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Law, politics and the governance of English and Scottish joint-stock companies, 1600–1850

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This article examines the impact of law on corporate governance by means of a case study of joint-stock enterprise in England and Scotland before 1850. Based on a dataset of over 450 company constitutions together with qualitative information on governance practice, it finds little evidence to support the hypothesis that common-law regimes such as England were more supportive of economic growth than civil-law jurisdictions such as Scotland: indeed, levels of shareholder protection were slightly stronger in the civil-law zone. Other factors, such as local political institutions, played a bigger role in shaping organisational forms and business practice.

Keywords: common- and civil-law regimes; corporate governance; joint-stock companies; law and economics; organisational form; Scotland

Introduction

Issues of good governance in business have become matters of great public and academic debate during the past two decades. Particular concerns have included the quality of auditing, transparency and accountability, and agency problems in the boardroom. Such concerns are not new. They have existed since the early days of the joint-stock company, which first emerged as an important form of business organisation during the seventeenth century.

A large body of recent literature considers the extent to which corporate governance is shaped by the external legal regime. The influential but controversial 'legal origin hypothesis' argues that common-law regimes have historically been more protective of investors, and more responsive to the distributional problems accompanying economic change, than civil-law regimes. Consequently, in the former share ownership was more dispersed, and financial markets more developed, than in the latter, and therefore common-law regimes have been more supportive of financial development and economic growth.[1] For example, La Porta et al. construct an index of shareholders' rights, comparing 49 different countries and a range of governance mechanisms including the voting systems within companies; they conclude that the rights associated with being a shareholder were largely determined by the legal regime.[2]

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Critics, however, question the 'legal origin hypothesis', arguing for example that the relationship between legal origins and financial development is not persistent over time.[3] Some argue that shareholder protection did not strongly rely on government or court enforcement of rights in either common- or civil-law regimes, and that most protections were provided instead by company by-laws or by stock market disclosure regulations.[4] Others argue that historic differences in investor protection are primarily the result of political systems or economic events.[5] Moreover, an important theme in the literature is change over time: both Musacchio and Deakin emphasise the convergence of systems of corporate governance in different legal regimes, albeit in very different historical contexts.[6]

With this debate in mind, we investigate below how governance issues in joint-stock companies were resolved in England (a common-law regime) and Scotland (a civil-law regime) from the seventeenth to the mid-nineteenth century and what impact, if any, the changing systems of sovereignty and law had on corporate governance in the two kingdoms. Although it was a civil-law regime, many economic historians have seen Scotland as providing a *more* propitious environment than England for company formation in the eighteenth and early nineteenth centuries, a claim that we have questioned elsewhere.[7] In this article, we chart the internal governance of businesses during the eighteenth and early nineteenth centuries, focusing on several key areas of investor rights that have been identified in debates on the 'legal origin hypothesis'. We conclude that, while sovereignty and legal systems mattered to varying degrees, the differences in practice between the two legal regimes were often less striking than the similarities. Moreover, there was a tendency for the governance structures of joint-stock companies in the two kingdoms to converge over time. We suggest that the influence of political models of government could be more significant than the legal regime in this respect.

For our evidence, we draw on a large dataset of the constitutions and by-laws of 452 joint-stock companies established in England and Scotland between the Bubble Act of 1720 and the Companies Registration Act of 1844. A larger version of this dataset, including Irish and Welsh companies, was used in our recent book, *Shareholder Democracies?*, which examines the evolution of corporate governance in the British Isles before 1850.[8] The dataset was carefully constructed to make it representative of the total population of joint-stock companies; the sectoral breakdown is summarised in Table 1, which also subdivides the dataset by type of company. (The differences between corporations and unincorporated companies are discussed below.) We estimate that it includes up to one-third of all joint-stock companies formed in England and Scotland during this period.[9] Its chronological distribution mirrors the familiar cycles of company promotion in this period, which makes us confident that the dataset is also representative over time.

Companies and the legal environment

In order to understand the complex and shifting relationship between the business corporation and the state, it is first necessary to consider the original source of corporate powers and how this changed over time. As we argue below, the source of sovereign power had an impact on the development of joint-stock governance.

What most large commercial organisations in England had in common before the 1640s, and again between 1660 and 1689, was that their public authority derived from rights bestowed by the Crown. These rights were generally given in the form of letters patent or a charter.[10] Royal sanction was essential because the king's subjects had no right

Table 1. Sectoral distribution of companies in the dataset.

	England		Scotland	
	Corporations	Unincorporated companies	Corporations	Unincorporated companies
Banking		39	1	18
Bridges	32	1		
Canals	50		5	
Gas	21	20	2	11
Harbours	23	3	3	
Insurance	1	43		15
Manufacturing/trade	4	16	2	7
Property	19	7		
Railways	41		8	
Shipping	5	12		7
Water	28		8	
Total	224 (61.4%)	141 (38.6%)	29 (33.3%)	58 (66.7%)

Source: Corporate governance database, adapted for this paper. For details, see Freeman, Pearson and Taylor, *Shareholder Democracies?*

to combine without it, and unauthorised assembly and oath-taking, or trading abroad without a licence, were activities likely to be regarded with suspicion by the authorities.[11] Moreover, because sovereign power was indivisible, and because the monarch embodied in his or her person the primary corporation of the state, corporate powers could only be delegated by the monarch.[12]

Such claims seldom remained uncontested. As early as 1597, Elizabeth I had declared that all monopoly grants, although her prerogative, ‘shall be examined and abyde the trial and true touchstone of the law’.[13] This amounted to an admission that royal grants of trading privileges were subject to parliamentary review and that the common law was the arbiter of the actions of corporations. The relationship between the state and the English chartered companies changed decisively after the Glorious Revolution, which permanently shifted the source of sovereign power in favour of parliament. Those monopoly companies most closely associated with the former Stuart court, such as the East India Company (EIC) and the Royal African Company (RAC), ran into determined political opposition. William III faced a hostile House of Commons when deliberating over the EIC’s request for a new patent. All sides recognised that the royal prerogative was now severely limited. By the reign of Anne there was a widespread acknowledgement of the need for joint-stock companies to gain the ‘sanction of parliamentary constitutions’, as one defender of the RAC put it, rather than simply rely on their royal charters or letters patent.[14]

Why did businessmen desire incorporation? First, it created a new legal personality, distinct from that of individuals. Partnership law by itself could not deliver this. Moreover, incorporation created a perpetual succession, separate from the mortality of individual members. The transferability of shares was a key feature of perpetual succession, allowing the ownership of a company to change over time without the need for it to be repeatedly reconstituted, as was the case with partnerships. Second, incorporation gave a company the power to sue and be sued in its separate personality. It allowed a company to own and convey assets in its corporate name, in mortmain. A standard clause conferring this power developed in royal charters during the seventeenth century, and recurred, with minor variations, in the parliamentary acts of incorporation of the eighteenth and nineteenth centuries. Third, companies sought charters because they desired the right to make by-laws to govern their own affairs. This included the power to regulate and levy taxes on their members, to resolve their own disputes, and sometimes to adjust the corporate liability of the company and the individual liability of members. Fourth, company promoters often sought the right to the monopoly of a trade and dispensation from the laws affecting the export and import of particular commodities.[15]

There were some differences in the situation in Scotland, where political thought held that, although Crown and parliament might legislate, they were not necessarily supreme. Natural and voluntary associations, public and private, from the smallest unit, the family, through *collegia* – guilds and corporations – to towns and provinces, formed the self-governing layers of the Calvinist model of a devolved and federal commonwealth.[16] Above these layers, sovereignty, delegated from below and circumscribed by scripture and natural law, resided with the commonwealth. Sovereign rights could be devolved onto a monarch, but ownership always resided with the commonwealth itself, the corporate embodiment of the people, and could not be alienated from it. This federal system promised, in principle, a permissive legal environment for business associations to flourish. Co-partners in a venture could choose their own governors, establish their own rules, and meet regularly to manage their own affairs, just as Presbyterian elders managed church affairs.

Calvinism thus prepared fertile soil for Scottish joint-stock companies to flourish as self-governing bodies, even though the economic ingredients for growth remained in short supply. A charter was still required, but, unlike in England, there were several ways for a Scottish company to incorporate. Royal burghs could grant a seal of cause that was treated as a charter. Lesser burghs of barony could grant a letter of licence for incorporation in the place of a seal of cause, though this letter required confirmation by the Crown.[17] These burgh powers were eroded over time, but they did not entirely disappear in our period.[18] Furthermore, the Scottish parliament also provided a general statutory basis for companies. Acts of 1641, 1661, 1681 and 1693 permitted the formation of companies, each as a self-governing 'bodie incorporation and pollitick', in textiles, fishing and foreign trade, while the Council of Trade was given a general authority to give new companies 'liberties and privileges'.[19] This body of legislation – including possibly the world's first general incorporation acts – thus authorised an indeterminate number of partners to incorporate themselves without further formality.

Incorporation under these general acts, however, did not provide Scottish firms with the full monopoly privileges that a letters patent or charter provided in England. Consequently, applications to the Council of Trade or the Scottish Privy Council to establish companies were commonly accompanied by requests for special acts of incorporation specific to the firm.[20] Nevertheless, the pace of company formation quickened. Of 63 Scottish companies established or applying for privileges of some sort between 1561 and 1707, 45 were formed after 1681.[21] Union in 1707 had implications for business, however. The Scottish Privy Council and the Scottish parliament were abolished, closing down two former routes to incorporation, and thereafter petitions were dealt with by Crown lawyers in England or by the Westminster parliament. The groundwork for convergence between the kingdoms was laid, a theme to which we return later.

The Bubble Act of 1720 changed the situation both north and south of the border less than has sometimes been claimed. Passed at the height of the boom of 1719–20, the act banned the issue of transferable shares without incorporation. Henceforth all joint-stock companies operating without either a royal charter or an act of incorporation passed by parliament were illegal. The Bubble Act was passed in order to protect the expansion of the South Sea Company's share capital by shutting down competing avenues for joint-stock investment, and was followed by a period in which the privileges of incorporation were more difficult to come by.[22] The Crown law officers became increasingly reluctant to approve incorporations and the flow of petitions for royal charters slowed to a trickle. This, however, was not only the result of the Bubble Act. Tight monetary conditions and economic depression also resulted in a decline in new joint-stock projects during the second quarter of the century.[23] Moreover, the process of parliamentary incorporation became increasingly regularised as the source of incorporating authority shifted from Crown to parliament. By 1750 parliament was the primary resort for those seeking powers of eminent domain and levying tolls for navigation and other infrastructural projects.[24]

It has been claimed that the Bubble Act arrested the development of the joint-stock company until the act was finally repealed in 1825. [25] In fact, as Dubois argued some time ago, the principal effect of the Bubble Act was to push entrepreneurs, whose ventures required large capitals but who could not obtain acts of incorporation or did not require powers of eminent domain, to establish unincorporated shareholding partnerships under a fragile patchwork of trust and equity law.[26]

Two legal developments facilitated the spread of the unincorporated company. First, during the late seventeenth century considerable progress had been made in the legal definition of trusts, which provided elements of perpetuity and joint holding useful to unincorporated companies.[27] It was by no means a perfect device. Trusts were not recognised at common law, and litigation in Chancery could be expensive. Trustees remained liable to shareholders. Under equity, any negligence or misuse of entrusted funds by trustees made their personal estates liable for compensation.[28] Moreover, trust law did not cover the question of transferable shares. But it was becoming more effective. A ruling in 1673, for instance, stipulated that assets held on trust could not be claimed by the trustees' creditors. Thus, by vesting their assets in a number of named trustees, unincorporated companies aimed to limit the liability of individual shareholders to their shares in the company.[29] Second, the hostility of the English judiciary to joint-stock companies diminished markedly in the second half of the eighteenth century. Only one case was prosecuted under the Bubble Act before 1800, and entrepreneurs were sometimes actively encouraged to associate as unincorporated bodies. In 1783, for example, although the charter application of the Phoenix Fire Office, a stock company with 89 shareholders, was rejected, rather than declare the undertaking illegal under the Bubble Act, the Attorney General told the promoters that a 'voluntary partnership' would be an 'easy method' of proceeding.[30]

In Scotland, the Bubble Act had even less impact, and the idea that it retarded growth is hard to sustain.[31] New companies were formed in increasing numbers from the 1740s, and by the 1840s there were over 100 joint-stock companies in Scotland with an aggregate capital of some £19 m.[32] Most of these proceeded without corporate privileges. The Bubble Act was an irrelevance, almost never cited by judges; in the case of *Macandrew* v. *Robertson* the Lord President of the Court of Session directly rejected the idea that the act had rendered a Scottish unincorporated joint-stock company illegal.[33] There was general agreement that partnerships of all types, small and large, were separate entities under Scots law, with the right to draw up regulations governing the conduct of their members that would be recognised by the courts. A petition of 19 Scottish banking companies in 1813, for instance, asserted that under the 'law, custom and understanding of the Country', banking partnerships had no limit on the number of partners and had a separate legal identity to those of their individual partners, that is they had a continual corporate existence beyond the life of any individual shareholder.[34] This was different from the situation in England where a partnership had no legal existence distinct from the persons composing it. In Scotland partnerships were separate legal persons, ‘competent to maintain legal relations with a third party by its separate firm or name, but not of holding land as a vassal’.[35]

These cross-border differences are reflected in the composition of our sample of companies: as Table 1 shows, two-thirds of Scottish companies in the dataset were unincorporated, compared with less than half in England. This is partly a result of different legal environments, but it is also due to the greater development of incorporated sectors of the economy in England, particularly transport, where powers of eminent domain were often necessary. Furthermore, as we have emphasised elsewhere, there remained significant disadvantages associated with lack of incorporation in Scotland. Most notably, unincorporated companies lacked the right to hold heritable property in their own names, and instead had to resort to the more cumbersome device of a trust. Moreover, some companies found that the lack of corporate privileges could be an obstacle in their day-to-day business activities, especially when dealing with debts owed from England.[36] As a result, a significant proportion of unincorporated companies north of the border made provision in their constitutions for a subsequent application to the state for incorporation. And as Table 2 shows, this was a provision which English companies increasingly made after 1825.

The constitutions of unincorporated companies also made provision for the appointment of trustees in a large majority of cases. Table 3 highlights a difference between practice north and south of the border: whereas nearly half of Scottish companies chose to vest the trusteeship of company property in the board of directors, in more than half of English companies the board of directors appointed a separate group of trustees, and in more than a third the choice was in the hands of the company’s general meeting (GM). This was not a significant disparity, however, with one Scottish legal authority holding that the

Table 2. Unincorporated companies making constitutional provision for incorporation, by period, 1800–1844.

	England		Scotland	
	Number	%	Number	%
1800–25	7	16	9	35
1826–44	68	69	17	53

Note: No company in the sample established before 1800 made this provision.
Source: See Table 1.

Table 3. Appointment of trustees in unincorporated companies in England and Scotland, 1720–1844.

	England		Scotland	
	Number	%	Number	%
Board and/or salaried officers functioned as a trust	2	1	28	48
Board appointed trustees	77	55	15	26
GM appointed trustees	48	34	4	7
No mention of trustees	14	10	11	19

Source: See Table 1.

legal differences between the two systems, so far as the holding of property was concerned, were so subtle that 'the practical result will generally be found to be the same'.[37]

There is little here to support the contention that civil-law regimes advance state power at the expense of property rights and financial development.[38] Both north and south of the border, there were 'mixed economies' of incorporated and unincorporated associations; businessmen could operate without corporate privileges, but were also aware of the additional benefits incorporation could bring. In the next sections, we consider the evolution of particular governance mechanisms, and the convergence between England and Scotland on some measures by the mid-1840s.

Corporate governance before the South Sea Bubble

If the legal environment is crucial for understanding the forms of business organisation adopted by entrepreneurs, then political conflicts and models of political governance are equally important for understanding how companies were internally governed. Under the early Stuarts, criticism of chartered monopolies spilled over into complaints about Crown interference in the internal governance of companies and about the quality of management. The attempt by Charles I, for example, to impose his own nominees on the Levant Company, or his support for the attempt by a group of courtiers to take over the East India Company, left a legacy in England of concern over shareholders' rights that re-emerged between the 1680s and 1700, in conjunction with renewed attacks on the monopolies of trading corporations. The growth in company numbers, and the rapid diffusion of share ownership in this period, also increased concerns about governance and the protection of investors. Three of the most contentious issues were the shareholder franchise and voting procedures at GMs, the election and term of office of company directors, and the right of shareholders to inspect company books and accounts.

Franchises were recognised as one of the most important factors shaping the distribution of power in a company. Many different types of franchise were adopted in the 1690s. At either extreme were the Saltpetre Company (1692), which allowed one vote per share, and the Million Bank (1695), which restricted each shareholder to one vote.[39] The former allowed large shareholders to dominate; the latter levelled out differences between shareholdings. Most companies adopted franchises between these two extremes, which recognised variations in shareholdings but capped the power that larger shareholders could wield. Sometimes the cap was a de facto one, derived from limits placed on the total number of shares an individual could hold. The Bank of Scotland (1695), for example, pegged the maximum shareholding at £20,000 Scots, which meant no one could cast more than 20 votes.[40] In other cases, sliding scales were adopted, as at the Land Bank (1695), where £300 entitled the holder to two votes, £500 to three votes and £1000 to five votes, the maximum permitted.[41]

The choice of franchise was often contested, and at the large corporations could involve the government as well as directors and shareholders. In 1692 the Privy Council, when discussing a new EIC share issue, proposed a ceiling of £10,000 on individual shareholdings and a new franchise with a sliding scale of one vote for £500 of stock up to a maximum of four votes for £10,000. This was more 'democratic' than the existing franchise, which was one vote per £500 stock, with no limit to the number of votes or shares that could be acquired by an individual.[42] The EIC directors, however, rejected the £10,000 ceiling, arguing that 'such kind of levelling or limiting personal Estates, was never known in Commonwealths, much less in Monarchies', and that the opportunity to acquire unlimited stock helped bind the interests of the directors to those of the

Company.[43] The new charter of 1693 was a compromise. The limit of £10,000 on individual holdings was imposed, but the franchise bar was raised to one vote per £1000 stock on a sliding scale to a maximum of 10 votes for £10,000.[44] This did not halt complaints that smaller investors were disenfranchised and that votes were concentrated in a few hands. The franchise was thus altered again in 1698 to one vote for those holding £500 of stock, and a sliding scale up to a maximum of five votes for £4000.[45]

The annual rotation of directors was another issue that invited controversy. Some companies, such as the Royal Fishing Company, appointed directors for life, 'unless removed'.[46] Others, such as the RAC, placed limits on the tenure of executive offices.[47] Sometimes the principle of rotation was adopted, but the length of term could be so great that directors were effectively insulated from the opinion of shareholders: the constitution of the ill-fated Company of Scotland Trading to Africa and the Indies, popularly known as the Darien Company (1695), stipulated that just one in 10 of its court of 50 directors would be rotated every year.[48] When a shorter term of office was proposed, directors sometimes resisted. The first Bank of England directors bitterly contested the proposal of its by-laws committee to oblige eight out of 24 of them to stand down at the end of every year. The committee argued, however, that this type of obligatory turnover would 'preserve in the Directors a due respect to the Community and prevent their Lording it over their Fellow Members', and they eventually got their way.[49]

Shareholder access to books and accounts was a third disputed area. At the EIC internal disputes had arisen as early as the 1630s over regulations restricting shareholders from copying extracts from the Company's books.[50] By the 1690s, shareholders' access to accounting information had become easier. The company's by-laws of 1695, for instance, required a triennial valuation to be made by the 'Accomptant Generall' and 'to lye open for time to time for the perusal of all persons concerned'.[51] Other corporations facilitated a degree of shareholder scrutiny in different ways. The Bank of England's by-laws of 1697 required the minutes of the General Court to be read aloud to each meeting. The directors of the RAC were required at one GM each year to present an 'exact ballance of the books, and an indifferent valuation of all remaining effects, that thereby the Adventurers may know the true condition of their stock and trade'.[52] Some corporations, however, such as the Royal Fishing Company, left the scrutiny of accounts entirely in the hands of a small caucus of directors.[53] North of the border we see similar variations. The contract of co-partnership of the Newmills Cloth Manufactory (1681) was a model of transparency: shareholders were permitted to attend the meetings of the managers, and the company's books were always open to inspection.[54] By contrast, individual shareholders in the Darien Company had no right to access the accounts; instead, these would be presented each year to the company's Council General, in which directors outnumbered shareholders.[55]

Shareholder rights, 1720–1844

These early examples of governance arrangements north and south of the border illustrate both the heterogeneity of governance forms that were possible in the two jurisdictions, and the potential for conflicts of interest between management and shareholders. In the remainder of the paper we trace these three issues over the course of the period 1720–1844, using our sample of 452 company constitutions. We show that, in some respects, Scottish companies offered greater protection for small investors, but the main finding is that there were more similarities than differences between England and Scotland. Moreover, there were elements of convergence over time, peaking in the mid-1840s with the legislative creation of 'model' constitutions for corporations in the Companies Clauses

Consolidation Acts of 1845.[56] In this process, the changing constitutional and legal framework mattered less than the influence of local politics. Companies rarely found themselves in court cases relating to their governance arrangements: by far the most important role of the courts was in forcing shareholders to pay the calls on their shares.[57] In other areas of the internal politics of joint-stock companies it is easier to discern political parallels than the influence of company law as such.

Election of directors

The most obvious, and arguably most important, role of shareholders in the internal decision-making of companies was to elect directors. In every company in our sample, they had at least some role in the choice of directors, and in 90% of cases they elected all of them, either annually or according to some rotation. Most constitutions set out rules for the kind of rotation, and hence how often directors would remain in office. The 10-year term granted to the directors of the Darien Company was rare – only three companies in our sample allowed their directors 10 years or more, with a handful more specifying that the office was for life – while the most common procedure was electing the whole board annually, giving a one-year term of office. Table 4 compares various aspects of company constitutions in England and Scotland for two periods, 1720–1825 (the period of the Bubble Act) and 1826–44 (until the passing of the Companies Act, which did not apply in Scotland). The first row of this table shows that the annual election of directors was slightly more common south of the border, but declined in both jurisdictions to around a quarter of all new companies after 1825. The second row shows the average term of office, for those companies where a term could be ascertained: here we see that, while English terms of office were much lower than Scotland's before 1826, there was convergence thereafter on a three-year term.

The legal framework had no discernable impact on this trend. To our knowledge, a director's term of office was never the subject of a legal judgement in this period. Rather, we would argue, there were implicit political influences at work. During the eighteenth century, elections of parish officers took place annually, and in England after 1834 Poor Law guardians were elected every year, but in municipal corporations after 1835, councillors were elected on a three-year rotation. One related protection for shareholders was the stipulation that directors would be ineligible for immediate re-election at the end of their term: as Table 4 shows, this was slightly more common in Scotland, which may reflect another political influence: the traditional Scottish requirement that burgh officers change annually.[58] Nevertheless, it was widely observed that in many companies directors were able to ensure their, and their friends', re-election, and what the Webbs referred to as the 'oligarchical principle' of co-option rather than election, which informed much of local government in the eighteenth and early nineteenth centuries, also had a de facto existence in joint-stock politics.[59]

Shareholder franchises

This shift towards a more passive role for shareholders can also be observed in the rise of less democratic franchises and the increased use of proxy voting. In *Shareholder Democracies?* we showed that across the British Isles there was a gradual but incomplete move away from 'democratic' towards 'plutocratic' franchises, whereby the voting power of small shareholders was curbed, and caps on the number of votes cast by larger investors were abandoned. Table 4 reveals that Scotland was slightly more 'democratic' in this

Table 4. Shareholder voting rights in England and Scotland, by period, 1720–1844.

	England 1720–1825		England 1826–44		Scotland 1720–1825		Scotland 1826–44	
	Number	%	Number	%	Number	%	Number	%
(1) Annual election of all directors (one-year term)	98	60	59	29	18	43	10	22
(2) Mean term of office for directors (years)	1.9	–	2.8	–	2.5	–	2.9	–
(3) Directors ineligible for immediate re-election	10	6	11	7	8	19	7	16
(4) Smallest shareholders allowed to vote	116	71	124	61	29	69	36	80
(5) Cap on voting power of largest shareholders	134	82	143	71	39	93	36	80
(6) Use of a graduated voting scale	47	29	104	51	7	17	20	44
(7) Proxy voting allowed	115	71	161	80	39	93	44	98
(8) Cap on number of proxy votes held by an individual (percentage of those allowing proxies)	74	64	45	28	20	51	29	66

Notes: Row 3 counts those companies where it was explicit that none of the directors were eligible for immediate re-election.
Source: See Table 1.

respect than England, with only 20% of companies north of the border preventing small shareholders from voting in the period 1826–44. Similarly, large shareholders in Scotland were more likely to find their voting powers capped, although the proportion in both countries fell a little after 1825. There is little evidence here that civil-law Scotland offered its shareholders less protection than common-law England. Insofar as the rights of shareholders declined in this respect over time, case law seemingly played no role, but we do find parallels in local government, namely the demise of 'direct democracy' exemplified by the rise of select vestries, the declining powers of county, town and parish meetings, and the increased use of a weighted property franchise for vestry elections in 1818, and for Poor Law elections from 1834 (England) and 1845 (Scotland). Indeed, the most striking development in terms of shareholder franchises during this period was the increased used of a graduated voting scale, as Table 4 shows. Comparatively rare in the period 1720–1825, this was used by around half of all new companies in both England and Scotland after 1825.

Perhaps the most contentious aspect of joint-stock politics was the use of proxy votes, which La Porta et al. see as a key element of 'anti-director rights' in the contemporary context.[60] It is clear that one reason for the growth of proxies was the spread of the shareholding base and the consequent impracticalities of shareholder participation, although in England the average nominal capital of companies allowing proxies was smaller than where they did not. In both England and Scotland a large majority of companies explicitly permitted proxy voting for either some or all of their shareholders, with the practice being particularly ubiquitous in Scotland, as Table 4 indicates. If proxy voting is seen as an important aspect of investor protection, then this is another example of companies in a civil-law regime offering greater levels of protection than those operating under common law. It is questionable, however, whether the effect of proxy voting was really to strengthen shareholder representation: many observers argued that the opposite was true, and that company directors were able to manipulate proxies in their favour. The size of some proxy voting blocks certainly supports this view.[61] Some companies recognised this by capping the number of proxy votes that any individual could hold at GMs: as Table 4 shows, this practice was decreasing in England but increasing in Scotland, with 66% of Scottish companies that allowed proxies in 1826–44 imposing a cap, compared with only 28% in England. Again, there is little evidence that the civil-law regime disadvantaged smaller investors, as the 'legal origins' literature would suggest.

Accounting transparency

Access to reliable accounting information was another key requirement for shareholders who wanted to monitor the activities of their directors and managers. As noted above, concerns about the right of shareholders to inspect company books dated back to at least the seventeenth century, though the liberal equation of transparency with responsible governance developed most fully from the late eighteenth. Our data, however, indicate a trajectory running counter to transparency and direct accountability, and although there are some differences between England and Scotland the main trends were common to both kingdoms. Table 5 summarises constitutional provisions in this area. It shows a decline in the proportion of English companies allowing shareholders to inspect account books at any time, with more than half of companies conceding this right before 1826 and less than a third thereafter. In Scotland, the figure was lower in the first period, but we see a convergence after 1825. Scotland had pioneered the practice of allowing inspection of account books at set periods only, usually either side of the AGM, and this was taken up by

Table 5. Shareholder access to accounting information in England and Scotland, by period, 1720–1844.

	England 1720–1825		England 1826–44		Scotland 1720–1825		Scotland 1826–44	
	Number	%	Number	%	Number	%	Number	%
(1) Account books open to inspection at all times	86	53	64	32	11	26	12	27
(2) Account books open to inspection at set periods only	1	1	20	10	11	26	8	18
(3) Account books explicitly closed to shareholders	6	4	58	29	4	10	13	29
(4) Account books presented at general meetings	103	63	83	41	16	38	11	24
(5) Summary accounts presented at general meetings	31	19	145	72	22	52	32	71
(6) Provision for general meeting to appoint a committee of inspection	0	0	60	30	4	10	11	24
(7) Provision for a standing audit	33	20	71	35	8	19	9	20
(8) Standing auditors appointed by general meeting	31	19	64	32	3	7	5	11

Notes: Rows 4 and 5 include cases where accounts were required to be presented, and where the general meeting could call for them. Row 7 includes any form of standing audit. In row 8, the percentages given are of all companies in that category.
Source: See Table 1.

more new English companies from 1825. Similarly, in both jurisdictions the proportion of companies explicitly refusing access to account books reached 29% in the later period. Both saw a decline in the requirement for companies to present account books at GMs, though in England the initial figure was higher. Meanwhile, the presentation of summary accounts to GMs became the norm after 1825, this time starting from a lower base in England. All these developments suggest convergence on a model of limited shareholder access to account books, with the provision of summary accounts becoming the norm.

Meanwhile, there was a growing culture of audit in the joint-stock economy, which could take the form of ad hoc committees of inspection appointed by shareholders at a GM, or, increasingly, an annual standing audit, which introduced intermediaries between shareholders and management. Table 5 shows these developments over time: both England and Scotland followed similar trajectories, although the right of shareholders to appoint standing auditors rather lagged behind in Scotland. Neither the ad hoc committee nor the standing audit guaranteed shareholders protection, particularly where directors and auditors colluded in concealing financial information. As with other aspects of corporate governance, these trends were mirrored in local government. For example, the Poor Law Amendment Act of 1834 empowered the new boards of guardians to elect their own auditors. The Municipal Corporations Act of 1835 stipulated that corporation accounts should be audited annually by three auditors – two elected by the ratepayers, one appointed by the mayor. Following this legislation, therefore, there was no direct public oversight of Poor Law accounts, and the direct access of individual ratepayers to municipal accounts was replaced by access through intermediaries.[62] It seems that in the joint-stock sector there was a tendency towards convergence of practice between English and Scottish companies, not always led by England; and there is little indication that the legal environment played a significant part in these developments.

Conclusion

Our evidence supports those such as Deakin who have argued that the common-law/civil-law dichotomy that underpins the legal origins literature masks complexity, and that all legal systems are hybrids in which case law and statutory legislation both played a role in shaping company law.[63] In England, statute law had a greater impact on the development of corporate governance than common law, although this becomes less true from the 1820s when English courts began overtly to uphold the constitutions of unincorporated companies, especially in cases of disputes between companies and defaulting shareholders. In England the evidence is unambiguous that the rules governing business before 1844 were largely either statutory (the acts that constituted corporations) or private (the articles and by-laws of unincorporated companies) in origin. In civil-law Scotland, parliamentary legislation had been of some importance in promoting the first flourish of joint-stock companies during the late seventeenth century. During the eighteenth century, however, judicial decisions that recognised Scottish unincorporated co-partneries as having some, if not all, of the features of legal entities, were arguably more important than statutory law in encouraging the growth of joint-stock companies. The repeated attacks by the Scottish chartered banks on the new unincorporated note- and share-issuing banking companies, for instance, were generally not supported by the Scottish judiciary. What mattered more in shaping governance structures were political models of local government – poor law unions, municipal corporations, parish vestries – with dominant practices here often being mirrored in joint-stock companies.

We find that the different legal regimes influenced corporate governance practices far less than is suggested by the 'legal origin hypothesis' advanced in some of the law and economics literature. The biggest difference is the greater ratio of unincorporated to incorporated companies north of the border, though this is partly accounted for by sectoral differences. The way companies were actually governed differed relatively little in the two nations, with similar provisions for voting, directorial term of office and transparency of accounting. We therefore agree with Musacchio, who finds 'no clear differentiation in terms of better or worse corporate governance across common and civil law countries'.[64]

Where there were differences, investor protections tended to be slightly stronger in Scotland than in England. But what we see, particularly in the years after 1825, is some degree of convergence of governance provisions in the two kingdoms, which received official recognition in the Companies Clauses Consolidation Acts of 1845. These acts set out standard constitutions for companies incorporated by act of parliament, and while there was a separate act for each nation, there were no significant discrepancies in the governance provisions fixed in each. These acts set three-year directorial terms as the default; adopted a graduated voting scale which permitted the smallest shareholders to vote but which did not cap the voting power of the largest shareholders; permitted proxy voting but did not cap the number of proxy votes which could be held by an individual; allowed shareholders to inspect the books, but only either side of the GM; and made provision for standing audit. Companies had the right to alter many of these provisions – and heterogeneity certainly continued after 1845 – but there were now clearly defined governance 'norms' which applied in both legal jurisdictions.

Notes

1. La Porta, Lopez-de-Silanes and Shleifer, "Law and Finance"; Gleaser and Schleifer, "Legal Origins."
2. La Porta, Lopez-de-Silanes and Shleifer, "Law and Finance," 1151.
3. Bordo and Rousseau, "Legal–Political Factors"; Sgard, "Do Legal Origins Matter?"
4. Musacchio, "Legal Origins."
5. Roe, "Political Preconditions."
6. Deakin, "Legal Origin"; Musacchio, "Legal Origins."
7. Freeman, Pearson and Taylor, "'Different and Better'?"
8. Freeman, Pearson and Taylor, *Shareholder Democracies?*
9. A full account of the dataset can be found in Freeman, Pearson and Taylor, *Shareholder Democracies?* This research was supported by a grant from the Economic and Social Research Council (UK), awarded to Robin Pearson, award number RES000230096, for which we are most grateful.
10. On the history of this royal prerogative, see Kyd, *Treatise*, i: 41–6.
11. Holdsworth, *History of English Law*, viii: 201.
12. Misselden, *Free Trade*, 53–4.
13. Cited by Scott, *The Constitution*, i: 106.
14. Davenant, *Reflections upon the Constitution*, 10–11, 28, 43.
15. Harris, *Industrializing English Law*, 18–19.
16. Althusias, *Politics*. We are most grateful to Richard Saville for helpful discussions of these points.
17. Mackenzie, *Scottish Burghs*, 117–19; Walker, *Legal History of Scotland*, iv: 316–17.
18. See, for instance, Glasgow's incorporation of a mutual insurance society in 1747, *Extracts from the Records of the Burgh of Glasgow*, vi: 515–17. The incorporating privileges of the Scottish burghs were finally abolished in 1846.
19. "Act appointing a Councill for Trade," 1661, *Acts of the Parliaments of Scotland*, vii: 273, c. 292; Walker, *Legal History of Scotland*, iv: 330.
20. Scott, *The Constitution*, i: 299–302.

21. Calculated from references in Scott, *The Constitution*, iii: divisions IX and XIV. This excludes about nine small partnerships for gold and silver mining. Walker states that 'more than 50' undertakings received special privileges between 1661 and 1707: Walker, *Legal History of Scotland*, iv: 690.
22. Harris, "Bubble Act"; Carswell, *South Sea Bubble*.
23. Dubois, *English Business Company*, 7–11.
24. Bogart and Richardson, "Property Rights, Public Goods," 10. See also Hoppit, "Patterns of Parliamentary Legislation."
25. By 4 Geo. IV c. 94. For such claims, see Scott, *The Constitution*, i: 438; Patterson and Reiffen, "Effect of the Bubble Act"; Mirowski, *Birth of the Business Cycle*, 271–6.
26. See Dubois, *English Business Company*.
27. Holdsworth, *History of English Law*, vi: 641–4.
28. Sanders, *An Essay*, 152. See, especially, *Ashby* v. *Blackwell and Million Bank Co*. (1765) Amb 503, 2 Eden 299.
29. Daunton, *Progress and Poverty*, 239. For a more sceptical view, see Harris, *Industrializing English Law*, 152–9.
30. Trebilcock, *Phoenix Assurance*, i: 72. The Phoenix promoters took the Attorney General's advice and proceeded successfully as an unincorporated joint stock. There was a brief flurry of prosecutions under the Bubble Act between 1807 and 1812, before its repeal in 1825: Harris, *Industrializing English Law*, 236–41, 245–9; Taylor, *Creating Capitalism*, 102–4, 120–21.
31. Some historians have argued differently: Walker, *Legal History of Scotland*, v: 695; Campbell, "Law and the Joint-Stock Company in Scotland," 138. For a refutation, see Freeman, Pearson and Taylor, "'Different and Better'?".
32. Michie, *Money, Mania and Markets*, 39, 45, 71; Taylor, *Creating Capitalism*, Table 6, 131.
33. Shaw and Dunlop, *Cases*, vi (1827–8): 955.
34. Anon., *To the Right Honourable the Lords Commissioners of His Majesty's Treasury*, 5.
35. Walker, *Legal History of Scotland*, vi: 712–13. See also Acheson, Hickson and Turner, "Organisational Flexibility."
36. Freeman, Pearson and Taylor, "'Different and Better'?"
37. Quoted in Ibid., 72.
38. Beck, Demirgüç-Kunt and Levine, "Law and Finance."
39. Scott, *The Constitution*, i: 340.
40. *Act for Erecting a Bank in Scotland*, 17 July 1695, 2.
41. Scott, *The Constitution*, iii: 250.
42. *Propositions for regulating the East India Company*, 11 February 1692; *Letters Patent*, 3 April 1661.
43. East India Company, *Humble Answer*, 28 May 1692.
44. *Letters Patent*, 11 November 1693.
45. *Letters Patent*, 13 April 1698.
46. Carr, *Select Charters*, no. 22, 182–5.
47. Royal African Company, *Generall Meeting*, 19 Dec. 1671, art. VIII; Davies, *Royal African Company*, 157.
48. *Constitutions of the Company of Scotland*, 2.
49. Anon., *Observations upon the Constitution*, 3; Acres, *Bank of England*, i: 40–41.
50. Scott, *The Constitution*, i: 226–9.
51. East India Company, *By-Laws*, 1695.
52. Royal African Company, *General Meeting*, 19 December 1671, arts. VII, IX, XIII.
53. Carr, *Select Charters*, no. 22, 182–5.
54. Scott, *The Constitution*, iii: 142.
55. *Constitutions of the Company of Scotland*, 2.
56. Company Clauses Consolidation Act, 8 & 9 Vict. c. 16 (1845); Company Clauses Consolidation (Scotland) Act, 8 & 9 Vict. c. 17 (1845).
57. This conclusion is based on a survey of 116 such cases between 1796 and 1843, the majority occurring after 1825. Thirty-three of these concerned the issue of calls, where companies were suing to recover unpaid subscriptions or shareholders were resisting calls as illegal. The cases were extracted in summary form from the LexisNexis database, http://www.lexisnexis.com/uk/legal.
58. See Freeman, Pearson and Taylor, *Shareholder Democracies?*, 272 n. 63.

59. Webb and Webb, *English Local Government*, 374–5.
60. La Porta, Lopez-de-Silanes and Shleifer, "Law and Finance," 1127.
61. Freeman, Pearson and Taylor, *Shareholder Democracies?*, 160–64.
62. Ibid., 214, 231.
63. Deakin, "Legal Origin."
64. Musacchio, "Legal Origins," 4.

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