# The Public-Private Distinction in American History: The Privatization of the Corporation and the Problem of Minority Shareholders

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## Overview of the Project

Among the most divisive issues confronting society today are those that concern the right to privacy. Although most Americans believe that they have a fundamental right to privacy, there is little consensus about what this right actually entails. Americans disagree about whether privacy includes a woman's right to an abortion, whether it conveys to gays and lesbians the freedom to engage in consensual sex, whether it can be invoked to limit businesses' aggressive telemarketing campaigns, and the extent to which it protects citizens from government intrusions to prevent terrorism. At the heart of these debates are difficult conceptual problems such as how to define privacy, where to draw the line between the private and public domains, how to weigh the right to privacy against other rights that may conflict with it, and the circumstances under which the greater public good might be served by infringing on this right.

Understanding the evolution of Americans' notions of privacy and of the boundary between public and private spheres should help to clarify these issues. Yet there exists no comprehensive history of such matters. What we have instead are a number of separate literatures that explore the public/private distinction in specific historical contexts. For example some scholars have described the emergence of a new kind of public sphere in the eighteenth century in which individuals came together to discuss politics and other matters of common concern. Others have portrayed this eighteenth-century transition to modernity as characterized by the emergence of a highly individualized (private) interior self. Historians of gender have analyzed the rise during the early nineteenth century of a concept of the family as a private haven from the public

world of commerce and industry. Business and economic historians have tracked the development of laissez faire ideology over the course of the nineteenth century. Finally, cultural historians have analyzed, for the twentieth century, the incursions that businesses and the media (deemed part of the public) have made into the private sphere in order to manipulate individual sensibilities and desires.

It is difficult to glean from these distinct literatures a more general understanding of how the private/public distinction has evolved over the course of American history. In the first place, the definition of what is public and what is private shifts dramatically from one body of literature to the next, so that, for example, the business historian's private sector is the public world against which the family is a private haven. In the second, the conceptions of private and public employed by these literatures themselves are not always stable. For example, the sense of moral worth with which women were imbued in their role as guardians of the private realm of the family has been seen by historians as empowering them to band together in voluntary associations, which on one level appear to be private organizations but on another operate in the public sphere. Moreover, the original aim of these associations was typically to reform private behavior, often by calling upon the enforcement powers of the state. Similarly, as businesses grew large and attracted capital from outside investors, they were transformed into public corporations which, though still part of the private sector, had obligations to the general citizenry that other private businesses did not have.

Our purpose in this project is to suggest how such apparently complex and contradictory conceptions of the public and private might be synthesized into a coherent history. In so doing, we both utilize and seek to revise the rich and abundant scholarship

that has developed on these various aspects of the public-private divide, starting with the most influential writer on this topic in recent decades, the German political philosopher Jürgen Habermas. Habermas is best known in historical circles for his account of the emergence of "the public sphere" in northern Europe in the eighteenth century.[1] In its most basic definition, the Habermasian public sphere refers to the opening up of non-governmental sites of widespread communication claimed to be essential to the advent of Western democracy. Habermas divides society into three spheres: public authority and the state; the public sphere; and the private, which for him combines both the economic world of commerce and labor and the "intimate sphere" of the family.[2] For Habermas the development of the public sphere in the eighteenth century was linked to the development of the intimate sphere, for the issues of individual freedom and personal subjectivity that became manifest above all in fictional literature were part of what was being debated in the public sphere. However, he at the same time sharply distinguishes the public sphere from both the intimate sphere and the state, situating it primarily in non-governmental social institutions such as the press and informal gathering places such as clubs, taverns, and coffee houses. The primary participants, in Habermas's view, were literate urban men, and what was most significant was the *kind* of conversation that took place among them—rational, critical, and inclusive—not the existence of the institutions per se. While Habermas sees the growth of commerce as also underlying the emergence of the public sphere, acknowledging that individuals like publishers and tavern keepers may have

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[1] Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, trans. Thomas Burger (Cambridge: MIT Press, 1989). The concept of the public sphere has far more than simply historical interest. Although first formulated in the 1960s it has importantly engaged with recent debates among social and political theorists about the emergence of democracy and the need for a non-governmental "civil society" in the post-Communist world, as well as with ongoing arguments about the relationship of democracy to capitalism more generally. We address the concept primarily as historians, but with an awareness of its larger repercussions.

[2] Habermas, *Structural Transformation*, pp. 28-30.

pursued their economic interests, he insists that the dominant form of exchange within the public sphere was not directed by the market but oriented to the common good.[3] In this sense Habermas is a part of the long tradition of political philosophy dating back to the Greeks that espouses an ideal of informed and participatory democratic citizenship.

Like most powerful analytical concepts, the idea of the public sphere has taken on a life of its own. Among American historians of the eighteenth century it has been applied to such disparate social phenomena as street parades, the circulation of unpublished literary works, and even proclamations of religious prophecy.[4] At times, the rationalist and democratic thrust of the Habermasian definition is almost entirely lost and the term carries more vague and ambiguous meanings.[5] Without disputing the value to our own work of the myriad publications that Habermas's writings have inspired, we approach the overused concept of the public sphere warily in the hope of clarifying its meaning. For us, the usefulness of the concept lies mainly in its definition of a gray area of collective life institutionally separate from government and fairly open and inclusive (though particular organizations within it frequently are not). We abandon Habermas's essentially political definition of the public sphere; in our view, his assertion that the

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[3] People in the public sphere engaged in critical debate as "hommes," "human beings," parts of "humanity," terms pointing at once to intellectual engagement and to universalistic aspirations. He sees this situation as collapsing in the middle of the nineteenth century when rational-critical debate began to give way to the passive consumption of mass culture. Habermas, *Structural Transformation*, pp. 158-175.

[4] For salient examples, see David Waldstreicher, *In the Midst of Perpetual Fetes: The Making of American Nationalism, 1776-1820* (Chapel Hill: University of North Carolina Press, 1997); David S. Shields, *Civil Tongues and Polite Letters in British America* (Chapel Hill: University of North Carolina Press, 1997); Susan Juster, *Doomsayers: Anglo-American Prophecy in the Age of Revolution* (Philadelphia: University of Pennsylvania Press, 2003).

[5] The application of the concept has also often failed to take into account cogent critiques of it, even those made by other historians. For example, Habermas's exclusion of women from the public sphere and his privileging of discursive rationality have been the subject of much feminist and other criticism, with which we largely agree. See, for example, Joan B. Landes, *Women and the Public Sphere in the Age of the French Revolution* (Ithaca: Cornell University Press, 1988); the essays by Landes, Keith Michael Baker, and Mary Ryan in *Habermas and the Public Sphere*, ed. Craig Calhoun (Cambridge: MIT Press, 1992); the essays by Joan Landes, Johanna Meehan, and Marie Fleming in *Feminists Read Habermas: Gendering the Subject of Discourse*, ed. Johanna Meehan (New York: Routledge, 1995).

historical importance of its emergence was the promotion of democracy captures only one aspect of its role. Nonetheless, we stress the ways in which organizations that occupied this middle ground often functionally substituted for government by enlisting collective energies (for example, in projects involving economic development and social reform) and by regulating the lives of its members. We diverge most from Habermas's interpretation in our skepticism that this emergence of this new sphere of activity marked a general turn towards rationality and egalitarianism. For example, we include religious organizations, notably absent from Habermas's formulation, as an important part of the "new public," and we emphasize the persistence of hierarchical structures of control in these and many of the other associations formed during this period. However, unlike Habermas who relegates women to the intimate sphere, we also stress the growing engagement of women in voluntary activism. Most fundamentally of all, we take issue with Habermas's overly neat divide between the private sphere and the public sphere, instead focusing our attention on the gradual process whereby the public/private divide achieved such ideological and legal importance and its continually shifting meaning.

To this end, we also contend with a second genre of historical literature more exclusively about private life. Over the course of the last four decades many formidable scholars, led initially by the French, have applied themselves to tracing the early modern evolution of private life. By the private they mean primarily the household and family, sexual identities and behaviors, and intimate friendships and individual subjectivity.[6] As suggested by Habermas's own observations about the simultaneous emergence of the

[6] The literature is legion. See especially the multi-volume *Histoire de la Vie Privée*, eds. Philippe Ariès and Georges Duby, 5 volumes (Paris: Seuil, 1985-), translated as *A History of Private Life*. Also, more indirectly, the influence of Foucault's work on prisons and sexuality which concern the violation of bodies and minds by structures of power. Foucault, however, does not centrally employ the concept of privacy.

intimate and the public spheres, the two historiographies partly interrelate, both describing key transitions in the early modern period.[7] Within American history, the interest in the household and the family has been propelled in large part by work in women's history since the 1970s, especially within the debates over the value of the nineteenth-century ideology of "separate spheres," and, more recently, within the history of sexuality. The best of this work underscores that what is private today was not necessarily private in the past—perceptions upon which we have drawn.[8] To the degree that the public and the private have separate historiographies proceeding in different directions, however, the shifting boundary between them often gets lost from view. The ways the family has developed in relation to other social organizations such as the corporation or churches—institutions generally regarded as less private than the family and yet not exactly public either – accordingly gets overlooked. Moreover, the history of the family is often told with minimal reference to the state.[9] Still more problematic, some scholars tend to idealize what they regard as privacy and to project onto the past a

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[7] For a perceptive analysis of this intersection see Dena Goodman, "Public Sphere and Private Life: Toward a Synthesis of Recent Historiography" History and Theory (1992). John Brewer builds upon Goodman's point in his "This, That, and the Other: Public, Social, and Private in the Seventeenth and Eighteenth Centuries" *Shifting the Boundaries: Transformations of the Language of Public and Private in the Eighteenth Century* (1995).

[8] For the American case, see, for example, John Demos, *A Little Commonwealth: Family Life in Plymouth Colony* (New York: Oxford University Press, 1970); David K. Flaherty, *Privacy in Colonial New England* (Charlottesville: University of Virginia Press, 1972 ed.); Mary Beth Norton, *Founding Mothers and Fathers: Gendered Power and the Forming of American Society* (New York: Knopf, 1996).

[9] For example, the now classic work, Carl Degler, *At Odds: Women and the Family in America from the Revolution to the Present* (New York: Oxford University Press, 1980); and, in very different ways, insightful overviews challenging Degler's and others' idealization of family life: Stephanie Coontz, *The Social Origins of Private Life: A History of American Families* (New York: Verso, 1988) ; Carole Shammas, *A History of Household Government in America* (Charlottesville: University of Virginia Press, 2002).

misleading image of families and individuals as relatively free of outside pressures of all kinds.[10]

Yet another literature with which we must engage is the scholarship that has developed over the last four decades on the emergence of private property rights.[11] Much of this work has been done by economists and economic historians, and the questions that motivate it are very different from those that underpin the historical literature on the family and sexuality, as are the techniques that scholars have employed to answer them. The underlying assumption is that secure property rights are critical for economic development because they provide incentives for individuals to innovate and thus increase the productive capability of the economy. The problem has been to understand when and how the necessary protections emerged in western economies and why they developed there and not in many other societies. Scholars started with the simple notion that secure property rights would emerge when the gains to be earned from creating them exceeded the costs. They then progressed to more complicated models that accommodated the likelihood that the costs and benefits associated with a given set of property rights would differ across interest groups and, therefore, that the relative power of these groups would determine whether the rights would be created and/or enforced. Studies of the emergence of property rights in the West, for example, emphasized the rivalry among nation states that forced monarchs to compromise with other powerful interests in order to obtain the funds they needed to wage war. Thus, according to

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[10] For example, among American historians, Christopher Lasch, *Haven in a Heartless World : The Family Besieged* (New York, Basic Books, 1977). Also implicitly in Michel Foucault, *The History of Sexuality: An Introduction,* vol I (New York: Vintage, 1990), in which the modern period is presented as more repressive of individual sexual expression than previous times.

[11] For surveys of this literature, see Eirik G. Furubotn and Svetozar Pejovich, "Property Rights and Economic Theory: A Survey of Recent Literature," *Journal of Economic Literature*, 10 (Dec. 1972), pp. 1137-62; and Thráinn Eggertsson, *Economic Behavior and Institutions* (New York: Cambridge University Press, 1990).

Douglass North and Barry Weingast, Britain gained ascendancy after the Glorious Revolution, when Parliament reigned in the king's ability to confiscate wealth by levying taxes. The greater security of private property that resulted not only enhanced the government's ability to float its debt, but stimulated the growth of the British capital markets, providing the financial wherewithal for the nation's subsequent industrial development.[12]

Although the most sophisticated works in this tradition incorporate conflicting interest groups into their theories, the redistributive implications of changes in the definition and enforcement of property rights have not been adequately addressed. Rather the assumption has been that all members of society benefit from improvements in institutions that increase the incentive to engage in economically productive activity. Yet the very fact that such changes are often met with opposition belies either this assumption or the idea that human beings rationally pursue their long-run self-interest. Whereas most scholars would not question the idea that restraining the king's ability to expropriate wealth was a good thing, the implications of other blows to traditional privileges are not so clear cut. For example, there has been much more debate about the costs and benefits of enclosure.[13] Moreover, aside from this issue of redistribution, large segments of the

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[12] Douglass C. North and Barry R. Weingast, "Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England," *Journal of Economic History*, 49 (Dec. 1989), pp. 803-32. For broader applications of this basic approach, see Douglass C. North and Robert Paul Thomas, *The Rise of the Western World: A New Economic History* (New York: Cambridge University Press, 1973); and Douglass C. North, *Structure and Change in Economic History* (New York: W. W. Norton, 1981). For a more nuanced view of the effects of the Glorious Revolution, see Stephen Quinn, "The Glorious Revolution's Effect on English Private Finance: A Microhistory, 1680-1705," *Journal of Economic History*, 61 (Sept. 2001), pp. 593-615.

[13] The literature is enormous. Recent doubts about the benefits of enclosure include Robert C. Allen, *Enclosure and the Yeoman* (Oxford: Oxford University Press, 1992); Jane Humphries, "Enclosures, Common Rights, and Women: The Proletarianization of Families in the Late Eighteenth and Early Nineteenth Centuries," *Journal of Economic History* 50 (March 1990): 17-42; and Elaine S. Tan, "'The Bull is Half the Herd': Property Rights and Enclosures in England, 1750-1850," *Explorations in Economic History* 39 (Oct. 2002): 470-89.

population benefited only indirectly from the strengthening of property rights that occurred during this period. To give an obvious example, married women still controlled neither their property nor their bodies.

More generally, the main weakness of all of these literatures is that they do not sufficiently problematize the very concept of privacy upon which they rely. Historians necessarily draw upon present-day categories of analysis in their work, so perhaps it is not surprising that historical studies of privacy often project backwards in time a definition that revolves around the family, sexuality, and the self, on the one hand, and ownership and economic incentives to innovate on the other. Within these specialized literatures there is little effort to compare one type of privacy to another or to come to terms with the multiple and changing meanings of the term. The historical quest has been, in large part, to discover the origins and evolution of specific aspects of life that we consider private today. Our quest is fundamentally different. It is instead to trace the historical process through which the private in its various manifestations has been ideologically defined and socially utilized in relation to the shifting power of American government.

The key to this undertaking is recognizing, first of all, that the idea of a private sphere distinct from the public had its origins in the intellectual ferment surrounding the political revolutions of the eighteenth century. This is not to say that there was no concept of privacy before this time, but simply that there was little intellectual justification or ideological commitment to the concept until ideas about privacy became intertwined with and inseparable from new notions of liberty and equality. Second, it was precisely because privacy was linked to both of these ideals that it quickly came to

have such widespread appeal, assuming the status of a kind of right long before it was formally recognized as such in constitutional law. The increasingly high value accorded to privacy played a powerful role in reserving large loci of activity, notably both the family and the firm, where people could pursue their interests without interference from the state. Third, because it was so intimately bound up with both of these important ideals, the emergent right to privacy became an important intellectual battleground in post-revolutionary struggles both to expand the reach of liberty and equality and to define the sometimes conflicting relationship between them. It is this role as battleground that best accounts for the variety of lines that have been drawn between the private and public domains. At different times the right to privacy has been invoked both in favor of and in opposition to the rights of women, workers, slaves, and other subordinate groups. It is because of this history that the right to privacy appears to have a chameleon-like quality – a variability that has made synthetic historical understanding difficult.

Our innovation is to approach the history of privacy through the study of organizations—families, businesses, and voluntary associations. We single out these particular types of organizations for study because they were the ones that were most clearly differentiated ideologically from the state during and after the American Revolution. Although there was in this period, as in the colonial era before, a commitment to certain kinds of individual rights, the new conception of a right to privacy was articulated mainly with respect to organizations. Each of these types of organizations claimed the mantle of privacy, and these multiple claims resonated with each other to increase their individual power. Laissez faire ideology, for example, obtained its force from this complex of claims and needs to be understood as more than simply the

articulation of business interests. Similarly, middle-class definitions of femininity evolved against a wide-ranging backdrop of demands for the value of privacy that cannot be explained in terms of gender alone.

While these diverse invocations of privacy could reinforce one another, however, they could also clash when various organizations staked out conflicting claims of privacy. Thus the family was conceived as a private refuge from the business world, which could be defined as public. Families and businesses both used ideas of privacy to resist attempts by religious denominations and other voluntary associations to regulate their behavior. Religious minorities invoked privacy in their battles with the older dominant churches, even as the movement toward disestablishment divested them all of support from the state.

Conversely, organizations countering threats to authority posed by such claims of privacy could reverse the terms of the argument by insisting that they, to the contrary, served the greater good of the whole. The increasing ideological appeal of privacy rights in the nineteenth century vied with the continuing influence of older notions of communal obligation. The organization seen to most legitimately represent the public was still the government, a perception rooted both in traditional beliefs about rulers' duty to their subjects and in newer revolutionary principles of popular sovereignty. But non-governmental organizations also advanced such public conceptions of themselves alongside the newer notions of privacy. Voluntary associations involved in religious and social reform, business enterprises promising to benefit the collective welfare, families thought to engender socially beneficial moral values—all of these institutions could be defended in terms of their service to the common good. In the process of resisting

challenges made in the name of privacy, they both modernized these old-regime ideas and gave them ongoing legitimacy.

Perhaps more significantly, both the new conception of privacy and the older ideal of the public welfare could be used as ideological weapons in internal conflicts within organizations. All of the organizations we study were hierarchically structured in the period of the American Revolution. Hence the immediate consequence of privatizing them was to free the men who held positions at the top of these hierarchies from the ongoing oversight of the state and to increase their power over subordinates. Not surprisingly, then, it was within these organizations that the meaning of (and conflict between) the twin ideals of liberty and equality was most directly confronted and the ramifications of the new conceptions of privacy most completely explored. Subordinates who suffered abuse at the hands of their superiors in these hierarchies initially appealed to the state to intervene on their behalf, invoking older notions of public good to justify their actions. Although this strategy sometimes brought relief, in the end subordinates' ability to secure the assistance of the state to redress inequalities of power within organizations depended on their own ability to lay claim to the mantle of privacy. By this historical process, the right to privacy gradually came to be extended beyond organizations to the individuals who made them up.

In the remainder of our study, we proceed chronologically to track the role that the rhetoric of privacy has played within organizations and between organizations and the state. Our first chapter surveys the limited role that the ideal of privacy played in the colonial America, where the prevailing institutional model conceptualized organizations as hierarchically structured and vertically linked from the king down to the individual

household. We then, in our second chapter, show how this view of the world was disrupted by the political revolutions of the late eighteenth century. Teasing out the resulting tension between the hierarchical and egalitarian aspects of the Revolutionary legacy occupies the bulk of our study. Inasmuch as the mantle of privacy cloaked persisting inequalities within organizations headed by white male citizens, the weakness of government in the post-revolutionary period perpetuated and reinforced hierarchical social authority. Inasmuch, however, as rights were applied to individuals without respect to their status positions, the increased value placed upon private life could also operate to increase social equality.[14] Appeals to public welfare permeated the resulting conflict, for residues of collective activism and notions of obligation to the general good of society remained widespread—despite the restricted authority of the state in the aftermath of the Revolution. Indeed, they received new momentum from the expansive, non-governmental, public domain that was also a heritage of the Revolutionary era.

Following this discussion of the changes set in motion by the Revolution we project three more chapters covering the family, business, and voluntary associations respectively. These chapters will concentrate on changes that occurred during the nineteenth century as each of these institutions responded to the decreased role of the government and to conflicts over the relative power of the individuals that made them up. Our discussion of the family highlights the post-revolutionary elevation of the white male

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[14] We have benefited from the argument by Ahkil Amar that rights in the Constitution apply more to collectivities (the states and the people) than to individuals, and that an individualistic understanding did not become ensconced in the Constitution until the Civil War Amendments. See Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven: Yale University Press, 1998). We, however, also underscore the importance of a more individualistic, if less institutionalized ideology that emanated from the political rhetoric of natural rights in both the American and the French Revolutions. This was at first a restricted individualism, however, one that applied to the heads of social organizations rather than to all their individual members. The Civil War Amendments, in our view, were part of the long-term process of this associational notion of rights breaking down into a truly individual one.

head of household, both as a citizen equal to other heads and as the public representative of his domestic domain. While ostensibly partaking in the collective right to privacy that the head of the household sought to protect, women and other dependents lost much of their prior ability to seek redress from the state in cases of abuse. The newfound valorization of the private within the emergent ideology of "separate spheres" drew a conceptual divide between home and work, women's activities and men's activities, women's nature and men's nature. While one effect of this sharpening division was to reinforce the authority of husbands and fathers, the increased idealization of wives and mothers—together with the influence of the egalitarian elements within revolutionary ideology—encouraged women to wield their maternal beneficence more widely in the semi-public arena of voluntary associations and to claim that they, too, possessed rights as individuals. By challenging the strictures of coverture, women activists began to chip away at the unitary conceptions of the family.

In the next chapter we suggest that similar patterns emerged in the world of business. Corporations, which initially received government charters on the grounds that they would serve the common good, became increasingly privatized with the passage of general incorporation laws. They also became internally more hierarchical as minor shareholders found themselves increasingly subject to voting rules that deprived them of influence in the company. These developments came to a head with the legal designation of the corporation as analogous to a private person with rights over and above those of its individual members. In practice, this designation rendered the corporation, led by directors whose interests were typically indistinguishable from those of its major shareholders similar in structure to the unitary family, with minority shareholders

occupying positions akin to those of wives and children. The internal hierarchies of American business came under attack by the incipient labor movement, as master-servant doctrine increasingly clashed with popular notions of the equality and common domestic responsibilities of male heads of households.

As we argue in the third of these institutional chapters, the history of voluntary associations within the "new public" arena interfaced with the privatization of the family and business in ways that further complicated the public/private divide. In many ways similar to corporations, voluntary associations often took up where the government left off. Sometimes established by charter, they often defined their missions in terms of the public welfare. Like corporations, moreover, voluntary associations at times came under widespread suspicion for being internally hierarchical and exclusive, and they, too, often defended their privacy and autonomy by invoking the personhood of their organizations. Voluntary associations could also exhibit basic features in common with families, for example the efforts of many religious denominations to discipline the lives of their members. Yet voluntary associations moved in a public direction as well during the first half of the nineteenth century. This trend is especially apparent in the case of reform organizations that promoted ambitious social causes like temperance and antislavery and coalesced with the new political parties of the 1840s and 50s. In their appeals for public support, however, they often stressed the violation of the rights to privacy of underprivileged women, children, and slaves.

We conclude by noting that the associational concept of privacy significantly declined in the late nineteenth century as, under the cumulative force of these appeals, the focus of political attention shifted from organizational to individual rights. Building upon

much of this earlier history, the Fourteenth Amendment after the Civil War played a critical role in this transition. But the debate over the meaning of privacy would continue and indeed would find novel forms of expression in the contest between (new) individualistic notions of privacy and older associational ones. In the end, we believe that any attempt to untangle what was truly public from what was truly private about this history would amount to an act of futility. It might perhaps be possible to achieve a modicum of clarity by artificially imposing our own rigorous definitions of these terms, but such an effort to draw a sharp boundary between them would at best serve only limited analytical purposes at a cost of missing a great deal of the actual history. Periodically in the course of this study we discuss the etymology of the words public and private and their changing meanings over time. The very fact that even today these terms elude clear definition bears testimony to the historical depth of the problem and the fact that it is more than a semantic one. We may today share in a general consensus about the meaning of the words, but reflective intellectuals and social critics still question the placement of the line between them and recognize that this line is historically malleable. What we hope to contribute to this discussion is a heightened awareness of how, over the course of American history, increasing commitments to privacy have stirred fundamental conflicts, conflicts that have been fought both within and among a variety of social institutions and that have been as much, or more, about rights to liberty and equality as they have been about rights to privacy per se.

## Chapter IV—Business Organizations

Note: The following two sections on the corporation will be proceeded by a brief introduction that sets up the themes laid out in our overview and by a section discussing the early popular support for, and later retreat from, government-financed transportation improvements such as the Erie Canal. They will be followed by a discussion of the ways in which developing notions of privacy were used both against and by labor organizations.

### Promotion of Economic Development by Chartering Corporations

Public works projects like the Erie Canal were the most visible manifestation of governments' pro-development activities during the half century following the Revolution, but it was more common for states to promote economic growth by granting of charters of incorporation to business people who were willing to invest their own funds in infrastructural improvements. Although states sometimes bought shares in these corporations or provided financial support in the form of loans, in general the direct burden of these projects on public treasuries was minimal. Chartering corporations thus enabled governments to pursue pro-development agendas without having to take the politically unpopular and divisive step of raising taxes. As we shall see, however, this strategy was not uncontroversial. To the contrary, as the number of corporate charters multiplied, opposition mounted, fueled by fears of corruption and elite dominance that were reminiscent of the era of the American Revolution and articulated in much the same language.

Although the corporate form has a long history that can be traced back to classical times, the device was revived in England during the early modern period to help the Tudor kings consolidate their power. When these monarchs granted (or confirmed)

corporate charters to urban governments and other associations like churches and guilds, they offered these organizations privileges, mainly the right to create a set of rules that would be binding on their members—that is, the right to be a governing authority—in exchange for recognition that the ultimate source of this authority was the king. By the seventeenth century, it had become apparent that grants of corporate charters could serve other purposes as well, and kings began to use their powers to charter trading companies. Although these ventures typically took the form of profit-oriented joint-stock enterprises whose shares were owned by private individuals, the grants were justified on the grounds that they furthered the geopolitical interests of the nation. After the Bubble Act of 1720, primary responsibility for chartering corporations shifted to Parliament, which reserved such grants at least in principle for projects that provided a public benefit.[15]

In the new United States, chartering corporations remained a legislative prerogative, and the corporate form retained its essentially public-service character. Although the vast majority of grants that legislatures issued during the late eighteenth and early nineteenth centuries were for towns and other collectivities such as churches and charitable associations, states also began to charter turnpike and bridge corporations as a way of encouraging investment in badly needed transportation projects.[16] Banks were thought to provide vital community services, and so merchants who sought to form them could

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[15] As Ron Harris has shown, however, whether or not a group received a corporate charter depended in large measure on the power of opposing interests. See *Industrializing English Law: Entrepreneurship and Business Organization, 1720-1844* (Cambridge: Cambridge University Press, 2000), pp. 60-81. On the early history of the corporation, see James Willard Hurst, *The Legitimacy of the Business Corporation in the Law of the United States, 1780-1970* (Charlottesville: University Press of Virginia, 1970), pp. 2-4. For a general overview, see also Naomi R. Lamoreaux, "Business Organization," in *Historical Statistics of the United States, Millennial Edition*, ed. Susan B. Carter, et al. (New York: Cambridge University Press, forthcoming).

[16] Pauline Maier, "The Revolutionary Origins of the American Corporation," *William and Mary Quarterly*, 50 (Jan. 1993), pp. 54-55; Hurst, *Legitimacy of the Business Corporation*, pp.15-18. Oscar Handlin and Mary Flug Handlin Handlin, *Commonwealth: A Study of the Role of Government in the American Economy* (Rev. edn.; Cambridge: Harvard University Press, 1969), pp. 87-133.

obtain charters by couching their appeals in terms of the public interest. For example, the incorporators of the Massachusetts Bank, chartered in Boston in 1784, promised, among other things, that their bank would make it possible for citizens of the Commonwealth to obtain credit at reasonable rates of interest, thus ensuring that "the enormous advantages made by the griping Usurer from the Necessities of those who want to borrow Money will be immediately checked & in great Measure Destroyed."[17] Industrial ventures might also secure charters if their organizers could provide an appropriate civic justification. Not surprisingly, legislators' willingness to grant such charters increased during the period of the Embargo and War of 1812, when manufacturing came to be considered, as William Kessler has suggested, a "patriotic duty."[18] Thus the Boston Associates obtained a corporate charter for their first textile enterprise in Waltham in 1813 by emphasizing the social value of securing "the establishment of manufactures upon a more permanent foundation than has hitherto been found practicable in this commonwealth."[19]

In order to demonstrate the social utility of their ventures, organizers of corporations often called public meetings to gather signatures for their petitions for charters and to demonstrate that their projects had widespread community support. Sally Griffith has documented the pervasiveness of these "rituals of incorporation" in the civic life of Americans during the first half of the nineteenth century. In a typical example, the Pittsburgh *Gazette* published an announcement in 1810 urging all "citizens" to attend a meeting at a local inn to discuss the formation of a bank. The owner of the newspaper

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[17] Quoted in N. S. B. Gras, *The Massachusetts First National Bank of Boston, 1784-1934* (Cambridge: Harvard University Press, 1937), pp. 212-14.

[18] William C. Kessler, "Incorporation in New England: A Statistical Study, 1800-1875," *Journal of Economic History*, 8 (May 1948), pp. 43-62.

[19] Quoted in Robert F. Dalzell, Jr., *Enterprising Elite: The Boston Associates and the World They Made* (Cambridge: Harvard University Press, 1987), p. 28.

was one of the organizers of the bank, and he used his publication both to publicize the venture and to make the case that it would provide valuable services to the town. When the organizers held a subsequent meeting at the town court house, which the *Gazette* reported was "larger than was ever known on any former occasion," the organizers were able to secure a resolution, "with but three voices dissenting," to send to the legislature in support of their application for a charter. By means of such gatherings, petitioners could portray the charters they were seeking as grants to communities, not to individuals—grants that would be administered, like other community institutions, by a few leading citizens.[20]

Those who succeeded in obtaining charters during this early period also went to great lengths to encourage broad participation in their ventures, advertising their initial stock offerings in newspapers and taking subscriptions in public locations, including market buildings, court houses, and taverns. Of course, one purpose of this use of the public sphere was to attract badly needed capital for their ventures. Transportation improvements could require funds beyond the reach of any small group of incorporators, and, by arguing that everyone in the community would benefit from their project, promoters tried to insure that everyone in the community would invest. To increase participation, they wrote newspaper editorials, distributed circulars, organized meetings, and exploited their networks of personal associations. Engaging in what John Majewski has called "public arm twisting," they tried to make members of their communities feel that it was their civic duty to buy stock.[21]

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[20] Sally F. Griffith, "Rituals of Incorporation in Ante-bellum Civic Live," *Mid-America*, 82 (Winter/Summer 2000), pp. 51-70. The example and quotes are from pp. 58-59.

[21] John Majewski, *A House Dividing: Economic Development in Pennsylvania and Virgina Before the Civil War* (New York: Cambridge University Press, 2000), pp. 28-58. See also Majewski,

But there was more going on than just the need to attract capital. In 1791, when investors oversubscribed for the capital stock of the Providence Bank on the first day the subscription books opened, the bank's incorporators limited the amount of stock that large investors could purchase in order to include a larger number of small shareholders in the company.[22] About a year later organizers of the Philadelphia and Lancaster Turnpike dealt with a similar problem of oversubscription by resorting to a lottery to distribute shares.[23] Nor were these isolated examples. There were frequently more would-be investors (especially in bank stock) than there were shares to buy. Moreover, those who were turned away might be quite vocal in expressing their disappointment. After tradesmen who were unable to purchase shares in the new Mechanic's Bank of Philadelphia rioted in 1810, the Pennsylvania legislature came up with a plan for rationing the sale of bank stock, so that no one could purchase more than two shares of stock per day during the first five days of an initial public offering.[24]

One rationale for insisting that small investors had ample opportunity to buy stock was to insure that the gains from corporate privileges would be broadly distributed through the community and thus to reduce the potential for conflict between the needs of the community and the desire of large investors for profits. Aligning interests in this manner was important because, although charters were supposed to be granted only for

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"Who Financed the Transportation Revolution? Regional Divergence and Internal Improvements in Antebellem Pennsylvania and Virginia," *Journal of Economic History*, 56 (Dec. 1996), pp. 763-88; Majewski, Christopher Baer, and Daniel B. Klein, "Responding to Relative Decline: The Plank Road Boom of Antebellum New York," *Journal of Economic History*, 53 (March 1993), pp. 106-22; and Griffith, "Rituals of Incorporation."

[22] ##citations

[23] Griffith, "Rituals of Incorporation," p. 57.

[24] Majewski estimates that stock ownership was so widespread during the first two decades of the nineteenth century that nearly 10 percent of the adult white population owned shares in banks, turnpikes, and bridge companies. John Majewski, "Democracy, Development and the Corporation in Pennsylvania and Britain, 1800-1845," unpublished paper, 2000. [##check for updated version and get permission to cite]

projects deemed to be in the public interest, it was also expected that shareholders would reap private returns from their investments.[25] Indeed, the whole point of the privileges that went along such charters was to make it possible for participants to earn a profitable rate of return and therefore encourage them to channel their savings into socially useful investments. Distributing the gains widely helped to legitimate these privileges and, at the same time, maintain public support for the venture.

For similar reasons, early charters usually gave small shareholders a voice in these organizations that was disproportionate to the amount of their investments. It was relatively rare during this period for charters to allow stockholders to exercise one vote for each share they owned. A few gave each stockholder one vote regardless of his or her holdings, but it was much more common to impose voting rules that allowed stockholders to cast one vote per share up to some ceiling (for example, ten shares) and then one vote for every five shares (or some other multiple) up to a maximum number of votes (say twenty).[26] These compromise provisions aimed to create incentives for the wealthier members of the community to invest and yet at the same time insure that the views of ordinary citizens would be heard and the interests of the larger community respected. Regardless of the number of votes that wealthy shareholders could cast, however, the deferential politics of the time meant that corporate offices typically went to members of the local elite. Indeed, small stockholders generally were so apathetic about corporate

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[25] Maier, "Revolutionary Origins of the American Corporation," p. 56.

[26] Colleen A. Dunlavy, "From Citizens to Plutocrats: Nineteenth-Century Shareholder Voting Rights and Theories of the Corporation," in *Crossing Corporate Boundaries: History, Politics, and Culture*, ed. Kenneth Lipartito and David B. Sicilia (New York: Oxford University Press, forthcoming). Of course, large investors could increase their power in a corporation by putting some of their stock in the names of family members.

elections that it was often difficult for the directors to secure a quorum at annual meetings.[27]

The extent and value of the privileges attached to corporate charters varied from case to case. Incorporation always conveyed to an enterprise the right to hold property and sue or be sued in the corporate name. Charters also often included a limitation on shareholders' liability for their corporation's debts.[28] Depending on the purpose of the corporation, the extent of the community's need, and the political clout of the organizers, there might be other boons as well. Bank charters invariably included the right to issue currency in the form of bank notes, and charters for turnpike and bridge companies the right to levy tolls. Transportation corporations were often also granted powers of eminent domain and sometimes monopolies on particular routes. In the case of canals to bring coal to Pennsylvania's anthracite fields, when these inducements proved insufficient to attract the necessary capital, the state added mining privileges as well. Perhaps because its organizers were well connected, the 1791 charter for the Society for Useful Manufactures (SUM), a textile company in New Jersey included a variety of

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[27] One might have thought, from all the controversy in the early nineteenth about banks, that stockholders would have turned out to vote at annual meetings of banking corporations, but meetings were so poorly attended that the Massachusetts bank commissioners reported in 1839 that "not infrequently . . . Directors are obliged to go out into the streets, and compel such luckless stockholders, as they may chance to meet, to come in and vote for them." Quoted in Naomi R. Lamoreaux, *Insider Lending: Banks, Personal Connections, and Economic Development in Industrial New England* (New York: Cambridge University Press, 1994), p. 74. See the same source for additional evidence on this point.

[28] Some early charters were silent on the issue of stockholders' liability, creating considerable uncertainty that, beginning in the second decade of the nineteenth century, was gradually resolved by the courts in favor of the presumption of limited liability. Where charters were not silent, they often provided for limited liability but sometimes (especially in the case of early manufacturing concerns) explicitly denied stockholders this privilege. See Edwin Merrick Dodd, *American Business Corporations until 1860: With Special Reference to Massachusetts* (Cambridge: Harvard University Press, 1954), pp. 365-437; Oscar Handlin and Mary Flug Handlin, "Origins of the American Business Corporation," *Journal of Economic History*, 5 (May 1945), pp. 8-17; Shaw Livermore, "Unlimited Liability in Early American Corporations." *Journal of Political Economy*, 43 (Oct. 1935), pp. 674-87; Edwin J. Perkins, *American Public Finance and Financial Services, 1700-1815* (Columbus: Ohio State University Press, 1994), pp. 373-76.

perks, ranging from permission to raise funds through a public lottery to exemptions from taxes and military service (except in the case of invasion) for the company's employees.[29] The privileges that corporate charters conferred on those who were able to secure such grants had two somewhat contradictory political effects. On the one hand, to the extent that these boons had real value, they stimulated ever greater numbers of applications for charters. On the other hand, they aroused opposition from those who thought that the grants were giving some members of the community unfair advantages over others—that the benefits of incorporation were in fact not widely distributed, even among stockholders, and that those in positions of managerial authority reaped disproportionate gains. The demand for bank charters increased rapidly, for example, once it became apparent that those who controlled a bank had favored access to credit, as well the ability to raise funds at low cost by issuing currency. At the same time, however, worries that manufacturers with connections to banks would be able to obtain capital more cheaply than their competitors fueled antagonism toward banks.[30]

Not surprisingly, the most vociferous opposition to corporations came from individuals whose interests were most directly affected by the privileges imbedded in charters. For example, in 1818 the Pennsylvania legislature had granted the Lehigh Navigation Company the sole right to provide transportation on the Lehigh River. When the miners who subsequently flooded into the region found they had to pay exorbitant charges to transport their coal to Philadelphia, they organized conventions to protest the company's

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[29] Maier, "Revolutionary Origins," pp. 66-69; Handlin and Handlin, *Commonwealth*, pp. 106-33; Louis Hartz, *Economic Policy and Democratic Thought: Pennsylvania, 1776-1860* (Chicago: Quadrangle Books, 1948), pp. 37-81.

[30] See Lamoreaux, *Insider Lending*, especially chapters 1 and 2.

monopoly.[31] Similarly, the initial protests against the SUM came mainly from manufacturers who worried that the many special provisions of the company's charter would give the firm an unfair competitive advantage in acquiring labor and raw-materials.[32]

These individual, interest-driven protests coalesced over time into a more general critique of corporations that drew upon the political ideology of the Revolution. This critique in fact had begun to develop in the immediate aftermath of the conflict with Britain, though initially it was all but drowned out by the much louder clamor for economic development. Like other aspects of Revolutionary thought, it drew on multiple intellectual traditions. One source, for example, was the antichartists' attack on incorporated boroughs and guilds as dangerous remnants of feudalism that concentrated economic and political power in the hands of a small elite.[33] Another was the longstanding opposition to grants of monopolistic privilege that had given rise to the English Statute of Monopolies of 1624. Yet another was the classical economists' critique of all types of barriers to competition and their claim that joint stock companies, because they separated ownership from control, tended by their very nature to be inefficient and poorly managed.[34]

An especially potent element of this mix was the revolutionary-era fear that corrupt access to government would enable the wealthy to perpetuate themselves as an aristocracy. All kinds of dire consequences threatened to follow from the "inequality of operation in the laws" that allowed a privileged few to obtain corporate charters and thus

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[31] Hartz, *Economic Policy and Democratic Thought*, pp. 58-59.

[32] Maier, "Revolutionary Origins of the American Corporation," p. 67.

[33] In "Revolutionary Origins of the American Corporation," Maier shows how these ideas fed early opposition to the incorporation of Boston and Philadelphia (pp. 52, 59-66).

[34] Maier, "Revolutionary Origins of the American Corporation," pp. 58-73.

"accumulate fortunes, and live in unequalled spender."[35] Banks charters were viewed as particularly pernicious. Not only did they give those who obtained them special access to capital, but they "collected from the many the whole monied capital of the state . . . and placed it under the management of the *few*." Because every business person was "obliged to apply [to banks] for the means to manage his concerns," the result was to reduce an otherwise energetic and entrepreneurial population to service dependency. "[C]orruption and tyranny [were] the *necessary effects*" (emphasis in original).[36]

In the hands of Jacksonian publicists such as William Gouge, these various libertarian and Revolutionary traditions were woven seamlessly into an indictment of corporations as "incompatible with equality of rights." Following Adam Smith, Gouge thought that corporations had such "inherent defects" that they were able to succeed only by dint of their special privileges and monopoly powers. Although they could not "work as cheap as the individual trader," the advantages conferred on them by their charters meant that they could "afford to throw away enough money in the contest to ruin" him and would soon "have the market to themselves." The consequences of this engrossment were particularly ominous because the balance would be difficult to redress, for "whatever power is given to [corporations] is so much taken from either the government or the people."[37] Or, as other writers put it, corporations were governments within governments whose multiplication "must have a direct tendency to weaken the powers of government" and thereby undermine the sovereignty of the people. As their ability to influence

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[35] The quotations are from "The Path to Riches: An Inquiry in the Origin and Use of Money . . . By a Citizen of Massachusetts," a 1792 pamphlet attributed to Attorney General Jams Sullivan, cited in Maier, "Revolutionary Origins of the American Corporation," pp. 71-72.

[36] For these and other quotations from contemporary newspapers and pamphlets, see Lamoreaux, *Insider Lending*, pp. 36-40.

[37] From Gouge's *Short History of Banking and Paper Money in the United States* (1833), quoted in Hurst, *Legitimacy of the Business Corporation*, p. 30.

legislative policy increased with their numbers and size, corporations would "in due time rule the commonwealth."[38]

In response to such fears, some politicians argued that corporations should be entirely abolished. Others proposed that enterprises should have to pass a more stringent test of the public interest before they could be awarded charters. Still others advocated the passage of general incorporation laws that would eliminate the element of privilege that inhered in corporate charters by enabling any group that met a set of basic requirements to incorporate its enterprise.[39] Although all three of these options were tried at different times and places and for different types of corporations, in the end the last won out—in part because there was broad interest in participating in corporate ventures, and in part because incorporation fees were so lucrative that states that chartered large numbers of corporations could reduce the property-tax burden on their citizens.[40] As a general rule, legislatures in the most industrial states faced the greatest pressure to liberalize the process of chartering corporations, and they responded first by making it easier for petitioners to obtain special charters and then by passing general incorporation laws. Massachusetts and New York had much earlier enacted rudimentary laws that made it possible for limited categories of firms to form corporations without special permission of the legislature, but the shift began in earnest in the late 1830s. Over the next couple of

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[38] Maier, "Revolutionary Origins of the American Corporation," pp. 71-72; Hartz, *Economic Policy and Democratic Thought*," p. 72.

[39] Maier, "Revolutionary Origins of the American Corporation"; Herbert Hovencamp, *Enterprise and American Law, 1836-1937* (Cambridge: Harvard University Press, 1991), pp. 1-41.

[40] On the latter point, see John Joseph Wallis, Richard E. Sylla, and John B. Legler, "The Interaction of Taxation and Regulation in Nineteenth-Century U.S. Banking," in *The Regulated Economy: A Historical Approach to Political Economy*, edited by Claudia Goldin and Gary D. Libecap (Chicago: University of Chicago Press, 1994), pp. 121-44.

decades, more than twenty states joined the movement to pass general incorporation laws.[41]

The egalitarian underpinnings of these acts were reinforced by provisions that aimed to limit the economic power of the corporations whose formation they routinized. The earliest laws applied only to a narrow range of businesses. For example, Pennsylvania's 1836 law was limited to firms that manufactured iron using coke or mineral coal, while its 1849 law extended the privilege of incorporating without special legislative permission to companies in the wool, cotton, flax, silk, iron, paper, lumber, and salt industries. An 1850 act added glass companies; one in 1851, salt goods and printing and publishing; and another in 1853, coal, copper, lead, tin, zinc, marble, and slate.[42] Later acts required each corporation to specify in its charter the type of business in which it would engage, forbidding it from moving into any other activity without first securing shareholders' unanimous consent to amend the charter. Similarly, early statutes limited the amount of capital that corporations could raise, whereas later laws permitted increases if stockholders unanimously consented and the charter was correspondingly amended.[43] Laws for specific kinds of enterprises could be even more restrictive. For example, the

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[41] Massachusetts had passed a law as early as 1753 making it possible for land companies to incorporate without obtaining special permission from the legislature. New York had provided for the general incorporation of manufacturing enterprises in a specified list of industries during the crisis leading up to the War of 1812. See Maier, "Revolutionary Origins of the American Corporation," pp. 56-57; and W. C. Kessler, "A Statistical Study of the New York General Incorporation Act of 1811," *Journal of Political Economy*, 48 (Dec. 1940), pp. 877-82. On subsequent general incorporation laws, see Hurst, *Legitimacy of the Business Corporation*, pp. 13-57; Margaret M. Blair, "Locking in Capital: What Corporate Law Achieved for Business Organizers in the 19th Century," *UCLA Law Review*, forthcoming. There are a number of studies of evolving legislative policy toward corporations in different states, but see especially Handlin and Handlin, *Commonwealth*; Hartz, *Economic Policy and Democratic Thought*; John W. Cadman, Jr., *The Corporation in New Jersey: Business and Politics, 1791-1875* (Cambridge: Harvard University Press, 1949); and Ronald E. Seavoy, *The Origins of the American Business Corporation, 1784-1855: Broadening the Concept of Public Service during Industrialization* (Westport: Greenwood Press, 1982).

[42] Hartz, *Economic Policy and Democratic Thought*, pp. 39-40.

[43] General incorporation laws also restricted the scope of corporations' activities by prohibited them from owning stock in other corporations. Hurst, *Legitimacy of the Business Corporation*, pp. 44-45.

so-called free banking laws generally required banks to back their currency issues by depositing an equivalent amount of government securities with a state authority.[44] In order to avoid some of these restrictions and secure more favorable terms for their ventures, businesses continued to seek special charters from the legislature even after routine incorporation was possible. Less than a dozen enterprises took out charters under Pennsylvania's General Manufacturing Act during the five years after its passage in 1849, and no banks sought incorporation under Massachusetts' 1851 general incorporation law for banks, though the number of banks in the state increased from 119 to 178 over the decade of the 1850s.[45] Similarly, in the decade and a half following the passage of New Jersey's general incorporation laws, only 160 enterprises formed under the new legislation, whereas more than 500 more secured special charters.[46] As a consequence of business people's ongoing preference for the benefits of special charters, the controversy over corporate privileges continued until, during the third quarter of the nineteenth century, most states passed constitutional amendments prohibiting legislatures from incorporating businesses other than under general laws.[47] General incorporation statutes remained highly restrictive, however, until New Jersey started a national trend toward liberalization in the late 1880s.[48]

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[44] Kenneth Ng, "Free Banking Laws and Barriers to Entry in Banking, 1838-1860," *Journal of Economic History*, 48 (Dec. 1988), pp. 877-89.

[45] Hartz, *Economic Policy and Democratic Thought*, p. 40; Ng, "Free Banking Laws," pp. 877-89; Lamoreaux, *Insider Lending*, p. 14.

[46] George Heberton Evans, Jr., *Business Incorporation in the United States, 1800-1943* (New York: National Bureau of Economic Research, 1948), p. 12.

[47] For a summary of such constitutional provisions, see Evans, *Business Incorporation in the United States*, p. 11. All the major industrial states outside New England passed such amendments during this period. On the persistence of special charters into the late nineteenth and early twentieth century, see Susan Pace Hamill, "From Special Privilege to General Utility: A Continuation of Willard Hurst's Study of Corporations," *American University Law Review*, 49 (Oct. 1999), pp. 81-180.

[48] See Cadman, *The Corporation in New Jersey*; and E. Merrick Dodd, Jr., "Statutory Developments in Business Corporation Law, 1886-1936," *Harvard Law Review*, 50 (Nov. 1936), pp. 27-59.

One consequence of this movement toward general incorporation was the gradual eclipse of the idea that corporations had special privileges and, along with that, the idea that corporate charters required a public-interest justification. Although some publicists would continue throughout the century to invoke the principle that corporations served the public good, as a matter of practice corporations were increasing treated as ordinary private enterprises. Even before the passage of general incorporation laws, the multiplication of the number of charters had set this process in motion. For example, although some applicants for bank charters in the 1820s and 1830s continued to provide a public-service justification in their petitions, it was increasingly common to see appeals that cited instead the interests of specific groups. For example, incorporators of the Mechanics Bank of Providence argued in 1823 "that the mechanics compose a large portion of the citizens of the town, and that the great & growing importance of the business in which they are engaged require the facilities and accommodation of a bank." Still other petitioners frankly admitted that they were seeking to establish a bank for their own personal benefit. Incorporators of the Smithfield (Rhode Island) Exchange Bank, for instance, sought to create an institution in which "they can become stockholders, and particularly if they can have one located and established in their own vicinity or neighborhood; in order to share or participate with their fellow Statesmen in equal privileges." An increasing number did not even bother to justify their requests for charters; their applications consisted solely of a list of participants and a brief statement explaining that the undersigned wished to organize a bank.[49]

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[49] Lamoreaux, *Insider Lending*, p. 28. The original source of the quotations is Rhode Island, General Assembly, "Charters," Vol. 7 (1820-23), p. 52, and Vol. 8 (1823-5), p. 15. These manuscript records are stored in the state archives.

Once there was no longer any need to demonstrate broad community support to secure a charter, the process of forming and investing in a corporation became increasingly private.[50] In the manufacturing sector, for example, the lists of incorporators on applications for charters now commonly included only a small number of names—often the minimum required to obtain a charter. Moreover, the vast majority of the industrial enterprises that organized as corporations by mid-century never made a public offering of their stock but rather were conceived from the very beginning as what we would today call "close" corporations.[51] Even in cases where organizers sought outside investors, it was increasingly common for a small number of individuals to divide the initial offering among themselves and then gradually sell off shares to small investors. In the case of banks, organizers often employed this method strategically, using borrowed money for their investments which they immediately repaid by withdrawing their investment from the bank in the form of stock loans (that is, loans secured by shares of the bank's own stock). Once the bank had been in operation for a few years, they were usually able gradually to sell off shares to outside investors and repay their stock loans. In this way, entrepreneurs who lacked both capital and the stature to attract investment in the first place were able to found their own banks.[52] It is worth noting that they were able to pursue this strategy thanks to the privately organized "public" securities markets that

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[50] In the case of railroads, as Griffith has demonstrated, the ritual of public meetings continued, mainly because communities competed with each other to influence the location of track (see "Rituals of Incorporation"). But the sources of railroad investment became increasingly private over time, especially in the more urban regions of the country. See Majewski, *House Dividing*, pp. 111-40; and George Rogers Taylor, *The Transportation Revolution, 1815-1860* (New York: Holt, Rinehart and Winston, 1951), pp. 74-103.

[51] See, for example, the microfilm records of business corporations chartered in Massachusetts under the 1851 general incorporation law. These are available in the office of the Corporations Division of the Secretary of the Commonwealth.

[52] Lamoreaux, *Insider Lending*, pp. 18-22.

had sprung up, first to trade in government securities and then in the widely distributed shares of early public-service corporations.[53]

Not surprisingly, as the investment process became more private, there was a corresponding shift in the standards of corporate governance toward majority rule based on one vote per share. Again, this trend was apparent even before the passage of general incorporation laws, especially in sectors such as manufacturing where enterprises were most likely to be regarded as private. But, for reasons that are not entirely clear, one-vote-per-share governance was typically mandated by the general incorporation laws passed during the middle decades of the century—in sharp contrast to the more flexible governance rules adopted in Britain around the same time and elsewhere in Europe over the next couple of decades.[54] Intriguingly, the egalitarian politics that led to the passage of general incorporation laws resulted in statutes that eliminated checks on the concentration of power in the hands of wealthy stockholders within the enterprise.

**Implications of the Privatization of Corporations**

As corporations increasingly took on a private character, the extent to which the governments that chartered them might oversee their affairs became increasingly unclear. On the one hand, enterprises organized as corporations were, like all businesses, subject

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[53] See Richard Sylla on the New York Stock Exchange. For a comprehensive overview of trading on the Boston securities markets, see Joseph G. Martin, *A Century of Finance: Martin's History of the Boston Stock and Money Markets* (Boston, 1898 [privately printed]).

[54] Dunlavy, "From Citizens to Plutocrats." British company law, for example, included a model set of governance rules that was similar to the American standard of one-vote-per-share majority rule but permitted corporations to deviate from this model by writing alternative provisions into their articles of association. See L. C. B. Gower, "Some Contrasts Between British and American Corporation Law," *Harvard Law Review*, 69 (June 1956), pp. 1369-1402. For a discussion of the rigidity with which American courts enforced the standard corporate governance rules, see Naomi R. Lamoreaux and Jean-Laurent Rosenthal, "Legal Regime and Business's Organizational Choice: A Comparison of France and the United States during the Mid-Nineteenth Century," unpublished paper, 2004.

to the police powers of the state. On the other hand, corporations were different from other businesses in that they were collectivities to which the state had granted both rights and a significant degree of autonomy. These two aspects of the corporation came into conflict when the exercise of the state's police powers required intervention in an enterprise's internal affairs. By the middle of the nineteenth century, it had become clear that the multiplication of corporations, and the resulting tendency to view them as ordinary private enterprises, was expanding in important ways the scope of the private sphere at the expense of governmental authority.

In fact, the conflict between the state's police powers and the autonomy of corporations arose long before the spread of general incorporation laws, as the famous case of *Dartmouth College v. Woodward* illustrates. In 1816 the New Hampshire legislature had passed a statute that, among other things, increased the role of the state in the governance of Dartmouth College by requiring its president to report to the governor, by giving the governor power to appoint trustees to the college's board, and by creating a Board of Overseers that would include the president of the New Hampshire Senate, the speaker of the House of Representatives, as well as officials from the state of Vermont. The existing board sued to prevent these modification to the college's charter, and the case ended up in the U.S. Supreme Court. Chief Justice John Marshall issued an opinion siding with the board, declaring that a charter of incorporation was a contract protected by the Constitution. Because "no State shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts," New Hampshire could not alter unilaterally the composition of the board or any other aspect of the college's articles of association.[55]

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[55] *Dartmouth College v. Woodward*, 17 U.S. 518 (1819).

Although this decision provoked outrage among critics of corporations, on its face it had little long-term impact on the states' ability to regulate corporations: legislatures simply responded by inserting clauses into charters that reserved their right to alter the terms of the grant.[56] A closer look at the decision, however, reveals an underlying set of ideas about corporations that, as developed further in the case law, would have much greater effect on what governments could and could not do. At the heart of this body of law was the idea that a corporation was a legal person, albeit, as Marshall put it, "an artificial being, invisible, intangible, and existing only in contemplation of law."[57]

Before plunging into this complex of ideas about corporate personhood, it is important to note that Marshall felt it necessary in his decision to treat seriously the defense's objection that his ruling would call into question the more liberal divorce laws that many states had passed in the aftermath of the Revolution. So did Justice Joseph Story in his concurring opinion. One might think such an objection to have been largely rhetorical. That both Marshall and Story did not treat it in this way is an important indication that claims to privacy in the realm of business had effects on conceptions of privacy in the realm of the family and vice versa. Marshall and Story answered the objection by admitting that marriages probably were private contracts that, like corporate charters, were protected by the Constitution. In Story's words, "A man has just as good a right to his wife, as to the property acquired under a marriage contract. He has a legal right to her society and her fortune; and to d[i]vest such right without his default, and

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[56] The debate over the application of the contract clause to corporations had actually begun long before the *Dartmouth* decision, and some states had already begun to add reservation clauses to charters. See Hartz, *Economic Policy and Democratic Thought*, pp. 236-53. On the effects of the decision, see also William P. Wells, "The Dartmouth College Case and Private Corporations," *Report of the Ninth Annual Meeting of the American Bar Association* (Philadelphia: Dando, 1886), pp. 229-56..

[57] *Dartmouth College v. Woodward*, 17 U.S. 518 at 636.

against his will, would be as flagrant a violation of the principles of justice, as the confiscation of his own estate."[58] But, the two justices agreed, divorce laws were very different in purpose from the kind of legislation at the heart of the *Dartmouth College* case. Divorce laws did not alter or violate the terms of the marriage contract. They simply offered the parties to the contract a remedy in situations where one of them had violated its terms. As Marshall put it, such laws enabled "some tribunal, not to impair a marriage contract, but to liberate one of the parties because it has been broken by the other."[59]

Despite the passage of more liberal divorce laws after the Revolution, one consequence of the shrinking role of the state during this period was, as we saw in the last chapter, an increasing reluctance of the courts (and government more generally) to intervene in the internal affairs of families. This change effectively increased the power that husbands/fathers could exercise over dependents within households. Much the same patterns are apparent in the history of the corporation. In particular, the ideas about the legal personhood articulated in the *Dartmouth College* decision would develop through the subsequent case law in ways that augmented the autonomy (and hence the power) of those who occupied positions of authority within enterprises.

At the simplest level, in order to make his case that corporate charters were contracts protected by the Constitution, Marshall had to establish that corporations and human beings occupied fundamentally similar positions in relation to the state. Marshall recognized that "the objects for which a corporation is created are universally such as the government wishes to promote," that indeed the expected public benefits were "in most

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[58] *Dartmouth College v. Woodward*, 17 U.S. 518 at 696.
[59] *Dartmouth College v. Woodward*, 17 U.S. 518 at 628.

cases, the sole consideration of the grant." But he declared that these motives did not make corporations public entities. Although a corporation was created by the legislature, it was "no more a State instrument, than a natural person exercising the same powers would be." If "a natural person, employed by individuals in the education of youth, or for the government of a seminary in which youth is educated, would not become a public officer . . . how is it, that this artificial being, created by law, for the purpose of being employed by the same individuals for the same purposes, should become a part of the civil government of the country?"[60]

In his concurring opinion, Story took a somewhat different tack, but ended up at the same position. What mattered, he asserted, was who founded the corporation and with what funds. If the founders were individuals and the funds came from their own savings, the corporation was private—"as much so, indeed, as if the franchises were vested in a single person."[61] That they were private did not mean that corporations were beyond the reach of the law, any more than private individuals were. But it did mean that the state could not intervene in the internal affairs of corporations on the general grounds that they were public entities that should operate for the public good.[62]

The deeper implications of this assertion of the similarly private character of corporate and human persons became apparent in another part of the decision in which Marshall, considering whether the corporation's trustees had the legal standing needed to bring the case before the court, determined that the corporation, and not the individuals who made it up, was the bearer of rights. Marshall admitted that the trustees who had

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[60] *Dartmouth College v. Woodward*, 17 U.S. 518 at 636-7.

[61] *Dartmouth College v. Woodward*, 17 U.S. 518 at 668-9. On Story's role in the case, see R. Kent Newmyer, "Justice Joseph Story's Doctrine of 'Public and Private Corporations' and the Rise of the American Business Corporation," *DePaul Law Review*, 25 (Summer 1976), pp. 825-41.

[62] See Newmyer, "Justice Joseph Story's Doctrine of 'Public and Private Corporations.'"

initiated the suit had no beneficial interest in the contract themselves. But, he pointed out, neither did any other human being: "The founders of the college, at least those whose contributions were in money, have parted with the property bestowed upon it, and their representatives have no interest in that property. The donors of land are equally without interest . . . . The students are fluctuating, and no individual among our youth has a vested interest in the institution, which can be asserted in a Court of justice." The beneficial interest belonged to the corporation itself. All these other parties were represented by the corporation, which as "the assignee of their rights, stands in their place, and distributes their bounty, as they would themselves have distributed it, had they been immortal." Only the corporation could assert these rights, and it could only assert them by acting through its governing agency, the board of trustees.[63]

As the corporate form was used increasingly for business purposes, this view that the corporation and not its stakeholders was the bearer of rights would prove extraordinarily important. In combination with the hierarchical structure of control built into the corporate form, it would severely limit the ability of the people who made up the firm to protect their interests, as well as the extent to which the state could intervene on their behalf. A good example is the 1847 Massachusetts case of *Smith v. Hurd*, cited frequently in the subsequent case law.[64] The Phoenix Bank had failed in 1842 after lending large sums to its president and other directors. Joseph Smith, a stockholder in the bank, sued the directors for misfeasance and for nonfeasance of their official duty. Council for the defense countered that Smith did not have standing to sue—that only the corporation, not an individual stockholder, "might maintain an action on the facts alleged

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[63] *Dartmouth College v. Woodward*, 17 U.S. 518 at 641-43.
[64] *Smith v. Hurd*, 53 Mass. 371 (1847).

in this declaration." Writing for the state's Supreme Court, Chief Justice Lemuel Shaw accepted this argument. In language reminiscent of Marshall's *Dartmouth* decision, he declared that "there is no legal privity, relation, or immediate connexion, between the holders of shares in a bank, in their individual capacity, on the one side, and the directors of a bank on the other."

> The directors are not the bailees, the factors, agents or trustees of such individual stockholders. The bank is a corporation and body politic, having a separate existence as a distinct person in law, in whom the whole stock and property of the bank are vested, and to whom all agents, debtors, officers and servants are responsible for all contracts, express or implied, made in reference to such capital, and for all torts and injuries diminishing or impairing it. . . . The individual members of the corporation, whether they should all join, or each act severally, have no right or power to intermeddle with the property or concerns of the bank, or call any officer, agent or servant to account, or discharge them from any liability.[65]

Shaw went on to claim that even if all the stockholders joined together, they could not take action, because "they are not the legal owners of the property, and damage done to such property is not an injury to them." Rather the injured party was the corporation, the legal person whose rights were at stake. Thus the appropriate remedy was for the

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[65] *Smith v. Hurd*, 53 Mass. 371 at 384-5. Intriguingly, Shaw did not cite Marshall's earlier *Dartmouth* decision or, for that matter, any other case law in coming to this conclusion. The wording of the opinion suggests that, although the suit was unprecedented, he thought the reasons for finding against the plaintiff were obvious: "[T]hat similar grievances have existed to a great extent, and in numberless instances, where such an action would have presented an obvious and effect remedy, affords strong proof, that in the view of all such suffering parties, and their legal advisers and guides, there was no principle on which such an action can be maintained" (383).

corporation "to obtain redress for injuries done to the common property, by the recovery of damages . . . ."[66]

Shaw admitted that this remedy was "a theoretic one" and that it was "perhaps often inadequate," but he did not offer an alternative.[67] The problem, of course, was that, under what had become the standard rules of corporate governance, shareholders owning a majority of the stock could control the election of corporate directors and officers and thereby set policy for the company. If the majority shareholders were the source of the problem (as they often were), they were unlikely to support any corporate action against themselves, and there was nothing that minority shareholders could do about it. With the exception of stockholders in the relatively few enterprises whose shares commanded a ready market on the exchanges, they could not easily exit by selling their shares. Their investments were essentially sunk, and like wives who, for better or worse, had to accept the dictates of their husbands, they were forced to bow to the will of the majority.[68] Like wives, however, minority shareholders who had no remedy at law to protect themselves against abuse could, at least in principle, turn to equity. In an early and also frequently cited case, *Robinson v. Smith*, New York's Chancellor explicitly extended to business corporations principles that had previously been applied to charitable entities. The Chancellor posited that the directors of a corporation were equivalent to trustees; that the stockholders, having a joint interest in the corporation's property, were "cestui que

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[66] *Smith v. Hurd*, 53 Mass. 371 at 385, 387.

[67] *Smith v. Hurd*, 53 Mass. 371 at 387.

[68] Minority shareholders were different from wives in that the courts were willing in principle, though not always in practice, to enforce agreements in which majority shareholders promised under specified conditions to buy back other stockholders' shares. Minority shareholders who sought a dissolution of a solvent corporation, however, were doomed to disappointment. Indeed, at this point in time, it was not even clear that the majority had a right to wind up the affairs of a solvent corporation without both unanimous approval of the stockholders and specific authorization from the legislature. See Edwin Merrick Dodd, *American Business Corporations until 1860: With Special Reference to Massachusetts* (Cambridge: Harvard University Press, 1954), pp. 139-40, 184-5, 191-2, 361.

trusts"; and that "no injury the stockholders may sustain by a fraudulent breach of trust can, upon the general principles of equity, be suffered to pass without a remedy."[69] Nonetheless, acknowledging that the rights involved were in actuality those of the corporation, not the individual stockholders, he decided the case in favor of the defendant on the grounds that the suit had to be brought in the name of the corporation, the true injured party. The Chancellor recognized that the corporation was unlikely to sue in its own name when it was controlled by the same directors who were perpetrating the fraud, and so he provided the stockholders with a potential solution. Declaring that "this court never permits a wrong to go underdressed merely for the sake of form," he indicated that the stockholders might, after demonstrating that the corporation was so controlled, file a bill in their own names, "making the corporation a party defendant."[70] This "derivative" right of stockholders to sue quickly became an established principle of equity,[71] although the grounds on which shareholders could bring suit remained highly uncertain until the U.S. Supreme Court forcefully declared, in the case of *Dodge v. Woolsey* in 1856, that courts of equity "have a jurisdiction over corporations, at the instance of one or more of their members," and could issue injunctions to restrain the officers and directors of corporations from taking any action in violation of their charters or "to prevent any misapplication of their capitals or profits, which might result in lessening the dividends of stockholders, or the value of their shares" if the action would result in "what is in the law denominated a breach of trust."[72]

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[69] *Robinson v. Smith*, 3 Paige 222 (1832) at 232.

[70] *Robinson v. Smith*, 3 Paige 222 at 233. The court reiterated the point in *Forbes v. Whitlock*, 3 Edw. Ch. 446 (1841).

[71] For a long list of citations, see *Peabody v. Fint*, 88 Mass. 52 (1863).

[72] *Dodge v. Woolsey*, 59 U.S. 331 (1856) at 341. Before this decision, the courts often interpreted the *Robinson v. Smith* precedent narrowly (see, for examples, *Hodges v. New England Screw Co.*, 1 R.I.

In practice, however, this remedy too could be more theoretical than real. Although judges subsequently claimed that "courts of equity [were] swift to protect helpless minorities of stockholders of corporations from the oppression and fraud of majorities,"[73] in fact minority shareholders faced substantial legal hurdles when they pursued this option. In the first place, they had to demonstrate to the satisfaction of the court that "suitable redress is not attainable through the action of the corporation" because "the corporate action is under the control of such parties" as are "charged with the wrong."[74] Second, they also had to show the corporation's refusal to take action was fraudulent—that the directors were not simply pursuing policies at variance with those that minority shareholders thought should be adopted. Because "intelligent and honest men differ upon questions of business policy, . . . a corporation, acting by its directors, or by vote of its members, may properly refuse to bring a suit which one of its stockholders believes should be prosecuted."[75] If the refusal was simply a matter of business judgment, the courts would not be willing to intervene.

This resort to what became known as the business judgment rule is important because it enables us to see how the privatization of the corporation could limit the extent to which even well established principles of law could be enforced inside an enterprise. Take, for example, the rule that contracts tainted by conflicts of interest were voidable. This rule was an absolute one and applied even to contracts that otherwise were completely reasonable, so that, in the words of a Michigan justice, it is "immaterial . . .

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312 [1850]; *Abbott v. Merriam*, 62 Mass. 588 [1851]; *Smith v. Poor*, 40 Me. 415 [1855]; *Peabody v. Fint*, 88 Mass. 52 [1863]).

[73] *Dunphy v. Traveller Newspaper Assoc.*, 146 Mass. 495 (1888) at 496.

[74] *Brewer v. Boston Theatre*, 104 Mass. 378 (1870) at 387.

[75] *Dunphy v. Traveller Newspaper Assoc.*, 146 Mass. 495 at 497-8.

whether there has been any fraud in fact, or any injury to the company."[76] The U.S. Supreme Court emphatically reaffirmed the application of this principle to corporations in 1880 in *Wardell v. Railroad Company*, a case that arose when officers of the Union Pacific Railroad entered into a contract with a coal company that they themselves had organized. Writing for the Court, Justice Field declared:

> Directors of corporations, and all persons who stand in a fiduciary relation to other parties, and are clothed with power to act for them, are subject to this rule; they are not permitted to occupy a position which will conf[l]ict with the interest of parties they represent and are bound to protect. They cannot, as agents or trustees, enter into or authorize contracts on behalf of those for whom they are appointed to act, and then personally participate in the benefits.[77]

One notable aspect of this case is that the original action to void the contract was taken in the name of the corporation, whose directors had not formally approved the contract (the agreement had been drawn up and executed by the road's executive committee and was never submitted to the board).[78] Hence the justices did not have to consider what the outcome of their decision would have been if the suit had been brought by a minority shareholder. But the cases Field cited in his decision suggest the outcome might have been different,[79] and, indeed, the next year the Supreme Court qualified

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[76] *Flint & Pere Marquette Railway Company v. Dewey*, 14 Mich. 477 (1866) at 487-88. This opinion was quoted approvingly in *European & North American Railway Company v. Poor*, 59 Me. 277 (1871), and both cases were cited as important precedents by the U.S. Supreme Court in *Wardell v. Railroad Company*, 103 U.S. 651 (1880).

[77] *Wardell v. Railroad Company*, 103 U.S. 651 at 658.

[78] The case before the Supreme Court was brought by the general manager of the coal company who was seeking damages from the railroad for abrogating the contract.

[79] For example, *Flint and Pere Marquette Railway v. Dewey* was brought by a corporation whose directors had ratified a contract proposed by the company's president without knowing that the president stood to profit from the arrangement. In its decision, the court raised the possibility that the contract might

*Dodge v. Woolsey* in ways that support this conclusion. Seeking to stem the flow of stockholders' derivative suits into the courts, Justice Miller enumerated the circumstances that would "enable a stockholder in a corporation to sustain in a court of equity in his own name, a suit founded on a right of action existing in the corporation itself . . . ." What is striking about this list is the use of adjectival and adverbial phrases to limit the scope for stockholders' actions. Thus contracts involving self-dealing did not justify a suit per se, but only "where the board of directors, or a majority of them, are acting for their own interest, *in a manner destructive* of the corporation itself, or of the rights of the other shareholders" or where "such a *fraudulent* transaction . . . will result in *serious* injury to the corporation, or to the interests of the other shareholders" (our emphasis).[80]

Certainly, state courts had already been applying what was in effect a reasonableness standard to cases involving conflicts of interest, and Miller cited a number of these decisions in his opinion. Where there was evidence of egregious fraud, the courts were willing to intervene on behalf of minority shareholders.[81] But the courts were also willing to validate self-dealing contracts that they thought were reasonable. Moreover, there is evidence of a tendency to give majority shareholders the benefit of the doubt on the grounds that they were unlikely deliberately to take actions that eroded the value of their own stock. Thus in a frequently cited Rhode Island case, *Hodges v. New England Screw Company*, the state Supreme Court refused to invalidate the sale of assets by one corporation to another that was controlled by essentially the same people. The court found the plan "judicious, and for the interest of the Screw Company," declaring

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possibly be construed as binding if it had been ratified by the board "after a full explanation and knowledge of their interest and of all the circumstances." 14 Mich. 477 at 487.

[80] *Hawes v. Oakland*, 104 U.S. 450 (1881) at 460.

[81] A good example that was frequently cited in the subsequent case law is *Brewer v. Boston Theatre,* 104 Mass. 378.

that "we are the more confirmed in this conclusion, when we recollect that the directors owned a large majority of the capital stock of the Screw Company, and could not reduce the plaintiff's stock, without, at the same time, and in the same proportion, reducing the value of their own."[82] Similarly, in *Faud v. Yates*, the Illinois Supreme Court found nothing wrong with a partnership agreement entered into by three stockholders of the Chicago Carbon and Coal Company. Collectively the three held a majority of the corporation's stock, and their agreement committed them to cast their votes in a block so that they could control the election of the board of directors. The partnership also leased the company's coal lands and operated the mines. In the view of the court, "The record wholly fails to disclose any injury to the other shareholders—any waste of the property," and therefore there was no reason to invalidate the agreement. But the court went even further and asserted that there was no conflict of interest involved because the incentives of the partners and of other shareholders were aligned. The partners, according to the court "had a double interest to protect,—their interests as shareholders, and their interests as lessees. . . . As shrewd, skillful and prudent men, they were desirous of increasing the investment, and making the stock more valuable. Their interests were identical with the interests of the minority shareholders."[83]

The justice who wrote the opinion of the Michigan Supreme Court in *Flint and Pere Marquette Railway v. Dewey* had warned that if self-dealing contracts "were held

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[82] *Hodges v. New England Screw Co.*, 1 R.I. 312 (1850) at 343-44. This decision was in part justified by the fact that the plaintiff, though he had objected initially to the arrangement, ultimately acquiesced in the transaction and disputed with the majority stockholders over the distribution of shares in the second corporation. See also the rehearing of the case, 3 R.I. 9 (1853).

[83] One circumstance that made it easier for the court to come to this conclusion was that the plaintiff was one of the three partners (they had had a falling out) and was not joined in the suit by any of the other minority shareholders. But the court's assertion that self-dealing does not necessarily involve conflict of interest is striking nonetheless. *Faulds v. Yates*, 57 Ill. 416 (1870). The quotations are from pp. 420-21.

valid until shown to be fraudulent and corrupt, the result, as a general rule, would be that they must be enforced in spite of fraud and corruption."[84] That prophesy was borne out by the late nineteenth century. The train of logic that followed, on the one hand, from the idea that the corporation, though the creation of the state, was a private entity and, on the other, from the assumption that the corporation, and not its shareholders, was the bearer of rights, had the consequence of reinforcing hierarchical structures of control within corporate enterprises.[85] Minority shareholders thus found themselves in a position that was in many ways analogous to that of dependents in families. Just as the courts preferred not to interfere with "family government" by "raising the curtain and exposing to public curiosity and criticism the nursery and the bed chamber,"[86] they were reluctant "to pierce the veil" of limited liability and interfere in the internal affairs of corporate enterprises. Moreover, just as the result in cases of spousal abuse was a presumption in favor of the husband, the bias in cases of minority oppression was in favor of the majority. Although minority shareholders, like wives, might obtain redress from the most egregious instances of abuse, there was a large gray area in which they were likely to lose any effort to enlist the powers of government on their behalf.[87]

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[84] *Flint & Pere Marquette Railway Company v. Dewey*, 14 Mich. 477 at 488.

[85] The shift away from an absolute prohibition against self-dealing by corporate officers was noted with puzzlement by Harold Marsh, Jr. ("Are Directors Trustees?" Conflict of Interest and Corporate Morality," *Business Lawyer*, 22 [Nov. 1966], pp. 35-76), who asserted, "One searches in vain in the decided cases for a reasoned defense of this change in legal philosophy, or for the slightest attempt to refute the powerful arguments which had been made in support of the previous rule" (p. 40). The mystery largely disappears, however, when the cases are viewed in terms of the legal history of stockholders' derivative suits.

[86] The words are those of Justice Edwin G. Read in *State v. A. B. Rhodes*, 61 N.C. 453 (1868), quoted in Laura F. Edwards, *Gendered Strife and Confusion: The Political Culture of Reconstruction* (Urbana: University of Illinois Press, 1997), p. 29. See also Reva B. Siegel, "'The Rule of Love': Wife Beating as Prerogative and Privacy," *Yale Law Journal*, 105 (June 1996), pp. 2117-207.

[87] I. Maurice Wormser wrote in 1912 that the courts were willing to pierce the corporate veil "[w]hen the conception of corporate entity is employed to defraud creditors, to evade an existing obligation, to circumvent a statute, to achieve or perpetuate monopoly, or to protect knavery or crime," but he did not mention any willingness to pierce the veil to protect minority shareholders. See "Piercing the

Veil of Corporate Entity," *Columbia Law Review*, 12 (June 1912), pp. 496-518 (the quote is from p. 517). Despite all these reasons for piercing, Robert B. Thompson found relatively few cases before the 1960s. See "Piercing the Corporate Veil: An Empirical Study," *Cornell Law Review*, 76 (July 1991), pp. 1048-52.