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NONVOTING SHARES—IN MISSOURI

WILLIAM H. PITTMAN*

...what sort of reason is that, in which the determination precedes the discussion; in which one set of men deliberate and another decide ...? Parliament is not a congress of ambassadors from different and hostile interests, which interests each must maintain, as an agent and advocate, against other agents and advocates; but parliament is a deliberative assembly of one nation, with one interest, that of the whole; where not local purposes, not local prejudices ought to guide, but the general good . . .

—Edmund Burke to the voters at Bristol.

CAUSE OF THE TROUBLE

In the early part of the 19th century there came on the continental political scene a transient distrust of the prevailing theory of representation, of which Burke's is the classic statement. There is, it must be allowed, a sort of insufferable condescendence in subordinating the democratic ideal that the will of the people should prevail, to the notion that the true representative performs his function by doing that which he, with uncommon insight, knows the represented would want done if they possessed his unbiased opinion, his mature judgment, his enlightened conscience and his rich experience.

It was, moreover, an age of revolution, a time when self-evident truths press uncompromisingly for acceptance over earlier ones, enfeebled, perhaps, if not spent. True representation, it was at last perceived, exists only if the representative body or assembly reflects with comparative mathematical accuracy the various divisions and factions of the represented electorate. Thereupon minority or proportional representation, by one elective system or another, came to be regarded as an essential ingredient of popular government. Democracy and democratic institutions,

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1. Burke again, to the French (from across the channel): "Your constitution has too much jealousy to have much sense in it. You consider the breach of trust in the representative so principally, that you do not at all regard the question of his fitness to execute it."

(117)
it was believed, could be made to function—despite the lack of a tradition therefor—by means of a mechanical electoral device designed to secure in the representative assembly a faithful reflection of the varieties of minorities, as well as of the majority, in the electorate. It was a theory that made a strong appeal to idealistic reformers, and on more practical grounds, to the numerous splinter parties representing opposing and hostile interests—social, economic, religious and political. In the reformist decades following the Civil War, proportional representation made converts in this country, especially in the states touched by the heavy immigration from northern Europe.

In Pennsylvania and New York agitation for government reform included proposals for minority or proportional representation made respectable by the eminent English idealist and political philosopher, John Stuart Mills. Only Illinois, however, was ready to accept the principle.2 The 1870 convention to revise the Illinois constitution provided for the election of three members of the lower house of the general assembly from each senatorial district, and that in voting for the members each voter should have the right to distribute his three votes among the candidates or cumulate them on one or several as he might see fit. Thus cumulative voting, to achieve proportional representation in government, came to Illinois—its author, Joseph Medill, newspaperman and reformer, ardent advocate of Mill's theory of minority representation, and chairman of the convention's committee on electoral and representative reform.3

2. "In January of 1870, the London Times, while watching the Illinois proceedings and noting the progress of the movement for minority representation in government, enthusiastically proclaimed that 'what Illinois thinks today the Union will think tomorrow.' That prophesy was doomed to complete failure. No state of the United States, other than Illinois, has seen fit to adopt cumulative voting or any other device designed to produce minority representation in the election of its legislative bodies." Campbell, The Origin and Growth of Cumulative Voting for Directors, 10 Bus. Law. 3, 6 (April 1955).

3. How has it worked? "It is a system that has worked in Illinois without serious complaint." Campbell, supra note 2, at 5. However, it was not always so. A half century ago a less charitable appraisal was coupled with a prayer that it be brought to condign obliteration. "Let us hope and pray that the legislature and the people will abolish the cumulative voting provision of the constitution in the near future. The good resulting from it has been small, the evils many and glaring. It has filled our legislatures with politicians of the poorer sort, with results we know and blush for. It has confused and muddled our courts. May we soon see the end of it." Comment by L. M. G., Recent Cases, 5 ILL. L. REV. 502, 508 (1911). In 1926, leading proponents of proportional representation, referring to the defeat of attempts between 1908 and 1914 to introduce the system in Oregon, wrote: "The use of cumulative voting in Illinois since 1870, for example, has probably not helped the cause of true representation." Hoag & Hallett, Proportional Representation 189 (1926). For a recent study see Blair, Cumulative Voting, 45 Ill. Studies in the Social Sciences (1960).
With childlike faith in the illimitable efficacy of an innovation derived from an alien concept of political representation, the Illinois convention vacuously adopted a provision applying the same method of voting to the selection of directors by shareholders of private business corporations.

Of this extraordinary constitutional adventure several things belatedly may be said. It is doubtful whether there was at the time either a demand or a demonstrated need for minority representation on boards of directors of Illinois corporations, although rigorous policing in corporate-economy states may well have been indicated. The casual and uncritical way in which it came into the constitution, simply as a "companion piece" to a superficially related provision for minority representation in government, an issue appropriate to a constitutional convention and naturally absorbing the attention and faculties of its members, could only beget a sort of constitutional nullius filius. Furthermore, one may question the competence of a constitutional convention to act in matters of corporation law without risk of harm to the reasonable facilities for doing business carefully worked out by legislative draftsmen, bar association committees and the courts. In any event, it is probably a fallacy to attribute a representative character to directors of a corporation. In its modern political sense, the term "representative" is properly applied to a member of an elected body or other official deriving his authority from the constituency by which he is chosen. It is the object of representative government to

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4. Or is it in the true American tradition? "Cumulative voting is so obviously in accord with our basic political philosophy of group representation and the party system that it is difficult to understand the legislature's repeated rejection of it, except in terms of a response to the pressure of corporate management interests." Young, The Case for Cumulative Voting, 1950 Wis. L. Rev. 49.

5. "The committee reports, the debates and proceedings of the convention, and the newspaper articles and editorials of the time, all indicate that the minority representation principle was advanced and attacked almost entirely as it related to the House of Representatives. The provisions on private corporation law drew little attention. But Joseph Medill, the chief exponent of minority representation, had likewise been influential with the Committee on Miscellaneous Corporations, and its report to the convention recommended cumulative voting by shareholders in the election of directors. A brief report submitted to the convention said, with no elaboration: and we have provided for the protection of the minority of stockholders of private corporations in the election of directors. . . . In this somewhat casual fashion, and largely as a companion piece to minority representation in government, the principle of cumulative voting for directors was first introduced to the law." Campbell, supra note 2, at 5-6.

6. There were, indeed, iniquities and irresponsible corporate practices. See Williams, Cumulative Voting for Directors ch. 2 (1951). But probably not in Illinois, then an agricultural state. Where they existed other correctional methods, not cumulative voting, probably proved to be no less reliable.
give by representation expression to the will of those who are sovereign. In the management of the business and property of a corporation, the shareholders are not sovereign. The authority of the board of directors is supreme and original; it is not derived from the shareholders by whom the directors are elected. 7 When a shareholder votes for a director, he simply is saying: You are my choice to do that for the corporation which only directors may legally do, and which I, singly or in concert with other shareholders, am not permitted to do. An inner voice, not the shareholder's, enjoins: Do it well, always with a view to the interest of the corporation, whether or not it reflects the attitudes, preferences, viewpoints and desires of the whole body of shareholders, and you will have discharged in full your duty as director. Do it ill, and you will be answerable to the corporation, whether or not it is done in a manner to please the shareholders by whom you were elected.

The Illinois provision as adopted in 1870 reads: “The General Assembly shall provide by law that in all elections for directors or managers of incorporated companies, every stockholder shall have the right to vote, in person or by proxy for the number of shares of stock owned by him, for as many persons as there are directors and managers to be elected, or to cumulate said shares, and give one candidate as many votes as the number of directors, multiplied by the number of his shares of stock, shall equal, or to distribute them on the same principle among as many candidates as he shall think fit; and such directors or managers shall not be elected in any other manner.” 8

7. “But in corporate bodies the powers of the board of directors are, in a very important sense, original and undelegated. The stockholders do not confer, nor can they revoke those powers. They are derivative only in the sense of being received from the State in the act of incorporation. The directors convened as a board are the primary possessors of all the powers which the charter confers . . . .” Hoyt v. Thompson's Executor, 19 N.Y. 207, 216 (1859). No less austere, perhaps, is Professor Chayes' exposition of the shareholder—director posture in the corporate order. “Shareholder democracy, so-called, is misconceived because the shareholders are not the governed of the corporation whose consent must be sought. If they are, it is only in the most limited sense. Their interests are protected if financial information is made available, fraud and over-reaching are prevented, and a market is maintained in which their shares may be sold. A priori, there is no reason for them to have any voice, direct or representational, in the catalogue of corporate decisions . . . on prices, wages, and investment. They are no more affected than nonshareholding neighbors by these decisions. In fine, they deserve the voiceless position in which the modern development left them.” The Modern Corporation and the Rule of Law, in The Corporation in Modern Society ch. 2, at 40 (Mason ed. 1960). See also BALLANTINE, CORPORATIONS 119 (rev. ed. 1946).

8. ILL. CONST. art. XI, § 3 (1870).
It is a clumsy bit of fundamental law, but with all its inelegance the "idea" spread to other states. Perhaps it is more accurate to say that simply finding the provision in the Illinois constitution was considered by states, then of little consequence corporationwise, reason enough to copy it. At any rate, virtually unchanged it made its ungainly way to West Virginia (1872), Nebraska (1875), Missouri (1875), California (1879), Idaho and Montana (1891), Mississippi (1890), and South Carolina (1895).

While sentiment for proportional representation was perhaps equally strong in the Pennsylvania constitutional convention of 1873, the principle was accepted only with respect to the election of corporate directors. The provision adopted, prescribing cumulative voting in their selection, was confined to a single subject—cumulative voting. It allowed "each member or shareholder to cast the whole number of his votes," to be determined outside the constitution, "for one candidate or more candidates, as he may prefer." This simple and direct provision became the example for the cumulative voting requirements in the constitutions of North and South Dakota (1889), Kentucky (1891), and Arizona (1910).

**The Principle That Each Share Has One Vote**

1. **Decisions**

In contrast, the Illinois type of provision does two distinct things. First, it fixes the precise number of votes each shareholder, by reason of his ownership of shares, has a right to cast in all elections for directors.

**Illinois** (art. XI, § 3)

"The General Assembly shall provide by law that in all elections for directors and managers of incorporated companies, every stockholder shall have the right to vote, in person or by proxy, for the number of shares of stock owned by him, for as many persons as there are directors or managers to be elected . . . ."

**Missouri** (art. XII, § 6)

"In all elections for directors or managers of any corporation, each shareholder shall have the right to cast as many votes in the aggregate as shall equal the number of shares held by him, multiplied by the number of directors or managers to be elected . . . ."

10. Mo. Const. art. XII, § 6 (1875).
Second, it establishes the right, in casting the number of votes to which a shareholder is constitutionally entitled, of cumulative voting for directors, and it invalidates any election that does not take into account these two shareholder rights.

**Illinois**

"... or to cumulate said shares, and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock shall equal, or to distribute them on the same principle among as many candidates as he may think fit; and such directors and managers shall not be elected in any other manner."

**Missouri**

"... and may cast the whole number of votes, either in person or by proxy for one candidate, or distribute such votes among two or more candidates; and such managers or directors shall not be elected in any other manner... ."

So read, the dualistic purpose of the provision seems fairly obvious, and, with one important exception, the decisions have recognized the plurality of the language used to effect the purpose. In *Durkee v. People ex rel. Askren*, a by-law which authorized bondholders to vote for directors was held invalid on the ground that it was in conflict with article XI, section 3, of the constitution and the statute enacted pursuant thereto. By these provisions, the Illinois court said, the power to elect directors was given to the shareholders, and the exercise of the power regulated by a "prohibition," i.e., that such directors should not be elected in any other manner. It recognized that their primary object may have been to protect minority shareholders by giving them the right to cumulate votes, but it found that even that purpose would be defeated by allowing non-shareholders to vote.

In a more direct manner, the court in a recent West Virginia case,* construing the 1872 provision, rejected the contention that it was primarily a guarantee of the right of the stockholders to cumulate their votes:

There was nothing new in the provision [1872] that every stockholder should have the right to cast one vote for every share of stock which he held, since that had been provided generally by the Code of 1868, but, in view of the varied provisions upon this subject prior to that time, the members of the constitutional

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convention saw fit to secure that right to all shareholders by inserting such a provision in the organic law of this State, but applicable only in elections of directors or managers.

But that part of the provision giving the right to cumulate votes was new, and the two distinctly different shareholder rights were linked and followed by "the emphatic provision 'and such directors or managers shall not be elected in any other manner.'"

A Nebraska case recently decided that an agreement among shareholders to vote their shares for certain directors was not invalidated by article XII, section 5, of the Nebraska constitution (taken unchanged from the Illinois constitution), so long as the voting conformed to the manner prescribed by the constitution. There was momentary puzzlement when the court made the dubious observation:

...It is clear to us that the purpose of the constitutional provision was to provide for cumulative voting in the election of directors ... In order to do this it was necessary that the law state the number of votes to which each stockholder was entitled ...

16. Id. at 463, 96 S.E.2d at 178-179. How the offensive strategy, planned twenty-five years before to ward off the decision, was brought to naught is a matter of no little interest. Immediately upon the adoption of the 1872 constitution and its article XI, section 4, which was copied from the Illinois constitution "even to the extent of inserting the quotation marks," the legislature authorized corporations to issue preferred shares and impose such restrictions as might seem advisable, but did not expressly authorize a voting restriction. Thus, by contemporaneous legislative and subsequent administrative interpretation, nonvoting shares could lay some claim to validity. In 1901, the legislature expressly authorized the chartering of corporations with authority to issue nonvoting preferred shares, thereby giving sanction to a practice that had prevailed from 1872 to 1901. In 1931, the commission to revise the laws of the state, bravely trusting that the court would follow the indulgent Swanger case rather than the "well-reasoned" cases of People ex rel. Wateska Telephone Co. v. Emmerson (Ill.) and Brooks v. State ex rel. Richards (Del.), recommended merely appending a note to the 1901 act "to buttress such decision with an express legislative interpretation of the provision," recognizing all the while "the weight of judicial authority to be against the constitutionality of the act of 1901," which was to be carried into the revision. However, the recommendation was not followed; instead, with sovereign boldness the legislature enacted that a corporation might create shares "with such voting powers, full or limited, or without voting powers," as might be stated in the charter. And that, in West Virginia, raised all manner of hob. "If the legislature had set out with the sole object of disregarding all constitutional obligations assumed by its members and defying the provisions of the section of the constitution ... language more apt for the purpose than that adopted could not have been found." See Sperry, The Power of a West Virginia Corporation to Deprive Classes of Its Stock of the Right to Vote for Directors or Managers, 40 W. Va. L. Q. 97 (1933).


18. Id. at 873, 62 N.W.2d at 294.
It overlooked the constitutional provisions in Pennsylvania, North and South Dakota, Kentucky and Arizona, making cumulative voting mandatory but allowing the number of votes to which each stockholder is entitled to be determined elsewhere. But the court soon righted itself by declaring that "the latter prohibition [such directors or managers shall not be elected in any other manner], as we view it, operates to prevent a corporation by its articles of incorporation, by-laws, or any act of its directors or stockholders from depriving a stockholder of the right to vote his stock in the manner specified in the Constitution and statute."19

In *People ex rel. Watseka Telephone Co. v. Emmerson*20 it was urged that by using the word "or" to introduce the cumulative voting clause of the provision, it was intended merely to provide alternative methods of voting, and that to give an "and" construction to "or" would defeat the single purpose of the constitutional convention. The court held, however, that "in construing the terms of this section of the constitution, giving to the language its ordinary and natural meaning, as we understand it, in which it was used by the members of the convention and by the people who voted on the constitution, we can reach no other conclusion than that it should not be construed with the word "or" as intended chiefly and primarily to allow cumulative voting . . . but just as strongly as intended to provide that no stockholder should be deprived of the right to vote for directors as therein specified."21

In the Missouri version, the annoying "or"—"and" problem does not arise. The clause relating to the cumulative method of casting the number of votes to which a shareholder is entitled was from the first introduced by the word "and."

It is clear that this type of constitutional provision does not invalidate nonvoting shares.22 On the contrary, it tacitly acknowledges their existence and legitimacy. However, when it comes to electing directors, its effect is to nullify whatever voting attribute is even by general agree-

20. 302 Ill. 300, 134 N.E. 707 (1922).
22. Some statutes go beyond the requirements of the constitutions by enacting that "each outstanding share, regardless of class, shall be entitled to one vote on each matter submitted to a vote at a meeting of shareholders." See *ILL. BUS. CORP. ACT* 1934, § 28; *W. Va. Acts* 1872-73, ch. 181, cited in *State ex rel. Dewey Portland Cement Co. v. O'Brien*, *supra* note 15.
For that purpose a share is a voting share from its creation, made so in a manner to defy change in that respect even with the full assent of the shareholders. It is only in this sense that the provision invalidates nonvoting shares, and it is in this sense that the term is used here.

Whether or not the type of constitutional provision under consideration invalidates nonvoting shares is a question usually raised in connection with preferred shares made nonvoting by the asserted authority of the common law or a statute purporting to permit the creation of nonvoting preferred shares.

People ex rel. Watseka Telephone Co. v. Emmerson was such a case. It was argued in support of the validity of such shares that as the common law recognized nonvoting preferred shares if authorized by articles

23. "The power to vote for directors can be exercised only by stockholders in person or by proxy, and they cannot be deprived or deprive themselves of this power . . . . A stockholder may refuse to exercise his right to vote and participate in stockholders' meetings but he cannot deprive himself of the power to do so." Luthy v. Ream, 270 Ill. 170, 178, 110 N.E. 373, 375 (1915).

24. " . . . the language of the provision alone is sufficiently clear and unambiguous to indicate that the purpose of the convention was to change the control of stock corporations from individual control to stock control, to do which it directly gave to a share of stock the quality of a vote. In doing this it made no discrimination between classes of stock which subsequent laws might authorize, but provided generally that the holder of a share of stock was the holder of a vote which he was entitled to cast. Being the holder of an interest in property that conferred upon him the right pro tanto to control and regulate that property, the holder of a share of stock was then possessed of a personal privilege or benefit which he might use or reject as he chose . . . and it is in this sense that a person may waive the provision of a law intended for his benefit. Being the owner of a share of stock with a voting power given it by the Constitution, he was by the possession of the share possessed of a privilege, but he could not by any act of his change the character of the share that gave him the privilege or rob it of the voting power conferred upon it by the Constitution, so that in his hands or in the hands of any subsequent holder it would not carry the power conferred upon it at its birth by the law that authorized its existence." Brooks v. State ex rel. Richards, 26 Del. 1, 79 Atl. 790, 801 (1911) (Del. Const. art. 9, § 6 (1897), was essentially the same as the first clause of Illinois' provision: "In all elections for directors or managers of stock corporations, each shareholder shall be entitled to one vote for each share of stock he may hold." At the time of incorporation (1901), 25 Del. Laws, ch. 167, § 13, provided that "every corporation shall have power to create two or more kinds of stock of such classes, with such designations, preferences and voting powers or restrictions or qualifications thereof, as shall be stated and expressed in the certificate of incorporation," and section 17, that "unless otherwise provided in the charter, certificate or by-laws of the corporation, each stockholder . . . shall at every election be entitled to one vote for each share of the capital stock held by him . . . ." Pursuant to these provisions, the incorporators proceeded to incorporate their company otherwise, and by charter and by-laws deprived its preferred stock of any voting power and vested the whole voting power in its common stock. Judgment of ouster of those claiming election as directors by the vote of the preferred stock was reversed and remanded.)

25. Supra note 20.
of incorporation, the constitution, properly understood and construed in the light of the common law and on the assumption that its rules remained in force, should do no less. The Illinois court recognized and accepted the principle of construction, taken from Cooley's *Constitutional Limitations*, that "in judging what [the constitution] means, we are to keep in mind that it is not the beginning of law for the State, but that it assumes the existence of a well understood system which is still to remain in force and be administered but under such limitations and restrictions as the instrument imposes . . ." It found, however, a well-understood system, a strong public policy manifested in legislative enactment, plainly opposed to nonvoting shares. "The public policy of this State to secure to each of the stockholders of a corporation the right to vote for directors or managers we think had been plainly shown for many years before the constitution of 1870 was passed. In 1824 the legislature passed an act to authorize the incorporation of manufacturing companies, and it was stated (Laws of 1824, p. 14) in the General Incorporation Law that in the election of trustees by the stockholders of manufacturing companies 'each share shall entitle its possessor to one vote.' In 1849 the legislature provided in the general law for the incorporation of companies organized to engage in any kind of manufacturing, agricultural, mining or mechanical business, that 'each stockholder shall be entitled to as many votes as he owns shares of stock in said company, and the persons receiving the greatest number of votes shall be trustees.' (Laws of 1849, p. 87). See to the same effect, Laws of 1857, pp. 110, 112."

2. Legislative History and Policy

Quickened by that rule of construction, let us attend to the almost identical constitutional provision in Missouri, article XII, section 6. What was the state of the law in Missouri before and at the time of the adoption of the constitution in 1875? What was the then existing "well-understood system" or public policy with regard to nonvoting shares? In Missouri, too, it is recognized that "the very highest policy of a state

26. COOLEY, CONSTITUTIONAL LIMITATIONS (5th ed. 1883).
27. 302 Ill. at 309, 134 N.E. at 711.
28. Id. at 310-311; 134 N.E. at 711.
29. Lifted for its style from the opinion by Lamm, J., in State ex rel. Bernero v. McQuillin, 246 Mo. 517, 535, 52 S.W. 347, 352 (1912).
is its statutory law, and if there is legislation on the subject the public policy of the state must be derived from such legislation.30

"A corporation is a creature existing not by contract, but in this country, is created or authorized by statute; and its rights, and even modes of action, may be and generally are, defined and marked out by statute; and when they are, they cannot be changed, even by the contracts of the corporators."31 This probably is an acceptable statement of the traditional American view of corporate dependence upon legislation. "A corporation can be created by or under legislative enactment, and by that act alone."32

In the early nineteenth century, corporations were created exclusively by special or private acts of state legislatures.33 The special act creating a particular corporation either determined all matters relating to voting and elections, or authorized the corporation to make suitable by-laws;34 otherwise the common law controlled in these respects.

At common law, each shareholder of a business corporation had but one vote, to be cast by him in person, irrespective of the number of shares held by him.35 This was the rule with respect to corporations cre-

31. Perkins, J., in Ohio Ins. Co. v. Nunnemacher, 15 Ind. 294, 295 (1860). Mark how different it is with the British, where the constitution of the business corporation is regarded as principally a matter of contract. Corporateness is there achieved by the comparatively simple process of registration; limited liability, by the expedient of having the word "limited" in the name. "Hence the modern English business corporation has evolved from the unincorporated partnership, based on mutual agreement, rather than from the corporation, based on a grant from the state, and owes more to partnership principles than to rules based on corporate personality." Gower, Some Contrasts Between British and American Corporation Law, 69 Harvard L. Rev. 1369, 1371-72 (1956).
32. COOK, CORPORATIONS § 1, at 3 (8th ed. 1923).
33. "But in this State, in 1839, when there was no general statute on the subject of corporations as there is now, we do not very well see how a private corporation could be called into existence except by special act of the legislature." Douthitt v. Stinson, 63 Mo. 268, 276 (1876).
34. An act to incorporate the Callaway Mining & Manufacturing Company provided: "That said company hereby incorporated, may appoint any one or more of it members, or other person or persons, to manage, control and direct the business and operations of said company, according to the by-laws, rules and regulations of said company." Mo. Laws 1846, at 151, § 2. The act incorporating the Hannibal & St. Joseph's Rail Road Company gave authority "also to ordain, establish and put into execution such by-laws, ordinances and regulations as shall appear necessary and convenient for the government of said company, not being contrary nor repugnant to the constitution and laws of the United States or of the State of Missouri . . . ." Mo. Laws 1846, at 156, § 1.
ated, as only they could be created in this country, by special or private legislative enactment. Any change, any departure from the common law rule, depended upon legislative authorization in the act of incorporation, i.e., in the charter granted by special act of the legislature. In the absence of a charter provision, that is to say, a statutory provision, giving or authorizing a different voice in the management of corporation affairs, each member had but one vote.\(^8\)

The earliest deviation from the view that members, not shares, were the significant units of which a corporation was composed came in the form of a restriction on rather than an enlargement of the right to vote. A member was given one vote only if he held a sizeable block of shares. Lesser shareholders, although members, could qualify to vote only by pooling their shares.\(^7\) But the demand for voting rights in some larger proportion to shareholding was insistent. Even in territorial days in Missouri, the share was coming to be considered the voting unit.

Probably the first act of incorporation by the legislature of Missouri Territory was one creating the Bank of St. Louis in 1813. It made no change in the common law save as to the rule requiring that the vote be cast in person. It provided for thirteen directors to be elected by stockholders "as shall attend for the purpose either in person or by proxy, which proxies shall always be stockholders; and all elections shall be by ballot, and the thirteen persons who shall have the greatest number of votes . . . shall be directors . . . and the said directors chosen at such election, as soon as may be thereafter, shall proceed in like manner to elect by ballot one of their members as president . . . ."\(^38\)

Four years later, however, an act to incorporate the stockholders of the Bank of Missouri made a decided change in both respects. It provided that "every stock-holder . . . shall be entitled to vote at all elections to be holden by the stockholders in pursuance of the act of incorporation, and shall have as many votes in proportion to the stock which he may hold, as follows, for one share and not exceeding four shares, one vote each; for every two shares above four and not exceeding twenty, one vote; for every four shares above twenty and not exceeding forty, one vote; for every six shares above forty and not exceeding one hundred, one vote; but no person . . . shall be entitled to more than fifty votes . . . ."

\(^{36}\) Id. at 157.
\(^{37}\) Williston, supra note 35.
\(^{38}\) Mo. Terr. Laws 1813, at 68.
All stockholders living in the county of St. Louis shall vote in the choice of directors by ballot, in person; . . . living out of said county may vote in person, by ballot or by a written ballot by him or her subscribed . . . .”

Incorporation acts were infrequent before 1830. Thereafter they became increasingly numerous. Occasionally, and as late as 1860, special incorporation acts contained voting provisions not unlike those found in the acts incorporating the Bank of St. Louis and the Bank of Missouri. But far more common, after 1830, was the provision found in the act incorporating Insurance Company of St. Louis, which called for the election of directors “by ballot, by a plurality of the votes of the stockholders present, allowing one vote for every share; and stockholders not present may vote by proxy, made in writing . . . .” And a phrase often repeated in subsequent acts of incorporation provided that in case no election was made on the appointed date, “it shall and may be lawful on any other day, to hold and make an election of directors in such manner as shall be regulated by the bye-laws or ordinances of the company.” Almost in a manner to suggest a settled pattern, special acts of incorporation, when dealing with the matter of voting in elections for directors, provided for one vote for each share, to be cast in person or by proxy in writing. When in the act of incorporation no heed was given to the manner of voting, as sometimes happened, the unit of voting presumably remained as at common law, membership, not the share.

39. Mo. Terr. Laws 1816-17, at 99. An act in 1826 to incorporate the Cape Girardeau Mill Company closely followed this voting and proxy arrangement, but gave authority to alter the ratio of voting if the capital stock should be increased by a specified amount. Mo. Laws 1826, ch. 3, at 10, § 5. The act to incorporate the Boonslick Manufacturing Company in 1831 provided: “Every stockholder shall be entitled to vote at all elections to be held by the said company, and shall be entitled to one vote for each share of stock he may hold not [to] exceed five.” Mo. Laws 1830, ch. 9, at 14, § 5. The same voting arrangement was made in the act to incorporate the Lexington Steam Saw Mill Company in 1830. Mo. Laws 1830, ch. 41, at 52, § 5.

40. See note 38 supra. See special acts of incorporation: providing for a president and five directors “who shall be elected annually, at a meeting of stockholders . . . .” Mo. Laws 1842, at 227; declaring that at elections “no stockholder shall have more than one vote,” Mo. Laws 1842, at 225; giving one vote for each share at elections,” provided that the number of votes cast by any one stockholder, may be limited to such number as the company may determine,” Mo. Laws 1848, at 168, § 6; allowing the board of trustees to determine “the manner of voting and the number of votes to which each stockholder shall be entitled . . . .” Mo. Laws 1848, at 278, § 4.

41. See note 39 supra. See Mo. Laws 1856, at 119 and 125, § 6; Mo. Laws 1858, at 400, § 6; Mo. Laws 1859-60, at 158, § 4; Mo. Laws 1861, at 140, § 11.

42. Mo. Laws 1830, at 60, § 6.

43. Williston, supra note 35. But Hanson v. Mathiason, 122 Mo. App. 437, 99 S.W. 502 (1907), with good sense and unfettered by a constitutional strait-jacket, changed the common law rule to base voting power (except in the election...
In 1849, the first general incorporation act was passed, authorizing but not requiring the organization of corporations thereunder. It was applicable only to corporations formed for manufacturing, mining, mechanical or chemical purposes. It decreed that the election of directors of corporations created pursuant thereto "shall be made by such of the stockholders as shall attend for that purpose either in person or by proxy," and that for that purpose "each stockholder shall be entitled to as many votes as he owns shares of stock in the said company . . . ."44 Despite a general law, incorporation acts of a private nature continued to be enacted, and in nearly all, a like provision with respect to a share's voting power was included. In the 1849 and 1850 session laws, for example, of thirty-seven and thirty-eight private acts, respectively, incorporating stock companies, twenty-nine and thirty-two respectively, contained such conditions pertaining to the election of directors as:

"every stockholder shall have one vote for each share held by him," or

"each stockholder shall be entitled to cast one vote for each share of stock he may hold," or

"each stockholder shall be entitled to as many votes as he shall have shares in the company," or

"allowing one vote for each share."

It is fair to say that by 1850 one vote for each share in elections for directors had become the accepted and almost uniformly followed rule in acts incorporating railway, insurance, plank road and turnpike companies, as well as the general business companies created for manufacturing, mining, mechanical and chemical purposes.

In 1855, general acts authorizing the incorporation of four types of corporations were enacted. (1) The 1849 law relating to corporations organized for manufacturing, mining, mechanical and chemical purposes was carried over with little change, and with the provision that in elections for directors, "each stockholder shall be entitled to as many votes as he owns shares of

of directors) on share ownership. "In the absence of any statute, charter provision or by-law . . . a share should be the voting unit, and we think this [proposition] is supported by the weight of authority and is the common practice of this class of corporations. In respect to the election of directors, it is the declared policy of this State." 122 Mo. App. at 448-449, 99 S.W. at 505. See Annot., 63 A.L.R. 1106 (1929).

44. Mo. Laws 1849, at 18, § 3.
stock in the said company. . . . 45 (2) A general act authorizing the incorporation of "Railroad Associations" thereunder provided: "In the election of directors, each stockholder shall be entitled to one vote for each share of stock held by him." 46 (3) A curious sort of phrase appeared in the general act to incorporate Road Associations. The section relating to shareholder voting stated that "each stockholder shall, in all things in which he may vote, have as many votes as he may have shares in such company . . . ." 47 (4) Only the general act to incorporate Fund Associations 48 contained no provision dealing with the manner of voting.

One might suppose from this review of both special and optional general acts of incorporation over nearly a half century, that the principle of one vote for each share in director elections was not so much the calculated established policy of the state as an unthinking repetition of a fortuitous prototype. However, in 1856, a general act authorizing the incorporation of banks was enacted deviating materially from the pattern theretofore followed. The provision relating to the elections of directors was a reversion to a procedure not uncommon in earlier days: "Every stockholder shall be entitled to vote, according to the number of shares he may hold in the following proportion, that is to say: for each and every share, not exceeding one hundred, one vote; for every two shares above one hundred and under two hundred and fifty, one vote; for every three shares over two hundred and fifty, one vote." 49 Six years earlier, as if to guard against a principle so well recognized and firmly established that it might be taken to apply unless the contrary were clearly stated, the special act to incorporate Hermann Saving Fund Association declared: "Each stockholder shall be entitled at an election, or on any other occasion, to one vote and no more, without reference to the number of shares he may possess. . . ." 50

Notwithstanding the enactment of self-incorporating laws applicable to nearly all types of businesses, special or private acts of incorporation continued to be used. By 1861, the provision that in the election of directors

45. C. 37, § 3, at 385, RSMo 1855. In 1863, a general statute relative to incorporations for manufacturing, mechanical, mining, smelting and printing purposes was enacted, and again it declared that in elections of directors "each stockholder shall be entitled to one vote on each share of stock." Mo. Laws 1863, at 19, § 2.
46. C. 39, § 5, at 408, RSMo 1855.
47. C. 38, § 6, at 395, RSMo 1855.
48. C. 36, at 381, RSMo 1855.
49. Mo. Laws 1856, at 20, § 19.
"each share is entitled to one vote" or that "each shareholder shall be entitled to one vote for each share held by him" became so much the order of things, that the fact was concisely set out in the condensed statement of contents of the numerous sections of each act of incorporation found in the session laws.

The constitution of 1865 put an end to special or private acts of incorporation and prescribed general incorporation laws for all save municipal corporations.\(^51\) The resulting general act relating to manufacturing and business corporations provided that in elections for directors "each stockholder shall be entitled to one vote on each share of stock" which vote might be cast in person or by proxy.\(^52\) The general act relating to railroad companies provided for the annual election of directors, in which "each stockholder shall be entitled to one vote for each share of stock held by him."\(^53\) So also, in the election of directors in fire and marine insurance companies, it was provided that "each share shall entitle the holder to one vote."\(^54\) Only the general acts relating to the incorporation of telegraph companies,\(^55\) savings banks, and fund companies,\(^56\) included no provision regulating the manner of voting for directors. In the case of macadamized, graded and plank road companies, the earlier provision was carried over: "Each stockholder shall, in all things in which he may vote, have as many votes as he may have shares in such company."\(^57\)

Thereafter one finds acts to amend private acts incorporating railroad companies, to give one elective vote for each share where, as originally incorporated, a different voting arrangement had been authorized.\(^58\) In 1871, an act was passed to allow any railroad company theretofore incorporated under special law, whose charter did not permit voting according to the number of shares held, to remove such restriction, "and thereafter every stockholder shall be entitled, at all general meetings and elections, to one vote for each share of the capital stock held by them in such company."\(^59\)

\(^{51}\) Art. VIII, § 4.
\(^{52}\) Mo. Laws 1865, ch. 76, at 65, § 3.
\(^{53}\) Mo. Laws 1865, ch. 70, at 29, § 6.
\(^{54}\) Mo. Laws 1865, ch. 74, at 51, § 5.
\(^{55}\) Mo. Laws 1865, ch. 72. Section 1 provides: ". . . The subscribers to such stock shall elect from among themselves such number of directors as they may determine . . . ." Section 3 provides: "There shall be an annual election of directors . . . chosen as provided in the first section of this chapter . . . ."
\(^{56}\) Mo. Laws 1865, ch. 76, at 62.
\(^{57}\) Mo. Laws 1865, ch. 71, at 41, § 6.
\(^{58}\) Mo. Laws 1867, at 138, § 6; Mo. Laws 1870, at 95, § 6.
This, then, was the state of the law in Missouri when in 1870 the Illinois constitution declared that in elections for directors, "every stockholder shall have the right to vote . . . for the number of shares of stock owned by him," and when in 1875 the Missouri constitution declared, "in all elections for directors . . . each stockholder shall have the right to cast as many votes in the aggregate as shall equal the number of shares held by him, multiplied by the number of directors or managers to be elected," each adding: "and such managers or directors shall not be elected in any other manner." It was simply a clear recognition and a constitutional declaration of the long-established policy, the well-understood system, governing the principal and infinitely more numerous kinds of corporations, that in the election of directors each shareholder "shall be entitled to one vote for each share held by him." It was not by mere chance that this legislative policy secured precisely the same interest directly to be protected by article XII, section 6, the right of each shareholder to cast as many votes as shall equal the number of shares held by him, but only in elections for directors and managers. There was no legislative policy touching the manner of voting on other matters; accordingly, the constitution remained silent with respect to the right of shareholders to vote on any other action of a corporation.

If, contrary to plain fact, ambiguity existed in article XII, section 6, then the uninterrupted persistence of the principle of one vote for each share in enacted law for the next twenty-five years would make applicable in a novel fashion, perhaps, the maxim that great weight is to be given to legislative construction of a constitutional provision when it is contemporaneous with or follows soon after the adoption of the provision in question.

NONVOTING PREFERRED STOCK

1. Historical Matter

But the case is different with preferred shares, said the Supreme Court of Missouri in 1905 in *State ex rel. Frank v. Swanger,* and it directed the peremptory writ of mandamus to issue to the Secretary of State requiring him to issue a certificate of incorporation to a company, the articles of which created preferred shares but vested voting power exclusively in the common shares.

60. Until the amendment in 1901 purporting to authorize, by one interpretation, the creating of nonvoting shares. See note 95 infra.
61. 190 Mo. 561, 89 S.W. 872, 2 L.R.A. (n.s.) 121, 4 Am. Ann. Cas. 563 (1905). The decision of the court was en banc.
The court recognized that a shareholder had a common law right to cast one vote, but only in person, irrespective of the number of shares held by him. It cited an earlier case in which it was noted that by positive legislative enactment that rule was changed to give to a shareholder a vote in proportion to his share interest, as well as the common law rule which proscribed voting by proxy. Such an enactment, it has been seen, was either a special act incorporating a particular company, or a general act, usually declaring that in the case of a corporation created thereby or thereunder, each shareholder should have the right to cast as many votes as he has shares. The court then made the obvious non sequitur that the object and purpose of article XII, section 6, of the 1875 constitution, "which ordains that 'each shareholder shall have the right to cast as many votes as shall equal the number of his shares'"—an ordination found in countless special acts and numerous general acts enacted in the fifty years preceding adoption of the 1875 constitution—was to introduce cumulative voting in order to secure to minority shareholders a voice in proportion to the number of their shares, "in lieu of the common law right to vote one vote irrespective of the number of shares held by him."

A short answer, of course, is that cumulative voting could readily be introduced as in Pennsylvania without giving each share one vote. Moreover, in director elections, each share already had one vote by statute. It would be unworthy to press for this sort of answer: but statutes are ephemeral things and there may come a time, with incorporators' financial skill and ingenuity put in requisition, when they may be altered to allow some shares (not all, surely) to be made nonvoting; hence, this article and section.

But the heart's core of the decision is elsewhere. It is in the singular assertion that the common law right of each shareholder to one vote on the basis of membership, as well as the statutory right of each share to one vote, may by shareholder agreement be denied to a class of shareholders if the shares of the disenfranchised class have some advantage or preference, however slight presumably, over other shares. This "contractual right of the stockholders, inter se, of providing that preferred stockholders shall or shall not have the right to vote such stock," was said to be "a well-recognized common law right." Then, concluding that the evident purpose

63. 190 Mo. at 575, 89 S.W. at 876.
64. See note 13 supra, and accompanying text.
65. 190 Mo. at 578, 89 S.W. at 877.
of article XII, section 6, of the constitution was to guarantee the right of cumulative voting only to shareholders having the right to vote, there could be found "no intention of changing the long-established right of stockholders to make certain stock a preferred lien on the dividends of the business, and to agree that the holders of such stock should have no right to vote in the management of the business . . . ." And, "when we recall the historic setting of this provision in our organic law and the obvious purpose of its insertion therein, we can discover no intention to take away a long-established right of stockholders at common law to make their own agreements as long as they did not collide with some settled principle of law, organic or statutory, and which did not contravene public policy, but concerned themselves only."\(^6\)

If the evident and obvious purpose of article XII, section 6, was not single, but plural,\(^6\) then there is little left of the premise upon which the Swanger case stands. But consider the matter in another way. Let us recall the historic setting (Missouri, circa 1875) of this provision of our organic law. In 1875, how "well recognized," how "long established," was the asserted common law right, or for that matter, how strong was the inclination, of corporations to create nonvoting preferred shares or even simply preferred shares? What did the term "preferred stock" then mean; that is to say, how did it look to contemporary lawyers, judges, legislators and convention delegates?

Even today it is fairly agreed that the principal characteristic of a preferred share is a preference, an advantage, over another share. But for the preference, every share in respect to the rights of the holder is identical with every other share. The denial of an attribute of shareholding, such as the power to vote, does not give a preference or make a share "preferred." It is, instead, a restriction or limitation, no more an incident of a preferred share than of a common share. The current practice of conferring a preference, balanced off by certain limitations, restrictions or qualifications, is of comparatively recent origin. It was first authorized by statute in Missouri possibly in 1901, surely in 1943.\(^6\)

The early companies created by special acts of incorporation were all chartered with only a single class of shares. Subsequent self-incorporation acts, and even general acts requiring companies to incorporate thereunder,

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66. Id. at 576, 89 S.W. at 876.
67. See pages 121-122 supra.
68. See notes 95 and 96 infra.
provided for only a single class of shares. The preferred share came later. It first appeared in American business corporations primarily in special acts authorizing increases of capital—by legislative amendment of existing charters. Its origin, then, is in statute law; there is no common law basis for it, except perhaps in England.\(^9\) Prior to 1875, the preference given to a share to distinguish it from a nonpreferred or common share was almost uniformly a priority or preference with respect to dividend payments. Only occasionally was a right to participate in profits beyond the fixed dividend rate given. A preference as to assets on dissolution was virtually unknown. Whether the share was voting or nonvoting had no relevance to its character as a preferred share.\(^7\)

If one examines the successive editions of Angell and Ames on *Private Corporations*, the only American treatise dealing with the subject of corporations for nearly fifty years prior to 1875, the first edition of which was published in 1832, one finds no mention whatever of preferred shares as late as the sixth edition in 1858.\(^71\) In the ninth edition (1871) there is a meagre footnote at the conclusion of section 555 dealing with pre-emptive rights: "If the capital of a company is not limited, it may issue new stock, and may give the holders a preference over other stockholders, this being considered merely as a mode of raising money."\(^72\) And to section 557, wherein the

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69. See note 31 supra, and accompanying text.
71. A footnote to section 610, which dealt with "liability of members," sets out an 1855 New York statute which authorized manufacturing companies to issue *special* stock as well as *general* stock. The special stock was in reality a preferred stock. But the statute was set out only because of its relation to the context of the section: it provided that "holders of such *special* stock shall in no event be liable for the debts of the corporation beyond their stock," whereas holders of general stock had a greater liability.
72. Citing Rutland R.R. Co. v. Thrall, 35 Vt. 536 (1863). In the *Rutland* case the defendant subscriber resisted an assessment on the ground that the special act authorizing a dividend preference was a fundamental alteration of the charter. The language of the opinion, at pages 545-546, is highly significant as an indication of the novelty of a share preference as late as 1863:

... It is therefore the giving of the guaranty that works injustice (if any) to the defendant. Substantially, this seems to us nothing more than a mode of raising money by pledging in some form the capital already obtained for the new amount required.

Now there is nothing in the terms of the charter, or the subscription, that forbids the pledging or mortgaging of the capital invested to secure further loans. In this form it certainly makes two classes of stockholders—one whose capital is invested without any security for profits or interest upon their money, except what the prospective success of the enterprise
nature of a share is considered, there is this brief footnote: "Although a certificate of shares of the guaranteed stock of a corporation contains the clause that the stock is entitled to dividends at a certain rate per annum, out of the net earnings of the company, and that the payment of dividends is guaranteed, the holder of the certificate does not thereby become a creditor of the corporation for a failure to declare and pay dividends." That is all, in Angell and Ames, on preferred shares in 1871.

Accounts of the early history of preferred stock in America seem to agree that probably the earliest statute providing for preferred shares was one in 1836, when the Maryland legislature authorized two railroad and three canal companies to issue preferred shares to be subscribed by the state. There was some political opposition to the act. Of a contemporary letter, a student of the subject writes: "The tone of this letter . . . indicates that preferred stock was unknown as a device for financing. Further evidence of this is to be found in the fact that the act does not use the term preferred may afford;—the other, to whom a profit, usually higher than simple interest of their money, is guaranteed upon the amount subscribed.

Notwithstanding the evils growing out of having two classes of stockholders, with conflicting interests, we believe it has been a mode of raising money much used in this kind of enterprise, and regarded only as in the nature of a mortgage. This form of security practically, perhaps, does not make the conflict of interests of the different holders of securities any greater, or depreciate to any greater extent the value of the original stock, than if in the form of a loan by bond and mortgage, for those who purchase bonds secured by mortgage may also be stockholders, and thus have the same motives for managing the company for their own interests as if their debt was in the form of preferred stock.

The issue of preferred stock seems to be treated as a legitimate mode of borrowing money, and as only a form of mortgage. Ch. J. Redfield so regards it in his treatise on railways, p. 593.

The whole subject of preferred shares is contained in this statement, for which no authority is cited, in Redfield, Railways (2d ed. 1858), Section 237: "The company, where the capital is not limited in the charter, may, from time to time, issue new shares, and even give them a preference probably, as a mode of borrowing money, where they have the power to borrow, on bond and mortgage, as preferred stock is only a form of mortgage. But without the power to mortgage expressly given, the right of the majority to issue preferred shares, a majority of which they would themselves be entitled to hold, might be more questionable." His fifth edition (1873), section 237, recites the same text, cites three American cases (the Taft case, infra note 74, the Bates case, infra note 75, and another) and adds that there is "probably no essential difference in the legal effect" of a share having a dividend preference and a share which guarantees the payment of a fixed dividend annually. "They both contain a virtual stipulation of the corporation, that the requisite dividend shall be declared out of the first surplus earnings of the company."

It is believed that the earliest appearance of the term in statutes was about 1850.

In Massachusetts, admittedly a leading and important state in the early development of corporation law, the first of a series of special acts of incorporation authorizing the issue of preferred shares, restricted to a dividend preference, were enacted in 1848 (railroad companies) and 1852 (manufacturing companies). In 1855, a general statute authorized all manufacturing companies to issue a class of “special stock,” again restricted to a dividend preference and subject to redemption, and that remained the law until 1902.75

In Missouri, probably the earliest legislative recognition of preferred stock was in 1857.76 It was an act supplementary to a special act to incorporate the Callaway Mining and Manufacturing Company, and it authorized the company to create and issue stock “to be called preferred stock . . . and to sell and dispose of the same at such prices and on such terms as the Board of Directors may deem best for the interest of said company, and the said preferred stock shall be convertible at the option of the holders at any time into common stock.” The preference entitled the holders “to receive a dividend of ten per cent. per annum upon its par value, payable semi-annually in preference of, and before any interest or dividend shall be declared or paid in favor of or to any holder or holders of the unpreferred stock of said company.” The final section of the act specifically provided that “the owners of said preferred stock shall be en-

74. Evans, The Early History of Preferred Stock in the United States, supra note 70, at 49. In Taft v. Hartford, Providence & Fishkill R.R. Co., 8 R.I. 310 (1866), the railroad company was authorized by legislative amendment of its charter to issue shares “with such provisions and guaranties as may be determined . . . entitling the holder to preferred and guaranteed dividends equal to ten per cent per annum payable semi-annually.” The question was whether the use of “guaranteed” in addition to “preferred” created a liability despite the nonexistence of profits. The opinion reads at page 334: “The court examined, and desired the counsel to examine, beyond our own libraries, the decisions of the courts upon this subject . . . . In this country we found no decision throwing light on the question.”

75. Dodd, American Business Corporations Until 1860, 322-326, 335-337 (1954). Professor Dodd did not rule out the possibility that some earlier corporations may have issued what purported to be preferred shares without legal authorization. In Bates v. Androscoggin & Kennebec R.R. Co., 49 Me. 491 (1860), the action was to recover dividends on shares of preferred stock. There was nothing to indicate whether the issue had legislative authorization. The court stated at page 504: “As to the policy of obtaining stock subscriptions in this way, we express no opinion, nor do we herein intend to express any opinion as to the legal rights of the holders of original and preferred stock, as between themselves.”

76. Mo. Laws 1857, at 265, §§ 1, 3.
titled to all the rights and privileges, and subject to all the conditions and restrictions that are or may be conferred by acts of Assembly on the owners of the unpreferred or common stock of said company . . . ." That is to say, the preference was plainly limited to dividend payments; in all other respects, the preferred and common shares were to be identical. It signifies something that equality as to all rights and privileges, except with respect to dividend payments, between the preferred and common shares was to be maintained despite language authorizing the issuance and disposition of preferred shares "at such prices and on such terms" as the directors might direct.

The next mention of preferred shares appears seven years later, in 1863. In 1847, the General Assembly had incorporated the Hannibal and St. Joseph Railroad Company. The act specifically stated that the company "shall in all things be subjected to the same restrictions and entitled to all the privileges, rights and immunities which were granted to the Louisiana and Columbia railroad" incorporated in 1837, "so far as the same are applicable to the company hereby created as fully and completely as if the same were herein reenacted."77 One of the provisions in the elaborate charter of the Louisiana and Columbia Railroad Company thus incorporated by reference prescribed that in elections for directors "every stockholder shall be entitled to one vote for each share by him held . . . ."78 A special act in 1863 authorized the Hannibal and St. Joseph Company to "issue preferred stock to parties now holding its bonds, which may be used in partial or total extinguishment thereof, upon such terms and with such rights as may be agreed upon with such parties . . . provided, that in declaring dividends the preferred stock hereby provided for shall have a preference over ordinary stock, to the amount of seven per cent. per annum, and no more."79

It is weakly arguable that under the broad authority apparently given to issue the shares "upon such terms and with such rights as may be agreed upon," a dividend preference with a compensating voting restriction was authorized, thus modifying the right of each share to cast one vote.80 However, the following month three special acts of incorporation gave au-

79. Mo. Laws 1863, at 482, § 1.
80. But see note 76 supra and accompanying text, where similar language was used with other words expressly preserving equality with common as to "all rights and privileges."
authority to issue preferred shares in a manner to leave no doubt as to the prevailing legislative policy.

The act to amend the charter of the Kansas City, Galveston and Lake Superior Railroad Company authorized the company to acquire railroad property, and “to issue and deliver to such persons or parties as shall furnish the money or means wherewith such purchases or acquisitions shall be made, shares of the capital stock of said company ... and may make any or all such shares preferred shares, entitling the owner thereof, in addition to his common rights as a shareholder, to such preference of payment as said company shall authorize or agree to ...”81 One of the “common rights as a shareholder” given by charter in the original act of incorporation, and to which the present preference was to be merely an addition, was the right “to one vote for every share held” by the shareholder.82

Two days later, an act to incorporate the Missouri Railway Company authorized the company to take over and complete the Platte Country Railroad, “under the charter granted to the said road, subject to the rights and restrictions established by said charter or any other laws passed in reference thereto.”83 Section 4 of the charter given to the Platte Country Railroad Company in 1853 provided that “every stockholder shall be entitled to one vote for each share held by him ...”84 The authority to issue preferred shares to persons who should furnish the means or money to purchase the Platte Country road is a verbatim copy of the authority given to the Kansas City, Galveston and Lake Superior Railroad Company. The preference, restricted to a dividend, was to be in addition to the shareholder’s common right to one vote for each share.

On the same day, an identical authority to issue preferred shares was given in an act to incorporate the “Missouri Company,” a corporation created for the purpose of carrying on the business of mining and manufacturing ores and minerals.85 Again, the preference of dividend payment authorized was stated in section 3 to be in addition to the holder’s common rights as a shareholder, one of which, specified in section 9 of the same act, was his right in elections “to one vote for every share of his stock.”

In 1865, the North Missouri Railroad Company, which had been

81. Mo. Laws 1863, at 481, § 3. (Italics added.)
83. Mo. Laws 1863, at 483, § 1.
85. Mo. Laws 1863, at 266.
chartered by a special act in 1850, with a provision giving each shareholder one vote for each share held, was authorized to accept outstanding bonds in exchange for preferred shares, the holders thereof to receive “a special dividend thereon, not exceeding the rate of six per cent. per annum . . . .” In the same year purchasers of the Platte Country Railroad were authorized to issue shares carrying a “preference in the payment of dividends” for donations and subscriptions of money, land, labor and materials.

These probably are the only instances of legally authorized preferred shares during the whole period of private or special acts of incorporation. Generally they were not issued as a part of the initial capital stock, nor were they issued as an incident of an increase of capital stock for the general expansion of the enterprise. Rather, they were authorized and issued to meet some specific need or financial crisis—in exchange for bonds, or in payment for property or other means wherewith to carry out some specific object. But what is significant is that the only preference provided for was a preference in the payment of a dividend, and that all common shareholder rights, including the right of each share to cast one vote, were scrupulously preserved.

From this time on legislative authority to increase the capital stock of existing corporations, simply because of the inadequacy of the initial issue, was sought and granted with increasing frequency by special acts amending incorporation acts, but with no call to make the new issue preferred. In 1866, after the 1865 constitution prohibited incorporation by special act, a general incorporation act pertaining to any corporation organized under Missouri laws authorized an increase in capital stock not exceeding double the amount of the authorized capital, but made no provision for the issue of preferred shares. That part of the same act governing the incorporation of railroad companies also authorized the increase of capital stock, and again there was no concession that the increase might be in preferred shares. Finally, so much of the act as was concerned with manufacturing and business corporations provided for an increase in the capital stock of “any corporation now existing, or which may hereafter be formed,” and prescribed in detail the manner by

86. Mo. Laws 1850, at 483.
87. Mo. Laws 1864, at 95, § 9.
88. Mo. Laws 1864, at 102, § 10.
which that might be accomplished, but made no allowance for preferred shares.\footnote{91}

It was not until 1868 that the latter provision, applicable to manufacturing and business corporations, was amended to enable a corporation under general law to issue preferred shares, and then only upon an increase in the capital stock. The procedure required that the stockholders determine (1) whether the capital stock should be increased; if so, (2) its character,\footnote{92} i.e., whether the proposed increased stock should be preferred stock. Upon an affirmative vote on both propositions, the stockholders then were to determine the amount, the number of shares and the price per share of the increased stock, and also what rate of dividend should be paid on the preferred stock before a dividend might be paid on the general stock. It was also required that the certificate to be filed upon an increase of the capital stock contain "a statement of the amount and the number of shares, the price per share of such increased stock, and also the rate of dividend to be paid on said increased preferred stock."\footnote{93}

So it was in 1868 with respect to manufacturing and business corporations: the preferred share contemplated and sanctioned by the statute was "preferred" over the general or common share only in the matter of dividend payments. There was no statutory language or legislative history to warrant any sort of restriction or qualification. This provision remained virtually unchanged in the revised statutes until 1909.\footnote{94} Other preferences and priorities would in time press for recognition and statutory sufferance. An amendment in 1901\footnote{95} authorized preferred shares in the initial issue of shares, and for the first time used the words "preferences," "priorities," "classifications" and "character" in reference to preferred shares. It was not until 1943 that the offsetting words "qualifications," "limitations," "restrictions" and "special and relative rights" were used in this connection.\footnote{96}

\footnote{91} C. 69, §§ 11-12, Mo. Gen. Stat. (1866).
\footnote{92} At the time of the 1875 constitution, the phrase used in the 1868 act, "character thereof," had reference to "increased stock," that is to say, was it to be preferred or common? The same phrase, "character thereof," as used in the 1901 amendment, is referable only to preferred stock; that is to say, does the preferred stock have this or that characteristic? In the Swanger case, the court concludes (1) that the constitution of 1875 did not prohibit nonvoting preferred shares, and (2) that the 1901 amendment, by using that phrase, allows a determination that the preferred stock shall have a nonvoting quality or character.
\footnote{93} Mo. Laws 1868, at 29, § 1.
\footnote{94} See § 942, RSMo 1879; § 2784, RSMo 1889; § 1332, RSMo 1899.
\footnote{95} Mo. Laws 1901, at 91-93.
\footnote{96} Mo. Laws 1943, at 421.
In 1871, an act was passed amending the general railroad act by adding a section to permit “any railroad company organized under general or special laws of this state” to issue dividend preference stock “for such amount and upon such terms and conditions as the board of directors may prescribe,” after first submitting the question of issuing the same, “together with such terms, conditions and privileges upon which the same is proposed to be issued” to a vote of the stockholders. The stock was issuable upon and with such terms, conditions and privileges as the director and stockholders might prescribe. The authorization seems broad. Today the words might suggest a limitation, a qualification or restriction set off against a preference, but in 1871 the words carried no such meaning. The apparent license thereby given to modify or deny “by mutual convention” stockholder rights was severely restricted by the proviso “that nothing contained in this section shall be so construed as to give the holders of the preferred stock herein provided for any other or greater power in the control and management of any corporation, or in the election of the officers thereof, than is exercised by the owners of the original or common stock of such company.”

No change was made in the law until 1945 when “qualifications,” “limitations,” “restrictions” and “special and relative rights” were permitted in connection with preferred shares issued by railroad companies.

One may say that in 1875, in Missouri, a preferred share meant a share having only a dividend preference. It probably meant that in respect to all other attributes to which a share is heir, it was in no way different from a general or common share. There was no consequential experience even in the more corporate-minded states to the east from which could come a notion of preference balanced off by a voting or other restriction. In so far as that may have been within contemporary sensibilities, it was outlawed by a plain and explicit declaration of legislative policy of equality among shares, except for the preference.

Of case law touching the subject of preferred shares, there was none. Only two cases could be found in all the Missouri and Missouri Appeal Reports from 1821 to 1885 (100 volumes) in which the term preferred stock or its equivalent was even mentioned, and then only by way of inapposite recital.

Even judicial language apropos of voting is incredibly scant in this
stretch of time, but there is some. Who and who alone might vote was thus assumed as late as 1879:

It is because there is a vote for each share of stock that stock-registry books and transfer books are kept, that the corporation and all interested may know who is and who is not entitled to vote; and the management of such a corporation is according to the will of the majority of its members,—that is, of its stockholders; no one but a stockholder has any right to a vote in its affairs.100

2. The Swanger Case

What, then, were the bases for the decision in the Swanger case? Upon what authoritative precedents, circa 1875, did the court rely to determine the meaning of an 1875 constitutional provision?

The opinion quotes Cook on Corporations,101 and extensively from the 1890 Ohio case of Miller v. Ratterman,102 and cites Clark and Marshall on Corporations.103 From Cook:

At common law it was and is legal, upon issuing preferred stock, to impose a condition that such stock shall not have a right to vote. There is no rule of public policy which forbids a corporation and its stockholders from making any contract they please in regard to restrictions on voting power.104

For that proposition Cook cites the case of Miller v. Ratterman.105 That was an action to enjoin the collection of a tax. Pursuant to An Act to enable Railroad Companies to redeem their bonded debts, passed in

100. Fisher v. Seligman, 7 Mo. App. 383, at 396-397 (St. L. Ct. App. 1879). See also Gregg v. Granby Mining & Smelting Co., infra note 115. 101. Cook, Corporations § 622b (5th ed. 1903). 102. 47 Ohio St. 141 (1890). 103. CLARK & MARSHALL, CORPORATIONS 1320 (1901). 104. In re Newark Library Ass'n, 64 N.J.L. 217 (Sup. Ct. 1899), cited late in the opinion, was called to the same purpose. There the statute under which the corporation was created made the charter subject to legislative alteration and repeal. By the charter, each shareholder had one vote for each share, not exceeding five. A later statute gave one vote for each share. The court held that the charter method of voting was a contract right unimpeachable by subsequent legislation. “The power reserved by the legislature . . . relates to those matters which concern the public . . . . The method of voting prescribed in the charter is part of the contract between stockholders. It relates to the manner of controlling the association and its property represented in their shares as between themselves. It in no wise affects the public.” But the Missouri court overlooked the fact that nine months and forty-eight pages later the judgment was reversed; the subsequent statute rightly changed the method of voting. The public evidently was in some wise affected. Rankin v. Newark Library Ass'n, 64 N.J.L. 265 (Sup. Ct. 1900). 105. Supra note 102.
1870, authorizing the exchange of preferred shares therefor,\textsuperscript{106} the corporation in 1871 issued certificates which purported to be certificates of preferred shares, guaranteeing and by mortgages securing the payment of dividends. They were taxed to the plaintiff, holder thereof, as "credits." The question, said the court, is "whether the certificates are certificates of stock or certificates of indebtedness. If the former, then, inasmuch as the company is an Ohio corporation, and itself pays taxes in this state upon its capital stock, these certificates are not taxable; if the latter, they are taxable as credits."\textsuperscript{107} The claim was made that a stipulation that the holders of the certificates of stock shall not have or exercise the right to vote made them certificates of indebtedness. The court did not think so; it decided that the nonvoting stipulation did not of itself determine the certificates to be certificates of indebtedness. The question of the right of the preferred shareholders to vote notwithstanding the stipulation was not decided nor was it in issue. But the court went on to say of the nonvoting clause:

The provision is not unusual. It is sometimes found in the statute itself. See act of May 5, 1877, 74 Ohio L. 183. Nor is it, in this instance unreasonable. The promise to the preferred stockholders was to award them the first net earnings, the holders of the common stock to share in such net earnings as they might, by good management, be able to make over and above the eight per cent. As the burden was upon the common stockholders, the power to manage might fairly be left to them. In any view, it is fair to treat the proviso as but an arrangement between two classes of stockholders which did not concern the public. It is true that one characteristic of stock generally is that it can be voted upon. But this is not essential. Indeed, instances may arise where it is good policy to prohibit the voting upon stock. Ryan v. Railway, 10 A. L. Rec. 263; Ex parte Holmes, 5 Cowen 426; Railway Frog Co. v. Haven, 101 Mass. 398; State v. Hunton, 28 Vt. 594. And the point here is, not whether any question of public policy intervenes to make it improper for the preferred stockholders to possess a right to vote, but whether any such question intervenes to make it imperative that they shall have the right.\textsuperscript{108}

\begin{itemize}
\item \textsuperscript{106} Section 4 of the Act provided: "It shall be lawful for the directors of such company to dispose of such preferred stock, on such terms as they may deem advisable in exchange for, or redemption of any outstanding bonds, for the payment of which said company is bound." The authorized preference was a dividend preference. There was no authority to make the shares nonvoting, except for the above language in section 4. Compare note 76 supra, and accompanying text.
\item \textsuperscript{107} 47 Ohio St. at 154.
\item \textsuperscript{108} Id. at 157-158. Note the reliance on \textit{Ex parte Holmes}, Railway Frog Co. v. Haven and State v. Hunton. They appear again following a quotation from \textit{Redfield, Railroads} (which is substantially his first sentence in note 72 supra),
\end{itemize}
This was high-sounding stuff, and it became the great point, the keystone, in the Swanger case. In its uncalled-for excursus on corporate stock structure, Miller v. Ratterman hit upon a plausible warrant for denying voting rights to preferred shares. Finding legal authorization to make non-voting shares was another thing. Consider the source from which is derived the "good policy" of prohibiting, and therefore the asserted common law right to prohibit, "the voting upon stock." The Ryan case gives the clue, and reveals the profound irrelation of even the dicta of the two cases (since in neither was it in issue nor decided whether or not the stock could vote) to the issue in the Swanger case:

There may be cases arising where the policy of the law itself, in the absence of legislation, would prohibit voting upon stock. So where a corporation takes its own stock as security for a debt, or in payment of a debt . . . in the name of trustees. Trustees are not permitted to vote, for the reason of policy, that otherwise a corporation itself might control its own management . . . . Ex parte Holmes, 5 Cowan 426; R. R. Frog Co. v. Haven, 101 Mass. 398; State v. Hunton, 23 Vt. 594, is an instance of the policy of the law as declared by the legislature touching voting upon stock, the statute in that case being, that no stockholder who is not a resident of the state shall vote at any meeting of the company, either in person or by proxy. This statute under which the right of the preferred stockholder to vote begins only after his dividends are in default is an indication of the policy which, for some reason, the legislature thought fit to adopt as to voting upon the stock, and it is not to be taken as an indication that what is called stock in the act is not really a stock.109

Clark and Marshall, at the cited page (section 417g) reads:

In the absence of charter or statutory provisions or valid stipulation to the contrary, holders of preferred stock have the same

and again in Ryan v. Railway. Ex parte Holmes: shares of a corporation held in trust for the corporation itself may not vote. Railway Frog Co. v. Haven: the right to vote on shares of a corporation held on a trust for the corporation itself is suspended while the shares are so held. State v. Hunton: a statute denying to a noninhabitant shareholder the right to vote applies even though the stock stands in the name of an inhabitant on the books of the corporation.

109. The Ryan case, decided in 1881, and also cited in Swanger, was an action by judgment creditors of a railroad company to enforce the statutory liability of stockholders. The defendants, holders of what purported to be preferred stock, for defense asserted inter alia that the issue, although stock in name, was simply the form of a loan. The stock was issued under a statute which authorized the issue of shares having a fixed dividend preference, and which specifically provided that the holders of such stock should not be entitled to vote such shares until six months after default of payment of any dividend, and that they should be entitled to vote only so long as the default continued. A demurrer to the defense was sustained.
right as holders of common stock to vote at stockholders' meetings.

On the other hand, it is within the power of a corporation, when it issues preferred shares, to provide expressly that it shall give no right to vote, and when certificates contain such a provision, it will be binding upon all persons who accept the same.

For the latter proposition, *Miller v. Ratterman* and two other cases are cited: one, *Hamlin v. Toledo, St. L. & K.C. R.R. Co.*; the other, *In re Barrow Haemitite Steel Co.*

In the *Hamlin* case, holders of securities of an insolvent corporation, upon its reorganization and organization of a new corporation, received nonvoting preferred shares constituting a lien upon the property and earnings next after a first mortgage, the corporation agreeing that it would create no lien on its property other than the first mortgage, except subject to the lien of the preferred shares, without the consent of two-thirds of the preferred shareholders. In an unsecured creditors' bill against the insolvent company to wind up its affairs, the question was whether the preferred shareholders as creditors might intervene on the ground that they were not properly represented by a trustee under the mortgage or by the defendant corporation. The case merely held that while preferred shareholders were not creditors, they were entitled to a preference over common shareholders, and as such, had an interest antagonistic to common shareholders, and therefore were proper parties to a suit for the winding up of the corporation and the distribution of its assets. There was no issue, no decision, as to the right of preferred shares to vote notwithstanding a voting restriction. But this much the court did say in regard to the preferred shareholders: "They surrendered the privilege of voting. That was perhaps a valid agreement between stockholders, though of doubtful public policy."

Of the second case it should be said: it is an English case, and that makes the difference. At a time when the articles of association of a company did not contain any power to reduce the capital, certain nonvoting preference shares were issued, to be considered as part of the original capital and subject to the same provisions as if part of the original capital, except for the preference and voting restriction. Thereafter, the company was authorized to reduce from time to time the capital stock, if sanctioned

110. 78 Fed. 664 (6th Cir. 1897).
111. 39 Ch. Div. 582 (1888).
112. 78 Fed. at 671.
113. See note 31 *supra.*
by a special resolution to that effect. A special resolution was passed to reduce the capital by cancelling capital unrepresented by available assets. A petition by the company for confirmation of the resolution by the court was opposed by the preference shareholders on the ground that it would be unfair that preference shareholders should be affected by the passing of a resolution by the votes of ordinary members, the preference shareholders being excluded from any voting power. The court confirmed the proposed reduction, saying: "I think the answer is, that it is by contract that they are excluded—it is part of the bargain with them."\(^{114}\)

Two Missouri cases were cited, neither of which touches the question in issue, but both of which present a fair historical explanation of the cumulative voting clause of the provision.

_Gregg v. Granby Mining & Smelting Co._\(^{115}\) decided that article XII, section 6, and statutes enacted thereunder did not impair the contract of the state with a corporation created under acts which (1) gave each share one vote, and (2) reserved to the legislature the right to alter or repeal the charter. But the following observations by Gantt, J., show quite clearly that as late as 1901 the view persisted that the number of votes to which a shareholder was entitled was determined solely by the number of shares held by him:

... but section 6 of article 12 of the Constitution of this State, adopted in 1875, granted the right of each shareholder to vote his shares on the cumulative plan; that is to say, since the adoption of that instrument by the people, _he is entitled to cast not only one vote on each share of stock in the election of directors, but is entitled to cast as many votes in the aggregate as shall equal the number of shares so held by him multiplied by the number of directors or managers to be elected at such election, either in person or by proxy, for one candidate, or may distribute such votes among two or more candidates for the directory of said corporation._\(^{116}\)

_In State ex rel. Lawrence v. McGann,_\(^{117}\) the question was whether within the announced time of the election of five directors, the majority shareholders, realizing that by their failure to cumulate their votes the minority would capture three seats to their two, might withdraw their first

114. 39 Ch. Div. at 603.
115. 164 Mo. 616 (1901).
116. _Id._ at 626. (Italics added.)
117. 64 Mo. App. 225 (1895).
set of ballots and cast their votes cumulatively in order to take the three seats to which they were entitled. The court held that they might.\textsuperscript{118}

\textit{Wright v. Central Cal. Colony Water Co.}, California, 1885,\textsuperscript{119} decided another question, not this one. It held that the petitioner, as a shareholder, whether or not “qualified” to vote in the sense of having held the stock ten days prior to the election, had a right to institute a proceeding to set aside an election for directors in which shareholders, in compliance with by-laws, were denied the right to cumulate their votes. It is true that the court unguardedly said:

This section is understood to confer upon the individual stockholder, \textit{entitled to vote at an election}, the right to cast all the votes which his stock represents, multiplied by the number of directors to be elected, for a single candidate, should he think proper to do so. So that the petitioner, as the representative of a single share of stock, \textit{if qualified under the charter of the company to vote}, was entitled to cast seven votes for any one of the candidates for the office of director, or to distribute them among any two or more candidates.\textsuperscript{120}

There is some uncertainty here, but “\textit{entitled to vote at an election}” and “\textit{if qualified under the charter of the company to vote}” probably are clauses to be read as relating to the assertion made that the petitioner was not a qualified voter since his shares did not stand in his name for ten days prior to the election. In any event, considerable doubt is removed by the clearer language that followed:

\ldots And when an election for directors has been properly called, each \textit{qualified} stockholder present has the same right, in exercising his power of voting for directors, to vote, at one time, \textit{the number of shares in his name}, for the whole number of directors to be elected, or to cumulate his shares by voting for one candidate for director, as many votes as shall equal \textit{the number of his shares multiplied by the number of directors to be elected}, or by distributing them, upon the same principle, among as many candidates for directors as he shall think fit.\textsuperscript{121}

\textsuperscript{118}. The opinion is a good historical account of the cumulative voting aspect of article XII, section 6, and restricts its purpose to giving the minority a representation, not depriving the majority of its larger representation.

\textsuperscript{119}. 67 Cal. 532, 8 Pac. 70.

\textsuperscript{120}. \textit{Id.} at 535, 8 Pac. at 72. (Italics added.)

\textsuperscript{121}. \textit{Id.} at 536, 8 Pac. at 72. (Italics added.)
Precarious Conclusion

But, for what is a man profited ———? The strengthlessness of the authorities upon which the Swanger case relies, the fragile regard for statutory primacy in this quarter and a near irreverence for manifest legislative policy, is all of little consequence. The case was decided in 1905. It construed a constitutional provision. The provision so construed was carried into the constitution adopted in 1945. The case is now in the bosom of the constitution.

This tedious review of ancient materials has value, and the sniping at the decision and opinion in the Swanger case is vindicable, only as it all is relevant to the live question—does article XI, section 6, of the 1945 constitution allow for nonvoting common stock? It is doubted, the Swanger case either notwithstanding or, held down to its precise reason why, being decisive.


123. For another and different analysis of the same problem, see Hines, The Right of Non-Voting Common Shareholders to Vote for Directors and Managers in Missouri, 17 U. Kan. City L. Rev. 66 (1948-49). See also Kraus, Cumulative Voting for Directors in Missouri Corporations, 16 J. Mo. B. 401, 441, 490 (1960).