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## From Special Privilege to General Utility: A Continuation of Willard Hurst's Study of Corporations

Susan Pace Hamill

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# From Special Privilege to General Utility: A Continuation of Willard Hurst's Study of Corporations

## **Keywords**

Corporate Law, Dual Incorporation, States' Primary Power, Federal Regulation

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## FROM SPECIAL PRIVILEGE TO GENERAL UTILITY: A CONTINUATION OF WILLARD HURST'S STUDY OF CORPORATIONS\*

SUSAN PACE HAMILL\*\*

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\* This Article is dedicated in memory of James Willard Hurst (1910-1997) who wrote more than a dozen books over a long career of many accomplishments and has been praised as a “[p]ioneer in history of law” and as “the founder of the field of legal history.” See Lawrence Van Gelder, *Willard Hurst, 86, Legal Scholar and Pioneer in History of Law*, N.Y. TIMES, June 20, 1997, at B8. Professor Hurst’s book, JAMES WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970* (1970), inspired the empirical research in this Article, which continues Professor Hurst’s study of the corporation’s evolution from special charters to the exclusive use of general incorporation statutes. The portion of the Article’s title “From Special Privilege to General Utility” comes from the first chapter of Professor Hurst’s book and bears no relationship to the famous corporate tax case, *General Utilities & Operating Co. v. Helvering*, 296 U.S. 200 (1935).

\*\* Associate Professor of Law, *The University of Alabama School of Law*. The author gratefully acknowledges the financial support of the University of Alabama Law School Foundation, the Edward Brett Randolph Fund, and the William H. Sadler Fund. Professor Hamill thanks her faculty colleagues, Dean Ken Randall, Bill Brewbaker, David Epstein, and Norman Stein for their valuable comments along with Tim Coggins, the members of the Cumberland Law School Legal History Forum, Howard Walthall, and Herbert Hovenkamp for comments on an earlier draft. Professor Ann Puckett and her staff at the University of Georgia Law Library made this research possible by generously providing the use of their library’s special collections of corporate statutes and session laws. Jamie Leonard, Robert Marshall, and Penny Gibson of the Bounds Law Library at the University of Alabama offered endless support, scouring the country for microfiche interlibrary loans. Special thanks goes to Wythe Holt and Tony Freyer, two legal historians who patiently provided constant practical advice, historical perspectives, comments on multiple drafts, and unlimited friendship and support. Finally, Professor Hamill especially recognizes the hard work and tireless efforts of the members of her research assistant team: Carol Longshore, James Coomes, Rick McBride, Charles Gorham, John Donsbach, Davis Smith, Wade Hartley, Todd Schroeder, Lisa Moss, Chris Davis, Kermit Kendrick, and Mike Perrett. These students, who come from four law school class years, participated in four grueling trips to the University of Georgia School of Law Library and labored in the trenches conducting the empirical research for this Article.

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## INTRODUCTION

At the dawn of the twenty-first century, the business corporation symbolizes the vast power and strength of United States business on a worldwide basis and remains the dominant legal form for doing business.<sup>1</sup> Although federal law plays a very important role in regulating corporate conduct, the foundation of U.S. corporate law

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1. In 1996, the latest year that complete data is available on corporation and partnership income tax filings, 4,474,167 corporate tax returns were filed, of which 2,349,169 had assets of \$100,000 or less, 715,389 had assets over \$100,000 but less than \$250 million, and 7,537 had assets of \$250 million or more. See STATISTICS OF INCOME DIV., INTERNAL REV. SERV., SOURCE BOOK 1995: STATISTICS OF INCOME, CORPORATION INCOME TAX RETURNS WITH ACCOUNTING PERIODS ENDED JULY 1995-JUNE 1996, at 9 [hereinafter IRS STATISTICS] (providing statistics for all industries' returns both with and without net income). In 1996, 1,654,256 partnership tax returns were filed, of which 1,116,054 were general partnerships, 311,563, were limited partnerships, 221,498 were limited liability companies, and 5,141 were unincorporated businesses taxed as partnerships that checked "other" on Form 1065, Schedule B, Type of Entity, meaning the business could not be considered a general or limited partnership or a LLC under state law. See Alan Zempel, *1996 Partnership Tax Returns*, STAT. OF INCOME BULL., Fall 1998 (Internal Revenue Service, Washington D.C.). Limited liability companies, which are taxed as partnerships while offering limited liability protection commonly associated with corporations, have grown geometrically in recent years, and due to the favorable income tax treatment under the partnership tax regime, may in the future become the business organization of choice for smaller businesses. See Susan Pace Hamill, *The Origins Behind the Limited Liability Company*, 59 OHIO ST. L.J. 1459, 1463-83 (1998) [hereinafter Hamill, *Origins*] (detailing the story behind the creation and proliferation of LLC statutes across the country with all 50 states authorizing the formation of LLCs under their laws by 1996); *id.* at 1460 (summarizing the major income tax advantages offered by the partnership tax regime as compared to the rules applicable to subchapter C and subchapter S corporations); *id.* at 1484 (stating that by the close of 1996, the LLC's raw potential had developed "into a mainstream choice for doing business"). The current income tax filings, however, show that the corporate form still dominates the business scene for smaller businesses concentrated in the group with assets of \$100,000 or less. Moreover, because back stops within the corporate tax system and administrative complexity inherent in operating a large business make the corporate forum more suitable, the limited liability company will never supplant the corporation for publicly traded and other non-publicly traded, widely held businesses. See Susan Pace Hamill, *The Limited Liability Company: A Catalyst Exposing the Corporate Integration Question*, 95 MICH. L. REV. 393, 426 (1996) [hereinafter Hamill, *Catalyst*] (noting that once a business becomes widely held, management will avoid the LLC and other partnership forms because of difficulty in adopting entity-level tax policies that will suit all investors and increased pressure to make distributions and provide disclosure); *id.* at 421 (noting that the increased use of LLCs will not cross over and usurp the corporate form as the entity of choice for publicly traded businesses because the Internal Revenue Code taxes all publicly traded entities as corporations); *id.* at 424-25 (stating that the increased use of LLCs will not cross over and usurp the corporate form as the entity of choice for non-publicly traded larger businesses because of the need to issue equity to tax-exempt and foreign investors and the reluctance of those investors to purchase LLC or other partnership equity due to unfavorable tax rules). See also generally *id.* at 413-18 (stating that LLCs will not substantially diminish corporate tax revenues for smaller businesses because small corporations pay very little corporate tax); *id.* at 418-29 (noting that LLC's threat to corporate tax revenues of larger corporations is only theoretical due to the practical inability of those businesses to use the LLC form).

started, and currently resides, in the state, rather than the federal, domain.<sup>2</sup> General incorporation statutes in all fifty states provide access to the corporate form, serve as the exclusive legal mechanism to legitimize the relationships created by the corporate form, and set out the fundamental legal principles that apply to corporations whose articles have been filed in that particular state.<sup>3</sup>

During America's earliest years, general incorporation statutes did not exist, and corporations were relatively rare.<sup>4</sup> To secure access to the corporate form, corporate sponsors had to petition one of the thirteen state legislatures for a special corporate charter.<sup>5</sup> The special charter, essentially a private bill creating the particular corporation, outlined the corporation's terms and conditions, such as authorized capital and permitted activities, applicable to that individual corporation, and in certain circumstances granted special privileges such as monopoly and eminent domain rights.<sup>6</sup> In his seminal book published in 1970, *The Legitimacy of the Business Corporation in the Law of the United States: 1780-1970*,<sup>7</sup> the late James Willard Hurst, lauded as the "dean of American legal historians,"<sup>8</sup> explored the evolution of

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2. See JAMES WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES: 1780-1970*, at 140 (1970) (explaining that from the late 1700s to the early 1930s, the federal role over corporations was limited); see also Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits On State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1442 (1992) (stating that federal law played no role in the internal governance of corporations until the passage of the Securities Act of 1933, 15 U.S.C. § 77a-77aa (1994)).

3. See EDWIN MERRICK DODD, *AMERICAN BUSINESS CORPORATIONS UNTIL 1860*, at 14-15 (1954) (stating that the business corporation "is in legal theory created by the state" and discussing the state's role in creating and legitimizing the business corporation); see also Bebchuk, *supra* note 2, at 1438, 1442-43 (maintaining that state law governs such matters as "the allocation of power between managers and shareholders, fiduciary duties owed to shareholders, and fundamental corporate changes such as mergers and dissolutions"); see also HURST, *supra* note 2, at 123-24 (noting that as the corporation evolved in the nineteenth century, "judges made a great deal of the corporation law," but because corporations needed legislative sanctioning before becoming legitimate, statutes or special charters, which were provided by state law, had to govern corporations before the common law developed "in the field").

4. See DODD, *supra* note 3, at 368 (noting that very few corporations existed in the United States prior to the Industrial Revolution); *infra* note 40 and accompanying text (stating that corporations were uncommon before 1800).

5. See HURST, *supra* note 2, at 7-15 (noting that the colonial legislature chartered business corporations, and arguing that the state "not only gave indispensable consent but itself created the whole working reality of any business association which took corporate form").

6. See *id.* at 133-35 (explaining that state legislatures granted special charters for such activities as constructing dams, "creating particular units of local governments," "establishing local courts," and many others).

7. See *id.* (discussing the development and growth of corporations in the United States).

8. See Lawrence Van Gelder, *Willard Hurst, 86, Legal Scholar and Pioneer in History of Law*, N.Y. TIMES, June 20, 1997, at B8 ("In linking law and social history in his

corporate law from the earliest years when the special charter served as the only access to the corporate form, to the time when general incorporation statutes operated as the exclusive channels to the corporate form.<sup>9</sup> Although Professor Hurst recognized that he did “not have a full inventory for all states,”<sup>10</sup> he wove together a vast amount of material and discussed the widespread enactment of state general incorporation statutes, the persistence of special charters, and finally the “total disappearance of such legislation from the last quarter of the nineteenth century on.”<sup>11</sup> Among his broad conclusions regarding the evolution of corporate law, Professor Hurst noted that the interplay of the federal and state spheres of power greatly affected the law of corporations,<sup>12</sup> concerns over the growth of corporate power led to federal regulation in the twentieth century,<sup>13</sup> and special charters lingered largely because of inefficiency rather than widespread corruption.<sup>14</sup>

To explore further state law’s pivotal role in developing the current regulatory regime of state and federal law occupying separate spheres of power over business organizations,<sup>15</sup> this Article continues Professor Hurst’s study of the corporation’s evolution from special

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studies . . . [he] broke with a school of thought in which law was regarded as a self-contained society and the law library as its laboratory.”).

9. See HURST, *supra* note 2, *passim*.

10. *Id.* at 131.

11. *Id.* at 131, 18, 33 (explaining that the “most striking institutional aspect of the growth of corporation law was the flow of special acts of incorporation from 1780 to 1875”).

12. See *id.* at 140-41 (finding that as Congress ventured into further exercise of its commerce power, such powers affected the corporate law of the states).

13. See *id.* at 141 (arguing that, although “Congress did act in the 1930s in matters of important effect upon corporate structure and practice,” it was cognizant of state authority in the area).

14. See *id.* at 139-40, 151-53, 135-36.

15. The empirical study presented in this Article of the corporation’s evolution from special charters to exclusive use of general laws began as part of a research project to discover the historical origins of the LLC, one of the more recent U.S. business organizations, which was invented in 1977 and became widely available by the early 1990s. The LLC’s invention was possible because the individual states possess the power to experiment with business organizations without congressional permission. Because the corporation represents the earliest American business organization requiring formal, sovereign recognition, the LLC’s earliest origins can be linked to the point when state, rather than federal, law assumed the power to authorize corporations that lead to the states enjoying general authority to create new business organizations. See Hamill, *Origins*, *supra* note 1, at 1484-85. During the course of the research focusing on the origins of the LLC, the absence of a full inventory of states documenting the corporation’s evolution from special charters to exclusive use of general laws was observed. See *id.* at 1495 n.164. This Article, which empirically provides the full inventory of states and attributes the lingering of special charters through the early twentieth century to the power enjoyed by the states over corporations, flows out of the article exploring the origins of the LLC and represents a continuation of a research agenda studying the evolution of U.S. business organization forms. See *infra* notes 335-36.

privilege, characterized by a significant presence of corporate special charters to general utility, in which incorporation under general laws supplanted the use of special charters.<sup>16</sup> Documenting for the first time the primary sources covering the full inventory of all fifty states, this Article empirically proves that incorporation by special charter remained a significant feature of the corporate landscape until the early twentieth century,<sup>17</sup> and identifies the domination of state law over the regulation of corporations through the early decades of the twentieth century as the principal reason why “[s]pecial chartering lingered longer than it should have.”<sup>18</sup>

Part I of this Article analyzes how state, rather than federal, law secured primary control over the corporation by examining the role of both in the chartering process from America’s earliest years through the early twentieth century. During the late eighteenth and early nineteenth centuries, when most corporations either met public responsibilities of the states or sponsored banks and transportation projects, federal law failed to establish a prominent role over corporations, which allowed the states to assume the primary power to grant special charters by the second decade of the nineteenth century. From the 1820s through the years leading up to the Civil War, the appearance of large numbers of special charters for manufacturing and other private businesses,<sup>19</sup> and the enactment of

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16. “The rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know.” Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

17. See Susan Pace Hamill, *Compilation of Special Charters Issued From 1875 Through the Twentieth Century in All States Offering General Incorporation Statutes While Permitting Incorporation By Special Charter* (Oct. 15, 1999) (unpublished) (on file with the *American University Law Review*) [hereinafter *Compilation*]. All footnotes providing numerical documentation to the discussion of the empirical data are supported by this *Compilation*. For each state that still permitted special charters, the research team located the special charters (by name of the corporation) in the index of the state’s session law of the particular year. The team then examined the special charter’s actual legislative bill and entered into a computer program the citation of the session law, the type of industry (public corporations, corporations conducting private businesses, transportation and communication corporations, banks and other financial institutions) authorized by the special charter, as well as capital limitations, special powers or privileges, and other unique attributes. The research team documented 19,998 special charters issued from 1875 through 1996. Because data was unavailable for isolated years, and because it is impossible to guarantee that all special charters were discovered, given the mass volume of data being dealt with, the true number definitely exceeds 20,000 special charters. The team used the computer program to break the special charters down by individual state, region, and type of industry. The program also calculated the average number of special charters issued per year and tracked the presence of special chartering within the four industry types over time.

18. See HURST, *supra* note 2, at 157.

19. See Hamill, *Origins*, *supra* note 1, at 1492 (noting that special charters issued



the first general incorporation statutes, further strengthened state law power over the incorporation process. By 1875, with over ninety percent of the states offering general incorporation laws and the unprecedented exercise of federal power during the Reconstruction Era waning rapidly, the states firmly cemented their primary power over access to the corporate form. By the early twentieth century, when lawmakers seriously debated moving the incorporation process into the federal domain, the primary power of the states proved to be irreversibly entrenched.<sup>20</sup>

From a national perspective, Part II of this Article details the protracted process of incorporation under the general laws totally replacing special charters. Most states failed to accompany their general laws with a constitutional amendment to prohibit special charters, thereby allowing potential corporate sponsors to choose between filing under the general law or seeking a special charter from the legislature.<sup>21</sup> For many states, the period between the enactment of the first general incorporation law and the prohibition of incorporation by special charter, often referred to as dual incorporation or dual period, extended for many years, sometimes exceeding fifty. Most states did not prohibit special charters until the early twentieth century. Moreover, corporate sponsors secured many special charters from the state legislatures that still permitted special charters despite the widespread presence of general laws allowing incorporation for multiple purposes.<sup>22</sup> Using empirical data covering the session laws of all fifty states from 1875 through the late twentieth century, Part II documents almost 20,000 individual special charters and marks the year 1904 as the best estimate of when special chartering truly started to fade away. Although a few states still continued to allow special charters as the twentieth century progressed, the number of special charters actually issued decreased substantially. This decline meant that special charters were no longer a serious means to gain access to the corporate form and consequently, state legislatures devoted less time to them.

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to manufacturing corporations grew rapidly in the 1820s even though America's real Industrial Revolution did not start until the 1840s); *see also* TONY A. FREYER, PRODUCERS VERSUS CAPITALISTS 45 (1994) (discussing the prodigious increase of factories operating as corporations between 1800 and 1860).

20. *See* HURST, *supra* note 2, at 141 (noting that state authority over corporate law was so dominant that Congress "should not preempt the . . . field").

21. *See id.* at 132 (explaining that New Jersey enacted thousands of special charters from 1791 to 1875, until a constitutional provision prohibited further legislation of this kind).

22. *See id.* ("[M]ost state legislatures passed a considerable number of special charters, so that the country-wide sum ran into the thousands.").

Part III breaks down the special charters issued from 1875 through the late twentieth century into four industries: public enterprises, transportation and communication projects, banks and other financial institutions and private businesses, such as manufacturing. Part III then analyzes why special charters occupied a significant presence on the corporate landscape from 1875 through the early twentieth century. The dominant role played by state law over all corporate matters within the regulatory framework of each of these four corporate prototypes kept special charters alive nearly three decades longer than Professor Hurst had speculated. Throughout the nineteenth century, special charters served as the principal regulatory mechanism for public enterprises sponsored by the state, with municipalities being the most visible. Not until the early twentieth century did general laws and internal governance standards replace the special charter within the corporate structure of America's cities. Despite broad interstate commerce problems posed by America's transportation and banking systems, special charters persisted as one of several state regulatory tools in those areas until Congress finally implemented effective federal regulation during the first few decades of the twentieth century. Finally, the compounded inertia resulting from each state's ability to decide when to prohibit special charters explains the significant number of special charters issued to sponsors of manufacturing and other private business ventures.

I. THE FOUNDATION OF CORPORATE LAW DEVELOPS AT THE STATE  
RATHER THAN THE FEDERAL LEVEL

A. *States Assume Primary Power to Issue Special Corporate Charters by Early  
Nineteenth Century*

Corporations always have been creatures of statute, requiring a formal recognition normally evidenced by a corporate charter issued by a sovereign person or government.<sup>23</sup> In America's earliest colonial days,<sup>24</sup> the first colonial corporations obtained corporate charters

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23. See 1 JOSEPH S. DAVIS, *ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS* 3, 6-7 & n.1 (1917) (explaining that during the colonial period, the Crown granted charters directly to corporations); HURST, *supra* note 2, at 2, 14 (noting that predecessors of the modern corporation, existing long before the American colonies appeared on the map, required formal recognition by a sovereign individual or government).

24. See 4 DAVIS, *supra* note 23, at 329 (stating that business corporations existed prior to the revolution); HURST, *supra* note 2, at 7-15 (stating that English chartered companies were prominent in establishing North Atlantic Colonies, that royal

directly from the King of England.<sup>25</sup> Later, after the colonies established colonial assemblies, those assemblies granted corporate charters under the implicit authority of the King of England.<sup>26</sup> Once America achieved independence, the legislatures of the newly born states, which continued and expanded upon the work accomplished by the colonial assemblies, probably assumed that they would continue to issue corporate charters.

Meanwhile, however, the Framers contemplated Congress enjoying some authority to issue corporate charters. Toward the end of the American Revolution, the first Congress authorized a committee to investigate the possibility of issuing a congressional corporate charter to establish a national bank.<sup>27</sup> Following a detailed plan engineered by Alexander Hamilton,<sup>28</sup> on December 31, 1781, Congress incorporated the Bank of North America.<sup>29</sup> Because the Articles of Confederation, ratified on July 9, 1778, failed to grant Congress the power to issue corporate charters,<sup>30</sup> many state leaders probably assumed that Congress did not possess the power to issue corporate charters under its weak provisions,<sup>31</sup> as evidenced by the Bank's

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governors and colonial legislatures chartered some business corporations in the colonial years, and that trading companies that founded colonies existed under royal charters); RONALD E. SEAVOY, *THE ORIGINS OF THE AMERICAN BUSINESS CORPORATION* 9-32 (1982) (discussing early colonial corporate charters).

25. See Thomas Linzey, *Awakening a Sleeping Giant: Creating a Quasi-Private Cause of Action for Revoking Corporate Charters in Response to Environmental Violations*, 13 PACE ENVTL. L. REV. 219, 228 (1995) (explaining that Britain "began chartering the American colonies to strengthen the English claim" in the new world).

26. See 1 DAVIS, *supra* note 23, at 7.

27. Proposed on June 21, 1780, in Congress, the committee consisted of Mr. Ellsworth, Mr. Duane, and Mr. Scott. See LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 9 (M. St. Clair Clarke & D.A. Hall eds., A.M. Kelley reprint 1967) (1832) [hereinafter U.S. BANK].

28. Robert Morris, the Superintendent of Finance, officially proposed the Congressional Bank, using a plan more than likely provided by Alexander Hamilton a few weeks before. See Letter from Robert Morris to Alexander Hamilton (May 26, 1781), in 2 THE PAPERS OF ALEXANDER HAMILTON 1779-1781, at 645 (Harold C. Syrett & Jacob E. Cooke eds., 1961) [hereinafter HAMILTON PAPERS]; U.S. BANK, *supra* note 27, at 14; 4 DAVIS, *supra* note 23, at 35.

29. See U.S. BANK, *supra* note 27, at 12-14; 4 DAVIS, *supra* note 23, at 10 n.2.

30. Under the Articles of Confederation, the states retained their sovereignty largely because the central government, composed solely of Congress, had few powers and no means of enforcement. See ART. OF CONFED. (1778).

31. See ART. OF CONFED. art. ii (1778) (mandating that congressional power must be explicitly provided). The Articles' powers also left the central government with weak taxing authority and no ability to regulate commerce. See DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 24-25 (1990); ANDREW C. McLAUGHLIN, *A CONSTITUTIONAL HISTORY OF THE UNITED STATES* 140-41 (1935) (declaring Congress was at its "wit's end"); see also 1 DAVIS, *supra* note 23, at 10 (citing a letter written by James Madison to Edmund Pendleton on January 8, 1782, stating that the Articles of Confederation did not empower Congress to incorporate a bank, but that a congressional charter provided prestige with an understanding that the states would validate the bank within their respective jurisdictions). See generally

directors securing charters from several states,<sup>32</sup> most likely as a back-up to the congressional charter.

The participants at the 1787 Convention, which ultimately replaced the weaker Articles of Confederation with the U.S. Constitution, addressed whether Congress should have the power to issue corporate charters.<sup>33</sup> James Madison and others proposed to empower Congress "to grant charters of incorporation in cases where the Public good may require them, and the authority of a single State may be incompetent."<sup>34</sup> Madison's proposal, however, was not adopted, and the Constitution did not otherwise identify explicitly the source of governmental power over corporate charters.<sup>35</sup> Believing that the Constitution accorded to Congress congressional powers broad enough to support corporate charters for national banks, Alexander Hamilton, then Secretary of the Treasury, urged Congress to charter a second national bank.<sup>36</sup> Despite much debate over whether the Constitution empowered Congress to do so,<sup>37</sup>

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MERRILL JENSEN, *THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 1774-1781*, at 241 (1940) (analyzing the distribution of power between the states and the federal government under the Articles of Confederation).

32. In 1782, the directors of the Bank of North America secured a corporate charter from Pennsylvania, Rhode Island, Connecticut, Massachusetts, and New York. Moreover, North Carolina and New Jersey validated the ordinance without actually granting the bank a charter. *See* 4 DAVIS, *supra* note 23, at 38. Despite all these validations, the Bank of North America appeared to operate exclusively under the Pennsylvania charter. *See* U.S. BANK, *supra* note 27, at 25. Several years later, in 1785, when Pennsylvania revoked the Bank's charter, the directors secured a replacement charter from Delaware. *See* 4 DAVIS, *supra* note 23, at 43.

33. *See* 4 DAVIS, *supra* note 23, at 12.

34. *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 324-25 (Max Farrand ed., 1937); *see also id.* at 614-17 (explaining that the proposal of congressional powers to establish corporations was referred to committee); *id.* at 362, 375-76 (finding that Madison and Baldwin noted that the proposed enumerated power of Congress to erect corporations was debated and struck out).

35. *See* 4 DAVIS, *supra* note 23, at 13-14.

36. *See* U.S. BANK, *supra* note 27, at 15-35. In his 1790 report, Alexander Hamilton expressed dissatisfaction with the Bank of North America because the Pennsylvania legislature's reinstatement of the Bank's charter restricted the amount of stock in the Bank to two million dollars as opposed to the original limit of ten million. Hamilton's proposal cites these restrictions as a reason for creating the Bank of the United States. *See id.* at 25.

37. *See id.* at 35-36. The Senate created a committee to study Hamilton's bank proposal. The President solicited opinions addressing whether the Constitution supported a congressional charter from Attorney General Edmund Randolph, Secretary of State Thomas Jefferson, and Secretary of the Treasury Alexander Hamilton. Randolph and Jefferson, strictly construing the powers of the Constitution, believed that a congressional charter was unconstitutional. Hamilton wrote a lengthy response favoring a congressional charter for the bank. *See id.* at 89-113. The House voted 39 to 20 for the charter, and the Senate also passed the charter. Apparently, "[t]he Senate Proceedings [did] not indicate the strength of the opposition." 4 DAVIS, *supra* note 23, at 14-15.

President Washington signed into law the corporate charter creating the Bank of the United States on February 25, 1791.<sup>38</sup>

Despite the federal corporate charters issued for the Bank of North America and the Bank of the United States, state legislatures, apparently by default,<sup>39</sup> continued to grant corporate charters in the early years following the American Revolution. Because corporations were not particularly important at this time,<sup>40</sup> there is no documentation that the Framers explicitly conferred a general power over corporate charters to the states.<sup>41</sup> In the late eighteenth and early nineteenth centuries, few enterprises other than strictly public organizations needed the legal benefits offered by the corporation. At that time, the principal legal benefits offered by the corporation, which were not available to partnerships, revolved around the corporation's ability to exist beyond the natural life of the shareholders, to pool large amounts of capital, and to own property.<sup>42</sup>

38. See Act of Feb. 25, 1791, ch. 10, 1 Stat. 188, 191.

39. See JOHN W. CADMAN, JR., *THE CORPORATION IN NEW JERSEY* 3-4 (1949) ("[I]n the absence of express designation of incorporating authority, the power to incorporate was an implied and exclusive right of the legislature."); see also HURST, *supra* note 2, at 139-41 (maintaining that the federal role over corporations was limited, not by the Constitution, but by the working tradition).

40. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 188 (2d ed. 1985) (contending that corporations were uncommon before 1800). Several critical issues occupied the Constitutional Convention, including the details of establishing a strong federal government, representation in Congress, and, most importantly, the slavery issue, including future limitations on trade and the extent to which slaves would be counted (ultimately, for representation purposes, slaves were counted as three-fifths of a person for every white man). See *THE FEDERALIST* NO. 9 (Alexander Hamilton); FARBER & SHERRY, *supra* note 31, at 112, 147-49, 164-65; McLAUGHLIN, *supra* note 31, at 163.

41. During the years the Articles of Confederation remained in effect, any attempt by Congress to assume complete jurisdiction over corporate charters would have been unconstitutional. See 4 DAVIS, *supra* note 23, at 10 (citing correspondence between James Madison and Edmund Pendleton on January 8, 1782, which explained that the Articles of Confederation did not grant Congress the power to incorporate a bank). Arguably, the Articles of Confederation failed to support even limited congressional powers to issue federal charters. See *supra* note 31 and accompanying text. During the Constitutional Convention, while the delegates discussed the degree to which Congress possessed limited powers to issue corporate charters, many delegates believed that Congress did have the power to incorporate based upon its power "to legislate in cases where the states should not be severally competent." See 4 DAVIS, *supra* note 23, at 14. A few years after the Convention, Alexander Hamilton wrote a letter to George Washington, in which he manifested his support for a federally chartered Bank of the United States. See *U.S. BANK*, *supra* note 27, at 95-112. Alexander Hamilton argued that Congress possessed limited powers to issue corporate charters because no language reserved these powers exclusively to the states. See *id.* On the other hand, Thomas Jefferson, who took a strict constructionist view of the Constitution, argued that the federal charter for the Bank of the United States was unconstitutional. See *id.* at 95-113. These discussions never directly questioned the states' general authority to issue corporate charters.

42. See 1 DAVIS, *supra* note 23, at 5; Robert R. Raymond, *The Genesis of the Corporation*, 19 HARV. L. REV. 350, 354-58 (1906). The most recognized corporate

During the colonial period and for a few years thereafter, most Americans labored on family farms that produced only the goods necessary for their own survival or perhaps the occasional surplus to be bartered.<sup>43</sup> The sole proprietorship and the partnership served as the business forms for producing manufactured goods in small shops, as well as for importing and exporting.<sup>44</sup> Because large-scale transportation of goods from the seaboard cities was prohibitively expensive, manufacturing remained minimal, and importing and exporting remained based at the seaboard.<sup>45</sup> The size and level of business activity had not yet evolved to a point of needing the legal benefits provided by the corporate form. As such, the colonial assemblies and the early state legislatures issued the vast majority of corporate charters for public purposes. These included municipalities, religious and educational institutions, cemeteries, and charitable organizations.<sup>46</sup>

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legal benefit in the twentieth century, limited liability protection to all shareholders, was not the principal reason for seeking a corporate charter in the late eighteenth and early nineteenth centuries. The assumption that limited liability protection automatically resulted when operating in the corporate form began to develop in the early nineteenth century and proceeded at an uneven pace across the states. See CADMAN, *supra* note 39, at 36-40 (discussing that, despite no mention of limited liability, charters were issued without opposition); HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW: 1836-1937, at 49-55 (1991) (discussing the development of limited liability, and noting that the concept of limited liability generally became entrenched during the Jacksonian period); SEAVOY, *supra* note 24, at 69-70 (discussing early nineteenth century case law addressing limited liability); see also DODD, *supra* note 3, at 277-390 (describing the evolution of limited liability).

43. See STUART BRUCHEY, THE ROOTS OF AMERICAN ECONOMIC GROWTH 1607-1861, at 23 (1965) (noting land as the most important capital in the agricultural colonial economy); ALFRED D. CHANDLER JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 17, 51 (1977) (stating that in 1790, the American population numbered 3,930,000, with only 202,000 living in towns or villages; close to 90% of the workers labored on farms); SEAVOY, *supra* note 24, at 258 (contending that due to the abundance of land, shortage of capital, and technological backwardness, the United States appeared to be one of the least likely nations to industrialize); CAROLINE F. WARE, THE EARLY NEW ENGLAND COTTON MANUFACTURE: A STUDY IN INDUSTRIAL BEGINNINGS 1-8 (1931) (explaining that agriculture possessed such great potential that few in the late eighteenth century contemplated America's future would be in industry rather than agriculture).

44. See CHANDLER, *supra* note 43, at 28 (stating that merchants operated in partnerships for shipping and financial ventures); *id.* at 51-52 (describing business practices of artisans in American seaboard cities of late eighteenth century); 4 DAVIS, *supra* note 23, at 8 (arguing that of the 330 business corporations chartered in America, by 1800, most of the business corporations secured their charters after 1789).

45. See CHANDLER, *supra* note 43, at 32 (noting that traveling on colonial roads was "a bone-shaking experience"; although most passengers and nearly all freight moved by water, the colonial period saw no common carrier water routes and only a small number of ferries); CHARLES SELLERS, THE MARKET REVOLUTION 5 (1991) (explaining that the undeveloped transportation system made hauls beyond 30 or 40 miles more expensive than the goods).

46. See CADMAN, *supra* note 39, at 32-33 (describing incorporation of New Jersey's

As the eighteenth century came to a close and the early decades of the nineteenth century unfolded, state legislatures began to issue significant numbers of corporate charters for banks and transportation projects.<sup>47</sup> State-chartered banks, which numbered over 200 by 1815,<sup>48</sup> played a prominent role in supplying credit to the nation's rapidly growing business economy through the circulation of bank notes, which served as a medium of exchange within the nation's currency.<sup>49</sup> During the decades before and just after the War of 1812, state legislatures issued a substantial number of corporate charters for canals and turnpikes, as the United States took its first step toward the transportation revolution.<sup>50</sup> Unlike the majority of manufacturing and other purely private business enterprises that still operated in the partnership form,<sup>51</sup> banks and transportation projects

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first business corporation, sponsored by Alexander Hamilton's "The Society for Establishing Useful Manufactures," often referred to as "the S.U.M." and noting this corporation as atypical for the late eighteenth century); 1 DAVIS, *supra* note 23, at 5, 331 (explaining that only seven business corporations existed in the colonies); 4 DAVIS, *supra* note 23, at 329 (describing many corporate charters issued for public corporations in America's earliest years); Simeon E. Baldwin, *American Business Corporations Before 1786*, 8 AM. HIST. REV. 449-65 (1903) (examining the framework of America's earliest corporations). See generally Raymond, *supra* note 42, at 350-55 (discussing the earliest American corporations in the colonial days and the years immediately following the Revolution); *infra* notes 225-28 and accompanying text (discussing how the legal establishment of municipalities developed exclusively under state law jurisdiction with special charters issued by state legislatures occupying an important role from the late eighteenth through the early twentieth centuries).

47. See CHANDLER, *supra* note 43, at 28-31; SELLERS, *supra* note 45, at 15, 18, 23 (stating that the number of corporate charters climbed to 307 by the year 1820).

48. See CHANDLER, *supra* note 43, at 28-30.

49. See *id.* (discussing the role of state-chartered banks and their notes serving as a medium of exchange due to the limitation of the amount of coin and bills of exchange and the lack of government-issued paper money); SELLERS, *supra* note 45, at 45-46 ("Bank's contribution to the take-off of a capital-hungry economy can hardly be exaggerated.").

50. See SELLERS, *supra* note 45, at 40-43 (describing the early boom in canal and turnpike state-issued corporate charters); *id.* at 391-92 (describing the early efforts to build railroads in the late 1830s and early 1840s). See generally GEORGE ROGERS TAYLOR, *THE TRANSPORTATION REVOLUTION* 15-31 (1951) (discussing the movement for improving roads and bridges as part of a national system and the significance of waterways for commerce); *id.* at 32-55 (discussing canals).

51. See CHANDLER, *supra* note 43, at 36 (explaining that despite the increased use of corporations, the partnership remained the standard business form for purely commercial enterprises until after 1840); FREYER, *supra* note 19, at 4 (contending that the majority of adult white males in antebellum America were self-employed in unincorporated enterprises). Although many corporate charters granted after 1800 for canals, turnpikes, and banks went to private business entrepreneurs, these corporations did not operate as private businesses in the same sense as unincorporated businesses. To encourage much needed improvements, the early special charters normally granted privileges in the form of monopolies or franchises, causing these early corporations to resemble more closely towns' public bodies rather than private competitive businesses. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860*, at 116-18 (1977); HOVENKAMP, *supra* note 42, at 113 (describing Justice Story's discussion of the difference between

required the ability to pool large amounts of capital and to exist beyond the natural life of the owners.<sup>52</sup>

The only constitutional impediment that could have prevented the state legislatures' widespread exercise of the general power to charter corporations for banking and transportation projects would have required the U.S. Supreme Court to hold that the federal government enjoyed exclusive power over interstate commerce, and that the chartering of business corporations constituted interstate commerce. The Supreme Court, led by Chief Justice John Marshall, considered for the first time the general question of whether federal power over interstate commerce was exclusive or concurrent with the states, and interpreted the powers as concurrent.<sup>53</sup> State enjoyment of concurrent rights with Congress over interstate commerce implicitly legitimized states' power to issue corporate charters for any purpose and allowed state-chartered banks and transportation projects to grow expeditiously without serious question or analysis. Thus, the Marshall Court gave the states a powerful headstart toward permanently assuming primary jurisdiction over the incorporation process.

Other than chartering the Bank of North America and the Bank of the United States, the federal government showed little serious interest in corporations.<sup>54</sup> No overt policy discussions addressed whether it would be more efficient to have Congress rather than the

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corporate charters granted with monopolies and franchises and those involving common rights that should not confer monopolies or franchises); *SELLERS, supra* note 45, at 45, 53 (discussing the blurred line between public and private purpose in early transportation and banking corporations).

52. *See* CHANDLER, *supra* note 43, at 28, 32, 34; *SELLERS, supra* note 45, at 44.

53. Of the members of the Marshall Court, only Justice Story wanted exclusive federal powers over commerce, but he could never muster a majority to support his position. *See* 3-4 G. EDWARD WHITE, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 491, 498-501 (1988) (summarizing Story's desire for a partnership relationship between Congress and federal courts to maintain federal government prominence, and discussing the negative reaction to Story's position by others who feared infringement on state sovereignty). Justice Marshall, who generally favored strong interpretations of commerce powers when Congress chose to act, equivocated, thus paving the way for commerce powers to be shared concurrently with the states. *See id.* at 510-85 (explaining that although Marshall believed in a strong federal government, he also conceded that the states must retain some powers); *see also* *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 24-25 (1824) (reserving concurrent state powers to regulate commerce despite upholding federal regulation under the particular facts of the case); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 380-90 (1821) (indicating that Justice Marshall recognized the sovereignty of the people to form the foundation of residual state powers); *McCulloch v. Maryland* 17 U.S. (4 Wheat.) 316, 344-51 (1819) (showing that Justice Marshall employed a coterminous power theory).

54. *See* WHITE, *supra* note 53, at 830-31 (describing the limited number of federally chartered corporations).



states assume principal responsibility for issuing corporate charters, especially corporate charters for banks and transportation projects, both of which raise significant interstate commerce issues. By the 1820s, however, concerns surfaced regarding the inevitable inefficiency resulting from each state sponsoring its own transportation improvements.<sup>55</sup> To coordinate the piecemeal transportation efforts of the states, John C. Calhoun, a member of the fourteenth Congress attempted to initiate a national transportation plan, embodied in the Bonus Bill.<sup>56</sup> The Bonus Bill, which passed by a two-vote margin, would have launched a massive federally sponsored effort “to bind the republic together with a perfect system of roads and canals,” funded by a \$1.5 million bonus from the Bank of the United States.<sup>57</sup> In 1817, due to serious disagreements concerning Congress’ constitutional powers to fund this project, President Madison vetoed the Bonus Bill. The failure of the Bonus Bill left America’s transportation development and the practice of issuing corporate charters for transportation projects largely under state control.<sup>58</sup>

The constitutional debate that killed the Bonus Bill focused on defining the word “necessary” in the clause empowering Congress to make all necessary and proper laws related to its constitutional powers to regulate commerce among the states. Those in favor of Alexander Hamilton’s strong interpretation of congressional powers read “necessary” to mean conducive, useful, or convenient to Congress’ constitutional goals of regulating, coordinating, or promoting commerce among the states. Those favoring Thomas Jefferson’s more restrictive view read “necessary” to require Congress’ actions to be far more essential toward furthering these constitutional

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55. See *infra* notes 263-66 (discussing the issuance of special charters in the field of banking and transportation).

56. See SELLERS, *supra* note 45, at 76-78 (outlining Calhoun’s efforts and justifications for the components of the Bonus Bill Plan).

57. See *id.* at 76, 78; *id.* at 62 (stating that first suggestions of a national transportation plan came from Thomas Jefferson’s treasury secretary, but that the coming of the War of 1812 shelved the idea).

58. See *id.* at 79 (noting that Madison vetoed the Bonus Bill the day before he left office in March, 1817); *id.* at 82-83 (discussing efforts by President Monroe to secure a constitutional amendment to support the Bonus Bill killed by House Speaker Henry Clay over a petty political slight). Although federal participation in transportation enjoyed limited support under President Monroe, the veto of the Bonus Bill and the defeat of the constitutional amendment left the commanding force for transportation improvements largely with state-chartered corporations. See *id.* at 83-84, 150-52; FREYER, *supra* note 19, at 44; see also SELLERS, *supra* note 45, at 79 (stating that New York chartered the Erie Canal immediately after Madison’s veto of the Bonus Bill); *id.* at 316 (noting that national support for transportation died after Jackson vetoed the Maysville Road Bill).

goals.<sup>59</sup> Despite Madison's concerns, the Supreme Court probably would have found the Bonus Bill, had it passed, to be a constitutional exercise of congressional authority under the Commerce Clause. Although the states enjoyed concurrent authority to regulate interstate commerce when Congress remained silent, when Congress chose to act, the Marshall Court interpreted the Commerce Clause as strong enough to support congressional regulation over intrastate activities having interstate effect. This broad interpretation of Congress' commerce powers first emerged in the language of *Gibbons v. Ogden*.<sup>60</sup> In *Gibbons*, the Supreme Court held that an exclusive license granted by the New York legislature covering movement of goods by steamboat between New York City and New Jersey fell within the boundaries of federal regulation under the Commerce Clause, due to the license's "effect on interstate commerce."<sup>61</sup>

By denying Congress any real chance to take the lead in the early development of America's transportation infrastructure, the defeat of the Bonus Bill in 1817, thirty years after the 1787 Constitutional Convention, serves as a marker of when state legislatures affirmatively assumed the primary power to issue special corporate charters. The state legislatures' general exercise of authority to issue corporate charters during the immediate years surrounding the American Revolution occurred with little discussion at a time when corporations, other than those organized strictly for public purposes, were extremely rare. In their struggle to find the ideal balance of power between Congress and the states, the Framers of the

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59. See SELLERS, *supra* note 45, at 77; see also *supra* notes 37-38 and accompanying text (noting that Alexander Hamilton and Thomas Jefferson had been on opposite sides before in the debate of congressional powers surrounding the bank charter of 1791).

60. 22 U.S. (9 Wheat) 1 (1824).

61. See *id.* at 50-52 (holding a New York statute granting exclusive rights of navigation between New Jersey and New York City to certain steamboat navigators unconstitutional because it conflicted with a federal statute); *id.* at 222-23, 239 (Johnson, J., concurring) (discussing the commerce powers and stating "[w]herever the powers of the respective government are frankly exercised, with a distinct view to the ends of such power, they may act upon the same object, or use the same means, and yet the powers be kept perfectly distinct"); see also *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 324-25 (1819) (holding that Congress had the power to establish the Second Bank of the United States as a necessary and proper means for regulating commerce); *Bank of United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809) (finding that the Bank of the United States was a citizen, for jurisdictional purposes, and thus could sue in federal court); HOVENKAMP, *supra* note 42, at 79 (noting that Marshall broadly interpreted federal power under the Commerce Clause); 3-4 WHITE, *supra* note 53, at 547-52 (stating that Marshall's decision in *McCulloch* was structured so that the Constitution sanctioned Congress to establish a national bank); *id.* at 568-80 (noting that Marshall broadly interpreted the Constitution's grant of congressional power to regulate "commerce among the states," giving the federal government extensive power of commerce regulation).

Constitution never would have contemplated corporate charters for public purposes properly falling within congressional jurisdiction. Establishing municipalities, religious and educational institutions, cemeteries, charities, and other public organizations are quintessential examples of state functions furthering the welfare of the citizens within that state.<sup>62</sup> Thus, the states' exclusive control of corporate charters for public purposes in no way established state law prevalence over corporate charters for other purposes such as banking, transportation, and private business.

The question of whether the federal or state government should enjoy the primary authority to issue all corporate charters arose on a practical level for the first time in the early nineteenth century during the proliferation of state chartered corporations for banking and transportation projects, both of which clearly raise important interstate commerce concerns.<sup>63</sup> Although the Bonus Bill did not directly detail whether the plans would involve federally issued corporate charters, the Bonus Bill, if passed, would have resulted in federal coordination of an important development, the first transportation system, which was then being handled by the states through state issued special corporate charters. Had the Bonus Bill been successful, federal law probably would have supplied effective regulation for America's railroads considerably sooner than the early twentieth century.<sup>64</sup> Moreover, the early experience of federal law playing a major role in America's transportation development conceivably could have redirected the regulation of corporations generally toward the federal direction. The Bonus Bill, had it succeeded, may have sponsored massive congressionally issued special charters, which could have set a precedent for granting large numbers of federally based charters for other purposes and steered the practice to federally based charters for all corporations.

*B. States' Power Increases Before the Civil War Through Numerous Special Charters Issued in All Business Areas and Appearance of First General Incorporation Statutes*

During the 1820s, because of protective tariffs adopted a few years earlier encouraging domestic production of industrially produced

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62. See *infra* notes 225-28 and accompanying text (viewing municipalities as exclusively under state control).

63. See HURST, *supra* note 2, at 141.

64. See *infra* notes 255-56, 281-85 and accompanying text (noting that the first federal response to railroads was not introduced until 1887, and that effective federal regulation did not evolve until the early twentieth century).

goods, for the first time large numbers of state-issued corporate charters appeared for new manufacturing enterprises. Although America's true Industrial Revolution remained several decades away,<sup>65</sup> for most of the 1820s, business and commerce grew steadily, and the state-chartered business corporation, which was on its way to becoming the dominant legal form for conducting all commercial enterprises, experienced little overt controversy.<sup>66</sup> Within the shadows of business' progress, however, discontent among the general population was growing, and the corporation soon would face widespread criticism for the first time. America's transformation from a predominantly agricultural and mercantile economy to a market economy displaced and negatively affected many individuals.<sup>67</sup> The rhetoric accompanying Andrew Jackson's election in 1828 as the sixth President of the United States denounced federal powers and harshly criticized banks, business corporations, and other instruments of power oppressing the large majority of farmers and workers.<sup>68</sup>

The policies of Jackson's Administration and the goals shared by proponents of Jacksonian Democracy, however, reflected a more complex agenda than these simple messages suggested; an agenda

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65. See CHANDLER, *supra* note 43, at 3, 14, 35, 49, 50-51, 77 (noting that although the widespread use of the corporate form to pool capital represented the most significant institutional development, it did not spawn the Industrial Revolution). As long as power remained limited to traditional sources of animal, wind, and water power, large-scale industrialization could not occur. The availability of coal and iron in the 1850s provided necessary power for large-scale industrialization. See *id.* at 75-77.

66. See CADMAN, *supra* note 39, at 36-37 (noting little opposition to corporations until the late 1830s); HURST, *supra* note 2, at 30 (noting that anti-charter feelings started in the 1830s and flourished through the 1860s); SELLERS, *supra* note 45, at 85-90 (discussing legal developments essentially protecting corporations); *id.* at 198 (discussing undercurrents of disaffection in the 1820s as undetected among the elite).

67. See ARTHUR M. SCHLESINGER, *THE AGE OF JACKSON* 30 (1945) (characterizing the 1820s as a decade of discontent); SELLERS, *supra* note 45, at 163 ("[F]rustrated and angry, a populace that had ignored entrepreneurs and their little-understood projects in times of piping prosperity moved into political revolt . . ."); *id.* at 172 (warning by Secretary Calhoun to Secretary Adams in 1820 of a general mass of disaffection, without direction, in search of a leader); *id.* at 198 (describing John Quincy Adams and Henry Clay as having no clear idea of the dissatisfaction of the average people); *id.* at 23 (noting that the commercial boom made nine out of ten individuals worse off); *id.* at 137-39 (describing the general misery following the Panic of 1819); see also FREYER, *supra* note 19, at 20 (noting social tensions caused by the rise of corporations).

68. See SELLERS, *supra* note 45, at 298-99 (describing Jackson's election and return numbers, with a popular vote unmatched until the twentieth century); *id.* at 173 (noting that, before his election, Jackson made flat statements that he opposed all banks on principle); *id.* at 321 (describing Jackson's fear of a national bank); *id.* at 301 (emphasizing popular enthusiasm along Jackson's inauguration route); see also FREYER, *supra* note 19, at 48 (identifying "the system of corporations" as "nothing more nor less than a moneyed federalism").

that in many ways accommodated the very business interests being criticized.<sup>69</sup> The wrath directed at banking focused exclusively on the Bank of the United States, ignoring the large number of state-chartered banks, many of which engaged in questionable financial practices.<sup>70</sup> Despite the sound credit practices and stabilizing effects that the Bank of the United States contributed to America's economy,<sup>71</sup> Jackson vetoed the re-issuance of the Bank's charter in

69. See FREYER, *supra* note 19, at 81 (describing that an attack on banks occurred simultaneously with the creation of more state-chartered banks to provide badly needed credit); *id.* at 92-104 (explaining that opposition to corporations was not unequivocal, and that the taxing of corporations kept them accountable to the community); SCHLESINGER, *supra* note 67, at 190 (referring to the Democratic opposition to Whig monopoly that created bank charters for deserving Democrats); *id.* at 306-21 (discussing the theoretical position behind the Jacksonian position as a complex conflict between producing and nonproducing classes); SELLERS, *supra* note 45, at 359, 363 (determining that by 1840, "democracy proved safe for capitalism"); see also WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE* 105-10 (1996) (discussing vast areas of state regulation during antebellum nineteenth century, and refuting the label of the period as being completely laissez-faire); EDWARD PESSON, *JACKSONIAN AMERICA* 91-121 (1985) (detailing the period and exploring the extent of true democratic reform during an era of laissez-faire); Reeve Huston, *The Nineteenth-Century Political Nation: A Tale of Two Syntheses*, in *REVIEWS IN AMERICAN HISTORY* 413-14 (Stanley J. Kutler ed., 1995) (reviewing CHARLES SELLERS, *THE MARKET REVOLUTION: JACKSONIAN AMERICA, 1815-1846* (1991), and JOEL H. SIBLEY, *THE AMERICAN POLITICAL NATION, 1838-1893* (1991)) (identifying capitalist development as a defining issue of Jacksonian politics).

70. See SCHLESINGER, *supra* note 67, at 74-87 (describing opposition to the Bank of the United States); *id.* at 89 (quoting Andrew Jackson as saying "[t]he bank . . . is trying to kill me, but I will kill it"); *id.* at 232 (summarizing the claim that the war was between the people and all incorporated entities); SELLERS, *supra* note 45, at 312-13 (noting Jackson's emphasis on power of state government and his urging Congress to consider alternatives to the Second Bank of the United States); see also CHANDLER, *supra* note 43, at 30-31 (explaining that state-chartered banks reached over 200 by 1815 and over 300 by 1820, and noting that after Jackson vetoed the charter for the Bank of the United States, state-chartered banks continued to grow, numbering 506 by 1834 and 901 by 1840); FREYER, *supra* note 19, at 82 (noting that Jackson's opposition to the Bank of the United States undercut resistance to state-chartered banks); SCHLESINGER, *supra* note 67, at 123 (assessing that state banks engaged in the most flagrant abuses of corporate privilege); *id.* at 172 (describing the alarming increase in the ratio of paper money to specie from 1828 to 1833); SELLERS, *supra* note 45, at 133 (describing questionable state bank practices and control, and discussing why these were the major reasons to re-charter the Bank of the United States in 1817); *id.* at 161 (recognizing hard times triggered by state-enforced debt collection and the depreciated notes of state-chartered banks).

71. See CHANDLER, *supra* note 43, at 30 (declaring that, during the late 1820s and early 1830s, the Second Bank of the United States provided excellent services and operated on an international scale, and that the number of state-chartered banks leveled off). Before enjoying success in the 1820s, the Bank of the United States experienced controversy embodied in the 1811 defeat of its charter, primarily because it diverted profits away from the state-chartered bank (the Bank's charter was reissued in 1815 by a large majority). See *id.* (describing the tension between support for state-chartered banks and national banks); SELLERS, *supra* note 45, at 62-63, 71-72 (noting that the Bank's charter extension was defeated in 1811, but that support was restored because of a "uniform currency" a few years later); *id.* at 313 (describing benefits provided by the Bank of the United States); see also SCHLESINGER, *supra* note 67, at 74 (describing the privileges and services of the Second Bank of the

1832.<sup>72</sup> For the rest of the 1830s through the Civil War, state-chartered banks engaging in unsound financial practices continued to proliferate, causing great instability to the nation's currency.<sup>73</sup>

Although the corporation experienced much criticism from the late 1820s through the 1850s—the period commonly associated with the development of Jacksonian Democracy<sup>74</sup>—none of the critics questioned the state legislatures' right to issue corporate charters. At no time did the corporation face a wholesale assault on its basic right to exist as a legitimate business organization.<sup>75</sup> Rather than opposing corporations or their state-chartered origin per se, proponents of Jacksonian Democracy objected to the unique privileges in the special legislative charters.<sup>76</sup> Prominent Jacksonian Democrats, such as Martin Van Buren and Theodore Sedgwick, advocated the creation of general incorporation laws, which would allow equal access to the

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United States); *id.* at 218 (asserting that the Bank of United States provided a "valuable brake on credit expansion" with its destruction "accelerating the tendencies toward inflation").

72. See SCHLESINGER, *supra* note 67, at 90 (noting that the veto message was broadly written as a defense for the common man from an unjust government, which carefully avoided the issue of hard versus soft currency, that would jeopardize the position of state banks); SELLERS, *supra* note 45, at 332-37 (summarizing the Bank supporters' unsuccessful efforts to resurrect the charter following Jackson's veto); *id.* at 326 (acknowledging the business community's outrage at the veto, and Jackson's easy re-election due to popular support of the veto).

73. See CARL H. MOORE, *THE FEDERAL RESERVE SYSTEM: A HISTORY OF THE FIRST 75 YEARS* 4 (1990) ("There followed [after 1836] 27 years of an unstable currency, the birth of "wildcat" banks, dozens of different banks issuing their own currency, loss of confidence in the banking industry and great difficulty in financing the Civil War."); ROBERT WEST, *BANKING REFORM AND THE FEDERAL RESERVE, 1863-1923*, at 15 (1977) (claiming that the period after the fall of the Second Bank of the United States leading up to the Civil War was called the "heyday" of state bank chartering, with "literally thousands of state banks issuing notes in thousands of varieties"). State banks issued their own currency, as well as notes that had little or no value outside the bank, and kept only enough reserves to fill the tills for the day. See *id.* at 16-17 (noting the name "wildcat" bank referred to banks located so far in the woods that only wildcats could find them).

74. See SCHLESINGER, *supra* note 67, at 187-88 (declaring that the attack on corporations was based on a fear of monopolies).

75. See *id.* at 188 (explaining that only an attack on charters was based on the creation of privileges and special advantages that were not available to everyone).

76. See FREYER, *supra* note 19, at 25 (noting that corporations often were subject to taxes to fund public education and the expenses of government as a condition to receiving the special privileges in the charter); FRIEDMAN, *supra* note 40, at 194 (observing that although the corporation endured much criticism in the first half of the nineteenth century and was often labeled "soulless," the demand for charters was too great, that by the 1840s the process of granting special charters was becoming routine); HURST, *supra* note 2, at 120 ("The Jacksonian outcry against corporations . . . [was] simply a demand that all should have reasonably equal access to the benefits of incorporation."); SCHLESINGER, *supra* note 67, at 126 (declaring Jackson's emphasis on exclusive privileges of corporations as being a "mischief" of power); *id.* at 175 (finding outrage with the Bank as "just the beginning").

corporate form to all those meeting the statutory requirements.<sup>77</sup> These early proponents of equal access assumed that the mere existence of general incorporation laws would cure the evils of special privileges conferred by special corporate charters.<sup>78</sup>

After President Jackson left office, two states—Pennsylvania in 1836 and Connecticut in 1837—passed general incorporation statutes.<sup>79</sup> Although New York technically enacted the first general incorporation statute in 1811,<sup>80</sup> the motive behind New York's general law was to promote domestic manufacturing enterprises and minimize U.S. dependence on British imports.<sup>81</sup> This objective set the New York statute apart from the first general laws of the 1830s, which clearly were Jacksonian products.<sup>82</sup> Unlike New York's general law, which stood alone for over twenty years and was hardly noticed by the other states, the two general laws enacted in the late 1830s<sup>83</sup> started a nationwide trend to enact general incorporation statutes.<sup>84</sup> During the 1840s, six additional states, undoubtedly influenced by the same Jacksonian policies that motivated the state legislatures of

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77. See SCHLESINGER, *supra* note 67, at 48 (describing Martin Van Buren's early attempts to create general incorporation statutes for banks). Van Buren, a prominent Jacksonian Democrat and governor of New York in 1817, was considered ahead of his time for his visions and attempts to create general incorporation statutes for banks. See *id.*; see also *id.* at 188-89 (discussing the writings of Theodore Sedgwick in 1834 as attacking the exclusive privileges granted by special corporate charters with the solution being the creation of general incorporation laws allowing any group of individuals to form a corporation).

78. See *id.* at 188-89 (explaining the solution seen in allowing all businesses to be open to competition with the formation of a corporation).

79. See Act of June 10, 1837, tit. XIV, ch. LXII, § 1, CONN. GEN. STAT. § 1 (1837) (authorizing corporate formation without a special charter to "engag[e] in and [carry] on any kind of manufacturing or mechanical or mining or quarrying or any other lawful business"); Act of June 16, 1836, ch. CCCLX, 1836 Pa. Laws 746 (authorizing corporate formation without a special charter for the purpose of "making or manufacturing iron from the raw material, with coke or mineral coal").

80. Act of Mar. 22, 1811, ch. LXVII, § 1, 1811 N.Y. Laws 111 (authorizing corporate formation without a special charter to "manufactur[e] woolen, cotton, or linen goods").

81. See SEAVOY, *supra* note 24, at 63-68 (detailing the policy behind the New York general law of 1811); see also L. RAY GUNN, *THE DECLINE OF AUTHORITY* 226 (1988) (declaring that New York's first general incorporation law of 1811 was enacted to encourage domestic manufacturing due to declining imports during a time of international crisis).

82. See GUNN, *supra* note 81, at 226 (stating that the New York 1811 statute "remained an anomaly for the next quarter century"); SELLERS, *supra* note 45, at 302-04 (explaining Jackson's goals as President, namely that he "challenged National Republicanism" and respected states' power); sources cited *infra* note 90 (identifying general incorporation laws as a product of Jacksonian Democracy).

83. See Act of June 10, 1837, tit. XIV, ch. LXII, § 1, CONN. GEN. STAT. § 1 (1837); Act of June 16, 1836, ch. CCLX, 1836 Pa. Laws 746.

84. See *infra* notes 94-95 and accompanying text (listing the general incorporation statutes enacted during and immediately after the Civil War, which brought the total number of states with incorporation statutes to 47).

Pennsylvania and Connecticut, passed general incorporation statutes.<sup>85</sup> By the end of the 1850s, the trend to copy other states to avoid being slow to offer innovative opportunities caught on with fifteen additional states enacting general incorporation statutes.<sup>86</sup> By 1859, this progression brought the total number of states offering general laws to twenty-four of the thirty-eight existing states or

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85. See WIS. STAT., ch. 51, § 1 (1849) (approving incorporation “for the purpose of carrying on any kind of manufacturing, mining, lumbering, agricultural, mechanical or chemical businesses”); Act of Mar. 16, 1848, No. 100, § 1, 1848 La. Acts 70, 70-75 (providing incorporation for many types of businesses, including manufacturing, mining, construction, insurance, foundries, and refining sugar, but forbidding general incorporation for “any mercantile or agricultural business . . . commission business . . . brokerage . . . jobbing . . . or the business of factors in any form or the business of exchange in any form”); Act of Feb. 22, 1847, ch. LXXXI, § 1, 1847 Iowa Acts 101 (allowing incorporation of “any business which may be the lawful subject of a general partnership, including the establishment of ferries, the construction of railroads, and other works of internal improvement”); Act of May 18, 1846, No. 148, § 1, 1846 Mich. Pub. Acts 265 (providing incorporation for “mining and manufacturing iron, copper or other materials”); Act of Feb. 25, 1846, 1846 N.J. Laws 64 (authorizing incorporation of “any . . . lawful manufactures”); Act of Feb. 9, 1846, ch. 29, § 80, 1846 Ohio Laws 224 (granting incorporation of “manufacturing . . . or mining”). Only New Jersey, which enacted a general incorporation law in 1816, and repealed it in 1819 when the statute had never been used, noticed New York’s 1811 statute. See Act of Jan. 26, 1816, 1816 N.J. Laws 158 (repealed 1819); CADMAN, *supra* note 39, at 24-25 (explaining that although New Jersey’s 1816 law is often overlooked, it is a significant historical incorporation law).

86. See ALA. CODE § 1473 (1852) (granting incorporation for “any manufacturing, mining or quarrying business”); Miss. Code ch. 35, § 1 (authorizing incorporation for “mechanics societies, manufacturing companies, agricultural societies, associations formed for building theaters, hotels and telegraph companies”); Act of Apr. 14, 1853, ch. LXV, § 1, 1853 Cal. Stat. 347 (enabling incorporation of “manufacturing, mining, mechanical, or chemical purposes”); Act of Jan. 8, 1853, ch. 490, No. 10, 1852 Fla. Laws 62 (authorizing incorporation “for the purpose of manufacturing woolen, cotton, or linen goods . . . or making glass . . . or lumber”); Act of Aug. 22, 1892, § 1, 1852 Ill. Laws 135 (allowing incorporation for “mining, or for the transportation of coal, or other products or commodities”); Act of May 20, 1852, ch. 66, § 1, 1852 Ind. Acts 358 (allowing incorporation to “carry on any kind of manufacturing, mining, mechanical or chemical business”); Act of Feb. 9, 1859, ch. XXXVI, §§ 1, 34, 1859 Kan. Sess. Laws 305, 315-16 (providing for incorporation for certain businesses including manufacturing companies); Act of Mar. 10, 1854, ch. 1012, §§ 1-2, 1854 Ky. Acts 179, 179-80 (granting incorporation for “carrying on any kind of manufacturing, mining, transporting, mechanical or chemical purposes or the transportation and vending of coal”); Act of May 28, 1852, ch. 322, 1852 Md. Laws 44, 44-45 (permitting incorporation for certain business including manufacturing); Act of May 15, 1851, ch. 133, No. 60, §§ 1-2, 1851 Mass. Acts 633 (allowing incorporation to “[carry] on any manufacturing, mechanical, mining or quarrying business . . . provided that no association shall be formed . . . for distilling or manufacturing intoxicating liquors”); Act of Aug. 12, 1858, ch. 1, § 1, 1858 Minn. Laws 330 (allowing incorporation for “transaction of any lawful business”); 1852 N.C. Sess. Laws, ch. LI, § 1 (authorizing incorporation for “mining or to establish any manufactory at any place within this state”); Act of Feb. 9, 1850, ch. CLXXIX, § 1, 1849-1850 Tenn. Pub. Acts 385 (authorizing incorporation of any “[m]anufacturing, [m]ining, [m]echanical or [c]hemical business”); Act of Mar. 13, 1854, ch. 46, §§ 1-2, 1854 Va. Acts 32 (providing incorporation “for the purpose of manufacturing and mining”); Act of No. 19, 1851, No. 60, 1851 Vt. Acts & Resolves 52, 53-54 (providing incorporation “for the purpose of manufacturing”).



territories, well over fifty percent.<sup>87</sup>

The Jacksonian period marked an important point in the evolution of corporate law. As the corporation became the business organization of choice for numerous manufacturing enterprises,<sup>88</sup> it began to emerge “as the preferred style of structured business organization” for all enterprises.<sup>89</sup> During this time, states both maintained and strengthened their control over access to the corporate form by issuing increasing numbers of special charters and inventing the first general incorporation laws. The apparent inconsistency between Jacksonian themes of equality and the increasing numbers of special charters issued for all purposes, especially manufacturing and other private businesses, sparked the trend among the states to enact general incorporation statutes, thereby creating the appearance of equal access to the corporation.<sup>90</sup> The invention of state general incorporation statutes during the Jacksonian period was not preordained.<sup>91</sup> Those criticizing corporations could have tried to deny access to the corporation under any circumstances. A successful attack of the legitimacy of the corporation itself<sup>92</sup> would have radically altered business development in a direction difficult to predict given the corporation’s dominant place in American business by the last quarter of the nineteenth century. Once the Jacksonian platform conceded the legitimacy of the corporation, however, the unwavering states’ rights theme embedded in Jacksonian politics negated any possibility of redirecting the state-centered power over the corporation toward federal control. The Supreme Court, led by Chief Justice Roger Taney, who was appointed by Jackson in 1836, would have held unconstitutional any federal attempt to stop or control the developing state general incorporation statutes. The Taney Court substantially narrowed the Marshall Court’s interpretation of the

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87. See Appendix B (showing percentage of states offering general incorporation statutes and prohibiting incorporation by special charter); see also *supra* notes 85-86 (listing statutes of states that enacted general incorporation statutes in the period).

88. See SCHLESINGER, *supra* note 67, at 316-17 (explaining the tensions in Jackson’s laissez-faire policies, as seen in his advocacy for government intervention and support of free enterprise).

89. See HURST, *supra* note 2, at 14 (“By 1830 the trend was plain: the corporation would emerge as the preferred style of structured business organization.”).

90. See HOVENKAMP, *supra* note 42, at 2 (identifying the modern business corporation as a Jacksonian product); SCHLESINGER, *supra* note 67, at 336-37 (claiming that general incorporation laws were a Jacksonian creation to attack bank monopolies).

91. See SCHLESINGER, *supra* note 67, at 89-90 (determining that Jackson’s position against the National Bank sparked his fear of federal incorporation).

92. See *id.* at 231-32 (discussing the banking crisis and that the issue was not merely with charters, but “between the people and all incorporated institutions”).

scope of Congress' powers under the Commerce Clause. Because the Taney Court's interpretation of the Commerce Clause only allowed federal regulation in cases where commerce actually moved among the states, the chartering of business corporations fell outside the scope of potential federal regulation.<sup>93</sup>

*C. States' Power Cements Following Reconstruction with Widespread Adoption of General Incorporation Statutes and Proves Irreversibly Entrenched by Early Twentieth Century*

The stampede of state general incorporation enactments continued during and after the Civil War. Throughout the 1860s, fourteen states passed general incorporation statutes, bringing the total number of states offering general laws to thirty-nine of the forty-seven existing states or territories—over eighty percent.<sup>94</sup> By 1875,

93. See *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421, 434-36 (1855) (ruling that the Pennsylvania act requiring bridges to be a certain height did not impose on federal Commerce Clause power); *Cooley v. Board of Wardens*, 53 U.S. 299, 320-21 (1851) (declaring that federal Commerce Clause power was not exclusive of states' rights to control commerce, provided that such state power did not interfere with the federal power); *New York v. Miln*, 36 U.S. 102, 141-42 (1837) (holding that a New York statute requiring vessel masters originating from other countries or states to report the names of foreign passengers, did not violate the federal Commerce Clause); HENRY ABRAHAM, JUSTICES AND PRESIDENTS 87 (1974) (discussing the states' rights posture of the Taney Court); HOVENKAMP, *supra* note 42, at 80 (explaining the Taney Court's interpretation of Congress' limited scope of power within the Commerce Clause).

94. During the Civil War, Maine, Montana, Nebraska, Nevada, Oregon, and West Virginia enacted general incorporation statutes. See Act of Mar. 10, 1865, ch. CXI, § 1, 1865 Nev. Stat. 359 (allowing incorporation for "manufacturing, mining, milling, ditching, mechanical, chemical, building, navigation, transportation, and farming purposes"); Act of Jan. 7, 1864, ch. 2, § 1, 1864 Jt. Resol. & Mem. of the Territory of Neb. 41 (enacting corporation rights for "any lawful business"); Act of Feb. 15, 1864, Corporations, 1864 Mo. Laws 20 (authorizing incorporation for "manufacturing, carrying on any mechanical, mining, smelting or printing business"); Act of Oct. 26, 1863, ch. 83, §§ 1-8, 1863 W. Va. Acts 76, 76-78 (enabling incorporation for "manufacturing, mining . . . and for any other purpose useful to the public . . . but not a bank of circulation or a company for the construction of any work of internal improvement, or any church or religious denomination, or any company, . . . purchas[ing] lands and resell[ing] the same for profit"); Act of Oct. 14, 1862, tit. I, 1862 Or. Laws 658 (allowing incorporation for "any lawful enterprise, business, pursuit, or occupation"); Act of Mar. 10, 1862, ch. 152, §§ 1-2, 1862 Me. Acts 118 (declaring incorporation allowed "for the purpose of engaging in and carrying on any kind of manufacturing, mechanical, mining, and quarrying businesses"). The trend continued after the Civil War. See Act of Dec. 22, 1869, No. 188, Art. 14, ch. 8, § 1, 1869 S.C. Acts 38, (regulating incorporation for "any mechanical, mining, quarrying, or manufacturing business"); Act of Dec. 10, 1869, ch. 8, tit. 1, § 1, 1869 Wyo. Sess. Laws 234 (providing "for the purpose of carrying on any kind of manufacturing . . . or carry[ing] on any branch of business designed to aid in the industrial or productive interests of the country"); Act of Apr. 12, 1869, No. XCII, § I, 1869 Ark. Acts 180 (authorizing incorporation "for . . . engaging in, or carrying on, any kind of manufacturing, mechanical, mining or other lawful business"); Act of Dec. 27, 1867, ch. 3, §§ 1-2, 1867 N.M. Laws (creating general incorporation for "mining, manufacturing and other industrial pursuits"); COLO. REV. STAT. ch. 18, § 1

America reached a point of uniform availability of incorporation under general laws, with forty-four of the forty-seven existing states or territories, over ninety percent, offering general incorporation statutes as an alternative to special charters.<sup>95</sup>

(1867) (declaring rights of incorporation for “carrying on any kind of manufacturing, mining, mechanical, or chemical business; construct wagon roads, railroads, telegraph lines, dig ditches, build flumes, run tunnels, or carry on any branch of business designed to aid in the industrial or protective interests of the country”); Act of Nov. 6, 1866, ch. LI, § 1, 1866 Ariz. Territory Laws 483 (providing incorporation for “any lawful enterprise, business, pursuit, or occupation”); Act of July 7, 1866, ch. 4224, § 1, 1866 N.H. Laws 3246 (enabling incorporation for “carrying on any lawful mechanical, manufacturing, mining or milling business”); Act of Jan. 18, 1866, §§ 1-4, 1866 Wash. Laws 55, 57-58 (allowing incorporation for “manufacturing, mining, milling, . . . and farming purposes or engaging in any other species of trade”).

95. See Act of Dec. 7, 1874, § 1, 1874 Idaho Sess. Laws 619 (permitting incorporation for “manufacturing, mining, mechanical, chemical or agricultural purposes, for constructing telegraph lines, for making roads, for establishing ferries, for building bridges, for conveying water, or for the purpose of engaging in any species of trade or commerce, or the construction and operation of irrigating ditches and canals and of the lands in connection therewith”); Act of Apr. 23, 1874, ch. XCVII, §§ 1-10, 1874 Tex. Gen. Laws 120, 120-23 (offering incorporation for “any other purpose intended for mutual profit or benefit not otherwise especially provided for, and not inconsistent with the Constitution and laws of this State”); Act of Jan. 12, 1872, § 1, Mont. Territory 406 (enabling incorporation of “any kind of manufacturing, mining, mechanical, or chemical business, dig ditches, build flumes, run tunnels, or carry on any branch of business designed to aid in industrial or productive interest of the country”); Act of Mar. 21, 1871, tit. 23d, ch. 52, 1871, Del. Laws 229 (allowing incorporation for “drying, canning, manufacturing and preparing of fruits and other products of the State for sale”); Act of Feb. 18, 1870, § 1, 1870 Utah Laws 136 (1870) (authorizing incorporation for “mining, manufacturing, commercial, or other industrial pursuit[s]”); see also Act of Feb. 29, 1876, pt. 1, tit. XIV, No. CXXXVIII, 1876 Ga. Act 118 (“enabling purchasers of railroads to form corporations”). In Georgia, before 1855, corporations were authorized only by the legislature, although in 1855 the courts had powers to grant corporate charters. See ALBERT BERRY SAYE, A CONSTITUTIONAL HISTORY OF GEORGIA, 1732-1938, at 182-83, 293-94 (1970). After its first general incorporation law in 1876, Georgia proceeded to make many amendments that tended to increase the types of businesses eligible to use the general laws. See Act of Feb. 29, 1876, pt. I, tit. XIV, No. CXXXVIII, 1876 Ga. Act 118 (“[E]nabling purchasers of railroads to form corporations.”). The courts proceeded to stay involved in the incorporation process into the twentieth century, long after Georgia prohibited the legislature from issuing special charters. See SAYE, *supra*, at 293-94.

The few states and territories that had not yet enacted their first general incorporation statute by 1875 did so by the early twentieth century. See Act of May 25, 1893, ch. 1200, § 1, cl. 5, 1893 R.I. Pub. Laws 267 (permitting incorporation of “any lawful business in this state or out of this state, excepting the business of any railroad company, turnpike company, or any company which shall need to possess . . . the power of eminent domain . . . or to acquire franchises in the streets and highways of towns or cities, and also excepting the business of insurance, of banks and banking corporations, savings banks, trust companies, or any other corporation trading in bonds, notes, or other evidence of indebtedness”); 1877 Territory of Dakota Laws, art. 1, § 1 (allowing incorporation of “mining, manufacturing, and other industrial pursuits”); 1890 Hawaii Sess. Laws ch. 43, § 1 (permitted incorporation for “carrying on any business or undertaking, either Mercantile, Agricultural, or manufacturing, for which individuals may lawfully associate themselves (except banking and professional business)”; OKLA. STAT. ch.

Although by 1875 virtually all states offered the use of general laws to any manufacturing or other enterprise engaging in private business activities,<sup>96</sup> many states continued to exclude certain enterprises from incorporating under the general laws. These excluded categories included enterprises raising interstate commerce concerns, notably railroads and banks, as well as purely public activities, such as municipalities.<sup>97</sup> The statutory provisions of

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XVIII, art. I, § 12 (1890) (authorizing incorporation for “mining, manufacturing, and other industrial pursuits; the construction or operation of railroads . . . for colleges; seminaries, churches, libraries, benevolent, charitable and scientific associations; for the business of insurance, banks of discount and deposit (but not of issue), and for the loan, trust and guarantee associations . . .”); 1877 C.L. Territory of Dakota Rev. Code, ch. 3, art. 1, § 384 (allowing incorporation of “mining, manufacturing, and other industrial pursuits, or the construction or operation of railroads, wagon roads, irrigating ditches, and the colonization and improvement of lands in connection therewith—or for colleges, seminaries, churches, libraries or any benevolent, charitable or scientific association and for such other purposes as congress may hereafter authorize”); *see also* ALASKA STAT. ch. 37, §§ 798-799 (1903) (providing incorporation to “construct railroads . . . operate mines, and fisher[ies] . . . and to construct smelters, power [plants] and lighting plants, docks, wharves, warehouses and hotels . . . or to carry on trade, transportation, agriculture, lumbering, and manufacturing”). Hawaii and Alaska enacted general incorporation statutes before organizing as a territory. *See* NEAL R. PIERCE, *THE PACIFIC STATES OF AMERICA* 264, 350 (1972) (noting that Alaska and Hawaii became states in 1952 and 1959, which is later than the enactment of the general incorporation laws). By 1903, all 50 states or territories enacted general incorporation statutes. *See* Appendix B (noting the increase in general incorporation statutes being offered by the states through the twentieth century).

96. *See supra* notes 79, 85-86, 94-95 (summarizing the first general incorporation statutes of Connecticut, Pennsylvania, New York, Louisiana, Michigan, New Jersey, Ohio, Wisconsin, Alabama, Mississippi, California, Florida, Illinois, Indiana, Kansas, Kentucky, Maryland, Massachusetts, North Carolina, Tennessee, Virginia, Vermont, Maine, Missouri, Nevada, Colorado, New Hampshire, New Mexico, South Carolina, Delaware, Montana, Utah, Georgia, Iowa, Minnesota, Oregon, West Virginia, Nebraska, Arizona, Washington, Arkansas, Wyoming, Texas, and Idaho, which came close to allowing general incorporation for all lawful businesses and/or allowed manufacturing and other private business enterprises to use the general law); *see also* FRIEDMAN, *supra* note 40, at 191 (noting that by 1875, the corporation was becoming a general form for doing business).

97. Although the earliest general incorporation laws sometimes provided a relatively narrow list of specific manufacturing enterprises permitted to use the statutes, by 1875, the statutes tended to allow all lawful businesses to incorporate under the general laws and provided for exceptions to that rule. *See* Act of June 21, 1875, ch. 611, § 1, 1875 N.Y. Laws 755 (justifying incorporation of “any lawful business except banking, insurance, [and] the construction and operation of railroads . . .”); Act of Apr. 7, 1875, ch. XC, § 1, 1876 N.J. Laws 103 (approving incorporation “to carry on any lawful business or purpose whatever . . .”); Act of Apr. 14, 1874, ch. 165, § 1, 1874 Mass. Acts 109 (allowing incorporation for “any lawful business . . . except buying and selling real estate and banking”); Act of Feb. 20, 1874, ch. XXIV, 1874 Utah Laws 50 (allowing incorporation “for any rightful subjects consistent with the constitution of the United States and laws of this territory . . .”); Act of Apr. 18, 1872, § 1, 1872 Ill. Laws 296 (authorizing incorporation for any lawful purpose, except banking, insurance, real estate brokerage, the operation of railroads and the business of loaning money.”); N.C. GEN. STAT. ch. 26, § 1 (1872-73) (creating incorporation rights for “any purpose not unlawful”); Act of Mar. 30, 1871, ch. 277, §§ 1-2, 1871 Va. Acts 367, 367-68 (1871)

nineteenth century general laws tended to subject corporations to a variety of restrictions. These restrictions included ceilings defining the corporation's maximum capitalization and asset size, public disclosure requirements, limitations on corporate purpose, types of shares issued, voting rights, sources of dividends, and prohibitions against owning holding companies.<sup>98</sup> The restrictions set regulatory standards for businesses at a time when only the states were attempting to regulate business activities.<sup>99</sup>

During the Civil War, which formally sparked the Industrial

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(granting incorporation "for the conduct of any enterprise or business which may lawfully be conducted by an individual or by a body corporate, except to construct a railroad, or turnpike, or canal . . . or to establish a bank of circulation"); ch. 54, § 1, 1871 Tenn. Pub. Acts 63 (authorizing chancery courts to grant corporate charters for any lawful business); Act of Mar. 15, 1870, ch. 729, §§ 1-6, 1870 Ky. Acts 94, 94-95 (providing incorporation for "any lawful business, except banking and insurance, and for the construction of railroads"); Act of Feb. 27, 1869, ch. XLVII, § 1, 1869 Nev. Stat. Ch. 95 (enabling incorporation for "manufacturing . . . or . . . any other species of trade, business or commerce, foreign or domestic"); Act of Aug. 8, 1868, No. 15, ch. 1639, 1868 Fla. Laws 118 (allowing incorporation "for the transaction of any lawful business or a public or private character, including all work of internal improvement"); N.H. REV. STAT. ch. 138, § 1 (1867) (authorizing incorporation "for carrying on any business except for banking and the construction and maintenance of a railroad"); 1864 Mo. Rev. Stat. ch. 69, § 1 (granting incorporation "for any other purpose intended for mutual profit or benefit . . ."); 1853 Cal. Stat. ch. 65, § 1 (permitting incorporation for "manufacturing, mining, mechanical or chemical purposes, or for the purpose of engaging in any species of trade or commerce"); Act of Apr. 2, 1853, ch. 68, § 2, 1853 Wis. Laws 66 (declaring incorporation rights "for the purpose of engaging in an carrying on any kind of manufacturing . . . or any other lawful business").

By the end of the 1880s, Colorado, Maine, Ohio, and South Carolina had amended and substantially broadened their purpose clauses to allow all or almost all lawful businesses to incorporate under the general laws. *See* 1886 S.C. Acts, Act XIX, § 1 (authorizing incorporation of "any manufacturing . . . or other business, except for railroad purposes"); Ohio Rev. Stat. ch. tit II, ch. 1, § 3235 (Derby 1879) (providing incorporation for "any purpose for which individuals may lawfully associate themselves . . . except for real estate [and] professional businesses"); Colo. Rev. Stat. ch. 18, §§ 237-238 (1877) (allowing incorporation "for the purpose of carrying on any lawful business"); Act of Feb. 3, 1876, ch. 65, § 1, 1876 Me. Acts 51 (enabling incorporation "for the carrying on of any lawful business within [the] state, except banking, insurance, the construction and operation of railroads").

98. *See* HURST, *supra* note 2, at 21, 29, 45, 56, 69 (detailing the various regulations and limitations on corporations when the numbers of charters increased).

99. There was no federal attempt to regulate railroads until the Interstate Commerce Act of 1887. *See* Interstate Commerce Act of 1887, 24 Stat. 379 (1887) (codified as amended in scattered sections of 49 U.S.C. §§ 10101-11901 (1994)). There was no federal attempt to regulate contracts restraining trade until the Sherman Act of 1890. *See* Sherman Act of 1890, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. § 1-7 (1994)). Even after the statutes' enactments, both pieces of legislation were not very effective. *See infra* notes 147-48 and accompanying text (reviewing criticism of the acts). Furthermore, federal regulation that was offered by the alternative banking system created by the National Bank Act of 1864, which provided limited benefits through Reconstruction, faded by the 1880s. *See* National Bank Act of 1864, 13 Stat. 99 (codified as amended at 12 U.S.C. *et seq.* (1994)); *infra* notes 144, 268-70 and accompanying text.

Revolution,<sup>100</sup> and the years of Reconstruction, America experienced unprecedented levels of federal activism,<sup>101</sup> which may have been channeled toward a greater federal role in the chartering of business corporations.<sup>102</sup> To curb abuses perpetuated by state banks in the years before the Civil War<sup>103</sup> and to encourage greater industrial development, Congress enacted the National Banking Act of 1864.<sup>104</sup>

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100. See ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877*, at 19 (1988) ("In April 1861, . . . there began in this country an industrial revolution . . . as far-reaching in its consequences as the political and military revolution through which we have passed.") (quoting James A. Garfield); *id.* (finding that even before the war, the North had developed as an industrial region with widespread factory systems, integrated railroads, telegraph networks, and a permanent laboring class); see also CHANDLER, *supra* note 43, at 76-77 (identifying the development of coal, which started in the 1840s and reached reliable production by the 1850s, as the technological breakthrough that allowed for increased production and the coming of the Industrial Revolution).

101. See MORTON KELLER, *AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA* 12 (1977) (stating that "only the central government could provide the leadership and authority that the war ultimately demanded"); *id.* at 35 (noting that actively expanded federal power persisted after the war); see also FONER, *supra* note 100, at 18, 21 (observing that, to finance the war, the North adopted stronger national policies that "embodied a spirit of national economic activism unprecedented in the antebellum years"). The expansion of federal power during the Civil War "reflected . . . the birth of the modern American state" and forced the United States to "confront the implications of its own nationality." See *id.* at 24 (explaining that broad nationalism against slavery carried over support for other federal measures, notably taxing notes issued by state banks); *id.* at 276-77 (describing the Reconstruction Act of 1867, which divided the South into five military districts). This division empowered the army to protect life and property, and required the southern states, and not the nation as a whole, to ratify the Fourteenth Amendment providing for manhood suffrage as a condition to be readmitted to the union. See *id.* at 454-59 (describing the Ku Klux Klan Act of 1871, which punished for the first time certain crimes under federal law). The first remarkably successful prosecutions under the Ku Klux Klan Act stopped the violent actions of the Ku Klux Klan, at least for the rest of the Reconstruction Era. See *id.*

102. Although the states still issued the vast majority of corporate charters, after the Civil War, Congress chose to charter a number of specific corporations, including railroad, telegraph, and navigation corporations whose business activities greatly affected commerce among the states. See, e.g., Act of July 29, 1892, ch. 322, 27 Stat. 326 (incorporating the Washington and Great Falls Electric Railway Company); Act of Aug. 2, 1882, ch. 372, 22 Stat. 185 (incorporating the Oregon Short-Line Railway Company in the Territories of Utah, Idaho, and Wyoming); Act of June 15, 1878, ch. 214, 20 Stat. 135 (incorporating the National Fair Grounds Association); Act of Jan. 21, 1873, ch. 45, 17 Stat. 412 (incorporating the Loomis Aerial Telegraph Company); Act of Mar. 8, 1871, ch. 72, 16 Stat. 573 (incorporating the Texas Pacific Railroad Company); Act of July 8, 1870, ch. 224, 16 Stat. 192 (incorporating the United States Freehold Land and Emigration Company); Act of June 29, 1870, ch. 168, 16 Stat. 168 (incorporating the National Bolivian Navigation Company); Act of May 4, 1870, ch. 75, 16 Stat. 97 (incorporating the Washington and Boston Steamship Company); Act of Mar. 29, 1869, ch. 5, 16 Stat. 3 (incorporating the National Junction Railway Company); Act of Mar. 1, 1869, Res. 15, 15 Stat. 346 (incorporating the Northern Pacific Railroad Company).

103. See *supra* note 73 and accompanying text (discussing unsound financial practices of state banks and the disastrous consequences therefrom).

104. National Bank Act of 1864, ch. 106, 13 Stat. 99 (1864) (codified as amended at 12 U.S.C. §§ 21 *et seq.* (1994)).

An alternative to state-chartered banking, the National Banking Act of 1864 created a national paper currency and banking system.<sup>105</sup> For the first time in American history, Congress offered an alternative to state-chartered banking.<sup>106</sup> Throughout Reconstruction, numerous sponsors of banks opted for the federal alternative, which required banks to operate under a federal charter.<sup>107</sup> As a result, the stability of the nation's currency greatly improved.<sup>108</sup>

During the early years of Reconstruction, the North experienced explosive economic growth and prosperity,<sup>109</sup> while the South enjoyed an opportunity to move economically beyond the agrarian plantation economy of the antebellum years.<sup>110</sup> The states, especially those

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105. *See id.* (establishing a national currency bureau and allowing formation of banking associations). In 1863, Congress began to reform the banking system with the passage of the National Currency Act, which established the National Bureau of the Treasury Department. The National Bureau of the Treasury Department would stabilize currency in the country. *See* Act of Feb. 25, 1863, ch. 58, 12 Stat. 665 (creating bureau to issue and regulate the national currency). Full reform of the system, however, did not occur until 1864, when Congress passed the National Bank Act, which created an alternative national banking system to co-exist with state-chartered banks. *See* National Bank Act of 1864, ch. 106, 13 Stat. 99 (1864) (codified as amended at 12 U.S.C. §§ 21 *et seq.*) (establishing national currency bureau, and allowing formation of banking associations); *see infra* notes 268-70 and accompanying text (discussing further the alternative federal banking system created by the National Banking Act of 1864, and the failure of the alternate federal system to supplant state-chartered banks).

106. *See* FONER, *supra* note 100, at 21-22 (characterizing the establishment of the national paper currency, issued at over \$400 million, as "an unprecedented exercise of federal authority in a country that had never had a national currency").

107. *See* GERALD C. FISCHER, *AMERICAN BANKING STRUCTURE* 177-78 (1968) (explaining the role of federal legislation in convincing local banks to switch to national status).

108. *See id.*

109. *See* FONER, *supra* note 100, at 18 (identifying that the times of unprecedented prosperity for the North started during the Civil War, and noting that railroads, which were needed to carry troops, especially benefited); *id.* at 460-64 (describing unprecedented growth in northern business industries, including manufacturing and railroads, with enormous growth in the middle states, the Great Lakes area, the Ohio Valley, and the West); KELLER, *supra* note 101, at 164-65 ("The economy of the late sixties and early seventies was dominated by a rise of prices, great prosperity, large profits, high wages, and strikes for higher, large importations, a railway mania, expanded credits, over-trading, over-building, and high living.").

110. *See* FONER, *supra* note 100, at 379 (describing the goals of economic development, "the gospel of prosperity," as dominating the early years of Reconstruction in the South). "With the aid of the state . . . the backward South could be transformed into a society of booming factories, bustling towns, a diversified agriculture freed from the plantation's dominance, and abundant employment opportunities for black and white alike." *Id.*; *see also id.* at 380-81 (describing the South's massive local investments in new railroad lines and other corporations, in the form of bonds to the railroads, tax exemptions, and other privileges for railroads and other industrial enterprises, which served as tools to attract outside capital); *id.* at 294-96 (detailing northern "carpetbaggers" as well-educated, middle-class persons who came to the South for personal gain but were also committed "to far-reaching changes in Southern life [who hoped] to reform the unprogressive South by establishing free institutions, free schools, and the system of

southern states that were governed by legislatures and governors elected under Reconstruction polices,<sup>111</sup> chartered numerous railroad lines and many other corporations to bring new investment and prosperity to their regions. These special charters issued for new railroad lines also served as regulatory measures in an attempt to control the monopolies enjoyed by established lines.<sup>112</sup>

Throughout the Reconstruction Era, the Republican-controlled Congress<sup>113</sup> hotly debated both the degree of citizenship to be enjoyed by the freedman and the amount of federal oversight necessary to ensure compliance by the southern states.<sup>114</sup> The Radical Republicans strongly urged that federal law guarantee the freedmen full civil rights.<sup>115</sup> Meanwhile, the Moderates, who believed that the

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free labor"); *id.* at 297-301 (describing southern-born white Republicans, known as "scalawags," as a group far more hated by the white elite than the "carpetbaggers"). The carpetbaggers, a group with highly diverse backgrounds and motivations, anticipated Republicanism would modernize the South and bring long overdue social and economic reform, including the building of railroads to bring "infusions of Northern capital . . . and the benefits of capitalist development." *See id.* at 325 (summarizing the developmental spirit in the South allowing for "extensive public aid to railroads and other ventures" as well as the general incorporation laws and limited liability for shareholders of corporations); *id.* at 381 (describing southern law tailored "to encourage the free flow of capital and enhance the property rights of corporations").

111. *See* FONER, *supra* note 100, at 300-01 (describing changes in southern states during Reconstruction).

112. *See* HOVENKAMP, *supra* note 42, at 142-45 (explaining the economics of railroad rates, the subsidies granted by state legislatures to railroads, subsidized loans, or even outright grants of cash). For example, throughout the mid-nineteenth century, the state legislatures dealt with high railroad rates by chartering more corporations to build more lines, which inevitably lead to overbuilding. *See infra* notes 254, 260 and accompanying text (explaining the distribution of railroad charters to encourage regional development and allow for regulation).

113. *See* FONER, *supra* note 100, at 228 (noting that Republicans outnumbered Democrats in both the House and Senate by a margin greater than three to one, enough to enact Reconstruction policies, and, if necessary, to override a presidential veto).

114. *See id.* at 220-21 (describing the beliefs of conservative Republicans that black suffrage would disrupt the southern labor force and slow down the revival of the southern economy, and that there was a united belief among the Radical Republicans that black suffrage constituted a mandatory condition of any Reconstruction).

115. *See id.* at 228-39 (describing that the platform of the Radical Republicans encompassed a perfect republic where no citizen was denied equality before the law and where blacks enjoyed equal standing in the polity and equal opportunity in free labor economy). Some Radical Republicans advocated guaranteeing black suffrage, prohibiting segregated railway cars, and seizing southern land owned by wealthy whites to be redistributed to blacks. *See id.* at 235-39 (explaining the Republican dilemma in implementing these policies of the Radicals, who viewed the southern states as conquered provinces or territories subject to the will of Congress); *id.* at 308 (describing never adopted resolutions that were introduced by Charles Sumner in 1867 to further enhance the rights of the freedmen by establishing integrated public school systems and providing homesteads); *id.* at 532 (describing the Civil Rights Bill of 1874, which outlawed racial segregation in public accommodations, discrimination in public schools, jury selection, churches, and cemeteries).



Civil War had not destroyed the legitimate rights of the states,<sup>116</sup> favored only a minimal amount of federal action to abolish the worst vestiges of slavery.<sup>117</sup> During Reconstruction, neither the Radical nor the Moderate Republicans considered the possibility of using federal law to coordinate the rapidly growing railroad system or to tame the increasingly powerful business corporation,<sup>118</sup> which was developing beyond the states' ability to regulate effectively.

Conceivably, the Radical Republicans' concern for the freedmen could have led them to pursue economic reform at a national level.<sup>119</sup> Enhanced regulation of banks and railroads, or even federal chartering of business corporations, could have played a part in the economic reform.<sup>120</sup> Had it been contemplated and successfully enacted, Reconstruction legislation introducing greater federal control over banks and railroads, or even upsetting state control over the chartering of business corporations, may have been able to pass constitutional muster.<sup>121</sup> After the death of Justice Taney in 1864, the Supreme Court greatly reduced its states' rights focus and throughout Reconstruction, tended to accommodate the goals of the

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116. See *id.* at 241 (noting that although Moderates shared some of the Radicals' commitments, they worked to limit Radical influence).

117. See *id.* at 35-36 (observing Lincoln's "10 Percent Plan" for Reconstruction and Lincoln's belief that Reconstruction contemplated no social or political changes beyond the abolition of slavery); *id.* at 198-209 (describing laws known as "Black Codes" passed by the southern states during Johnson's Presidential Reconstruction, which severely limited the social and economic rights of the freedmen); *id.* at 225-26 (emphasizing that the violence against the freedmen and the passage of Black Codes offended many politicians beyond the circle of Radical Republicans); *id.* at 237 (noting that some conservative Republicans were alarmed by sweeping equality for the freedmen proposed by Radicals and quoting Pennsylvania Senator Edgar Cowan, who questioned, "who would do the menial offices of the world . . . if Sumner's doctrines became reality"); *id.* at 241, 245 (illustrating Moderates' lack of enthusiasm for black suffrage, with a primary goal of Reconstruction to adopt safety measures for the freedmen); *id.* at 242-44 (summarizing that limited federal action ensured that the southern states guaranteed only essential civil rights; the primary traditions of federalism survived the war, and the primary responsibility of law enforcement remained with the states with only a "latent federal presence").

118. See *supra* note 117 and accompanying text (explaining that Radical Republicans were unable to understand the benefits of using federal law to regulate business); *infra* note 123 (explaining the mixture of economic and social ideals fostered during Reconstruction, and how the Radical Republican platform defining federal powers and endorsed by Moderate Republicans, would not have encompassed broad federal regulation over railroads or business corporations in general).

119. See FONER, *supra* note 100, at 301-07 (detailing the economic policies of the Radical Republicans in the South due to organized union leagues dispatched from various northern cities).

120. See *infra* notes 159-60 and accompanying text (discussing federal incorporation and licensing proposals in the early decades of the twentieth century).

121. See *supra* note 105 and accompanying text (describing the National Currency Act and Congress' intention to federally regulate currency and banking associations and emphasizing federal control in choosing specific corporations to charter).

Republican-controlled House and Senate.<sup>122</sup> The Radical Republicans, however, confined their quest for greater federal oversight and regulation to ensure that the freedmen enjoyed a broad variety of civil rights.<sup>123</sup> The Radical leaders, the most prominent being Thaddeus Stevens and Charles Sumner, who otherwise were years ahead of their time,<sup>124</sup> enjoyed no understanding of the basic underpinnings of business and corporations.<sup>125</sup> Consequently, they could not comprehend a possible relationship between sound business practices, a healthy economy, and the resulting increased economic opportunities that would enhance the rights of the freedmen.<sup>126</sup> The Moderate Republicans, many of whom understood how business and corporations operated, still trusted the

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122. See KELLER, *supra* note 101, at 18 (illustrating that Lincoln made five appointments to the Supreme Court, and that the death of Chief Justice Taney in 1864 brought expectations of cooperation among all branches of government). Under Chief Justice Chase, the Supreme Court largely accommodated Reconstruction goals accepting "the superiority of national over state authority . . . [and] the legitimacy of Reconstruction." See *id.* at 73-83; see also FONER, *supra* note 100, at 529 (explaining that as the northern opinion shifted and Reconstruction waned in the 1870s, the Supreme Court retreated from its expansive definition of federal power, which prevailed during Reconstruction).

123. See FONER, *supra* note 100, at 233 ("Reconstruction Radicalism was first and foremost a civic ideology, grounded in a definition of American citizenship. Of the economic issues of the day . . . no distinctive or unified Radical position existed."). Foner explains that the economic positions of some Radicals favored small businesses and producers, while some Radicals personally enjoyed great economic success or had close ties to local railroad interests, yet generally, economic issues were viewed as secondary to Reconstruction. See *id.* The most radical proposal of all, offered by Thaddeus Stevens, was to confiscate land owned by wealthy southern whites and to redistribute to blacks, was political rather than purely economic. See *id.* at 235-36. Some entrepreneurs favored black suffrage and economic opportunities to form new markets for their products; other entrepreneurs feared that the Radical position would "disrupt the cheap Southern labor force." See *id.*; see also *id.* at 276-77 (explaining how the Reconstruction Act of 1867 failed to address economic concerns of the freedmen).

124. See *id.* at 229 (identifying Thaddeus Stevens and Charles Sumner as "the preeminent Radical leaders"); *id.* at 612 ("Nearly a century elapsed before the nation again attempted to come to terms with the implications of emancipation and the political and social agenda of Reconstruction.").

125. See *id.* at 234 (describing that Charles Sumner, who admitted knowing nothing about finance, proposed a plan to resume special payments to a group of Boston businessmen and that the plan was "so out of touch with fiscal reality . . . it would prove economically disastrous"); *id.* (summarizing complaints made by Philadelphia businessmen that Thaddeus Stevens focused exclusively on the freedmen, and ignored their concerns); *id.* at 233-34 (describing campaign rhetoric that accused James Ashley, a Radical Republican, of neglecting the commercial interests of his district by spending all of his time on Reconstruction).

126. See *id.* at 234-35 (explaining different opinions on the possible economic changes due to Reconstruction's influence); see also *id.* at 302 (describing the "seeds of future conflict over Republican economic policy" as pitting proponents of ambitious economic programs, requiring higher taxes and security for creditors to attract outside capital, against "debt-ridden yeomen"); *id.* at 329 (describing the new constitutions of the Southern states as failing "to satisfy the economic aspirations that had animated much of the grass-roots organizing of 1867").

state and local free market to provide the proper level of regulation, and therefore, never would have considered pushing for increased federal oversight and control over corporations.<sup>127</sup>

By 1875, with Reconstruction headed toward failure,<sup>128</sup> the national spirit of federal activism rapidly disappeared.<sup>129</sup> The Reconstruction years probably represented the last opportunity for federal law to take control over the legitimacy of corporations.<sup>130</sup> The combination of the Radical Republicans' inability to recognize the importance of business issues concerning corporations,<sup>131</sup> and the views held by the Moderate Republicans that state and locally based power served as the best mechanism to regulate corporations<sup>132</sup> explains why the idea of federal law to regulate business more extensively never surfaced during Reconstruction.

Ironically, the failure of the Radical Republicans to seek and secure a greater level of federally based economic reform probably contributed to the failure of Reconstruction. Unwise business practices, including overbuilding of railroad lines directly traceable to state-chartered and largely unregulated corporations, greatly contributed to the Panic of 1873.<sup>133</sup> The economic crisis triggered by

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127. See *supra* note 117 and accompanying text (noting that the policies of Radical Republicans during Reconstruction were frowned upon by many who favored limited federal action).

128. See FONER, *supra* note 100, at 559-63 (illustrating that Grant's failure to intervene in 1875, when, in contravention of federal law, Democrats used violence to intimidate voters and regain control of Mississippi, served as a milestone for the eventual failure of Reconstruction); *id.* at 556 (depicting the 1875 Civil Rights Bill as a broad assertion of principles with little enforcement powers that became a dead letter many years before the Supreme Court declared it unconstitutional in 1883); KELLER, *supra* note 101, at 35 (noting that "in the 1870s . . . racism, localism, [and] laissez-faire rapidly reasserted themselves").

129. See FONER, *supra* note 100, at 582 (marking 1877 as a decisive retreat from the idea, born during the Civil War, of "a powerful national state protecting the fundamental rights of American citizens"); *id.* at 521 (describing the posture of states' rights used by the North to defeat federal regulation of railroad rates in 1873); KELLER, *supra* note 101, at 121 (observing that by 1877 the nation had returned to "a system of government dominated by localism and laissez-faire").

130. See FONER, *supra* note 100 (noting need for stronger, expansive federal government immediately after the war).

131. See sources cited *supra* note 125 (explaining that the Radical Republicans focused on social changes as they had little knowledge of business and economic issues).

132. See *supra* note 113, 117, 127 (noting that Moderates were more in favor of local control rather than federal regulation).

133. The immediate trigger of the Panic was the collapse of millions of dollars of Northern Pacific Railroad bonds. Overbuilding and speculative credit created "a financial house of cards." In 1876, over half of the nation's railroads were in receivership and had defaulted on their bonds. See FONER, *supra* note 100, at 512 (describing state-sponsored capitalist development, railroads building being the most prevalent activity leading to widespread corruption, and bonds over-issued by Republican governments flooding the market as threatening the collapse of credit, with state-chartered corporations competing for state aid); *id.* at 390 (noting that tax

the Panic of 1873 brought the economic boom following the Civil War to a screeching halt,<sup>134</sup> and numbered as one of the many complex factors responsible for the failure of Reconstruction.<sup>135</sup> The Panic of 1873 decimated the South's burgeoning efforts to develop a modern industrial economy and propelled the southern states back to a plantation economy that persisted until the early twentieth century.<sup>136</sup> Moreover, the labor and other problems experienced in

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exemptions for manufacturing corporations investing in the South were criticized as "discrimination in favor of capital"). By the early 1870s, railroad aid was coming to a halt. Some southern states benefited from extending aid to railroads, while others "had little to show for their generosity except enormous debts." *See id.*; *see also id.* at 465-68 (describing corruption and other practices in the North where northern legislatures gave special favors to corporations in the name of promoting railroad development); *id.* at 468 ("Our great corporations are fast emancipating themselves from the State or rather subjecting the State to their control.") (quoting Charles Francis Adams); *id.* at 493 (describing "an outcry against corruption" calling for an end to special legislative favors and other patronage based politics); *see also* KELLER, *supra* note 101, at 221 (noting that corruption and fraud "were endemic in the relationship between enterprise and politics in the postwar South"); *id.* at 222 (noting tax exemptions and other state aid offered for industrial development).

134. *See* FONER, *supra* note 100, at 512 ("The intoxicating economic expansion of the Age of Capital came to a wrenching halt in 1873.").

135. *See id.* at 382-83 (remarking that "the program of state-sponsored capitalist development, inaugurated with grandiose hopes, proved in many ways the [Republican] party's undoing . . . [and] soon threatened to undermine the entire Reconstruction experiment"); *id.* at 392 (stating that "the gospel of prosperity failed . . . it produced neither a stable Republican majority nor a modernizing society"); *id.* at 535 ("The economic disaster dealt yet another blow to the credibility of surviving Reconstruction governments, helping to propel the Deep South down the road to Redemption."); *id.* at 523-25 (describing the Panic of 1873 that directly affected the national elections of 1874, which transformed the Republican party's overwhelming majority to a Democratic majority of 60 seats, and resulted in a major retreat from Reconstruction); *id.* at 279 (explaining that "the end of Reconstruction would come not because propertyless blacks succumbed to economic coercion, but because a politically tenacious black community, abandoned by the nation, fell victim to violence and fraud"); *id.* at 337 (noting that the acquittal of President Andrew Johnson during his impeachment trial in 1868 weakened the political clout of the Radicals and paved the way for Ulysses S. Grant's presidential nomination); *id.* at 344 (declaring that Grant's election came with a change of Republican leadership destined to be more moderate); *id.* at 425-44 (describing the Ku Klux Klan's violence between 1868 and 1871, which escalated during the 1870 elections, as contributing greatly to the defeat of Republican candidates in the 1870 elections); *id.* at 528 (explaining broad retreat from Reconstruction during Grant's second term due to preoccupation with economic depression and political scandals); *id.* at 603 (summarizing factors contributing to the failure of Reconstruction, specifically, the "nature of the national credit and banking systems, the depression of the 1870s, [and] the stagnation of world demand for cotton"); *see also* KELLER, *supra* note 101, at 225 (noting that violence and intimidation by the Ku Klux Klan restored white Democratic rule to the South).

136. *See* FONER, *supra* note 100, at 391 (finding that the expansion of southern textiles did not start until the 1880s, that the flood of outside investments did not come until after Reconstruction, and that inducements offered by southern states during the late 1860s and the early 1870s failed to attract sufficient northern and European capital). Foner further states that the South descended to a pattern of underdevelopment with "its rate of economic growth and per capita income lagging far behind the rest of the nation." *Id.* at 392.

the North from the economic crisis greatly contributed to the waning of northern enthusiasm toward the goals of Reconstruction.<sup>137</sup> Ironically, had the Radical Republicans understood the importance of proper business regulation, they conceivably could have both improved the freedmen's situation and redirected corporate development toward the federal domain.<sup>138</sup> A Reconstruction plan that included more federal regulation over all business areas could have propelled the banking and railroad industries toward effective federal regulation sooner than the early twentieth century, and may have even steered the chartering of business corporations toward federal control.<sup>139</sup>

For the remainder of the nineteenth through the early twentieth century, as business continued to grow geometrically<sup>140</sup> beyond the capacity of the states to regulate and control,<sup>141</sup> the states served as the only regulatory authority over the business corporation.<sup>142</sup> During the

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137. See *id.* at 513-17 (describing the northern and western states' preoccupation with economic troubles at home). For example, in 1874, an estimated one quarter of New York City's workers could not find jobs. See *id.*; see also *id.* at 517 (noting that depression marked a change in the North's ideological perspective, and that by limiting sources of income, contributed to the decline of goodwill societies' activism).

138. See *id.* at 233-34 (observing that Radical Republicanism was primarily a civic ideology and lacked any cohesive economic vision); *id.* at 531-32 (describing the failure of the Freedman's Savings and Trust Company, which had provided many economic opportunities, as devastating to the Freedmen).

139. It is impossible to speculate whether the Radical Republicans could have successfully imposed federal control over the chartering of business corporations as part of the broader plan aimed at national economic reform. The Radicals enjoyed substantial political power, constituting nearly half of the Republicans in the House and a significant number of the Republicans in the Senate. See *id.* at 238 (noting substantial numbers of Radicals but stating precise classification was impossible). The Radicals possessed a coherent sense of purpose and pushed unpopular positions during Reconstruction that with time became accepted by mainstream Republicans. See *id.* at 238-39. Therefore, it is not inconceivable to imagine the Radicals successfully implementing federal incorporation, had it been on their agenda.

140. See HOVENKAMP, *supra* note 42, at 241 (noting that a rash of American mergers began in 1880, with the trust movement resulting in greatly expanded enterprises); KELLER, *supra* note 101, at 371-72 (noting that despite speculative panics dotting the landscape, business and the economy steadily grew in the last quarter of the nineteenth century).

141. See HOVENKAMP, *supra* note 42, at 263 (noting that by the end of the century, state corporate law either failed or succeeded so well in creating a powerful corporation that state law could no longer control); see also FONER, *supra* note 100, at 586 (noting that after Reconstruction, federal courts used their power to protect corporations from local regulation); HURST, *supra* note 2, at 65-68 (discussing the rise of constitutional protections for corporations during the 1880s and the 1890s); KELLER, *supra* note 101, at 366-67 (noting judicial protection of corporations during the late 1880s and the 1890s); *id.* at 434 ("By the turn of the century corporations had much of the legal standing that attached to national citizenship.").

142. See FRIEDMAN, *supra* note 40, at 445-50 (discussing state law attempts to regulate railroads, which were ineffective because the railroads operated nationally while the powers of the state stopped at the border); KELLER, *supra* note 101, at 306-

late 1880s, large vertically integrated corporations first appeared,<sup>143</sup> and the profile of state-chartered banks resurged because banks choosing the federal system greatly declined.<sup>144</sup> In the late nineteenth century, the New Jersey legislature removed many restrictions from its general incorporation statute, the most significant being the prohibition against owning holding companies, thus creating the first modern liberal general incorporation law.<sup>145</sup>

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07 (noting that the relative inactive state of Congress during the late 1870s through the 1880s reflected the intense political localism of nineteenth century America: "Americans have little need or desire for national leadership"); *id.* at 319 (noting that state regulation of corporations amounted to effectively no regulation, and that "[t]he corporations rose upon the ruins of the States as centers of industrial administration").

143. See CHANDLER, *supra* note 43, at 167, 207, 209, 285-89 (explaining that vertical integration, where the same firm carries out multiple aspects of the business, often encompassing the production, transportation, and retail functions, first appeared in the 1880s, with railroads leading the way, foreshadowing the modern corporate enterprise with a hierarchy of managers that would dominate many aspects of the American economy by World War I).

144. The alternate federal banking system under the National Bank Act of 1864 offered the security of U.S. government bonds as backing for notes in exchange for meeting reserve and other requirements. See National Bank Act of 1864, ch. 106, 13 Stat. 99 (codified as amended at 12 U.S.C. §§ 21 *et seq.* (1989)); see also *infra* note 270 (discussing effectiveness of the National Bank Act). Because of these benefits, the federal alternative offered a viable choice over the state system through the 1880s. See FISCHER, *supra* note 107, at 178 (explaining that "[s]ince most bankers considered currency issuance essential to bank operation, they rapidly switched to national charters"). Once banking became based on deposit banking rather than note banking, however, the advantages of the federal system disappeared, thus, striking down a major highlight of the National Bank Act of 1864. See WEST, *supra* note 73, at 25 ("State banks quickly learned that note issues were becoming less important relative to demand deposits as the financial system developed."). Moreover, numerous state statutes specified lower reserve requirements, and granted more liberal lending and investment powers and greater branching authority to banks. See FISCHER, *supra* note 107, at 184 (discussing the factors that made many banks favor state over federal charters).

145. In 1888, New Jersey passed ground-breaking legislation, which for the first time allowed corporations to own stock in other corporations. See Act of Apr. 3, 1888, ch. CCLXIX, § 1, 1888 N.J. Laws 385, 385. By 1893, New Jersey perfected this legislation, allowing for the first time efficient accumulations of capital without the use of trusts. See Act of April 17, 1888, ch. CCXCV, § 1, 1888 N.J. Laws 445, 445-46. In 1896, further revisions to New Jersey's statute produced the first modern liberal incorporation law, establishing New Jersey as the favorite state for incorporation by amending its general incorporation statutes to make the provisions more attractive to business managers. See HOVENKAMP, *supra* note 42, at 58 (noting New Jersey's long history of tending to the needs of business corporations); *id.* at 257-58 (discussing details of New Jersey's holding company statute, noting that New York followed suit in 1892 as well as several other states over the next decade); HURST, *supra* note 2, at 147 (stating that New Jersey's abolishment of capitalization limitations in 1875 foreshadowed its later role); Edward Q. Keasbey, *New Jersey and the Great Corporations*, 13 HARV. L. REV. 198, 205-09 (1899) (describing New Jersey's corporate policy of encouraging the aggregation of corporate capital); see also FRIEDMAN, *supra* note 40, at 464 (noting the holding company rapidly replacing the trust by 1890); *id.* at 524 (emphasizing that New Jersey attracted large New York businesses by offering low taxes and easy laws).

Although federal statutes addressing rate discrimination in railroads and contracts restraining trade appeared for the first time during the late nineteenth century,<sup>146</sup> the Interstate Commerce Act of 1887<sup>147</sup> and the Sherman Antitrust Act of 1890<sup>148</sup> both failed to provide effective federal regulation, and neither upset the power of the states to charter corporations.<sup>149</sup> Although the Sherman Act deliberations involved discussions of federal incorporation,<sup>150</sup> the final statute left the primary power to charter corporations with the states.<sup>151</sup> This result most likely occurred because most lawmakers in the late nineteenth century believed that state and local power aided by the free market system still adequately regulated corporations.<sup>152</sup> Moreover, any attempts made in the late nineteenth century to divest the states of their chartering power probably would have been held unconstitutional. The Supreme Court's post-Reconstruction cases focused on the movement of goods as a necessary prerequisite to

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146. See HOVENKAMP, *supra* note 42, at 159-68 (discussing the interstate nature of state regulation of rates and development of federal policy and Supreme Court jurisprudence); Herbert Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 YALE L.J. 1017, 1035-72 (1988) (discussing federal approach to railroads and rate discrimination during the Gilded Age).

147. See Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (codified as amended at 49 U.S.C. §§ 501-507 (1989)); KELLER, *supra* note 101, at 427-29 (discussing the Interstate Commerce Act of 1887 as a milestone due to the creation of the Interstate Commerce Commission with powers to investigate and prosecute, but nevertheless reactive in the sense of only having the power to address discrimination rather than the ability to establish a secure railroad rate structure); see also FRIEDMAN, *supra* note 40, at 451-52 (noting shortcomings of Interstate Commerce Commission stemming from its lack of express power to set railroad rates); *infra* notes 256, 281-85 and accompanying text (discussing further why Interstate Commerce Act of 1887 failed to effectively address rate discrimination in railroads, and the twentieth century amendments that led to a nationally coordinated transportation system).

148. See Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1994)); FRIEDMAN, *supra* note 40, at 463 (discussing the Sherman Act as broad, vague, cloudy legislation with no specific program); HOVENKAMP, *supra* note 42, at 266 (noting that it took the Supreme Court until 1912 to allow an otherwise legal under state law merger to be struck down by the Sherman Act); see also KELLER, *supra* note 101, at 436 (noting that the Sherman Act reflected undeveloped federal regulation).

149. See *supra* notes 99, 147-148 (discussing infirmities of the Interstate Commerce Act of 1887 and the Sherman Antitrust Act of 1890).

150. See WILLIAM LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT* 63, 85-99 (1980) (discussing the strong sentiments against monopolies implicated in corporation law and analyzing the legislative history of the Sherman Act).

151. See 15 U.S.C. §§ 1-7 (1994) (prohibiting contracts, trusts, or conspiracies in restraint of interstate commerce, but not mentioning federal incorporation).

152. See HOVENKAMP, *supra* note 42, at 263 (observing that the relatively new phenomenon of holding companies was not taken very seriously by Congress); HURST, *supra* note 2, at 56-57 (discussing that during the 1880s, restrictions in the general incorporation laws appeared to provide regulation, but were of little effect).

valid federal regulation under the Commerce Clause.<sup>153</sup>

In the early decades of the twentieth century, the primary power of the states over the legitimacy of corporations proved to be irreversibly entrenched.<sup>154</sup> New Jersey's liberal general incorporation statute set off a heated competition among the states, known in later literature as the "race-to-the-bottom,"<sup>155</sup> to enact liberal general incorporation laws.<sup>156</sup> Delaware established itself as the favorite state for

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153. See *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 248 (1899) (declaring private contracts related to manufacture, sale, and transportation of goods among several corporations covered by Sherman Act under authority of the Commerce Clause due to direct effect on interstate commerce encompassed by the movement of goods across state lines); *United States v. E.C. Knight*, 156 U.S. 1, 17 (1895) (concluding that corporation's sugar manufacturing was local and, therefore, outside the reach of the Sherman Act); *Kidd v. Pearson*, 128 U.S. 1, 26 (1888) (holding that the Commerce Clause covers regulation of transportation of goods not transformation, thus, finding state statute prohibiting alcohol manufacture constitutional); FELIX FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WHITE* 74 (1937) (discussing post-Reconstruction movement towards national legislation and economic motives of limiting state power through Due Process and Commerce Clauses); see also FRIEDMAN, *supra* note 40, at 465-66 (noting that early Supreme Court interpretations limiting the reach of the Sherman Act on Commerce Clause grounds greatly limited its effectiveness).

154. See *infra* note 160 and accompanying text (discussing several presidential endorsements of federal incorporation that were unsuccessful).

155. For general discussions of the competition among the states to produce the most business-friendly general incorporation statute, see Bebachuk, *supra* note 2, at 1442-44, which states that the race-to-the-bottom theory assumes that state competition for corporate charters harms shareholders by allowing managers to shop for attractive corporate domiciles offering lax regulation to managers and controlling shareholders and noting that the tendency of managers to incorporate in states with lax corporate laws encourages all the states to lower the regulatory standards; and *id.* at 1445, which examines a competing theory, the "race for the top," where "market forces . . . will discourage managers from seeking incorporation in states where legal rules . . . permit managers to 'exploit' shareholders." See FRIEDMAN, *supra* note 40, at 523-25 (discussing how one state could play off another state's weak or stringent incorporation laws to its advantage); *id.* at 83-84 (commenting that numerous states in the 1890s followed New Jersey's lead, which resulted in the "outbid[ding of] each other in passing even more 'liberal' corporation laws that removed many of the remaining legal barriers to consolidation"); HOVENKAMP, *supra* note 42, at 258 (noting New Jersey's advantage in attracting corporations and observing that of 121 large corporations formed in states by 1899, New Jersey had 61 of them); HURST, *supra* note 2, 147-48 (noting New Jersey's development of liberal incorporation policy); William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 698-701 (1974) (arguing that state competition for corporate charters harms shareholders by forcing states to enact rules that are too lax and therefore federal regulation was necessary to protect shareholders).

156. See FRIEDMAN, *supra* note 40, at 524 (noting the popularity of West Virginia corporations); HURST, *supra* note 2, at 69-74, 84, 93 (describing amendments to general laws that weaken shareholder voting power, such as creation of non-voting shares); KELLER, *supra* note 101, at 431 (identifying West Virginia, Delaware, and New Jersey as "snug harbors" for both large companies doing interstate business and "marginal, tramp and piratical" corporations, and noting Massachusetts legislation in 1903 that allowed an ordinary corporation to "do anything that an individual may do"); WILLIAM Z. RIPLEY, *MAIN STREET AND WALL STREET* 28-30 (1927) (describing advertisements in early twentieth century that sought to lure corporate charters to a



incorporation before 1920,<sup>157</sup> and by the 1930s, liberal general incorporation laws emerged as a pattern across the entire nation.<sup>158</sup>

During the early twentieth century, responding to criticism aimed at the rise of liberal general incorporation laws,<sup>159</sup> the administrations of Presidents Roosevelt, Taft, Wilson, and Franklin D. Roosevelt, supported proposals, all of which failed to become law, requiring corporations to obtain a federal license or a federal charter.<sup>160</sup> If

particular state).

157. In 1913, Governor Woodrow Wilson of New Jersey sponsored new provisions to curtail antitrust activities of New Jersey corporations resulting in many businesses moving their charters out of New Jersey to neighboring states. See William E. Kirk, III, *A Case Study in Legislative Opportunism: How Delaware Used the Federal-State System to Attain Preeminence*, J. CORP. L., Fall 1984, at 233, 256-58 (explaining Governor Wilson's moralistic foundation for the "Seven Sisters" antitrust law, which outlawed attempts to create a monopoly or suppress competition and forbid the chartering of any new holding companies and describing its negative effect on New Jersey's businesses). As a result of this new law, Delaware quickly emerged as the favorite state for incorporation. See RUSSELL CARPENTER LARCOM, *THE DELAWARE CORPORATION* 155-79 (1937) (maintaining that corporate charters for public companies clearly favored Delaware in 1915); see also Cary, *supra* note 155, at 672 (finding that the generation of revenue, pride in being "number one," and the creation of a favorable climate has led Delaware to permit "minimal standards for director responsibility"); HURST, *supra* note 2, at 73, 147-49 (discussing how Delaware obtained corporate statutory leadership by capitalizing on New Jersey's brief adherence to strictness by a new general incorporation act).

158. See HURST, *supra* note 2, at 70 ("By the 1930's a new type of general incorporation act emerged throughout the country.").

159. See, e.g., RIPLEY, *supra* note 156, at 28-37, 39-54, 55-66, 160-67 (criticizing the competition to produce the most attractive general incorporation laws, the elimination of pro rata subscription rights, par value of stock, lack of standards addressing directors dealing with their corporations and unfair proxy solicitation procedures); I. MAURICE WORMSER, *FRANKENSTEIN INCORPORATED* (1931) (analogizing the modern corporation to Mary Shelley's fictional monster Frankenstein); J. Newton Baker, *The Evil of Special Privilege*, 22 YALE L.J. 220, 234 (1913) (arguing for a compulsory federal incorporation statute); Winston S. Brown, *The Federal Corporation Licensing Bill: Corporation Regulation*, 27 GEO. L.J. 1092, 1117 (1939) (examining the federal licensing bill and criticizing predatory corporate practices); James B. Dill, *National Incorporation Laws of Trusts*, 11 YALE L.J. 273, 274 (1902) (advocating for the enactment of National Incorporation Act because "the country demands uniform corporate legislation, formulated upon the good of the country as a whole, and not sectional legislation, state against state"); Joseph C. O'Mahoney, *Federal Charters to Save Free Enterprise*, 1949 WIS. L. REV. 407, 412-15 (arguing that by eliminating the need to regulate corporate conduct, federal incorporation and licensing proposals effectively would reduce the size of the federal government); H.L. Wilgus, *Need of a National Incorporation Law*, 2 MICH. L. REV. 358, 382 (1904) (arguing for a national incorporation law that gives the federal government the unequivocal power to control incorporation); Comment, *A Federal System of Licenses and Charters*, 25 GEO. L.J. 700, 713 (1937) (examining the federal licensing bill and speculating that the bill can limit corporate abuses).

160. For a discussion of presidential endorsements of federal incorporation, see Joel F. Henning, *Federal Corporate Chartering for Big Business: An Idea Whose Time Has Come?*, 21 DEPAUL L. REV. 915, 919 (1972), stating that Presidents Roosevelt, Taft, and Wilson all supported federal incorporation or licensing; Watkins, *supra* note 159, at 93, describing President Taft's proposal for optional federal incorporation, known as the Taft-Wickersham bill; Comment, *supra* note 159, at 704, exploring Theodore Roosevelt's ardent support of federal regulation of corporations and Woodrow

successful, the federal chartering or licensing proposals clearly would have passed constitutional muster. By the early twentieth century, the Supreme Court allowed the Commerce Clause to support federal regulation of all intrastate activities that affect interstate commerce.<sup>161</sup>

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Wilson's endorsement of federal licensing; see also MORTON KELLER, REGULATING A NEW ECONOMY: PUBLIC POLICY AND ECONOMIC CHANGE IN AMERICA, 1900-1933, at 26-29 (1990), discussing the appeal of federal incorporation as a response to the argument that "the rise of big business was national in character, and thus required a national government response"; COMPILATION OF PROPOSALS AND VIEWS FOR AND AGAINST FEDERAL INCORPORATION OR LICENSING OF CORPORATIONS, S. DOC. NO. 92, at 32 (1st Sess. 1933) observing that between 1903-1914, 20 bills were proposed in Congress, over half of which would have required federal chartering; *id.* at 42-43, observing that between 1914-1932, eight bills were proposed, only one of which required compulsory federal incorporation or licensing, all other bills regulated corporate conduct in various ways at the margins. The federal licensing bills would have left state corporation law intact, requiring all corporations operating in interstate commerce to obtain a license. See *id.* at 44 (quoting Democratic and Republican party platforms from 1908, 1912, and 1924 advocating a federal licensing system only for those corporations engaged in interstate commerce). Federal chartering would have replaced state corporation law with federal corporation law. See generally Donald E. Schwartz, *Federal Chartering of Corporations: An Introduction*, 61 GEO. L.J. 71, 96-121 (1972) (outlining a possible federal incorporation statute and considering the constitutional and policy bases for such a statute).

161. In 1905, the Supreme Court held in *Swift v. United States*, 196 U.S. 375 (1905), that price-fixing among cattle dealers, operating solely intrastate, fell within the scope of regulation under the Commerce Clause due to the fact that the purchases were falling within the "current of commerce," thereby affecting interstate commerce. See *id.* at 399 ("When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another, . . . and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states . . ."). Other than certain isolated cases limiting federal power in child labor cases (see *Child Labor Tax Case*, 259 U.S. 20, 44 (1922) (holding unconstitutional federal Child Labor Tax Law that imposed a ten percent tax on the income of a person employing child labor); *Hammer v. Dagenhart*, 247 U.S. 251, 277 (1918) (finding unconstitutional federal law prohibiting the shipment of interstate goods manufactured by child labor)) the Supreme Court perfected the "current of commerce" theory before the 1920s. See *Houston, E. & W. Texas Ry. Co. v. United States*, 234 U.S. 342, 360 (1914) (finding regulation of discriminatory rates technically occurring only intrastate within reach of Commerce Clause); *Southern Ry. Co. v. United States*, 222 U.S. 20, 27 (1911) (holding use of defective railway cars not engaged in interstate hauls within reach of federal regulation under the Commerce Clause). The "current of commerce" theory paved the way for virtually all economic and commercial activity to fall within reach of federal regulation under the Commerce Clause. See *Russell v. United States*, 471 U.S. 858, 862 (1985) (holding federal law reaching individual intrastate fire destruction activities in rental property constitutional); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 283 (1981) (finding federal law regulating mining activities conducted intrastate constitutional); *Perez v. United States*, 402 U.S. 146, 157 (1971) (determining Consumer Credit Protection Act that prohibited intrastate extortionate credit transactions constitutional); *Katzenbach v. McClung*, 379 U.S. 294, 305 (1964) (holding that the Civil Rights Act, as applied to a restaurant that bought food through interstate commerce, is constitutional); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 262 (1964) (holding that the Civil Rights Act, as applied to a motel that accepted out-of-state guests, is constitutional); *Wickard v. Filburn*, 317 U.S. 111, 129 (1942) (finding personal wheat farming has indirect effect on commerce and therefore Agricultural Adjustment Act constitutional); *United States v. Darby*, 312 U.S. 100, 123 (1941) (holding Fair Labor

By the time the proposals for federal chartering or licensing received serious attention, however, the longstanding tradition empowering the states to charter corporations and the recent popularity enjoyed by the liberal general incorporation laws became too powerful for Congress to overcome.<sup>162</sup> Although, during the twentieth century, Congress enacted effective federal laws regulating corporate conduct,<sup>163</sup> the primary power of state law over the legitimacy of corporations never again faced serious challenge.<sup>164</sup> The power enjoyed by the states to issue corporate charters and enact general incorporation laws also meant that each individual state legislature, rather than Congress acting for the nation as a whole,

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Standards Act regulating intrastate wages valid exercise of Commerce Clause); *NLRB v. Jones & Laughlin*, 301 U.S. 1, 75 (1937) (pronouncing legislation protected union members from discrimination while preserving collective bargaining rights a valid exercise of the Commerce Clause due to "substantial relation" test); Harris Berlack, *Federal Incorporation and Securities Regulation*, 49 HARV. L. REV. 396, 418-25 (1936) (analyzing competing theories on whether federal incorporation law would be constitutional); Brown, *supra* note 159, at 1117 (noting that commentators in the late 1930s believed the Commerce Clause was strong enough to sustain federal licensing and chartering proposals); H.W. Chaplin, *National Incorporation*, 5 COLUM. L. REV. 415, 419-20 (1905) (concluding that Congress possesses constitutional authority to require national incorporation); Victor Morawetz, *The Power of Congress to Enact Incorporation Laws and to Regulate Corporations*, 26 HARV. L. REV. 667, 667 (1913) (arguing that "subject to the limitations expressly imposed by the Constitution . . . Congress can pass an act of incorporation . . . if such an act is merely a means of executing some constitutional purpose or power"). *But see* E. Parmalee Prentice, *Congress and the Regulation of Corporations*, 19 HARV. L. REV. 168, 171-79 (1906) (arguing that the commerce power is insufficient to permit federal regulation of corporations).

162. See Schwartz, *supra* note 160, at 77 (discussing strong connection between state and privately owned interests, characterized as "partners in the economic development of the country").

163. See *infra* notes 284-85, 287-89, 323 and accompanying text (citing federal legislation and discussing its effectiveness).

164. Although the states never lost the principal authority over the incorporation process, throughout the twentieth century, Congress issued corporate charters for specific purposes. See, e.g., 12 U.S.C. §§ 1716(b)-1723 (1994) (incorporating the Government National Mortgage Association, separate from the Federal National Mortgage Association, to establish and encourage secondary markets for mortgage-backed securities); 12 U.S.C. §§ 1811-1835a (1994) (incorporating the Federal Deposit Insurance Corporation to insure the deposits of all banks and savings associations); 15 U.S.C. § 714 *et seq.* (1994) (incorporating the Commodity Credit Corporation to stabilize, support, and protect farm income and prices and to facilitate orderly distribution of agricultural commodities); 16 U.S.C. §§ 831 *et seq.* (1994) (incorporating the Tennessee Valley Authority to operate and maintain land in interest of agricultural and industrial development, improve navigation in the Tennessee River, and control destructive flood waters); 29 U.S.C. §§ 1302-1323 (1994) (incorporating the Pension Benefit Guaranty Corporation to encourage voluntary private pension plans and provide for timely and uninterrupted payment of benefits); 36 U.S.C. §§ 1-13 (1994) (incorporating the American National Red Cross to provide volunteer aid in times of war and to mitigate suffering caused by disasters in times of peace); 47 U.S.C. § 396 (1994) (incorporating the Corporation for Public Broadcasting to encourage the growth and development of public radio and television to address the needs of the unserved and underserved audiences).

possessed the discretion to decide when to stop issuing special charters and establish access to the corporation as coming exclusively from general laws.

## II. THE PHENOMENON OF DUAL INCORPORATION PERSISTS THROUGH EARLY TWENTIETH CENTURY

### A. *Special Charters Remain Constitutionally Viable Through the First Years of Twentieth Century*

Most states chose to end the practice of issuing special charters by passing a constitutional amendment forbidding the legislature from issuing special charters. As general incorporation laws proliferated from the 1830s through 1875, the majority of state legislatures failed to accompany their first general incorporation statute with a constitutional amendment forbidding incorporation by special charter. Although some states showed remarkable efficiency by constitutionally prohibiting special charters either simultaneously or within a few years of its first general law, nearly three quarters of the states failed to do this. This failure left both the special charter and general law routes available on a nationwide basis.<sup>165</sup>

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165. Out of the 50 states or territories only 14 prohibited special charters within a few years of enacting its first general law. With the exception of Texas, which prohibited special charters in 1876, all of these states prohibited special charters before 1875. See ARK. CONST. of 1868, art. V, § 48 ("The general assembly shall pass no special act conferring corporate powers."); CA. CONST. of 1849, art. 4, § 31 ("Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes."); IND. CONST. of 1851, art. 11, § 13 ("Corporations, other than banking, shall not be created by special act."); IOWA CONST. of 1846, art. 8, § 2 ("Corporations shall not be created in this state by special laws, except for political or municipal purposes."); KAN. CONST. of 1859, art. XII, § 1 ("The legislature shall pass no act conferring corporate powers."); MICH. CONST. of 1850, art. 15, § 1 (amended 1862) ("Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes."); MINN. CONST. of 1857, art. X, § 1 ("No corporations shall be formed under special acts, except for municipal purposes."); MO. CONST. of 1865, art. VIII, § 4 ("Corporations may be formed under general laws, but shall not be created by special acts, except for municipal purposes."); NEB. CONST. of 1866, art. 8, § 1 ("The legislature shall pass no act conferring corporate powers."); NEV. CONST. of 1864, art. 8, § 1 ("The legislature shall pass no special Act in any manner relating to corporate powers, except for municipal purposes . . ."); OHIO CONST. of 1851, art. XIII, § 1 ("The General Assembly shall pass no special act conferring corporate powers."); OR. CONST. of 1857, art. XI, § 2 ("[C]orporations may be formed under general laws, but shall not be created by special laws, except for municipal purposes."); TEX. CONST. of 1876, art. XII, § 1 ("[N]o corporation shall be created except by general laws."); W. VA. CONST. of 1863, art. XI, § 5 ("[N]o special act incorporating, or granting peculiar privileges to any joint stock company or association, not having in view the issuing of bills to circulate as money or the construction of works of internal improvement, shall be passed."). Thirty-six states waited many years, sometimes approaching or exceeding fifty years after enacting their first general incorporation law before finally prohibiting special charters. See *infra* notes 167, 181-85; see also Appendix A.

By 1875, general incorporation laws reached virtual uniform availability.<sup>166</sup> Indeed, only eighteen states had prohibited special charters.<sup>167</sup> Because twenty-nine of the existing forty-seven states and territories still allowed their legislatures to issue special corporate charters, in 1875, the legislative forum for securing special charters remained open.<sup>168</sup> As long as a state's constitution contained no language prohibiting special charters, nothing prevented the legislature from issuing special charters, even if the corporate sponsor easily could have formed the corporation under a general law.<sup>169</sup> For many of these states, the period of dual incorporation or dual period, in which the states permitted incorporation under either the general incorporation statute or pursuant to a special charter,

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166. See *supra* notes 79-87, 94-95 and accompanying text; see also *infra* Appendix B.

167. Fourteen states, including Texas in 1876, had prohibited special charters within a few years of enacting their first general incorporation statute. See *supra* note 165. After experiencing lengthy dual periods, where many special charters were issued, five states (Tennessee, Illinois, Wisconsin, Pennsylvania, and New Jersey) amended their constitutions by 1875 and prohibited special charters. See ILL. CONST. of 1870, art. 11, § 1 ("No corporation shall be created by special laws, or its charter extended, changed, or amended except those for charitable, educational, penal, or reformatory purposes . . ."); N.J. CONST. of 1844, art. 3, § 11 (amended 1875) ("The legislature shall pass no special act conferring corporate powers."); PA. CONST. of 1874, art. III, § 7 ("The general assembly shall not pass any local or special law . . . Creating corporations, or amending, renewing, or extending the charter thereof . . ."); TENN. CONST. of 1870, art. XI, § 8 ("[N]o corporation shall be created, or its powers increased or diminished by special laws . . ."); WIS. CONST. of 1848, art. IV, § 31 (amended 1871) ("[T]he legislature is prohibited from enacting any special or private laws . . . granting corporate powers or privileges, except to cities."); see also Appendix B.

168. See Appendix B.

169. See FRIEDMAN, *supra* note 40, at 525. The individual states' manner of prohibiting special charters fell into three patterns. Twenty-three states (Ohio, Kansas, West Virginia, Nebraska, Arkansas, Tennessee, Pennsylvania, New Jersey, Texas, Louisiana, Washington, Wyoming, Mississippi, Kentucky, Utah, Hawaii, Alabama, Virginia, Oklahoma, Arizona, New Mexico, Alaska, and South Carolina) constitutionally prohibited all special charters with no exceptions, thus requiring all corporate sponsors to proceed under general laws. Twenty-one states (Iowa, California, Michigan, Indiana, Minnesota, Oregon, Nevada, Missouri, Illinois, Wisconsin, Colorado, Georgia, Montana, North Dakota, South Dakota, Idaho, Delaware, Florida, Vermont and North Carolina) constitutionally prohibited special charters with certain exceptions, normally for public oriented activities such as municipalities, charities, and educational institutions. Thus, the constitutions required uses of corporations for these purposes to be pursuant to a special charter while requiring all other corporate sponsors to proceed under general laws. Finally, seven states (Maryland, Maine, New Hampshire, Connecticut, New York, Rhode Island, and Massachusetts) never constitutionally prohibited special charters, relying on the legislatures to stop of their own accord. This Article treats absolute constitutional prohibitions and constitutional prohibitions with limited exceptions equivalently. See *supra* notes 165, 167 and notes 184, 187, 207-208 (providing statutory trail of states constitutionally prohibiting special charters, and discussing seven states that never enacted constitutional prohibitions causing special charters to linger well into the twentieth century).

lasted many years, sometimes exceeding fifty years.<sup>170</sup>

It has been well documented that until 1875, corporate sponsors sought and received many special charters from state legislatures, even though general incorporation laws were widely available.<sup>171</sup> On the one hand, the state legislatures issued many special charters to enterprises, including municipalities, railroads, and banks, that did not clearly fit within the particular state's general incorporation statute.<sup>172</sup> On the other hand, many special charters were granted to private businesses that clearly had the option of incorporating under the general statute.<sup>173</sup> The reasons these businesses sought special charters from the legislature rather than incorporating under the general statute varied substantially.<sup>174</sup> Some business advisors felt comfortable with the more familiar special charter process and

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170. Nineteen states experienced very long dual periods of more than 30 years: Alabama (49); Arizona (44); Connecticut (dual period continues); Florida (48); Maine (dual period continues); Maryland (dual period continues); Massachusetts (dual period continues); New Hampshire (dual period continues); New Mexico (45); New York (dual period continues); North Carolina (64); Rhode Island (dual period continues); South Carolina (101); Vermont (62); Virginia (48); Kentucky (37); Louisiana (31); Mississippi (33); Pennsylvania (38). Twelve states experienced long dual periods of more than 15 years or more: Delaware (26); Georgia (15); Idaho (15); Illinois (18); Montana (17); New Jersey (29); Oklahoma (17); Tennessee (20); Utah (25); Washington (23); Wisconsin (22), and Wyoming (20). Five states experienced dual periods that cannot be categorically classified as short or insignificant, of more than five years: Alaska (9); Colorado (9); Hawaii (10); North Dakota (12); and South Dakota (12). Only fourteen states Iowa (0); California (0); Michigan (4); Indiana (0); Ohio (5); Minnesota (0); Oregon (0); West Virginia (0); Arkansas (0); Nebraska (2); Missouri (1); Texas (2); Nevada (0); and Kansas (2); made a smooth transition from special charters to general incorporation with dual periods of five years or less. *See* Appendix A.

171. *See* CADMAN, *supra* note 39, at 160-161 (identifying the years 1858 to 1875 as the "heyday of special charters" despite the availability of general incorporation); HURST, *supra* note 2, at 132 ("Special chartering continued to be the dominant style of legislative dealing with incorporation until the 1870s."); *see also* FRIEDMAN, *supra* note 40, at 195 (claiming that early general incorporation laws were not very effective; when the rules of the general law were too burdensome, business took the special charter route).

172. *See* FRIEDMAN, *supra* note 40, at 524 (noting that exceptions existed in instances in which the object of the corporation could not be attained, but these limited exceptions were often ineffective because many businesses chose the special charter route); *supra* note 169 (observing that some states prohibiting special charters carved out exceptions for special industries); *supra* notes 85-86 (stating that general laws often were unavailable to certain activities—generally municipalities, railroads, and banks—thus requiring corporate sponsors to either seek a special charter or proceed under a specialized general law crafted for that activity).

173. *See* HURST, *supra* note 2, at 136 ("[A]fter optimal general incorporation acts were available, businessmen continued to obtain special charters which omitted various restrictive provisions of general acts . . . . [T]he record does not substantiate charges of large-scale corruption of the legislative process in enactment of special charters for business corporations.").

174. *See* GEORGE J. KUEHUL, *THE WISCONSIN BUSINESS CORPORATION* 146-57 (1959) (maintaining that special charters were obtained to secure prestige, avoid reporting requirements, annual reports, usury laws, and out of habit).

therefore, continued to approach the legislature out of habit,<sup>175</sup> even though the general law would have served the business just as well.<sup>176</sup> Furthermore, many advisors viewed businesses with special charters as carrying a certain prestige not present in corporations formed under a general statute.<sup>177</sup> Still other businesses secured special charters to avoid reporting or other requirements imposed by the general statute, or to secure other advantages, such as greater flexibility concerning the raising of capital and borrowing powers, tax exemptions, monopoly rights, or eminent domain privileges.<sup>178</sup> The ability of well-connected and influential businesses to use the special charter to secure favorable arrangements unavailable to others spawned vigorous criticism of the legislative practice of issuing special corporate charters.<sup>179</sup>

Illustrating the ambivalence of many state legislatures concerning the value of continuing to allow special corporate charters, a few states attempted to fashion a system that prohibited most special charters while still maintaining legislative discretion to issue only the most important or necessary special charters. In 1846, an amendment to the New York Constitution prohibited special charters “unless the objects of the corporation cannot be obtained.”<sup>180</sup> Several other states followed New York’s example by adding similar language to their constitutions.<sup>181</sup> Despite this constitutional language that

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175. See FRIEDMAN, *supra* note 40, at 194 (noting that by the 1840s and 1850s, the process of granting special charters had become routine to businesses, and therefore, impacted their decision to continue to pursue special charters).

176. See CADMAN, *supra* note 39, at 169 (discussing why New Jersey businesses sought special charters when general laws were simpler and less expensive).

177. See *id.* at 222 (stating that special charters conferred prestige).

178. See *id.* at 169-70, 222, 399 (noting that special charters conferred eminent domain powers, tax exemptions, prestige, monopoly protection, and liberal borrowing privileges); see also HURST, *supra* note 2, at 29 (noting that special charters sometimes avoided capitalization limits and reporting requirements).

179. See HOVENKAMP, *supra* note 42, at 37 (observing that special charters were criticized by Jacksonians as favoring the wealthy, well-established entrepreneurs over newcomers); KUEHUL, *supra* note 174, at 161 (quoting Governor Randall as stating “the power and influence and wealth of a corporation, created by special act, may be prostituted to dangerous purposes”); SHAW LIVERMORE, *EARLY AMERICAN LAND COMPANIES: THEIR INFLUENCE ON CORPORATE DEVELOPMENT* 295 (1929) (illustrating that critics urged general incorporation laws to eliminate monopoly privileges).

180. N.Y. CONST. of 1846, art. VIII, § 1; see also GUNN, *supra* note 81, at 232 (asserting that New York included constitutional language leaving legislative discretion to issue special charters, even after the general constitutional prohibition was added, to allow legislative scrutiny over the delegation of eminent domain powers). Gunn writes that a “Corporation may be formed under general laws; but shall not be created by special act except for municipal purposes, and in cases when in judgment of the legislative, the objects of the corporation cannot be attained under general laws and special acts passed pursuant to this section, may be altered from time to time, or repealed.” *Id.*

181. See, e.g., ILL. CONST. of 1848, art. X, § 1 (“Corporations . . . shall not be

evidenced a clear directive to avoid all but the most essential special charters, the state legislatures approved many special charters under the guise of meeting corporate objectives or goals not obtainable under the general statute, despite the fact that many could have been issued pursuant to the available general law.<sup>182</sup> The persistence of

created by special Acts, except for municipal purposes, and in cases where, in the judgment of the General Assembly, the object of the corporations cannot be attained under general laws."); ME. CONST. of 1819, art. IV, § 14 (amended 1876) ("Corporations . . . shall not be created by special acts of the legislature, except for municipal purposes, and in cases where the objects of the corporation cannot otherwise be attained."); MD. CONST. of 1851, art. III, § 47 ("Corporations . . . shall not be created by special act, except for municipal purposes and in cases where, in the judgement of the legislature, the objects of the corporation cannot be attained under general laws."); N.C. CONST. of 1868, art. VIII, § 1 ("Corporations . . . shall not be created by special act, except for municipal purposes, and in cases where, in the judgement of the Legislature, the objects of the corporation cannot be attained under general laws."); WIS. CONST. of 1848, art. XI, § 1 ("Corporations . . . shall not be created by special Acts, except for municipal purposes, and in cases where, in the judgement of the legislature, the objects of the corporation can not be attained under general laws."). In 1875, New York attempted once again to prohibit special charters by forbidding private bills "granting to any private corporation . . . any exclusive privilege, immunity or franchise." N.Y. CONST. of 1846, art. VIII, § 18 (amended 1875). This language in fact did not operate to prohibit issuing special charters, rather it forbids the charter, if issued, from granting special privileges or immunities. *See id.* In 1895, South Carolina attempted to discourage special charters by requiring a higher threshold of legislative vote to secure the bill's passage. *See* S.C. CONST. of 1895, art. IX, § 2 ("No charter of incorporation shall be granted, changed or amended by special law . . . *Provided* that the General Assembly may by a two-thirds vote of each house . . . allow a Bill for a special charter to be introduced . . ."). The South Carolina Constitution further states that:

No charter of incorporation shall be granted, changed or amended by special law . . . provided, that the General Assembly may by a two-thirds vote of each house on a concurrent resolution allow a Bill for a special charter to be introduced, and when so introduced may pass the same as other Bills.

*Id.* In 1897, the South Carolina legislature attempted to prohibit special charters. *See* Act of Mar. 9, 1897, No. 333, § 1, 1897 S.C. Acts 522 ("[T]hat the charter for any and every corporation except railroad, railway, tramway, turnpike and canal corporations shall be issued by the Secretary of State."). Apparently the statutorily based, rather than constitutionally based, prohibition failed to bind the legislature because special charters covering corporations outside the excepted subject areas continued to appear. South Carolina continued to issue special charters, albeit in very small numbers well into the twentieth century. From 1897 through 1967, in most years, South Carolina issued at least one special charter but almost never issued more than 10 in any given year. *See* Compilation, *supra* note 17, at South II, South Carolina Special Charters Table, 36-43 (providing state empirical data for special charters issued). However, in each of the years 1968, 1969, and 1970, South Carolina issued 15, 26, and 22 special charters, respectively. *See id.* This undoubtedly prompted its final constitutional prohibition in 1970. *See* S.C. CONST. of 1970, art. IX, § 2.

182. *See* FRIEDMAN, *supra* note 40, at 195-96 (noting that the New York legislature issued many special charters after the 1846 constitutional amendment); GUNN, *supra* note 81, at 241 (discussing numerous special charters issued in New York after the 1846 constitutional amendment); HURST, *supra* note 2, at 120 (assessing New York's 1846 constitutional amendment as symbolic of the gap between the stated denouncements of special charters and the legislative practice of continuing to issue special charters); *id.* at 131 (noting the presence of a "flow of special acts of incorporation" up through 1875); KUEHUL, *supra* note 174, at 163 (criticizing most of



special charters issued by these states, as well as by the seven states that never constitutionally prohibited special charters, demonstrate that only an absolute constitutional prohibition served as an effective way to stop special charters.<sup>183</sup>

The number of states without a constitutional amendment prohibiting special charters remained high until the early twentieth century. Although the number of states prohibiting special charters steadily increased after 1875, not until 1889, a year in which four states prohibited special charters,<sup>184</sup> did the number of states no longer allowing incorporation by special charter exceed fifty percent.<sup>185</sup> By the end of the nineteenth century, a total of thirty-two states had prohibited special charters, leaving eighteen—over one-third of the existing states and territories—that still permitted incorporation by special charter.<sup>186</sup> Viewing the nation as a whole, the number of states prohibiting special charters did not approach three quarters until 1907.<sup>187</sup> This pattern of state law constitutional

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the special charters granted during Wisconsin's dual period as entirely unnecessary).

183. See *infra* notes 207-15 and accompanying text (discussing how failure of seven states to constitutionally prohibit special charters contributed substantially to the presence of special charters after 1875 and accounts for the lingering of special charters well into the twentieth century).

184. See COLO. CONST. of 1876, art. XV, § 2 ("No charter of incorporations shall be granted, extended, changed, or amended by special law, except for such municipal, charitable, educational, penal or reformatory corporations . . ."); LA. CONST. of 1879, art. 46 ("The General Assembly shall not pass any local or special law . . . granting to any corporation . . . any special or exclusive right, privilege or immunity."); MONT. CONST. of 1889, art. 15, § 2 ("No charter of incorporation shall be granted, extended, changed or amended by special law, except for such municipal, charitable, educational, penal or reformatory corporations."); N.D. CONST. of 1889, art. 7, § 131 ("[N]o charter of incorporation shall be granted, changed, or amended by special law, except in the case of such municipal, charitable, educational, penal or reformatory corporations."); S.D. CONST. of 1889, art. XVII, § 1 ("[N]o corporation shall be created or have its charter extended, changed, or amended by special laws except those for charitable, educational, penal or reformatory purposes."); WASH. CONST. of 1889, art. XII, § 1 ("Corporations may be formed under general laws, but shall not be created by special acts.").

185. By the end of 1889, 25 of the existing 47 states or territories had prohibited special charters. See Appendix B (providing data showing percentage growth from 1811 through the twentieth century of states offering general incorporation statutes and prohibiting incorporation by special charter).

186. See *id.*

187. See *id.* See, e.g., ALA. CONST. of 1901, art. XII, § 229 ("The legislature shall pass no special act conferring corporate powers."); DEL. CONST. of 1897, art. IX, § 1 ("No corporation shall hereafter be created, amended, renewed or revived by special act; . . . but the foregoing provisions shall not apply to municipal corporations, bans or corporations for charitable, penal, reformatory or educational purposes . . ."); FLA. CONST. of 1885, art. III, § 25 (amended 1900) ("The legislature . . . shall not pass any special law on any such subject [numerous corporate purposes including "other useful companies or associations as may be deemed necessary"] . . ."); GA. CONST. of 1877, art. III, § 17, ¶ 18 (amended 1891) ("The general assembly shall have no power to grant corporate powers and privileges to private companies."); GA. CONST. of 1889, art. 11, § 2 (effective July 3, 1890) ("No charter of incorporation shall be

amendments prohibiting special charters proves that a significant number of state legislatures permitted special charters through the early twentieth century, roughly three decades longer than Professor Hurst estimated.<sup>188</sup>

*B. Special Charters Actually Issued in Significant Numbers Through the First Years of Twentieth Century*

Empirical evidence proves that the legislative forum offering the opportunity to secure special charters remained available in a significant number of states through the early twentieth century.<sup>189</sup> This evidence also demonstrates that many of these state legislatures actually issued a substantial number of special charters. It follows that special charters remained an important part of the corporate landscape on both a theoretical and practical level. The session laws of the states failing to prohibit special charters reveal that the legislatures issued over 20,000 special charters from 1875 through the end of the twentieth century.<sup>190</sup> The number of special charters

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granted, extended, changed, or amended by special law, except for such municipal, charitable, educational, penal or reformatory corporations.”); KY. CONST. of 1891, Art. III, § 27 (“The General Assembly shall not pass local or special acts . . . to grant a charter to any corporation, or to amend the charter of any existing corporation.”); MISS. CONST. of 1890, art. 7, § 178 (“Corporations shall be formed under general laws only.”); OKLA. CONST. of 1907, art. IX, § 38 (“[N]o private corporation shall be created nor foreign corporation licensed to conduct business in the State, except by general law.”); UTAH CONST. of 1895, art. VI, § 26 (effective Jan. 4, 1896) (“[T]he legislature is prohibited from enacting any private or special laws . . . granting to an individual, association or corporation any privilege, immunity or franchise.”); VA. CONST. of 1902, art. XII, § 154 (“The creation of corporations, and amendment of charters . . . shall be provided for by general laws and no charter shall be granted, amended, or extended by special act . . .”); WYO. CONST. of 1889, art. III, § 27 (effective July 10, 1890) (“[T]he legislature shall not pass local or special laws . . . granting to any corporation, association or individual . . . any special or exclusive privilege, immunity or franchise . . .”); An Act to Provide Government for the Territory of Hawaii, ch. 330, 31 Stat. 141 (1900) (“The legislature shall not grant to any corporation, association or individual any special or exclusive privilege, immunity, or franchise . . .”). See Appendix B.

188. When Professor Hurst speculated that special charters had disappeared from the corporate landscape during the 1870s, leaving general laws as the exclusive channel to the corporate form, he primarily relied on the patterns of the states of New Jersey, Wisconsin, and Pennsylvania. See HURST, *supra* note 2, at 17-18, 132. Those three states all experienced lengthy gaps between their first general incorporation statutes and their prohibition of special charters and each issued well over 1,000 special charters during their periods of dual incorporation. See *id.* at 17-18, 33, 131-32. Their patterns do suggest that special charters disappeared by 1875, because by 1875, all three of these states had prohibited special charters. See *supra* note 167.

189. See Appendix B.

190. See Compilation, *supra* note 17. Of the states still allowing special charters as of 1875, Connecticut, Kentucky, Maine, North Carolina, and Virginia each issued well over 1,000 special charters, and as a group, these state legislatures were responsible for more than half the total special charters issued from 1875 through

issued each year waned over time, showing only minuscule numbers by the last few decades of the twentieth century. This large volume of special charters empirically proves that special charters remained an important vehicle to gain access to the corporate form for many years after 1875.<sup>191</sup>

To approximate when special charters ceased to occupy a significant presence on the corporate landscape and to gauge over time the incidence of special chartering, the total number of special charters issued from 1875 through the end of the twentieth century was broken down into six smaller periods: (1) 1875 through 1886, (2) 1887 through 1893, (3) 1894 through 1903, (4) 1904 through 1915, (5) 1916 through 1975, and (6) 1976 through 1996.<sup>192</sup> After

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the present. *See id.* With the exception of Florida (which issued 257 special charters) Alabama, Delaware, Florida, Georgia, Massachusetts, Maryland, Mississippi, New Hampshire, New York, Rhode Island, and Vermont issued well over 500 special charters each. *See id.* The remaining states issuing special charters in their session laws from 1875 to present—Colorado, Louisiana, New Jersey, New Mexico, Texas, and Washington—issued very few, totaling 150 for the entire group. *See id.* The number of special charters documented in the Compilation issued by each state is as follows: Alabama (587 charters), Colorado (1 charter), Connecticut (2,284 charters), Delaware (908 charters), Florida (257 charters), Georgia (895 charters), Kentucky (2,462 charters), Louisiana (41 charters), Maine (2,082 charters), Maryland (642 charters), Massachusetts (970 charters), Mississippi (529 charters), New Hampshire (705 charters), New Jersey (44 charters), New Mexico (7 charters), New York (533 charters), North Carolina (2,392 charters), Rhode Island (999 charters), South Carolina (926 charters), Texas (27 charters), Vermont (759 charters), Virginia (1,922 charters), and Washington (30 charters). *See id.* No data was available for special charters issued by Alaska, which did not prohibit special charters until 1912. *See* Act of Aug. 24, 1912, § 9, 37 Stat. 512 (stating “nor shall [the legislature] grant private charters or special privileges”). Arizona, Hawaii, Idaho, Montana, North Dakota, Oklahoma, South Dakota, Utah, and Wyoming all technically allowed special charters after 1875; however, in documenting the special charters from 1875 through 1996, the research team found no special charters easily identifiable in the session laws.

191. The empirical conclusion that special charters remained a significant avenue to the corporate form through the early twentieth century is based on documenting the trail of constitutional prohibitions and the actual special charters appearing in the session laws of the states still allowing special charters. This Article does not attempt to compare the number of special charters issued with the number of corporate filings under general laws. Although the number of general law filings probably greatly exceeds the number of special charters, especially as the years approach and enter into the twentieth century, the actual number of special charters issued from 1875 through the early twentieth century, standing alone still indicates that special charters occupied a significant amount of legislative time and remained an important channel to the corporation. Because the research team treated all constitutional prohibitions as absolute, even if the state carved out exceptions for certain corporations, usually public corporations, the number of special charters documented in the Compilation understates the actual number of special charters in the session laws. *See supra* note 169.

192. From 1875 through 1996, the states issued 19,998 total special charters, of which 6,055 (30.3%) were issued from 1875 to 1886; 5,982 (29.9%) were issued from 1887 to 1893; 4,029 (20.2%) were issued from 1894 to 1903; 1,967 (9.8%) were issued from 1904 to 1915; 1,826 (9.1%) were issued from 1916 to 1975; and 139 (.7%) were issued from 1976 to 1996. *See* Compilation, *supra* note 17. The year 1996

comparing the total number of special charters issued each year from 1875 through 1996, and calculating the average number of special charters issued per year during each of the six periods, the data identifies 1903 as an artificial dividing line, marking the last year when special charters still constituted an important means of incorporation.<sup>193</sup> From 1875 until 1903, state legislatures issued over 16,000 special charters, which account for slightly over eighty percent of the total number of special charters issued from 1875 through the end of the twentieth century.<sup>194</sup> Moreover, the average number of special charters issued each year<sup>195</sup> for the first three periods remained significant. For most years from 1875 through 1886, the number of special charters issued reached over 500 per year.<sup>196</sup> From

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was the last year the session laws were examined for special corporate charters. In the year 1995, Connecticut issued two special charters, Massachusetts issued one special charter, Maine issued two special charters and Rhode Island issued one special charter. *See id.* at North II, Connecticut Special Charters Table, 95; *id.* at North II, Massachusetts Special Charters Table, 39; *id.* at North II, Rhode Island Special Charters Table, 50; *id.* at North III, Maine Special Charters Table, 166. In the year 1996, Connecticut and Rhode Island each issued one special charter. *See id.* at North II, Connecticut Special Charters Table, 95; *id.* at North II, Rhode Island Special Charters Table, 50. The special chartering activity of these four states, which are among the seven states that never constitutionally prohibited special charters, prove that special charters still exist, albeit in minuscule numbers at the dawn of the twenty-first century.

193. In the year 1903, the data shows that 372 special charters were issued nationwide. *See* Compilation, *supra* note 17. Although the even years leading up to 1903 consistently show smaller numbers (1902, 262 charters; 1900, 284 charters; 1898, 257 charters; and 1896, 324 charters), the tendency of state legislatures to meet during odd years caused greater numbers for the odd years leading up to 1903 (1901, 557 charters; 1899, 454 charters; 1897, 460 charters; 1895, 662 charters). *See id.* Starting in 1904, special charters, although still largely staying within triple digit range through 1916, consistently stayed well below 300 per year (with the exception being 1907, which showed 340 special charters issued, however still less than the 372 issued in 1903), often falling below 200 per year. *See id.*; *infra* note 209. Thus, 1903 marks the artificial dividing line when special charters were no longer important.

194. From 1875 through 1996, the states issued 19,998 total special charters of which 16,066 (80.3%) were issued from 1875 through 1903. *See* Compilation, *supra* note 17.

195. The compiled data reveals that the number of special charters issued in a particular year tended to be higher for odd years than for even years. The reason for this difference is directly attributable to the tendency of state legislatures to meet on a bi-annual basis. Because most bi-annual legislatures met in odd years, the odd year special charter totals are higher than the even year special charter totals. Of the 23 states analyzed in this Article, 11 (Alabama, Colorado, Georgia, Louisiana, Massachusetts, New Jersey, New York, Rhode Island, South Carolina, Texas, and Virginia) primarily met on an annual basis during the periods in question. *See* Compilation, *supra* note 17. Of the remaining 12 states that met on a bi-annual basis, nine (Connecticut, Delaware, Florida, Kentucky, Maine, New Hampshire, New Mexico, North Carolina, and Washington) met in odd years, while only three (Maryland, Mississippi, and Vermont) met in even years. *See id.*

196. The total special charters issued during the odd years, based on the compiled data (1875, 736 charters; 1877, 484 charters; 1879, 618 charters; 1881, 763 charters, 1883, 842 charters; and 1885, 705 charters), averaging 691.3 special charters per year, consistently showed greater numbers on a national basis than the total special

1887 through 1893, the number of special charters issued each year increased substantially in comparison to the previous twelve years, sometimes exceeding 1,000 during a particular year.<sup>197</sup> From 1894 through 1903, the number of special charters issued by state legislatures still averaged more than 400 per year, clearly less than previous years, although not insubstantial.<sup>198</sup>

From a national perspective, special charters remained a significant feature of the corporate landscape through 1903.<sup>199</sup> During the 1875 through 1903 period, twenty-three states actually issued special charters. The rest of the states, slightly more than half, either already had prohibited special charters or had stopped issuing special charters, even though their legislative forum technically remained open.<sup>200</sup> To better present the trends underlying the national picture, the twenty-three states have been broken down into two regions,

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charters issued during the even years (1876, 229 charters; 1878, 216 charters; 1880, 303 charters; 1882, 391 charters; 1884, 385 charters; and 1886, 383 charters), averaging 317.8 special charters per year. *See id.* When accounting for the total special charters issued during both odd and even years, the compiled data shows 6,055 special charters issued from 1875 until 1886, with an average of 504.6 special charters per year. *See id.*

197. The compiled data shows that in each of the odd years (1887, 1238 charters; 1889, 1488 charters; 1891, 830 charters; and 1893, 1081 charters), the total special charters issued at a national level exceeded 1,000 per year in all years except 1891, with an average of 1159.3 special charters per year. *See id.* During the even years, the average number of special charters, although less than the odd years due to the tendency of bi-annual legislatures to meet during odd years, still approached 450 per year (1888, 406 charters; 1890, 602 charters; 1892, 337 charters), for an average of 448.3 special charters per year. *See id.* Examining odd and even years together, the compiled data shows that three out of the seven years in this period, there were more than 1000 special charters. *See id.* Based on the compiled data, the total number of special charters issued from 1887 through 1893 equals 5,982, and the average each year (including both odd and even years) was 854.6 special charters issued per year. *See id.*

198. The number of special charters issued during the odd years (1895, 662 charters; 1897, 460 charters; 1899, 454 charters; 1901, 557 charters; and 1903, 372 charters), an average of 501 special charters per year, were higher than the number of special charters issued during the even years (1894, 397 charters; 1896, 324 charters; 1898, 257 charters; 1900, 284 charters; and 1902, 262 charters), an average of 304.8 special charters issued per year. *See id.* Based on the compiled data, the total number of special charters issued from 1894 through 1903 equals 4,029 and the average number of special charters per year was 402.9. *See id.*

199. *See supra* note 193 (stating that 372 special charters were issued nationwide in 1903).

200. By the end of 1875, Iowa, California, Michigan, Indiana, Ohio, Minnesota, Oregon, Kansas, West Virginia, Nevada, Missouri, Nebraska, Arkansas, Tennessee, Illinois, Wisconsin, Pennsylvania, and New Jersey had prohibited special charters by constitutional amendment. *See supra* notes 165 and 167 (citing state constitutional provisions prohibiting special charters). Although Alaska, Arizona, Hawaii, Idaho, Montana, North Dakota, Oklahoma, South Dakota, Utah, and Wyoming still allowed special charters after 1875, no special charters were easily identifiable in the session laws. Of the 23 states issuing special charters as of 1875 two, New Mexico and Washington, were still territories. *See* Appendix A.

based loosely on the states' geographic location. During the period from 1875 through 1903, the southern region, comprised of Kentucky, Virginia, North Carolina, South Carolina, Georgia, Alabama, Mississippi, Florida, Texas, New Mexico, and Louisiana issued over 9,400 special charters, accounting for almost sixty percent of the total.<sup>201</sup> The northern region, comprised of Delaware, New Jersey, New York, Maryland, Connecticut, New Hampshire, Rhode Island, Maine, Vermont, Massachusetts, Colorado, and Washington issued over 6,600 special charters, slightly greater than forty percent of the total.<sup>202</sup>

A further breakdown of the southern and northern special charters issued during the 1875 through 1903 period indicates a heavier southern contribution to the total special charters from 1875 through 1886 and from 1887 through 1893.<sup>203</sup> From 1894 to 1903, however, the special charters issued by the southern region declined. Thus, the northern region contributed a greater share during this period.<sup>204</sup> These patterns can be explained partially by the southern region's tendency to issue large numbers of special charters right up to the

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201. From 1875 through 1903, the states in both regions issued 16,066 total special charters of which 9,425 (58.7%) were issued by the southern region. *See* Compilation, *supra* note 17, at South I-III. The 9,425 southern special charters break down as follows: Kentucky (2,462), Virginia (1,922), North Carolina (1,918), South Carolina (781), Georgia (895), Alabama (587), Mississippi (529), Florida (257), Texas (27), New Mexico (6), and Louisiana (41). *See id.* at South I-III. Although Texas and New Mexico do not fit geographically, they have been included in the southern region to avoid creating a third region. Because these two states issued very few special charters there was no need to create a third region; moreover their presence in the southern region does not materially alter the southern data.

202. From 1875 through 1903, the states in both regions issued 16,066 total special charters, of which 6,641 (41.3%) were issued by the northern region. *See id.* at North I-III (detailing special charters). The 6,641 northern special charters break down as follows: Maine (979), Delaware (908), New Jersey (44), New York (303), Maryland (381), Connecticut (1577), New Hampshire (582), Rhode Island (599), Vermont (561), Massachusetts (676), Colorado (1), and Washington (30). *See id.* Although Colorado and Washington do not fit geographically within the northern region, they have been included to avoid creating a third region. Because these two states issued very few special charters there was no need to create a third region; moreover their presence in the northern region does not materially alter the northern data.

203. From 1875 through 1886, the states in both regions issued 6,055 total special charters of which 4,082 (67.4%), an average of 340.2 special charters per year, were issued by the southern region and 1,973 (32.6%), an average of 164.4 special charters per year, were issued by the northern region. *See id.* at South I-III, North I-III. From 1887 through 1893, the states in both regions issued 5,982 total special charters of which 3,637 (60.8%), an average of 519.6 special charters per year, were issued by the southern region, and 2,345 (39.2%), an average of 335 special charters per year, were issued by the northern region. *See id.*

204. From 1894 through 1903, the states in both regions issued 4,029 total special charters of which 1,706 (42.4%), an average of 170.6 special charters per year, were issued by the southern region, and 2,323 (57.6%), an average of 232.3 special charters per year, were issued by the northern region. *See id.*

year the legislature constitutionally prohibited special charters, as compared to the northern region's tendency to issue smaller numbers of charters each year.<sup>205</sup> Moreover, during the 1890s, three southern states—Kentucky, Georgia, and Mississippi—which previously issued large numbers of special charters, enacted constitutional prohibitions, thereby greatly contributing to the decrease in special charters issued by southern states from 1894 through 1903.<sup>206</sup>

205. *See id.* at North I-III, South I-III.

206. A comparison of the special chartering pattern between Kentucky, Georgia, and Mississippi and three similar northern states, Maryland, New Hampshire, and New York demonstrates that the southern states tended to issue significantly more special charters per year right up to the year the legislature constitutionally prohibited special charters. Meeting bi-annually from 1875 through 1889, the Kentucky legislature, which prohibited special charters in 1891, issued 182 charters in 1875, 153 charters in 1877, 294 charters in 1879, 279 charters in 1881, 338 charters in 1883, 248 charters in 1885, 396 charters in 1887, and 572 charters in 1889. This is a total of 2,462 charters, averaging 307.75 per year. *See* Compilation, *supra* note 17, at South III, Kentucky Special Charters Table (providing breakdown of special charter totals in various industries). Meeting annually from 1875 through 1892 (the year special charters were prohibited constitutionally) the Georgia legislature issued 38 charters in 1875, 31 charters in 1876, 31 charters in 1877, zero charters in 1878, 24 charters in 1879, six charters in 1880, 56 charters in 1881, six charters in 1882, 48 charters in 1883, 12 charters in 1884, 54 charters in 1885, 43 charters in 1886, 111 charters in 1887, 44 charters in 1888, 165 charters in 1889, 87 charters in 1890, 134 charters in 1891, and five charters in 1892. This is a total of 895 charters, averaging 49.7 per year. *See id.* at South I, Georgia Special Charters Table. Meeting bi-annually in most years from 1875 through 1890 (the year special charters were prohibited), the Mississippi legislature issued one charter in 1875, 22 charters in 1877, 55 charters in 1878, 83 charters in 1880, 102 charters in 1882, 69 charters in 1884, 52 charters in 1886, 68 charters in 1888, and 77 charters in 1890. This is a total of 529 charters, averaging 52.9 per year. *See id.* at South I, Mississippi Special Charters Table. Meeting bi-annually from 1875 through 1903 (continuing to issue special charters well after 1903), the Maryland legislature issued 15 charters in 1876, 16 charters in 1878, 11 charters in 1880, 21 charters in 1882, 20 charters in 1884, 20 charters in 1886, 27 charters in 1888, 26 charters in 1890, 30 charters in 1892, 34 charters in 1894, 26 charters in 1896, 27 charters in 1898, 60 charters in 1900, and 48 charters in 1902. This is a total of 381 charters, averaging 27.2 per year. *See id.* at North I, Maryland Special Charters Table. Meeting bi-annually for most years from 1875 through 1903 (continuing to issue special charters well after 1903), the New Hampshire legislature issued 24 charters in 1875, 23 charters in 1876, 31 charters in 1877, 18 charters in 1878, 14 charters in 1879, 39 charters in 1881, 38 charters in 1883, 14 charters in 1885, 66 charters in 1887, 54 charters in 1889, 64 charters in 1891, 64 charters in 1893, 20 charters in 1895, 18 charters in 1897, 24 charters in 1899, 37 charters in 1901, and 34 charters in 1903. This is a total of 582 charters, averaging 34.2 per year. *See id.* at North III. Meeting annually for most years from 1875 through 1903 (continuing to issue special charters well after 1903), the New York legislature issued 12 charters in 1875, five charters in 1877, five charters in 1878, seven charters in 1879, 10 charters in 1880, 21 charters in 1881, 18 charters in 1882, seven charters in 1883, 11 charters in 1884, 12 charters in 1885, 16 charters in 1886, 15 charters in 1887, 16 charters in 1888, eight charters in 1889, 14 charters in 1890, five charters in 1891, 18 charters in 1892, 13 charters in 1893, 11 charters in 1894, 22 charters in 1895, 12 charters in 1896, three charters in 1897, eight charters in 1898, nine charters in 1899, eight charters in 1900, four charters in 1901, nine charters in 1902, and four charters in 1903. This is a total of 303 charters, averaging 10.8 per

*C. Presence of Special Charters Substantially Declines During First Two Decades of the Twentieth Century*

During the second decade of the twentieth century, several states that had not yet constitutionally prohibited special charters did so.<sup>207</sup> Seven northern states—Maryland, New Hampshire, New York, Massachusetts, Maine, Rhode Island, and Connecticut—never enacted constitutional prohibitions, thus leaving the technical forum for special charters open indefinitely. Because these state legislatures continued to issue special charters well into the twentieth century, and four of these states—Massachusetts, Maine, Rhode Island, and Connecticut—continued issuing special charters during the 1990s, special charters continue to linger, albeit in minuscule numbers, at the dawn of the twenty-first century.<sup>208</sup>

year. *See id.* at North I.

207. Between 1910 and 1916, Arizona, New Mexico, Alaska, Vermont, and North Carolina constitutionally prohibited special charters. *See* ARIZ. CONST. of 1910, art. XIV, § 2 (“Corporations may be formed under general laws, but shall not be created by special acts.”); N.C. CONST. art. VIII, § 1 (enacted 1916) (“No corporation shall be created, nor shall its charter be extended . . . by special act, except corporations for charitable, educational, penal or reformatory purposes . . .”); N.M. CONST. art. XI, § 13 (enacted 1912) (“The legislature shall provide for the organization of corporations by general law.”); VT. CONST. ch. II, § 69 (enacted 1913) (“No charter of incorporation shall be granted, extended, changed or amended by special law, except for such municipal, charitable, educational, penal or reformatory corporations . . .”); Act of Aug. 24, 1912, § 9, 37 Stat. 512 (“[N]or shall the legislature pass local or special laws . . . grant private charters or special privileges . . .”). In 1970 South Carolina finally prohibited special charters by constitutional amendment. *See* S.C. CONST. art IX, § 2 (“The General Assembly shall provide by general law for the formation, organization, and regulation of corporations . . .”); *see also* Compilation, *supra* note 17, at South II, South Carolina Special Charters Table (noting that 1970 was the last year South Carolina issued special charters). Alaska and Hawaii prohibited special charters well before being admitted to the Union, even before officially being organized as territories. *See* Appendices A & B.

208. The Maryland legislature, meeting bi-annually, issued 189 charters from 1904 through 1915, averaging 31.5 per year. *See* Compilation, *supra* note 17, at North I, Maryland Special Charters Table. From 1916 through 1945, Maryland issued 72 special charters, averaging 4.8 per year, with five charters in 1945, the last year Maryland issued special charters. *See id.* (providing details of special charters). Meeting bi-annually, the New Hampshire legislature issued 102 charters from 1904 through 1915, averaging 17 per year. *See id.* at North III, New Hampshire Special Charters Table. From 1916 through 1923, New Hampshire issued 21 charters, averaging 5.3 per year with one charter in 1923, the last year New Hampshire issued special charters. *See id.* The New York legislature, meeting annually, issued 91 charters from 1904 through 1915, averaging 7.6 per year. *See id.* at North I, New York Special Charters Table. From 1916 through 1938, New York issued 139 charters, averaging six per year with 11 charters in 1938, the last year New York issued special charters. *See id.* Meeting annually, the Massachusetts legislature issued 166 charters from 1904 through 1915, averaging 13.8 per year. *See id.* at North II, Massachusetts Special Charters Table. From 1916 through 1975, Massachusetts issued 110 charters, averaging 1.8 per year. *See id.* From 1976 through 1996, Massachusetts issued 18 charters, averaging 0.86 per year, and continues to issue special charters in the 1990s (one charter in 1990, two charters in 1991, two charters in 1992, one charter in 1994,



Based on the total number of special charters issued for the entire period from 1904 to the end of the twentieth century, as well as the average number of special charters issued each year, 1904 serves as an artificial line identifying when special charters ceased to provide meaningful access to the corporate form.<sup>209</sup> The total number of special charters from 1904 through 1996 was just under 4,000, slightly less than twenty percent of the more than 20,000 special charters issued since 1875.<sup>210</sup> Moreover, the average number of special charters issued per year during the last three of the six periods, empirically illustrates that special chartering was far less visible than in the previous periods.<sup>211</sup> From 1904 until 1915, the practice of incorporation by special charter entered into a phase marked by substantial and consistent decline, with the number of special charters averaging less than 175 per year.<sup>212</sup> By 1916, special

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and one charter in 1995). *See id.* Meeting biannually in odd years, the Maine legislature issued 367 charters from 1904 through 1915, averaging 61.5 per year. *See id.* at North III, Maine Special Charters Table. From 1916 through 1975, Maine issued 702 charters, averaging 23.4 per year. *See id.* From 1976 through 1996, Maine issued 35 charters, averaging 3.2 per year and continues to issue special charters in the 1990s (six charters in 1991, two charters in 1993 and one charter in 1995). *See id.* Meeting annually, the Rhode Island legislature issued 97 charters from 1904 through 1915, averaging 8.1 per year. *See id.* at North II, Rhode Island Special Charters Table. From 1916 through 1975, Rhode Island issued 274 charters, averaging 60 per year. *See id.* From 1976 through 1996, Rhode Island issued 25 charters, averaging 1.2 per year, and continues to issue special charters in the 1990s (one charter in 1991, one charter in 1995, and one charter in 1996). *See id.* (giving details of special charters issued). Meeting biannually, the Connecticut legislature issued 244 charters from 1904 through 1915, averaging 40.1 per year. *See id.* at North II, Connecticut Special Charters Table. From 1916 through 1975, Connecticut issued 402 charters, averaging 13.4 per year. *See id.* From 1976 through 1996, Connecticut issued 61 charters, averaging 2.9 per year, and continues to issue special charters in the 1990s (four charters in 1990, one charter in 1991, two charters in 1992, four charters in 1993, one charter in 1994, two charters in 1995, and one charter in 1996). *See id.*

209. In 1903, the number of special charters reached 372 and in 1904 the total number dipped down to 123. *See* Compilation, *supra* note 17. Although in the odd years—when bi-annual legislative sessions tended to meet—immediately following 1904, the total number of special charters exceeded 123, (1905, 268 charters; 1907, 340 charters; 1909, 196 charters; 1911, 216 charters; 1913, 230 charters) the special charters issued in those odd years never reached the level of the 372 special charters issued in 1903. *See id.* Moreover, the number of special charters issued in the even years after 1903 (1904, 123 charters; 1906, 136 charters; 1908, 101 charters; 1910, 115 charters; 1912, 65 charters; 1914, 42 charters) do not approach the 262 charters issued in 1902. *See id.* Therefore, 1904 represents a reasonable estimate marking the point in time when special chartering ceases to be a significant factor in the evolution of the corporation. *See supra* note 193 (showing 1903 is the artificial dividing line marking the last year when special charters were still important).

210. From 1875 through 1996, the states issued 19,998 total special charters of which 3,932 (19.7%) were issued from 1904 through 1996. *See* Compilation, *supra* note 17. The last year that the research team examined the published session laws for all the states was 1996.

211. *See id.*

212. Although during the odd years (1905, 268 charters; 1907, 340 charters; 1909, 196 charters; 1911, 216 charters; 1913, 230 charters; and 1915, 135 charters) the

chartering neared complete insignificance with the number of special charters averaging well below fifty per year through 1975.<sup>213</sup> From 1975 through the 1990s, special charters maintained only a negligible presence, averaging well under ten special charters per year.<sup>214</sup> Because all of the southern states except two—North Carolina and South Carolina—prohibited special charters by 1903, the northern states, especially the seven that failed to constitutionally prohibit special charters, were largely responsible for special chartering

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average number of special charters issued per year exceeded 200 (230.8 based on the compiled data), the average number of special charters issued during the even years (1904, 123 charters; 1906, 136 charters; 1908, 101 charters; 1910, 115 charters; 1912, 65 charters; 1914, 42 charters, and 1916, 29 charters) fell below 100 (97.0 based on the compiled data). *See id.* The average number of special charters for all years, therefore, stayed under 175 per year (163.9 based on the compiled data). *See id.* Based on the compiled data, the number of special charters issued from 1904 through 1915 totals 1,967. *See id.*

213. By 1916, special charters dipped to a double digit figure, never again returning to the three digit figures of the previous years, and marks a true break point, where the substantial decline of the period 1904 through 1915 reached a level of true insignificance. *See id.* During the odd years (1917, 83 charters; 1919, 44 charters; 1921, 65 charters; 1923, 31 charters; 1925, 80 charters; 1927, 70 charters; 1929, 59 charters; 1931, 37 charters; 1933, 42 charters; 1935, 26 charters; 1937, 35 charters; 1939, 30 charters; 1941, 46 charters; 1943, 19 charters; 1945, 39 charters; 1947, 75 charters; 1949, 82 charters; 1951, 64 charters; 1953, 52 charters; 1955, 59 charters; 1957, 56 charters; 1959, 45 charters; 1961, 51 charters; 1963, 63 charters; 1965, 47 charters; 1967, 38 charters; 1969, 57 charters; 1971, 16 charters; 1973, 13 charters; and 1975, 15 charters) the number of special charters averaged just under 50 (48.0 based on the compiled data) per year. *See id.* During the even years (1916, 29 charters; 1918, 13 charters; 1920, 22 charters; 1922, 22 charters; 1924, 28 charters; 1926, 27 charters; 1928, 13 charters; 1930, 18 charters; 1932, 15 charters; 1934, 13 charters; 1936, seven charters; 1938, 13 charters; 1940, four charters; 1942, four charters; 1944, zero charters; 1946, four charters; 1948, three charters; 1950, five charters; 1952, seven charters; 1954, six charters; 1956, 12 charters; 1958, 13 charters; 1960, nine charters; 1962, seven charters; 1964, six charters; 1966, seven charters; 1968, 22 charters; 1970, 30 charters; 1972, 20 charters; and 1974, eight charters) the number of special charters averaged just over 12 (12.9 based on the compiled data) per year. *See id.* For both the even and odd years from 1916 through 1975, the average number of special charters issued was 30.4 special charters per year. *See id.* Based on the compiled data, the total number of special charters issued from 1916 through 1975 was 1,826. *See id.*

214. By 1976, with only a few exceptions, the annual number of special charters issued had reduced to a single digit figure. *See id.* During the odd years (1977, 11 charters; 1979, seven charters; 1981, 12 charters; 1983, six charters; 1985, six charters; 1987, 17 charters; 1989, eight charters; 1991, 10 charters; 1993, six charters; and 1995, five charters) the number of special charters averaged just under nine per year (8.8 based on the compiled data). *See id.* During the even years (1976, five charters; 1978, five charters; 1980, four charters; 1982, six charters; 1984, eight charters; 1986, six charters; 1988, four charters; 1990, five charters; 1992, four charters; 1994, two charters; 1996, two charters) the number of special charters averaged just under five per year (4.6 based on the compiled data). *See id.* Including both odd and even years, the average number of special charters issued per year from 1976 through 1996 was 6.6 special charters per year. *See id.* Based on the compiled data the total number of special charters issued from 1976 through 1996 was 139. *See id.*

lingering well into the twentieth century.<sup>215</sup>

### III. PERSISTENCE OF SPECIAL CHARTERS LINKED TO THE STATES' PRIMARY POWER OVER CORPORATIONS

Special charters remained a significant feature of corporate law through the early twentieth century primarily because state law, rather than federal law, assumed and maintained the dominant role over the legitimacy and regulation of corporations. The power of each state to decide when to stop issuing special charters kept the practice alive “long after there were any meritorious grounds for this cumbersome procedure.”<sup>216</sup> The enactment of constitutional amendments expressly forbidding incorporation by special charter was by far the most effective way to end this cumbersome practice.<sup>217</sup> Like all major changes limiting legislative power, the prohibition of special charters encountered delays because of resistance from special interest groups as well as the natural suspicion of change and from inertia.<sup>218</sup> The effect of these forces probably would have been

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215. From 1904 through 1996, the states in both regions issued 3,932 total special charters of which 3,312 (84.2%) were issued by the northern region and 620 (15.8%) were issued by the southern region. *See id.* at North I-III, South I-III. The relative presence in both regions fluctuates when breaking the 1904 through 1996 time frame into three periods. From 1904 through 1915, the states in both regions issued 1,967 total special charters, of which 1,454 (73.9%), an average of 121.2 special charters per year, were issued by the northern region and 513 (26.1%), an average of 42.8 special charters per year, were issued by the southern region. *See id.* From 1916 through 1975, the states in both regions issued 1,826 total special charters, of which 1,719 (94.1%), an average of 28.7 special charters per year, were issued by the northern region and 107 (5.9%), an average of 1.8 special charters per year, were issued by the southern region. *See* Compilation, *supra* note 17. Due to its constitutional prohibition in 1916, *see* N.C. CONST. art. VIII, § 1 (enacted 1916), North Carolina issued no charters during the period from 1916 through 1975. *See* Compilation, *supra* note 17, at South II, North Carolina Special Charters Table. New Mexico, which prohibited special charters in 1912, *see* N.M. CONST. art. XI, § 13 (enacted 1912), issued one charter in 1909. *See* An Act to Incorporate the New Mexico Spanish-American School, ch. 97, § 1, 1909 N.M. Laws 254, 254-56. The remainder of the 1916 through 1975 southern charters were issued by South Carolina. *See* Compilation, *supra* note 17, at South II, South Carolina Special Charters Table. From 1976 through 1996, four of the seven northern states that failed to constitutionally prohibit special charters issued all 139 charters. *See supra* note 208 (discussing states that continued to issue special charters in the 1990s).

216. HURST, *supra* note 2, at 61.

217. *See supra* note 206 and accompanying text (noting that the states continued to issue large numbers of special charters until legislatures constitutionally prohibited the practice).

218. *See* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 129-31 (1991) (discussing how Congress’ legislative veto power, struck down in *INS v. Chadha*, 462 U.S. 919 (1983), frustrated much-needed legislation); *id.* at 22-23 (noting that organized interest groups have the ability to influence legislation); *id.* at 40-42, 56-58 (commenting on the power of congressional committees and the “agenda setter” to kill beneficial legislation); *see also* HURST, *supra* note 2, at 61, 157 (arguing that the inertia of state legislatures caused incorporation by special charter

far less significant if the power to make the transition from special charters to exclusive use of general laws rested solely with Congress. The ability of each state to plot its own course, however, undoubtedly increased the force of inertia. Also, from a national perspective, this state power greatly delayed the constitutional prohibitions and left the special charter forum open in a substantial number of states through the early twentieth century.<sup>219</sup>

To further explore why corporate sponsors and legislatures continued to take advantage of the forum and use special charters, the data categorizes the nearly 20,000 special charters issued from 1875 through 1996 as belonging to one of four broad industries. The data then demonstrates the role played by the special chartering process within the broader context of the particular industry's needs and regulatory framework. Public corporations, including municipalities, public utilities, nonprofit organizations, and educational institutions, which never posed a serious question concerning the primary regulatory power resting with the states, account for well over 10,500 special charters, slightly under fifty-four percent of the total special charters issued from 1875 through 1996.<sup>220</sup> Special charters constituted an important tool that many states used to establish and maintain public services for their citizens until state law developed a practice of handling these matters outside the special charter process.<sup>221</sup> Transportation and communication corporations, including railroads, turnpikes, canals, bridges, roads, telegraph, and telephone enterprises, account for almost 4,000 special charters, just under twenty percent of the total issued from 1875 through 1996. Banks and other financial institutions, including traditional banks, brokerage houses, and other enterprises providing investment services as well as insurance corporations, account for just over 3,000 special charters, slightly over fifteen percent of the total.<sup>222</sup> In these two industries, both of which raise significant interstate commerce

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to linger too long).

219. See *supra* note 193 (explaining that although special charters remained present in large numbers until 1903, 1904 marks an artificial dividing line when special charters ceased to be important).

220. From 1875 through 1996, out of 19,998 total special charters in all industries, 10,685 (53.4%) were issued to public corporations. See Compilation, *supra* note 17; see also Appendix C.

221. See *infra* notes 241-43 (discussing how general incorporation laws, home rule procedures, and self-governance measures began replacing special charters in the twentieth century).

222. From 1875 through 1996, out of the 19,998 total special charters in all industries, 3,933 (19.7%) were for transportation and communication corporations, and 3,030 (15.2%) were for banks and other financial institutions. See Compilation, *supra* note 17; see also Appendix C.

issues best coordinated by federal regulation, many states used special charters as a regulatory tool until federal law pre-empted the states by establishing a national regulatory framework.<sup>223</sup> Private enterprises, including manufacturing, mining, timber, real estate, and publishing enterprises, which, unlike public transportation and banking corporations, do not naturally lean toward exclusive state or federal regulation, account for 2,350 charters, slightly over eleven percent of the total special charters issued from 1875 through 1996.<sup>224</sup> By 1875, virtually all states offered general laws meeting the needs of most private businesses. As a result, the special charters issued to private businesses can be attributed largely to the state law inertia that kept the special charter forum open through the early twentieth century.

*A. Special Charters for Public Corporations Persisted Until General Laws Replaced Direct Legislative Control*

From 1875 through 1903, state legislatures issued almost 8,000 of the over 16,000 special charters issued in all industries for public corporations.<sup>225</sup> Moreover, the average number of special charters issued per year for public corporations—which reached just over 250 per year from 1875 through 1886, climbing to just over 400 per year from 1887 through 1893, and staying well over 200 per year from 1894 through 1903—remained at significant levels.<sup>226</sup> The substantial number of special charters issued for public corporations from 1875 through 1903, of which municipalities constituted an important and

223. See *infra* notes 281-88 and accompanying text.

224. From 1875 through 1996 out of 19,998 total special charters in all industries, 2,350 (11.7%) were for private business. See Compilation, *supra* note 17.

225. From 1875 through 1903, the states issued 16,066 special charters in all industries of which 7,991 (49.7%) were for public corporations. See Compilation, *supra* note 17; see also Appendix C. Municipalities (which includes all corporations formed for supporting services such as fire, police, libraries, and other civil services) numbered 2,068 (25.9%); nonprofit corporations (which includes all corporations formed for social, charitable, religious, civic purposes as well as hospitals and military organizations) numbered 3,507 (43.9%); public utilities (which includes all gas, power, and water corporations) numbered 1,022 (12.8%); and educational corporations (which includes all types of schools, i.e., grammar, secondary, and post secondary, as well as school districts) numbered 813 (10.2%). See Compilation, *supra* note 17. From 1875 through 1903, 581 special charters contained so little information it was impossible to determine their corporate purposes. They appear in the compiled data as miscellaneous corporations and come to 7.2% of the public corporations issued from 1875 through 1903. See *id.*

226. From 1875 through 1886, the states issued 6,055 total special charters in all industries of which 3,048 (50.4%), an average of 254 special charters per year, were for public corporations. See *id.* From 1887 through 1893, the states issued 5,982 total special charters in all industries of which 2,816 (47.1%), an average of 402.3 special charters per year, were for public corporations. See *id.* From 1894 through 1903, the states issued 4,029 total special charters in all industries of which 2,127 (52.8%), an average of 212.7 special charters per year, were for public corporations. See *id.*

visible category, can be explained by the states using special charters to maintain direct control over all aspects of these corporations.<sup>227</sup> These aspects included the first step of establishing the initial charter, detailing governance procedures, and authorizing the annexation of more territory within the city limits.<sup>228</sup>

The colonial assemblies and the state legislatures assumed responsibility for chartering public corporations during America's earliest years.<sup>229</sup> Although at the time the Framers created the Constitution, legitimate arguments existed that Congress had the ability to charter banks serving the national interests, the states undoubtedly possessed the exclusive right to charter corporations serving the public needs of citizens within a particular state.<sup>230</sup> The Supreme Court's 1819 decision in *Trustees of Dartmouth College v. Woodward*,<sup>231</sup> which held that public corporations existed solely at the pleasure of the state legislature, first articulated the exclusive sphere of state, as opposed to federal, jurisdiction over public corporations.<sup>232</sup> The *Dartmouth College* decision directly led to the legal evolution of municipalities existing totally under state control, with the special charter constituting a major tool to deal with municipal matters throughout the nineteenth century.<sup>233</sup>

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227. See CHARLES R. ADRIAN & ERNEST GRIFFITH, A HISTORY OF AMERICAN CITY GOVERNMENT: THE FORMATION OF TRADITIONS, 1775-1870, at 34 (1976) (arguing that during this time period, legislatures assumed control over municipal corporations).

228. JOHN A. RUSH, THE CITY-COUNTY CONSOLIDATED 143-58 (1941) (indicating that states that amended their constitutions and adopted charters moved toward allowing legislative control of municipal corporations); JON C. TEAFORD, THE MUNICIPAL REVOLUTION IN AMERICA 113-15 (1975) (discussing how the municipal revolution was realized by reforms aimed at municipal charters).

229. See ADRIAN & GRIFFITH, *supra* note 227, at 23 (noting that municipal charters came from the colonial governor and that legislatures controlled the process of taxation); see also *supra* notes 23-27, 46 and accompanying text.

230. See *supra* notes 24, 46 (noting how colonial and early American corporations were primarily for public purposes); see also *supra* notes 31-41 (discussing the power of the states and Congress during America's earliest years and recognizing a significant role for the states).

231. 17 U.S. (4 Wheat.) 518 (1819).

232. See *id.* at 562-63 (stating that a corporation established for educational purposes does not fall under the category of a public corporation or a private corporation, but noting, in dicta, that corporations formed for public purposes, the municipality being the clearest example, are subject to the exclusive control of the state legislature where the corporation is located).

233. See *supra* notes 227-29 (noting how states used special charters to maintain control over corporations); see also JOHN F. DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS 72 (1872) (stating that "the power of the legislature over [municipal] corporations is supreme and transcendent: it may erect, change, divide, and even abolish, at pleasure, as it deems the public good to require"). Dillon writes that:

Public corporations are called into being at the pleasure of the state, and while the state may, it need not, obtain the consent of the people of the locality to be affected. The charter or incorporating act of a municipal

Consequently, many of the numerous special charters for public corporations in the session laws during the 1875 through 1903 period can be explained by municipal officers constantly “knocking on the legislatures’ doors asking for more power or additional delegations . . . .”<sup>234</sup>

The northern and southern regions showed different trends in issuing special charters for public corporations. Special charters for public corporations, although generally less in total number for each period analyzed, assumed a higher profile in the northern states than the southern states. From 1875 through 1903, the northern special charters issued for public corporations approached sixty percent of the northern total, significantly greater than the national average of almost fifty percent.<sup>235</sup> On the other hand, the southern region’s special charters for public corporations was only forty-four percent of

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corporation is in no sense a contract between the state and the corporation . . . .

*Id.* at 71. Judge Dillon cites *Dartmouth College*, 17 U.S. (4 Wheat.) at 518; *Allen v. McKean*, 1 Sumn. 276 (C.C.D. Me. 1833), and *People v. Morris*, 13 Wend. 325 (N.Y. 1835), among his authorities supporting these statements. For more on how states started to control municipal corporations, see generally ADRIAN & GRIFFITH, *supra* note 227, at 34, which argues that Congress authorized the state legislatures to grant charters of incorporation for municipalities; and EMMETT CLINTON YOKLEY, MUNICIPAL CORPORATIONS 7-8 (1956), which states that: “[The state] legislature creates municipal corporations, defines them, and limits their powers, enlarges and diminishes them at will, points out the agencies which are to execute them, and possesses such general supervision over them as they shall deem proper and needful for the public welfare.”

234. Rush writes that:

Municipalities of the state . . . were continuously at the door of Ohio’s General Assembly asking for additional power or modifications in some form of previous delegations of such power . . . . Municipalities were, therefore, largely a political football for each succeeding legislature, and there was no stability of law touching municipal power, nor sufficient elasticity of law to meet changed or changing municipal conditions.

RUSH, *supra* note 228, at 143 (citing *City of Perrysburg v. Ridgeway*, 140 N.E. 595, 598 (Ohio 1923)). Throughout the nineteenth century, the use of special charters for municipal functions faced criticism for causing higher taxes and fostering corruption. See ADRIAN & GRIFFITH, *supra* note 227, at 35-36 (stating that such state decisions often resulted in local protests).

235. From 1875 through 1903, the northern region issued 6,641 total special charters in all industries, of which 3,832 (57.7%) were for public corporations. See Compilation, *supra* note 17, at North I-III. When further breaking down the 1875 through 1903 period, the presence of public corporation special charters in the northern region fluctuated slightly. From 1875 through 1886, the northern region issued 1,973 total special charters in all industries, of which 1,158 (58.7%), an average of 96.5 special charters per year, were for public corporations. See *id.* From 1887 through 1893, the northern region issued 2,345 total special charters in all industries, of which 1,392 (59.4%), an average of 198.9 special charters per year, were for public corporations. See *id.* From 1894 through 1903, the northern region issued 2,323 total special charters in all industries, of which 1,282 (55.2%), an average of 128.2 special charters per year, were for public corporations. See *id.*

the southern total, significantly less than the national average.<sup>236</sup> This regional variation between the northern and the southern states could have resulted from the North's prosperity following the Civil War, especially after Reconstruction, which created the need for more municipalities and the necessary collateral services.<sup>237</sup> Moreover, because the North was relatively more established and developed than the South, the northern states had less need for other kinds of corporations, especially transportation corporations.<sup>238</sup>

Although the presence of public corporations remained visible and continued to command an even greater percentage of the total special charters issued throughout the twentieth century, the numbers of special charters issued for public corporations substantially declined as the twentieth century progressed. Of the nearly 4,000 special charters issued from 1904 through 1996, almost 2,700, approaching seventy percent, were for public corporations.<sup>239</sup>

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236. From 1875 through 1903, the southern region issued 9,425 total special charters in all industries of which 4,159 (44.1%) were for public corporations. *See id.* at South I-III. When further breaking down the 1875 through 1903 period, the presence of public corporation special charters in the southern region fluctuated significantly. From 1875 through 1886, the southern region issued 4,082 total special charters in all industries, of which 1,890 (46.5%), an average of 157.5 special charters per year, were for public corporations. *See id.* From 1887 through 1893, the southern region issued 3,637 total special charters in all industries, of which 1,424 (39.1%), an average of 203.4 special charters per year, were for public corporations. *See id.* From 1894 through 1903, the southern region issued 1,706 total special charters in all industries, of which 845 (49.6%), an average of 84.5 special charters per year, were for public corporations. *See id.*

237. *See* FONER, *supra* note 100, at 18-19 (stating that as a result of the Civil War, most northern industries boomed, especially those most closely tied with the war effort).

238. *See id.* at 380-85, 460-65 (comparing the railroad industry of the northern and southern states during Reconstruction and noting that the North's industrial development was remarkable compared to the South's economic stagnation); *see also infra* notes 263-64 and accompanying text (discussing the number of special charters issued in all industries in the northern and southern regions from 1875 through 1903).

239. From 1904 through 1996, the states issued 3,932 total special charters in all industries, of which 2,694 (68.5%) were for public corporations. *See* Compilation, *supra* note 17; Appendix C. Municipalities (which includes all corporations formed for supporting services such as fire, police, libraries, and other civil services) numbered 710 (26.3%) of the 2,694 total; nonprofit corporations (which includes all corporations formed for social, charitable, religious, and civic purposes, as well as hospitals and military organizations) numbered 848 (31.5%) of the 2,694 total; public utilities (which includes all gas, power, and water corporations) numbered 671 (24.9%) of the 2,694 total; and educational corporations (which includes all types of schools, i.e., grammar, secondary and post secondary, as well as school districts) numbered 391 (14.5%) of the 2,694 total. *See* Compilation, *supra* note 17. From 1904 through 1996, 74 special charters contained so little information it was impossible to determine their corporate purposes. They appear in the compiled data as miscellaneous corporations and come to about 2.8% of the public corporations. *See id.* Of the 43 states constitutionally prohibiting special charters, 23 required all corporations, including public corporations, to proceed under the



Moreover, the average number of special charters issued for public corporations dropped from just over 100 per year from 1904 through 1915 to just under twenty-five per year from 1916 through 1975.<sup>240</sup>

This decline of special charters issued for public corporations can be linked to evolution of state law during the twentieth century toward replacing the special charter with other means to deal with municipal matters. During the early decades of the twentieth century, three developments, the widespread proliferation of general incorporation laws tailored for municipalities, the invention of home rule procedures, and the creation of self-governance measures, contributed to the waning of special charters for public corporations. By 1914, virtually all states had adopted general incorporation laws, allowing cities to be created without seeking a special charter from the legislature.<sup>241</sup> By the 1920s, home rule procedures became increasingly common. These procedures transferred the power over municipalities away from the state legislature by allowing the city to annex more territory without seeking an additional special charter.<sup>242</sup>

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general laws, while 20 built exceptions into the constitutional prohibition allowing sponsors of public corporations to seek a special charter after the date of the constitutional prohibition. *See supra* note 169. Because the research team treated all constitutional prohibitions as absolute and did not examine the session laws of any of the states, after the constitutional prohibition, even if exceptions existed (often for public corporations), the total number of special charters issued to public corporations is undoubtedly greater than the empirical evidence in the compiled data. The trends revealed by the compiled data, however, focusing especially on the seven states that never constitutionally prohibited special charters, show a substantial decline, but not a total disappearance of special charters issued for public corporations, as the twentieth century progressed. *See id.* It is reasonable, therefore, to assume that had the research team continued to search the session laws of the 20 states with exceptions built in the constitutional prohibition through the end of the twentieth century, the trend of decline without total disappearance of public corporations would be the same.

240. From 1904 through 1915, the states issued 1,967 total special charters in all industries, of which 1,233 (62.7%), an average of 102.8 special charters per year, were for public corporations. *See id.* From 1916 through 1975, the states issued 1,826 total special charters in all industries, of which 1,390 (76.1%), an average of 23.2 special charters for public corporations per year, were for public corporations. *See id.*

241. *See* ROGER W. COOLEY, HANDBOOK OF THE LAW OF MUNICIPAL CORPORATIONS 42 (1914) (asserting that such laws prescribe how cities and towns may become incorporated); *id.* at 44-45 (stating that self-chartering achieved relative popularity by the 1920s by having a judicial authority appoint a commission that would draft the municipal charter eventually to be put up for popular vote); *id.* at 41 (discussing whether, when states constitutionally prohibited special charters, they included municipal corporations).

242. In 1874, the Missouri legislature passed the first home rule statute. *See Act of Mar. 30, 1874 §1, 1874 Mo. Laws 189.* The Act stated that:

[T]he inhabitants of any addition to or part of any town or village, not included within the metes and bounds of any such incorporated town or village, may at any time be attached to and become a part of such incorporated town or village, in like manner and upon like proceedings as herein provided for the incorporation of towns in the first instance, and

In addition, self-governance measures became increasingly common by the 1920s and were used by virtually all cities by the 1940s. These

when so attached shall be a part of the original incorporation, and entitled to all the privileges . . . .

*Id.* A home-rule statute was not passed until 1875, when two Missouri cities—Bethany and Carthage—exercised the privilege by amending their city charters to allow for home rule. *See* Act of Mar. 12, 1875, § 3, 1875 Mo. Laws 153, 154 (“All additions that are now laid out into town lots or out-lots adjoining the City of Bethany, and not embraced in the corporate limits . . . shall, upon the petition of the owner or owners of a majority of the lots in any such addition, or of such out-lots, or of said town of West Bethany, become annexed to the city and form a part of the corporate limits thereof . . . .”); Act of Feb. 27, 1875, art. I, § 5 1875 Mo. Laws 159, 162 (“Whenever any tract of land adjoining the said City of Carthage shall have been laid off into town lots, or lots of less than five acres in size, and the same offered for sale or the plats thereof recorded, as required by law, the same shall thereby be annexed to and become and form a part of said City of Carthage.”). Although home rule statutes varied among the states, they typically allowed cities to issue charters for annexation and creation of other cities (or in some cases, to annex neighboring school districts) without the need for the legislature’s drafting and approval. By 1930, 16 states had adopted the home rule system. *See* CAL. CONST. art. XI, § 8 (1879) (amended 1903, new section 8 1/2 1896, further amended 1905) (allowing cities of a certain population to adopt their own city charters); Act of June 8, 1912, 1912 Ariz. Sess. Laws 15 (Spec. Sess.) (permitting cities of certain population to form their own charters to extend and define their own powers); Act of Mar. 8, 1901, ch. 46, 1901 Colo. Sess. Laws 97 (creating a constitutional amendment allowing the city of Denver to exercise annexation and consolidation powers); Act of Apr. 25, 1895, ch. 9 § 1, 1895 Minn. Laws 131 (“A fraction of a township or any unorganized territory, whether fractional or otherwise, may be attached by said commissions to an adjoining town, or be divided . . . .”); Act of Mar. 29, 1911, ch. 227, § 2, 1911 Neb. Laws 681-82 (providing a constitutional amendment that allowed cities to frame their own charters); Act of May 22, 1923, ch. 583, 1923 N.Y. Laws 881 (establishing a commission to study the general laws and the feasibility of using home-rule processes); Act of Mar. 22, 1915, ch. 192, § 1, 1915 Nev. Laws 294, 294 (allowing cities and towns to adopt a commission form of government, whereby they can write their own charters with the same powers as under the general laws of the state); Act of Mar. 1, 1917, ch. 104, 1917 N.C. Sess. Laws 153 (authorizing city enlargement for school purposes only); Act of June 13, 1911, § 1, 1911 Ohio Laws 441, 441 (“If there shall be presented to the council of a municipality proposed to be annexed to an adjoining or contiguous municipality a petition asking for the submission of the question of annexation to a vote . . . .”); Act of May 29, 1908, ch. 10, art. II, § 1, 1908 Okla. Laws 178, 178 (“The city council, in their discretion, may add other territory adjacent to the city limits, as defined and existing at the time of the approval of this act . . . .”); Act of June 8, 1923, No. 282, 1923 Pa. Laws No. 282 (authorizing a commission to study the consolidation of cities); Act of Feb. 16, 1912, No. 456, 1912 S.C. Acts 817 (allowing Williamsburg and Florence counties to transfer and annex land); Act of Feb. 9, 1912, ch. 23, 1912 Va. Acts 42 (allowing for the extension of city limits solely for school purposes); Act of Feb 26, 1980, 1889-90 Wash. Laws 227, 227 (“An Act to provide for extending and enlarging the corporate limits of any city, town or village in this state, and for consolidating and uniting cities, towns and villages and declaring an emergency”); Act of June 28, 1911, ch. 476, 1911 Wis. Laws 558 (providing self-governance for cities). One of the major problems with home rule statutes was that to become a home rule city, the city had to modify its charter to provide for such rule. *See* CHARLES R. ADRIAN, A HISTORY OF AMERICAN CITY GOVERNMENT: THE EMERGENCE OF THE METROPOLIS, 1920-1945, at 59 (1987) (asserting that by 1920, 13 states had home rule); *see also* RUSH, *supra* note 228, at 143-58 (arguing that a movement towards more independent self-governance for municipal corporations gained momentum at the end of the nineteenth century with the passage of home rule).

measures set up an internal management structure to govern the city, with the commission or city council possessing the power to delegate authority to others without seeking legislative permission.<sup>243</sup>

Although the development of general incorporation laws, home rule procedures, and self-governance measures largely eliminated the need for special charters to meet the needs of municipal public corporations, the lingering presence of small numbers of special charters for public corporations in the last half of the twentieth century demonstrates that municipal special chartering never completely disappeared from the legislature. From 1976 through 1996, special charters issued for public corporations reached just over seventy charters, averaging at just over three per year.<sup>244</sup> Connecticut, Massachusetts, and Maine continued to issue special charters for municipalities into the 1990s in the traditional town committee fashion.<sup>245</sup>

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243. See ADRIAN, *supra* note 242, at 51-59 (discussing the new forms of city government that had developed by the 1920s, and noting that the commission plan to delegate authority reached its peak in 1922). In 1901, the city of Des Moines became the first city to adopt a commission plan of governance. See OSWALD RYAN, *MUNICIPAL FREEDOM: A STUDY OF THE COMMISSION GOVERNMENT* 161 (1915) (providing a full copy of the Act, its notes, and its addendum). The commission plan of governance centralized all municipal powers, legislative and administrative, in a single board consisting of a certain number of members. See *id.* at 11-12. Although the commission governance structure represented a major step for cities to take control of their own governance from state legislatures, the commission denied citizens control over electing municipal officials and made it difficult to delegate municipal responsibilities, causing most cities in the 1920s and 1930s to abandon the commission for a council-manager form of city government with strong mayor plans. See ADRIAN, *supra* note 242, at 51-55 (discussing the opposition the commission plan generated and noting that by 1923, at least 53 cities had abandoned the commission plan); see also ERNEST S. GRIFFITH, *A HISTORY OF AMERICAN GOVERNMENT: THE PROGRESSIVE YEARS AND THEIR AFTERMATH, 1900-1920*, at 124 (1923) (noting that the commission plans fell short of the ideal for a free city whose legislatures could frame its own charter, elect officials, and perform its municipal functions).

244. From 1976 through 1996, the states issued 139 total special charters in all industries, of which 71 (51.1%), an average of 3.4 special charters per year, were for public corporations. See *Compilation*, *supra* note 17; see also Appendix C.

245. See RYAN, *supra* note 243, at 6 (detailing that municipal corporations came to America from England and originated in the form of the New England Town meeting). From 1976 through 1996, these three states issued 24 special charters for municipal corporations. See Spec. Act of May 28, 1991, ch. 91-27, 1991 Conn. Spec. Acts 35 (An Act to Incorporate Regional Refuse Disposal District One); Spec. Act of Mar. 31 1977, ch. 14, 1977 Me. Laws 1353 (An Act to Incorporate Eastport Port Authority); Spec. Act of Apr. 28, 1977, ch. 28, 1977 Me. Laws 1372 (An Act to Incorporate Eastport Utilities District); 1981 Me. Laws ch. 22 (An Act to Incorporate Casco Bay Island Transit District); Act to Est. Lubec Port Auth., ch. 36, Priv. and Spec. Laws, 1st Reg. Sess., 1987 Me. Laws 2190 (An Act to Incorporate Lubec Port Authority); An Act to Incorporate Pembroke Utils. Dist., ch. 91, Priv. and Spec. Laws, 2d Reg. Sess., 1987 Me. Laws 2358 (An Act to Incorporate Pembroke Utilities District); Act to Incorporate Fort Kent Utils. Dist., ch. 103, Priv. and Spec. Laws 2d Reg. Sess., 1991 Me. Laws 2184 (An Act to Incorporate Fort Kent Utilities District); Act of May 11, 1993, ch. 17, Priv. and Spec. Laws, 1st Reg. Sess., 1993 Me. Laws 1095

*B. Special Charters for Transportation and Communication Projects and Banks and Other Financial Institutions Remain Significant Until Federal Regulation Replaced State Law*

A major portion of the over 16,000 special charters issued from 1875 through 1903, just over 3,500, or twenty-two percent, were for transportation and communication corporations.<sup>246</sup> The average number of special charters issued in this category reached just over 120 per year from 1875 through 1886, climbed to almost 190 per year from 1887 through 1893, and then declined from 1894 through 1903, averaging just over 78 per year.<sup>247</sup> The state legislatures also issued many special charters for banking and other financial institutions, numbering slightly over 2,300 or nearly fifteen percent of the more than 16,000 total special charters issued from 1875 through 1903.<sup>248</sup>

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(An Act to Amend the Mars Hill Utility District); Act of Nov. 30, 1977, ch. 778, 1977 Mass. Acts 950 (An Act to Incorporate Economic Development and Industrial Corporation of Lynn); Act of July 19, 1978, ch. 497, § 1 1978 Mass. Acts 810, 810-11 (An Act to Incorporate Massachusetts Technology Development Corporation); Act of July 19, 1978, ch. 498, § 1, 1978 Mass. Acts 817, 817 (An Act to Incorporate Community Economic Development Corporation); Act of May 13, 1982, ch. 73, 1982 Mass. Acts 78 (An Act to Incorporate Everett Development and Financial Corporation); Act of July 13, 1982, ch. 312, 1982 Mass. Acts 822 (An Act to Incorporate Massachusetts Technology Park Corporation); Act of Dec. 23, 1982, ch. 560, 1982 Mass. Acts 1236 (An Act to Incorporate Massachusetts Technology Park Corporation); Act of Nov. 29, 1983, ch. 521, 1983 Mass. Acts 879 (An Act to Incorporate Lexington Housing Assistance Board, Inc.); Act of Nov. 15, 1988, ch. 284, 1988 Mass. Acts 1006 (An Act Providing a Charter for the Town of Orange); Act of Dec. 6, 1989, ch. 582, 1989 Mass. Acts 860 (An Act to Incorporate Economic Development and Industrial Corporation of Leominster); Act of July 24, 1990, ch. 133, 1990 Mass. Acts 244 (An Act to Incorporate Everett Economic Development Finance Corporation); 1991 Mass. Acts 6:24 (An Act to Incorporate Commonwealth Zoological Corporation); Act of Aug. 23, 1991, ch. 188, 1991 Mass. Acts 664 (An Act to Incorporate U.S.S. Lexington Development Corporation); Act of July 7, 1992, ch. 102, 1992 Mass. Acts 188 (An Act to Incorporate Quincy 2000 Corporation); Act of Jan. 7, 1993, ch. 339, 1992 Mass. Acts 947 (An Act to Incorporate United States Naval Shipbuilding Museum Corporation); Act of Aug. 26, 1994, ch. 103, 1994 Mass. Acts 714 (An Act Establishing a Council Manager form of Government for the City of Chelsea); Act of Aug. 8, 1995, ch. 93, 1995 Mass. Acts 669 (An Act to Establish the Amherst Economic Development and Industrial Corporation).

246. From 1875 through 1903, the states issued 16,066 total special charters in all industries, of which 3,550 (22.1%) were for transportation and communication corporations. *See* Compilation, *supra* note 17; *see also* Appendix C.

247. From 1875 through 1886, the states issued 6,055 total special charters in all industries, of which 1,445 (23.9%), an average of 120.4 special charters per year, were for transportation and communication corporations. *See* Compilation, *supra* note 17. From 1887 through 1893, the states issued 5,982 total special charters in all industries of which 1,324 (22.1%), an average of 189.1 special charters per year, were for transportation and communication corporations. *See id.* From 1894 through 1903 the states issued 4,029 total special charters in all industries of which 781 (19.4%), an average of 78.1 special charters per year, were for transportation and communication corporations. *See id.*

248. From 1875 through 1903, the states issued 16,066 total special charters in all industries, of which 2,336 (14.6%) were for banks and other financial institutions. Of the 2,336 total special charters in the banks and other financial institutions

From 1875 through 1886, however, special charters in this category assumed less prominence, averaging just over fifty-six per year.<sup>249</sup> They increased substantially from 1887 through 1893 averaging almost 139 per year.<sup>250</sup> From 1894 through 1903, the special charters dropped to an average of just over sixty-nine per year, still greater than the special charters issued during the 1875 through 1886 period.<sup>251</sup> Special charters for transportation and communication projects as well as for banks and other financial institutions—the most visible of which were for railroads and banks—served as one of the many tools to deal with the absence of federal regulation over enterprises posing significant interstate commerce issues.<sup>252</sup>

The pattern of special charters issued, during the 1875 through 1903 period for transportation and communication projects, with railroads being the most visible and important, can be attributed to the states' attempt to regulate rates and other matters because of the absence of federal regulation. Since the late 1840s, the beginning of America's first railroad boom, and throughout the nineteenth century, railroads occupied a high profile in the business world and remained privately owned enterprises carrying the potential for enormous profits.<sup>253</sup> The numerous special charters issued to railroads can be attributed partially to the states' sponsoring of new lines to promote railroad development in their regions and to mitigate high railroad rates.<sup>254</sup> Despite the significant effects on interstate commerce, federal law contributed little toward regulating railroad rates throughout the nineteenth century and the early years of the twentieth century.<sup>255</sup>

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category, 490 (21%) were insurance corporations. *See id.*

249. From 1875 through 1886, the states issued 6,055 total special charters in all industries, of which 674 (11.1%), an average of 56.2 special charters per year, were for banks and other financial institutions. *See id.*

250. From 1887 through 1893, the states issued 5,982 total special charters in all industries, of which 970 (16.2%), an average of 138.6 special charters per year, were for banks and other financial institutions. *See id.*

251. From 1894 through 1903, the states issued 4,029 total special charters in all industries, of which 692 (17.2%), an average of 69.2 special charters per year, were for banks and other financial institutions. *See id.*

252. *See HOVENKAMP, supra* note 42, at 125 (stating that the corporate charter acted as the principal institutional mechanism for governmental regulation).

253. *See CHANDLER, supra* note 43, at 81-83; *see also* HOVENKAMP, *supra* note 42, at 131 (stating that in the 1880s railroads were one of America's largest economic activities accounting for about ten percent of American wealth).

254. *See FONER, supra* note 100, at 379-80 (describing how railroad special charters were distributed to encourage regional development).

255. *See HOVENKAMP, supra* note 42, at 167 ("The record of congressional railroad activity . . . is probably as consistent with the traditional Progressive 'public interest' theory of regulation as it is with revisionist alternatives."); *id.* at 160 (stating that until federal laws were upheld by the Supreme Court, most rate regulation was written

Although the Interstate Commerce Act of 1887 empowered the Interstate Commerce Commission ("ICC") to investigate and present evidence of excessive rates to the courts, the new federal law failed to control excessively high rates because the ICC had no affirmative power to set fair rates.<sup>256</sup> The states attempted to deal with excessively high rates through several mechanisms. The states enacted "Granger Laws,"<sup>257</sup> set up state commissions,<sup>258</sup> and issued numerous special

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into corporate charters imposed by the state).

256. The formation of the Interstate Commerce Commission was the first recorded federal regulatory committee activity. *See* The Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (codified as amended in scattered sections of 49 U.S.C. §§ 10101-11901 (1994)) (establishing the Interstate Commerce Commission); Rene Sacasas, *The Filed Tariff: Casualty or Survivor of Deregulation?*, 29 DUQ. L. REV. 1 (1990) (noting how federal regulation of business in the United States began with the transportation industry, when in 1887, after years of public complaints regarding inequitable behavior by the railroads, Congress passed the Act to regulate commerce). Limitations greatly hampered the Act's ability to control excessive rates. First, the Act only applied to interstate commerce, leaving rates for transportation within one state solely under that state's control; second, the Act only allowed the Commission to react to excessive rates by filing suit after investigating a complaint, leaving it up to the court to provide the ultimate remedy. *See* Sacasas, *supra*, at 8 (noting that in response to the Act's limitations, Congress passed additional legislation in 1903 with the intent to give the Act more "bite").

257. Due to the poorly regulated nature of the railroad industry in the early and mid-nineteenth century, numerous protests arose among farmers in the mid-west where intrastate grain haul prices had become exorbitant. *See* GEORGE HALL MILLER, *RAILROADS AND THE GRANGER LAWS* 161-68 (1971) (analyzing the protests of the Granger movement). Taking their name from the Order of Patrons of Husbandry, or Grange, an organization founded in 1867, these farmers established cooperative enterprises that forced mid-west state legislatures to pass many laws regulating prices. *See id.* at 161. These laws, known as the Granger Laws, were designed to protect consumers. In 1869, the Illinois Legislature passed the first of the Granger Laws. *See* Stefan H. Krieger, *Problems for Captive Ratepayers in Nonunanimous Settlements of Public Utility Rate Cases*, 12 YALE J. ON REG. 257, 268-70 (1995) (noting that the Illinois law requiring rates to be just and reasonable failed to provide an effective means for enforcement of its provisions). *See generally* MILLER, *supra*, at 59-96 (examining the history of the drive to reform railroad rate law in Illinois). The Granger Laws were eventually upheld by the Supreme Court. *See* *Munn v. Illinois*, 94 U.S. 113, 135 (1876) (concluding that an Illinois statute that fixed grain storage charges was not "repugnant to the Constitution"). Many of the Granger Laws, however, were repealed shortly after they were enacted, due, in part, to railroad counterattack and severe economic depression in the 1870s that drove rates down without the need for regulation. *See* THOMAS K. MCCRAW, *PROPHETS OF REGULATION* 57 (1984) (addressing the enactment and repeal of Granger laws in a discussion of the shift from state to federal regulation of the railroads).

258. *See* MCCRAW, *supra* note 257, at 121 (noting how other states, and eventually the federal government, responded to high rates, creating railroad commissions through much the same "evolutionary process" that took place in Massachusetts). *See id.* at 17 (discussing the development of the Massachusetts Board of Railroad Commissioners under Charles Francis Adams). *But see* Krieger, *supra* note 257, at 268-70 (noting that independent commissions created to deal with state legislatures also proved ineffective in regards to the regulation of railroads). Adams directed the commission, which was to become a model for most states' railroad commissions, not as a rate regulatory authority, but one of educational authority. *See* MCCRAW, *supra* note 257, at 31-32 (explaining how Adams "sought to clarify for both the corporations and the public the basic principles of railroad's odd economics").

charters to railroad sponsors<sup>259</sup> to establish rate ceilings and create competition, thus driving the rates even lower.<sup>260</sup> The states' inability to regulate railroads effectively, however, became painfully apparent by the 1890s.<sup>261</sup> Due to the overbuilding of railroads and excessively low rates on interstate routes, both of which resulted from ruinous competition among multiple lines, the railroad industry experienced serious financial difficulty causing railroad owners to merge competing railroads and form cartels to set minimum rates.<sup>262</sup>

The northern and southern regions showed different trends in issuing special charters for transportation and communication corporations, with southern transportation and communication charters assuming a higher profile. From 1875 through 1903, special charters issued for transportation and communication corporations in the southern regions reached almost thirty percent of the southern total, significantly greater than the national average of twenty-two percent.<sup>263</sup> On the other hand, the northern region's special charters

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Adams recommended what he considered "reasonable" or "fair" specific price rates, but did not advocate rate-setting by statute since it voided the natural needs and flow of the railroad industry. *See id.* at 32-40 (discussing Adams' influence over the practice of rate-setting in Massachusetts).

259. *See* HOVENKAMP, *supra* note 42, at 143-44.

260. *See id.* (discussing how policy-makers tried to regulate rates by chartering competing railroads rather than by setting the rates of existing railroads); *see also id.* at 144 (noting that by establishing two competing railroads, regulators were forced to set rates high enough to guarantee each a reasonable return); *id.* at 126 ("Regulation by charter was common well into the nineteenth century, long after general incorporation acts had been developed for ordinary firms.").

261. *See* KELLER, *supra* note 101, at 178 (noting that railroad regulation first developed in the states due to, among other reasons, steady weakening of the national government during the 1870s); *id.* at 180 (arguing that "[t]he combined force of intricately clashing interests, corporate power, and general hostility to active government reduced state railroad regulation to insignificance").

262. *See* HOVENKAMP, *supra* note 42, at 148 (discussing the great financial difficulties faced by railroads at the end of the nineteenth century, and noting that one-fourth of all railroads were in receivership by 1895); *see also* CHANDLER, *supra* note 43, at 316 (discussing railroad mergers and cartels as a response to the continued decline of rates, which "became increasingly oppressive after the panic of 1873 ushered in a prolonged economic depression"); HOVENKAMP, *supra* note 42, at 142-44 (discussing, through the use of simple examples, how chartering of multiple lines was financially disastrous for railroads); *id.* at 145-47 (elaborating upon how the railroads' repeated efforts to create a cartel in the interstate freight market failed to achieve the success envisioned).

263. *See* Compilation, *supra* note 17. From 1875 through 1903, the southern region issued 9,425 total special charters in all industries, of which 2,617 (27.8%) were for transportation and communication corporations (of the 2,617 transportation and communication charters, 1,672 (63.9%) of those were railroad corporations). *See id.* at South I-II. Upon further examination of the period from 1875 through 1903, the presence of transportation and communication special charters begins with even higher percentages. From 1875 through 1886, the southern region issued 4,082 total special charters in all industries, of which 1,187 (29.1%), an average of 99 special charters per year, were for transportation and communication corporations. *See id.* From 1887 through 1893, the southern region

for transportation and communication corporations amounted to only fourteen percent of its total, significantly less than the national average.<sup>264</sup> This regional variation between the northern and southern states may reflect the South's efforts to rebuild following the Civil War, creating the need for it to charter more railroad lines. Moreover, because the nation's first railroad lines started in the northern states, leaving the northern infrastructure far more developed than the southern infrastructure, the northern region had less of a need to charter railroad corporations.<sup>265</sup>

The pattern of special charters issued during the 1875 through 1903 period to banks and other financial institutions<sup>266</sup> can be attributed to the states reaction to the business conditions of the late nineteenth century, which made the federal system—created by the National Bank Act of 1864—less attractive.<sup>267</sup> Until the early 1880s, a significant number of bank sponsors chose the federal system because it offered the security of U.S. government bonds as backing

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issued 3,637 total special charters in all industries, of which 1,003 (27.6%) (an average of 143.3 special charters per year) were for transportation and communication corporations. *See id.* From 1894 through 1903, the southern region issued 1,706 total special charters in all industries, of which 427 (25.0%), an average of 42.7 special charters per year, were for transportation and communication corporations. *See id.*

264. From 1875 through 1903, the northern region issued 6,641 total special charters in all industries, of which 933 (14.0%) were for transportation and communication corporations (of the 933 charters, 544 (58.3%) of those were for railroad corporations). *See id.* at North I-III. Upon further examination of the 1875 through 1903 period, the presence of transportation and communication special charters begins with lower percentages. From 1875 through 1886, the northern region issued 1,973 total special charters in all industries, of which 258 (13.1%), an average of 21.5 special charters per year, were for transportation and communication corporations. *See id.* From 1887 through 1893, the northern region issued 2,345 total special charters in all industries, of which 321 (13.7%), an average of 45.9 special charters per year, were for transportation and communication corporations. *See id.* From 1894 through 1903, the northern region issued 2,323 total special charters in all industries, of which 354 (15.2%), an average of 35.4 special charters per year, were for transportation and communication corporations. *See id.*

265. *See* CHANDLER, *supra* note 43, at 89-90 (noting that the first railroad—and incidentally telegraph—boom of the 1850s was concentrated in the north; specifically in New York).

266. The presence of special charters for banks and other financial institutions varied less than one percentage point from the 14.6% national average between the northern and southern regions. *See* Compilation, *supra* note 17, at North I-III & South I, II (comparing northern and southern charters for banks and other financial institutions). From 1875 through 1903, the southern region issued 9,425 total special charters in all industries of which 1,408 (14.9%) were for banks and other financial institutions and the northern region issued 6,641 total special charters of which 928 (14.0%) were for banks and other financial institutions. *See id.* (tabulating northern and southern charters for all industries, and specifically banks, between 1875 and 1903).

267. *See* National Bank Act of 1864, ch. 106, 13 Stat. 99 (1864) (current version of the National Bank Act at 12 U.S.C. § 21 *et seq.* (1994)).



for notes in exchange for meeting certain reserve and other requirements, thus explaining the lower profile of state bank special charters issued from 1875 through 1886.<sup>268</sup> The increased presence of bank special charters from 1887 through 1893 and from 1894 through 1903 can be linked to the rise of deposit banking over note issuance and the tendency of state law to offer less stringent reserve and other requirements.<sup>269</sup> The combination of these changes in the banking business and Congress' failure to either make the federal system mandatory or at least more attractive by offering benefits geared toward deposit banking caused sponsors to choose state-chartered banks in greater numbers during the late 1880s through the early twentieth century.<sup>270</sup>

During the twentieth century, special charters issued for transportation and communication corporations, as well as for banks and other financial institutions, declined rapidly. From 1904 through 1996, the transportation and communication special charters numbered almost 400, nearly ten percent of the almost 4,000 total special charters issued during that time.<sup>271</sup> From 1904 through 1915, the special charters in this category averaged almost twenty-five special charters per year<sup>272</sup> and dropped substantially from 1916 through 1975, averaging just over one special charter per year.<sup>273</sup> By

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268. See National Bank Act §§ 7, 14 (explaining that banks operating under the federal system must have no less than \$50,000 in a place whose population does not exceed 6,000 inhabitants and no less than \$200,000 capital reserves in any city whose population exceeds 50,000 inhabitants; and at least 50% of the capital stock must be paid in before commencing business); FISCHER, *supra* note 107, at 178 (noting that although the National Bank Act of 1864 failed to solve many problems for banks in agricultural areas, the initial effect of the Act was somewhat positive and thus the federal and state systems competed for banking charters throughout the 1880s).

269. See FISCHER, *supra* note 107, at 184 (noting that prior to Congress' enactment of the Federal Reserve Act in 1913, which generally undermined the benefits of state charters, state charters were favored for having lower capital requirements, more liberal lending and investing powers, the ability to engage in fiduciary business, smaller legal reserve requirements, greater branching authority, the right to purchase and deal in corporate stocks, and less strict supervision).

270. See WEST, *supra* note 73, at 25 (noting that in the 1880s, deposit banking materially replaced note banking, thus rendering moot the major advantages of the National Bank Act of 1864; and noting that allowing state banks to continue business hurt Congress' attempt to eliminate them); see also FISCHER, *supra* note 107, at 184 (noting that the trend in banking moved away from the federal system and back to state chartering in the 1880s).

271. From 1904 through 1996, the states issued 3,932 total special charters for all industries, of which 383 (9.7%) were for transportation and communication corporations. See Compilation, *supra* note 17, at West, North I-III, South I-II; see also Appendix C.

272. From 1904 through 1915, the states issued 1,967 total special charters in all industries, of which 294 (15%), an average of 24.5 special charters per year, were for transportation and communication corporations. See Compilation, *supra* note 17, at West, North I-III, South I-II.

273. From 1916 through 1975, the states issued 1,826 total special charters in all

the period from 1976 through 1996, these special charters disappeared.<sup>274</sup> Although special charters issued for banking and other financial institutions also declined numerically as the twentieth century progressed, approaching 700 in total, just over seventeen percent of the total charters issued from 1904 through 1996, their presence remained visible, albeit in minuscule numbers, through the end of the twentieth century.<sup>275</sup> From 1904 through 1915, special charters in this category averaged just over twenty-eight per year<sup>276</sup> and dropped to an average of almost five special charters per year from 1916 through 1975.<sup>277</sup> From 1976 through 1996, this category maintained an average of just over three special charters per year, accounting for sixty-five of the 139 lingering special charters issued from 1976 through 1996.<sup>278</sup>

Within the category of banks and other financial institutions, however, special charters for banks and financial services display opposite trends when compared to insurance corporations. The presence of special charters issued for banks and other financial services corporations declined steeply during the 1916 through 1975 period, with special charters for banks disappearing in the 1930s. The presence of insurance special charters, however, continued in very small numbers throughout the entire 1916 through 1975 period.<sup>279</sup> Moreover, special charters issued to insurance corporations

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industries, of which 87 (4.8%), an average of 1.5 special charters per year, were for transportation and communication corporations. *See id.*

274. From 1976 through 1996, the states issued 139 total special charters in all industries, of which only two charters (1.4%), an average of 0.095 special charters per year, were for transportation and communication corporations. *See id.*; *see also* Act of Mar. 31, 1977, ch. 84, § 1, 1977 Mass. Laws 71, 71 (incorporating the Bay Colony Railroad Corporation); Act of Apr. 12, 1982, ch. 32, § 1, 1982 Mass. Laws 19, 19 (incorporating the New England Southern Railroad Company).

275. From 1904 through 1996, the states issued 3,932 total special charters in all industries of which 694 (17.7%) were for banks and other financial institutions. *See* Compilation, *supra* note 17, at North I-III, South I-II, West; *see also* Appendix C. From 1990 through 1996, the states issued 14 special charters in the banks and other financial institutions category. *See infra* notes 279-80 (noting charters issued for banks and other financial institutions).

276. From 1904 through 1915, the states issued 1,967 total special charters in all industries, of which 337 (17.1%), an average of 28.1 special charters per year, were for banks and other financial institutions. *See* Compilation, *supra* note 17.

277. From 1916 through 1975, the states issued 1,826 total special charters for all industries, of which 292 (16%), an average of 4.9 special charters per year, were for banks and other financial institutions. *See id.*

278. From 1976 through 1996, the states issued 139 total special charters for all industries, of which 65 (46.8%), an average of 3.1 special charters per year, were for banks and other financial institutions. *See id.*

279. From 1875 until 1915, special charters for insurance corporations remained a distinct minority of the banks and other financial institutions category. From 1875 through 1886, of the 674 special charters for banks and other financial institutions, 178 (26%) were for insurance corporations. *See id.* From 1887 through 1893, of the

continued to appear in the session laws of Connecticut and Rhode Island, albeit in miniscule numbers, through the end of the twentieth century. During the 1976 through 1996 period, virtually all of the special charters in the banks and other financial institutions category were granted for these insurance corporations.<sup>280</sup>

970 special charters for banks and other financial institutions, 118 (12%) were for insurance corporations. *See id.* From 1894 through 1903, of the 692 special charters for banks and other financial institutions, 194 (28%) were for insurance corporations. *See id.* From 1904 through 1915, of the 337 special charters for banks and other financial institutions, 82 (24%) were for insurance corporations. *See id.* After 1915, for the first time insurance corporations dominated the special charters issued in the banks and other financial institutions category. From 1916 through 1975, of the 292 special charters for banks and other financial institutions, 162 (55.5%) were for insurance corporations. *See id.* After 1975, nearly all the special charters issued in this category were for insurance corporations. From 1976 through 1996, of the 65 special charters for banks and other financial institutions, 62 (95.4%) were insurance companies. *See id.* The last special charters for banks were issued in the early twentieth century, disappearing by 1932. *See id.*; *see also* Act of Mar. 2, 1932, ch. 45, 1932 Mass. Acts 35 (An Act to Incorporate the Co-operative Central Bank); Act of Apr. 14, 1921, ch. 274, 1921 N.H. Laws 397 (An Act to Incorporate Manchester Morris Plan Bank); Act of Apr. 30, 1913, ch. 387, 1913 N.H. Laws 943 (An Act to Incorporate the Fidelity Savings Bank); Act of Feb. 25, 1913, ch. 301, 1913 N.H. Laws 859 (An Act to incorporate the Farmers' Guaranty Savings Bank); Act of Mar. 12, 1913, ch. 461, § 1, 1913 N.C. Laws 1409, 1409 (An Act to Incorporate the Five-cent Union Bank and Trust Company). Special charters for financial services, such as brokerage houses, continued to appear in minuscule numbers after the last bank special charter of 1932, with three special charters issued for financial service corporations as late 1993. *See* Act of May 10, 1993, ch. 93-12, 1993 Conn. Acts, Spec. Acts, 1897 (An Act to Incorporate Aetna Fiduciary Services, Inc.); Spec. Act of June 10, 1993, ch. 93-19, 1993 Conn. Acts 1893 (Spec. Sess.) (An Act to Incorporate Hartford Fiduciary Services, Inc.); Act of June 10, 1993, ch. 93-20, 1993 Conn. Acts 1894 (Spec. Sess.) (An Act to Incorporate Cigna Fiduciary Services, Inc.).

280. Other than three special charters issued for financial service corporations, all of the special charters issued in the banks and other financial institutions category during the 1976 through 1996 time period were for insurance corporations. During the 1990s, Connecticut granted all 11 of the insurance corporation special charters issued. *See* Act of May 29, 1996, S.A. 96-4, 1996 Conn. Acts 1496 (Spec. Sess.) (An Act to Incorporate the Partners Insurance Company and the ArConn Specialty Insurance Company); Act of June 12, 1995, S.A. 95-11, 199 Conn. Acts 1803 (Spec. Sess.) (An Act to Incorporate the New England States Insurance Company and PHS Insurance of Connecticut); Act of May, 1995, S.A. 95-3, 1995 Conn. Acts 1788 (Spec. Sess.) (An Act to Incorporate the Nathan Hale Insurance Company); Act of May 23, 1994, S.A. 94-8, 1994 Conn. Acts 1194 (Spec. Sess.) (An Act to Incorporate RVI America Insurance Company); Acts of May 26, 1992, S.A. 92-9, 1992 Conn. Acts 960 (Spec. Sess.) (An Act to Incorporate PML Life Insurance Company); Act of May 26, 1992, S.A. 92-8, 1992 Conn. Acts 957 (Spec. Sess.) (An Act to Incorporate Renaissance Equities Company); Act of May 8, 1990, S.A. 90-11, 1990 Conn. Acts 10 (Spec. Sess.) (An Act to Incorporate the Personal Property Insurance Company); Act of May 8, 1990, S.A. 90-12, 1990 Conn. Acts 13 (Spec. Sess.) (An Act to Incorporate the New Chartwell Reinsurance Company); Act of May 17, 1990, S.A. 90-16, 1990 Conn. Acts 17 (Spec. Sess.) (An Act to Incorporate the Connecticut Financial Life Insurance Company); Act of Apr. 16, 1990, S.A. 90-4, 1990 Conn. Acts 2 (Spec. Sess.) (An Act to Incorporate the Zurich Reinsurance Company). During the 1980s, there were 38 special charters—23 by Connecticut and 15 by Rhode Island—issued for insurance companies. *See* Compilation, *supra* note 17. During the 1970s, there were 52 special charters—21 by Connecticut and 31 by Rhode Island—for insurance companies. *See id.*

The rapid decline and ultimate disappearance of transportation and communication special charters during the first few decades of the twentieth century undoubtedly was aided by the replacement of special chartering and other ineffective state regulatory mechanisms with effective federal regulation over the nation's railroads. During the early years of the twentieth century, Congress moved to strengthen federal regulation by enacting the Elkins Act of 1903, requiring railroads to publish rates for the first time;<sup>281</sup> the Hepburn Act of 1906, allowing the ICC to set rates after a court ruled a rate structure excessive;<sup>282</sup> and the Mann-Elkins Act of 1910, allowing the ICC to defer and suspend disputed rates and to establish a commerce court to oversee the resolution.<sup>283</sup> Although these laws clearly set the stage for complete federal control, the Transportation Act of 1920, creating the first national railroad system, not only empowered the ICC to set minimum and maximum rates for both intrastate and interstate lines affirmatively,<sup>284</sup> but also replaced state law as the major regulatory force and eliminated any utility of special charters for railroads.<sup>285</sup>

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281. See The Elkins Act, 49 U.S.C. §§ 11703, 11902-03, 11915-16 (1903) (amended by the Interstate Commerce Act, 49 U.S.C. §§ 10702, 10704 (1978)) (requiring railroads to file their rates with the ICC, making those filed rates mandatory, and giving the ICC more direct power to investigate discriminatory railroad rates).

282. See Hepburn Act of 1906, ch. 3591, § 4, 34 Stat. 584 (1906) (codified as amended in scattered sections of 49 U.S.C. (1978)) (allowing the ICC to determine reasonable and just rates upon complaint, investigation, and court resolution that a rate is excessively high).

283. See Mann-Elkins Act, ch. 309, §§ 1, 15, 36 Stat. 539 (1910) (codified as amended in scattered sections of 49 U.S.C. (1978)) (allowing the ICC to defer and suspend disputed rates upon complaint and establishing a commerce court that would oversee any stays or suspensions). See generally HOVENKAMP, *supra* note 42, at 165 (discussing the Elkins, Hepburn, and Mann-Elkins Acts).

284. See Transportation Act of 1920, 40 U.S.C. § 316 (1920) (amending the Interstate Commerce Act of 1887 to allow the ICC to regulate all forms of transportation at all levels); see also HOVENKAMP, *supra* note 42, at 166 (noting that "the Transportation Act of 1920 . . . rewrote railroad regulatory policy and for the first time created a single, national railroad system"); William G. Mahoney, *The Interstate Commerce Commission/Surface Transportation Board As Regulator of Labor's Rights and Deregulator of Railroads' Obligations: The Contrived Collision of the Interstate Commerce Act with the Railway Labor Act*, 24 TRANSP. L.J. 241, 249 (1997) (noting that the Act gave the ICC greater control over the economic affairs of the railroads by regulating market entry and exit and by creating future plans for the consolidation of many railroad companies); Sacasas, *supra* note 256, at 10 (stating that the "Transportation Act of 1920 . . . which recognized the nation's need for a sound national transportation system, accepted the view that a fair rate of return to the carriers was required, and began a policy of protecting the railroads from harmful competition by controlling entry into the industry and minimum rates").

285. From 1904 through 1996, 781 total special charters were issued in the transportation and communication category, of which 556 were railroad corporations. See Compilation, *supra* note 17. From 1904 through 1915, 294 total special charters were issued in the transportation and communication category, of which 219 were railroad corporations, clearly a substantial decrease from the

The steep decline and ultimate disappearance of special charters for banks by the 1930s was precipitated by the emergence of effective federal regulation over the nation's banks. Prompted by The Panic of 1907,<sup>286</sup> Congress began establishing an effective federal banking system by enacting the Federal Reserve Act of 1913 and continued these efforts with emergency banking legislation during the early 1930s, enacted in response to the stock market crash of 1929 and the Great Depression.<sup>287</sup> Congress then proceeded to make significant

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previous period but not yet insignificant. *See id.* From 1916 through 1975, 87 total special charters were issued in the transportation and communication category, of which 40 were railroad corporations, a significant decrease from the previous period. *See id.* Moreover, after 1930, the states issued only eight special charters for railroad corporations. *See id.*; *see also* Act of Mar. 1, 1933, ch. 10, § 1, 1933 Me. Laws 465, 465 (An Act to Incorporate the Wiscasset, Waterville and Farmington Railway Company); Act of Sept. 12, 1959, ch. 88, § 1, 1959 Me. Laws 792, 792 (An Act to Incorporate the R. and T. Cement Railroad Company); Act of Apr. 26, 1963, ch. 145, § 1, 1963 Me. Laws 1141, 1141 (An Act to Incorporate the Sugarloaf Narrow Gauge Railroad Company); Act of Mar. 31, 1977, ch. 84, § 1, 1977 Mass. Acts 71, 71 (An Act Incorporating the Bay Colony Railroad Corporation); Act of Apr. 12, 1982, ch. 32, § 1, 1982 Mass. Acts 19, 19 (An Act Incorporating New England Southern Railroad Company).

286. The Panic of 1907 was the last of four major state bank panics—1873, 1884, and 1893 were the other years for state bank panics—before the passage of the Federal Reserve Act, 12 U.S.C. § 221 (1913). *See* FISCHER, *supra* note 107, at 186 (discussing the implications of the “rich man’s crisis” of 1907). In 1907, a break in the prices on the stock market led to questions regarding the ability of numerous New York banks to survive an emergency. *See id.* at 186-87 (noting that the Panic of 1907 was “important in showing the need for fundamental changes in the American financial system” as a whole). When one member of the Morse-Heinz chain of New York banks applied to the Clearing House for assistance, runs on banks ensued. *See id.* at 187 (noting how the Clearing House’s necessary investigation revealed problems with the entire chain of banks, and how as word spread, lines of “terrified depositors grew”); *see also* WEST, *supra* note 73, at 53 (noting that “[t]he Panic of 1907 convinced most people that control outside and above the banks was necessary”). The Panic of 1907 led to the passage of the Aldrich-Vreeland Act, 35 Stat. 546 (1908) (repealed by 108 Stat. 2292, 2294 (1994)), which provided for emergency currency based on commercial assets held by banks. *See* WEST, *supra* note 73, at 52 (noting that after the passage of this Act, emergency currency was asset—and never again bond—secured).

287. *See* Federal Reserve Act, ch. 6, 38 Stat. 25 (1913) (codified as amended at 12 U.S.C. §§ 338a, 347b, 371d, 375b, 618 (1994)) (establishing a large federal bank conglomerate with larger reserves than were found in most state banks). By the end of 1916, however, only 35 of the 19,231 state banks in the United States had joined the federal system, prompting amendments in 1917 providing, for example, more details on how state banks could withdraw from the system. *See* MOORE, *supra* note 73, at 49-50 (discussing the actions taken by Congress to account for certain weaknesses in the original act). Despite these amendments, the Federal Reserve Act still was not as attractive as many state banking statutes, which offered higher lending rates and did not require banks to clear checks at par value. *See id.* at 49 (noting the weaknesses in the Federal Reserve Act realized by 1916, specifically noting that member banks lost many of the advantages provided to them under their state charters). Although both the state and federal systems chartered a large number of banks following the Federal Reserve Act of 1913, the effects of rising commodity and land prices as well as over-banking, and poor management caused many state banks to experience financial trouble. *See* FISCHER, *supra* note 107, at 199-201. The

improvements to the federal system by enacting the Banking Act of 1935, creating the Federal Deposit Insurance Corporation.<sup>288</sup> Because all state banks wanting to offer this insurance to their depositors had to follow the federal requirements, in substance federal law had finally preempted state regulation over banks, thus substantially reducing the authority of state regulation over banks and eliminating the utility of special charters for banks.<sup>289</sup>

The continued visibility of special charters for insurance companies throughout the entire twentieth century can be explained by the

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depleted reserves following World War I and the stock market crash of 1929 prompted runs on Federal Reserve banks, placing their future in jeopardy. See MOORE, *supra* note 73, at 63-64, 75-78. President Franklin D. Roosevelt took control of all banks in early 1933, through a number of executive orders and Acts of Congress. See Exec. Order No. 2039, *reprinted in* 48 Stat. 1689 (1933); see also 2 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 24-29 (Samuel I. Rosenman ed., 1938) (discussing the 1933 seizure of bank control through his March 6 bank holiday proclamation). In response to this executive order, Congress passed the Emergency Banking Act of 1933, which prohibited the payment of interest on demand deposits, raised capital requirements for federal banks, and allowed the Federal Reserve Board to set maximum interest rates on certain types of accounts. See Emergency Banking Relief Act of 1933, ch. 1, 48 Stat. 1 (1933) (codified at scattered sections of 12 U.S.C. (1933)) (adopting the phrase "banking institution": used and denied in President Roosevelt's March 6, 1933, proclamation); see also 2 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, *supra* (providing a recitation of the executive order entitled, "Recommendation to the Congress for Legislation to Control Resumption of Banking," and calling for Congress to pass legislation giving the Executive branch of the Government control over banks for the protection of depositors); Timothy A. Canova, *The Transformation of U.S. Banking and Finance: From Regulated Competition to Free-Market Receivership*, 60 BROOK. L. REV. 1295, 1297-98 (1995) (detailing how, within days of his inauguration, Roosevelt responded to the financial crisis by reforming the banking system with the Emergency Banking Act of 1933, which "prohibited the payment of interest on demand deposits (checking accounts), raised minimum capital requirements for federally chartered banks, and provided the statutory authority for the Federal Reserve Board to implement Regulation Q, which set maximum interest rates payable on time deposits such as savings accounts"). Roosevelt continued to control both federal and state banking until December 30, 1933, when he issued an executive order delegating authority over non-Federal Reserve System member banks to state banking authorities, provided the banks adhered to the national standards against hoarding. See Exec. Order No. 2070, *reprinted in* 48 Stat. 1727 (1933) (amending Proclamations of March 6 and 9, 1933, and Executive Order of March 10, 1933).

288. See Banking Act of 1935, 12 U.S.C. § 221 (1996) (amending Federal Reserve Act, ch. 6, 38 Stat. 251 (1913)). The Federal Deposit Insurance Corporation ("FDIC") provided insurance only to those state banks that transferred to the federal system. See *id.* § 12B(e)(1)-(2).

289. Because all state chartered banks that wanted to offer FDIC insurance on their deposits had to follow the requirements of the federal system, no possible benefits existed from seeking a special charter for a bank. The last special charters issued for banks came before the Emergency Banking Act of 1933 and the National Banking Act of 1935 effectively secured federal control over banks. See *supra* note 279 (documenting that charters for insurance corporations remained a distinct minority of the banks and other financial institutions issued between 1875 and 1915). Although many banks were chartered under state general incorporation laws, which were in place in most states by 1935, federal control had defeated state control of the substantive terms of the banking industry.

evolution of insurance regulation falling exclusively within the states' powers and by the concentration of the industry within the few New England states that never constitutionally prohibited special charters. State legislatures had been issuing special charters for insurance companies since America's beginnings, and, throughout the nineteenth century, insurance law developed completely under the state domain.<sup>290</sup> By refusing to extend coverage of the Sherman Act of 1890 to insurance businesses in the late nineteenth century, the

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290. See *supra* note 279 (listing special charters for insurance corporations, a distinct minority of the banks and other financial institutions category through 1915). At the beginning of the nineteenth century, marine insurance dominated the insurance business. See JOSEPH B. MACLEAN, *LIFE INSURANCE* 575 (1962) (noting how the "formation of life-insurance companies as we know them today . . . had to await the development of mortality tables and of the mathematical principles underlying calculations involving the duration of life," which did not take place in the United States until the 1840s). Throughout the nineteenth century, periods of low losses and economic prosperity allowed the marine insurance field to thrive. See BANKS McDOWELL, *DEREGULATION AND COMPETITION IN THE INSURANCE INDUSTRY* 14 (1989) (discussing how attempts at self-regulation by an insurance industry trying to stabilize itself were undermined by insurers who would ignore agreements and undercut agreed-upon rates as well as by "trust-busting" state legislatures that worked to make such agreements illegal). Life insurance, which had sparsely existed in the eighteenth century, grew out of marine insurance in the nineteenth century and experienced its first real growth and popularity in the 1840s. See SPENCER L. KIMBALL, *INSURANCE AND PUBLIC POLICY: A STUDY IN THE LEGAL IMPLEMENTATION OF SOCIAL AND ECONOMIC PUBLIC POLICY, BASED ON WISCONSIN RECORDS 1835-1959*, at 10-11 (1960) (discussing how the first serious attempts to popularize life insurance were largely directed at refuting religious objections; and that by the 1870s, life insurance premiums were gaining on marine insurance premiums); see also MACLEAN, *supra*, at 577-78 (documenting that in the late eighteenth century, about 30 insurance companies were formed, only five of which could issue life insurance, but only six policies were issued in a period of five years). In the areas of marine, fire, and life insurance, periods of highs and lows existed in the nineteenth century. However, as the agency system developed in the 1840s and as the insurance industry as a whole took an upswing around the beginning of the Civil War, commissions for life insurance began to grow while competition in the industry as a whole sent premiums down so that reserves were not being met. See *id.* at 584-85 (discussing the effects of the Civil War on the insurance industry as well as the development of the agency system). Many insurance companies went bankrupt after the Civil War due in part to high commissions and in part to the general extravagance of the industry causing a low public image of insurance. See *id.* at 586-87 (discussing how the post-Civil War depression thinned the ranks of the insurance industry, leaving only several giants, such as the Metropolitan Life Insurance Company); see also KIMBALL, *supra*, at 48-52 (noting that around 1870, numerous life insurance companies were failing due to bad reserves and the need for assessment type insurance). The insurance businesses that survived needed larger reserves, prompting state commissions to regulate the insurance industry and its fierce competition by requiring higher reserves and protecting consumers from discriminatory rates. See MACLEAN, *supra*, at 587-88 (noting that those companies that survived the process of the 1870s prospered under the newly developing agency system); see also McDOWELL, *supra*, at 15-16 (discussing the emergence of state rate regulation). Despite this period of shaky performance and the need for regulation, the industry as a whole experienced an upswing in the late nineteenth century. See 1 R. CARLYLE BULEY, *THE AMERICAN LIFE CONVENTION, 1906-1952: A STUDY IN THE HISTORY OF LIFE INSURANCE* 105 (1953) (noting that by 1886, annual sales had reached their pre-depression high of 1869).

Supreme Court solidified the power of the states to regulate insurance rates and reserves through general laws, commissions, and special charters.<sup>291</sup>

During the twentieth century, in response to a clear need for increased regulation of the insurance industry and possibly to avoid tempting Congress into implementing federal regulation, the states strengthened their general laws and commissions to ensure that the corporations carried adequate reserves and charged fair rates.<sup>292</sup>

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291. Despite contrary holdings by the Supreme Court, the language of the Sherman Anti-Trust Act of 1890, seems applicable to any insurance business. *See* The Sherman Act, 15 U.S.C. §§ 1-3 (1994) (providing that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal”). The Supreme Court consistently held, before and after the enactment of the Sherman Anti-Trust Act, that the insurance industry should be regulated only by the states. *See* *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868), *overruled by* *Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999) (holding that the recognition of an insurance corporation’s existence even by other states depends “purely on the comity of those States”); *see also* *Blake v. McClung*, 172 U.S. 239, 252-53 (1898), *rev’d*, 176 U.S. 59 (1900) (stating that Tennessee did not “assume to declare, even if it could legally have declared, that [a] company, being admitted to do business in Tennessee should transact business with the citizens of Tennessee, or should not transact business with citizens of other states”); *Horn Silver Min. Co. v. New York*, 143 U.S. 305, 314 (1892) (noting that foreign corporations are subject to the conditions imposed by the state’s laws).

292. *See supra* note 161 (addressing the early twentieth century Supreme Court interpretation of the Commerce Clause, allowing federal regulation over any activity affecting interstate commerce, broad enough to reach the insurance industry); BULEY, *supra* note 290, at 193-99 (describing generally early twentieth century literature regarding the proliferation of big business and insurance and the need to reign in their unrestrained power); *id.* at 209-44 (describing the Armstrong investigation of New York Life); *id.* at 300-20 (describing increased state regulation of the insurance industry possibly to thwart federal regulation). In 1905, Congress began the Armstrong Investigation, looking into claims of abuse, mismanagement, and all around unfairness toward the consumer in the New York insurance industry. *See id.*; *see also* MACLEAN, *supra* note 290, at 591-92 (discussing the objectives and subsequent recommendations of the Armstrong Investigation). The investigation did not turn up any substantive abuses and in fact suggested that states be given more power to regulate insurance companies. *See* BULEY, *supra* note 290, at 209-44; *see also* MACLEAN, *supra* note 290, at 591-92 (noting, in a discussion of the Armstrong Investigation, that although it revealed no financial unsoundness, the testimony taken exposed a need for reform in some of the largest companies). Subsequently, possibly to thwart federal regulation, numerous states began to pass more regulations addressing the practices of the largest companies. *See* BULEY, *supra* note 290, at 300-20. Although the insurance industry on the whole experienced large growth and prosperity in the first three decades of the twentieth century, it continued to experience serious “adverse occurrences.” *See* MACLEAN, *supra* note 290, at 596 (noting how events such as the 1918 influenza epidemic and the 1929 stock market crash had a much greater influence on the life insurance industry than either of the World Wars, resulting in general prosperity in the industry). In 1944, following *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533, 561-62 (1944) (superceded by the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015), states again enacted statutes and established insurance commissioners to control the industry and set rates in an effort to dissuade Congress from carrying out their threat to federally regulate the industry. *See* McDOWELL, *supra* note 290, at 19-22 (examining



During the last half of the twentieth century, powerful lobbying groups representing insurance corporations in Connecticut and Rhode Island seem to have preserved successfully for insurance corporations the use of the special charter route to address their business needs in light of the overall complex and strict state regulation found in the home states of the major insurance underwriters.<sup>293</sup>

*C. Special Charters for Manufacturing and Other Private Businesses Linger Because Widespread State Law Inertia Permitted Special Charters Through Early Twentieth Century*

Throughout the last quarter of the nineteenth century and the early years of the twentieth century, state legislatures issued a surprisingly large number of special charters for private business corporations, totaling almost 2,200, just over thirteen percent of the over 16,000 special charters issued from 1875 through 1903.<sup>294</sup> Moreover, the average number of special charters issued in this category from 1875 through 1886 reached almost seventy-five per year<sup>295</sup> and rose to nearly 125 per year from 1887 through 1893.<sup>296</sup>

the Massachusetts experience with “open competition” systems for setting insurance rates).

293. By 1945, in response to increased state regulation following the *South-Eastern Underwriters* decision, powerful insurance lobbies influenced state legislatures to pass open competition provisions that allowed for competitive pricing in the industry. See McDOWELL, *supra* note 290, at 19-20 (discussing the Massachusetts state legislature’s experience with open competition systems). Competitive pricing schemes, which caused uneven benefits among consumers, created tension between insurance lobbies and state insurance commissioners. See *id.* at 20-22. This struggle between powerful insurance lobbies and state insurance commissions provides an example where the special charter possibly could be perceived by both parties as a useful alternative to forge a compromise. Although the experience in Connecticut and Rhode Island are not discussed specifically, because the insurance industries probably function similar to the insurance industry in Massachusetts, the Massachusetts experience is instructive by analogy. Consequently, conflicts between insurance lobbies and state insurance commissions may explain why Connecticut and Rhode Island still issued special charters for insurance companies from the 1970s through the 1990s. See *supra* note 280 (noting that all but three of the charters issued for financial service corporations between 1976 and 1996 were for insurance corporations in Connecticut and Rhode Island).

294. From 1875 through 1903, the states issued 16,066 total special charters in all industries, of which 2,189 (13.6%) were for private businesses. See Compilation, *supra* note 17 (tabulating charters issued for all industries and specifically private businesses between 1875 and 1903); see also Appendix C. The presence of special charters for private businesses varied less than one percentage point from the national average of 13.6% between the northern and southern regions. From 1875 through 1903, the southern region issued 9,425 total special charters in all industries, of which 1,241 (13.2%) were for private businesses, while the northern region issued 6,641 total special charters of which 948 (14.3%) were for private businesses. See Compilation, *supra* note 17, at North I-III, South I-II.

295. From 1875 through 1886, the states issued 6,055 total special charters in all

Although the number dropped to just over forty-two per year from 1894 through 1903, these special charters remained visible.<sup>297</sup> The vast majority of these special charters can be attributed to the states' inertia in allowing the legislatures to issue special charters long after this cumbersome procedure proved useful. Because only a small minority of these special charters offered business advantages that were not yet available under nineteenth century general laws, the vast majority of these special charters were not issued to avoid the restrictions characteristic of nineteenth century general laws.<sup>298</sup>

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industries, of which 888 (14.7%), an average of 74 special charters per year, were for private businesses. *See* Compilation, *supra* note 17.

296. From 1887 through 1893, the states issued 5,982 total special charters in all industries, of which 872 (14.6%), an average of 124.6 special charters per year were for private businesses. *See id.*

297. From 1894 through 1903, the states issued 4,029 total special charters in all industries of which 429 (10.6%) (an average of 42.9 special charters per year) were for private businesses. *See id.* (tabulating charters for all industries and specifically for private businesses from 1894 to 1903).

298. The research team compared each of the 2,350 special charters issued for private businesses from 1875 through 1996 to the general incorporation law in effect in that state and scrutinized the special charter to see if it granted any benefits or privileges not available under the general law. Of the 23 states identified as issuing special charters as of 1875 in at least one of the four industry groups, five states—Louisiana, New Mexico, Texas, Colorado, and Washington—issued no special charters to any private businesses. *See id.* Four states—Florida, Georgia, Delaware, and New York—issued 26, 37, 252, and 12 special charters respectively, for private businesses, but none showed any evidence of providing benefits or privileges unavailable under the applicable general law. *See id.* Although 14 states—Virginia, South Carolina, Alabama, Mississippi, Kentucky, North Carolina, Connecticut, Massachusetts, Maryland, Maine, New Hampshire, New Jersey, Rhode Island, and Vermont—issued at least one special charter to a private business providing benefits unavailable under the applicable general incorporation law, the vast majority of their special charters for private businesses contained no special benefits or privileges. *See id.* In Virginia, of the 397 special charters issued for private businesses, 330 offered no benefits varying from the general law. In South Carolina, of the 126 special charters issued for private businesses, 108 offered no benefits varying from the general law. In Alabama, of the 81 special charters issued for private businesses, 70 offered no benefits varying from the general law. In Kentucky, of the 248 special charters issued for private businesses, 243 offered no benefits varying from the general law. In Mississippi, of the 58 special charters issued for private businesses, 55 offered no benefits varying from the general law. In North Carolina, of the 277 special charters issued for private businesses, 276 offered no benefits varying from the general law. In Connecticut, of the 329 special charters issued for private businesses, 303 offered no benefits varying from the general law. In Massachusetts, of the 65 special charters issued for private businesses, 57 offered no benefits varying from the general law. In Maryland, of the 42 special charters issued for private businesses, 36 offered no benefits varying from the general law. In Maine, of the 152 special charters issued for private corporations, 146 offered no benefits varying from the general law. In New Hampshire, of the 52 special charters issued for private businesses, 47 offered no benefits varying from the general law. In New Jersey, of the five special charters issued for private businesses, four offered no benefits varying from the general law. In Rhode Island, of the 136 special charters issued for private businesses, 135 offered no benefits varying from the general law. In Vermont, of the 48 special charters issued for private businesses, 39 offered no benefits varying from the general law.

From 1875 through 1903, only 153, or seven percent, of the almost 2,200 special charters issued to private business corporations contained evidence of providing benefits not available under the applicable general law.<sup>299</sup> By far the greatest number of these special charters, seventy-nine, were issued to relax the capital limitations imposed by the applicable general law.<sup>300</sup> Another group of special

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299. From 1875 through 1903, states issued 2,189 total special charters for private businesses, of which 153 (7%) provided benefits not available under the applicable general law. *See id.* Of the 153 charters, Virginia issued 67, South Carolina issued 18, Alabama issued 11, Mississippi issued three, Kentucky issued five, North Carolina issued one, Connecticut issued 17, Massachusetts issued eight, Maryland issued three, Maine issued six, New Hampshire issued five, New Jersey issued one, Rhode Island issued zero, and Vermont issued eight. *See id.* at North I-III, South I-II (listing the number of charters issued by certain states between 1875 and 1903).

300. Virginia issued 44 of these charters. *See* An Act to Incorporate Virginia Mining and Improvement Company, ch. 263, 1874 Va. Acts 336; An Act to Incorporate Farmville Manufacturing Company, ch. 233, 1875 Va. Acts 275; An Act to Incorporate Birmingham Coal and Iron Company, ch. 108, 1876 Va. Acts 117; An Act to Incorporate Old Dominion Mining Company, ch. 229, 1876 Va. Acts 271; An Act to Incorporate Southwest Virginia Land, Colonization and Improvement Company, ch. 114, 1876 Va. Acts 120; An Act to Incorporate Lewiston Land and Immigration Company, ch. 242, 1876 Va. Acts 283; An Act to Incorporate Wytheville Mining Manufacturing and Hotel Company, ch. 205, 1877 Va. Acts 193; An Act to Incorporate Virginia Marble and Mining Company, ch. 119, 1879 Va. Acts 103; An Act to Incorporate North and Southside Virginia Mining and Manufacturing Company, ch. 188, 1878 Va. Acts 164; An Act to Incorporate Mount Alto Mining and Land Company, ch. 91, 1879 Va. Acts 105; An Act to Incorporate Southwest Virginia Improvement Company, ch. 247, 1879 Va. Acts; An Act to Incorporate Moccasin Manufacturing Company, ch. 260, 1882 Va. Acts 271; An Act to Incorporate Botetourt Manufacturing Company, ch. 84, 1882 Va. Acts 451; An Act to Incorporate Virginia Coal and Iron Company, ch. 1, 1882 Va. Acts 3; An Act to Incorporate Holston Iron & Steel Company, ch. 42, 1882 Va. Acts 39; An Act to Incorporate London and Buckingham Construction and Mining Company, ch. 145, 1882 Va. Acts 147; An Act to Incorporate Blue Ridge Mining Company, ch. 178, 1882 Va. Acts 180; An Act to Incorporate New River & Southwest Virginia Mining and Manufacturing Company, ch. 263, 1881 Va. Acts 277; An Act to Incorporate Alexandria Mining, Manufacturing and Warehouse Company, ch. 100, 1882 Va. Acts 474; An Act to Incorporate Cripple Creek Iron & Manufacturing Company, ch. 534, 1884 Va. Acts 714; An Act to Incorporate Balcony Falls Company, ch. 296, 1884 Va. Acts 386; An Act to Incorporate Rorer Iron Company, ch. 343, 1884 Va. Acts 448; An Act to Incorporate Virginia Mining, Milling & Transportation Company, ch. 345, 1884 Va. Acts 450; An Act to Incorporate Montgomery & Floyd Mining and Manufacturing Company, ch. 408, 1884 Va. Acts 512; An Act to Incorporate Tazewell County Improvement Company, ch. 415, 1884 Va. Acts 518; An Act to Incorporate Roanoke Mineral and Lumber Company, ch. 465, 1884 Va. Acts 645; An Act to Incorporate Holston Springs Company, ch. 467, 1884 Va. Acts 647; An Act to Incorporate Wythe County Iron Company, ch. 469 1883 Va. Acts 650; An Act to Incorporate Pulaski Iron Company, ch. 473, 1884 Va. Acts 655; An Act to Incorporate New River Steel & Iron Company, ch. 481, 1884 Va. Acts 664; An Act to Incorporate New River Zinc & Iron Company, ch. 535, 1884 Va. Acts 716; An Act to Incorporate Stone Creek Coal & Iron Company, ch. 546, 1884 Va. Acts 716; An Act to Incorporate United States Fishery Company, ch. 464, 1884 Va. Acts 643; An Act to Incorporate Banner Company, ch. 7 1884 Va. Acts 9; An Act to Incorporate Progressive Age Company, ch. 84 1884 Va. Acts 122; An Act to Incorporate Northern Neck News Company, ch. 312, 1884 Va. Acts 418; An Act to Incorporate the Norfolk Classified Building Association, ch. 100, 1884 Va. Acts 136; An Act to Incorporate the Nelson Improvement

charters, numbering forty, relaxed other requirements imposed by the general laws, for example relating to corporate stock and the duration of the corporation's business.<sup>301</sup> A smaller group of these

Company, ch. 292, 1884 Va. Acts 383; An Act to Incorporate the Farmville Lumber Company, ch. 378, 1884 Va. Acts 485; An Act to Incorporate Farmers Union of Cumberland, Buckingham & Prince Edward Counties, ch. 124, 1886 Va. Acts 119; An Act to Incorporate Glade Mountain Maganese Company, ch. 158, 1886 Va. Acts 160; An Act to Incorporate Bristol Slate & Mining Company, ch. 353, 1886 Va. Acts 388; An Act to Incorporate Lynchburg Perpetual Company Building & Loan Company, ch. 312, 1886 Va. Acts 355; An Act to Incorporate Petersburg Perpetual Building & Loan Company, ch. 183, 1887 Va. Acts 247. South Carolina issued three. *See* An Act to Incorporate Southern Land and Navigation Company, no. 520, 1878 S.C. Acts 590; An Act to Incorporate Mason Cotton Harvester Company, no. 522, 1884 S.C. Acts 849; An Act to Incorporate S.C. Land Company, no. 839, 1891 S.C. Acts 1303. Alabama issued 10. *See* An Act to Incorporate the Ten Island Manufacturing Company, no. 303, § 1, 1881 Ala. Acts 416; An Act to Incorporate Alabama Central Mining and Manufacturing Company, no. 318, § 1, 1881 Ala. Acts 454; An Act to Incorporate the Coosa Mining and manufacturing Company, no. 248, § 1, 1883 Ala. Acts 512; An Act to Incorporate the Jefferson Iron Company, no. 297, § 1, 1885 Ala. Acts 484; An Act to Incorporate Southern Iron Company, no. 464, § 1, 1889 Ala. Acts 781; An Act to Incorporate Southern Steel Company, no. 401, § 1, 1891 Ala. Acts 941; An Act to Incorporate Coosa Iron and Railroad Company, no. 547, § 1, 1895 Ala. Acts 1139; An Act to Incorporate Alabama Steel and Ship Building Company, no. 586, § 1, 1897 Ala. Acts 1289; An Act to Incorporate Birmingham Tube and Steel Company, no. 186, § 1, 1898 Ala. Acts 381; An Act to Incorporate Ensley Steel and Pipe Company, no. 189, § 1, 1898 Ala. Acts 392. Mississippi issued three. *See* An Act to Incorporate Tombigee Manufacturing Company of Columbus Mississippi, ch. 278, § 1, 1880 Miss. Laws 567; An Act to Incorporate Rosalie Yarn Mills Company, ch. 287, § 1, 1880 Miss. Laws 586; An Act to Incorporate Oxford Mills Company, ch. 292, § 1, 1880 Miss. Laws 596. Massachusetts issued seven. *See* An Act to Incorporate Boston Sugar Warehousing Company, ch. 68, § 1, 1876 Mass. Acts 52; An Act to Incorporate Hoosac Tunnel Dock and Elevator Company, ch. 277, § 1, 1879 Mass. Acts 602; An Act to Incorporate States Union Telegraph and Telephone Construction Company, ch. 86, § 1, 1881 Mass. Acts 50; An Act to Incorporate Washington Mills Company, ch. 54, § 1, 1884 Mass. Acts 41; An Act to Incorporate State Street Exchange, ch. 82, § 1, 1888 Mass. Acts 64; An Act to Incorporate Bennett Spinning Company, ch. 21, § 1, 1898 Mass. Acts 17; An Act to Incorporate Crompton and Knowles Loom Works, ch. 51, § 1, 1900 Mass. Acts 37. Maine issued six. *See* An Act to Incorporate Pejepscot Manufacturing Company, ch. 17, § 1, 1881 Me. Acts 17; An Act to Incorporate Cushnoe Manufacturing Company, ch. 143, § 1, 1881 Me. Acts 153; An Act to Incorporate Bangor Manufacturing Company, ch. 160, § 1, 1881 Me. Acts 213; An Act to Incorporate Twin Land and Heels Mining and Smelting Company, ch. 98, § 1, 1881 Me. Acts 97; An Act to Incorporate Milton Mining Company, ch. 149, § 1, 1881 Me. Acts 198; An Act to Incorporate Sullivan Weaukeag Company, ch. 156, § 1, 1881 Me. Acts 208. Vermont issued six. *See* An Act to Incorporate Howe Scale Company, ch. 195, § 1, 1878 Vt. Laws 190; An Act to Incorporate Ely Copper Company, ch. 171, § 1, 1880 Vt. Laws 165; An Act to Incorporate Pike Hill Copper Company, ch. 172, § 1, 1880 Vt. Laws 167; An Act to Incorporate Saw Dust Pulp and Paper Company, ch. 203, § 1, 1884 Vt. Laws 171; An Act to Incorporate American and European Cartridge Company, ch. 204, § 1, 1884 Vt. Laws 172; An Act to Incorporate Bittersweet Gold Mining Company, ch. 182, § 1, 1886 Vt. Laws 157.

301. Virginia issued 11 charters that extended the duration of the corporate term or business. *See* An Act to Incorporate Virginia Steel Company, ch. 106, § 1, 1887 Va. Acts 145; An Act to Incorporate Cripple Creek Iron & Steel Company, ch. 52, § 1, 1887 Va. Acts 58; An Act to Incorporate Virginia Mining Company, ch. 97, § 1, 1887 Va. Acts 133; An Act to Incorporate New River Iron & Coal Company, ch. 103, § 1, 1887 Va. Acts 140; An Act to Incorporate Mount Pony Granite & Railway Company, ch. 148, § 1, 1887 Va. Acts 199; An Act to Incorporate Shenandoah Land &

special charters also granted special privileges, such as tax exemptions<sup>302</sup> and eminent domain rights.<sup>303</sup>

Anthracite Company, ch. 177, § 1, 1887 Va. Acts 232; An Act to Incorporate Dunlop & McCance Milling & Manufacturing Company, ch. 7, § 1, 1888 Va. Acts 6; An Act to Incorporate Nelson Manufacturing Company, ch. 230, § 1, 1888 Va. Acts 284; An Act to Incorporate Crimora Maganese Company, ch. 38, § 1, 1888 Va. Acts 41; An Act to Incorporate Old Dominion Boom and Log Company, ch. 380, § 1, 1888 Va. Acts 452; An Act to Incorporate American Tobacco Company, ch. 16, § 1, 1889 Va. Acts 19. Virginia issued 9 that exempted the corporation from certain provisions under the general law. *See* An Act to Incorporate Salem Improvement Company, ch. 197, § 1, 1890 Va. Acts 290; An Act to Incorporate Tug River Coal & Coke Company, ch. 313, § 1, 1890 Va. Acts 513; An Act to Incorporate Ohio & Big Sandy Coal Company, ch. 324, § 1, 1890 Va. Acts 523; An Act to Incorporate Bland County Land, Improvement, Development & Transportation Company, ch. 329, § 1, 1890 Va. Acts 535; An Act to Incorporate Pan-American Investment Company, ch. 447, § 1, 1894 Va. Acts 501; An Act to Incorporate Pacific Company, ch. 563, § 1, 1896 Va. Acts 597; An Act to Incorporate the American Development Company, ch. 161, § 1, 1898 Va. Acts 163; An Act to Incorporate the Spotsylvania Mining Company, ch. 249, § 1, 1900 Va. Acts 275; An Act to Incorporate the Brookneal Mill and Power Company, ch. 34, § 1, 1901 Va. Acts 29. Connecticut issued 12 that permitted the corporation to issue preferred stock. *See* An Act to Incorporate Schuyler Electric Manufacturing Company, ch. 41, § 1, 1887 Conn. Spec. Acts 442; An Act to Incorporate Matthews and Willard Manufacturing Company, ch. 271 1893 Conn. Spec. Acts; An Act to Incorporate Metropolitan Rubber Company, ch. 380, § 1, 1893 Conn. Spec. Acts 486; An Act to Incorporate U.S. Construction and Equipment Company, ch. 657, § 1, 1893 Conn. Spec. Acts 987; An Act to Incorporate Columbian Colonization and Development Company, ch. 656, § 1, 1893 Conn. Spec. Acts 983; An Act to Incorporate Connecticut Land and Improvement Company, ch. 658, § 1, 1893 Conn. Spec. Acts 990; An Act to Incorporate Rippowam Woolen Manufacturing Company, ch. 34, § 1, 1895 Conn. Spec. Acts 28; An Act to Incorporate United States Wool Company, ch. 223, § 1, 1895 Conn. Spec. Acts 291; An Act to Incorporate C. Rogers and Brothers Meriden, ch. 128, § 1, 1901 Conn. Spec. Acts 695; An Act to Incorporate Chickamauga Cement Company, ch. 364, § 1, 1901 Conn. Spec. Acts 930; An Act to Incorporate Eastern Manufacturing Company, ch. 377, § 1, 1901 Conn. Spec. Acts 975; An Act to Incorporate Automobile Livery Company, ch. 491, § 1, 1901 Conn. Spec. Acts 1165. Connecticut issued four that allowed the corporation to hold patents. *See* An Act to Incorporate Benedict and Burnham Manufacturing Company, ch. 95, § 1, 1879 Conn. Spec. Acts 266; An Act to Incorporate Coe Brass Manufacturing Company, ch. 140, § 1, 1879 Conn. Spec. Acts; An Act to Incorporate Russell and Erwin Manufacturing Company, ch. 160, § 1, 1880 Conn. Spec. Acts 117; An Act to Incorporate Monhansett Manufacturing Company, ch. 212, § 1, 1882 Conn. Spec. Acts 652. Massachusetts issued one allowing the corporation to accept special consideration for its stock. *See* An Act to Incorporate Shoe and Leather Building Association, ch. 168, § 1, 1895 Mass. Acts 175. Maryland issued two allowing the corporation to issue stock for services. *See* An Act to Incorporate Maryland Construction and Contracting Company, ch. 363, § 1, 1898 Md. Laws 958; An Act to Incorporate Maryland Compressed Air Company, ch. 228, § 1, 1900 Md. Laws 335. New Hampshire issued one reducing the liability of the officers. *See* An Act to Incorporate Sawyer Woolen Company, ch. 167, § 1, 1899 N.H. Laws 394.

302. A total of 30 special charters were issued providing the corporation tax benefits otherwise unavailable. Virginia issued three. *See* An Act to Incorporate Lynchburg Cotton Mill & Improvement Company, ch. 143, § 1, 1888 Va. Acts; An Act to Incorporate Southern Coal & Iron Company, ch. 105, § 1, 1890 Va. Acts 154; An Act to Incorporate Albemarle Orchard Company, ch. 457, § 1, 1900 Va. Acts 486. South Carolina issued 15. *See* An Act to Incorporate Mount Dearborn Manufacturing Company, no. 167, § 1, 1879 S.C. Acts 165; An Act to Incorporate Chester Cotton Manufacturing Company, no. 181, § 1, 1879 S.C. Acts 182; An Act to Incorporate Pelzer Manufacturing Company, no. 282, § 1, 1880 S.C. Acts 337; An Act to

Although the state legislatures issued a small number of special charters that offered benefits not otherwise available under the general laws, they issued almost 2,050 special charters, ninety-three percent of the total special charters issued for private businesses from 1875 through 1903, that showed no evidence of providing any business benefits not otherwise available under the general laws in effect at the time. Many of these special charters contained short statements summarizing the corporation's purpose and stated that the corporation was subject to the applicable general law.<sup>304</sup> Consequently, these special charters existed solely because a large number of states still offered the special charter forum, and

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Incorporate Charleston Manufacturing Company, no. 284, § 1, 1880 S.C. Acts 339; An Act to Incorporate Rock Hill Cotton Factory Company, no. 292, § 1, 1880 S.C. Acts 348; An Act to Incorporate Columbia Manufacturing Company, no. 343, § 1, 1880 S.C. Acts 416; An Act to Incorporate Palmetto Manufacturing Company, no. 432, § 1, 1881 S.C. Acts 548; An Act to Incorporate Magnetic Manufacturing Company, no. 491, § 1, 1881 S.C. Acts 618; An Act to Incorporate Fairmont Manufacturing Company, 1881 S.C. Acts 708; An Act to Incorporate Camden Cotton Factory Company, no. 556, § 1, 1881 S.C. Acts 742; An Act to Incorporate Cherokee Falls Manufacturing Company, no. 590, § 1, 1881 S.C. Acts 786; An Act to Incorporate Bellemonte Cotton Manufacturing Company, no. 605, § 1, 1881 S.C. Acts 857; An Act to Incorporate Pacolet Manufacturing Company, no. 708, § 1, 1881 S.C. Acts 1096; an Act to Incorporate Cathwood Manufacturing Company, no. 194, § 1, 1883 S.C. Acts 317; An Act to Incorporate Wares Shoals Manufacturing and Power Company, no. 89, § 1, 1892 S.C. Acts 152. Alabama issued one. *See* An Act to Incorporate Wetumpka Manufacturing Company, no. 1189, § 1, 1901 Ala. Acts 2689. Kentucky issued five. *See* An Act to Incorporate Meniffee Mining and Lumber Company, ch. 340, § 1, 1881 Ky. Acts 604; An Act to Incorporate Cynthiana Leaf Tobacco Company, ch. 897, § 1, 1881 Ky. Acts 297; An Act to Incorporate Manufacturing and Building Association of Fulton, Kentucky, ch. 921, § 1, 1881 Ky. Acts 335; An Act to Incorporate Western Cotton Mills, ch. 761, § 1, 1883 Ky. Acts 1368; An Act to Incorporate Blue Grass Canning Company, ch. 1566, § 1, 1887 Ky. Acts 949. North Carolina issued one. *See* An Act to Incorporate rock Ford Manufacturing Company, ch. 129, § 1, 1875 N.C. Sess. Laws 650. Maryland issued one. *See* An Act to Incorporate Savage Manufacturing Company of Howard County, ch. 250, § 1, 1876 Md. Laws 419. New Hampshire issued one. *See* An Act to Incorporate Real Estate Improvement Company, ch. 251, § 1, 1891 N.H. Laws 542. New Jersey issued one. *See* An Act to Incorporate Ossenbergh Hose Company of the City of Trenton, ch. 58, § 1, 1876 N.J. Laws 51. Vermont issued two. *See* An Act to Incorporate International Company, no. 166, § 1, 1882 Vt. Laws 155; An Act to Incorporate Lyndonville Improvement Society, no. 275, § 1, 1902 Vt. Laws 448.

303. A total of four special charters were issued providing eminent domain rights, which were otherwise unavailable. Connecticut issued one. *See* An Act to Incorporate Danbury Oil Company, ch. 489, § 1, 1889 Conn. Spec. Acts; New Hampshire issued three. *See* An Act to Incorporate Dodge's Falls Dam and Manufacturing Company, ch. 190, § 1, 1881 N.H. Laws; An Act to Incorporate Gardner Cable Company, ch. 199, § 1, 1893 N.H. Laws; An Act to Incorporate Diamond Granite Company, ch. 181, § 1, 1895 N.H. Laws.

304. From 1875 through 1903, states issued 2,189 total special charters for private corporations. The research team examined each of these special charters and compared the terms of these special charters to the provisions of the general laws in effect in that state at that time. Of the total special charters, 2,036 (93%) showed no evidence of providing benefits or privileges that were not available under the applicable general law. *See* Compilation, *supra* note 17.

corporate sponsors chose to use that forum. No evidence exists documenting why business advisors chose the more cumbersome special charter route when objectively, the available general laws met the needs of the business. Perhaps many corporate lawyers believed that special chartering still seemed to be the safest way, or from a fee-generating perspective the most profitable way, to form a corporation. Corporate lawyers and business sponsors, at the height of their careers from the 1870s through the 1890s, probably received their formative training either just before or just after the Civil War, at a time when general incorporation still was relatively new. The combination of special chartering still being part of the professional habits at the time and the special charter forum existing in many states provides a plausible explanation for why many lawyers and business sponsors continued to seek and receive special charters long after this inefficient practice provided any corresponding benefits.

The existence of only a small number of special charters granting identifiable business benefits not provided by the applicable general laws suggests that the evolution of state general incorporation laws progressed at a pace largely meeting the needs of business. From the last quarter of the nineteenth century through the earliest years of the twentieth century, the available general incorporation laws probably met the needs of most businesses—otherwise, a greater percentage of the special charters issued to manufacturing and other private businesses would have contained terms varying from the general laws. Up through the 1880s, most manufacturing corporations were either closely held or family owned<sup>305</sup> and therefore, probably had little need for liberal corporate provisions characteristic of twentieth century laws. Although vertically integrated corporate conglomerates, primarily concentrated in the railroad industry,<sup>306</sup> appeared after the Civil War with business needs to control other corporations, these needs were met without any significant use of special charters. Because no state permitted corporations to use the holding company structure,<sup>307</sup> the first vertically integrated corporations used trusts to establish effective

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305. See HOVENKAMP, *supra* note 42, at 253.

306. See HOVENKAMP, *supra* note 42, at 332 (noting that the trust movement and mergers from 1895 to 1905 accomplished vertical integration); CHANDLER, *supra* note 43, at 204 (stating that the great railway systems of the 1890s were the pioneers of modern business administration); *id.* at 289 (noting that by the 1880s railroad, steamship, and telegraph networks were fully integrated).

307. See HOVENKAMP, *supra* note 42, at 249-50 (describing three legal models of business trusts); CHANDLER, *supra* note 43, at 319 (describing New Jersey's creation of first general law in 1893 effectively allowing holding companies).

control of a combination of companies providing the necessary goods and services related to the railroad's, or other industry's, business.<sup>308</sup> By the time modern big business emerged in critical mass during the second decade of the twentieth century, liberal general laws, which allowed holding companies and provided managers and controlling shareholders with many other beneficial provisions, were in the process of proliferating across the states, and special charters for private businesses had largely disappeared.<sup>309</sup>

As the twentieth century progressed, the issuance of special charters for private business corporations declined rapidly. From 1904 through 1996, the private business special charters numbered just over 160 special charters, approximately four percent of all special charters issued from 1904 through 1996.<sup>310</sup> From 1904 through 1915, special charters issued for private businesses maintained a small but clear presence, averaging just over eight special charters per year.<sup>311</sup> From 1916 through 1975, the presence of special charters issued for private businesses dropped substantially, reaching an average of less than one per year.<sup>312</sup> By the 1976 through 1996 period, the presence of these special charters disappeared.<sup>313</sup> From 1904 through 1996, of the just over 160 special charters issued to private business corporations, only fourteen granted terms not

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308. See HOVENKAMP, *supra* note 42, at 249-50 (describing three legal models of business trusts); CHANDLER, *supra* note 43, at 319 (describing the trust structure as a legal form invented to provide effective control over companies in a combination during a time when general incorporation laws did not allow holding companies and special charters would not likely be issued allowing holding companies).

309. See HOVENKAMP, *supra* note 42, at 335 (noting that by the turn of the century corporations could be chartered to engage in any lawful business activity); *supra* notes 155-58 and accompanying text (describing the proliferation of liberal general laws in the early decades of the twentieth century); CHANDLER, *supra* note 43, at 286 (stating that by 1917, industrial enterprises were the most powerful institutions in American business); *id.* at 312 (noting that the giant integrated enterprise remained the exception until after 1900); *id.* at 345-62 (detailing the description of the growth of multi-unit industrial enterprises).

310. From 1904 through 1996, the states issued 3,932 total special charters in all industries, of which 161 (4.1%) were for private businesses. See Compilation, *supra* note 17; see also Appendix C.

311. From 1904 through 1915, the states issued 1,967 total special charters in all industries, of which 103 (5.3%), an average of 8.6 special charters per year, were for private businesses. See Compilation, *supra* note 17; see also Appendix C.

312. From 1916 through 1975, the states issued 1,826 total special charters in all industries, of which 57 (3.1%), an average of less than one special charter per year, were for private businesses. See Compilation, *supra* note 17; see also Appendix C.

313. From 1976 through 1996, the states issued 139 total special charters in all industries, of which only one (0.7%) was for a private business. See Compilation, *supra* note 17; see also An Act to Incorporate the Home Title Guarantee Company, ch. 65, § 1, 1988 R.I. Pub. Laws 50 (stating that this company was formed for the purpose of facilitating real estate transactions); Appendix C.



available under the applicable general law.<sup>314</sup> Of these special charters, ten granted tax exemptions or eminent domain rights,<sup>315</sup> while four relaxed other requirements imposed by the applicable general laws.<sup>316</sup>

As the twentieth century progressed, special charters issued for private businesses effectively died out because the state law forum rapidly evaporated due to constitutional prohibitions. Moreover, because a new generation of corporate lawyers and sponsors undoubtedly became accustomed to using general laws, they were not inclined to seek a special charter for a private business in the few states that still offered the special charter forum. The observation that very few special charters issued after 1875 for private businesses contained evidence of special privileges or benefits, adds far more to the understanding of the evolution of corporations than merely identifying the vast majority of these special charters as a product of state law inertia. The overwhelming absence of business benefits or privileges in these special charters also sheds light on the evolution of liberal general incorporation laws and on the structure of businesses operating as corporations. The fact that most special charters issued to private businesses failed to offer the benefits that later became available under liberal general incorporation laws corroborates existing evidence suggesting that most late nineteenth century and

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314. See Compilation, *supra* note 17. Of the 14, nine were issued by Connecticut, three were issued by Maryland, one was issued by Vermont, and one was issued by Rhode Island. See *id.* at North I-III.

315. See An Act to Incorporate Sternberg Construction Company, ch. 359, § 1, 1917 Conn. Spec. Acts 1080 (\$50,000 of property tax-exempt); An Act to Incorporate Guaranty Mortgage and Title Company, ch. 444, § 1, 1917 Conn. Spec. Acts 1188 (all property tax-exempt); An Act to Incorporate Western Connecticut Mortgage and Title Company, ch. 266, § 1, 1919 Conn. Spec. Acts 222 (all property tax-exempt); An Act to Incorporate Mortgage, Bond, and Title Company, ch. 297, § 1, 1925 Conn. Spec. Acts 802 (all property tax-exempt); An Act to Incorporate Investors' Mortgage and Guaranty Company, ch. 483, § 1, 1925 Conn. Spec. Acts 985 (all property tax-exempt); An Act to Incorporate Waterbury Title Company, ch. 494, § 1, 1933 Conn. Spec. Acts 1159 (all property tax-exempt); An Act to Incorporate Torrington Traction Company, ch. 363, § 1, 1915 Conn. Spec. Acts. 472 (may levy taxes; may receive aid from the state); An Act to Incorporate Premier Title and Mortgage Company, ch. 405, § 1, 1925 Conn. Spec. Acts 877 (may condemn land); An Act to Incorporate Fairfield County Mortgage and Title Company, ch. 465, § 1, 1925 Conn. Spec. Acts 926 (may condemn land); An Act to Incorporate Rhode Island Public Building Authority, ch. 163, § 1, 1958 R.I. Acts & Resolves 822 (providing tax exemptions and eminent domain rights).

316. See An Act to Incorporate Wilmington Power and Paper Company, no. 318, § 1, 1908 Vt. Laws 485 (relaxing capital limitations imposed by the general law); An Act to Incorporate Castleman River Coal and Coke Company, ch. 340, § 1, 1908 Md. Laws 1394; An Act to Incorporate Castleman Basin Coal Company, ch. 258, § 1, 1910 Md. Laws 1215; An Act to Incorporate Empire Coal Company, ch. 226, § 1, 1912 Md. Laws 446 (permitting subscribers of the corporation to exchange services for corporate stock).

early twentieth century businesses had not yet evolved to a point where the vast flexibility eventually offered by the liberal general incorporation laws would prove useful. By the time the giant integrated industrial enterprise emerged at the end of the second decade of the twentieth century, liberal general laws that allowed modern business to grow and gain unrestrained power had become widely available.<sup>317</sup> Consequently, from a timing perspective, the rise of liberal general laws occurred simultaneously, as big business evolved in critical mass to a point of being able to harness the flexibility of the liberal laws and grow to a point beyond the power of state law to regulate effectively.

#### CONCLUSION AND EPILOGUE

As the corporation moved forward into the early years of the twentieth century,<sup>318</sup> it was lauded as a great development. One commentator placed the corporation above steam and electricity in importance, declaring “the limited liability corporation [to be] the greatest single discovery of modern times.”<sup>319</sup> Another commentator, while conceding “the corporation as indispensable to modern business enterprise,” greatly feared that the state of business affairs allowed the corporation to exist in “irresponsible mastery,” accumulating and employing vast capital without “the full legal responsibilities of those who supplied them with it.”<sup>320</sup> As the early years of the twentieth century unfolded with special charters rapidly fading while liberal general incorporation laws proliferated across the corporate landscape, it became clear that the pure unrestrained competition of the individual states in the corporate law marketplace no longer could effectively serve as the only regulatory mechanism over corporate power.<sup>321</sup> Responding to corporate abuses beyond the

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317. See CHANDLER, *supra* note 43, at 285-86, 319 (noting that integrated industrial enterprise, nonexistent in the 1870s, took its modern form after 1917), and sources cited at *supra* note 158 (by the 1930s, liberal general incorporation laws emerged as a pattern across the nation).

318. In 1909 the first year Statistics of Income compiled a nationwide count, 262,490 corporations filed tax returns. See STATISTICS OF INCOME, CORPORATIONS RETURNS (1909). By 1930 the number of corporations filing returns nearly doubled reaching 518,736. See STATISTICS OF INCOME, CORPORATIONS RETURNS (1930). By 1960, 1,140,574 corporations filed returns; almost four times the number when compared to 1909. See STATISTICS OF INCOME, CORPORATION RETURNS (1960).

319. President Nicholas Murray Butler of Columbia University, Remarks at the 143rd Annual Banquet of the Chamber of Commerce of the State of New York (Nov. 16, 1911), in HURST, *supra* note 2, at 9.

320. Woodrow Wilson, Remarks at the Annual Address of the American Bar Association (1910), in RIPLEY, *supra* note 156, at 13.

321. See HOVENKAMP, *supra* note 42, at 238, 354-62 (detailing how market shifts made the previous business model unacceptable); HURST, *supra* note 2, at 75

power of the states to collectively stop, federal law, by addressing corporate conduct, matured during the early decades of the twentieth century. In addition to creating the national railroad system under the National Transportation Act of 1920 and federally insured deposits under the National Banking Act of 1935,<sup>322</sup> the enactment of the 1933 and 1934 Securities Acts greatly strengthened the regulation of private business.<sup>323</sup>

The development of state, rather than federal, supremacy at the foundation of corporations played a major role in perpetuating the special charter in all industries and greatly affected the regulatory path of all U.S. business organizations. Although special charters lingered about three decades longer than Professor Hurst estimated, he did identify the most important legal development—the regulatory jurisdiction enjoyed by state versus federal law—that kept special chartering alive far longer than practical utility justified this cumbersome procedure. The power enjoyed by each state to decide when to close the legislative forum by prohibiting special charters greatly increased the amount of time, from a national perspective, that the special charter forum remained open.<sup>324</sup> This forum contributed to the states' vast inefficiency in continuing to issue special charters in large numbers through the early twentieth century.<sup>325</sup>

The inefficiency caused by state law inertia in leaving the special charter forum open represents the sole explanation for the large amount of special charters issued for public corporations and insurance corporations. Because federal law had no serious claim

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(indicating that in the mid-twentieth century, an equilibrium developed that no longer required a grant of corporate status to be leveraged against business regulation).

322. See Transportation Act of 1920, 45 U.S.C. §§ 101-25 (1994) (repealed by Act of May 26, 1926, 45 U.S.C. § 163 (1994)) (providing a cause of action on labor disputes against the railroads); Banking Act of 1935, 12 U.S.C. § 228 (1994) (amending the Federal Reserve Act, 12 U.S.C. §§ 221-522 (1994)). Congress also enacted the Clayton Act of 1914, 15 U.S.C. §§ 12-27 (1994), which took the prohibition of anti-competitive activities of the Sherman Act a step further and was primarily used as a device against organized labor. See HOVENKAMP, *supra* note 42, at 236-38, 336 (indicating the purposes and goals of the Clayton Act and how it backfired against the labor movement); see also *supra* note 284-85, 287-88 and accompanying text.

323. See Securities Act of 1933, 15 U.S.C. § 77a-77aa (1994) (regulating the issuance of securities); Securities Exchange Act of 1934, 15 U.S.C. § 78a-78II (1994) (placing general reporting and dealing restrictions on both the purchase and sale of securities in the primary and secondary markets).

324. See *supra* notes 207-15 and accompanying text (detailing the decline of special charter issuance following amendments to the states' constitutions).

325. See *supra* notes 207-15 and accompanying text (describing the statistical decline, but still prevalent issuance, of special charters).

over the regulation of public corporations, the timing of federal regulation over corporate conduct plays no role in explaining special charters issued for public corporations. Rather, the public purpose special charter lingered as a state regulatory tool until a critical mass of states moved toward establishing general laws and other procedures to deal with municipalities and other public corporations. State law inertia also accounts for insurance special charters lingering into the twentieth century. Although insurance corporations arguably raise interstate commerce concerns and therefore, could have been subject to federal regulation, this industry always remained under state law control. Consequently, only the potential threat of federal regulation, rather than the timing of actual federal regulation, affected the evolutionary pattern of special charters issued for insurance corporations. The fact that newly issued special charters for public and insurance corporations linger at the dawn of the twenty-first century, albeit in minuscule numbers, demonstrates that the inertia in a few states, which continues to allow special charters, has allowed discrete interest groups to use the special charter procedure to further their goals.

Unlike public corporations, which always fell exclusively under state law jurisdiction, railroad and banking activities posed significant interstate commerce issues that needed federal regulation for these industries to operate efficiently. The dominant role played by state law over the regulation of all corporate matters through the early twentieth century substantially delayed the implementation of effective federal regulation over railroads and banks. The absence of effective regulation addressing railroads and banks helped keep special charters alive in these industries. At various times in the nineteenth century, increased federal regulation over transportation and banking was contemplated but never was implemented effectively. Had the Bonus Bill of 1817 been successful, federal law would have coordinated America's first transportation infrastructure, possibly leading to effective federal regulation for railroads sooner than the early decades of the twentieth century. Had the National Banking Act of 1864 set up mandatory standards or had it been amended to make the federal alternative more attractive after the emphasis shifted from note to deposit banking, effective federal regulation for banks may have occurred before the early decades of the twentieth century. In both the transportation and banking industries, the acceleration of federal regulation probably would have reduced the number of these special charters in the post-1875 period despite the widespread state law legislative forum allowing special

charters. Once Congress coordinated the nation's transportation and banking infrastructures with effective regulation, special charters in these industries totally disappeared even though state law inertia in seven states continued to allow incorporation by special charter.

Furthermore, a more active federal role over all corporate matters during the nineteenth century could have diminished substantially the inertia that led to special charters for private businesses continuing through the early twentieth century. A greater presence of federal regulation in the banking or transportation industries would have set an example that conceivably could have led to federal chartering during the nineteenth century. A system of federal chartering would have resulted in congressional coordination of the transition from special charters to general laws, which could have eliminated the special charter forum by 1875 or maybe even earlier. However, once state power over the chartering of corporations became irreversibly entrenched after 1875, state law inertia, unimpeded by federal influence, kept the special charter forum open through the twentieth century, allowing corporate sponsors access to special charters for private businesses. Because the overwhelming majority of the private business special charters offered no benefits outside the applicable general laws, these special charters persisted due largely to state law inertia keeping the forum open, rather than reflecting a widespread ability of business to use the provisions characteristic of liberal general laws before they became widely available in the early decades of the twentieth century. By the time business, in critical mass, evolved to a point where the flexible provisions of liberal general incorporation laws could be used to achieve unprecedented growth and power, those laws had become simultaneously available, while special charters for private businesses had practically disappeared.

The power of individual states rather than Congress to legitimize corporations, first through special charters, then by the creation of general laws, had profound consequences in the development of corporate law that extend far beyond the inefficient lingering of special charters through the twentieth century. The dominance of state law had a pivotal impact on the entire regulatory structure of business at the broadest level. Our current system of regulating corporations and other business organizations involves two tiers of regulation, state and federal, each essentially occupying separate spheres of power. Strong federal laws address specific corporate conduct, leaving a preserved power in the states to both legitimize corporations through the general laws and to address corporate

governance, financial, and other issues not addressed by federal law.<sup>326</sup> The two-tier state and federal approach distinctive of U.S. corporation law, resulted directly from the states, rather than Congress, securing primary control over the corporation during the nineteenth century. Had federal law taken over all regulatory aspects of corporations during the nineteenth century, the effects would have been far greater than a mere shortening of the transition time from special charter incorporation to exclusive use of general laws. Had federal power prevailed, corporate law might have developed as a one-tier, rather than a two-tier, regulatory regime, perhaps along the line of the federal incorporation and licensing proposals that failed to become law in the early decades of the twentieth century.

The power of the states rather than Congress to legitimize corporations also had a pivotal impact on the evolution of new business organization forms. State law power to legitimize corporations bestowed to the states the ability to experiment with and invent new business organizations. Early in the nineteenth century, to provide an alternative to the corporation, the states took advantage of this ability to invent new business organizations and created the limited partnership.<sup>327</sup> The limited partnership was intended as an alternate to the corporation, allowing limited partners to be treated essentially like corporate shareholders, while the business itself was managed by the general partners. In 1822, New York became the first state to pass a limited partnership statute, and Connecticut quickly followed with its own limited partnership statute.<sup>328</sup> Unlike

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326. See HURST, *supra* note 2, at 98-99 (indicating that courts developed doctrines demanding fidelity from directors and officers, which reflects current standards in corporate law).

327. See HOVENKAMP, *supra* note 42, at 12 (noting that the limited partnership offered an alternative to the corporation as a device that would also assemble "large amounts of capital so it could be controlled by a few active managers"); see also SEAVOY, *supra* note 24, at 97 (discussing that the New York Legislature's enactment of a limited partnership statute reflected "anti-corporation sentiment" prevalent in the 1821 Constitutional Convention of New York).

328. See Act of Apr. 17, 1822, Ch. 244, §§ 1-2, 1822 N.Y. Laws 259, 259 ("[I]t shall and may hereafter be lawful to form limited co-partnerships, for the transaction of business within this state" however, "nothing herein contained, shall be construed to authorize any such partnership for any banking purpose whatsoever, or for any business or concern connected with insurance."); see also Act of May 29, 1822, ch. 1, § 1, 1822 Conn. Pub. Acts 3, 3 ("[L]imited co-partnerships for the transaction of business, may hereafter be formed" but "nothing herein contained, shall be construed to authorize any such partnership for any banking purpose whatsoever, or for any business or concern connected with insurance"). In 1808, while still a territory, Louisiana passed a limited partnership statute. See *Of the Various Kinds of Partnerships*, ch. 2, art. 17, 1808 La. Civ. Code 388, 390 ("Corporate partnership is that which one of the contracting parties carries on alone and in his name, the commerce for which the other contributes only a sum which belongs to the partnership under the condition of a certain share in the benefits or losses, without

corporations, which for a lengthy period required a special charter from the legislature, limited partnerships were created by state filings outside of the legislature similar to the procedure eventually offered by the general incorporation laws.<sup>329</sup>

The proliferation of the first limited partnership statutes across the states bore a striking resemblance to the pattern shown by the first general incorporation laws. During the 1830s and 1840s, twenty-one states enacted limited partnership statutes,<sup>330</sup> and by 1875, over eighty percent of the states offered the limited partnership as an alternative to the corporation.<sup>331</sup> By the close of the nineteenth century, virtually

however his being liable to be answerable for losses beyond the amount brought by him into the partnership.”).

329. See HOVENKAMP, *supra* note 42, at 12-13 (noting that in 1832, Angell and Ames identified the ability to raise capital without a special charter as a strong advantage of the limited partnership and that the early limited partnership statutes are the ancestors of general incorporation laws).

330. See, e.g., Act of Nov. 4, 1835, § 1, 1835 Mass. Acts 304, 304 (authorizing “Limited partnerships for the transaction of mercantile, mechanical or manufacturing business” except “for the purpose of banking or insurance”); Act of Mar. 15, 1836, ch. 211, § 1, 1836 Me. Acts, 342, 342 (same); An Act Relating to Limited Partnerships in This State, 1836 Md. Laws 1228; Act of Mar. 21, 1936, No. 51 § 1, 1836 Pa. Laws, 143, 143 (same); Partnerships-limited, § 1, 1843 Ala. Acts, 389, 389 (same); Act of Dec. 22, 1837, § 1, 1837 Ga. Laws, 182, 182 (same); Act of Mar. 18, 1837, No. 58, § 1, 1837 Mich. Pub. Acts 108, 108 (same); Act of Feb. 9, 1837, § 1, 1837 N.J. Laws, 121, 121 (same); Act of Jan. 12, 1837, § 1, 1836 R.I. Pub. Laws 14, 14 (same); Act of Dec. 20, 1837, ch. 27, § 1, 1837 S.C. Acts (same); Act of Mar. 29, 1837 ch. 67, § 1, 1837 Va. Acts ch. 67 (same); Act of Mar. 2, 1838, ch. 108, § 1, Ark. Acts 599, 599 (same); Act of Feb. 2, 1838, No. 17, § 1, 1838 Fla. Laws 17, 17 (same); Act of Feb. 17, 1838, ch. 78, § 1, 1838 Ind. Acts 428, 428 (same); Act of Feb. 15, 1838, § 1, 1838 Miss. Laws 165, 165 (same); Act of Jan. 25, 1839, § 1, 1839 Iowa Acts 361, 361 (same); Act of Nov. 19, 1839, ch. 75, § 1, 1840 Vt. Acts & Resolves 369, 369 (same); Act of Jan. 24, 1846, § 1, 1846 Ohio Laws 29, 29 (same); Act of Feb. 3, 1842, ch. 132, § 1, 1841 Tenn. Priv. Acts 149, 149 (same); Act of May 12, 1846, § 1, 1846 Repub. Tex. Laws, *reprinted in* 2 H.P.N. Gammel, Laws of Texas 279, 279 (1898) (same); Act of Feb. 23, 1847, § 1, 1853 Ill. Laws 60, 60 (same).

331. See, e.g., Act of Feb. 26, 1850, ch. 189, 1850 Ky. Acts 24, 24 (authorizing “limited partnerships for the transaction of any agricultural, mercantile, mechanical, mining and transporting of coal, or manufacturing business” except “for the purpose of banking, or making insurance.”); Of Limited Partnerships, ch. 64, § 1, 1852 Del. Laws 185, 185 (same); Act of Mar. 5, 1855, 1855 Mo. Laws 165, 165 (same); Act of Mar. 3, 1855, ch. 28, § 1, 1857 D.C. Stat. 138, 138 (same); Act of Mar. 9, 1857, ch. 97, § 1, 1857 Wis. Laws 126, 126 (same); Act of July 1855, ch. 1677, § 1, 1855 N.H. Laws 1572, 1572; Act of Feb. 26, 1858, ch. 69, § 1, 1858 Minn. Laws 161, 161-62 (same); Act of Feb. 27, 1860, ch. 94, § 1, 1860 Kan. Sess. Laws 159, 159 (same); Act of Feb., 1861, ch. 28, § 1, 1860-61 N.C. Sess. Laws 54, 54 (same); Act of Dec. 19, 1862, ch. 60, § 1, 1863 Nev. Stat. 55, 55 (same); Act of Oct. 17, 1862, ch. 29, § 1, 1845-1864 Or. Stat. 788, 788 (same); Act of Mar. 4, 1970, ch. CXXIX, 1870 Cal. Stat. 123; Limited Partnership, ch. 100, 1870 W. Va. Acts 538, 539; Partnership, ch. 49, § 1, 1871-72 Mont. Laws 532, 532 (authorizing “Limited partnership for the transaction of mercantile, mechanical, mining or manufacturing business” except “for the purpose of banking or insurance”); Act of Feb. 18, 1873, ch. 52, § 1, 1873 Neb. Laws 504, 504 (same); Act of Feb. 13, 1874, § 1, 1874 Colo. Sess. Laws 199, 199 (“it shall be lawful to form limited partnerships”); Of Limited Partnerships, ch. 32, § 324, 1900 Alaska Sess. Laws (“Limited partnerships for the transaction of mercantile, mechanical, or manufacturing business may be formed within the district by two or more persons,

all of the states recognized limited partnerships.<sup>332</sup>

Despite the resemblance between corporations and limited partnerships when focusing on the tendency of the states to quickly enact statutes, the experiences of actual businesses using the corporate versus the limited partnership forms differed substantially. During the nineteenth century, businesses that chose to operate as limited partnerships experienced significant problems because the courts interpreted the statutes strictly and held many limited partners personally liable for the debts of the business.<sup>333</sup> Unlike the

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upon the terms and subject to the conditions and limitations contained in this chapter.”).

332. *See, e.g.*, Act of Dec. 12, 1877, § 1, 1877 Wyo. Sess. Laws 84, 84 (“A special partnership may be formed by two or more persons in the manner and with the effect prescribed in this act, for the transaction of any business except banking or insurance.”); Special Partnership, ch. III, art. I, § 1449, 1877 Territory of Dakota Laws 430, 430 (“A special or limited partnership may be formed by two or more persons in the manner and with the effect prescribed in this chapter, for the transaction of any business, except banking or insurance.”); Limited Partnerships, ch. 181, § 2370, 1881 Wash. Laws 409, 409 (“Limited partnership for the transaction of mercantile, mechanical or manufacturing business may be formed.”); Act of Feb. 4, 1885, § 1, 1885 Idaho Sess. Laws 148, 148 (“A special partnership may be formed by two or more persons in the manner and with the effect prescribed in this act, for the transaction of any business except banking or insurance.”); Act of Oct. 15, 1886, ch. 70, § 1, 1886 Haw. Sess. Laws 139, 139 (“A special partnership may be formed between one or more persons, called general partners, and one or more persons called special partners, for the transaction of any business.”); Partnerships, ch. VIII, § 2473, 1888 Utah Laws 67, 69 (“That limited partnerships ... may be formed by two or more persons upon the terms, with the rights and powers, and subject to the condition and liabilities herein prescribed; but the provisions of this act shall not be construed to authorize any such partnership for the purpose of banking or effecting insurance.”); Partnership, ch. 62, art. 2, § 1, 1890 Okla. Sess. Laws 738, 738 (“A special or limited partnership may be formed by two or more persons in the manner and with the effect prescribed in this article, for the transaction of any business except banking or insurance.”); Partnership-limited, ch. II, § 2658, 1897 N.M. Laws 685, 685 (“[L]imited partnerships for the transaction of any mercantile, mechanical, manufacturing or other business, except banking or insurance, may be formed.”); Special Partnership, § 1768, 1913 S.D. Laws 252, 252 (“A special or limited partnership may be formed by two or more persons in the manner and with effect prescribed in the chapter, for the transaction of any business except banking or insurance.”); Act of Mar. 19, 1943, ch. 30, § 1, 1943 Ariz. Sess. Laws 124, 124 (“A limited partnership is a partnership formed by two or more persons under the provisions of section 2, having as members one or more general partners and one or more limited partners. The limited partners as such shall not be bound by the obligations of the partnership.”).

333. *See, e.g.*, *Argall v. Smith*, 3 Denio 435, 435 (N.Y. 1846) (holding that the publication of incorrect capital amounts resulted in loss of limited partnership status); *Andrews v. Schott*, 10 Pa. 47, 51-52 (Pa. 1848) (finding that inclusion of the phrase “& Company” in the name of a firm was a violation of the statute and resulted in loss of limited partnership status); *Richardson v. Hogg*, 2 Pa. Super. 153, 154-55 (Pa. Sup. Ct. 1861) (ruling that the investment of \$5,000 in cash and \$6,700 in property violated the requirement that contributions of special partner must be in cash resulting in the loss of limited partnership status); *Pierce v. Bryant*, 87 Mass. (5 Allen) 91, 92 (1862) (holding that a contribution of bonds instead of cash violated the cash contribution only requirement of the statute resulting in the loss of limited partnership status); *Haggerty v. Foster*, 103 Mass. 17, 19-20 (1869) (finding that a



corporation, which by the 1830s had emerged as the dominant business organization,<sup>334</sup> it took until the twentieth century for the limited partnership to emerge as a reasonable and practical choice for a substantial number of businesses.<sup>335</sup>

The power enjoyed by the states to experiment and invent new business organizations continues to affect profoundly new developments in the business area. In the late twentieth century, state law power made it possible for additional business organization forms to join the corporation and the limited partnership. Largely in response to the inequities of the federal income tax system, interest groups harnessed the power of the states to invent new business organizations to create and perfect the limited liability company.<sup>336</sup>

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special partner's contribution of securities in three separate transactions violated the cash-only requirement of the statute, which resulted in the loss of limited partnership status); *Van Ingen v. Whitman*, 62 N.Y. 513, 518 (1875) (holding that a special partner's transfer of interest from a former firm to a new firm violated cash-only requirement resulting in the loss of limited partnership status); *Holliday v. Union Bag & Paper Co.*, 3 Colo. 342, 345 (1877) (determining that a partner's contribution of groceries while stating a contribution of cash on the affidavit violated the notice requirement resulting in the loss of limited partnership status); *Haddock v. Grinnell Mfg. Corp.*, 1 A. 174, 177 (Pa. 1885) (holding that an affidavit filed by a special partner does not meet the requirement that a general partner file an affidavit and thus, no limited partnership existed); *Fourth St. Nat'l Bank v. Whitaker*, 33 A. 100, 102 (Pa. Sup. Ct. 1895) (stating that an inaccurate appraisal of assets is a false statement on an affidavit, which resulted in loss of limited partnership status); *Spencer Optical Mfg. Co. v. Johnson*, 31 S.E. 392, 393 (S.C. 1898) (finding that a statement of the contributions of special partners in the aggregate violated the requirement that the contributions of the special partners be stated separately, which resulted in the loss of limited partnership status).

334. See HOVENKAMP, *supra* note 42, at 12 (noting that "in the 1830s and 1840s limited partnerships were found only in Louisiana and New York while corporations were everywhere"); HURST, *supra* note 2, at 14 ("By 1830 the trend was plain: the corporation would emerge as the preferred style of structured business organization.").

335. See sources cited *supra* note 333. To address the difficulties articulated by nineteenth century courts and make the limited partnership a reasonable alternative for businesses that could not easily use the corporation, in 1916 the Uniform Law Commissioners sponsored a Uniform Limited Partnership Statute to offer to the states. See William Draper Lewis, Explanatory Note as to the Uniform Limited Partnership Act, in *Proceedings of the Twenty-Sixth Annual Meeting of the National Conference of Commissioners on Uniform State Laws and Proceedings* 1916 Nat'l Conf. Commissioners on United States Laws (discussing the development of limited partnership law and presenting a draft model statute). By the early 1970s, the limited partnership emerged as the business organization of choice for tax shelter investments. See Hamill, *Origins*, *supra* note 1, at 1512-13, 1516-17; Hamill, *Catalyst*, *supra* note 1, at 426-27; Susan Pace Hamill, *The Taxation of Domestic Limited Liability Companies and Limited Partnerships: A Case for Eliminating the Partnership Classification Regulations*, 73 WASH. U. L.Q. 565, 574-75 (1995). A complete discussion of the evolution of the limited partnership form from its early nineteenth century origins to its twentieth century development is beyond the scope of this Article and will be explored as part of a research agenda studying the evolution of U.S. business organization forms. See *supra* note 15.

336. See Hamill, *Origins*, *supra* note 1, at 1520; see also *supra* note 15.

The first limited liability company statute appeared in Wyoming in 1977,<sup>337</sup> and by the middle 1990s, the limited liability company emerged as a formidable alternative to the corporate and partnership forms.<sup>338</sup> In 1991, Texas invented another business organization form known as the limited liability partnership, which offers a serious alternative to corporations, partnerships, and limited liability companies.<sup>339</sup> Thus, the power of the states to control access to the corporate form, which from America's beginnings through the twentieth century stayed within the state domain, was not only responsible for the corporation's inefficient evolution from special charters to exclusive use of general laws, but also paved the way for new business organization forms to enter the American legal landscape, years after special charters ceased to have any substantive significance.

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337. See Wyoming Limited Liability Company Act, ch. 158, 1977 Wyo. Sess. Laws 537 (enacted Mar. 4, 1977) (codified at WYO. STAT. ANN. §§ 17-15-101 to 17-15-144 (Michie 1997)) (codifying the guidelines for a limited liability company).

338. See generally Hamill, *Catalyst*, *supra* note 1, at 398 (explaining how the LLC exposes the main problems in corporate tax law as applied to both large and small corporations); Hamill, *Origins*, *supra* note 1, at 1461-62 (analyzing the origins of the LLC based on historical, business, and tax considerations).

339. See generally Robert W. Hamilton, *Registered Limited Liability Partnerships: Present at the Birth (Nearly)*, 66 COLO. L. REV. 1065 (1995) (discussing the origins of the first LLP statute created by the Texas legislature); Fallany O. Stover & Susan Pace Hamill, *The LLC Versus LLP Conundrum: Advice For Businesses Contemplating the Choice*, 50 ALA. L. REV. 813, 819 (1999) (outlining the legal distinctions and technical differences between LLPs and LLCs).

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SPECIAL PRIVILEGE TO GENERAL UTILITY

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