "the function of coöperating owners uniting to establish a public utility."[68] The Middlesex Canal's original charter of 1793 contained an elaborate graduated voting scale, a scheme that was streamlined by a charter amendment two years later granting voting by shares subject to a limit of twenty-five votes per shareholder.[69] In the Delaware and Raritan canal, a restricted voting scheme was apparently instituted as a defensive mechanism against foreign (i.e., out-of-state) control of the

65. *See* CHANDLER, *supra* note 17, at 35 ("The first canal lines were organized by merchants who needed the facilities to transport their goods. But they quickly came to be owned and operated by specialists.").

66. 2 DAVIS, *supra* note 29, at 167-69 (noting that Dutch capital contributed to "the Proprietors of the Locks and Canals on Connecticut River," chartered by Massachusetts in 1792, and London Capital financed most of the construction of a canal on the Connecticut River at Bellows Falls in Vermont, also chartered in 1792).

67. CHRISTOPHER ROBERTS, THE MIDDLESEX CANAL 1793-1860, at 28 (1938) (reporting that the leading citizens of Medford "were interested both directly as landowners and more indirectly as men of business attracted by the prospect of general prosperity").

68. *Id.* at 45.

69. *Id.* at 41. The original charter provided that "[f]rom one hundred to three hundred dollars, inclusive, there shall be allowed one vote; from three hundred and one, to six hundred dollars, inclusive, shall be allowed one vote more; and for every thousand, above one thousand, shall be allowed one vote more, provided no one Proprietor shall have more than twenty votes." An Act for Incorporating James Sullivan, and Others, by the Name and Stile of the Propriotors of the Middlesex Canal, ch. 21, 1793 Mass. Acts 325, 326 (emphasis omitted).

enterprise, again presumably to protect shareholders as customers at the expense of their interest as investors.[70]

Ultimately, U.S. canals came to develop as government rather than private (either investor-owned or consumer-owned) enterprises, evidently for a variety of reasons.[71] First, U.S. demographic patterns cut against private ownership of canals by investors.[72] The most densely populated and commercially active areas in the United States were located either next to natural waterways or in the proximities of big East Coast centers that were accessible by roads, thus rendering canals uncompetitive.[73] Second, private ownership by customers was surely impeded by the need for large amounts of capital, and by the heterogeneous group of merchants served by a long canal. Third, although the actors of the time would not have spoken in these terms, they presumably recognized that the high fixed costs and low variable cost of a canal required that, for efficiency, prices be set lower than the average cost, which required a substantial construction subsidy that was best injected through government ownership. Prior to the Erie Canal, only three of the existing canals in the country covered more than two miles; at twenty-eight miles in length, the Middlesex Canal was the longest of them, but struggled financially.[74] In constructing and financing the trailblazing Erie Canal without the intermediation of the corporate form, the state government of New York inaugurated a new era of direct state involvement in canal development.[75] Those public projects, in turn, would soon be threatened by the rise of railroads.

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70. *See* H. JEROME CRANMER, THE NEW JERSEY CANALS: STATE POLICY AND PRIVATE ENTERPRISE, 1820-1832, at 34, 144 (1978) (arguing that the adoption of a regressive voting rule in the Delaware and Raritan (granting one vote per share up to ten shares, and one vote per every five shares thereafter) was designed to prevent the corporation from falling under the control of New York or Pennsylvania).

71. *E.g.*, 2 DAVIS, *supra* note 29, at 185 (concluding that, with respect to eighteenth- and early nineteenth-century canals, "the corporate form, while necessary here, proved unequal to the task").

72. For a discussion of the U.K. experience with canal companies, see *infra* Section IV.B.

73. DAVID R. MEYER, THE ROOTS OF AMERICAN INDUSTRIALIZATION 28 (2003).

74. Julius Rubin, *Canal or Railroad? Imitation and Innovation in the Response to the Erie Canal in Philadelphia, Baltimore and Boston*, TRANSACTIONS AM. PHIL. SOC'Y, Nov. 1961, at 5 (1961).

75. CHANDLER, *supra* note 17, at 34 (describing the insufficiency of private corporations to finance canal development). For a study on the role of the government in canal development, see CARTER GOODRICH, GOVERNMENT PROMOTION OF AMERICAN CANALS AND RAILROADS, 1800-1890 (1960).

4. *Railroads*

Railroads came to dominate long-distance transportation in the nineteenth century, but they appeared later than the turnpikes and canals that they eventually replaced. While turnpikes and canals had been chartered since the eighteenth century, the first railroad corporations date from the late 1820s.[76] As was the case with many canals, some railroad corporations received substantial government backing, but most of the early New England railroads formed in the 1830s were wholly private enterprises.[77]

Voting restrictions were common in the early stages of private railroad development. Massachusetts railroads established in the 1830s typically capped the voting power of large shareholders.[78] A Massachusetts railroad statute of 1836 restricted the voting rights of individual shareholders to one-tenth of the number of outstanding shares,[79] a rule also followed by five of the first ten railroads incorporated in Connecticut.[80]

Similar to turnpikes and canals, the formation of early railroad corporations was commonly animated by the prospect of indirect benefits stemming from improved means of communication. With minimal exceptions, domestic and foreign finance capital, which became important financing sources in later decades, did not play a major role in funding early railroad construction.[81] As highlighted by Thelma Kistler, the first railroad promoters generally framed their appeals for subscriptions in terms of "incidental advantages" rather than profitability. Shareholders agreed to subscribe for the stock of the Western

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76. *See* WINTHROP M. DANIELS, AMERICAN RAILROADS: FOUR PHASES OF THEIR HISTORY 3 (1932) (tracing the development of U.S. railroads back to the 1830s). A few railroad companies, however, were launched before then, such as the Baltimore and Ohio Railroad of 1827 and the Mohawk and Hudson Railroad of 1826. *See infra* notes 95 & 100.

77. *See* STEPHEN SALSBURY, THE STATE, THE INVESTOR, AND THE RAILROAD: THE BOSTON & ALBANY, 1825-1867, at 80 (1967).

78. DODD, *supra* note 51, at 258-63. All of the first Massachusetts railroads chartered in 1830 capped the number of votes per shareholder, even if one of them placed the rather lenient cap of "one-fourth of the whole number" of shares. *Id.* at 262.

79. Mass. Rev. Stat., ch. 39, § 50 (1836) ("[E]ach member shall . . . not be entitled to any vote for any shares beyond one tenth part of the number of shares of the stock of such corporation.").

80. Dreier, *supra* note 52, at 27-28.

81. *See* DANIELS, *supra* note 76, at 8-10 (finding that much of the early capital required for railway construction was raised directly from contributions at home); TAYLOR, *supra* note 25, at 98-100.

Railroad despite "a certainty of no direct profits."[82] Likewise, calls for contributions from residents along the route of the Amherst and Belchertown road stressed that subscriptions were not meant to be "an investment" for "financial return," but rather "to secure the benefits for himself and community."[83]

However, restricted voting gradually fell into disuse as the industry matured in its first decades. All Connecticut railroads chartered after 1841 granted one vote per share.[84] New York's general incorporation law for railroads of 1850 also specified a one-share-one-vote rule in director elections.[85] In our multistate analysis, the percentage of railroad charters with restricted voting dropped precipitously from 48% of those chartered in the 1820s to 6% of those chartered in the 1850s. Consistent with these figures, Colleen Dunlavy shows that in the 1840s, support for restricted voting was already rapidly losing traction even in railroad corporations that initially limited the voting rights of large shareholders.[86]

We suggest that changes in voting rules parallel major transformations in the financing and ownership structure of railroad companies. Late nineteenth-century railroads came to be seen as the paradigm of the modern, large-scale business corporation requiring massive amounts of capital, specialized management, and dispersed ownership. Railroad securities ultimately became the darlings of Wall Street and the object of the most high-profile corporate scandals and control contests of the nineteenth century.[87] But this shouldn't

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82. Thelma M. Kistler, *The Rise of Railroads in the Connecticut River Valley*, 23 SMITH C. STUD. HIST. 1, 81 (1938).

83. *Id.*

84. Dreier, *supra* note 52, at 28.

85. An Act to Authorise the Formation of Railroad Corporations, and to Regulate the Same, ch. 140, § 5, 1850 N.Y. Laws 211, 213. Even after the enactment of general incorporation laws for railroads, however, corporate promoters continued to seek special charters for additional privileges. *See* COLLEEN A. DUNLAVY, POLITICS AND INDUSTRIALIZATION: EARLY RAILROADS IN THE UNITED STATES AND PRUSSIA 70 (1994).

86. Dunlavy, *supra* note 11, at 1383 (describing developments at the Western Railroad); *see also* Colleen A. Dunlavy, *Corporate Democracy: Stockholder Voting Rights in Nineteenth-Century American and Prussian Railroad Corporations*, *in* INSTITUTIONS IN THE TRANSPORT AND COMMUNICATIONS INDUSTRIES: STATE AND PRIVATE ACTORS IN THE MAKING OF INSTITUTIONAL PATTERNS, 1850-1990, at 33, 47 (Lena Andersson-Skog & Olle Krantz eds., 1999) (noting that by the mid-nineteenth century "graduated voting schemes—even a simple cap on total votes—seem generally to have fallen out of favor in the United States, except possibly in Massachusetts").

87. DANIELS, *supra* note 76, at 25-27.

obscure the fact that many of the earliest U.S. railroads closely resembled the type of cooperative enterprise that characterized other early transportation companies.

The geographical distribution of early railroad shareholdings corroborates the import of ancillary benefits as an inducement to stock subscriptions. The first railroad corporations in New England were eminently local businesses, covering an average distance of 36 miles as late as 1850.[88] As many as 95% of Western Railroad's Massachusetts shareholders (holding 96.6% of its total stock) resided along the route of the road.[89] Most shareholders of the New London Railroad were also adjacent residents.[90] All in all, the vast majority of early railroad promoters and shareholders were local merchants, manufacturers, or landowners who expected to benefit from the railroad's operations.[91]

The interests of shareholder-consumers help explain the use of voting restrictions in early railroad companies. A key driver behind the first railroad incorporations, in particular, was "the desire to deflect trade from a rival commercial town."[92] In this light, voting restrictions helped assure that the corporation would not easily come under the control of capitalists having interests antagonistic to those of the railroad and its beneficiaries—a consideration that seems to have carried real weight at the time.

The experience of the Western Railroad, one of the first Massachusetts railroad companies, is illustrative of this concern. In 1834, when the Western faced great difficulty obtaining the requisite financing for construction, a group of New York capitalists offered to subscribe to the company's entire capital in exchange for control of the business. Despite the firm's urgent need for funds, its representative rebuffed the offer, pointing to the risk that the railroad would be "so managed as to defeat the purpose of its incorporators."[93] The voting

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88. *Id.* at 4.

89. Kistler, *supra* note 82, at 84.

90. *Id.* at 85.

91. TAYLOR, *supra* note 25, at 97 ("As with the turnpike companies, many of the early railroads secured most of their private capital from merchants, small manufacturers, farmers, and professional men living along the proposed route of the new railroad.").

92. DANIELS, *supra* note 76, at 4.

93. Kistler, *supra* note 82, at 84; *see also* TAYLOR, *supra* note 25, at 98-99 (noting that "New York competition was so feared that when badly needed funds for the Western Railroad were offered by New York capitalists, they were refused"). Two years later, the Western succeeded in obtaining public financial support; the new subscriptions by the Commonwealth of Massachusetts made it a "one-third partner" in the enterprise and restrictions specified in Western's initial charter, which capped the voting rights of individual shareholders at one-tenth of the total shares,[94] arguably fulfilled a similar function.[95]

By contrast, the little Mohawk and Hudson Railroad chartered by the New York legislature in 1826 was one of the few early railroads to be entirely investor owned.[96] The Mohawk, which sought to connect the cities of Albany and Schenectady, was the first New York railroad designed to draw passenger traffic.[97] Unlike its contemporary counterparts, it was not a local enterprise, being primarily sponsored by New York City capitalists.[98] In 1830, only two months after the beginning of construction, it became the first railroad to be traded on the New York Stock Exchange.[99] Consistent with its investor ownership, the Mohawk adopted a one-share-one-vote rule from the outset.[100]

The development of the railroad industry brought about changes in its financing and size. Once the first railroads were successfully constructed and turned out to be lucrative ventures, railroad promoters began to emphasize potential profit as well as indirect benefits when seeking new subscriptions.[101] The structure of early railroads as "local ventures designed to serve local

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entitled it to appoint three of its nine directors. *See* SALSBURY, *supra* note 77, at 143; Dunlavy, *supra* note 11, at 1376.

94. An Act to Establish the Western Railroad Corporation, ch. 116, § 10, 1833 Mass. Acts 660, 666-67.

95. To be sure, not all merchant-backed railroads adopted voting restrictions. Merchants seeking to regain the trade that was being diverted through the Erie Canal promoted the creation of the Baltimore & Ohio Railroad, chartered in 1827. This corporation, however, enjoyed substantial governmental support from its inception, with the state of Maryland and the city of Baltimore subscribing for one half of its total capital. *See* EDWARD HUNGERFORD, THE STORY OF THE BALTIMORE & OHIO RAILROAD 1827-1927, at 27-28 (1928). Perhaps because of its concentrated government ownership and the infeasibility of a takeover, its charter adopted a one-share-one-vote rule. *Id.*

96. *Cf.* Frank W. Stevens, *The Beginnings of the New York Central Railroad*, N.Y. CENT. LINES MAG., Apr. 1926, at 21 (describing how the Mohawk & Hudson Railroad began to receive subscriptions for stockholding within six months of incorporation); *see also* DANIELS, *supra* note 76, at 15 ("[T]he Mohawk and Hudson was the first railroad to appear on the stock market.").

97. EDWARD HAROLD MOTT, BETWEEN THE OCEAN AND THE LAKES: THE STORY OF ERIE 9 (New York, John S. Collins 1899).

98. *See* Stevens, *supra* note 96, at 17, 24.

99. DANIELS, *supra* note 76, at 13-14; Stevens, *supra* note 96, at 24-25.

100. An Act to Incorporate the Mohawk and Hudson Rail Road Company, ch. 253, § 4, 1826 N.Y. Laws 286, 287.

101. Kistler, *supra* note 82, at 92.

purposes" no longer seemed practical after 1847, and railroad expansion to more distant areas of the country became a priority.[102]

As the scale of railroad operations expanded, so did their financing sources. As noted by Winthrop Daniels, in the infancy of the industry, railroads "were chiefly financed by the savings of the localities they traversed."[103] Railroads resorted to the issuance of bonds beginning in the 1850s; meanwhile, railroad securities were becoming popular in eastern financial centers, and were increasingly held by speculators or magnates seeking control of the enterprise.[104] By 1905, it appeared clear that "Wall Street is built on railway securities."[105]

As the industry developed, and railroad ownership and control shifted away from local beneficiaries to investors, public dissatisfaction mounted over the railroads' monopolistic pricing practices. Arthur Hadley's classic study on railroad history viewed the separation between owners and customers as the source of discontent against railroad monopoly. "Serious conflicts of interests concerning a turnpike or bridge were almost impossible," he argued, "because those who owned them and those who used them were to a large extent the same, or, at any rate, came in personal contact"; by contrast, "one set of men own a railroad and another set of men use it."[106]

B. Financial Infrastructure

Restricted voting was not confined to firms providing society's physical infrastructure. It was also frequently employed by firms that provided the financial infrastructure for business activity.

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102. *Id.* at 35-36.

103. DANIELS, *supra* note 76, at 9.

104. *Id.* at 16; *see also* TAYLOR, *supra* note 25, at 101 (stating that stocks "tended to gravitate into the hands of railroad magnates and promoters who used them for purposes of speculation and control").

105. 1 FRANK PARSONS, THE RAILWAYS, THE TRUSTS, AND THE PEOPLE 115 (C.F. Taylor ed., 1905). As late as 1906, railroad securities represented 85% of the bonds and 50% of the stocks traded on the New York Stock Exchange. *See* DANIELS, *supra* note 76, at 26.

106. ARTHUR T. HADLEY, RAILROAD TRANSPORTATION: ITS HISTORY AND ITS LAWS 21 (New York, G.P. Putnam's Sons 1896).

1. *Banks*

Voting restrictions were also common in early U.S. banking firms. Merrick Dodd finds that voting caps were a "uniform practice" in Massachusetts banks in the early nineteenth century.[107] According to Dreier's study of nineteenth-century Connecticut charters, banking corporations accounted for the highest incidence of voting restrictions across all industries, with precisely 50% of such firms specifying a graduated voting scale or, more often, an absolute cap on the number of votes per shareholder.[108] Similarly, nearly one half of early New Jersey banks adopted a graduated voting scale.[109] Voting restrictions were comparatively less frequent among New York banks. Hilt finds that 26% of New York banks in his sample adopted restricted voting, while 63% followed a one-share-one-vote rule.[110] Our multistate analysis, in turn, shows 53% of banks adopting restricted voting between 1790 and 1859, with 82% doing so in the active decade from 1810 to 1820.

Like other early business corporations, the impetus for the creation of the first banks often came from parties who were more interested in the bank's services than in its profits.[111] In the words of Robert Morris, the Superintendent of Finance who promoted the creation of the first chartered bank in the United States, the Bank of North America, the bank's profit rate "would never be sufficient inducement to hold stock, if there were no other

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107. DODD, *supra* note 51, at 215.

108. Dreier, *supra* note 52, at 24-25. Dreier's study also reveals that caps on share ownership were widespread among early Connecticut banks as well.

109. CADMAN, *supra* note 32, at 308 (noting that this proportion included "nearly every bank charter passed before 1850").

110. Hilt, *supra* note 14, at 658. In the period covered by Hilt (all incorporations through 1825), the chartering process in New York was particularly corrupt, with politicians expecting financial and political benefits in consideration for banking charters. A backlash against these corrupt practices led to the adoption of Free Banking in New York in 1838. *See* Howard Bodenhorn, *Bank Chartering and Political Corruption in Antebellum New York: Free Banking as Reform*, *in* CORRUPTION AND REFORM: LESSONS FROM AMERICA'S ECONOMIC HISTORY 231-44 (Edward L. Glaeser & Claudia Goldin eds., 2006).

111. *See, e.g.*, DODD, *supra* note 51, at 214 ("The eagerness to organize new banks was in many cases due more to the desire of prospective borrowers to create a bank from which they could obtain credit than to the desire of prospective investors to profit by means of dividends on bank shares."); SEAVOY, *supra* note 27, at 53 ("Merchants organized the first state banks because they wanted to use the credit the banks created.").

consideration"[112] and the majority of its shares "belong to citizens of Philadelphia, and principally to the commercial men, whose greatest inducement to continue [as] stockholders, is to support an institution which affords them accommodation and convenience, by means of discounts."[113]

Local merchants were simultaneously the principal owners and the principal customers of most banks in the late eighteenth and early nineteenth centuries. In the words of a contemporary observer, "those who are not *capitalists*, but who are *borrowers*" were the main promoters of early Massachusetts banks.[114] In their work on the history of New York's Citibank, Harold Cleveland and Thomas Huertas noted that "like nearly all banks of the day," the bank established in 1812 "was intended to be a kind of credit union for its merchant-owners."[115]

These banks typically financed the purchase and sale of merchandise at wholesale, and steered away from serving other types of potential customers.[116] In particular, banks provided much-needed liquidity for these merchants, who often had to advance credit at both ends of a given sale transaction.[117] For example, merchants would pay sellers of merchandise with notes of obligation

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112. DEBATES AND PROCEEDINGS OF THE GENERAL ASSEMBLY OF PENNSYLVANIA, ON THE MEMORIALS PRAYING A REPEAL OR SUSPENSION OF THE LAW ANNULLING THE CHARTER OF THE BANK 44 (Mathew Carey ed., Philadelphia, Carey & Co. Seddon & Pritchard 1786).

113. *Id.* at 95. For a detailed description of the commercial motives behind the later opposition to the Bank of North America, see Sommer, *supra* note 19, at 1034-37.

114. HENRY WILLIAMS, REMARKS ON BANKS AND BANKING; AND THE SKELETON OF A PROJECT FOR A NATIONAL BANK BY A CITIZEN OF BOSTON 17 (Boston, Torrey & Blair 1840) (noting that investor contributions made up only a modest proportion of the banks' total capital).

115. HAROLD VAN B. CLEVELAND & THOMAS F. HUERTAS, CITIBANK 1812-1970, at 8 (Alfred D. Chandler, Jr. ed., 1985); *see also* Sommer, *supra* note 19, at 1028 (describing the early U.S. banks as "considered merchants' utilities, chartered perhaps as public corporations, but operated as private credit clubs").

116. *See* BRAY HAMMOND, BANKS AND POLITICS IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR 75-76 (1957) (noting that "the first American bankers were merchants seeking to advance their own interests by an improved means of providing the credit they needed," that "they lent as bankers the way they had lent as merchants," and that "the earning assets acquired by banks were obligations arising from the sale and purchase of merchandise at wholesale"); *cf.* DODD, *supra* note 51, at 214 ("The eagerness to organize new banks was in many cases due more to the desire of prospective borrowers to create a bank from which they could obtain credit than to the desire of prospective investors to profit by means of dividends on bank shares.").

117. Naomi R. Lamoreaux, *The Structure of Early Banks in Southeastern New England: Some Social and Economic Implications*, 13 BUS. & ECON. HIST. 171, 176 (1984) ("[W]hen these merchants borrowed money from the banks they controlled, they were to a great extent merely withdrawing their own funds.").

rather than with piles of coin. The sellers could then take those notes to the local bank to "discount" them—which is to say, exchange the company's notes for short-term credit in the bank, with the bank taking a small fee (discount) for the transaction. The bank might itself give sellers notes of obligation—banknotes—issued by the bank, which these sellers, in turn, could hand over to other merchants as payment for consumption goods. Unlike modern commercial banks, which take deposits from the general public, early banks lent heavily out of their own capital stock.

Competition appears to have been limited in late eighteenth- and early nineteenth-century banking. Dreier reports, for example, that "[j]udging by the names of the banks and insurance companies chartered by special act in Connecticut between 1789 and 1856, which usually reflected where they were located, it was rare to find two banks, or two insurance companies insuring against the same risks, in the same town."[118] This initial shortage of bank charters was reinforced by state limitations on interstate and intrastate branching and by the legal restrictions on unincorporated banking in many states.[119] While these legal restraints on bank competition were evidently in large part the product of ideology and political influence, early banks may also have enjoyed some monopoly power as a result of simple economies of scale. For example, prior to the establishment of a national currency in the 1860s, there were presumably important economies of scale in the issue of private banknotes.

The combination of a limited supply of bank charters and price regulation via usury laws led banks to favor insiders in allocating funds.[120] Merchants unaffiliated with banking institutions had difficulty obtaining credit. Hence there was a good reason for local merchants, who needed the bank to discount their notes, to control the bank (and, before they did that, to pitch in together

118. Dreier, *supra* note 52, at 49 n.119.

119. *See, e.g.*, Richard Sylla, *Early American Banking: The Significance of the Corporate Form*, 14 BUS. & ECON. HIST. 105, 111 (1985) (noting that "[u]nincorporated enterprises, glorified in most fields, were actually crusaded against in banking"). For a political economy account of branching restrictions, see Ronald J. Gilson, Henry Hansmann & Mariana Pargendler, *Regulatory Dualism as a Development Strategy: Corporate Reform in Brazil, the United States, and the European Union*, 63 STAN. L. REV. 475, 519-20 (2011).

120. *See* Efraim Benmelech & Tobias J. Moskowitz, *The Political Economy of Financial Regulation: Evidence from U.S. State Usury Laws in the 19th Century* (Nat'l Bureau of Econ. Research, Working Paper No. 12851, 2007), http://www.nber.org/papers/w12851 (finding that nineteenth-century usury laws allowed incumbents to deter entry and competition while decreasing their own cost of capital).

to finance its creation). That is, in this scenario, "[e]ach borrowing interest wanted a bank of its own."[121]

Moreover, banks of the time were highly risky enterprises and failed at a substantial rate. Among the reasons for failure was the presence of moral hazard. Investor-owned banks were subject to the temptation to speculate with their creditors' money (e.g., money received in exchange for private banknotes)—a practice now controlled by public regulation of banks' capital reserves. If the banks' principal customers collectively owned the bank, however, they had an incentive to manage it conservatively so it would be less likely to fail (and especially to fail while owing them money). This is the same reason why consumer savings banks were organized exclusively as nonprofit or mutual firms before 1845, only slowly becoming investor-owned after that as states began to regulate the banks' reserves.[122]

Voting restrictions in consumer-owned banks helped prevent large shareholders from appropriating the banks' credit to themselves to the detriment of other merchant owners. Yet the impetus for the adoption of voting restrictions in banks did not always come from the firm's shareholders; it was sometimes externally imposed. The Bank of Massachusetts of 1784, one of the very first banks established in the United States,[123] illustrates this point. Its charter mentioned the interests of merchants-consumers among the main justifications for the Bank's creation.[124] Many of the Bank's initial shareholders were prospective customers, but its principal founder and stockholder, William Phillips, publicly displayed himself as a capitalist and a lender, not borrower, of the bank.[125] The Bank's initial charter provided for a one-share-one-vote rule.[126]

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121. HAMMOND, *supra* note 116, at 147.

122. *See* HANSMANN, *supra* note 8, at 248-50.

123. Stuart Bruchey, *Alexander Hamilton and the State Banks, 1789 to 1795*, 27 WM. & MARY Q. 347, 348 (1970).

124. The "Petition of William Phillips and Five Others for a Charter," dated January 1784, argued that "it would prove beneficial to the Public in general & particularly to all Persons concerned in Trade to have a well regulated Bank established in this State." N.S.B. GRAS, THE MASSACHUSETTS FIRST NATIONAL BANK OF BOSTON 1784-1934, at 213 (1937).

125. *Id.* at 54 (noting that Phillips "borrowed only small sums from the Bank and indeed seems generally to have stood before the community as a lender or stockholder rather than as borrower").

126. An Act to Establish a Bank in the State, and to Incorporate the Subscribers Thereto, ch. 2, 1784 Mass. Acts 54, 56 ("[T]he number of votes to be determined by the number of shares each voter holds or represents.").

When elected president of the Massachusetts Bank in 1786, Phillips forced its shareholder-borrowers to sell their shares and withdraw from the corporation, in a move which was arguably designed to steer the bank away from the type of debtor cooperative that was prevalent at the time.[127] He also imposed limits on the amounts any shareholder or person could borrow, a rule which was, however, later abandoned.[128] Yet the Bank's monopoly profits, combined with a perception of insider favoritism and arbitrary discount refusals, continued to trigger resentment among disgruntled borrowers.[129]

In order to appease critics and ensure "a more secure administration of the affairs of the Massachusetts Bank,"[130] the state legislature eventually amended the bank's corporate charter over its objections. Among the charter amendments, which ranged from prudential regulations to limitations on the bank's scope of activity, the legislature imposed a cap of ten votes per shareholder—a rule that would persist as the norm for Massachusetts banks for nearly half a century.[131]

In 1790, two years before this incident, Alexander Hamilton had famously defended the adoption of a restricted voting scheme in the First Bank of the United States—a rule that he viewed as a "prudent mean" between the more extreme alternatives of one vote per member and one vote per share. In his words, "[a] vote for each share renders a combination between a few principal stockholders, to monopolize the power and benefits of the bank, too easy,"

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127. NAOMI R. LAMOREAUX, INSIDER LENDING: BANKS, PERSONAL CONNECTIONS AND ECONOMIC DEVELOPMENT IN INDUSTRIAL NEW ENGLAND 12 (1994); *see also* GRAS, *supra* note 124, at 53-54 (noting that, through the stock repurchase, the Massachusetts Bank "seemed to be about to step down the primrose path of early banks in New England . . . owned by stockholders who were more interested in borrowing from the Bank than in loaning to it, more concerned with becoming fixed debtors than permanent creditors").

128. *See* LAMOREAUX, *supra* note 127, at 12-13.

129. *Id.* at 13 ("The suspicion began to take root, both inside and outside the state legislature, that a handful of wealthy individuals had gained control of the bank and were using it for their own private purposes.").

130. An Act in Addition to an Act, Entitled "An Act to Establish a Bank in this State, and to Incorporate the Subscribers Thereto," ch. 48, 1792 Mass. Acts 188, 188.

131. 2 DAVIS, *supra* note 29, at 68-69 (explaining that "[t]his act (1) fixed a minimum denomination of $5 on notes issued; (2) made directors personally liable for payments of notes in case notes plus loans exceeded 'double the amount of their capital stock in gold and silver, actually deposited in the Bank, and held to answer the demands against the same'; (3) required directors to furnish statements to the governor and council semi-annually, or oftener upon request, of the amount of capital, debts, deposits, circulation, and cash on hand; (4) forbade dealings in merchandise or bank stock on penalty of forfeiture of double the value, half to go to the informer; (5) limited the votes per stockholder to ten").

while "[a]n 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."[132]

Hamilton's statements do not sufficiently clarify his motives for advocating the adoption of voting restrictions in the Bank of the United States. But read in light of contemporary controversies and Hamilton's overall concerns and objectives for the Bank, it seems more consistent with the consumer protection account of voting restrictions than with investor protection.[133] The Bank of North America of 1781—the backdrop against which Hamilton formulated his proposals—had been arguably "'all but crippled' during the 1790s because a few powerful borrowers had monopolized its funds."[134]

Throughout his "Report on a National Bank," Hamilton sought to reconcile the interests of investors and those of the general public.[135] He seemed particularly concerned with mitigating profit-maximizing behavior by the Bank's shareholders to the detriment of consumers, as well as with preventing favoritism in lending decisions. He defended, for instance, the constitution of a bank with a large capital, because shareholders, fearing a decrease in profits, might resist subsequent capital increases that are beneficial

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132. Alexander Hamilton, Report on a National Bank, Communicated to the House of Representatives, Dec. 14, 1790, *reprinted in* 3 THE WORKS OF ALEXANDER HAMILTON 388, 423 (Henry Cabot Lodge ed., 1904). The voting rule ultimately adopted provided as follows:

> 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.

National Bank Act, § 7, 1 Stat. 191, 193 (1791).

133. *See* Sommer, *supra* note 19, at 1042 ("Although this rationale [described in Hamilton's Report] can be read as providing for community control of the merchants, it reads more logically as providing mercantile control of the directors. In theory, regressive voting would ensure that the respectable merchants would collectively dominate the bank, but would keep individual merchants (or factions) from oppressing the rest." (footnote omitted)).

134. LAMOREAUX, *supra* note 127, at 7 (quoting FRITZ REDLICH, THE MOLDING OF AMERICAN BANKING: MEN AND IDEAS 11 (1947)).

135. Hamilton, *supra* note 132, at 419 (also arguing that "[p]ublic utility is more truly the object of public banks than private profit. And it is the business of government to constitute them on such principles, that, while the latter will result in a sufficient degree to afford competent motives to engage in them, the former be not made subservient to it").

to the Bank's security and to its customers. "Banks are among the best expedients for lowering the rate of interest in a country," he argued,

> but, to have this effect, their capitals must be completely equal to all the demands of business, and such as will tend to remove the idea, that the accommodations they afford are in any degree favors—an idea very apt to accompany the parsimonious dispensation of contracted funds. In this, as in every other case, the plenty of commodity ought to beget a moderation of price.

Hamilton also proposed a mandatory rotation of directors, a rule that he deemed to reduce "the danger of combinations among the directors, to make the institution subservient to party views, or to the accommodation, preferably, of any particular set of men."[136]

Ownership and control of banks by their merchant customers—and voting restrictions designed to reinforce that control—presumably served not just to constrain exploitation of monopoly power, but also to inhibit the banks from assuming an inefficient amount of risk, the costs of which would fall upon the banks' customers. Clearly this was the reason for the dominance of mutual and nonprofit firms among savings banks—which in the nineteenth century were a distinct class of institutions from the commercial banks we are concerned with here—prior to the advent of effective governmental regulation of reserves beginning in the late 1840s.[137] While the threat to customers of inefficient risk-taking was surely much higher in savings banks than in commercial banks, merchants whose notes were discounted by commercial banks clearly had a strong interest in the continuing creditworthiness of the banknotes or other credits issued by the banks in exchange.

Indeed, viewed in this latter respect, consumer ownership of commercial banks also helps explain other common charter provisions beyond shareholder voting rules. It was common for early bank charters to specifically prevent banks from engaging in trade or dealing in merchandise.[138] Such provisions seem more likely to have been intended as consumer protection than as investor protection. In particular, they plausibly served to limit the riskiness of the banks, and perhaps also prevented the banks from competing with their local merchant-owners.

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136. *Id*. at 420-21.

137. HANSMANN, *supra* note 8, at 246-64.

138. *See, e.g.*, 2 DAVIS, *supra* note 29, at 69 (describing a charter amendment prohibiting the Massachusetts Bank from dealing in merchandise).

The early nineteenth-century commercial banks gradually transitioned from consumer ownership to investor ownership.[139] What accounted for this transition? Increased competition seems a likely answer, as localities came to have more than a single bank and, beginning in the 1860s, bank entrepreneurs had the alternative of a federal charter as well as a state charter (though the widespread limitations on both interstate and intrastate branch banking continued to limit effective competition).[140] Expanding state and federal regulation presumably also reduced the riskiness of banks, and was perhaps important as well in providing some assurance to merchants that their local bank would not discriminate against them in favor of their competitors.

2. *Insurance*

Voting restrictions also appeared among early property and casualty insurance companies.[141] Maximum vote provisions were common, although not universal, in late eighteenth- and early nineteenth-century stock insurance companies in Pennsylvania and Massachusetts.[142] Approximately one third of stock insurance corporations chartered by special act in Connecticut through 1856 adopted restricted voting schemes.[143] By contrast, the overwhelming majority of New York finance and insurance companies[144] and New Jersey insurance companies[145] granted voting rights in direct proportion to share

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139. For a description of this process, see LAMOREAUX, *supra* note 127. Lamoreaux focuses on an intermediate stage of the process, in which the banks remained under the partial ownership and control of their merchant customers, and argues that those customers provided reputational reassurance to prospective non-customer investors: "[i]nvestors knew that when they bought stock in a bank they were actually investing in the diversified enterprises of that institution's directors." *Id*. at 5. We do not engage the latter issue here.

140. *See* Prasad Krishnamurthy, Financial Market Integration and Firm Growth (Sept. 20, 2012) (unpublished manuscript) (on file with author).

141. 2 DAVIS, *supra* note 29, at 246-47 (noting that, with respect to late eighteenth-century insurance companies, "regressive voting, or else one vote per share up to a maximum of ten, thirty, or fifty, was the rule").

142. DODD, *supra* note 51, at 225; JAMES MEASE, THE PICTURE OF PHILADELPHIA 109-12 (Philadelphia, B&T Kite 1811); *see also* Ratner, *supra* note 10, at 7-8 (citing an 1832 Massachusetts statute on insurance companies capping the number of votes at thirty per shareholder).

143. Dreier, *supra* note 52, at 23.

144. Hilt, *supra* note 14, at 657-58.

145. CADMAN, *supra* note 32, at 308-09.

ownership. Our multi-state analysis shows 38% of insurance companies chartered between 1790 and 1859 adopting restricted voting.

A significant number of the early insurance corporations were, both in name and substance, mutual insurance companies. These firms were owned by their customers—the insured—and typically adopted one vote per member or another form of stringent voting restrictions. Early mutual insurance companies were particularly common in the fire insurance business.[146] The economies of scale in building an insurance pool gave many of these companies substantial monopoly power, and created a strong incentive for collective ownership by their customers.[147]

While many consumer-owned insurance companies were organized formally as mutuals, a number of insurance companies formed as joint stock corporations were also effectively mutuals, serving principally to insure their shareholders. In this sense, the history of insurance companies is essentially akin to, and closely related with, that of banks.[148] As described by Alfred Chandler in the context of marine insurance, "[b]y pooling resources in an incorporated insurance company, resident merchants, importers, exporters, and a growing number of specialized shipping enterprises were able to get cheaper insurance rates"; as a result, "[n]early all these companies handled only the business of local shippers and ship owners."[149] The local element of early insurance firms was made explicit in their charter provisions; state

146. The first U.S. insurance company was, famously, the Philadelphia Contributionship, a mutual firm founded with the assistance of Benjamin Franklin in 1752. F.C. Oviatt, *Historical Study of Fire Insurance in the United States*, 26 ANNALS AM. ACAD. POL. & SOC. SCI. 155, 157 (1905).

147. HANSMANN, *supra* note 8, at 278. However, while the mutual form of organization mitigated potential conflicts between investors and consumers, it also gave rise to disputes among heterogeneous consumers themselves. For instance, a decision by the Contributionship board to stop insuring houses surrounded by trees (for they arguably hindered fire-fighting efforts) caused much discontent among some of its members, who ultimately created a new mutual insurance company to provide such coverage upon payment of an additional premium—the Mutual Assurance Company, whose symbol, fittingly, was a green tree. *See* Oviatt, *supra* note 146, at 157. In *Currie's Administrators v. Mutual Assurance Society*, 14 Va. (4 Hen. & M.) 315 (1809), a member sued over an amendment to the charter of a mutual insurance corporation increasing the premium to be charged from residents in the town vis-à-vis those of the country. The court held that the amendment had been approved by a majority of the corporation and was therefore valid.

148. 2 DAVIS, *supra* note 29, at 245-46 (stressing the close relationship between banks and insurance firms). Davis notes that "the merchant class demanded both services and naturally tended to control both types of institutions." *Id.* at 246.

149. CHANDLER, *supra* note 17, at 31, 32.

citizenship—or, in some cases, town residency—requirements for directors were common.[150]

Take, for example, the Insurance Company of North America, the first U.S. stock insurance company, which was chartered in Philadelphia in 1784. Historians attribute the decision to transform what was initially a failing tontine into a marine insurance company to John Maxwell Nesbitt, one of its founders and its future president who, as virtually all leading merchants at the time, had significant experience both as a policyholder and underwriter of marine insurance.[151] The company came to insure the ventures of many of its shareholders and directors—a situation expressly contemplated and permitted by the corporation's charter, provided that insiders did not receive special privileges.[152] However, not all prospective customers were able to become shareholders in the company. In fact, the Pennsylvania legislature granted a charter to another marine insurance company, the Insurance Company of the State of Pennsylvania, signed into law just four days after the charter of its predecessor, with the justification that "a number of the ship owners and traders of Philadelphia, from local circumstance, have not been able to obtain shares in [the Insurance Company of North America]."[153] Both insurance companies adopted a graduated voting scheme, subject to an absolute cap on the number of votes per shareholder.[154]

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150. 2 DAVIS, *supra* note 29, at 324. Prohibitions on interlocking directorates were also widespread.

151. *See* MARQUIS JAMES, BIOGRAPHY OF A BUSINESS 1792-1942: INSURANCE COMPANY OF NORTH AMERICA 16 (1942) (noting that leading Philadelphia merchants of the time previously "banded together to insure one another's shipping ventures"); THOMAS HARRISON MONTGOMERY, A HISTORY OF THE INSURANCE COMPANY OF NORTH AMERICA OF PHILADELPHIA 11 (Philadelphia, Press of Review 1885).

152. An Act to Incorporate the Subscribers to the Insurance Company of North America, ch. 220, § 7, 1794 Pa. Laws 489, 494 [hereinafter Insurance Company of North America Act] ("Any member of the corporation may, nevertheless, become assured thereby, on any vessel, goods, wares, merchandise, or lives, in the same manner and with the same effect, as if such member had no interest in the corporation."); JAMES, *supra* note 151, at 36.

153. MONTGOMERY, *supra* note 151, at 43 (emphasis omitted) (quoting the report of the legislative committee on the companies' charter applications).

154. Insurance Company of North America Act, *supra* note 152, at 492 (granting one vote per share up to fifty shares, one vote for every ten shares above fifty, subject to a cap of one hundred votes per shareholder, in his own right or as a proxy); An Act to Incorporate the Insurance Company of the State of Pennsylvania, ch. 227, § 4, 1794 Pa. Laws 512, 516 (providing one vote for the first share, one vote for every two shares up to ten, and one vote for every four shares up to thirty, subject to a maximum of twenty-four votes per shareholder).

Leading merchants were also instrumental in establishing the first stock insurance corporation in Connecticut, the Hartford Fire Insurance Company, in 1810. According to P. Henry Woodward, "[a] sense of ever-present peril, a desire to avert the worst effects of calamity from the immediate sufferer by distributing the loss through the community, and a willingness to contribute fairly to the common fund, brought the company into existence"; even though its subscribers certainly intended to make a profit, "money-making was a secondary consideration."[155] Nevertheless, its shareholders and directors turned out not to be avid purchasers of insurance policies, and the company initially struggled for lack of a clientele.[156] The corporation's charter granted voting rights in proportion to share ownership.[157]

The inspiration for the establishment of another fire insurance company in Hartford came from merchants who were previously customers of the Hartford Fire Insurance Company. Interestingly, their main motivation for creating a competing business was allegedly not the firm's monopoly prices, but rather its slack customer service. The story goes that the office of Walter Mitchell, the secretary and sole salesman of the Hartford Fire Insurance Company, had a highly inconvenient location, erratic hours of operation, and no regard for agreed-upon appointments. A disgruntled group of merchants then "pooled their discontent in a general protest" and incorporated the Aetna Insurance Company in 1819.[158] Although originally a local endeavor, competition soon led the Aetna to expand to other localities and procure outside business through agents.[159] The company's original charter capped voting rights at fifty per

155. P. HENRY WOODWARD, INSURANCE IN CONNECTICUT 14 (Boston, D.H. Hurd 1897).

156. HAWTHORNE DANIEL, THE HARTFORD OF HARTFORD: AN INSURANCE COMPANY'S PART IN A CENTURY AND A HALF OF AMERICAN HISTORY 34 (1960) (noting that "some of the Directors were very slow about taking out policies, and a good many of the stockholders apparently never did").

157. *Id.* at 273 app.

158. HENRY R. GALL & WILLIAM GEORGE JORDAN, ONE HUNDRED YEARS OF FIRE INSURANCE: BEING A HISTORY OF THE AETNA INSURANCE COMPANY, HARTFORD, CONNECTICUT, 1819-1919, at 29 (1919). Gall & Jordan detail that "[t]he trip out to Wethersfield along a clayey road, sometimes swamped by rains or rutted by drought, was an exasperating journey at the best . . . . Merchants or business men who wanted insurance did not relish the 'Gone for the day' sign that greeted their eyes so often on the door of his office." *Id.* at 28-29.

159. *Id.* at 46 ("It was realized at the very beginning that the local field, shared as it was with another company, would be small, and that it would be essential to stimulate outside business through carefully selected agents.").

shareholder, a rule that was, however, abandoned in favor of voting by shares in 1877.[160]

C. *Manufacturing*

In sharp contrast to the types of firms discussed above, one vote per share was from the outset the dominant voting rule in U.S. manufacturing corporations. Only one out of 135 manufacturing corporations chartered by special act in Connecticut through 1856 adopted voting restrictions.[161] Similarly, restricted voting schemes were present in only 2% of the manufacturing corporations chartered in New York between 1790 and 1825 and 5% of such firms incorporated in New Jersey between 1790 and 1867.[162] New York's path-breaking general incorporation act for manufacturing firms of 1811 provided a one-share-one-vote rule—a pattern that prevailed in most such statutes subsequently enacted by other states.[163]

Our multistate analysis shows 31% of manufacturing firms chartered between 1790 and 1859 as having restricted voting, but this proportion is, almost certainly, misleadingly high. Manufacturing firms, in contrast to other types of firms, appear to have been formed under the period's new free incorporation statutes in substantial numbers from an early stage.[164] Indeed,

160. *Id.* at 232 app., 236 app.

161. Dreier, *supra* note 52, at 22-23.

162. Hilt, *supra* note 14, at 658 tbl.1; CADMAN, *supra* note 32, at 206 tbl.1, 207 tbl.2, 309 (finding that 15 of 283 manufacturing firms incorporated over this period had restricted voting schemes).

163. An Act Relative to Incorporations for Manufacturing Purposes, ch. 68, § 3, 1811 N.Y. Laws 151, 151 [hereinafter Manufacturing Purposes Act]. The Connecticut and Michigan general incorporation laws of 1837 followed the New York example. Ratner, *supra* note 10, at 7. By contrast, the 1837 Virginia statute was unusual in providing a regressive, although uncapped, graduated scale for manufacturing companies. An Act Prescribing General Regulations for the Incorporation of Manufacturing and Mining Companies, ch. 84, § 5, 1837 Va. Acts 74, 76.

164. *See* W.C. Kessler, *A Statistical Study of the New York General Incorporation Act of 1811*, 48 J. POL. ECON. 877, 879 tbl.1 (1940) (showing that between 1811 and 1848, 362 manufacturing corporations were incorporated in New York under the Act of 1811, while only 150 were incorporated under special acts); *see also* Henry N. Butler, *Nineteenth-Century Jurisdictional Competition in the Granting of Corporate Privileges*, 14 J. LEGAL STUD. 129, 144 (1985) ("Between 1848 and 1871, only 143 business corporations were created under Wisconsin general incorporation laws while 1,130 were created by special acts—a ratio of almost eight to one. Thus, in Wisconsin as in New York, the constitutionally mandated, dual system did not significantly alter the legislators' behavior toward special charters. In general, it appears the pioneering New York corporation statute of 1811 was limited to manufacturing firms. Consequently, manufacturing firms are probably underrepresented in these data, which exclude corporations chartered under free incorporation statutes. Moreover, there is good reason to believe that the omitted manufacturing corporations had a substantially higher ratio of one-share-one-vote rules than did the specially chartered manufacturing corporations included in the data. One reason is that the early statutes providing for free incorporation, such as the New York statute of 1811, were not only limited to manufacturing firms but also mandated a rule of one-share-one-vote.[165] Thus our multistate analysis presumably understates the disparities between the voting rules adopted by manufacturing corporations and those adopted by corporations in other industries. Nonetheless, the regression reported in Table 2 shows that the frequency of restricted voting was significantly smaller in manufacturing corporations than in corporations organized to provide banking, bridges, canals, insurance, or roads.

The trend towards voting by shares in manufacturing firms was already apparent upon the incorporation of the pioneering Society for Establishing Useful Manufactures (S.U.M.) in New Jersey in 1791. The S.U.M. was a privately owned, but state-sponsored, corporation intended to foster the development of manufacturing in the United States. Even though the corporation was ultimately chartered and headquartered in New Jersey, most subscribers were New York capitalists and speculators. Unlike other contemporary corporations, which specified the object of the firm with considerable precision, the purposes clause of the S.U.M charter was exceedingly broad, providing that the corporation was to carry on "the Business of Manufactures in this State" and to employ its capital stock in "Manufacturing or making all such Commodities or Articles as shall not be prohibited by Law."[166] The S.U.M. charter granted one vote per share to private shareholders, while limiting the voting rights of the U.S. and state governments to one hundred votes each if they were to become shareholders in the firm.[167] Interestingly, Alexander Hamilton, who vigorously defended the

that the constitutionally mandated, dual system failed to have a negative impact on the market for special corporate charters." (footnote omitted)).

165. Manufacturing Purposes Act, *supra* note 163, at 151.

166. 1 DAVIS, *supra* note 29, at 380.

167. *Id.* at 382-83.

adoption of voting restrictions in the First Bank of the United States, was one of the chief promoters of the S.U.M.[168]

While many of the early corporations previously examined—such as bank, insurance, and transportation companies—were customer-owned local monopolies, shareholders of manufacturing corporations were almost always investors, not consumers. In contrast to the public utilities of the time, most manufacturing firms that required enough capital to employ the corporate form—which produced mostly textiles and, in smaller numbers, glass and metal[169]—were likely to be part of a reasonably broad market and thus face substantial competition. Moreover, the consumers of manufacturing firms were generally so dispersed, and purchased their products so sporadically, that they could not be efficiently organized to become owners of the enterprise. In this respect, they contrasted with the users of turnpikes, banks, and insurance companies, who would have continuously transacted with those service providers at a fairly constant rate of expenditure. Finally, as Donald Smythe observes, manufacturing firms required more active and innovative management than the early public utilities, and were therefore best served by active owners who faced and reacted to strong financial incentives, as compared to the broad cross-section of customers who presumably shared ownership of the monopolistic service industries.[170]

II. ULTRA VIRES AS CONSUMER PROTECTION

The recognition that a great number of early business corporations were owned by consumers rather than investors can shed light on other historical aspects of corporate law beyond shareholder voting rights. Another prominent feature of nineteenth-century corporation law that later fell into desuetude was a strong doctrine of "ultra vires" (literally, "beyond the powers"), which essentially prohibited corporate managers from deviating from the particular set of activities (or "purposes") set forth in the corporation's charter. Nineteenth-century business corporations typically listed in their charters a relatively narrow and specific set of corporate purposes. Corporate acts falling outside the scope of the specified purposes were subject to particularly stringent remedies, which ranged from shareholder and state lawsuits against

168. For a very thorough review of the establishment and early development of the S.U.M., see *id.* at 349-89.

169. 2 DAVIS, *supra* note 29, at 275-79; SEAVOY, *supra* note 27, at 62-64.

170. *See* Smythe, *supra* note 18, at 1419.

corporate managers to the voiding of ultra vires contracts by the corporation or its counterparty.[171]

Since the late nineteenth century, this restrictive approach to corporate purposes has been progressively abandoned in both law and practice.[172] Two conventional explanations have been offered for the rise and fall of the ultra vires doctrine. The first is that a narrow definition and construal of corporate powers made sense at a time in which incorporation conferred special privileges, a rationale that faded with the decline of the franchise view of the corporation, the spread of general incorporation statutes, and the gradual acceptance of general purpose clauses. The second is that the ultra vires doctrine served as a form of investor protection, assuring investors that their capital contributions to the firm would only be used in industries or activities in whose profitability they had some faith.[173] The abandonment of the doctrine

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171. Interestingly, the old doctrine to the effect that ultra vires contracts are void was not part of the ancient English common law, but rather a U.S. legal development. *See* 2 ARTHUR W. MACHEN, JR., A TREATISE ON THE MODERN LAW OF CORPORATIONS 826 (1908) ("If *ultra vires* contracts of royal-charter corporations were binding at common law, the universal and apparently spontaneous growth in America of the doctrine that *ultra vires* contracts of all kinds of corporations are void is very difficult to explain.").

172. *See, e.g.*, ROBERT CHARLES CLARK, CORPORATE LAW 675-76 (1986) (describing the ultra vires problem as only of historical interest); 1 WILLIAM W. COOK, A TREATISE ON THE LAW OF CORPORATIONS HAVING A CAPITAL STOCK, at vii (4th ed. Chicago, Callaghan & Co. 1898) (noting that "[t]he doctrine of *ultra vires* is disappearing"). *But see* Kent Greenfield, *Ultra Vires Lives!: A Stakeholder Analysis of Corporate Illegality (With Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279 (2001) (arguing that the ultra vires doctrine subsists in depriving managers of authority to commit illegal acts).

173. Some later interpretations of ultra vires have treated the doctrine as protecting the interests of investors. *See* ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 122 (Transaction Publishers 1991) (1932) (arguing that the strict purpose limitations of nineteenth-century firms were "probably designed to prevent corporations from dominating the business life of the time," but that "to the shareholder, however, it meant that he knew the particular enterprise, or at the widest, the type of business in which his capital was to be embarked"); Michael A. Schaeftler, *Ultra Vires—Ultra Useless: The Myth of State Interest in Ultra Vires Acts of Business Corporations*, 9 J. CORP. L. 81, 81 & n.1 (1983) ("The judicially-created doctrine of ultra vires evolved as a mechanism for the protection of shareholder interests . . . [since] [s]upposedly, a critical factor in the investment decisions of shareholders is the scope of permissible business activities in which a corporation may engage.").

The view of purpose restrictions as an investor protection device was explicitly articulated in the prominent decision in *Colman v. Eastern Counties Railway Co.*, (1846) 50 Eng. Rep. 481 (Rolls Ct.); 10 Beav. 1, which marked the overt recognition of the ultra vires doctrine in English law. The dispute concerned the authority of a railroad corporation to invest in a steam packet company, a strategy designed to increase the railroad's passenger in more recent times is then explained on the grounds that it was ultimately ineffective and rendered unnecessary by the advent of the norm of shareholder supremacy and by the increasing liquidity of securities markets and the easy exit this permitted for shareholders unhappy with a corporation's change of activities.[174]

We suggest that purpose restrictions might have served an additional important function in those early corporations—such as turnpikes, banks, and insurance companies—that were in essence consumer cooperatives. In consumer-owned firms, the nature and specifics of the business that the corporation engages in matter a great deal from a shareholder's perspective. The early turnpike cases in which shareholders refused to pay for their subscriptions after a change in the proposed location of the road provide an illustrative example of this concern.[175] A strong ultra vires doctrine not only assured firm members that their contributions would be channeled to the desired services, but also reduced the potential for using rents from the monopoly activity to cross-subsidize another activity that had a different distribution of benefits across the firm's shareholders—a problem that haunts

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traffic. In enjoining the transaction as ultra vires, the court argued that "a railway investment should not be considered a wild speculation, exposing those engaged in it to all sorts of risks, whether they intended it or not." *Id.* at 18. Accordingly, the court enforced the charter limitations even as it acknowledged that the ultra vires activities could be financially rewarding to the firm. *Id.* at 15 ("I am far from saying that that which is proposed to be done might not be extremely profitable to this company."). Interestingly, the fact that the shareholder plaintiff in the case was clearly defending not the financial interests of regular investors, but the conflicting interest of a competing navigation company whose position was threatened by the proposed transaction, did not seem to influence the court's reasoning. For a discussion of the *Colman* decision, see Harry Rajak, *Judicial Control: Corporations and the Decline of Ultra Vires*, 26 CAMBRIAN L. REV. 9, 16-18 (1995).

174. Greenfield, *supra* note 172, at 1284 (arguing that although once the norm of shareholder supremacy and the profit maximization rule were put into place, shareholders no longer needed ultra vires for protection from corporate overreach, the doctrine still increases transparency to shareholders); Michael A. Schaeftler, *Clearing Away the Debris of the Ultra Vires Doctrine—A Comparative Examination of U.S., European, and Israeli Law*, 16 LAW & POL'Y INT'L BUS. 71, 106-07 (1984) (showing that as distrust of corporations gave way to acceptance, and as states sought to attract business, legislators broadened the statutory language authorizing incorporation to include a wide-ranging purpose clause in place of ultra vires restrictions); Schaeftler, *supra* note 173, at 86 (arguing that the right of the state to challenge ultra vires activities lost "much of its persuasive force" with "the emergence of new attitudes towards the corporation in modern times").

175. *See supra* notes 40-42 and accompanying text.

cooperatives up to this day.[176] Moreover, the binding character of the proposed lines of business helped assure early shareholder-merchants that their corporate subscriptions would not be used to fund potential competitors. This concern was at the heart of the case of *Colman v. Eastern Counties Railway Co.*, which contains what is arguably the first overt reference to ultra vires in English law.[177]

Nevertheless, as product market competition increased the prevalence of purely investor-owned firms, this early function of the ultra vires doctrine lost its raison d'être for most business corporations. If what a shareholder expects from the firm is not a specific product or service, but a profit—the fungible good par excellence—the precise purposes and activities specified in a corporate charter should be comparatively less important. Indeed, flexibility in switching lines of business in response to changing market conditions and technological advances is critical to maintaining profitability. It should therefore come as no surprise that, in parallel to the decline of the ultra vires doctrine, investor-owned business corporations came to take advantage of the law's permission to craft exceedingly general purpose clauses that do not impose any meaningful limitation to their scope of action.[178]

Consequently, ultra vires was gradually abandoned as investor-owned firms came to dominate the corporate landscape. Consistent with this interpretation, (i) the ultra vires doctrine first started to lose its force as applied to manufacturing firms (which, as noted above, were overwhelmingly investor owned)[179] and (ii) ultra vires has only subsisted (although in increasingly weakened form) in firms where the corporate purpose is not profit, such as

176. *See* Abhijit Banerjee et al., *Inequality, Control Rights, and Rent Seeking: Sugar Cooperatives in Maharashtra*, 109 J. POL. ECON. 138 (2001) (finding evidence that controlling members of sugar cooperatives in India engage in rent-seeking by directing the firm to enter into ancillary activities that provide disproportionate benefits to themselves).

177. D.L., *Ultra Vires*, 25 AM. L. REG. 513, 514-15 (1877); *see supra* note 173 and accompanying text. The formulation of U.S. case law on the consequences of charter limitations of corporate powers long preceded these developments in Britain. D.L., *supra*, at 515.

178. *See, e.g.*, FOURTH AMENDED AND RESTATED CERTIFICATE OF INCORPORATION OF GOOGLE INC., art. III (June 22, 2012) ("The nature of the business or purposes to be conducted or promoted by the Corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of the State of Delaware.").

179. HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836-1937, at 60 (1991) (noting that courts first relaxed the application of the ultra vires doctrine with respect to manufacturing corporations).

nonprofit corporations in general and charities in particular.[180] Although voting restrictions persisted as the norm in consumer cooperatives' law and practice, the courts' willingness to police ultra vires acts in cooperatives faded just as it did with respect to business corporations.[181] But unlike business corporations, cooperatives continue to include purpose restrictions in their charters, as required under some statutes and encouraged by tax laws[182] and, more importantly, because this avoids the strong conflicts of interest, and consequent governance problems, that arise when different groups of owners have conflicting interests in a firm's activities.[183]

III. THE DECLINE OF VOTING RESTRICTIONS

Throughout this paper, we have sought to demonstrate the link between shareholder voting restrictions and consumer ownership of monopolistic corporations in the late eighteenth and early nineteenth century. Just as in the twentieth century,[184] restricted voting schemes historically functioned as

180. James J. Fishman, *Improving Charitable Accountability*, 62 MD. L. REV. 218, 237 (2003) ("The duty of obedience mandates that the board refrain from transactions and activities that are *ultra vires*, that is, beyond the corporation's powers and purposes as expressed in its certificate of incorporation."); Linda Sugin, *Resisting the Corporatization of Nonprofit Governance: Transforming Obedience into Fidelity*, 76 FORDHAM L. REV. 893, 900 (2007) ("While the ultra vires doctrine is nearly dead in the jurisprudence of for-profit corporations, it is potentially powerful in nonprofit enforcement . . . .").

181. *See, e.g.*, Cal. Canning Peach Growers v. Harkey, 78 P.2d 1137, 1148 (Cal. 1938) (holding that the same legal regime applicable to an ultra vires contract by "an ordinary commercial corporation" applied to cooperatives).

182. CHARLES T. AUTRY & ROLAND F. HALL, THE LAW OF COOPERATIVES 3 (2009).

183. *See* HANSMANN, *supra* note 8, at 120-67.

184. The comeback of voting restrictions in the twentieth century aimed primarily at avoiding corporate takeovers—be they by foreign firms at the expense of national ownership of industry, by corporate raiders to the detriment of managerial interests, or by investors at the expense of consumers. *See, e.g.*, Thomas J. André, Jr., *Cultural Hegemony: The Exportation of Anglo-Saxon Corporate Governance Ideologies to Germany*, 73 TUL. L. REV. 69, 167 (1998) (attributing the adoption of voting caps by German companies in the 1970s to the threat of foreign takeovers fueled by oil wealth from the Middle East); Marcello Bianchi, Magda Bianco & Luca Enriques, *Pyramidal Groups and the Separation Between Ownership and Control in Italy*, *in* THE CONTROL OF CORPORATE EUROPE 154, 160 (Fabrizio Barca & Marco Becht eds., 2001) (describing the prevalence of voting caps among privatized firms and cooperative banks in Italy in the 1990s); Ronald J. Gilson, *The Case Against Shark Repellent Amendments: Structural Limitations on the Enabling Concept*, 34 STAN. L. REV. 775, 814-15 (1982) (explaining the potential use of voting caps as an antitakeover device in the United States during the 1970s).

takeover defenses, albeit of a different kind. Unlike their modern counterparts, voting restrictions in early business corporations served not to shield corporate management and employees from a hostile acquisition, but rather to protect consumers by preventing the corporation from falling under the control of either a profit-maximizing investor or of a single merchant who would favor his own business over other local merchants in setting output allocation and pricing policies.

The consumer protection account predicts that the disappearance of voting restrictions would follow a shift from consumer to purely investor ownership of business corporations. We suggest that the nineteenth century witnessed precisely such a shift, for several reasons.

A. Governmental Provision of Infrastructure

By the late nineteenth century, general physical infrastructure, such as roads and bridges, were commonly financed and frequently owned and operated by government at one or another level, removing the need to fund such projects through quasi-philanthropic financing in which prospective beneficiaries purchased non-remunerative shares in private corporations. This expansion of the role of government paralleled more general changes in the structure of government in the first decades of the new nation, which saw the municipal corporation, in particular, evolve from its medieval role as a politically closed guild-like regulator of commerce to a new incarnation as a relatively democratic institution supported by general taxes rather than fees and flexibly organized to provide a variety of collective goods and services.[185] In effect, the shift from provision by a private corporation with restricted voting to provision by local government involved the replacement of a makeshift type of cooperative with a much more durable one. Local governments are, after all, effectively territorial consumer cooperatives established in large part to provide services that would otherwise be local monopolies.[186] And, of course, modern democratic governments have abandoned old practices of censitary suffrage in favor of the same highly restricted voting scheme that is the norm in consumer cooperatives—namely, the rule of one person, one vote.

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185. *See* TEAFORD, *supra* note 22, at 16-34.

186. *See* Henry Hansmann, *Ownership and Organizational Form*, *in* THE HANDBOOK OF ORGANIZATIONAL ECONOMICS 891, 910 (Robert Gibbons & John Roberts eds., 2013).

B. Separation of Competition Law from Corporation Law

The scope of corporate law became increasingly narrow during the course of the nineteenth century, as the field progressively specialized in the respective rights and duties of a firm's shareholders, managers, and creditors—the "internal affairs" of the corporation. Concerns about monopoly—which were initially addressed by limitations in charter provisions and in corporation statutes—became increasingly extraneous to this area of law.[187] Early corporate charters and statutes contained several mechanisms that regulated monopoly pricing and dissuaded anticompetitive combinations—of which restricted voting is but one unappreciated instance.[188] Over time, however, the regulation of monopoly (natural or otherwise) came to be the object of specialized areas of law—namely, antitrust law and utility regulation—that were much better focused, and less needlessly constraining, than were charter-based corporate voting restrictions.

C. Evolution and Differentiation of Standard Corporation Statutes

Over the course of the nineteenth century, the franchise view of the corporation was all but abandoned. Since the Supreme Court decision in *Charles River Bridge* in 1837, monopoly privileges were no longer implied by the mere grant of a corporate charter, and they became increasingly rare thereafter.[189] Moreover, general incorporation laws, which allowed firms to incorporate without the need to obtain special legislative charters and

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187. *See* HOVENKAMP, *supra* note 179, at 243 (noting that by the early twentieth century antitrust policy was already recognized as entirely distinct from state corporate law, so that compliance with corporate laws was no longer a defense against claims of anticompetitive conduct).

188. Hovenkamp has highlighted what turned out to be powerful antitrust provisions of early corporate charters, which frequently prevented corporations from operating out-of-state, from holding shares in other corporations, and from engaging in activities not expressly contemplated by the charter. *Id.* at 63. These restrictions, in turn, led many firms to adopt the trust form in order to obtain greater organizational flexibility—hence the term antitrust. *Id.* at 64. Similarly, many other forms of regulation in the nineteenth century, including pricing schemes for public utilities, also took place via corporate charters. *Id.* at 126. In fact, before the Supreme Court decision in *Munn v. Illinois*, 94 U.S. 113 (1877), it was not even clear that states had constitutional authority to regulate unincorporated entities.

189. In *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837), the Court construed a corporate charter of a bridge company narrowly and refused to imply an exclusive privilege to operate a bridge in the same location. The case became a watershed in the history of business corporations in the United States by dissociating corporations from monopoly.

conferred no exclusive privileges, gradually became dominant after the mid-nineteenth century; by the end of the century, they were the typical basis for incorporation, rendering the corporate form easily available to entrepreneurs seeking to raise outside capital.[190]

As this standardization and generalization of business corporation law proceeded, making that body of law particularly suited to investor-owned firms, separate statutes were adopted specifically to govern consumer-owned mutual and cooperative corporations. Maryland, for example, passed a special statute governing mutual savings and loan associations in 1843, and was followed by New Jersey in 1847, Pennsylvania in 1850, and subsequently other states as well.[191] In 1857, New York adopted one of the first mutual insurance company acts.[192] And, while early business corporations included many cooperatives in disguise, from the mid-nineteenth century onward cooperatives began to be recognized as a distinctive form of organization and to be expressly formed and labeled as such.[193] Scholars typically view the establishment of the Rochdale Society of Equitable Pioneers, an English consumer cooperative, in 1844 as marking the birth of the cooperative movement and the first enunciation of cooperative principles, including the rule of one member, one vote.[194] In 1865, Michigan enacted the first U.S. cooperative corporation statute,[195] followed within a few years by Massachusetts, New York,

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190. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 390-91 (3d ed. 2005).

191. SEYMOUR DEXTER, A TREATISE ON CO-OPERATIVE SAVINGS AND LOAN ASSOCIATIONS 43, 49, 65 (New York, D. Appleton & Co. 1891).

192. Harold Hedges, *Integrating Economic and Legal Thought Relating to Agricultural Cooperation*, 31 J. FARM ECON. 908, 911 (1949).

193. AUTRY & HALL, *supra* note 182, at 14-15 (noting that prior to the enactment of cooperative statutes, cooperative organizations were formed as business corporations). The lack of a separate organizational form for cooperatives for most of the nineteenth century and beyond was also apparent outside of the United States. Rob McQueen argues that pressures for an organizational form granting limited liability to worker cooperatives may have played an important role in the enactment of the English Joint Stock Companies Act in 1856. ROB MCQUEEN, A SOCIAL HISTORY OF COMPANY LAW: GREAT BRITAIN AND AUSTRALIAN COLONIES 1854-1920, at 67-76 (2009). Similarly, the first cooperative statutes in Brazil date back to the twentieth century; before then, companies serving cooperative functions were organized as regular business organizations, often taking the form of *sociedade anônimas* under existing corporations laws. *See, e.g.*, WALDIRIO BULGARELLI, AS SOCIEDADES COOPERATIVAS E A SUA DISCIPLINA JURÍDICA 64-65 (2d ed. 2000).

194. For discussion of the functions of the one-member-one-vote rule in cooperatives, and the deviations from it, see HANSMANN, *supra* note 8, at 13-15.

195. Charles E. Nieman, *Revolving Capital in Stock Cooperative Corporations*, 13 LAW & CONTEMP. PROBS. 393, 394 n.3 (1948).

Pennsylvania, Connecticut, and Minnesota.[196] These cooperative statutes regularly imposed a mandatory rule of one member, one vote.[197] The statutes for mutuals generally did not make such a voting rule mandatory, though the structure of their business would generally have rendered the number of shares held by customer-owners similar.[198]

The result was that consumer-owned and producer-owned firms, as distinct from investor-owned firms, increasingly faced the option of organizing, not as jury-rigged *business* corporations, but under specialized statutes that provided explicitly for the formation of cooperative and mutual corporations. And while voting restrictions have disappeared from the basic business corporation statutes, and in practice from publicly traded corporations in general, the sharply restricted rule of one-member-one-vote has subsisted as the voting rule commonly chosen by cooperatives.[199]

The anti-monopoly role played by restricted voting in the early nineteenth century was, by the end of the century, largely taken over by these mutual and cooperative corporations. A dramatic example involves the large farmer-owned marketing cooperatives that started to form in the late nineteenth century in direct response to the growing market power of investor-owned grain elevators, grain brokers, and railroads, often exercised through cartels. By around 1910, after more than a decade of economic warfare, the farmer-owned

196. Kimberly A. Zeuli & Robert Cropp, *Cooperatives: Principles and Practices in the 21st Century*, UW EXTENSION 17 (2004), http://www.learningstore.uwex.edu/pdf/A1457.pdf. There is some disagreement about the precise dates. *See, e.g.*, Nieman, *supra* note 195, at 394 n.3; Diane Rizzuto Suhler & Michael L. Cook, *Origins of a Current Conflict? An Examination of Stock-Nonstock Cooperative Law*, 8 J. AGRIC. COOPERATION 54, 57 (1993).

197. *E.g.*, An Act in Relation to the Formation of Coöperative Associations, ch. 62, § 7, 1875 Conn. Laws 34, 35; An Act in Relation to the Formation of Co-Operative Associations, ch. 290, § 7, 1866 Mass. Laws 270, 272; An Act Relating to the Organization of Co-Operative Associations, for the Purpose of Carrying on Any Mechanical, Mining, Manufacturing or Trading Business in the Commonwealth of Pennsylvania, no. 61, § 6, 1868 Pa. Laws 100, 102.

198. *E.g.*, An Act to Encourage the Establishment of Mutual Savings Associations, 1847 N.J. Laws 172, 172 (providing no voting rule but stating, in the Preamble, the intent to facilitate creation of associations permitting members to accumulate a fund "to be finally distributed equally among them").

199. Bruce J. Reynolds, Thomas W. Gray & Charles A. Kraenzle, *Voting and Representation Systems in Agricultural Cooperatives*, USDA iii-iv (June 1997), http://www.rurdev.usda.gov /rbs/pub/rr156.pdf. Indeed, one area in which the legal transition was at least partially *towards* rather than away from restricted voting was that of mutual insurance. While an 1859 Wisconsin statute authorized the grant of voting rights proportionately to the firm's patronage, a subsequent law of 1929 adopted the rule of one vote per member. *See* Ratner, *supra* note 10, at 8 n.41.

marketing cooperatives achieved dominance over investor-owned firms in the markets for the major grain crops[200]—a position that the cooperatives largely retain today.[201] Indeed, mutual and cooperative firms continue to account for a large fraction of the nation's economic activity. Farmer cooperatives market roughly a quarter of all farm products and provide farmers with a similar fraction of their supplies, such as oil, fertilizer, and seed,[202] while mutual companies currently write roughly a quarter of all property and liability insurance in the United States.[203] But, in general, these firms no longer form under the basic business corporation statutes.

D. *Increased Competition*

Increased competition in both capital markets and product markets was presumably also important in the decline of voting restrictions. The decline of legislative chartering and the rise of free incorporation statutes meant that governmentally-granted monopolies became rare outside of regulated industries. The development of stock markets made it easier for firms to obtain financing, both to undertake capital-intensive infrastructure projects such as railroads that had previously relied upon quasi-donative customer financing and to compete with established monopolies. Improvements in transportation and communication expanded the potential scope of a given firm's market, thereby reducing the market power of local providers of goods and services. And, beginning around the middle of the nineteenth century, government regulation to protect consumers—such as reserve requirements for banks and insurance companies—permitted investor-owned business corporations to enter markets for services that had previously been limited to nonprofit and mutual enterprise.[204]

The suggestion that increased market competition was responsible for the decline of voting restrictions in business corporations is not entirely novel. Colleen Dunlavy attributes what she sees as the premature abandonment of the democratic conception of the corporation in the United States to the early intensification of competition for capital in the United States compared to

200. *See* Oscar N. Refsell, *The Farmers' Elevator Movement*, 22 J. POL. ECON. 872 (1914); Oscar N. Refsell, *The Farmers' Elevator Movement II*, 22 J. POL. ECON. 969 (1914).

201. HANSMANN, *supra* note 8, at 120-22.

202. *Id.* at 120, 149.

203. *Id.* at 265.

204. *Id.* at 246-86.

Europe.[205] David Ratner, in turn, has speculated that, with the rise of general incorporation statutes and the demise of the franchise view of the corporation, "the external control afforded by competition supplanted the internal control provided by voting restrictions."[206]

We argue, by contrast, that the competition that helped foster a change in voting patterns did not take place in capital markets, but rather in product and service markets. Moreover, it was not competition in itself, but the decline of customer ownership made possible by competitive markets and governmental activity, that ultimately led to the abandonment of restricted voting rules.

E. Ease of Evasion

Another reason for the decline is that share ownership with restricted voting is an unstable means of restraining monopolistic behavior. Over time, increasing numbers of consumer-shareholders are likely to sell their shares to non-consumers (or themselves become non-consumers) whose only benefit from the shares comes from distributed profits. When the latter shareholders, no matter how fragmented, come to hold a majority of the votes among themselves, they have an incentive to turn the firm toward profit maximization rather than consumer protection. Moreover, the constraint of restricted voting structures can often be evaded by various forms of subterfuge, such as breaking up a large block of shares into smaller—and hence higher-per-share-vote—blocks whose nominal ownership is distributed among family and friends.

These various forms of evasion could largely be avoided by making shares in the corporation non-transferable—something that is often permitted or required by mutual and cooperative corporation statutes. But the business corporation statutes adopted in the nineteenth century, and the interpretations that the courts gave those statutes, generally required that shares be freely transferable, presumably on the theory that transferability was necessary to provide the liquidity that would otherwise be lost owing to the potentially infinite life of a business corporation and the inability of its shareholders, acting as individuals, to force liquidation of their investment in the firm as they could in a partnership. Strong restrictions on the transferability of shares in

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205. Dunlavy, *supra* note 13, at 5 (contrasting the timing of the abandonment of voting restrictions in the United States and Europe); Richard Sylla, *Comment*, *in* A HISTORY OF CORPORATE GOVERNANCE AROUND THE WORLD 661 (Randall K. Morck ed., 2005) (describing and analyzing Dunlavy's account of the early "plutocratic turn" in shareholder voting rights in the U.S. in her forthcoming book *Shareholder Democracy*).

206. Ratner, *supra* note 10, at 45-46.

business corporations came to be accepted only well into the twentieth century.[207]

F. The Interests of Small Versus Large Shareholders

One of the advantages of the one-share-one-vote rule compared to restricted voting, from an economic perspective, is that it gives large shareholders an incentive to monitor and influence management. But creating incentives for shareholder monitoring was arguably less important in the consumer-owned enterprises of the early nineteenth century than in the average listed corporation today. Because early shareholders transacted with the firm on a regular basis in their role as consumers, they were in a better position to observe mismanagement than were small and dispersed investors. Moreover, early turnpikes, bridges, canals, and banks were fundamentally local enterprises, and geographic proximity to the firm's headquarters and operations further facilitated monitoring. Finally, investment shares in the consumer-owned enterprises were presumably relatively equal, as they typically are in mutual and cooperative firms, since the amount of fire insurance bought by local merchants, or the use made of a short turnpike by local farmers and merchants, probably did not vary by large amounts. Only investors seeking profit would have an incentive to buy a large block of stock in such a corporation.

In contrast, for the purely investor-owned firms that became increasingly prevalent among business corporations over the course of the nineteenth century, one-share-one-vote was the natural rule. In addition to stimulating efficient monitoring, as just described, that rule avoids the exploitation of large shareholders by small ones that can result from restricted voting—for example, through the threat of holding up efficient transactions in an effort to induce redistribution from large to small shareholders.

In sum, as consumer ownership increasingly came to be either inefficient or accommodated through specialized statutes for cooperative and mutual firms, a rule of one-share-one-vote naturally became the dominant practice among business corporations, as well as the default rule in the business corporation statutes and a requirement for listing stock on the nation's largest stock exchange.

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207. *See* F. Hodge O'Neal, *Restrictions on Transfer of Stock in Closely Held Corporations: Planning and Drafting*, 65 HARV. L. REV. 780-84 (1952).

G. *Mixed and Muddled Motives*

Although we have been seeking here to make a persuasive case for the consumer protection theory of restricted voting schemes, we do not mean to suggest that there were no other motives behind their adoption, or that the reasons for adopting restricted voting—whether consumer protection or something else—were always clear in the minds of the individuals who formed business corporations or the minds of the legislators who granted individual corporate charters or enacted general corporation statutes.

In the late-eighteenth and early-nineteenth centuries, there was clearly widespread concern about the power and autonomy of business corporations. That vague but strong concern surely extended well beyond the possibility that corporations might engage in monopolistic exploitation of their customers. It led legislators to impose a variety of relatively arbitrary restrictions on incorporated firms—such as maximum lifespans and maximum capitalization—that had no special bearing on consumer protection, and that were evidently intended simply to limit the power of corporations generally, as a prophylactic against unforeseen abuses. Viewed this way, the various limitations imposed on early business corporations, including restricted voting, appear broadly consistent with Dunlavy's interpretation of them as an expression of the nation's democratic spirit.

It is also quite possible that there is some validity to the investor protection theory. There may have been firms that adopted restricted voting with the intention of protecting small shareholders from large ones. This would not have been illogical. The difficulty is that—in contrast with the consumer protection theory—we see little direct evidence of this motive. Moreover, as a general explanation, it seems inconsistent with both the pattern of restricted voting across industries and the gradual disappearance of restricted voting over the course of the nineteenth century.

Eric Hilt, in an article written in response to an earlier draft of this article, presents a comparative test of our consumer protection theory with the investor protection theory developed earlier by him and others.[208] For this purpose he reviews the data from his earlier studies, and also adds to that data an impressive survey of the wealth and general occupation of shareholders in New York corporations as of 1826 who were resident in New York City.[209] Hilt recognizes the force of the consumer protection theory, accepting in particular

208. Eric Hilt, *Shareholder Voting Rights in Early American Corporations*, 55 BUS. HIST. 620 (2013).

209. *Id.* at 635.

that the pattern of restricted voting he observes is consistent with that theory: restricted voting rules were nearly ubiquitous in New York turnpike companies, almost totally absent in manufacturing companies, and present in about a quarter of bank charters. Only the insurance companies in his sample—which rarely had restricted voting—differ from the pattern we have observed in other states.[210] Nonetheless, Hilt argues that there is other evidence that weighs in favor of the investor protection theory.

First, Hilt shows that the median wealth of shareholders in manufacturing companies was considerably larger than that of shareholders in other types of corporations, and that the value of the stock held by the median shareholder was much larger in manufacturing companies than in other types of corporations. Indeed, he observes that the par value of stock was generally set much higher in manufacturing firms than in other types of firms, impeding all but the wealthy from buying shares. Hilt concludes from this that, "[c]onsistent with the investor protection theory, manufacturing firms did not employ graduated voting rights because *they had no small investors to protect*."[211] But the logic runs more easily in the other direction. Why did only manufacturing firms have no small shareholders? A plausible answer is: because manufacturing firms, lacking market power, had no *consumers* to protect. (Hilt himself notes that, "manufacturers often produced undifferentiated products such as cotton cloth and faced intense competition from domestic and foreign producers, and thus did not hold much market power."[212]) Consequently, the charters of manufacturing companies did not subject them to restricted voting, because the principal purpose of such a rule was to facilitate distribution of stock, and, correspondingly, voting power, among the firms' (prospective) customers as protection from product market exploitation by the firm.

Second, Hilt observes that when a company's charter provided for restricted voting, the charter often contained other restrictions that were unambiguously designed to protect customers. In particular, the charters of turnpike and bridge companies commonly set out in detail the tolls that the companies could charge for different types of traffic. Hilt concludes from this that turnpike and bridge companies "had no discretion over pricing," and that restricted voting "was therefore most likely motivated by concerns unrelated to

210. *Id.* at 624-25.

211. *Id.* at 625-26.

212. *Id.* at 624.

the market power of firms."[213] But the strength of this inference is doubtful. For one thing, as Hilt concedes, the presence of price restrictions in corporate charters is unambiguous evidence that the legislature was concerned about the firm's exercise of monopoly power vis-à-vis consumers.[214] For another, it seems unlikely that legislators would have believed that price restrictions in a company's charter would successfully eliminate all of a firm's market power. The prices set were maximums; a customer-controlled firm would presumably have been free to set lower tolls, or no tolls at all, if costs permitted. Moreover, companies subject to charter provisions limiting prices presumably retained the ability to increase their profits by cutting their operating and maintenance costs to inefficiently low levels. And one must wonder how well the pricing provisions in the charters were enforced in any event. The more convincing interpretation, it seems, is that legislatures imposed multiple limitations in the charters of early corporations that were perceived as monopolies, in the hope that together those controls might be effective. Other such (crude) controls, for example, included limits on the lifespan of a corporation and on the total assets that a corporation could hold.

But we do not want to overstate our own case. The pattern of restricted voting revealed in Table 1 of the Appendix, while broadly consistent with the consumer protection theory, contains a great deal of variation—across industries, across states, and across time—that seems hard to explain in great detail with the consumer protection theory, or with any simple functional theory. On top of variations in interests, ideologies, and understanding, there was presumably much copying of charter provisions from one firm to another, and from one statute to another, without much hard thought as to whether the old provisions made sense in the changed context.[215] We see further evidence of this noisiness when we turn, as we do now, to the historical experience with restricted voting in other countries.

IV. VOTING RESTRICTIONS IN COMPARATIVE PERSPECTIVE

Early U.S. corporations were not unique in resorting to voting rules that limited the number of votes that large shareholders could cast. Similar schemes were present among the closest antecedents of the modern business

213. *Id.* at 627.

214. *Id.*

215. *Cf.* Sommer, *supra* note 19, at 1017 ("There is a lot of mindless copying in United States banking law . . . .").

corporation, dating back to the Dutch East India Company, as well as in a number of other jurisdictions in the nineteenth century. This Part examines the characteristics and the rationale for the adoption of restricted voting in these contexts. Although the evidence of consumer ownership in these cases is mixed, voting restrictions still appear to serve more plausibly as a response to concerns about market power than as a mechanism to protect the financial interests of small investors.

A. *The Dutch East India Company*

The pioneer Dutch East India Company—also known as the VOC, an acronym for its Dutch name *Vereenigde Oost-Indische Compagnie*—is widely recognized as the first publicly-traded business corporation.[216] The company was chartered in 1602 as the product of a merger, clearly designed to eliminate competition, of six existing trading companies, each of which previously operated as a form of *commenda* or limited partnership established for single voyages.[217] In exchange for a grant by the state of a monopoly on the trade routes between the Cape of Good Hope and the Straits of Magellan, the VOC was also to fulfill public functions such as assisting in wars of independence against Spain.

The VOC charter restricted the voting rights of large shareholders, though hardly in a way that benefited minority investors. The company had a two-tier shareholding structure composed, on the one hand, of governors or *bewindhebbers*, who were the active merchants who had been in charge of the six prior trading companies and had hereditary status, and, on the other hand, of the outside investor class of *participanten*. *Bewindhebbers* had one vote each and only they could be elected to the VOC governing body, the "Seventeen Directors."[218] *Participanten*, by contrast, lacked voting and information rights

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216. For a description of the antecedents of the modern joint-stock company in Roman law—the slave-based *peculium* arrangement and the *societas publicanorum*, see Henry Hansmann, Reinier Kraakman & Richard Squire, *Law and the Rise of the Firm*, 119 HARV. L. REV. 1333 (2006).

217. Ron Harris, *Law, Finance and the First Corporations*, *in* GLOBAL PERSPECTIVES ON THE RULE OF LAW 145, 156 (James J. Heckman et al. eds., 2010).

218. Ella Gepken-Jager, *Verenigde Oost-Indische Compagnie (VOC): The Dutch East India Company*, *in* VOC 1602-2002: 400 YEARS OF COMPANY LAW 41, 54 (Ella Gepken-Jager et al. eds., 2005). The Seventeen Directors were governor representatives of each of the VOC's six chambers, which were remnants of the early trading companies existing before the merger. The division of activities and votes among the chambers was done in a manner such that no single chamber would come to dominate the others, even though the chamber of altogether. Although the VOC's initial charter gave shareholders the right to withdraw their capital contributions after the first ten years, a subsequent charter amendment orchestrated by *bewindhebbers* and the state eliminated this right, effectively locking in outside investors against their will.[219]

The VOC gradually came to boast most of the key elements of the corporate form as we know it today—legal personality, limited liability, delegated management, and transferable shares—as well as partial investor ownership.[220] Nevertheless, the company also was partly owned and entirely controlled by the merchant traders in charge of the partnerships that it replaced, thus effectively functioning as a consumers' cooperative. As described by a Dutch scholar, similarly to the early companies, "the governors [of the VOC] were simultaneously the suppliers of the goods sent to Asia and the main buyers of the spices and other goods that the ships returned with."[221] Until 1623, the governors had a right to prior purchase on the goods shipped by the company, which they then resold at a profit. From the perspective of the outside investors, the merchant governors were essentially self-dealing by charging themselves low prices for the merchandise to the detriment of the firm's profitability.[222] Despite the charter's mandate, dividends were not distributed until 1610 and 1612, and then were paid out only in kind—in mace, pepper, and nutmeg—at a time in which the market price for these commodities was particularly low due to excess supply.[223]

In this context, the rule of one vote per governor ensured that no single merchant would be able to appropriate the benefits of the firm's monopoly to

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Amsterdam had invested the most capital. *See* FEMME S. GAASTRA, THE DUTCH EAST INDIA COMPANY: EXPANSION AND DECLINE 21 (2003).

219. *See* Andrew von Nordenflycht, *The Great Expropriation: Interpreting the Innovation of "Permanent Capital" at the Dutch East India Companies*, *in* ORIGINS OF SHAREHOLDER ADVOCACY, *supra* note 15, at 89, 90-91.

220. John Armour, Henry Hansmann & Reinier Kraakman, *What is Corporate Law?*, *in* ANATOMY OF CORPORATE LAW, *supra* note 3, at 1, 1-14; Giuseppe Dari-Mattiacci, Oscar Gelderblom, Joost Jonker & Enrico Perotti, The Emergence of the Corporate Form (2013) (unpublished manuscript) (on file with authors) (describing the VOC's progressive adoption of corporate characteristics).

221. Gepken-Jager, *supra* note 218, at 66.

222. Klaus J. Hopt & Patrick C. Leyens, *Recent Developments of Internal Corporate Governance Structures in Germany, the United Kingdom, France, and Italy*, *in* VOC 1602-2002: 400 YEARS OF COMPANY LAW, *supra* note 218, at 283, 284 (noting that "the governors' right to prior purchase turned out to be unfortunate, leading to an early form of what we today call self-dealing").

223. GAASTRA, *supra* note 218, at 23-24.

himself at the expense of other merchants. The famous episodes involving Isaac Le Maire are illustrative of this concern. Initially the largest single shareholder in the Amsterdam Chamber[224] and a *bewindhebber* sitting on the board of governors, Le Maire was among a handful of directors that apparently attempted to divert the firm's potential trading profits to themselves by undertaking an expedition of fourteen ships under their own accounts instead of those of the company.[225] Since his large shareholdings were not accompanied by greater voting power, Le Maire was soon ousted by other governors in 1605 on charges of embezzlement, and was eventually forced to sign an agreement not to compete with the VOC.[226]

Having retained stock in the company following this incident, in 1609 Le Maire led one of the first expressions of shareholder advocacy.[227] Le Maire protested in a petition to the VOC board, denouncing the "impotence" of the VOC, its failure to make discoveries, and its tendency to send out too few ships.[228] In addition to his written complaint, Le Maire launched a bear raid against the company,[229] which ultimately resulted in the enactment of a ban on naked short selling.[230] But Le Maire's main source of discontent was not the lack of dividend payments by the company, but rather the extended scope of its monopoly, which legally (though not practically) prevented him from launching competing ventures.[231] In fact, Le Maire

> subordinated his . . . criticism [of the company's corporate governance] to his main concern, that the VOC's monopoly should be restricted and

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224. HENK DEN HEIJER, DE VOC EN DE BEURS: DE VERENIGDE OOST-INDISCHE COMPAGNIE ALS GRONDLEGGER VAN DE EERSTE AANDELENBEURS 16 (2002) [THE VOC AND THE EXCHANGE: HOW THE VOC LAID THE FOUNDATIONS FOR THE WORLD'S FIRST STOCK EXCHANGE].

225. J.G. van Dillen, *Isaac Le Maire and the Early Trading in Dutch East India Company Shares*, *in* 1 PIONEERS OF FINANCIAL ECONOMICS 45, 47-48 (Geoffrey Poitras ed., Asha Majithia trans., 2006).

226. *Id.* at 45.

227. Oscar Gelderblom, Abe de Jong & Joost Jonker, *An Admiralty for Asia: Business Organization and the Evolution of Corporate Governance in the Dutch Republic, 1590-1640*, *in* ORIGINS OF SHAREHOLDER ADVOCACY, *supra* note 15, at 29, 29-30.

228. Johan Matthijs de Jongh, *Shareholder Activists* Avant La Lettre*: The "Complaining Participants" in the Dutch East India Company, 1622-1625*, *in* ORIGINS OF SHAREHOLDER ADVOCACY, *supra* note 15, at 61, 66.

229. Gelderblom et al., *supra* note 227, at 30; *see also* de Jongh, *supra* note 228, at 66.

230. *See* de Jongh, *supra* note 228, at 80.

231. In fact, in 1607 Le Maire entered secretive negotiations with the French King, Henry IV, to establish a competing company. *Id.* at 66.

> not, as the board wanted, extended. Big merchants such as he and De Moucheron were keen to get the scope of the intercontinental trade widened and chafed at the unremunerative VOC monopoly.[232]

Over time, however, the protests of outside investors were heard. The VOC's charter of 1623 simultaneously curbed self-dealing by the merchant governors and increased the rights of large investors. The new charter eliminated the governors' right of prior purchase, only permitting *bewindhebbers* to purchase goods from the company if they had fixed prices or were bought in public auctions.[233] It also modified the system of director compensation by providing for a joint remuneration of one percent of net returns in lieu of the prior scheme that was based on the value of the equipping of ships.[234] At the same time, the charter granted voting and supervisory rights to the major shareholders. Major *participanten* became eligible for a newly created Committee of Nine, an early form of supervisory board, and had a say in the appointment of governors, but small shareholders remained thoroughly disenfranchised.[235]

In short, the early VOC was essentially a monopolistic traders' cooperative—a cartel—whose restrictive voting rules were clearly designed not to protect small outside shareholders, but instead to protect the firm's trader-members from the control of either outside investors or prominent insiders like Le Maire.

B. Nineteenth-Century Voting Restrictions in England, Brazil, and France

In recent years, economic historians have documented the presence of charter rules limiting the number of votes that large shareholders could cast in a variety of jurisdictions in the early nineteenth century.[236] This raises the question of whether the shift from restricted voting to proportional voting paralleled the separation of ownership and consumption in these other

232. Gelderblom et al., *supra* note 227, at 50.

233. Gepken-Jager, *supra* note 218, at 66-67.

234. de Jongh, *supra* note 228, at 79.

235. Gepken-Jager, *supra* note 218, at 57-58; Hopt & Leyens, *supra* note 222, at 284.

236. *See supra* note 15 and accompanying text.

countries as well—an issue which we have examined in greater detail in a companion article.[237]

In England, the pattern of shareholder voting rights in the late eighteenth and early nineteenth centuries is largely similar to that of the United States, and seems to support the consumer protection account of voting restrictions. Restricted voting schemes were particularly common among firms providing essential infrastructure services to their merchant-owners—such as canal, insurance, and gas lighting companies—but were rarer among purely investor-owned firms.[238] Just like U.S. turnpikes, gas lighting companies in the U.K. rarely paid dividends, but this was hardly the object of discontent among shareholders, who seemed more than happy to receive a return on their investment in the form of lower gas prices.[239]

By contrast, the Brazilian Council of State and the French Conseil d'Etat—the central government bodies in charge of approving requests for incorporation—consistently imposed voting caps across the board, without regard to industry or ownership structure, as a condition to the grant of a corporate charter.[240] This poses challenges to both the investor protection and the consumer protection interpretations of voting restrictions. To be sure, a significant number of early corporations in both jurisdictions had their roots in the insurance and public works industries, hinting at their cooperative or mutual character.[241] Nevertheless, voting restrictions were clearly prevalent among purely investor-owned firms as well, which contradicts the association—largely present in the United States and Britain—between consumer ownership and restricted voting schemes.

But if the observed patterns on nineteenth-century voting rights in Brazil and France fail to confirm the consumer protection view of voting restrictions,

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237. Mariana Pargendler & Henry Hansmann, *A New View of Shareholder Voting in the Nineteenth Century: Evidence from Brazil, England and France*, 55 BUS. HIST. 585 (2013).

238. *Id.* at 587-89.

239. JOHN F. WILSON, LIGHTING THE TOWN: A STUDY OF MANAGEMENT IN THE NORTH WEST GAS INDUSTRY 1805-1880, at 90 (1991).

240. Pargendler & Hansmann, *supra* note 237, at 591, 593.

241. *See* ANNE LEFEBVRE-TEILLARD, LA SOCIÉTÉ ANONYME AU XIXE SIÈCLE: DU CODE DE COMMERCE À LA LOI DE 1867, HISTOIRE D'UN INSTRUMENT JURIDIQUE DU DÉVELOPPEMENT CAPITALISTE 369 (1985); Pargendler & Hansmann, *supra* note 237, at 589, 594. For further discussion of early French corporate forms, see RAYMOND SALEILLES, DE LA PERSONNALITÉ JURIDIQUE: HISTOIRE ET THÉORIES 116-34 (1910), which describes how French non-profit firms in the nineteenth century adopted the corporate form in the absence of more suitable organizational alternatives.

they certainly help to refute the interpretation of these rules as an investor protection device. First, both countries' Councils of State not only insisted on strict voting caps but also admitted minimum stock ownership requirements for attending and casting votes in shareholder meetings, thereby disenfranchising small shareholders.[242] Second, the incidence of voting restrictions fell precipitously as soon as merchants began to have a real choice as to the voting rule following the advent of general incorporation in these jurisdictions. Contrary to the view that restricted voting schemes "were critical to encouraging the participation of small investors in equity ownership" in Brazil,[243] voting caps were being abandoned precisely as the country's capital market boomed.[244]

CONCLUSION

Shareholders in business corporations around the world today are generally investors whose primary, and typically only, interest in the firm is to obtain a financial return.[245] The need to protect outside investors against abuse by insiders—either managers or controlling shareholders—largely dominates corporate law and policy.[246] The dominance of investor-owned firms came to be such that the application of the U.S. federal securities law regime that emerged in the twentieth century—notably, as a result of the Securities Act of 1933 and the Securities Exchange Act of 1934—is premised on the existence of an "investment contract" where the shareholders' primary interest in the enterprise is to "invest for profit."[247] The separation between investment and consumption thus became a defining element for the scope of securities

242. For instance, France's Conseil d'État raised from twenty to forty the number of shares required for a vote in the Société Générale Algerienne. CHARLES E. FREEDEMAN, JOINT-STOCK ENTERPRISE IN FRANCE, 1807-1867, at 128 (1979).

243. Musacchio, *supra* note 15, at 461.

244. Pargendler & Hansmann, *supra* note 237, at 593.

245. *See* Armour, Hansmann & Kraakman, *supra* note 220, at 5-16 (listing legal personality, limited liability, delegated management, transferable shares, and investor ownership as the basic elements shared by business corporations worldwide).

246. *See, e.g.*, *id.* at 35.

247. United Hous. Found., Inc. v. Forman, 421 U.S. 837, 851-52 (1975) (holding that shares in a housing cooperative did not qualify as a "security" or as an "investment contract" subject to federal securities laws).

regulation, placing possible abuses of shareholder-consumers in cooperative corporations, no matter how large,[248] outside the purview of securities law.

Before the late nineteenth century, however, shareholders in a significant fraction of business corporations were not primarily interested in obtaining a financial return on their investment but rather in having access to the firm's services at reasonable cost. Accordingly, some peculiar features of early corporate law and practice—including, in particular, restricted voting schemes—served not to protect the shareholders as investors but to protect them as consumers.

By the late nineteenth century, governmental provision of infrastructure had expanded, while legal rules addressing problems of market power were spun off from the law of business corporations and embodied in separate statutory regimes (such as antitrust law, utility regulation, and regulation of banking and insurance), and distinct bodies of organizational law were developed to cover cooperative corporations. This evolution permitted business corporations, and the corporate law that governs them, to focus on the agency problems within investor-owned firms—between controlling and non-controlling shareholders, and between managers and the shareholders as a group—for which the rule of one share, one vote appears more suitable than restricted voting.[249]

The appreciation of the distinctive ownership structure of nineteenth-century corporations cautions against automatically drawing policy lessons from historical practices for the development of capital markets today. Contrary to existing suggestions based on a misreading of nineteenth-century corporate practice,[250] voting caps are as unlikely to protect investors' interests today as they were in the past. For one thing, it is not apparent that, to be effective, corporations subject to restricted voting rules require less well-developed legal regimes than do corporations operating under a rule of one-share-one-vote. Moreover, there are obvious costs to restricted voting that

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248. *See id.* Exclusion of cooperatives from coverage by securities law was not a reflection of the size of the firms involved. Farmland Industries, for example, had—near its peak, just prior to a 2003 restructuring—600,000 farmer-members, 13,800 employees, and $6.5 billion in sales. *Farmland Industries*, NNDB, http://www.nndb.com/company/590/000098296 (last visited Oct. 14, 2013). *See generally* HANSMANN, *supra* note 8, at 120-22 (noting that among other evidence of the economic scale of cooperatives, as of 1992 there were fourteen cooperatives among the Fortune 500 largest industrial firms).

249. *See supra* note 20 and accompanying text.

250. *See, e.g.*, MUSACCHIO, *supra* note 6, at 253-54 (arguing that historical lessons suggest that restricted voting schemes may be more conducive to minority investor protection than the rule of one-share, one-vote).

seem relatively larger for purely investor-owned firms than for consumer-owned firms. Restricted voting is likely to discourage investors from investing relatively large amounts of money in a firm, since the investment will be disproportionally under the control of other smaller investors. Moreover, with restricted voting, a firm can fall under the control of entrenched managers lacking a strong incentive to maximize profits. And, over time, restricted voting rules can be avoided, especially if the courts do not develop and enforce a relatively sophisticated set of doctrines to prevent it. Analogous problems surely faced the cooperative-type corporations of the early nineteenth century, though they may have been relatively modest. The essentially donative share purchases in those corporations might not have varied greatly in magnitude even without restricted voting. And the geographic propinquity of an infrastructural firm's shareholder/donors may have afforded them relatively easy control over the managers of those firms.

Legal and economic scholarship today focuses heavily on agency problems regarding managers and controlling shareholders, and on the evolution of the separation between ownership and control that has aggravated those problems. If we look back to the nineteenth century, however, we see another important—though frequently overlooked—turning point in the history of the business corporation: namely, the separation between ownership and consumption. Ignoring that earlier phase in the development of the business corporation can result in an anachronistic misinterpretation of the restricted voting structures that were so widely employed in the past, but that have now largely disappeared. Failure to understand the role played by restricted voting in the past, moreover, may lead us to overestimate the potential advantages of current proposals for a return to restricted voting, in both developing and mature economies.

APPENDIX: PATTERNS OF RESTRICTED VOTING ACROSS INDUSTRIES, STATES, AND DECADES

The results reported in Tables 1 and 2 below are derived from the Sylla/Wright data set.[251] That data set includes corporations with legislatively granted charters, but excludes corporations that formed under statutes—such as the New York statute of 1811 for manufacturing firms[252]—that provided for incorporation as of right without special legislative action. For most industries, legislatively granted charters were evidently dominant until the middle of the nineteenth century even in the presence of incorporation statutes.[253] For this reason, the pattern of corporate voting rules reflected in the Sylla/Wright data set presumably offers a reasonably accurate picture of the relative prevalence of restricted voting to be found among firms in different industries, states, and decades. That is evidently not true for manufacturing firms, however, as discussed in the text.[254] Thus, the results in the tables below presumably understate the disparities between the voting rules adopted by manufacturing corporations and those adopted by corporations in other industries.

The full data set includes 22,419 observations. The voting rule for each of these corporations was coded as "one-share-one-vote," "one-person-one-vote," "prudent mean" (which includes all capped and graduated voting rules), or "not specified." We aggregated the firms with one-person-one-vote and prudent mean rules into a single category of "restricted" voting, permitting us to code each firm with a binary variable indicating whether the firm had restricted voting or one-share-one-vote.

The voting rule is specified for less than half the corporations in the sample, perhaps because the voting rule was included in the corporate bylaws rather than in the charter, or because the voting rule was established by a separate statute not located by the coder of the data. For the analyses reported here we eliminated all firms for which the voting rule was missing, though this of course leaves questions about systematic bias in the sample that remains. We were left with a sample of 10,996 firms. We then eliminated all firms chartered in states other than the original thirteen, firms operating in industries (usually small) other than those reported in the tables below, and all firms incorporated in either Massachusetts or South Carolina (because of irregularities that

251. *See supra* note 33 and accompanying text.

252. Manufacturing Purposes Act, *supra* note 163.

253. FRIEDMAN, *supra* note 190, at 390-91.

254. *See supra* note 164 and accompanying text.

suggested systematic miscoding or missing data[255]). We also eliminated all observations for the decade of the 1860s, which were quite limited. We were finally left with a sample of 6,387 corporations, which we used for the analyses reported here.

The Sylla/Wright data set contains no information on the ownership of the firms involved other than the names of the original incorporators. As a consequence, it does not permit us to explore directly the relationship between firms' voting rules and the number and nature of their shareholders.

Table 1 below offers a simple breakdown of the frequency of restricted voting rules among firms by industry and decade. Table 2 presents a regression analysis in which the dependent variable is an indicator variable taking the value of 1 if the firm has a restricted voting rule and 0 if the voting rule is one-share-one-vote. The omitted variables in that regression are manufacturing (industry), Georgia (state), and 1850s (decade). Therefore, each regression coefficient in Table 2 reflects the difference between (1) the probability that a corporation in the given industry, state, and decade will have a restricted voting rule and (2) the probability that a restricted voting rule will be found in a corporation engaged in manufacturing in Georgia in the 1850s.

255. Massachusetts and South Carolina, in contrast to the other states, have substantial amounts of non-random missing data. The majority of observations for these states do not have a voting style specified and the missing data is significantly related to particular business types.

Table 1.
PERCENTAGE OF RESTRICTED VOTING CHARTERS BY INDUSTRY AND DECADE

	1790s	1800s	1810s	1820s	1830s	1840s	1850s	Total
Bank	87.5 (16)	63.3 (30)	82.0 (128)	43.1 (58)	42.9 (156)	34.7 (49)	46.9 (271)	52.8 (708)
Bridge	3.3 (30)	34.0 (47)	27.2 (81)	44.6 (65)	42.0 (119)	45.3 (75)	45.0 (80)	37.8 (497)
Canal	65.5 (29)	68.8 (16)	45.8 (24)	39.0 (41)	30.4 (23)	45.5 (22)	4.8 (21)	42.6 (176)
Insurance	61.5 (13)	46.9 (32)	26.1 (46)	17.0 (53)	20.0 (175)	48.4 (155)	47.8 (253)	37.8 (727)
Manufacturing	50.0 (2)	40.0 (10)	31.4 (70)	10.0 (80)	37.6 (335)	39.1 (161)	19.6 (148)	31.4 (806)
Mining	N/A (0)	0.00 (3)	14.3 (7)	9.1 (22)	71.7 (187)	53.1 (98)	25.0 (152)	48.4 (469)
Railroad	N/A (0)	N/A (0)	100.0 (1)	48.4 (31)	41.3 (322)	33.9 (121)	5.8 (276)	27.4 (751)
Road	3.0 (33)	45.5 (231)	66.8 (316)	71.2 (146)	67.7 (288)	67.5 (268)	72.1 (605)	65.3 (1887)
Utility	25.0 (4)	33.3 (18)	28.6 (14)	21.7 (23)	28.6 (42)	33.3 (60)	25.4 (205)	27.3 (366)
Total	35.4 (127)	45.5 (387)	56.6 (687)	41.0 (519)	46.1 (1647)	48.9 (1009)	42.6 (2011)	45.9 (6387)

Total observations are reported in parentheses

Table 2.
LOGISTIC REGRESSION

Dependent Variable: Percentage of Firms with Restricted Voting
Omitted Variables: Manufacturing, Georgia, 1850s

Industry	Coefficient	State	Coefficient	Decade	Coefficient
Bank	1.724***	CT	-0.330	1790s	0.109
	(0.134)		(0.240)		(0.228)
Bridge	0.351**	DE	-0.218	1800s	0.206
	(0.148)		(0.343)		(0.136)
Canal	0.599***	MD	-0.0637	1810s	0.504***
	(0.210)		(0.223)		(0.112)
Insurance	0.600***	NC	1.647***	1820s	0.199
	(0.133)		(0.225)		(0.124)
Mining	0.161	NH	-0.400	1830s	0.213**
	(0.155)		(0.260)		(0.0885)
Railroad	-0.0641	NJ	-0.101	1840s	0.210**
	(0.137)		(0.209)		(0.0969)
Road	1.599***	NY	0.610***	Constant	-2.322***
	(0.118)		(0.198)		(0.213)
Utility	0.0696	PA	1.796***		
	(0.168)		(0.192)		
		RI	1.303***		
			(0.219)		
		VA	3.686***		
			(0.219)		

Standard errors in parentheses: *** $p<0.01$, ** $p<0.05$, * $p<0.1$
Number of observations: 6,387