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David L. Ratner

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THE GOVERNMENT OF BUSINESS CORPORATIONS: CRITICAL REFLECTIONS ON THE RULE OF "ONE SHARE, ONE VOTE"*

David L. Ratner†

Business corporations are the dominant institutions in American society. The decisions of their managers shape our present and future lives. The processes by which the selection of those managers, and the decisions they make, are ratified or legitimized, are therefore of central importance. Scholars have devoted thought to these processes, but there has been almost no effort to relate that thought to existing or potential legal mechanisms for control.

This article is a tentative effort to cross that gap by relating scholarly analysis of corporate government to a particular legal datum—the rule of “one share, one vote.” I have not attempted to erect a new framework, but have rather made a series of thrusts at the rule from different points of view, followed by an extremely preliminary consideration of alternatives. If the thrusts are well-directed, the subsequent erection of a new framework can be undertaken with more confidence about the footing.

OVERTURE: GAMES PEOPLE PLAY

There are three games of Corporations. They are played by different people, on different boards, and with different rules.

Corporations I is played on a board with fifty squares, called States. The players are called Corporation Lawyers, and they form

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† Professor of Law, Cornell University. A.B. 1952, LL.B. 1955, Harvard University.

themselves into teams, called Bar Association Committees. There are two types of pieces used in the game—small pieces called Businessmen and large pieces called Corporations. The large pieces are carefully designed by the Corporation Lawyers to look just like the Businessmen, except of course that they are much larger. Within the States there are obstructions which sometimes prevent the large pieces from moving in the direction that the Corporation Lawyers want to move them. The object of the game is to change the rules in each State to eliminate the obstructions. This process is called Modernizing the Corporation Laws. (Actually it consists of substituting nineteenth-century ideas for eighteenth-century ideas, but since the game became popular in the nineteenth century the term Modernizing is still used.) The Corporation Lawyers who are proficient at this game win large amounts of money, but since all the teams are on the same side, it is not a very interesting game to watch.

Corporations II is not played on a board, but with a large box called a Corporation. Inside the box are piles of money. One group of players is inside the box. They are called Insiders. The Insiders are allowed to take money, but there are rules as to how much money they can take, or how fast or how far they can go, on any one move. There are a few small holes cut in the box through which players outside the box can watch the Insiders. If an outside player thinks he sees one of the Insiders make an illegal move, he shouts "Breach of Fiduciary Duty!" An outside player who shouts this is called a Strike Suiter. Since the rules are not written down, a referee has to be called in to see whether the move was really illegal. If the move was legal, the Insider can keep the money. If the move was illegal, the Insider must put the money back on the pile, and the referee then pays half of it to the Strike Suiter. (Under the old rules, the Insider could pay half to the Strike Suiter and keep the other half, without calling in the referee, but this is no longer permitted.) This game is a lot more fun to watch than the first game.

Corporations III is also played with a large open box, called The Corporation. The box is kept in a luxuriously appointed gaming hall, colloquially called a Think Tank, which is always found in an area with a very nice climate and many recreation facilities. Inside the box are piles of money, and pieces of different shapes and sizes with such names as Workers, Shareholders, and Creditors. There is also a group of players inside the box called Corporate Managers, who move the money and the pieces around in some pattern. The other group of players, called Scholars, are outside the box. They come into the gam-

ing hall after tennis, or swimming, or skin diving, and watch the activities of the Corporate Managers. Then they sit around a table and try to guess what rules the Corporate Managers are following in making their moves. The Scholars who make the cleverest guesses are invited back to play another round at the expense of the gaming hall. Nobody is allowed to watch the game while it is being played, but the guesses made by the Scholars are usually reported in special books with paper covers, which some people read.

I

HISTORICAL AND COMPARATIVE VIEWS

A. *An Excursion into Antiquity*

The Corporation textbooks do not say much about the development of the rule of one vote per share in business corporations. According to Ballantine, "[a]t common law . . . each member [of a corporation] was entitled to one vote, and no more," but this "rule was adopted with respect to public corporations and private corporations not having a capital stock, and at a time when joint stock corporations were unknown It is generally expressly provided . . . by a statute or by by-laws, that stockholders shall have one vote for each share held by them."¹

This explanation does not tell us much, and what it does tell us is misleading. The problem of shareholder voting was recognized at the earliest stages of the development of business corporations in England, 400 years ago, and a variety of approaches were developed in response to economic and social needs over the succeeding years.

Through the early part of the seventeenth century, the charters of the joint stock companies, each of which was specially granted by the King, generally made no special provision for the relationship of shares to voting rights, leaving this to the by-laws.² However, the charter of the Mines Royal in 1568 provided for one vote for each quarter of a share, the total capital being divided into twenty-four shares.³ Since the project was a joint venture of Englishmen and Germans, between whom there was some "friction and suspicion,"⁴ this provision was

¹ H. BALLANTINE, *MANUAL OF CORPORATE LAW AND PRACTICE* § 171, at 573 (1930).

² I W. SCOTT, *THE CONSTITUTION AND FINANCE OF ENGLISH, SCOTTISH AND IRISH JOINT-STOCK COMPANIES TO 1720*, at 162-63 (1912).

³ *SELECT CHARTERS OF TRADING COMPANIES 1530-1707*, at 14-15 (Selden Soc'y ed. 1913). See also I W. SCOTT, *supra* note 2, at 163.

⁴ *SELECT CHARTERS OF TRADING COMPANIES 1530-1707*, *supra* note 3, at xciv.

presumably inserted to assure continued English control of the operation, regardless of the number of German shareholders.⁵

The charter of the Mineral and Battery Works, also granted in 1568, had voting provisions similar to those of the Mines Royal. By 1574 it had produced an alleged abuse of fiduciary duty by a controlling stockholder who acquired between one-fifth and one-quarter of the shares and used his voting power, together with allegedly fraudulent accounts, to procure a reduction in the rent that he and two other stockholders paid for property they leased from the company.⁶

Not surprisingly, in the companies whose charters did not specify the manner of voting, controversies arose when the result of the election would differ depending on whether each shareholder had one vote or one vote for each share. A principal issue in the controversy between the Smythe and Sandys factions for control of the Virginia and Somers Island Companies between 1618 and 1625 was whether voting should be by ballot, in which case each member would have one vote, or by a poll in which members would be entitled to one vote for each share.⁷ And in 1637, when the members of the Merchant Adventurers, on a vote by ballot, refused to accept the man "recommended" by King Charles I as the company's deputy in Rotterdam, "the King in Council ordered that, in future, no company should use a ballot-box in the conduct of its business."⁸

By the latter part of the seventeenth century, it became more common to specify voting rights in the charter and three distinct patterns emerged. As Scott describes it:

On the one side, there were a number of companies in which there was no limitation, for instance in the White Paper Makers, the Saltpetre company, that for digging Mines and the Hampstead Aqueducts each share entitled the holder to one vote. On the other hand, while there was no undertaking which followed what is said to have been the method of a regulated company, namely the decision of controverted questions by a poll of persons, the Bank of England approached near to this rule, since it was decreed that no member should have more than one vote. The difference lay

⁵ A return made in 1571 showed that 14 shares were owned by 22 Englishmen, and the remaining 10 shares by an unspecified number of Germans. 2 W. Scott, *supra* note 2, at 387.

⁶ 1 *id.* at 58-59. "When one recollects the amount of discussion that has centred round 'controlling interests' . . . in recent years, it is not uninteresting to notice how soon the evil manifested itself." *Id.* at 59.

⁷ 2 *id.* at 266-88. Sandys also tried to introduce the ballot box at the election of the East India Company in 1619. *Id.* at 106.

⁸ 1 *id.* at 228 (footnote omitted). It is tempting to infer from this incident an historical affinity of autocrats for the "one share, one vote" rule.

in the fact that those, who owned less than £500 stock, had no voting-power. Similarly in the Million Bank £300 of stock entitled the holder to one vote and no one might have more than one. In the Royal Lustring company 10 shares (£250) conferred a single vote, which in this case also was the maximum allowed to each member. There was a third group which aimed at a compromise between the extreme tendencies. Like the Bank of England, £500 stock in the Greenland company gave a right to one vote, £1,000 stock to two, the latter being the maximum for any person. According to the constitution of Barbon's land bank, £300 stock qualified for two votes, £500 stock for three votes, £1,000 stock for five votes—the latter being the maximum. In the company for smelting Iron with Pit-coal the maximum was four votes, in the Scots Linen manufacture five votes. In some cases, where no express maximum is mentioned, there was still a limit to the votes of any shareholder, arising out of the restriction which limited the amount of stock or shares that might be subscribed for or owned by a member. Thus in the Bank of Scotland each £1,000 Scots carried one vote, subject to the proviso that no one might take up more than £20,000 Scots; and in the society of White writing and printing Paper, while each five shares gave a vote, the maximum holding was 20 shares. The final step in this tendency, as it existed in the seventeenth century, was made by the charter of the Old East India company (1698), which introduced a sliding scale, but not a uniformly progressive one.⁹

The third pattern appears to have become the dominant one in English business companies during the eighteenth century, so that, while large shareholders were almost always entitled to more votes than small shareholders, there was "[n]evertheless, almost universally, in order to prevent the concentration of control . . . a relatively low maximum number of votes that any one proprietor might cast."¹⁰

In America, there were very few business corporations or joint stock companies in existence before the Revolution.¹¹ One of the few was William Penn's Free Society of Traders in Pennsylvania, chartered in England in 1682, in which shareholders not resident in Pennsylvania were restricted to one vote, while those who owned at least 1,000 acres of inhabited land in the province were allowed two votes for two shares and three votes for six shares or more.¹²

More than 300 private corporations for business purposes were

⁹ *Id.* at 340-41 (footnotes omitted).

¹⁰ A. DuBois, *THE ENGLISH BUSINESS COMPANY AFTER THE BUBBLE ACT 1720-1800*, at 288 (1938). For specific examples see *id.* at 316-17 nn. 48-50.

¹¹ 2 J. DAVIS, *ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS* 4 (1917).

¹² 1 *id.* at 42.

chartered in the United States between the Revolution and 1801,¹³ of which two-thirds were transportation or water companies or otherwise of a "quasi-public character."¹⁴ The charters evidenced the same variations as English companies of the same period:

Voting rights were usually not mentioned in water company charters, where the rule of one vote for each *proprietor* may have been general through this period; in Massachusetts bridge charters, which were notably free; and in occasional other charters, such as the congressional charter to the bank of North America (1781). From the outset, however, most charters specified voting rights. These were usually limited in one way or another. A maximum of ten votes, or sometimes twenty, was common, and well-nigh universal in case of turnpike companies. Higher maxima were common in insurance companies. Frequently a complicated system was drawn up giving less and less weight per share as the size of the holdings increased. Alexander Hamilton, arguing for such a scheme in his report on the "National bank," said:

"A vote for each share renders a combination between a few principal stockholders, to monopolize the power and benefits of the bank, too easy. An equal vote to each stockholder . . . allows not that degree of weight to large stockholders which it is reasonable they should have, and which, perhaps, their security, and that of the bank, require. A prudent mean is to be preferred."

The tendency was, however, for these limitations to be relaxed toward a simple vote per share basis. This was done, probably invariably, at the request of the corporations, probably under pressure from those who were or would be large holders. And voting rights of one per share were specified in occasional charters, notably in those of the Bank of North America (Pennsylvania charter, 1782), the Massachusetts Bank (1784), the New Jersey manufacturing society (1791), and the New Haven Insurance Company (1797).¹⁵

The restrictions on voting rights were at least in part attributable to widespread public concern that grants of power to corporations and those who controlled them would weaken democratic government.¹⁶ This concern may have been reinforced by the "tendency to concentration of ownership" already apparent at the end of the eighteenth century, particularly in the more promising enterprises.¹⁷

¹³ 2 *id.* at 8.

¹⁴ Baldwin, *Private Corporations*, in *TWO CENTURIES' GROWTH OF AMERICAN LAW 1701-1901*, at 261, 276 (1901).

¹⁵ 2 J. DAVIS, *supra* note 11, at 323-24, quoting M. CLARK & D. HALL, *BANK OF THE UNITED STATES 28* (1832) (emphasis in original) (footnotes omitted).

¹⁶ 2 J. DAVIS, *supra* note 11, at 304.

¹⁷ *Id.* at 302.

The nineteenth century saw the gradual substitution of general incorporation laws for private acts of incorporation. The early general incorporation laws, however, showed the same variations as the special laws that preceded them.

New York's general law for manufacturing corporations, enacted in 1811, specified that "each stockholder shall be entitled to as many votes as he owns shares of the stock of the said company"¹⁸ and the Connecticut and Michigan statutes of 1837 followed the same pattern,¹⁹ while New Jersey provided for one vote per share unless otherwise specified.²⁰ However, New York's 1807 general incorporation law for turnpike companies specified one vote for every share up to ten, and one vote for every five shares above that,²¹ a provision which appears to have survived until the general corporation law revision of 1890.²²

Pennsylvania and Massachusetts experimented with various methods of limiting the voting power of any single stockholder. The Pennsylvania act of 1836 gave a stockholder one vote for each share up to two, for each two shares above two and up to ten, for each four shares above ten and up to thirty, for each ten shares above thirty and up to 100, and for each twenty shares above 100.²³ This formula was abandoned in 1849 in favor of a provision that "each stockholder shall be entitled to as many votes as he owns shares of stock in said company, but no person shall in any case be entitled to more than one-third of the whole number of votes to which the holders of all the shares would . . . be entitled"²⁴ This restriction was finally eliminated by the Corporation Act of 1874.²⁵

Massachusetts made no mention of voting rights in its general incorporation laws for manufacturing companies in 1809 and 1830.²⁶ In the laws governing special kinds of corporations, however, while votes were on a per-share basis up to a certain point, a stockholder in a bank was limited to ten votes,²⁷ a stockholder in an insurance com-

¹⁸ Act of March 22, 1811, ch. 67, § 3, [1811] N.Y. Laws 112.

¹⁹ Act of June 10, 1837, ch. 63, § 9, [1836-37] Conn. Pub. Acts 49; Act of March 22, 1837, No. 121, § 3, [1837] Mich. Laws 285.

²⁰ Act of Feb. 25, 1846, § 11, [1846] N.J. Laws 66.

²¹ Act of March 13, 1807, ch. 38, [1807] N.Y. Laws 104.

²² See Act of June 7, 1890, ch. 564, § 54, [1890] N.Y. Laws 1077.

²³ Act of June 16, 1836, No. 194, § 3, [1835-36] Pa. Laws 800.

²⁴ Act of April 7, 1849, No. 368, § 4, [1849] Pa. Laws 564.

²⁵ Act of April 29, 1874, No. 32, § 10, [1874] Pa. Laws 79.

²⁶ Act of March 3, 1809, ch. 65, [1809] Mass. Laws 464; Act of Feb. 23, 1830, ch. 53, [1829-30] Mass. Laws 325.

²⁷ MASS. REV. STAT. pt. 1, tit. 13, ch. 36, § 23 (1836).

pany to thirty votes,²⁸ and a stockholder in a railroad was not "entitled to any vote for any shares beyond one tenth part of the whole number of shares . . . of stock . . ." ²⁹ The restriction on voting in railroads appears to have been eliminated in 1906,³⁰ and that on banks in 1910.³¹ Restrictions on voting in insurance companies were not completely eliminated until 1928.³² In manufacturing companies, Massachusetts tried a different approach by providing that no person could vote more than fifty shares as proxy unless they were all owned by one person, and that no officer of the corporation could cast more than twenty votes as proxy or attorney.³³ This restriction, too, disappeared by 1902.³⁴

North Carolina's general incorporation law of 1836, for silk and sugar companies, gave one vote for each share up to five and one vote for each five shares above that,³⁵ but the broader general incorporation law of 1850 left the matter of voting to be prescribed by the by-laws,³⁶ as did the first general incorporation law of Delaware.³⁷

In England, the Companies Act of 1862 provided that in default of regulations each member should have one vote,³⁸ but the suggested regulations contained in the first schedule to the Act provided for one vote for each share up to ten, for each five shares above ten up to 100, and for each ten shares above 100.³⁹ These provisions were eliminated in 1908 in favor of a provision that on a poll each stockholder would have a vote for each share.⁴⁰

By the end of the nineteenth century, then, statutory restrictions on the rule of one vote per share in business corporations had virtually disappeared, and it is now unusual to find a statutory reference to any formula other than one vote per share.⁴¹

²⁸ Act of March 6, 1832, ch. 95, § 3, [1831-33] Mass. Laws 334.

²⁹ MASS. REV. STAT. pt. 1, tit. 13, ch. 39, § 50 (1836).

³⁰ Act of June 7, 1906, ch. 463, pt. 2, § 37, [1906] Mass. Acts & Resolves 521.

³¹ See Act of April 14, 1910, ch. 399, § 14, [1910] Mass. Acts & Resolves 335.

³² Act of April 2, 1928, ch. 185, [1928] Mass. Acts & Resolves 205.

³³ MASS. GEN. STAT. ch. 60, § 7 (1860). Dodd found Massachusetts during this period far more prone than New York to discourage concentration of control in the hands of large shareholders. Dodd, *American Business Association Law*, in 3 LAW, A CENTURY OF PROGRESS 254, 273 (1937).

³⁴ MASS. REV. LAWS ch. 110, § 25 (1902).

³⁵ 2 N.C. REV. STAT. 216, at § 4 (1837).

³⁶ N.C. REV. CODE ch. 26, § 2 (1855).

³⁷ Act of March 14, 1883, ch. 147, § 18, [1883] Del. Laws 221.

³⁸ Companies Act of 1862, 25 & 26 Vict., c. 89, § 52.

³⁹ *Id.* § 44, sched. 1.

⁴⁰ Corporations (Consolidation) Act, 8 Edw. 7, c. 69, § 60, sched. 1 (1908).

⁴¹ Under Vermont law, the articles of association or by-laws of a corporation

This brief history indicates that the emergence of a general rule of one vote per share did not result from enlightened awareness of the inadequacies of an inappropriate common law rule, but was the nineteenth-century culmination of a 300-year political controversy over the degree and type of control that should be retained over the managers of corporations chartered for economic purposes. Indeed, there is no real indication that any common law rule of one vote for each member of a business corporation ever existed.

The case most often cited for such a proposition is the 1834 decision of the New Jersey Supreme Court in *Taylor v. Griswold*,⁴² invalidating a by-law provision of a bridge company which purported to give one vote for each share. The court did not cite any earlier decisions on the question; its only direct authority was a statement in Angell and Ames's treatise on corporations that "[i]n joint stock companies, the owner of one share or action of the capital stock, is, in general, a member of the company; a corporator; and as such, entitled to, and cannot be denied, the entire rights and privileges of a member."⁴³ The court went on to state that

[t]hose rights and privileges . . . cannot be different in one member, than they are in another. . . . A man with one share is as much a member, as a man with fifty; and it is difficult to perceive any

"may provide that each stockholder shall have one vote for each share of stock held by him, or that each stockholder shall have but one vote, regardless of the amount of stock held by him . . ." VT. STAT. ANN. tit. 11, § 64(a)(4) (1958). In the absence of any provision, stockholders apparently have one vote for each share. *Id.* § 64(d).

There appears to have been at least one area where the trend was in the opposite direction. An 1859 Wisconsin law authorizing mutual insurance companies based voting rights "not on the democratic principle of one vote per person but on a property-oriented principle of one vote for each \$200 of insurance." S. KIMBALL, *INSURANCE AND PUBLIC POLICY* 71 (1960). However, as a result of a continuing campaign, this rule was abandoned in favor of the democratic voting principle in 1929. *Id.*

⁴² 14 N.J.L. 222 (Sup. Ct. 1834).

⁴³ *Id.* at 237, quoting J. ANGELL & S. AMES, *PRIVATE CORPORATIONS* 62 (1832). The statement in Angell and Ames, however, related solely to the right of a person who bought stock in a joint stock corporation to become a member without a vote of admission. None of the editions of Angell and Ames from 1832 to 1882 discussed the question of the number of votes to which a shareholder was entitled. Morawetz, in 1886, believed "the custom of giving the shareholders . . . a vote for every share has become so well established that it is fair to imply an intention to follow this custom in the absence of any indication to the contrary." 1 V. MORAWETZ, *PRIVATE CORPORATIONS* § 476 (2d ed. 1886). See also W. COOK, *STOCK AND STOCKHOLDERS* § 608 (1887). Clark reached the same conclusion in 1897, and believed that "this is clearly the just rule, for stockholders are interested not equally, but in proportion to the number of shares held by them." W. CLARK, *PRIVATE CORPORATIONS* 477 (1897). He did note, however, that "often the number of votes which a single stockholder shall be allowed to cast is limited. The object is to prevent the corporation from getting into the control of a single person." *Id.* at 476.

substantial difference between a by-law, excluding a member with one share from voting at all, and a by-law reducing his one vote to a cipher, by giving another member fifty or a hundred votes.⁴⁴

The court noted that the legislature had "thought proper, in some instances" to give one vote for each share in corporate charters and in other cases had provided for graduated voting. The court believed, however, that as a policy matter, it should not permit the members of the corporation to adopt such a rule in the absence of specific legislative authority, since

the tendency, at least, the *apparent* tendency, of the by-law in question, is to encourage speculation and monopoly, to lessen the rights of the smaller stockholders, depreciate the value of their shares, and throw the whole property and government of the company, into the hands of a few capitalists; and it may be, to the utter neglect or disregard of the public convenience and interest.⁴⁵

What this opinion seems to indicate is not a rigid adherence to an old common law rule, since there does not seem to have been any,⁴⁶ but rather a judicial reluctance to abandon traditional democratic principles for the government of business corporations unless the legislature evidenced a clear intent to abandon them. The persistence of this judicial concern can be seen in an 1890 decision by the Supreme Court of Alabama upholding the effectiveness of a provision inserted by the legislature in the charter of a coal and iron company, prohibiting any person from casting "more than one-fourth of all the votes at any election of directors."⁴⁷ Another company, which had bought a majority of the shares, attempted to evade the prohibition by putting some of its shares in the names of its officers and directors. The court thought

the statutory restraint on the voting power of the stockholders was enacted for very wise and conservative purposes It is perhaps to be lamented that our organic law does not contain a provision applicable to all business corporations aggregate, that no one per-

⁴⁴ 14 N.J.L. at 237-38 (emphasis in original).

⁴⁵ *Id.* at 241 (emphasis in original).

⁴⁶ The other case most often cited for the "common law rule" is *Commonwealth v. Conover*, 10 Phila. (Pa.) 55 (C.P. 1873), in which the court stated, without authority:

We think it may with safety be assumed, that at common law, the rights of the members of a corporation stand upon the principle, that all are equal in the enjoyment of franchises granted, unless the contrary appears on the face of the charter

Id. at 56. Since this case involved the Vesper Yacht Club of Philadelphia, it did not involve any examination of the merits of voting procedures in business corporations.

⁴⁷ *Mack v. De Bardelaben Coal & Iron Co.*, 90 Ala. 396, 401, 8 So. 150, 152 (1890).

son, whether natural or artificial, can ever exercise a controlling voice in their organization or government.⁴⁸

B. *Perspectives from the Civilian*⁴⁹

In many of the leading commercial countries with civil law systems, the corporation law modifies the prevailing rule of one vote per share either by restricting the number of votes that any one stockholder can cast or by specifically authorizing the inclusion of such a limitation in the articles of incorporation.

Sweden, Argentina, Colombia, and Belgium limit the proportion of the shares represented at a meeting that may be voted by any one stockholder, the proportion being one-fifth in Sweden⁵⁰ and Argentina,⁵¹ one-quarter in Colombia,⁵² and two-fifths in Belgium.⁵³ In addi-

⁴⁸ *Id.* at 403, 8 So. at 152.

⁴⁹ The research for this part was hampered both by the difficulty in obtaining up-to-date information on the law and practice in various countries and by difficulty in reading the languages in which certain of the materials were found. The specific references should therefore be taken more as indicative than definitive.

⁵⁰ Stock Corporation Act of 1944, § 119(4), *as amended*, in CORPORATION LAWS OF SWEDEN 79 (Foreign Tax Law Ass'n 1965). A stockholder may be required to make a written declaration that he is the real owner of the shares he is voting and did not acquire them for the purpose of evading any restrictions contained in the law or the articles of association, particularly those relating to voting rights. The company's rules, however, can eliminate the restriction and give one vote per share. K. RODHE, AKTIEBOLAGSRÄTT 113 (1964).

⁵¹ CÓDIGO DE COMERCIO art. 350 (de Zavalla 1968). The Argentine provision has been criticized on the ground that, because it is too easily avoided, it does not achieve its objective. I V. RIVAROLA, SOCIEDADES ANONIMAS 150-52 (5th ed. 1957). It would be eliminated in a proposed revision of the corporation laws because, in the great majority of Argentine corporations that have bearer shares, the ease with which accommodation transfers can be made renders the limitation virtually unenforceable. ANTEPROYECTO DE LEY GENERAL DE SOCIEDADES 32 (1967).

⁵² Law No. 58 of 1931, art. 28, in THE COMMERCIAL CODE OF COLOMBIA 405 (Foreign Tax Law Ass'n 1965). See V. RUEDA, LAWS OF COLOMBIA IN MATTERS AFFECTING BUSINESS 45 (3d ed. 1961). This limitation was reconfirmed and elaborated in Decree No. 2521 of 1950, art. 90, in THE COMMERCIAL CODE OF COLOMBIA, *supra* at 517. It would be carried forward in Article 592 of the new Commercial Code submitted by a committee of revision in 1958. I PROYECTO DE CÓDIGO DE COMERCIO 129 (1958). This limitation was made inapplicable to government holdings in public service companies. Decree No. 2521 of 1950, art. 91, in THE COMMERCIAL CODE OF COLOMBIA, *supra* at 518. Problems have arisen in applying it to majority-owned subsidiaries of other companies. See J. BENETTI SALGAR, DE LA ASAMBLEA GENERAL DE ACCIONISTAS 50-56 (1963).

⁵³ Law of 1935, art. 76, in COMMERCIAL LAWS OF BELGIUM 12 (Foreign Tax Law Ass'n 1965). The workings of this provision are described in A. GREGOIRE, MANUEL DES SOCIÉTÉS ANONYMES 63-66 (1968). A recent project for the revision of Belgian corporation law proposes its elimination because it is objectionable in principle to the system of decision by majority vote, and because the ease with which it can be evaded by the use of nominees often makes it unworkable in practice. AVANT PROJET DE LOI SUR LES SOCIÉTÉS ANONYMES 53-54.

tion, two of these countries limit the proportion of the issued shares that any one stockholder may vote—one-tenth in Argentina⁵⁴ and one-fifth in Belgium.⁵⁵

Uruguay has the strictest limitation: no person may represent more than six votes (three, if the corporation has less than 100 shares),⁵⁶ and the restriction has been interpreted as applying to persons voting as proxies for others as well as to those voting for their own account.⁵⁷

The laws of France, Germany, Switzerland, Netherlands, Denmark, and Brazil specifically authorize inclusion in the articles of incorporation of provisions limiting the number of votes that may be cast by any one stockholder.

The basic French rule, carried over into the 1966 corporation law, is that the number of votes to which stockholders are entitled is proportional to the aggregate par value of the shares which they own.⁵⁸ However, the articles may limit the number of votes that any single stockholder may cast at any meeting of shareholders,⁵⁹ provided that limitation is uniform for all shares.⁶⁰ Limitations of this sort, such as a provision that no stockholder may cast more than ten votes at the annual meeting, are reportedly frequently employed.⁶¹

The German Corporation Law of 1965 carries forward the provision of the prior law that the voting rights of large stockholders may be limited in the articles of incorporation either by fixing a maximum

⁵⁴ CÓDIGO DE COMERCIO art. 350 (de Zavala 1968).

⁵⁵ Law of 1935, art. 76, in COMMERCIAL LAWS OF BELGIUM, *supra* note 53.

⁵⁶ CÓDIGO DE COMERCIO art. 420 (Barreiro y Ramos 1964). This formula was adapted from the Dutch Commercial Code of 1826. See Decree of May 26, 1949, in *id.* at 377.

⁵⁷ Decree of May 26, 1949, in *id.* at 377. Even this low limit is apparently "qualified in practice through the splitting of the votes by calling in nominee shareholders." J. O'FARRELL & C. FREIRA, COMPANY, TAXATION, AND BANKING LAWS IN URUGUAY 2 (2d ed. 1959).

⁵⁸ Law No. 537 of July 24, 1966, art. 174, in A. DALSACE, MANUEL DES SOCIÉTÉS ANONYMES 403 (4th ed. 1967). See also Law of Nov. 13, 1933, art. 4, in CODE DE COMMERCE art. 46 (60e ed. Petits Codes Dalloz 1964); E. CHURCH, BUSINESS ASSOCIATIONS UNDER FRENCH LAW § 351 (1960).

⁵⁹ Law No. 537 of July 24, 1966, art. 177, in A. DALSACE, *supra* note 58. Under the old law, the limitation apparently could only be made applicable to voting at annual meetings. Law of July 24, 1867, art. 27, in CODE DE COMMERCE art. 46 (60e ed. Petits Codes Dalloz 1964).

⁶⁰ Law No. 537 of July 24, 1966, art. 177, in A. DALSACE, *supra* note 58. In a 1957 decision, the Court of Appeals of Paris upheld a provision limiting any shareholder to 30 votes, reasoning that the provision was designed to protect a company formed by small investors from coming under the control of capitalists motivated by speculative considerations. The court also held that a shareholder representing himself and others at a meeting could vote the sum of all the shares they would severally have been entitled to vote. 3 H. MOREAU, LA SOCIÉTÉ ANONYME § 272 (2d ed. Supp. 1955).

⁶¹ H. MOREAU, H. BRESSAC & O. McCANDLESS, FRENCH CORPORATIONS 12 (1956).

number of votes or by scaling down voting rights as the number of shares increases.⁶² To facilitate enforcement of such limitations, the articles may also provide that shares held by one stockholder for the account of another may be included in the latter's holdings in determining the applicability of the limitation.⁶³

One special German provision is found in the law providing for the transfer of the Volkswagen Company to public ownership, which limits each stockholder to a number of votes equal to the number that would be conferred by ownership of one ten-thousandth of the outstanding shares.⁶⁴ This provision was apparently a significant factor in preventing a merger of Volkswagen and Daimler-Benz, since the latter company "is closely held, and its owners presumably don't want to yield control of their company for Volkswagen stock they can't vote."⁶⁵

In Switzerland, the articles may limit the number of votes that a single stockholder may cast,⁶⁶ and the transfer of shares for the purpose of exercising voting rights at a meeting is prohibited if made for the purpose of avoiding such limitations.⁶⁷

The Dutch corporation law has rather complex provisions. The articles may either (a) restrict the number of votes any one holder may cast, provided that holders of equal numbers of shares are entitled to equal number of votes and that the restriction does not favor large shareholders over small shareholders, or (b) deviate from the rule of one vote per share in any other way, provided that no shareholder may cast more than six votes (three, if the corporation has fewer than 100 shares outstanding).⁶⁸ A provision limiting each shareholder to six votes is apparently frequently found in the articles of large corporations.⁶⁹

⁶² Law of Sept. 6, 1965, § 134(1), [1965] BGBI. I 1120.

⁶³ *Id.*

⁶⁴ Law of July 21, 1960, § 2(1), [1960] BGBI. I 585.

⁶⁵ Wall St. J., June 30, 1966, at 4, col. 4.

⁶⁶ SCHWEIZERISCHES OBLIGATIONENRECHT art. 692 (Schulthess & Co. 1966). Prior to 1937, Swiss law limited any single shareholder to one-fifth of the votes represented at a meeting, and many companies have kept or adopted this provision, either because they liked it or did not notice the change in the statute. 2 G. BROSSET & C. SCHMIDT, GUIDE DES SOCIÉTÉS EN DROIT SUISSE 92 (1963). However, many other companies reportedly fix a maximum number of votes that any single shareholder may cast, or scale down the voting rights of large shareholders. P. BÖCKLI, DAS AKTIENSTIMMRECHT UND SEINE AUSBUNG DURCH STELLVERTRETER 43-48 (1961).

⁶⁷ SCHWEIZERISCHES OBLIGATIONENRECHT art. 691 (Schulthess & Co. 1966).

⁶⁸ COMMERCIAL CODE art. 44b, in DUTCH CORPORATION LAW 19 (S. van der Meer transl. 1960).

⁶⁹ SUCCURSALES ET FILIALES DANS LE MARCHÉ COMMUN 165 (Dalloz & Sirey 1963).

Denmark added a new section to its Companies Act in 1962, permitting a corporation, at a general meeting of stockholders, to adopt a provision that no shareholder may possess voting rights for more than a specified proportion of the voting shares.⁷⁰ The provision must be approved by the holders of four-fifths of the outstanding voting shares; dissenters have the right to require the corporation to purchase their shares.⁷¹

Brazil simply permits the articles to establish limitations on the number of votes of each shareholder, in derogation of the general rule of one vote per share.⁷²

Japan, before World War II, authorized inclusion in the articles of a provision limiting the voting rights of stockholders having eleven or more shares;⁷³ this authorization disappeared in a 1950 amendment of the Commercial Code during the American occupation.⁷⁴ The Italian pre-War code also scaled down the voting rights of holders of more than five shares; this restriction was eliminated in the 1942 code revision in favor of a rule of one vote per share.⁷⁵

It has been suggested that a mandatory restriction such as that found in Argentina, Belgium, and Uruguay "scarcely works in practice, since the holder of a large number of shares will make a fictional transfer of them before the meeting."⁷⁶ This may well be true in Argentina or Belgium because the limits are so high, but a stockholder in a large Uruguayan corporation might be hard pressed to round up enough "fictional transferees" with a limit of six votes for each. The restrictions have also been criticized on the ground that large shareholders have the greatest interest in the prosperity of the company and that their opinions are more enlightened than those of small share-

⁷⁰ Act No. 225 of June 22, 1962, § 57a, in *THE DANISH COMPANIES ACT*, at App. (Supp. 1962).

⁷¹ *Id.*

⁷² Law No. 2627 of Sept. 26, 1940, art. 80, in *COMMERCIAL LAWS OF BRAZIL* 32 (Foreign Tax Law Ass'n 1965).

⁷³ *COMMERCIAL CODE* art. 241, in *CIVIL AFFAIRS HANDBOOK: JAPAN* 28 (W. Sebald transl. 1945).

⁷⁴ *COMMERCIAL CODE* art. 241, in *CODE DE COMMERCE DU JAPON* 78 (S. Komachiya ed. & transl. 1954). The amendments were reportedly made under pressure from the occupation forces to remodel Japanese corporation law to correspond to American law. *CODE DE COMMERCE DU JAPON*, *supra* at 14-18. Elimination of the possibility of restrictions on large shareholders has been characterized as a strengthening of voting rights "through the abolition of restrictions." Blakemore & Yazawa, *Japanese Commercial Code Revisions*, 2 *AM. J. COMP. L.* 12, 20 (1953).

⁷⁵ I V. RIVAROLA, *supra* note 51, at 150. See *CODICE DI COMMERCIO* art. 157 (2d ed. Barbèrà 1893); *COMMENTADO* art. 2351 (Laporta & Tamburrino 1963).

⁷⁶ de Sola Canizares, *The Rights of Shareholders*, 2 *INT'L & COMP. L.Q.* 564, 569 n.37 (1953).

holders.⁷⁷ The merits of this argument are considered in subsequent sections.

II

THE LARGE SHAREHOLDER

A. *Sales of Control*

Fifteen years ago, the United States Court of Appeals for the Second Circuit handed down its decision in *Perlman v. Feldmann*⁷⁸ and inaugurated a new era in discussion of the issue of sale of corporate control. The literature spawned by that decision and the succeeding elaboration of the problem by the same court in *Essex Universal Corp. v. Yates*⁷⁹ has been impressive not only in its bulk, but also in the stature of the gladiators who have entered the arena and the subtlety and elaboration of what they have written.⁸⁰

Yet, having reviewed this vast outpouring, and having compared the latest contributions with the earliest, and the most recent court decisions, such as *Jones v. H.F. Ahmanson & Co.*,⁸¹ with *Perlman* itself, it is evident that we are no closer to the development of a useful rule or rules for the guidance of prospective buyers and sellers of control—or even to an understanding of what the question is—than we were fifteen years ago.

The reason for this colossal failure, I suggest, is that the examination has been limited to a surface manifestation of a much more serious question about the structure of American corporation law, and that until that other question is exposed and analyzed, there can be neither a solution to, nor an understanding of, the problem of sale of control.

The problem has arisen in the context of a corporation whose

⁷⁷ 1 V. RIVAROLA, *supra* note 51, at 152.

⁷⁸ 219 F.2d 173 (2d Cir.), *cert. denied*, 349 U.S. 952 (1955).

⁷⁹ 305 F.2d 572 (2d Cir. 1962).

⁸⁰ E.g., Jennings, *Trading in Corporate Control*, 44 CALIF. L. REV. 1 (1956); Leech, *Transactions in Corporate Control*, 104 U. PA. L. REV. 725 (1956); Hill, *The Sale of Controlling Shares*, 70 HARV. L. REV. 986 (1957); Berle, "Control" in *Corporate Law*, 58 COLUM. L. REV. 1212 (1958); Berle, *The Price of Power: Sale of Corporate Control*, 50 CORNELL L.Q. 628 (1965); Andrews, *The Stockholder's Right to Equal Opportunity in the Sale of Shares*, 78 HARV. L. REV. 505 (1965); Javaras, *Equal Opportunity in the Sale of Controlling Shares: A Reply to Professor Andrews*, 32 U. CHI. L. REV. 420 (1965). A series of articles have been written on the subject by Father Bayne, all cited in Bayne, *The Sale of Control Premium: The Disposition*, 57 CALIF. L. REV. 615, 618 n.33 (1969).

⁸¹ 1 Cal. 3d 93, 460 P.2d 464, 81 Cal. Rptr. 592 (1969), *noted in* 83 HARV. L. REV. 1904 (1970).

stock is widely distributed but in which one person, or a small group of people, owns substantially more stock than anyone else. This is the so-called "control stock," and the problem arises when the owner of this stock sells it—usually at a premium over the market price for small quantities of the same stock—and passes to the buyer the power to control the corporation.

The basic issue to which all the commentators have addressed themselves is what limitations should be placed on the right of the seller to pass control of the corporation in this manner without the participation or consent of the other shareholders. They have all recognized one dilemma that complicates their labors: any restriction on the right to transfer control must be cast in a form that also restricts the free transferability of the underlying shares, and the free transferability of shares is quite properly recognized as a desirable means to the optimum utilization of resources, an objective at least as important as ensuring that those in control of corporations respect the rights of all shareholders.

There is, however, another dilemma to which they have not turned their attention: the principal effect of any restriction that is imposed by law and respected by a prospective seller of control may be to prevent the transfer of control and leave it in the hands of the prospective seller. Thus, the other stockholders are protected from having control lodged in someone who is willing to purchase it at a premium by a rule that leaves it firmly lodged in someone who is willing to sell it at a premium. It is hard to detect a sufficient difference in righteousness or responsiveness to fiduciary duty between the buyer and seller in these situations to warrant an assumption that the other shareholders will thereafter be treated any worse by the former than by the latter.

The recognition of some limitation on the power of a controlling shareholder to transfer control by selling his shares must lead inevitably to the question whether there must not also be some corresponding limitation on his right to control the corporation by virtue of his ownership of the shares. To turn the question around, should the ownership of the shares, by itself, give him any right to control the corporation?

As far as management and control are concerned, there are two functionally different kinds of corporations—privately-owned corporations and publicly-owned corporations. The determination of the draftsmen of state corporation laws to force both kinds of corporations

into the same statutory molds⁸² is responsible for much of the inadequacy of "modern" corporation law. The privately-owned corporation is one in which the entire equity interest is owned by people who are, or have been, actively involved in the conduct of the business, or are related by personal or business ties to people who are. The publicly-owned corporation is one in which some or all of the equity interest is owned by a substantial number of people who acquired it in the open market and have no other connection with the corporation and its business.

In which category do we place the corporation that has "public" shareholders but also has one or more large shareholders who participate actively in the selection of management and in fact control the selection process? It is clearly not the functional equivalent of a privately-owned corporation. Looking at it as a publicly-held corporation, the question becomes whether the owner of a substantial block of shares, whether a majority of the outstanding shares or not, should be entitled to control the corporation through the selection of its management.

Almost forty years ago, Berle and Means examined the problem of the divorce of ownership and control in the public corporation.⁸³ The inquiry that has followed has concentrated on finding the most appropriate agency for controlling the power of the managers in the corporations whose scattered shareholders have demonstrated their incapacity for the task. This problem has not existed in those public corporations in which one concentrated holding of shares was sufficient to enable the holder to exercise ultimate control over the corporation's affairs. But there has been little analysis of whether this cure—or, rather, preventive—is more beneficial to the remaining shareholders than the ill of uncontrolled management discretion.⁸⁴

⁸² This was prompted in large part, no doubt, by the desire of the managers of large corporations, for political reasons, to maintain their protective coloration of identification with small businessmen.

⁸³ A. BERLE & G. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

⁸⁴ [T]he possibility should be considered that the public may be less in jeopardy from a large business enterprise run by an unpropertied professional management—one said not to be "accountable"—than from a large enterprise personally owned and operated by an individual or a small family group. To whom is such an individual or small family group "accountable"? It is perhaps unfair to recall that before World War II the managers of the basic industry of Germany and of Japan were directly "accountable" to their shareholders—the Krupps and the four Zaibatsu families.

Manning, *Corporate Power and Individual Freedom: Some General Analysis and Particular Observations*, 55 NW. U.L. REV. 38, 41 (1960) (emphasis in original). On the specific is-

In a corporation with no concentrated shareholdings, the most effective control over management that has been developed during the last thirty-five years is the requirement of disclosure—disclosure of financial information, of transactions by insiders, of other types of information through which shareholders and others can measure management's performance against general standards of competence and integrity. To some extent, disclosure is a self-effectuating control; many things are not done by corporate managements which would be done if they could be done without disclosure. But the requirement of disclosure gains strength from the sanctions available to those to whom the information is disclosed. Perhaps the most important sanction is the derivative suit to recover for the corporation the fruits of a manager's breach of his duty. Another is the threat that the management will be deposed by an insurgent if its performance does not measure up to the expected standards.

The first sanction is only effective where a legal standard has been violated; it does not reach any other "wrong" decisions. Where control of the corporation rests on a basis of one or a few large shareholdings, the second sanction is missing. The management supported by the holder of a majority, or near-majority, of the outstanding voting shares cannot be deposed no matter how far its performance falls below the standards expected by the other shareholders.

What justification is there for giving the man with thirty percent, or fifty-one percent, or even ninety-nine percent, of the voting shares, absolute power to choose the management that controls the corporation's affairs? If there is justification, it should be found either in the interests of the shareholders or in important interests relating to the allocation of resources in our society.

First, the interest of the controlling shareholder himself: his interest, as a shareholder, is presumably in seeing that the corporation is run to achieve maximum benefit for the shareholders, including

sue of management compensation, one study has concluded that companies not subject to control by large shareholders or by financial interests tend to give higher rewards to management than companies in which those controls are present. Washington, *The Corporate Executive's Living Wage*, 54 HARV. L. REV. 733, 761 (1941), discussed in 2 G. WASHINGTON & V. ROTHSCHILD, COMPENSATING THE CORPORATE EXECUTIVE 926 (3d ed. 1962). See also J. LIVINGSTON, THE AMERICAN STOCKHOLDER 226, 229 (1958). The presence of "outside" (i.e., non-officer) directors on the board, however, does not seem to act as a control on management compensation according to another study which found that median salaries of executives of companies with a majority of outside directors were higher than those in comparable companies in which a majority of the directors were also executives of the company. M. NEWCOMER, THE BIG BUSINESS EXECUTIVE 128 (1955).

himself. If he has thirty percent of the shares, and the remaining shareholders seventy percent, his total stake in the corporation is less than half as great as theirs. In this situation, it is hard to argue that taking away his right to choose the management would be an unfair deprivation. But what if he has fifty-one percent, and the remaining shareholders forty-nine percent? Here his stake is not only larger than that of any other single shareholder, but, in one sense, larger than all the others put together. He would argue that it is inequitable to permit those with a smaller aggregate stake in the corporation to override his views, simply because their holdings are scattered and his are concentrated.

There is undoubtedly surface appeal to the argument that logical application to business corporations of the putative common law rule of one vote per member will give to shareholders a vote for each share. Unfortunately, there is little more than that. Policy may argue for such a result, but logic cannot command it unless we accept the further proposition that the directors represent the shares rather than the shareholders. The members of a non-business corporation or other institutional constituency do not have equal votes because their interests are "equal." Their respective interests may be very different, and interests cannot be measured in the same way that votes are. They are accorded equality in voting under the fundamental principle that votes are decisions, decisions are made by people, and one person's decision should not be given greater weight than another's unless some important reason of policy supports the distinction.⁸⁵ In business corporations, a method of allocating interests in profit and loss happens to have an analogue in voting procedure that has the twin advantages of being simple and precise in application and being congenial to the interests of those who set up such corporations. It is inherently no more logical than making voting rights in school district elections proportional to the school taxes paid by the voters or the numbers of their children enrolled in the school system.⁸⁶

The situation of the shareholder who has ninety-nine percent of the outstanding shares differs only in degree from the preceding example. However, where the percentage of shares held by the scattered shareholders falls below a certain point—which could be five percent or ten percent—there should obviously be a method by which the major shareholder could convert the corporation from public to private

⁸⁵ See text accompanying notes 139-156 *infra*.

⁸⁶ See text accompanying notes 148-156 *infra*.

status and buy out the interests of the scattered shareholders subject to procedural safeguards like those now used in appraisal proceedings.⁸⁷

The second interest that may be thought to justify control by the large shareholder is the interest of the scattered shareholders themselves. This could rest on either (or both) of two theories.

First, because the large shareholder has a large investment, he will devote more time and care to it, and his judgment as to what will most benefit all the shareholders will be better than the collective, but uncollected, wisdom of his scattered brethren. It is hard to know how much weight to give to this argument. The large shareholder will almost certainly have better access to information about how the company is being managed, but unfortunately there are many opportunities and incentives for him to use that information for his own personal advantage rather than for the common benefit of all the shareholders or of all the people interested in the company's operation. The number of cases in which large shareholders are alleged to have breached their "fiduciary duty" to the other shareholders indicates that this "safeguard" may be similar to putting the lions in the same cage with the rabbits at the zoo, on the assumption that the lions will represent the rabbits' interests in negotiating with the keepers for food.

Second, the single large shareholder can exercise more effective control over the management. No question about it: it is doubtful whether the control exercised by a scattered shareholder electorate through the use of its votes is even worthy of the name "control," while the single large shareholder often can, and does, closely supervise the actions of the elected management (if he is not himself the chief executive officer). The question is whether the control he exercises is more responsive to the welfare of the scattered shareholders than the self-control of the management itself. To the extent that the large shareholder views himself as the trustee of the business and the employer of its management, and has no substantial financial or other interests in other firms that might affect his view of the corporation's affairs, the ideal may be fulfilled. However, by the nature of the beast, there is a much greater likelihood that the single large shareholder, with more spare money and spare time than the salaried management of the corporation, will have substantial interests in other businesses

⁸⁷ The conversion can be effected without even a vote of shareholders in many states by use of a "short-form" merger. *E.g.*, DEL. CODE ANN. tit. 8, § 253 (Supp. 1968); N.Y. BUS. CORP. LAW § 905 (McKinney 1963). Occasionally a large publicly-held company is restored to private ownership, as was the George A. Fuller Company in 1965. *N.Y. Times*, June 8, 1965, at 59, col. 3.

than that the salaried managers will have such interests. Also, to the extent that he is less involved than the salaried managers in the running of the corporation's business, he may have a lesser sense of identification with the corporation as an entity and a consequently greater inclination to view the corporation as a means of achieving objects unrelated to the interests of the shareholders and the corporation's other constituencies.⁸⁸ On balance, the scattered shareholders are likely to have a more faithful agent in the salaried management than in the large shareholder, despite the superficial identity of interest that they have with the latter. Furthermore, it is much easier to police the actions of the official managers of the business than those of the controlling shareholder, who may operate in an unofficial and indirect manner in achieving his objectives.

The public policy argument for favoring large shareholder control is that the large shareholder is likely to be closer to the classical economic ideal of the innovative entrepreneur, who through his selfish efforts will produce a more efficient allocation of productive assets and thereby benefit the entire society. The trouble with this theory, as Galbraith has pointed out, is that for those companies which have ceased to be "Entrepreneurial Corporations" and have become "Mature Corporations" (which includes most of our largest enterprises), the entrepreneurial techniques suited to new, small, single-product businesses simply will not work.⁸⁹ When such techniques are actually continued, they may lead to the financial ruin of the company.⁹⁰ More often, the "entrepreneurial" image cultivated by the Mature Corporation merely serves as window dressing for sophisticated financial manipulations, such as those that characterized the "conglomerate" developments of the past decade.

B. *Take-Over Bids and the Rise of the Conglomerate*

The problems of sale of control, by their nature, can arise only in corporations in which a "controlling block" of shares already exists. The development of the "conglomerate" corporation and the use of one of its principal techniques, the "take-over bid," however, indicate

⁸⁸ Section III *infra*.

⁸⁹ J. GALBRAITH, *THE NEW INDUSTRIAL STATE* 92 (1967).

⁹⁰ *Id.* at 88-92. Among Galbraith's examples of entrepreneurs who carried on in the "entrepreneurial" manner after it had become counter-productive are Henry Ford, Sewell Avery of Montgomery Ward, and Howard Hughes of TWA. The most recent notorious example is Bernie Cornfeld of IOS. See Ball, *Bernie Cornfeld: The Salesman Who Believed Himself*, *FORTUNE*, Sept. 1970, at 136.

that there is a similar problem, at least in latent form, for any publicly-held company.

The conglomerate corporation is one that grows by acquiring other companies in related or unrelated lines of business. These acquisitions are sometimes made with the concurrence of the acquired company's management but in other cases are made by means of a published tender offer for the publicly-owned stock of the company to be acquired, either in exchange for securities of the acquiring conglomerate or for cash it has accumulated or borrowed.

The situation here is the same as that involved in the sale of control to the extent that control of the corporation is shifted to a new person or group acquiring a substantial part of the corporation's voting shares. The significant difference, however, is that the initiative in the take-over bid comes from outside the corporation, and the shift of control is often accomplished by paying a premium above market price for the interests of the scattered shareholders rather than those of the incumbent management. The result, in many cases, is simply the unceremonious ousting of the old management without any compensation whatsoever.

As might be imagined, the cries of outrage over this form of transfer of control came not from the scholars but from the managers. (The scholars, in fact, were quite taken with the whole development as a means of securing a more efficient utilization of capital assets.)⁹¹ The managers ran to Congress and the state legislatures for protection against the "pirates" who were raiding "fine old companies" and received a rather mixed reception. From Congress, which has generally limited itself to disclosure requirements in regulating management-shareholder relations in industrial companies, they got the Williams Bill,⁹² which amended the Securities Exchange Act of 1934 to apply to contested take-over bids the same kind of filing and disclosure requirements that were already applicable to proxy contests. In Ohio⁹³ and Virginia,⁹⁴ they secured the passage of laws giving state agencies supplementary authority over disclosure and other practices in tender offers. In other states, such as Illinois⁹⁵ and Pennsylvania,⁹⁶ they were unsuccessful in putting through broader laws authorizing state agen-

⁹¹ See, e.g., *Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess., at 53-67, 114-45 (1967).

⁹² 15 U.S.C. §§ 78m(d)(1)-(e)(2), 78n(d)(1)-(f) (Supp. IV, 1969).

⁹³ OHIO REV. CODE ANN. § 1707.04.1 (Page Supp. 1970).

⁹⁴ VA. CODE ANN. § 13.1-528 (Supp. 1970).

⁹⁵ See BNA SEC. REG. & L. REP. No. 5, at A-9 (July 2, 1969).

⁹⁶ Pa. H.R. 841, 1969 Sess.

cies to approve or disapprove the acquisition of a controlling block of a company's shares after considering the general interest of shareholders, employees, and affected communities. The academic opposition of the economists was combined in these cases with the more selfishly-motivated (and more effective) opposition of the investment bankers, who make substantial amounts of money out of the activities surrounding take-over bids.⁹⁷

A second major defense of the threatened managers was to amend their corporate charters in a variety of ways to make it more difficult for a raider who acquired a substantial block of their shares to merge the target company into his own. One company, for example, proposed to require the approval of the holders of two-thirds of the shares not held by the raider, as well as the holders of two-thirds of all the shares, for any such merger.⁹⁸ The most interesting thing about this line of defense was the reaction of the New York Stock Exchange, on which many of the principal target companies were listed. The Exchange saw these defensive tactics as a threat to its concepts of "corporate democracy," "which would in effect discriminate between shareholders based on the size of their investment."⁹⁹ In other words, "corporate democracy" means "one share, one vote," and any departure from that rule is "undemocratic." As a result of strong protests from the management of many listed companies against any implementation of the Exchange's "democratic" principles, "the Board of Governors of the Exchange indicated a deep concern with the problems in this area but determined not to adopt a formal policy at this time."¹⁰⁰

The significance of the rise of the take-over bid, and the managerial response to it, insofar as it relates to allocation of corporate voting rights, is that it showed that any company, no matter how large or how widely scattered its shareholdings, was subject to being brought

⁹⁷ See *Hearing Before Pennsylvania House Comm. on Business and Commerce in re House Bill 841*, 1969 Sess.

⁹⁸ Letter from NYSE to Presidents of Listed Companies, Dec. 26, 1968, in NYSE, *COMPANY MANUAL*, at xxi (1969).

⁹⁹ *Id.* The American Stock Exchange, two years earlier, had informed a Canadian company that a provision of its by-laws limiting any shareholder to 1,000 votes was "not consistent with the Exchange's policy with respect to voting rights . . ." and might lead to delisting. The company had stated that the by-law "ensures among other things that any 'take-over' offers for the Company would be made openly to the Company or to all the shareholders, rather than to the owners of large blocks of stock in undisclosed transactions." Prospectus of Canada Southern Petroleum Ltd. 19 (July 7, 1966). The company still has the restriction on voting rights, but is no longer listed on the American Stock Exchange. MOODY'S INDUSTRIAL MANUAL 3143 (1969).

¹⁰⁰ Letter from NYSE to Presidents of Listed Companies, Feb. 21, 1969, in NYSE, *COMPANY MANUAL*, at xxiii (1969). See *Wall St. J.*, Feb. 20, 1969, at 6, col. 2.

quickly under the control of almost any "entrepreneur" who really wanted to take it over. Many take-overs were motivated, at least in part, by the availability to the acquiring company of substantial retained earnings in the form of liquid assets which the tax law discouraged it from distributing to its shareholders or investing in income-producing securities. However, as many enterprising conglomerateurs¹⁰¹ showed, no substantial assets (other than stock selling at a high multiple of earnings) were needed to "buy" a large publicly-held company. Little companies could, and did, swallow much larger ones by the simple expedients of issuing their own convertible debentures in exchange for the shares they wanted to acquire, or borrowing from banks the money needed to buy the shares and pledging the acquired shares as collateral.¹⁰²

Whether these take-over artists were pirates out to loot fine old companies, as the ousted or threatened managers charged, or enterprising capitalists ousting tired old managements to secure a more efficient use of capital, as they themselves asserted, is hard to determine. The current shakeout of the conglomerates indicates that in most cases they were neither, but rather were enterprising individuals who took advantage of a "performance" fad and flabby accounting rules to create an appearance of growth by putting together companies whose financial statements looked good together, whether or not their operations fit well together.

Despite the misgivings of many thoughtful people concerning the economic, social, and political consequences of the conglomerates, the managers of target companies were unable to put together any satisfactory rationale for imposing legal restrictions on take-over activities. According to conventional wisdom, if a person or company was willing to make a tender offer at fifty dollars a share for stock that was selling in the market for forty dollars a share, he presumptively had plans for utilizing the company's assets in a way that would make

101 This may be considered an unduly elegant way of referring to someone who puts companies together. Ogden Nash, commenting on a news story about the marriage of the Marquesa de Portago to "Richard C. Pistell, the conglomerateur," expresses the hope "that every oilateur and shipping magnateur and scrap-metalateur, /indeed every tycoonateur, will soon have a Marquesa of their/own." He notes in conclusion, however, that "to eur is human, isn' it?" Nash, *Who, Sir? Me, Sir? No, Sir, The Times, Sir!*, ATLANTIC MONTHLY, June 1970, at 66.

102 One analyst even felt that General Motors, because of its "underleveraged" financial structure, would be an "ideal target" for a conglomerateur able to print up "\$15 billion worth of debentures and maybe another \$10 billion in stock and warrants" to offer in exchange for GM's shares. Burck, *The Merger Movement Rides High*, FORTUNE, Feb. 1969, at 79, 161.

them worth more than the value the "market" was now assigning to them; that is, he would have to provide better management to justify his own investment. The managers could not claim any vested right in themselves to continue to control the company, for the conventional theory was that they were the mere hirelings of the "owners" of the company—its shareholders. Hence, their only argument to justify state interference was that the threatened take-over would harm the interests of some group the state had an obligation to protect. This could hardly be the shareholders, the "owners" who were being offered fifty dollars for shares that were worth only forty dollars in the market. It must, therefore, be other groups, such as employees, suppliers, or customers, or the economic interest of the people of the state as a whole.

Thus, under rather unlikely auspices, arising from unusual circumstances, the state was importuned to make corporate management responsive to a broader constituency in directing the corporation's business affairs. Though tempted, the state by and large did not respond.¹⁰³

C. Institutional Investors

At the same time that conglomerate adventurers were busy restoring publicly-held companies to single ownership—sometimes by private individuals or groups but more often as subsidiaries of other companies—another group of investors, with entirely different purposes and different techniques, had been buying up even larger numbers of shares that were in "public" hands. This group is composed of the so-called "institutional investors," most notably the mutual funds, insurance companies, and pension funds, which are becoming (if they have not already become) the principal vehicle for "public" investment in common stocks.

The banks, which are still the largest institutional investors, have, of course, been in this business for decades. Their holdings of common stock, however, have been largely in individual accounts, held in trust or similar capacity, and voting of the shares may be subject to different procedures or consents in each of the separate accounts. The distinctive features of the newer breed of institutional investors is that their decisions—on investment, voting of shares, and everything else—are

¹⁰³ The activities of the conglomerates have been sharply curtailed, at least temporarily, by a sharp drop in the market price of their securities and by indirect restrictions on their issuance of convertible securities through changes in the tax laws and in stock exchange listing standards. INT. REV. CODE OF 1954, § 279, added by Tax Reform Act of 1969, Pub. L. No. 91-172, § 411(a) (Dec. 30, 1969); Letter from NYSE to Presidents of Listed Companies, *supra* note 100.

made by a small group of managers on behalf of scattered beneficiaries, the great majority of whom have no idea what shares their institution owns, let alone how those shares are being or should be voted.

Unlike the conglomerate-builders, who buy shares largely to amass enough of the votes that are attached to them to take control of the company's assets, the institutional investors generally want shares only for the possibility of profit or return. They do not really want the votes, which require them to make decisions for which they do not wish to be held responsible.

The divergence of objectives between conglomerates and institutions has led to some rather unattractive symbiotic relationships. The conglomerate may interest an institution in buying up shares of the target company at the current market price, with the expectation that the institution will then tender its shares to the conglomerate in a subsequent tender offer at a higher price, or that it will vote its shares in favor of a subsequent merger and cash them in for the higher valued package of securities of the attacking company. In either case, the conglomerate gets the votes and the institution gets the profit by selling the votes, which it has no desire to use for itself.¹⁰⁴

Far more serious than these ad hoc special relationships is the general problem created by lodging the power and responsibility for the selection and legitimation of corporate management in the hands of people who have disclaimed any interest in the election decision. The standard line of the institutional manager is: "We vote with the management. If we don't like the management, we sell the stock." Since institutions now own about one-quarter of the shares of the companies listed on the New York Stock Exchange,¹⁰⁵ this attitude creates a rather large vacuum in the corporate election process.¹⁰⁶

But what if the job of voting portfolio securities held by institutions is taken away from the functionaries to whom it is now generally delegated and exercised directly by the directors and top officers of the institutions? Some commentators have seen this possibility as the best hope of providing an independent check on the actions of corporate managers.¹⁰⁷

¹⁰⁴ See, e.g., *SEC v. Talley Indus., Inc.*, 399 F.2d 396 (2d Cir.), *cert. denied*, 393 U.S. 1015 (1968). The Chairman of the SEC has indicated in congressional testimony that the practice may be widespread. *N.Y. Times*, May 15, 1970, at 51, col. 7.

¹⁰⁵ NYSE, 1969 FACT BOOK 45.

¹⁰⁶ There are, of course, many individual investors whose views are identical to those ascribed to institutional managers. The difference is that the individual investor is normally not subject to any fiduciary obligation that prevents (or that he believes prevents) his taking a more active role in the selection process.

¹⁰⁷ See A. BERLE, *ECONOMIC POWER AND THE FREE SOCIETY* 12-13 (1958); Rostow, *To*

There are at least two problems here. First, the people who actually manage the institutions have shown no more inclination to take the time or trouble to improve corporate management than have their hirelings; if they don't like the management, they will sell (unless they have word that an attractive tender offer or merger proposal is coming). Second, and more important, many of the directors of the institutions are also officers or directors of the companies in which the institutions invest. Although they would presumably disqualify themselves from participating in the institution's evaluation of the companies with which they are personally involved, they can hardly be unaware of the reciprocal impact of such intervention. If Mr. Smith, as a director of Fund A, undertakes to evaluate the management of X Corporation, in which Fund A has a substantial interest, he does so with the realization that Mr. Jones, who is the President of X Corporation, can, as a director of Fund B, undertake a similar evaluation of the management of Y Corporation, in which Fund B has a substantial interest and of which Mr. Smith is President. It is not too pleasant to contemplate one part of the business establishment sitting in judgment on another part of the same establishment, with the knowledge that their roles may be reversed in a similar future situation.¹⁰⁸

D. Campaign GM

The development of conglomerates and the rise of institutional investors each involve a process of "reconcentration," in which previously scattered shareholdings are brought together to be managed and voted as a block. Perhaps neither of these two developments standing alone, or even together, would place any significant new strain on the rules governing corporate elections were it not for a third development which has changed the nature, not of the electorate, but of the questions to be decided.

If an electorate is not presented with any significant policy questions, it does not matter too much who comprises the electorate or what motivates their decisions. As long as it was assumed that the sole test of the performance of corporate management was the amount of money they made "for the shareholders," one man's (or institution's) view of his economic self-interest was pretty much like another's.¹⁰⁹

Whom and for What Ends Is Corporate Management Responsible?, in *THE CORPORATION IN MODERN SOCIETY* 46, 55 (E. Mason ed. 1961).

¹⁰⁸ See Rostow, *supra* note 107.

¹⁰⁹ Opinions may differ, of course, about the best way to achieve optimum performance, but the issues to be resolved are usually so complex as to defy rational participation by a substantial electorate. For example, the proxy statements that publicly-held

If the management's economic performance is bad, they have to face the possibility that they will be ousted. Since the shareholders are voting only their selfish economic interest, there is nothing wrong with their buying and selling votes (through the medium of purchases and sales of shares) or with one man buying up enough votes to kick the incumbent management out and try his own ideas on how to make more money (if that is the real objective of his take-over).

Since the rise of the modern publicly-held business corporation, two limitations have been recognized on the type of issues that could be brought before the shareholder electorate for decision or ratification (and, by implication, on the type of issues they could consider in voting on nominees for the board of directors). First, the issue could not be so narrow as to constitute an interference with the directors' (*i.e.*, management's) right and obligation to manage the day-to-day affairs of the company. Second, the issue could not be so broad that it could be said to relate primarily to "general economic, political, racial, religious, social or similar causes" rather than to the self-interest of the shareholders as economic animals.¹¹⁰

What reasons underlie this dual limitation which has put a severe squeeze on the range of issues that can be put to a shareholder vote? Management can presumably justify the first limitation on the ground that shareholder meetings are an intolerably clumsy instrument for making frequent and detailed administrative decisions. It can be questioned whether there is any real danger of shareholder intervention in this direction, but in any event the limitation is not a serious one. Egregious cases of unfairness or impropriety by management certainly deserve and require scrutiny by the shareholders, but this can probably be better achieved by the judicial proceeding of a derivative suit (the game of Corporations II) than by the legislative activity of the shareholders at a meeting.

The justification for the second limitation rests on somewhat different footing. One would expect management to argue that shareholders should not vote on "general economic, political, racial, religious, social or similar" issues because those are outside the scope of the corporation's concerns and are matters on which management should take no stand. In fact, management's current position seems

companies are required to furnish to their shareholders when soliciting votes on a proposed merger are considered by experts to be the most useful source for appraising the company's financial prospects. Yet their complexity and length (often running to 100 pages or more) make them incomprehensible to all but the most sophisticated shareholders.

¹¹⁰ SEC rules 14a-8(c)(2), (5), 17 C.F.R. §§ 240.14a-8(c)(2), (5) (1970).

to be quite different. In response to the recent proxy solicitation by a group calling itself the Campaign to Make General Motors Responsible (Campaign GM) in favor of changes in the General Motors management structure, "designed to make the Corporation more responsible to the community as a whole,"¹¹¹ management did not argue that it had no such responsibilities but instead distributed to its shareholders a twenty-one page defense of how well it was fulfilling them.¹¹² To be sure, the GM management did emphasize its "basic obligation" to "pay dividends to its stockholders."¹¹³ However, it seemed to view this as its intermediate rather than its ultimate goal, stating that "a corporation's ability to fulfill its other responsibilities depends upon how successful it is in achieving a profit."¹¹⁴

By taking this position, the GM management appeared, at least, to be more concerned with the public responsibilities of an automobile manufacturer than is the management of Yale University. Yale, like Harvard, decided to abstain from casting its 25,000 votes on the Campaign GM proposals "on the principle that the Fellows of the [Yale] corporation do not and should not have the power to take a corporate position on issues of a political or social nature which do not directly affect the university in its relations with the local community."¹¹⁵ In other words, the universities, along with the other institutional investors that are amassing an increasing proportion of the voting shares of major industrial companies, do not want the votes that come with these shares if it requires them to do anything other than make a decision on how best to increase their investment return to meet their pressing financial needs. This institutional "cop-out" raises some serious questions.

Campaign GM broke new ground by persuading the Securities and Exchange Commission, over GM's vigorous opposition, that at least two of its proposals were proper subjects for shareholder consideration.¹¹⁶ Since then, the Court of Appeals for the District of Columbia has ordered the SEC to reconsider its rejection of the attempt by a group of shareholders of Dow Chemical Company to force a shareholder vote on whether the company should continue to manufacture

111 Proxy Statement of Campaign GM 2 (March 25, 1970).

112 General Motors Corp., *GM's Record of Progress* (1970).

113 *Id.* at 20.

114 *Id.* See also note 118 *infra*.

115 N.Y. Times, May 11, 1970, at 27, col. 1.

116 Wall St. J., April 7, 1970, at 40, col. 2.

napalm.¹¹⁷ The court ruled that shareholders have the right to be involved in corporate decisions that have social impact and that they must be given an opportunity to vote on these matters at shareholders' meetings.¹¹⁸ Future campaigners should have less difficulty in tailoring their proposals to the liberalized SEC standards and bringing more economic and social issues into corporate meetings.

Senator Muskie has introduced a bill entitled the "Corporate Participation Act," which would bar the SEC from excluding a stockholder proposal "on the ground that such proposal may involve economic, political, racial, religious or similar issues, unless the matter or action proposed is not within the control of the issuer."¹¹⁹ The bill is designed, in his words, "to allow shareholders to place on the company ballot any proposal which promotes economic, or social causes related to the business of the corporation."¹²⁰ He indicated that his proposed bill was a consequence of the inadequate results of Campaign GM,¹²¹ and it would indeed have ensured that all of the proposals made by that group would have been brought to the floor of the meeting.

The Muskie proposal, however, would have no direct effect on the reception accorded proposals of the Campaign GM type when they reached the floor. Although the Campaign leaders had hoped to derive their principal support from public-spirited institutional managers holding large blocks of shares, their principal support, in fact, came from the smaller shareholders. Their two proposals, for the establishment of a Committee on Corporate Responsibility and for the addition to the board of three "public-interest" directors, received the support of 7.19 percent and 6.22 percent, respectively, of the shareholders, but only 2.73 percent and 2.44 percent, respectively, of the shares voted.¹²² The shareholders who voted for the Campaign GM

¹¹⁷ Medical Comm. for Human Rights v. SEC, BNA SEC. REG. & L. REP. No. 59, at D-1 (D.C. Cir. July 8, 1970).

¹¹⁸ The Dow management's position was weakened by their having been repeatedly quoted in sources which include the company's own publications as proclaiming that the decision to continue manufacturing and marketing napalm was made not *because* of business considerations, but *in spite of* them; that management in essence decided to pursue a course of activity which generated little profit for the shareholders and actively impaired the company's public relations and recruitment activities because management considered this action morally and politically desirable.

Id. at D-11 (emphasis in original).

¹¹⁹ S. 4003, 91st Cong., 2d Sess. (1970).

¹²⁰ 116 CONG. REC. S 9568 (daily ed. June 23, 1970); N.Y. Times, June 23, 1970, at 59, col. 2.

¹²¹ 116 CONG. REC. S 9568 (daily ed. June 23, 1970).

¹²² Wall St. J., May 25, 1970, at 4, col. 3.

proposals owned an average of 103 shares as against an average of 284 shares for those who voted against the proposals and an average of 210 shares for all GM shareholders.¹²³

While neither proposal came close to achieving a majority, no matter how the vote is sliced, the indication is that on a vote of this nature the result may differ sharply depending on whether one is counting shares or voters. Of course, the vote of an institutional investor may itself reflect a division among its managers. College Retirement Equities Fund (CREF), a pension fund for university professors, cast 608,700 votes against the Campaign GM proposal to add public-interest directors to the GM board on the basis of a nine-to-seven vote against the proposal in its own board of trustees.¹²⁴ Thus, on that vote, the individual decisions of two members of an institutional board offset the individual decisions of approximately 6,000 other GM shareholders.¹²⁵

III

MANAGEMENT AND ITS CONSTITUENCIES

In the spring of 1932, a debate was conducted in the pages of the *Harvard Law Review* on the question: "For Whom Are Corporate Managers Trustees?" Professor E. Merrick Dodd postulated that corporate managers owed duties to employees, consumers, and the general public, as well as to shareholders.¹²⁶ Mr. A. A. Berle, on the other hand, considered it unwise to depart from the view that corporate managers should act solely for the purpose of making profits for the shareholders "until such time as you are prepared to offer a clear and reasonably enforceable scheme of responsibilities to someone else."¹²⁷ It is now

¹²³ These calculations are based on data in MOODY'S INDUSTRIAL MANUAL 2278, 2281 (1969).

¹²⁴ Letter from William C. Greenough, Chairman of CREF, to James M. Roche, Chairman of GM, May 13, 1970.

¹²⁵ Dr. Roger Murray of CREF is quite concerned about the situation:

The people who have control over the stock have a great deal of power that no one ever really gave them. They speak, not with their own voices, but with the voice of the size of their stock. Do you really think that your counterpart at Metropolitan Life ought to be seven times as influential as you are because he has seven times more stock?

Landau, *Do Institutional Investors Have a Social Responsibility?*, INSTITUTIONAL INVESTOR, July 1970, at 25, 87. His only suggestion, however, is that "it should be seven times more difficult for Metropolitan Life to take a stand." *Id.*

¹²⁶ Dodd, *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1156 (1932).

¹²⁷ Berle, *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1367 (1932):

popularly supposed that Professor Dodd had the better of the argument; indeed, Mr. Berle himself has since conceded that "the argument has been settled (at least for the time being) squarely in favor of Professor Dodd's contention,"¹²⁸ and that "modern directors are not limited to running business enterprise for maximum profit, but are in fact and recognized in law as administrators of a community system."¹²⁹

My concern here is not with whether Dodd or Berle was right; in fact, while corporate management today may prefer to quote the former than the latter, its actual motivation is probably closer to Galbraith's formulation of "a secure minimum of earnings" which is necessary to "preserve the autonomy on which its decision-making power depends."¹³⁰ My purpose is rather to question whether the present system of "one share, one vote" is a desirable method of selecting (or ratifying the selection of) corporate managers under either of the alternative formulations of their fiduciary obligation. At first glance, it would seem that if there is to be an electorate, it should include all the groups to which the management owes responsibility. If Professor Dodd was right, this should include employees, consumers, and the general public, as well as shareholders.¹³¹ However, the determination of the boundaries of these other groups raises serious difficulties.

Employees would not be too difficult a group to delimit. They could be given voting power in either of two ways: the German system, under which they vote separately for "labor directors," or a system under which they would vote along with shareholders for a single slate of directors.

Consumers present a different problem. In the case of a large manufacturing concern, "consumers" may include the wholesalers and retailers who distribute the corporation's products, as well as the ultimate consumers. Not only are the interests of these two groups divergent in many respects, but expansion of the electorate to the latter group would, in the case of some corporations, extend the franchise almost without limit. If every person who had ever purchased

¹²⁸ A. BERLE, *THE TWENTIETH CENTURY CAPITALIST REVOLUTION* 169 (1954).

¹²⁹ Berle, *Foreword to THE CORPORATION IN MODERN SOCIETY*, *supra* note 107, at xii.

¹³⁰ J. GALBRAITH, *supra* note 89, at 167-68.

¹³¹ In fact, we might first question whether shareholders should be included at all. Chayes maintains, not without justification, that "of all those standing in relation to the large corporation, the shareholder is least subject to its power." Chayes, *The Modern Corporation and the Rule of Law*, in *THE CORPORATION IN MODERN SOCIETY*, *supra* note 107, at 25, 40.

a General Electric light bulb had a right to participate in choosing the directors, the corporation would be forced to say that anyone in the world who wants to vote at a GE election can do so. This is absurd, but absurd only because it is unworkable. The purchasers of GE light bulbs, as a group, have a real and substantial interest in whether GE management incorporates known improvements in the product. The problem is finding the most appropriate means by which this interest can be taken into account in management decisions. To say that the customers' only right is to buy the goods of a competing manufacturer is akin to saying that a shareholder does not need a vote in a publicly-held corporation because he is fully protected by his right to sell his shares on the market at any time. The light bulb users have an interest, and they have a right to have it considered by the management; the real question is the procedure, if any, by which they should be able to express their dissatisfaction.

If consumers are indeterminate, the general public is virtually indefinable. The inhabitants of areas around the corporation's plants are certainly part of it, but how large an area? And what of communities all along the river into which the wastes from the corporation's plants are discharged, or communities around the plants of the corporation's suppliers?

This brief catalogue is enough to show that an electorate—if there should be an electorate—cannot be defined by the groups to whom managers are said to have responsibility. Yet if we expect managers to act in the interest of their various constituencies, we must give them some incentive to do so. The pluses and minuses of their stewardship should be subject to genuine debate at the time they seek re-election or when a particular action requires ratification by their constituents. We cannot expect them to continue indefinitely to aim for higher levels of "statesmanship" in the management of the institutions for which they are responsible if we continue at the same time to structure the electorate so that it will perforce be guided only by the most selfish and limited economic interests in casting its votes.

The absence of workable alternatives forces us to return to the concept of the shareholders as the electorate. The system has shown that it works, and perhaps some modification could make it an effective instrument for the conduct of a plebiscite.

The difficulty with the system of "one share, one vote" as it applies to the publicly-held corporation is that it makes it virtually impossible for any constituency, no matter how large, to make any impression in the vote for directors unless its members have an enor-

mous amount of money available to buy shares. Take General Motors Corporation (admittedly an extreme example, but an important one). GM has 285 million shares outstanding with a current market value of about twenty billion dollars.¹³² Assume that a sizable group of GM's customers, or dealers, or employees decide that the GM management is not giving adequate weight to their interests. To acquire a majority of the outstanding shares would cost them about ten billion dollars. To acquire a thirty-percent interest which might give them "working control" would cost about six billion dollars. The money required to achieve any sort of voice in management would be totally beyond their capabilities, if not their imagination. In the period 1964-68, GM produced approximately 22,000,000 passenger cars. Assuming that is a rough measure of the number of current owners of GM cars, it would require an investment of almost \$500 by each of them to acquire a majority of GM's outstanding shares. For the 750,000 employees, an investment of more than \$13,000 per capita would be required.¹³³

Contrast the situation that would exist if each GM shareholder had one vote. GM presently has about 1,400,000 shareholders.¹³⁴ Even assuming none of the present shareholders is an employee, an investment of sixty-five dollars by each of the employees (the approximate price of one share) would give them more than one-third of the votes, assuming, that is, that other interested groups did not start buying GM shares to ensure proper consideration of their interests. The customers, of course, could obtain a majority of the votes even if only one-tenth of them bought one share each. The dealers and suppliers and their employees would have a similar, if smaller, potential.

Of course, there is no assurance that the employees, or the customers, or the dealers would make any effort to gain control of GM or any other corporation, or that those who did buy would exercise their voting rights with more thought to their status as employees, or users, or some other capacity than to their interests as shareholders in increasing the profits of the corporation. The important point is that the potential would be there. The management would have to

¹³² MOODY'S INDUSTRIAL MANUAL 2278 (1969).

¹³³ The situation in the Ford Motor Company is even worse. When Ford went public in 1956, the Ford family retained a special class of common stock that entitles it to 40% of the votes at any shareholders' meeting, even though it currently represents only about 15% of the equity interest in the company. The New York Stock Exchange sanctioned this departure from its concepts of "corporate democracy" in order to have Ford stock listed on the Big Board. See J. LIVINGSTON, *supra* note 84, at 166-77.

¹³⁴ MOODY'S INDUSTRIAL MANUAL 2281 (1969).

recognize that if it failed significantly in its responsibilities to any one of its major constituencies, that constituency would have a reasonable chance to muster the votes to turn it out of office. The incumbents would still have the important advantages that they now have in control of the corporate procedures, but that is as it should be. The burden should be on those who argue for change to prove their point to a sufficient proportion of the electorate to overcome the inertia that characterizes the bulk of the members of any electorate.

But now suppose that Mr. Berle has really been closer to the truth all along than Professor Dodd, and that we have not yet defined clearly enough management's responsibilities to its other constituencies to cut it adrift from the guidance of the profit motive and the benefit of the shareholders.

In the section on "Sales of Control" above, I have questioned whether giving the single large shareholder power to override or ignore the views of large numbers of small shareholders best serves the interests of the shareholders as a group, even when those interests are viewed in the narrow economic sense. My question here is whether the authority given to the managers to represent shareholder interests on a "one share, one vote" basis can still be justified by the argument that corporate managers are ill-suited, by training or temperament, to the job of balancing the social and economic interests of diverse groups, and should therefore be limited to doing what they are trained and know how to do—make a profit.

Under the original Berle formulation, it is not management's job to take account of the interests of employees, consumers, or the general public except when it takes those interests into account as a tactical measure to secure the favor, or avert the opposition, of those groups and thus to further its ultimate goal of profit. In this view, management in effect acts as bargaining agent for itself and the shareholders in negotiating with the other interest groups. It is an appealing viewpoint, but if it is to facilitate an optimum balance among the different interest groups, there must be real arm's-length bargaining between management and the representatives of the interest groups other than shareholders.

The ideal is probably most nearly achieved in the case of the employees; in fact, in some industries, the balance of bargaining power has tipped strongly in favor of the employees vis-à-vis corporate management. Under current labor laws, there is a good deal of bona fide arm's-length bargaining between management and labor representatives over real questions of allocation of economic benefits and deci-

sion-making power within the corporate organization.¹³⁵ The principal weakness in the system as it presently operates is that no interests other than labor, management, and the shareholders are effectively represented, and it is quite possible, and indeed common, for the negotiations to result in an agreement that satisfies both employees and management at the expense of consumers or other unrepresented economic or social interest groups.

The situation regarding consumers is somewhat more complex. It is fashionable among corporate public relations men to picture the consumer as "king" and the manufacturer as a humble supplicant begging his favor to assure its economic survival. The example of the Edsel is usually trotted out to show that even the largest and most powerful corporations have only limited power to manipulate the public taste. The weakness of this argument lies in the nature of the choice presented to the customer and the circumstances under which he must make his decision. Unlike the employee situation, there is no regular, formalized arm's-length bargaining between management and customer representatives to determine what products will be offered at what prices; management determines what products will bring it the greatest return on the use of its capital facilities and then bends its efforts, through advertising and other techniques, to secure their maximum acceptance. To the extent that new products represent responses to expressed customer preferences or measurable improvements in quality or reductions in cost, the system can be said to be working. But the distressingly high percentage of cases in which new product development represents none of these is sufficient indication that the interests of consumers, as distinguished from the psychology of consumers, are not given effective weight in corporate managerial decisions.¹³⁶

The representation of "community" interests vis-à-vis those of management and shareholders suffers from a somewhat different kind of weakness—one which Alfred Kahn has referred to as the "tyranny of small decisions."¹³⁷ The issues on which the management-shareholder interest and the community interest might be expected to

¹³⁵ See Latham, *The Body Politic of the Corporation*, in *THE CORPORATION IN MODERN SOCIETY*, *supra* note 107, at 218, 227.

¹³⁶ "A consumer veto over wasteful use of resources after the use has been made is by no means the same as consumer control over their use." Means, *Collective Capitalism and Economic Theory*, in *THE CORPORATION TAKE-OVER* 67, 87 (A. Hacker ed. 1964). See Latham, *supra* note 135, at 227-28.

¹³⁷ Kahn, *The Tyranny of Small Decisions: Failures, Imperfections, and the Limits of Economics*, 19 *KYKLOS* 23 (1966).

differ are often not presented by management to the community as such but to its individual members in one or another of their particular capacities. For example, the community is not asked what kind of automobile would best serve community needs; each individual is given a choice of automobiles carefully designed to emphasize what they can do for *him*, materially or psychologically. The community is not asked what plant location would best serve community needs; the landowners and potential employees in a particular area are seduced by the economic benefits that will flow to them personally from location of the plant at a place that the management has determined to be most profitable. In each case, the way in which the question is presented determines the response, and the cumulation of responses based on individual self-interest is adduced as proof that the management's decisions were in accord with the community's interests since they were endorsed by the members of the community.

This absence of arm's-length bargaining between management and the community is justified by the argument that "public" interests are represented by government, which, through its powers of regulation, taxation, and spending, can effectively represent those interests against the selfish interests of management and shareholders. Given the great and increasing size of governmental bureaucracies and governmental budgets, this argument has a certain plausibility. Yet given the results of this "bargaining" to date, one comes away with the uneasy feeling that the public interest has been had. But if government has not been an effective bargaining agent, why not?

One weakness of government is that, except in the case of war, we have conceived of it in this country as playing a largely passive and responsive role. Government does not take the initiative; it responds to the initiatives of "businessmen." What is more, if government disagrees with what businessmen want to do, government has the burden of proof and must prove not simply that the businessman's initiative will not advance the public interest but that it will cause substantial harm. Given the great gaps in our understanding of, and ability to forecast, scientific, social, and economic phenomena, this can be a formidable task.

Of course, this traditional view of American government no longer corresponds completely to reality. Government is increasingly taking the initiative in many areas other than war and is utilizing business corporations for public purposes. But even where government has taken the initiative, it is still under a serious handicap in dealing with corporate management because government is, more or

less, democratically selected while corporate management is not. What this means is that government decision makers must be responsive to the interests of their electorate in all of its capacities—as workers, as consumers, as shareholders, as landlords and as tenants, as walkers and riders, as breathers, eaters, and what have you—while corporate management decision makers are supposed to be guided by a single arbitrary standard—profit. The management's electorate is not the shareholders, but the shares. The "one share, one vote" system, the institution of voting by proxy, and the use of record dates that result in many votes being cast on behalf of people who are no longer shareholders at the time of the meeting, all combine to depersonalize the decisional process in corporate elections. The shareholder under the present system is not voting as a person at all, but as the temporary trustee of a piece of paper embodying values to which shareholders and management alike have agreed to adhere in making their "corporate" decisions, whether or not they accept them in their personal lives.

Given this disparity, it is no wonder that corporate managements, with power of disposition over aggregations of tangible and intangible assets equal in magnitude to, and often far greater than, those available to government officials, are able to reach big and important decisions regarding the utilization of those assets far more easily than their government counterparts. Corporate managers enjoy the advantages of speed, flexibility, and secrecy available to all autocrats, as well as the assurance of certainty available to those who are permitted to guide their actions by a single arbitrary standard. So long as we acquiesce in their privileges we cannot expect an optimum balance between public and private interests to be reached by a process of negotiations between them and their more democratically-selected counterparts in government. That balance will not be attainable until a more democratic method of selection of corporate managers can be substituted for the present rule of "one share, one vote."¹³⁸

IV

EQUAL PROTECTION OF THE LAWS

In a series of cases beginning with *Baker v. Carr*,¹³⁹ the United States Supreme Court has held that the provision of the fourteenth

¹³⁸ Rostow describes the corporation with widely-scattered shareholders as "endocratic." Rostow, *supra* note 107, at 47 n.2. The rule of one vote for each share may perhaps be described as "plutocratic," but whatever the present system is, it is clearly not democratic.

¹³⁹ 369 U.S. 186 (1961).

amendment prohibiting the states from denying to any person "equal protection of the laws" means that when any public official or legislative body is elected by popular vote, the vote of one group of electors may not be given greater weight than those of any other group. The principal effect of these decisions has been on legislative bodies whose members are elected from geographical constituencies. As to these, the Court has established a rule of "one man, one vote," under which there may not be any significant variation in the number of persons represented by each member of the legislature. The rule has been extended from congressional¹⁴⁰ and state legislative districts¹⁴¹ to local governing bodies such as county commissions¹⁴² and even to a board of trustees established for the purpose of managing a junior college.¹⁴³

As Justice Black stated in the most recent of these decisions, "the constant factor" leading to invocation of this constitutional principle is "the decision of government to have citizens participate individually by ballot in the selection of certain people who carry out governmental functions."¹⁴⁴

At the same time that the Supreme Court has been striking down apportionments of voting power that give one person's vote greater weight than another's, it has also been striking down, as a denial of equal protection, various restrictions on the right of individuals to vote in governmental elections. Among the limitations thus held invalid is the restriction of voting rights to property owners, either in an election of school board members¹⁴⁵ or in referenda to approve the issuance of revenue bonds¹⁴⁶ or general obligation bonds.¹⁴⁷

In *Cipriano v. City of Houma*,¹⁴⁸ the Court held that ownership of real property could not be made a qualification for voting in a referendum on the issuance of revenue bonds. The decision is particularly interesting because the bonds involved were to be issued to finance the extension and improvement of gas, water, and electric utility systems which in Houma happened to be operated by the city, rather than by a "private" public utility. "The [State] maintain[ed] that property owners have a 'special pecuniary interest' in the election, because the efficiency of the utility system directly affects 'property and

¹⁴⁰ *Wesberry v. Sanders*, 376 U.S. 1 (1964).

¹⁴¹ *Reynolds v. Sims*, 377 U.S. 533 (1964).

¹⁴² *Avery v. Midland County*, 390 U.S. 474 (1968).

¹⁴³ *Hadley v. Junior College Dist.*, 397 U.S. 50 (1970).

¹⁴⁴ *Id.* at 54.

¹⁴⁵ *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969).

¹⁴⁶ *Cipriano v. City of Houma*, 395 U.S. 701 (1969).

¹⁴⁷ *Phoenix v. Kolodziejki*, 399 U.S. 204 (1970).

¹⁴⁸ 395 U.S. 701 (1969).

property values' and thus 'the basic security of their investment in [their] property [is] at stake.'"¹⁴⁹ The Court held, however, that "the operation of the utility systems . . . affects virtually every resident of the city, nonproperty owners as well as property owners," and that the vote could not constitutionally be limited to the "owners" of the city.¹⁵⁰ Even two Justices who had dissented from the decision that ownership of property could not be made a qualification for voting in school board elections concurred in this judgment on the ground that it involved a voting classification "wholly irrelevant" to achievement of the state's objective.¹⁵¹

The *Cipriano* case is also interesting for another provision of the challenged Louisiana statute, which was not specifically put in issue, requiring that a utility revenue bond issue "must be approved by a majority of the property taxpayers voting and their votes must also represent a majority of the assessed property owned by those taxpayers who are actually voting."¹⁵² In other words, not only were non-property owners completely disfranchised, but even the desire of a majority of the property owners to approve a bond issue could be overridden by the votes of those who owned a majority in value of the city's assessed property. The Supreme Court has not yet passed on the constitutionality of such a provision, but it has agreed to decide whether the requirement of a greater-than-majority vote for approval of a bond issue is constitutional.¹⁵³ The California Supreme Court has recently held that such a requirement violates the equal protection clause of the fourteenth amendment because it gives greater weight to a "no" vote than a "yes" vote.¹⁵⁴

In *Phoenix v. Kolodziejski*,¹⁵⁵ the Court extended the *Cipriano* rule to cover referenda on general obligation bonds that were to be serviced primarily out of property taxes. Even though property owners in this case had a direct pecuniary interest in the question not shared by other residents of the city, the Court held that the interest of other citizens in the services to be provided from the proceeds of the bond

¹⁴⁹ *Id.* at 704.

¹⁵⁰ *Id.* at 705.

¹⁵¹ *Id.* at 707 (Black & Stewart, JJ., concurring).

¹⁵² LA. REV. STAT. § 39:501 (1950). Since the statute provides that only qualified voters can participate in a bond issue election, a corporate landowner would not be entitled to vote and its landholdings would therefore not be counted in determining whether the issue was approved. See [1914-16] OPS. ATT'Y GEN. LA. 394-96.

¹⁵³ *Gordon v. Lance*, 170 S.E.2d 783 (W. Va. 1969), cert. granted, 397 U.S. 1020 (1970).

¹⁵⁴ *Alhambra City School Dist. v. Mize*, 2 Cal. 3d 806, 471 P.2d 515, 87 Cal. Rptr. 867 (1970).

¹⁵⁵ 399 U.S. 204 (1970).

issue, the provision that part of the debt service would be furnished by non-property taxes, and the interest of tenants, as well as landlords, in the level of real property taxes, made their exclusion from the referendum unconstitutional. The Court stated:

Presumptively, when all citizens are affected in important ways by a governmental decision subject to a referendum, the Constitution does not permit weighted voting or the exclusion of otherwise qualified citizens from the franchise. . . . Placing such power in property owners alone can be justified only by some overriding interest of those owners which the State is entitled to recognize.¹⁵⁶

There is no question that the provisions of state corporation laws regarding the election of corporate directors are "decision[s] of government to have citizens participate individually by ballot in the selection of . . ." those directors. If the directors of business corporations, or some of them, can be said to be "carrying out governmental functions," then there are obviously serious problems under the equal protection clause in the exclusion of large classes of interested persons from the electoral process and in the allocation of voting power among those who are entitled to vote.¹⁵⁷

A corporate charter is a grant of power by the state. In their earlier form, each charter was granted as a separate act by the legislature to named individuals to engage in specified activities. Gradually, state governments were induced to relinquish their right to determine who could incorporate so long as the corporation stayed out of certain activities that the states reserved for the regularly-elected government. However, the corporate charter remains a continuing grant of power by the state to certain people—the "directors" of the corporation—to regulate the disposition of large aggregations of capital and fixed assets and the behavior of large numbers of people.

Is this a "governmental" function? Traditionally, it has been considered that the function of government is to regulate and the function of business is to produce. But there is no clear dividing line. Government is engaged in many "productive" activities, including the post office, municipal utility systems such as that operated by the city of Houma, as well as the much more economically significant activities of military production and highway building. And business is engaged in regulation—of production, of distribution, of competition, and of

¹⁵⁶ *Id.* at 209.

¹⁵⁷ The question here is whether business corporations *should* be studied as political institutions, not whether they *can* be. The latter question has been pretty well answered in the affirmative. See, e.g., A. BERLE, *THE TWENTIETH CENTURY CAPITALIST REVOLUTION* (1954); W. HAMILTON, *THE POLITICS OF INDUSTRY* (1957); Latham, *supra* note 135, at 218.

many other aspects of the economy. The more concentrated an industry becomes, the greater the regulatory component of the decisions of industrial managers. The division of industrial governmental jurisdictions along chiefly functional, rather than geographical, lines should not obscure the basic similarity. The production and distribution of automobiles is governed by the managers of the four major automobile producers just as the geographical area of New England is governed by the local and state governments of six states. In neither case can one government operate in disregard of what "competing" governments are doing. A man can change his citizenship (*i.e.*, residence) from one state to another just as he can transfer his citizenship (*i.e.*, employment or customer relationship) from one automobile manufacturer to another. But a man's ability to switch his allegiance from one state to another has never been thought to justify excluding him from an equal voice in the government of the state while he is there, and there is no intrinsic reason why the same principle should not be applicable to his corporate allegiances.

No generalizations can be made about the extent to which business corporations exercise "governmental" powers. The corporations organized under a single law may range from a monopoly public utility corporation or massive industrial enterprise with widely scattered shareholders, employees, and customers to a small shop or business with one owner, no employees, and one or a handful of customers. It is neither feasible nor necessary to introduce public selection of management into the latter corporation, while the managers of the former type are performing functions that can well be classified as "governmental" and are indeed performed by elected government officials in many localities.

In a series of cases applying the equal protection clause to discrimination against black people, the Supreme Court has been required to determine whether the discrimination is purely "private" or involves "state action" which brings it within the prohibition of the fourteenth amendment. While other members of the Court have been trying to analyze the cases by the degree of involvement with the official state or local "government," Justice Douglas has been attempting to enunciate a formula under which certain activities that are essentially "governmental" in nature would be subject to the strictures of the equal protection clause even when they were undertaken by "private" groups or organizations. He has applied this reasoning to the operation of a public restaurant, because "state licensing and surveillance . . . brings its service into the public domain" and makes the res-

taurant an "instrumentality of the state";¹⁵⁸ to a privately-owned park, because a park's function of "mass recreation" is "municipal in nature";¹⁵⁹ and to group action to maintain segregated neighborhoods, because "zoning is a state and municipal function" that the state may not suffer "to be performed under private auspices in a way the state itself may not act."¹⁶⁰

The equal protection clause has two facets. It forbids discrimination by public agencies when they act on individual members of the community, and it forbids discrimination in the process by which the directors of public agencies are chosen and controlled. Justice Douglas has been concerned primarily with the first facet—racial discrimination in the operation of public facilities.¹⁶¹ Our concern here is with the second facet—discrimination in the selection of corporate directors. I would argue that, just as when a group or organization becomes subject to the equal protection clause in its first aspect when it presumes to perform a public function, so a corporation or other organization becomes subject to the clause in its second aspect when its directors presume to govern the conduct of its operations on behalf of a public electorate and cease to be the instrumentality of a single person, or closely-associated group, which can be considered the "owner" of the enterprise in the traditional sense.¹⁶² In other words, the election of corporate directors becomes subject to the equal protection clause when the corporation makes a public offering of its securities.¹⁶³

It should be noted that Justice Douglas's redefinition of the line

¹⁵⁸ *Lombard v. Louisiana*, 373 U.S. 267, 282-83 (1963) (concurring opinion).

¹⁵⁹ *Evans v. Newton*, 382 U.S. 296, 301 (1966) (opinion of the Court).

¹⁶⁰ *Reitman v. Mulkey*, 387 U.S. 369, 384 (1967) (concurring opinion). It has been suggested that "with the continuing 'pluralizing' of American society and the increasing recognition of the governmental power of private groups, . . . the trend of the Court in 'public-izing' private groups . . . should become the important constitutional law development of the midtwentieth century." Miller, *Private Governments and the Constitution*, in *THE CORPORATION TAKE-OVER*, *supra* note 136, at 122, 140.

¹⁶¹ Adolf Berle's suggestions for applying constitutional limitations to powerful business corporations have also concentrated on this facet of the equal protection clause, as well as on the due process clause. See Berle, *Economic Power and the Free Society*, in *THE CORPORATION TAKE-OVER*, *supra* note 136, at 91, 105 (1963); Berle, *The Developing Law of Corporate Concentration*, 19 U. CHI. L. REV. 639, 657 (1952).

¹⁶² Or, as Galbraith would put it, when it passes from the "Entrepreneurial" to the "Mature" stage. Note 89 and accompanying text *supra*.

¹⁶³ There are, of course, some corporations that become "Mature" while still privately-held, just as there are some that make public offerings of shares (often with disastrous results to the purchasers) while they are still in the "Entrepreneurial" stage. In most cases, however, the public offering, with the attendant invocation of federal securities regulations, is probably the best place to draw the line.

between "public" and "private" has not gone unquestioned even within the Court. Justice Harlan has observed

a clash of competing constitutional claims of a high order: liberty and equality. Freedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of protection from governmental interference. This liberty would be overridden, in the name of equality, if the strictures of the amendment were applied to governmental and private action without distinction.¹⁶⁴

By this statement, however, Justice Harlan has strengthened the case for making the election of directors of publicly-held corporations subject to the equal protection clause because those in control of the corporate assets are clearly not "individuals free to use and dispose of [their] property as [they see] fit, to be irrational, arbitrary, capricious, even unjust . . ."; they are, by their own admission, the governors of that property, under a grant of power from the state, on behalf of wide and diversified constituencies.

V

WHERE DO WE GO FROM HERE?

If what I have written thus far is to be believed, the rule of "one share, one vote" represents an aberration in historical development, is widely departed from in other countries, facilitates trafficking in control and the development of unhealthy conglomerates, is vesting increasing power in the hands of financial managers who have neither the desire nor the ability to exercise it, inhibits democratic decision making on important social and economic issues, and is of dubious constitutionality.

It is much easier (and much more enjoyable) to poke holes in an existing system than to devise a better one. But the current dissatisfaction with the operation of our corporate governments provides a tempting opportunity to sketch the rough outline of a new system that might encourage, rather than discourage, corporate managers to use the assets at their command in a manner that is more responsive to the needs of those affected by their decisions.

One possible route is government selection of corporate managers. However, the experience of countries that have nationalized basic industries, such as England, does not give any assurance that the benefits

¹⁶⁴ Peterson v. City of Greenville, 373 U.S. 244, 250 (1963) (separate opinion).

of that extreme procedure would justify the economic dislocations involved,¹⁶⁵ except perhaps in a few really sick industries, such as railroads, where any change could hardly fail to be an improvement. Examples of government selection of representatives who would constitute a minority of a board of directors of an essentially profit-oriented corporation have been generally discouraging.¹⁶⁶ Furthermore, we are now sufficiently confused about our national goals that centralized planning of economic activity has lost much of whatever appeal it formerly had. An adaptation of the ideas of economic federalism, in which the selection of the managers of each corporate government would be ratified by a distinct electorate of real people, may offer the best opportunity for experimentation with the management of these vast aggregations of physical and contractual assets to determine what approaches best meet America's current economic and social needs.

Assuming that we should begin to consider limitations on the voting rights of large shareholders in order to increase the democratic element in the selection of corporate management, what is our starting point? A return to the basic democratic principle of "one man, one vote" is appealing, although appropriately scaled-down voting rights for large shareholders, or fixed upper limits such as that found in the Volkswagen charter,¹⁶⁷ might be more palatable at the start. The questions are how such a system would meet the objections to the present system which I have outlined above, what new problems it might raise, and what affirmative benefits it might produce.

First, why or how would such a system survive the forces that led to its abandonment in American and English law in the mid-nineteenth century and that have caused criticism in the civil law systems where it is still maintained?

There is little hard evidence as to why the restrictions all but disappeared during the nineteenth century, but one can speculate that there were several reasons:

1. The restrictions were inconsistent with the laissez-faire philosophy of giving entrepreneurs maximum freedom in determining how to run their business affairs.
2. The substitution of general incorporation laws for special acts of incorporation meant that a corporation would not have a statutory

¹⁶⁵ See Crosland, *The Private and Public Corporation in Great Britain*, in *THE CORPORATION IN MODERN SOCIETY*, *supra* note 107, at 260, 267-73.

¹⁶⁶ See Schwartz, *Governmentally Appointed Directors in a Private Corporation—The Communications Satellite Act of 1962*, 79 *HARV. L. REV.* 350 (1965).

¹⁶⁷ Notes 64-65 and accompanying text *supra*.

monopoly of its "line of commerce" and that the external control afforded by competition supplanted the internal control provided by voting restrictions.¹⁶⁸

3. The restrictions were relatively easy to evade, at least as long as the corporation had relatively few stockholders. Once an unsympathetic court had held that it would not inquire into the reasons for a transfer of shares,¹⁶⁹ it was a simple matter for a substantial stockholder to increase his voting power by transferring shares to his relatives or others who would vote as he directed.

How persuasive are these considerations today?

1. The doctrine of laissez-faire is limited by the idea that business corporations can be and are regulated when it is decided that the public interest requires regulation. The question now is whether restriction of the voting rights of large shareholders is desirable.

2. Anyone can still form a corporation to manufacture automobiles, for example, but the problem of turning the corporation into an automobile manufacturer is something else again. At least in the oligopolistic industries, there is a serious question as to what competition is doing to protect the "public" interest. To the extent that the external controls of the market become less effective, the desirability of internal controls gains significance.¹⁷⁰

3. As long as there are restrictions, methods will be devised to avoid them. But if a corporation has 100,000 shareholders, a large shareholder would have to be unusually fecund or gregarious to find sufficient relatives or friends to increase his voting power by transfers to dummies.

In short, while there may be persuasive arguments against imposing restrictions on the one vote per share rule at the present time, history does not indicate insuperable obstacles; it does indicate possible forms the restrictions might take.

Second, would the proposed change eliminate, or even ameliorate, the "control" problem discussed above: the situation where the holders

¹⁶⁸ It is interesting that voting restrictions were more prevalent in the general and special laws relating to "quasi-public" corporations, such as banks and transportation companies, than they were in the laws relating to manufacturing companies.

¹⁶⁹ *Moffatt v. Farquhar*, 7 Ch. D. 591 (1878).

¹⁷⁰ [I]t would be interesting to see if replacing the Sherman anti-trust law by the assurance of a republican form of government to all private corporations would not take the strain off the heavily pressed executive and hasten the present tendency of the business corporation to accept more community responsibilities. Buchanan, *The Corporation and the Republic*, in *THE CORPORATION TAKE-OVER*, *supra* note 136, at 19, 36.

of a majority, or substantial minority, of the shares exercise effective control because the remaining shareholders are not united on any competitive course of action? Although the proposed change would, by its basic nature, eliminate the possibility that any one man, or small group of men, could achieve this degree of control, it does leave open the possibility of one of the corporation's larger constituencies, say, its employees, exercising the effective choice of management and installing a management that would run the corporation for their benefit to the detriment of consumers, creditors, equity investors, and the general community.

I believe this danger is more theoretical than real. Getting 100,000 voters to cast their votes for a particular slate is not nearly so easy as getting one man to cast 100,000 votes for that slate, particularly where the people involved must take an affirmative action (*i.e.*, become shareholders) before they are entitled to vote at all. The likelihood would be that only where management consistently ignored the interests of an important group would that group be motivated to amass sufficient voting power to change the management.

Even if one particular interest group were to obtain "control" and attempt to operate the corporation without regard to the interests of other constituencies, the latter groups would be able, by promoting the purchase of shares by their own members and others sympathetic to their objectives, to acquire sufficient voting power either to turn out the incumbent management or to require that management to give attention to their interests. Unlike the present situation, in which the management, supported by the holder or holders of a majority of the outstanding shares, can never be turned out of office, a group that held a majority of the votes under a per capita voting system could never be sure that another group might not obtain a majority within a short period by dispersal of, and additions to, its holdings.

To provide immediate remedies for gross disregard of management obligations to one of its constituencies, a shareholder should have recourse to the courts, as he has now, suing either as representative of a group of shareholders or derivatively on behalf of "the corporation." The difficult question is the extent to which the court, in such a situation, should recognize the interest of the complaining shareholder as an employee, or as a consumer, or as anything other than an owner of a share in the equity.¹⁷¹ If the management does have a responsibility

¹⁷¹ In *DeRosa v. Terry Steam Turbine Co.*, 26 Conn. Supp. 131, 214 A.2d 684 (Super. Ct. 1965), three employees of a company, who were also members of the union negotiating committee, each purchased one share of stock in the company and requested

to these other groups, their interests should presumably be given recognition by the courts. This does not mean that management should be found delinquent because in a certain situation, faced with alternative courses of action, it has chosen one that is more beneficial to equity owners and less beneficial to employees, or more beneficial to creditors and less beneficial to equity owners, or the like. However, it would be appropriate to hold management liable where it utterly failed to consider the interests of one of its constituencies or otherwise dealt unfairly with them.¹⁷²

permission to inspect the company's list of shareholders for the purpose of apprising the shareholders prior to the annual meeting of "certain facts relating to labor relations of the company . . ." *Id.* at 133, 214 A.2d at 685-86. Connecticut corporation law provided that such a list "shall be subject to inspection by any shareholder . . . for any proper purpose in the interest of the shareholder as such or of the corporation and not . . . for any purpose inimical to the interest of the corporation or of its shareholders." CONN. GEN. STAT. ANN. § 33-333 (1960). The company denied the request on the ground that it was not made in their interest as shareholders and was inimical to the interest of the company. The court held that since the employee-shareholders "wish[ed] to communicate with the shareholders in respect to matters of interest and legitimate concern to the shareholders and to the company," they were entitled to inspect the list, and that their affiliation with the union did not "in any way impair the[ir] status . . . as shareholders." *Id.* at 138, 214 A.2d at 688.

¹⁷² The problem is analogous to one that can arise in corporations that have more than one class of stock. In one case, Transamerica Corporation had an outstanding issue of convertible preferred shares the holders of which were entitled to receive \$240 per share upon liquidation, but only \$81 per share if the shares were called for redemption (which the board could do at any time). The board redeemed the preferred shares and then proceeded to liquidate the corporation. The court said that the board, acting in the interest of the holder of a majority of the common shares, had violated its duty to the preferred shareholders by calling their shares for redemption at the lower price. *Zahn v. Transamerica Corp.*, 162 F.2d 36, 46 (3d Cir. 1947). Viewed alone, this would place an impossible burden on a management faced with responsibility to act in the best interests of both its preferred and common shareholders. But in subsequent proceedings, the court approved a recovery by the preferred shareholders, not of the difference between the redemption price and the liquidation preference but of the difference between the redemption price and the amount the preferred shareholders would have received if they had converted their preferred into common shares instead of surrendering them for redemption. *Speed v. Transamerica Corp.*, 235 F.2d 369, 374 (3d Cir. 1956). It thus appeared that the real offense the directors had committed was not their redemption of the preferred shares. Their failure to do so, when they clearly had authority, would have subjected them to legitimate criticism by the common shareholders. Rather, it lay in their concealment from the preferred shareholders of information that would have made clear that it was in their best interest to convert their shares, rather than to surrender them for redemption.

The *Transamerica* cases do not even begin to answer the specific questions that would arise if the courts attempted to determine the bounds of management discretion in balancing the interests, not merely of different classes of shareholders, but of classes of shareholders with entirely different kinds of interests in the corporation. But if the responsibility does exist, there must be a means by which it can be made effective; and when a constituent of the corporation alleges that the management has failed in its responsibilities to the group of which he is a member, the courts must determine, possibly with legislative aid, whether this is so and what should be done about it.

Third, what effect would the change in voting rights have on corporate take-overs? It would undoubtedly make it easier for the management of a locally-controlled, relatively unaggressive company to resist a take-over motivated by stock market considerations. Our re-examination of priorities and goals, however, is already leading us to question whether a management using the corporate assets to produce steady employment for its work force and a modest return for its investors may not be doing a socially useful job for employees, consumers, and other significant constituencies. And assuming that there are at least some take-overs that can be considered beneficial to all interest groups, it is arguable whether reduction of the voting power of large shareholders would in fact prevent a new, more aggressive, more imaginative management from taking over by carrying its argument for change to a dissatisfied corporate electorate. It might even make the process easier, since it would enable men long on ideas and ability but short on funds to compete for management positions without being forced to pay a premium for a "controlling block" of shares, a method of taking control which practically assures that a successful group will seek to recoup its excess investment at the expense of the other shareholders.¹⁷³

Fourth, the question of institutional investors. It would hardly lie in the mouths of the institutional managers to complain about being deprived of votes that they have so clearly indicated they do not want. Reducing the voting power of large blocks of shares might actually make their investment job easier. As these institutions grow to mammoth size, they find their opportunities for equity investments limited to the very largest publicly-held corporations, which are the only ones in which they can invest their millions without finding themselves, willy-nilly, in control because of the number of votes they can cast. If they could purchase larger percentage interests in smaller companies without automatically acquiring the control position they say they do not want, the access of the smaller companies to the principal equity capital markets might be improved.¹⁷⁴

¹⁷³ Of course, those who gain control of a corporation by means of a proxy fight are also entitled to reimburse themselves out of corporate assets for the cost of the campaign, at least where it involves questions of policy and the payment is ratified by a vote of the shareholders. *Rosenfeld v. Fairchild Engine & Airplane Corp.*, 309 N.Y. 168, 128 N.E.2d 291 (1955); *Steinberg v. Adams*, 90 F. Supp. 604 (S.D.N.Y. 1950); see *Campbell v. Loew's, Inc.*, 37 Del. Ch. 17, 134 A.2d 852 (1957). However, explicit reimbursement in these circumstances seems not only appropriate but consistent with the current suggestions that government should help finance political campaigns to prevent major elective offices from becoming the exclusive preserve of the rich.

¹⁷⁴ Depriving a large shareholder of his voting rights would not, of course, eliminate his influence on company policies resulting from the ever-present threat that he might clobber the market price of the company's shares by dumping large blocks on the market.

Fifth, would the proposed change in the electorate really change the issues and responses in corporate elections, or would it simply, as Rostow suggests, add "new groups of apathetic and disinterested voters to the masses of stockholders who now fail to exercise their franchise intelligently"?¹⁷⁵ This is, of course, impossible to forecast, but it seems to me that it would inevitably have far greater potential than the present system for producing public discussion of the social and economic policy issues that corporate managers have to face in the context of ratifying the selection of those managers. At the very least, it would remove the inhibiting effect that the present plutocratic voting system has on those managers who have the imagination and competence to turn their companies' assets to more constructive uses.

Sixth, and most important, if the change in corporate voting procedures does change the orientation of corporate management, will that change be toward a fairer and more rational allocation of benefits between competing social and economic groups, or will it simply create new islands of privilege that will be more effectively insulated from central government intervention by an appearance of democracy? Here the results would probably be spotty, varying greatly from industry to industry and from company to company. However, since today's corporate managers, in making their supposedly "technological" or "economic" decisions, are in fact making the decisions that shape society,¹⁷⁶ the balancing process can hardly be less responsive to group needs than it is now.

The managers themselves are beginning to recognize the need to hear from someone outside the financial establishment in their board deliberations. John Bunting, the president of the largest bank in Philadelphia, recently disclosed that he is "contemplating the possibility of turning up to a third of the bank's 24 board seats over to consumer representatives, young adults, employes, blacks, poor people and perhaps even militant feminists."¹⁷⁷ If representatives of such "non-finan-

This, however, is one aspect of an entirely separate problem which is probably going to require restrictions on the trading practices of institutional investors.

¹⁷⁵ Rostow, *supra* note 107, at 56.

¹⁷⁶ See A. HACKER, *THE END OF THE AMERICAN ERA* 38-76 (1970).

¹⁷⁷ Morris, *A Banker's Startling Idea on Directors*, Wall St. J., Aug. 5, 1970, at 14, col. 4. In contrast, General Motors's response to Campaign GM has been the appointment of a "public policy committee" of five of its directors, described by the chairman as having "a broad and diverse background reflecting their deep interest in social, environmental and other concerns." The five are the chairmen of the boards of Mellon Bank, Allied Chemical Co., and Massachusetts Institute of Technology, the president of Marshall Field & Co., and a former vice chairman of GM. A spokesman for Campaign GM was "dismayed to observe that [the committee] suffers from the same parochialism as the board

cial" interest groupings are to be selected, it is not too late to begin thinking about how their selection is to be legitimized, if the process is designed to assure members of the groups involved that "their" interests are being represented.

It will of course be argued that subjecting corporations to democratic rule will simultaneously subject them to the delays, confusion, and political intrigues that afflict all democratic governments, and thus impair their efficiency and productivity, the supposed ultimate source of all the benefits, economic and social, in American life. If we accept the classical arbitrary economic definitions of efficiency and productivity, democratic rule probably would impair them.¹⁷⁸ We can further grant that a high level of business efficiency and productivity was required to lift the national community to a certain level of economic sufficiency that could support the social benefits we now enjoy. We can question, however, whether that same efficiency and productivity has become to some extent counter-productive in terms of the quality of human life in the society that it has spawned.

There are many situations in which special exceptions or incentives are allowed to new and developing enterprises and systems, which become undesirable and even dangerous when allowed to continue after the enterprise or system has become large and well-entrenched. The patent system is one example. A patent is a deliberate exception to the generally-accepted rule that no man should be able to prevent others from competing with him in a particular line of business. In its original conception, it was an appropriate way to encourage invention and improvement by giving the individual an opportunity to profit from his ingenuity when his invention was made available to the public. But now that most research is carried on by employees of large institutions—corporations, government, and universities—the patent system has become, to a large extent, a mechanism for restraining economic competition and hindering, rather than fostering, the process by which new inventions are made available to the public.¹⁷⁹

The laws excepting the managers of large corporate enterprises from our generally-accepted rules for democratic selection of those who run our institutions may be in the same category. Developed in the

itself," and Ralph Nader characterized it as "genuinely preposterous." N.Y. Times, Sept. 1, 1970, at 1, col. 3 (city ed.); *id.* at 58, col. 2.

¹⁷⁸ Even on those terms, we may wish to question whether we are more concerned with "good government" or "self-government." See Mason, *Introduction to THE CORPORATION IN MODERN SOCIETY*, *supra* note 107, at 6.

¹⁷⁹ See Schmookler, *Technological Progress and the Modern American Corporation*, in *THE CORPORATION IN MODERN SOCIETY*, *supra* note 107, at 141.

nineteenth century as an incentive to industrial development and as an exception to the established rules that the managers of productive, as well as regulatory, agencies should be selected by democratic procedures, they have now become, to a large extent, a method for frustrating democratic decision making and hindering, rather than fostering, the rational allocation of economic and social benefits.¹⁸⁰

The last question that I raised about the rule of "one share, one vote" was its constitutionality under the equal protection clause. The question now becomes whether it is possible to design a system of corporate voting that meets the constitutional standard.¹⁸¹ The difficulty, described above, of defining the boundaries of the corporation's constituencies indicated that giving one vote to each shareholder might be the most effective way of approaching the ideal. But if all "citizens" of the corporation are entitled to vote, the use of share ownership to determine eligibility to vote may be considered the equivalent of a poll tax. The Supreme Court has said that a poll tax is unconstitutional, that "a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard."¹⁸² It might therefore be necessary to require publicly-held corporations to issue, upon request and without charge, voting shares of a special class carrying no dividend or liquidation rights.¹⁸³ Limitations could be placed on the number of corporations of which a single individual could become an elector in this manner, just as a person's participation in present governmental elections is limited to the jurisdictions of which he is an official "resident."

¹⁸⁰ A distinguished legal historian has recently made the point that the power wielded by corporate managers must be legitimized by social utility and social responsibility. J. HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES* 58 (1970). He notes that the utility aspect dominated public policy toward corporations from the 1880's into the 1930's, because "we treated the corporate instrument as so useful for desired economic growth as to warrant using law to make it available on terms most responsive to businessmen's needs or wishes." *Id.* at 62. Since the 1930's, however, interest conflicts have shown up the insufficiency of the utility approach and led to a variety of attempts to enforce social responsibility, which "expresses the prime emphasis this culture puts on the individual as the ultimate measure of institutions." *Id.* at 58.

¹⁸¹ Commentators are fond of quoting William Graham Sumner's statement that "industry may be republican; it can never be democratic." *E.g.*, Latham, *The Commonwealth of the Corporation*, 55 Nw. U.L. Rev. 25, 33 (1960).

¹⁸² *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 666 (1966).

¹⁸³ The validity of a class of stock of this type was recently upheld by an Illinois court on the ground that the corporation law did not require that voting shareholders have any interest in the assets or earnings of the company (the shares in that case, of course, had been issued to the promoters of the company for the purpose of preserving their control vis-à-vis public investors). *Stroh v. Blackhawk Holding Corp.*, 117 Ill. App. 2d 301, 253 N.E.2d 692 (1969).

If selection of corporate officers is to become truly "democratic," it will of course require the organization of some sort of "political parties" to stimulate and mobilize group interests in anticipation of the vote.¹⁸⁴ Currently, the Securities and Exchange Commission has, and exercises, a comprehensive power of censorship over what can be said, and when and how it can be said, when proxies are being solicited from shareholders, either in connection with a contest for control or for an uncontested election or ratification. So long as the appeals are solely to the shareholder's economic self-interest, these restrictions presumably escape first amendment prohibitions by falling within the recognized exception for government regulation of purely commercial enticements.¹⁸⁵ However, with the recent decision in *Medical Committee for Human Rights v. SEC*¹⁸⁶ and the introduction of Senator Muskie's "Corporate Participation Act,"¹⁸⁷ shareholders' votes may increasingly be solicited on a range of social and economic questions as to which any form of government or other censorship would be of dubious constitutionality.¹⁸⁸

Apart from changes in the electoral process, a good deal more thought must be given to the internal structure of the corporate government. At present, business corporations operate under a legal frame-

¹⁸⁴ One important question that will arise is whether voting by proxy should continue to be permitted, and if so, what modifications will be required. While proxy voting under the present rules has been primarily an instrument for management to legitimize itself, some means will have to be found to enable large groups of geographically-scattered shareholders to express themselves simultaneously in an election, and the proxy system, with appropriate modifications, may provide the most workable approach. It is not too different in mechanics, after all, from the electoral college system for election of the President.

In addition, the continuation of a substantial quorum requirement will be necessary to provide management with an incentive to encourage voting. The directors of mutual insurance companies are theoretically elected by a vote of policyholders, and "each policyholder has one vote regardless of the number of policies held and regardless of its or their value." Hetherington, *Fact v. Fiction: Who Owns Mutual Insurance Companies*, 1969 Wis. L. REV. 1068, 1080 (footnote omitted). However, in the absence of meaningful quorum or notice requirements, the directors of the 10 largest mutual life insurance companies, ranging in size from one million to 22 million policyholders, were returned to office in 1968 by elections in which the number of votes cast ranged from 47 to 4,181. *Id.* at 1079.

¹⁸⁵ See *Valentine v. Chrestensen*, 316 U.S. 52 (1942); cf. *Talley v. California*, 362 U.S. 60 (1960).

¹⁸⁶ BNA SEC. REG. & L. REP. No. 59, at D-1 (D.C. Cir. July 8, 1970); text accompanying notes 116-17 *supra*.

¹⁸⁷ Text accompanying notes 119-21 *supra*.

¹⁸⁸ The SEC was confronted with this problem when it attempted to apply its proxy rules to a group soliciting AT&T shareholders for authority to represent their interests in an FCC hearing on telephone rates. See N.Y. Times, Sept. 29, 1966, at 77, col. 3; *id.*, Oct. 15, 1966, at 35, col. 3.

work which specifies simply that there be a board of directors responsible for the conduct of the corporation's affairs. Little attention has been paid to this rather primitive legal structure, largely because the board of directors, as such, seldom performs any significant function. Its members are selected by the management group to serve as dummies, or as window dressing, or to provide information or mutually advantageous contacts with corporations in other lines of activity, or as a reward for hard-working executives.¹⁸⁹ But if it is possible to devise an electoral system under which delegates to the corporate government campaign on issues and purport to represent interest groups, the legislative and executive authority within the company will have to be much more carefully spelled out.

One possibility would be the division of the functions of the board of directors between an elected board, which would be responsible for "legislative" policy determinations, and an administrative board appointed by the legislative board (or possibly headed by a directly-elected chief executive), which would be responsible for the company's day-to-day operations.¹⁹⁰ A further extension of federalist principles might indicate that companies with plants in more than one place should have locally-selected boards responsible for aspects of the company's operation that are of particular concern to the local community.¹⁹¹

One of the major rallying points of those who profess to espouse the cause of "corporate democracy" has been the institution of cumulative voting. Cumulative voting is the corporate analogue of proportional representation, a system which, despite its theoretical appeal, has been generally discarded in American politics. In government, there is much to be said for forcing the many special-interest groups in society to compromise and consolidate their positions through the medium of the political campaign rather than in the deliberative and administrative process of the government itself. Similarly, in the corporation, a winner-take-all system may make its own special kind of sense by forcing the incumbent management, and any group that seeks

¹⁸⁹ Professor Myles L. Mace of Harvard Business School asserts that "[o]utside directors of big, widely owned corporations are typically prestige names from other companies and extremely busy people . . . They're often cronies of the president and don't have a hell of a lot of motivation to spend time learning about the company or industry." *Wall St. J.*, Aug. 17, 1970, at 1, col. 6.

¹⁹⁰ A somewhat similar division of functions is prescribed in the German corporation law. For an evaluation see Vagts, *Reforming the "Modern" Corporation: Perspectives from the German*, 80 *HARV. L. REV.* 23, 48-64 (1966).

¹⁹¹ See Long, *The Corporation, Its Satellites, and the Local Community*, in *THE CORPORATION IN MODERN SOCIETY*, *supra* note 107, at 202.

to overthrow it, to justify its positions to a wide enough spectrum of the corporation's constituencies to achieve an overall majority, rather than directing its appeals to a more limited group whose proportion of votes exceeds the magic formula of $X/Y + 1$ necessary to place a nettlesome minority of X on the board of Y directors.

Under the present system of per-share voting, it really makes little difference whether cumulative voting is permitted or not since there is no form or definition to the constituency except to the extent that it represents the theory that "money talks." But if the substitution of per-capita for per-share voting does actually have the effect of increasing participation by employees, customers, and members of other communities of interest in corporate elections, it is arguable that representatives of the views of those groups should sit on the board of directors, even if they could not amass enough votes to elect the entire board.

CODA

Corporate democracy may yet prove to be a will-o'-the-wisp. It will take a good deal of persuasive argument to convince the Supreme Court to apply the rule of "one man, one vote" to business corporations, even the biggest ones. The Bar Association Committees who have been playing Corporations I are not yet ready to change the rules so as to make the game more like Corporations III. No bill will be introduced in the Delaware legislature to impose restrictions on the voting rights of large shareholders.

There is growing dissatisfaction, however, inside as well as outside the business establishment, with the way business corporations are managed and with the way in which the managers are selected. No longer can one say, as Rostow did ten years ago:

There seems to be no general conviction abroad that reform is needed. The vehement feelings of the early thirties, expressing a sense of betrayal and frustration at a depression blamed on twelve years of business leadership, are almost entirely absent.¹⁹²

The feelings today may be closer to those of the Thirties than those of the Fifties. There are widespread vehement feelings that business leadership, freed from democratic controls, is leading us toward an intolerable environment and a disoriented society. The purpose of this article is to suggest that, at least in the area of selection and ratification of corporate management, the models and concepts developed in the

¹⁹² Rostow, *supra* note 107, at 59.

late nineteenth and early twentieth centuries to facilitate a process of rapid industrial expansion may not be our most appropriate starting point for the reordering of corporate government.

Of the agencies available, Congress is probably in the best position to effect a restructuring that actually makes corporate management more responsive to national needs. But there should first be a detailed study, by a congressional committee or presidential commission, of the alternative methods available for the selection of corporate managers and how well each of them could be expected to serve this objective. I have focused on voting rights because I believe that a periodic general plebiscite is the most effective way of achieving responsiveness on the part of the governors and acceptance on the part of the governed.