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Progressive Era Conceptions Of The Corporation And The Failure Of The Federal Chartering Movement

Camden Hutchison
Allard School of Law at the University of British Columbia, hutchison@allard.ubc.ca

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PROGRESSIVE ERA CONCEPTIONS OF THE CORPORATION AND THE FAILURE OF THE FEDERAL CHARTERING MOVEMENT

Camden Hutchison*

Despite the economic integration of the several states and the broad regulatory authority of the federal government, the internal affairs of business corporations remain primarily governed by state law. The origins of this system are closely tied to the decentralized history of the United States, but the reasons for its continued persistence—in the face of significant federalization pressures—are not obvious. Indeed, federalization of corporate law was a major political goal during the Progressive Era, a period which witnessed significant expansion of federal involvement in the national economy. By examining the historical record of Progressive Era policy debates, this Article bridges the analytical gap between historical and corporate legal scholarship, bringing to light the specific reasons why a federal corporation law was never enacted.

Drawing on primary source evidence, the conclusions of this Article are as follows. First, proponents of federal chartering were deeply divided in their attitudes toward corporations, some viewing them as a dangerous threat, others viewing them as central to economic progress. These divisions led to conflicting views on the very purpose of corporate regulation, making agreement on the content of a federal corporation act unlikely. Second, notwithstanding these divisions, many reformers viewed corporations as

* Assistant Professor, Peter A. Allard School of Law, University of British Columbia. I would like to thank Colleen Dunlavy, Jeffrey Gordon, Avery Katz, Gwendolyn Leachman, Gregory Mark, Miriam Seifter, Mitra Sharafi, and Susannah Camic Tahk for helpful feedback on earlier drafts. I would also like to thank the Institute for Legal Studies at the University of Wisconsin Law School. Any errors are solely my own.

directly accountable to the public interest. Legislative proposals were therefore framed in terms of benefiting the public, and only secondarily addressed the shareholder interests that dominate corporate law today. Finally, it was the conflicted nature of the political support for federal chartering legislation—not any specific policy preference for maintaining corporate law federalism—that led to the persistence of state-based corporate law. Ultimately, the absence of federal corporate law was a product of historical circumstance, rather than any conscious determination of legal or economic policy.

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I. INTRODUCTION

Among the most salient features of American corporate law is its distinctly subnational structure. Under the U.S. federal system, a corporation's internal affairs—including the rights and obligations of its managers and shareholders—are governed by the substantive law of its state of incorporation, not that of the federal government.

Although the scope of federal corporate law has steadily increased over the decades, making notable inroads in the areas of securities regulation,[1] proxy voting,[2] gatekeeping,[3] retirement fund investments,[4] certain reorganizational transactions,[5] and—most recently—executive compensation, board nominations, and disclosure by hedge fund and private equity fund managers,[6] the fundamental principles of corporate governance remain within the purview of the respective states. This traditional aspect of American corporate law distinguishes it from that of most developed countries, in which business corporations are formed and governed under centralized national legislation.[7]

1 The issuance and sale of corporate securities is primarily governed by the federal securities laws. Securities Act of 1933, 15 U.S.C. §§ 77a–77aa (2012); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78pp (2012).

2 *See* Lucian Bebchuk & Assaf Hamdani, *Federal Corporate Law: Lessons from History*, 106 COLUM. L. REV. 1793, 1804–07 (2006).

3 The Sarbanes-Oxley Act of 2002 imposed new obligations on corporate gatekeepers such as auditors, securities analysts, and outside legal counsel. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745. For a discussion of corporate gatekeeping, see generally JOHN C. COFFEE JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE (2006).

4 The management of employee retirement plans is broadly regulated under federal law. Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001–1169 (2012). *See generally* Kimberly Lynn Weiss, Note, *Directors' Liability for Corporate Mismanagement of 401(k) Plans: Achieving the Goals of ERISA in Effectuating Retirement Security*, 38 IND. L. REV. 817 (2005).

5 *See* Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 590, 618–19 (2003).

6 These recent federal regulations were established under the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376. Although President Trump promised to "dismantle" Dodd-Frank, it is uncertain whether any future reforms will affect the law's corporate governance provisions. *See* Jeff Cox, *Why It Won't Be Easy for Trump to Repeal Dodd-Frank*, CNBC (Nov. 21, 2016), http://www.cnbc.com/2016/11/21/repeal-dodd-frank-it-wont-be-easy-for-donald-trump-to-end-the-rule.html [perma.cc/XM9F-MMB5].

7 A notable exception being Canada, where corporations can be formed under either federal or provincial law. PURI ET AL., CASES,

The federal structure of American corporate law figures centrally in corporate legal scholarship, which is intellectually dominated by the relationship between management and shareholders. Beginning with Adolf Berle and Gardiner Means's seminal study of the modern corporation,[8] and continuing with the development of modern finance theory in the 1960s and 1970s,[9] corporate scholars have closely attended to this fundamental governance issue. This focus resulted in a long-running debate over the merits of state corporate law, particularly regarding state "competition" and the ensuing dominance of the state of Delaware.[10] Many scholars have argued that a "race to the bottom" has degraded corporate governance standards and that Delaware has attracted corporations by favoring management over shareholders.[11] Others have

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MATERIALS AND NOTES ON PARTNERSHIPS AND CANADIAN BUSINESS CORPORATIONS 167–68 (6th ed. 2016). *See also* Glenford Jameson, *Competing with Ourselves: Supply-Side Competition for Corporate Charters in Canada*, 50 ALTA. L. REV. 843 (2013).

8 ADOLPH A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (Transaction Publishers 1991) (1932).

9 *See* THE MODERN THEORY OF CORPORATE FINANCE 2–20 (Michael C. Jensen & Clifford W. Smith eds., McGraw-Hill 1984).

10 Since corporations are essentially free to incorporate in any state of their choosing (regardless of geographical presence), certain states have tailored their laws to attract incorporation fees and franchise taxes. Among these states, Delaware has been far and away the most successful. It today serves as the legal home to more than half of all publically-traded U.S. corporations and nearly two-thirds of the Fortune 500. JEFFREY W. BULLOCK, DEL. DIV. OF CORPS., 2013 ANNUAL REPORT, https://corp.delaware.gov/Corporations_2013%20Annual%20Report.pdf [perma.cc/J67D-G4VV].

11 *See, e.g.*, RALPH NADER ET AL., TAMING THE GIANT CORPORATION 54–61 (1976); Oren Bar-Gill et al., *The Market for Corporate Law*, 162 J. INST. & THEOR. ECON. 134, 137–41 (2006); Lucian Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1437, 1440–45 (1992); Bebchuk & Hamdani, *supra* note 2, at 1804–07; William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 663 (1974); Renee M. Jones, *Rethinking Corporate Federalism in the Era of Corporate Reform*, 29 J. CORP. L. 625, 653 (2004); Stanley A. Kaplan, *Fiduciary Responsibility in the Management of the Corporation*, 31 BUS. LAW. 883, 885–87 (1976);

argued that Delaware's success is instead the result of a "race to the top," and that Delaware has provided the most efficient balance between shareholder protection and management prerogative.[12] More recently, a number of scholars have questioned the assumption that states actually compete for incorporations at all, based on evidence that Delaware has enjoyed an effective monopoly on out-of-state incorporations for several decades (tempered only by the periodic threat of federal legislation).[13] Regardless of their

Donald E. Schwartz, *Federalism and Corporate Governance*, 45 OHIO ST. L.J. 545, 556 (1984); Gordon G. Young, *Federal Corporate Law, Federalism, and the Federal Courts*, L. & CONTEMP. PROBS., Summer 1997, at 146, 151.

[12] *See, e.g.*, FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 212–27 (1991); ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW (1993); RALPH K. WINTER, GOVERNMENT AND THE CORPORATION 28–42 (1978); Barry D. Baysinger & Henry N. Butler, *The Role of Corporate Law in the Theory of the Firm*, 28 J.L. & ECON. 179, 184–90 (1985); Robert Daines, *Does Delaware Law Improve Firm Value?*, 62 J. FIN. ECON. 525, 527 (2001); Daniel R. Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporate Law*, 76 NW. U. L. REV. 913, 913 (1982); Roberta Romano, *Corporate Law as the Paradigm for Contractual Choice of Law, in* THE FALL AND RISE OF FREEDOM OF CONTRACT 370 (F. Buckley ed., 1999); Roberta Romano, *Law as Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 226 (1985); Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 254 (1977).

[13] *See, e.g.*, Robert Anderson IV & Jeffrey Manns, *The Delaware Delusion*, 93 N.C. L. REV. 1049, 1092–94 (2015); Lucian Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 YALE L.J. 553, 555 (2002); Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 684–85 (2002); Roe, *supra* note 5, at 590. Increasingly, scholars characterize the market for incorporations as a binary "local versus Delaware" market, in which firms incorporate either in the state in which they are headquartered (for example, a Wisconsin-based corporation incorporating under Wisconsin law) or in Delaware (a Wisconsin-based corporation incorporating under Delaware law). A common view is that no states (with the possible recent exception of Nevada) even attempt to compete with Delaware for out-of-state incorporations. *See* Bruce H. Kobayashi & Larry E. Ribstein, *Nevada and the Market for Corporate Law*, 35 SEATTLE U. L. REV. 1165, 1167–68 (2012).

specific perspectives on the state corporate law debate, most of these scholars share two basic intellectual premises: (1) state law provides the foundational legal rules into which federal policy may selectively intervene; and (2) corporate law should primarily focus on the economic interests of shareholders. The positive corollaries of these premises—the absence of comprehensive federal corporate law and the limitation of management's duties to shareholders exclusively—are largely taken for granted, implicitly portrayed as natural results of the American federal system of government.[14]

In fact, neither premise commanded appreciable support during the formative period of modern corporate law. By examining Progressive Era political debates over federal incorporation proposals, this Article shows that there was nothing preordained about the state-based system of corporate governance. At the turn of the twentieth century, amidst dramatic growth of industrial corporations, the possibility of federal chartering became a national political issue. Federal chartering proposals, which—in their various forms—would have added to, limited, or completely replaced state corporation statutes, enjoyed the support of two sitting presidents, both major political parties, and a broad array of

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[14] It should be emphasized that this naturalized view is the dominant perspective in the *legal* literature. Historians of American business have often conceptualized corporations (and corporate law) much differently. For prominent examples of the variety of historical approaches to corporations, see, e.g., JOHN WILLIAM CADMAN, JR., THE CORPORATION IN NEW JERSEY: BUSINESS AND POLITICS, 1791–1875 (1949); ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS (1977); NAOMI LAMOREAUX, THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS, 1895–1904 (1985); GLENN PORTER, THE RISE OF BIG BUSINESS, 1860–1920 (1973); CONSTRUCTING CORPORATE AMERICA: HISTORY, POLITICS, CULTURE (Kenneth Lipartito & David B. Sicilia eds., 2004); Colleen Dunlavy, *How Did American Business Get So Big?*, AUDACITY, Spring 1994, at 41; Colleen Dunlavy, *Social Conceptions of the Corporation: Insights from the History of Shareholder Voting Rights*, 63 WASH. & LEE L. REV. 1347 (2006); Oscar Handlin & Mary Handlin, *Origins of the American Business Corporation*, 5 J. ECON. HIST. 1 (1945); Charles W. McCurdy, *American Law and the Marketing Structure of the Large Corporation, 1875–1890*, 38 J. ECON. HIST. 631 (1978).

political interests, including big business, organized labor, and the national agricultural lobby. The policy concerns of this federalization movement were unlike those of corporate law today, however. Rather than focusing on the conflict of interest between professional management and shareholders, Progressive Era reformers addressed themselves to much broader questions of political economy, including the fundamental nature of the corporation's role in modern industrial society. In seeking to directly regulate large business corporations, Progressive Era proposals implicated the power of both managers *and* shareholders, the economic interests of which were only rarely differentiated. Given their ambitious regulatory agenda, had Progressive Era reformers succeeded in passing federal chartering legislation, the institutional structure of American business would look much different than it does today.

This Article focuses on the historical moment in which federalization had the strongest political support: the period beginning with the "Great Merger Movement" of 1895–1904 and ending with the creation of the Federal Trade Commission (the "FTC") in 1914. These years were marked by deep anxiety over the rise of national corporations and by a strong sense among American policymakers of confronting unprecedented economic change. In examining the responses to this change, this Article follows several prior studies of the period: beyond the canonical historiography of the Progressive Era itself,[15] historians such as Gabriel Kolko, Martin Sklar, and Melvin Urofsky have specifically

[15] The classic work on the Progressive Era (as well as the Populist movement and the early New Deal) remains RICHARD HOFSTADTER, THE AGE OF REFORM (1955). Other important works include: SAMUEL P. HAYS, THE RESPONSE TO INDUSTRIALIZATION, 1885–1914 (1957); MICHAEL MCGERR, A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA 1870–1920 (2003); DANIEL T. ROGERS, ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE (2000); ROBERT H. WIEBE, BUSINESSMEN AND REFORM: A STUDY OF THE PROGRESSIVE MOVEMENT (1962) [hereinafter BUSINESSMEN AND REFORM]; ROBERT H. WIEBE, THE SEARCH FOR ORDER, 1877–1920 (1967), as well as many others.

addressed progressive efforts to federalize corporate law.[16] The Article extends beyond these previous studies in two important respects. First, it pays greater attention to the legal details of the period's specific reform proposals. Second, by comparing these proposals with more recent developments in conceptions of the corporation, it more clearly reveals that federalization efforts did *not* represent a unified political movement, but rather embodied divergent conceptions of corporations' role in American society. Melvin Urofsky, for example, who has authored the most specific study of the federal incorporation movement to date, is unable to satisfactorily explain *why* the movement failed, arguing only that "a consensus on broad goals could not be translated into agreement on specific details."[17] This Article shows that federal incorporation proposals were actually characterized by *dissensus*, and that different reformers often advocated irreconcilable policy goals. This political dissensus better explains the federalization movement's ultimate failure and the resulting entrenchment of the state law system in the absence of federal legislation.

Specifically, by drawing on the historical record of federal chartering proposals, this Article makes three central arguments. First, although federal incorporation as an abstract concept enjoyed broad political support, it was undermined by a fundamental conflict between what this Article labels "anti-corporate" and "corporatist" ideologies.[18] "Anti-corporate" populists viewed large corporations as a

[16] *See* GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM (1963); MARTIN J. SKLAR, THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890–1916 (1988); Melvin Urofsky, *Proposed Federal Incorporation in the Progressive Era*, 26 AM. J. LEGAL HIST. 160 (1982). *See also* Theodore H. Davis, Jr., *Corporate Privileges for the Public Benefit: The Progressive Federal Incorporation Movement and the Modern Regulatory State*, 77 VA. L. REV. 603 (1991).

[17] Urofsky, *supra* note 16, at 160.

[18] In this Article, "corporatism" is defined as cooperative management of the national economy by government and large corporations. This definition is distinct from—though not unrelated to—the conventional definition of corporatism in political theory (i.e., the organization of society through cooperation among major interest groups).

dangerous threat to economic freedom and saw federal legislation as a means of supplanting overly permissive state corporation acts. "Corporatist" progressives, on the other hand, viewed large corporations as central to economic progress and saw federal legislation as a means of supplanting overly *restrictive* state corporation acts. Second, notwithstanding this core conflict, many reformers on both sides of the debate believed corporate regulation should serve the public interest and were therefore only secondarily concerned with the economic interests of shareholders. At a time when public shareholding was more limited, the conflict of interest between management and shareholders was a less significant policy issue. Finally, it was the conflicted nature of the political support for federal chartering legislation, not any specific policy preference for maintaining corporate law federalism, that ultimately ensured the continued existence of the state corporate law regime. In other words, the state-based structure of American corporate law was a default outcome, not an active choice.

Together, these conclusions illustrate a broader historical phenomenon—that institutional features of the American economy are often shaped *not* by popular will, technocratic expertise, or even special interest preferences, but simply by the contingent nature of legislative politics.[19] Regardless of whether Delaware law is economically superior to its alternatives (a question this Article does not address), its prominence was hardly predetermined by the genius of American federalism. Had early debates over federal chartering occurred under different political circumstances, the evolution of corporate law would likely have unfolded differently.

Before proceeding, a note on terminology: In order to capture all major proposals to impose federal standards on corporate law, this Article employs a catholic definition of federal "chartering" proposals. Specifically, the term "chartering" includes any legislative proposal to (1) require

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[19] For an example of this phenomenon in the tax policy context, see Camden Hutchison, *The Historical Origins of the Debt-Equity Distinction*, 18 FLA. TAX REV. 95 (2015).

or permit businesses to incorporate under federal charters, (2) require or permit businesses to obtain federal corporate licenses, or (3) impose comprehensive federal standards on the governance of state corporations. Although distinct in form, these various legislative proposals were often similar in substance, as each sought to replace—in whole or in part—the variety of state laws with federal standardization. A mandatory licensing system requiring compliance with federal standards, for example, is little different from imposing those standards directly though federal incorporation. Thus, this Article includes each type of proposal as part of a single federalization movement.

The remainder of this Article proceeds as follows. Part II discusses the rise of corporate chartermongering and early calls for federal reform. This Part explores the diversity of perspectives that characterized early federalization proposals. Part III examines the major federalization proposals debated during the Theodore Roosevelt Administration. This was the moment at which the political conflict between corporatist and anti-corporate perspectives was most stark. Part IV discusses the failure of federalization proposals under William Howard Taft and the effective end of the chartering movement following the election of Woodrow Wilson. Part V concludes, assessing the relevance of federalization efforts to current U.S. corporate law.

II. STATE CORPORATE CHARTERMONGERING AND CALLS FOR FEDERAL REFORM

Since the origins of the United States, the formation of corporations has been a subject of state law. At the Constitutional Convention, James Madison proposed empowering Congress "to grant charters of incorporation where the interest of the U.S. might require & the legislative provisions of individual States may be incompetent."[20]

[20] James Madison, Debates in the Federal Convention of 1787 (Sept. 14, 1787), *in* AVALON PROJECT (2017),

Madison's proposal was rejected, however, on the grounds that federal corporations might lead to national monopolies.[21] Thus, although the federal government has chartered specific corporations under the Necessary and Proper Clause, including the first and second Banks of the United States, the first transcontinental railroads, and the Tennessee Valley Authority, general incorporation of private businesses has remained limited to the states. To this day, nearly all American corporations are chartered under state law, a distinctive feature of American corporate governance.

During the nineteenth century, states facilitated incorporation to promote local economic development. The economic and technological advances of the post-Civil War decades allowed locally incorporated businesses to grow increasingly national in scope. As markets expanded and geographical distances shrank, states encountered constitutional obstacles to regulating "foreign," or out-of-state corporations.[22] Not only did the Commerce Clause limit state interference with interstate commerce, but under established legal doctrine, a corporation's internal affairs were governed by its state of incorporation, regardless of the geographical location of its business, assets, or operational headquarters.[23] Since corporate promoters[24] were free to incorporate in any state of their choosing, and since states collected fees and taxes for the granting of corporate charters, the circumstances emerged for states to compete to attract out-of-state incorporations. New Jersey was the first and most successful of these states, attracting the majority of the largest combinations formed during the Great Merger

http://avalon.law.yale.edu/18th_century/debates_914.asp#16 [perma.cc/4XDL-34V7].

[21] *Id.*

[22] *See, e.g.*, Norfolk & W.R. Co. v. Pennsylvania, 136 U.S. 114, 120 (1890) (invalidating a Pennsylvania tax on foreign corporations).

[23] For analysis of the historical origins of the corporate internal affairs doctrine, see generally Frederick Tung, *Before Competition: Origins of the Internal Affairs Doctrine*, 32 J. CORP. L. 33 (2006).

[24] "Promoters" was the historical term for the owners, managers, and financial intermediaries who organized incorporations, particularly for public investment.

Movement.[25] Certain states—such as Delaware, Maine, and West Virginia—attempted to compete with New Jersey by liberalizing their corporation laws.[26] Other states—such as Ohio, Illinois, and Massachusetts—continued to maintain their traditional restrictions on corporations' size and business activities.[27] As discussed below, this legal diversity contributed to the conflicted nature of the federal chartering movement: Simply put, certain proponents of federal legislation were opposed to the laws of states like Ohio, while other proponents of federal legislation were opposed to the laws of states like New Jersey.

A. New Jersey Chartermongering

New Jersey was the original winner of the "race" to attract incorporations. In 1846, New Jersey enacted a general incorporation law intended to facilitate capital formation, providing corporations greater structural freedom than many larger industrial states.[28] Revisions in 1875 provided even greater flexibility, while also eliminating the

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[25] For a listing of all "trusts" existing as of 1904, the majority of which were incorporated in New Jersey, see JOHN MOODY, THE TRUTH ABOUT THE TRUSTS 453–75 (1904). For detailed figures on incorporations in New Jersey, see also Charles Yablon, *The Historical Race Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880–1910*, 32 J. CORP L. 323, 377–80 (2007).

[26] *See* Yablon, *supra* note 25, at 359–67.

[27] For contemporaneous discussions of relatively restrictive state laws, see 1 INDUSTR. COMM'N, PRELIMINARY REPORT ON TRUSTS AND INDUSTRIAL COMBINATIONS, TOGETHER WITH TESTIMONY, REVIEW OF EVIDENCE, CHARTS SHOWING EFFECTS OF PRICES, AND TOPICAL DIGEST 297–330, 1035, 1133–34 (1900) [hereinafter INDUSTR. COMM'N, PRELIMINARY REPORT]. These laws could have significant consequences for in-state corporations. For example, Standard Oil Company was sued—and nearly dissolved—by the Ohio attorney general for actions considered *ultra vires* under Ohio's corporation law. Standard Oil Company subsequently reorganized under the holding company Standard Oil Co. of New Jersey.

[28] *See* Edward Quinton Keasbey, Address to Chicago Conference on Trusts: New Jersey and the Trusts (Sept. 15, 1899), *in* CHICAGO CONFERENCE ON TRUSTS: SPEECHES, DEBATES, RESOLUTIONS, LISTS OF THE DELEGATES, COMMITTEES, ETC. 383 (Civic Fed'n of Chi. ed., 1900) [hereinafter CHICAGO CONFERENCE ON TRUSTS].

traditional practice of incorporation by special legislative act.[29] In addition to its liberal corporation statute, New Jersey also benefited from low corporate taxes and a well-regarded conservative judiciary.[30] For these reasons, New Jersey had become an attractive destination for corporations even before the 1880s.[31] Building on its existing reputation as a corporate-friendly jurisdiction, New Jersey emerged as the earliest state to actively promote itself to out-of-state capital.[32]

Legislative reforms in the late 1880s and 1890s solidified New Jersey's position as the jurisdiction of choice for large industrial corporations. The most significant of these reforms were devised by James B. Dill, a talented and ambitious Wall Street attorney who lived across the river in New Jersey. In 1890, Dill suggested to Leon Abbett, the Democratic governor of New Jersey (and a former corporate attorney himself), that New Jersey further revise its corporation laws.[33] At the time, Abbett was in search of additional tax revenue to balance New Jersey's budget

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[29] *Id.* at 386. Historically, incorporation by a specific legislative act had been the typical means of forming a corporation, but this practice fell into public disfavor by the middle of the nineteenth century. During the Jacksonian era, many Americans viewed special incorporation as an instrument of privilege and monopoly, and nearly every state eliminated the practice by the latter decades of the century. *See* Gregory A. Mark, *The Role of the State in Corporate Law Formation, in* 1 INTERNATIONAL CORPORATE LAW ANNUAL 1, 5–9 (Fiona Macmillan ed., 2000).

[30] New Jersey's corporate franchise tax was levied at a maximum rate of 0.1% of paid-in capital, with decreasing marginal rates for increasingly greater capitalizations. For large corporations, this resulted in a lower effective tax rate than (for example) New York's. For contemporary discussion of New Jersey's corporation taxes, see 2 INDUSTR. COMM'N, PRELIMINARY REPORT ON TRUSTS AND INDUSTRIAL COMBINATIONS, TOGETHER WITH TESTIMONY, REVIEW OF EVIDENCE, CHARTS SHOWING EFFECTS OF PRICES, AND TOPICAL DIGEST 21, 975, 1077 (1899). According to the journalist Lincoln Steffens, the New Jersey judiciary was highly regarded by Wall Street lawyers. Lincoln Steffens, *New Jersey: A Traitor State*, MCCLURE'S MAG., Apr. 1905, at 649, 658.

[31] *See* Yablon, *supra* note 25, at 332–36.

[32] *Id.* at 328.

[33] Urofsky, *supra* note 16, at 163.

deficit, while Dill was seeking a streamlined mechanism for organizing his clients' businesses; the two men quickly agreed on a mutually beneficial reform program.[34] Pursuant to Dill's plan, which Abbett recommended to the state legislature, New Jersey revised its corporation act in 1893 so as to clearly authorize New Jersey corporations to acquire the stock and/or assets of out-of-state firms.[35] Three years later, in 1896, the entire act was fully recodified by a revision commission chaired by Dill.[36] This recodification, which significantly streamlined the act's requirements, is widely considered the first modern "enabling" corporation statute.[37] The new statute played an important role in facilitating corporate mergers, as reflected by New Jersey's prominent position in the growing national merger movement.[38] Between 1895 and 1904, approximately 50% of all industrial

[34] *See The Lawyer Who Earned Title of Being Father of the Trusts*, WALL ST. J., Dec. 28, 1907, at 6. There is also evidence that Abbett and other New Jersey politicians were able to reap personal financial benefits from Dill's reform plan. Together with Dill, Abbett was a stockholder in the Corporation Trust Company of New Jersey, a company founded by Dill to facilitate New Jersey incorporations. Urofsky, *supra* note 16, at 163.

[35] Act of Mar. 14, 1893, ch. 171, 1893 N.J. Laws 301 (providing for general intercorporate stockholding). Although previous scholars have written that New Jersey's first "holding company" laws were passed in 1888 and 1889, these earlier laws were of only narrow application. *See* Act of Apr. 4, 1888, ch. 269, 1888 N.J. Laws 385 (providing, redundantly, that corporations "authorized by law to own and hold shares of stock and bonds of corporations" could hold and dispose of the same); Act of Apr. 17, 1888, ch. 295, 1888 N.J. Laws 445 (providing for intercorporate stockholding by certain real estate and transportation corporations). A law passed in 1889 was broader, but seemed limited to mining and manufacturing companies. *See* Act of May 9, 1889, ch. 265, 1889 N.J. Laws 412. Additional industry-specific laws were passed in 1891. The 1893 law was the first unambiguous authorization to purchase and hold the stock of any corporation, in any industry, whether or not formed in New Jersey.

[36] Urofsky, *supra* note 16, at 163–64.

[37] As opposed to the restrictive statutes that constituted the historical norm. *See* Yablon, *supra* note 25, at 349–53.

[38] The new statute was enacted as an act concerning corporations. Act of Apr. 21, 1986, ch. 185, 1896 N.J. Laws 277.

consolidations were incorporated in New Jersey;[39] between 1896 and 1901, the state's annual incorporations increased nearly 200%;[40] and by 1904, all seven of John Moody's "greater industrial trusts" had incorporated in New Jersey.[41] These developments had a major effect on New Jersey's corporate tax revenue, which more than tripled from less than one million dollars in 1895 to nearly three million dollars in 1905.[42] By any measure, Dill's plan was a remarkable success.

As New Jersey attracted a growing share of the nation's largest corporations, other states took notice. Hoping to capture a portion of New Jersey's rising incorporation revenues, states including Maine, South Dakota, and West Virginia passed corporation laws that were even less restrictive than New Jersey's.[43] Delaware adopted a corporation act nearly identical to the New Jersey statute, attempting to compete for corporations by charging lower fees and franchise taxes.[44] Even highly industrialized states such as New York and Massachusetts were forced to revise their corporate laws to avoid losing corporations to New Jersey.[45] With several states actively vying to attract and

39 RALPH L. NELSON, MERGER MOVEMENTS IN AMERICAN INDUSTRY, 1895–1956, at 67 (1959).

40 Urofsky, *supra* note 16, at 164.

41 MOODY, *supra* note 25, at 453. These firms were: Amalgamated Copper Company, American Smelting and Refining Co., American Sugar Refining Co., Consolidated Tobacco Co., International Merchant Marine Company, Standard Oil Company, and United States Steel Company. *Id.*

42 Christopher Grandy, *New Jersey Corporate Chartermongering, 1875–1929*, 49 J. ECON. HIST. 677, 682 (1989).

43 *See* Yablon, *supra* note 25, at 358–67.

44 Grandy, *supra* note 42, at 685. Although the two acts were very similar (Delaware lawyers expressly marketed their state's act as being based on the New Jersey act), Delaware law was more permissive with respect to the sale of stock, the location of corporate meetings, and certain other specific provisions. *See* William Jennings Bryan, Address to Chicago Conference on Trusts: The Man Before the Dollar (Sept. 16, 1899), *in* CHICAGO CONFERENCE ON TRUSTS, *supra* note 28, at 494, 506–08. Of course, Delaware would eventually replace New Jersey as the preferred incorporation jurisdiction.

45 *See* Yablon, *supra* note 25, at 358–67, 370–71.

retain corporations, this period represented the historical peak of state corporate law competition.

For many contemporary observers, this competition was cause for alarm. At the turn of the century, public attitudes toward corporations were dominated by antitrust sentiment, and the liberalizing reforms of individual states were seen as enabling monopolistic trusts. Although the Sherman Act of 1890 prohibited efforts to monopolize,[46] many Americans feared indulgent state governments were nonetheless encouraging dangerous consolidation.[47] A famous example of this view was the muckraking journalism of Lincoln Steffens, whose McClure's Magazine article *New Jersey: A Traitor State* accused New Jersey politicians of betraying the country in exchange for local tax revenues.[48] According to Steffens, New Jersey was fostering national monopolies in order to maximize tax collections—a specific example of a broader phenomenon of corrupt, parochial-minded state government. Fearing the economic consequences of permissive state corporation laws, many in American politics began to call for federal standards. In the late 1890s, these calls led to serious discussions regarding the desirability and constitutionality of a federal corporate chartering act. The two most prominent examples—each highlighting a different perspective on the fundamental goals of corporate regulation—were the Chicago Conference on Trusts, held in 1899, and the proceedings of the U.S. Industrial Commission, held from 1898 to 1902.

B. The Chicago Conference on Trusts

At the end of the nineteenth century, Americans were keenly aware of the economic changes occurring around them. The traditional economic model of small, independent

46 Sherman Act, 15 U.S.C. §§ 1–7 (2012).

47 This concern is suggested by William Jennings Bryan's comments, see *infra* notes 56–61 and accompanying text, which were received with "some minutes" of applause and a "crowd which rushed forward to congratulate him." Bryan *supra* note 44, at 514.

48 Steffens, *supra* note 30, at 649–50.

businesses—central to the economic ideology of nineteenth-century America—was rapidly ceding to a new reality of large, integrated corporations, many of which had dominated their industries in the span of only a few short years. Concern over these corporations' economic power led to state and federal antitrust legislation, as well as calls for the federal government to assume direct control over corporations themselves. In this respect, the antitrust movement and federal chartering proposals were closely interrelated. Although today the word "trust" connotes economic monopoly—and "antitrust" connotes anti-monopoly policy—the popular meaning of both of these terms was significantly broader during the Progressive Era.[49] In both the public and political vernacular of the time, a "trust" was simply any large corporation, while "corporation" could refer to any large trust. The "trust" issue in American politics was therefore synonymous with the "corporation" issue, and "antitrust" policy concerned any business that operated on a national scale. As stated by James B. Dill, the popular (if legally inaccurate) understanding of the term "trust" was simply "a corporate aggregation engaged in business other than merely local, and not confined in its operations and scope to the state of its creation."[50]

Although Congress had responded to growing antitrust sentiment with the Sherman Act of 1890, limited enforcement of the statute's prohibitions had produced equally limited results.[51] As concern over the trust issue continued to mount—and as state law appeared increasingly ineffective—many public figures began to advocate more

[49] The term "trust" was originally a reference to the practice of organizing large businesses as actual legal trusts. The legal motivations for this practice were obviated by the liberalization of state corporate law, after which most trusts reorganized as corporations. The general public continued to refer to all large businesses as trusts, however.

[50] James B. Dill, *National Incorporation Laws for Trusts*, 11 YALE L.J. 273, 274–75 (1902).

[51] While outright cartelization declined, industrial consolidation significantly *increased* in the decade following the Sherman Act. *See* HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINS OF AN AMERICAN TRADITION 285–308 (1955).

ambitious policy alternatives. It was in this context that the Civic Federation of Chicago, a major business reform organization, convened the Chicago Conference on Trusts late in the summer of 1899. The conference assembled a wide range of figures from government, academics, journalism, labor, the legal profession, and elsewhere to discuss potential legal and political responses to the rise of national trusts. The conference's stated objective was not to attack the trusts, but merely to facilitate the exchange of ideas. In the words of Franklin Head, President of the Civic Federation of Chicago, "it is not a trust or an anti-trust conference, but a conference in search of truth and light."[52] In this spirit, an impressive variety of ideological perspectives were represented at the conference, from socialists to laissez-faire conservatives, and everything in-between. National political and intellectual figures including William Jennings Bryan, Bourke Cockran, Samuel Gompers, John Bates Clark, Jeremiah Jenks, and even James B. Dill each presented their particular views on how best to address the trust issue. Notwithstanding this diversity, federal incorporation or licensing of corporations emerged as a common policy proposal. The conference was therefore the first occasion for sustained discussion of federal chartering, laying the groundwork for subsequent developments within the federal government itself.

The general sentiment of the conference was that state corporate law was seriously inadequate. Regardless of their specific perspectives on the dangers and/or benefits of industrial combination, most conferees agreed that some form of federal regulation was necessary. In general, what drove this agreement was not primarily concern for corporate investors, whose economic interests were rarely recognized as distinct from those of corporate management. In 1899—still the early days of public shareholding—the separation of ownership and control was a less prominent feature of

[52] Franklin J. Head, President, Civic Fed'n of Chi., Address to Chicago Conference on Trusts (Sept. 13, 1899), *in* CHICAGO CONFERENCE ON TRUSTS, *supra* note 28, at 7.

American corporations.[53] While participants at the conference had various reasons for supporting federal legislation, a common concern was protecting the public from concentrated economic power. Given the liberalization of state corporate law and the rapid growth of national combinations, many conferees feared that individual state governments had abandoned their responsibility to the public interest.

This fear reflected a conception of corporations much different from that of modern legal scholarship. Rather than viewing the corporate form as an enabling mechanism for private enterprise—the mainstream academic view of corporations today—many at the time continued to view corporations as quasi-public instruments of the state, whose legal privileges were predicated upon provision of a public benefit. According to several conferees, corporations had become dangerous because they were no longer limited to public purposes: Since states such as New Jersey had authorized corporations to engage in *any* lawful business, their statutory legal advantages (limited liability, continual existence, etc.) allowed them to dominate the American economy.[54] This view of corporations as instruments of public policy—and the implicit rejection of private profit as a legitimate public policy goal—would significantly influence political debates over the proper purposes of federal chartering.

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[53] Although the Great Merger Movement represented the beginning of public shareholding of industrial corporations, truly widespread public shareholding would not emerge until the 1920s. *See* JONATHAN BARRON BASKIN & PAUL J. MIRANTI, JR., A HISTORY OF CORPORATE FINANCE 193–97 (1997).

[54] *See, e.g.*, Dudley G. Wooten, Member, Texas Legislature, Address to Chicago Conference on Trusts (Sept. 13, 1899), *in* CHICAGO CONFERENCE ON TRUSTS, *supra* note 28, at 42; Henry White, General Secretary, United Garment Workers of America, Address to Chicago Conference on Trusts (Sept. 15, 1899), *in* CHICAGO CONFERENCE ON TRUSTS 323; John B. Conner, Chief, Indiana Bureau of Statistics, Address to Chicago Conference on Trusts (Sept. 13, 1899), *in* CHICAGO CONFERENCE ON TRUSTS, *supra* note 28, at 340.

The conception of corporations that characterized the Chicago conference is well illustrated by its most famous attendee, the once and future presidential candidate William Jennings Bryan. While many speakers at the Chicago conference issued general calls for federal reform, Bryan presented a more specific proposal for a federal corporate licensing system. Speaking before a packed, enthusiastic audience the morning of September 16, 1899, Bryan began by outlining the failings of state corporate law.[55] Using the example of Delaware, which was eagerly attempting to compete with New Jersey, Bryan claimed that irresponsible state governments were fostering dangerous economic concentration. In Bryan's dramatic rhetoric, the interests of natural "God-made man" were being sacrificed to corporations, "the man-made man."[56] To emphasize his point, Bryan read his audience an advertisement from a Delaware incorporation service that extolled the lack of legal restrictions in Delaware's general corporation act.[57] Bryan maintained that such brazen appeals to trust-promoters were clear evidence that state governments were disregarding the public interest. According to Bryan, since Delaware and other chartermongering states were financially motivated to favor corporations, "protection of the public from the greed and avarice of great aggregations of wealth" required *national* legislation.[58]

Bryan's own proposal was legislation requiring all corporations in interstate commerce to apply for and maintain a federal license. In order to control the "man-made man," this license would be predicated on three requirements: (1) licensees would be prohibited from having

[55] Bryan was an extremely popular orator, as evidenced by his reception at the conference. *See, e.g.*, CHICAGO CONFERENCE ON TRUSTS 459, 494, 496, 514.

[56] Bryan, *supra* note 44, at 510–11.

[57] *Id.* at 503–05.

[58] *Id.* at 508.

any "watered stock" in their capital structure;[59] (2) licensees would be prohibited from having a monopoly in any line of business; and (3) licensees would be required to disclose the details of their business operations.[60] Each of these conditions was meant to protect the public, rather than investors—Bryan spoke in general terms of the dangers of "corporations" and made no distinction between investors and management. To modern readers, requiring financial disclosure and prohibiting the sale of overvalued stock may seem like investor protection measures, but this was not Bryan's goal. In the assessment of Bryan and many of his contemporaries, these measures would actually prevent investors from profiting at public expense.

This became clear in the controversy over "watered stock," or the practice of selling stock for more than the value of a company's assets. The central concern was not that investors were being defrauded, as one might assume. Rather, since dividend payments were often set at a fixed percentage of nominal par value, inflated capital values increased the pressure on management to maximize profits in order to satisfy the cash flow requirements of high fixed-dividend obligations.[61] According to many critics, pressure to pay higher dividends was the reason for (allegedly) monopolistic prices.[62] Although there was also worry that outside shareholders might be deceived by inflated stock

[59] The sale of "watered stock"—stock issued in excess of the value of a corporation's assets—was one of the most controversial corporate practices of the period. *See infra* notes 61–63 and accompanying text.

[60] Bryan, *supra* note 44, at 506–08.

[61] The payment of dividends on common stock was not a legal obligation. However, given the information asymmetries that characterized early American securities markets, steady payment of fixed dividends was an important signal to investors of financial health. *See* BASKIN & MIRANTI, *supra* note 53, at 5–7.

[62] *See, e.g.*, Cyrus G. Luce, Former Governor of Michigan, Address to Chicago Conference on Trusts (Sept. 14, 1899), *in* CHICAGO CONFERENCE ON TRUSTS, *supra* note 28, at 230, 231–32; Bryan, *supra* note 44, at 496, 506–08; T. B. Walker, Minneapolis Board of Trade, Address to Chicago Conference on Trusts: Trusts From a Business Man's Standpoint (Sept. 16, 1899), *in* CHICAGO CONFERENCE ON TRUSTS, *supra* note 28, at 539, 539–41.

values, the greater concern was that elevated dividends were effectively a wealth transfer from consumers to investors. Again, this historical understanding of corporate finance differs significantly from the modern view, which is primarily concerned with corporate management *failing* to maximize returns to investors. Indeed, there is even an ironic parallel between this early conception of dividend obligations and the claim by modern financial economists that debt service obligations can discipline management.[63]

The requirement of corporate disclosure, referred to by Bryan as "publicity," was also conceived primarily as a means of protecting the public welfare. Bryan was not alone in calling for disclosure—"publicity" was a major goal of reformers throughout the Progressive Era. Unlike the modern conception of corporate disclosure, publicity was not viewed as a form of investor protection, but rather as a mechanism for preventing monopolistic profits. Bryan stated confidently that publicity would benefit the consuming public, even if his basis for this prediction was not entirely clear. Without explaining how or why, Bryan merely asserted that corporate publicity would represent a "long step toward the destruction of monopoly."[64] Parsing Bryan's rhetoric, the implication seemed to be that once the public learned the details of corporations' profits, they would no longer tolerate excessive prices.[65] Bryan's contemporaries were rarely clearer in justifying publicity's importance, though they presented it as a panacea for a host of economic issues. As a general matter, anti-corporate populists were often vague in explaining the benefits of their proposals,

[63] The theory that leverage can discipline management was first advanced by Michael Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305 (1976). Although not uncontroversial, this theory remains influential in financial economics.

[64] Bryan, *supra* note 44, at 508.

[65] *Id.* A more economically plausible theory is that disclosure of high profits would attract new competition, thus lowering prices. This theory (expressed in somewhat inchoate language) was occasionally advanced by other Progressive Era reformers.

which often entailed unacknowledged conflicts between the economic interests of consumers and investors.

Given his influence within the Democratic Party and his broader prominence in American politics, Bryan represents a particularly important example of the anti-corporate political perspective. However, many other figures at the Chicago conference also expressed similar views. To name but a few, Representative Francis G. Newlands (D-NV), who would subsequently introduce several chartering bills in Congress, argued that state regulation of corporations was "impossible" and that only the federal government could control corporate power.[66] Henry C. Adams, professor of political economy at Cornell University and statistician for the Interstate Commerce Commission, strongly criticized state corporation laws for failing to protect the public welfare.[67] A. E. Rogers, a professor of constitutional law at the University of Maine, issued similar criticisms and called for the imposition of federal standards.[68] In their preference for federal over state legislation, all of these speakers were more concerned with protecting the public than with protecting investors. In the words of attorney R. S. Taylor, "the interests of investors in the shares of [trusts] is a small consideration beside the interest of the general mass of people whose food, clothing, and transportation are controlled by them."[69] Ultimately, the chairman of the conference, William Howe, remarked during the closing of discussions that nearly every participant—whatever their political views—agreed on the importance of national standards. Howe summarized the conference as

[66] Representative Francis G. Newlands, Address to Chicago Conference on Trusts (Sept. 14, 1899), *in* CHICAGO CONFERENCE ON TRUSTS, *supra* note 28, at 305, 306.

[67] *See* Henry C. Adams, Statistician, Interstate Commerce Comm'n, Address to Chicago Conference on Trusts (Sept. 13, 1899), *in* CHICAGO CONFERENCE ON TRUSTS, *supra* note 28, at 35, 39.

[68] A. E. Rogers, Univ. of Me., Address to Chicago Conference on Trusts (Sept. 15, 1899), *in* CHICAGO CONFERENCE ON TRUSTS, *supra* note 28, at 409, 422.

[69] R. S. Taylor, Attorney, Address to Chicago Conference on Trusts (Sept. 13, 1899), *in* CHICAGO CONFERENCE ON TRUSTS, *supra* note 28, at 72, 72.

having established the necessity of (1) strong, uniform antitrust legislation, (2) centralized control over the formation of corporations, (3) stricter regulation of the sale of stock and bonds, and (4) a uniform system of corporate publicity.[70] According to Howe, the message of the conference was that corporations should be controlled "as we control steam and electricity, which are also dangerous if not carefully managed, but of wonderful usefulness if rightly harnessed to the car of progress."[71]

The Chicago Conference on Trusts was an important event in the national discussion of the corporation issue, but it was only one of many sources of federal chartering proposals. Moreover, despite the efforts of the conference's organizers to achieve political and ideological diversity, the conference included few representatives of large corporations themselves—one of the most important constituencies in debates over corporate reform. Partly for this reason, the prevailing theme of the Chicago conference was constraining the power of corporations, and the balance of speakers was decidedly weighted toward the anti-corporate perspective. Concurrently with the Chicago conference, a different outlook on federal chartering emerged from another important political event. The investigative hearings of the U.S. Industrial Commission, spanning 1898–1902, featured much greater involvement from the business community, including the leaders of several of the nation's largest corporations. Surprisingly, many of these businessmen[72] also supported federal chartering legislation, though for different reasons than the anti-corporate reformers so vocal at the Chicago conference.

[70] William Wirt Howe, New Orleans Board of Trade, Address to Chicago Conference on Trusts (Sept. 16, 1899), *in* CHICAGO CONFERENCE ON TRUSTS, *supra* note 28, at 623, 624–25. Note, however, that in light of the Chicago conference's ecumenical philosophy, the committee on resolutions declined to adopt any official resolutions. *See id.* at 625–26.

[71] *Id.*

[72] To the author's knowledge, all of the businesspeople involved in these debates were men.

C. The Industrial Commission

Like the Chicago Conference on Trusts, the U.S. Industrial Commission was a response to the dramatic economic changes of the era. Unlike the Chicago conference, however, which had no formal connection to the federal government, the Industrial Commission was a federal body created by congressional legislation.[73] Its mandate was also broader, encompassing not only trusts, but a wide range of economic issues. The commission was formed in 1898 to "investigate questions pertaining to immigration, to labor, to agriculture, to manufacturing, and to business," and to recommend appropriate legislation.[74] It was composed of a somewhat ungainly roster of nine presidential appointees (drawn primarily from business and labor), five sitting U.S. senators, and five sitting U.S. representatives. Taking inspiration from the British Royal Commissions of the 1890s, the Industrial Commission conducted several investigations, held numerous hearings, and ultimately issued 19 volumes' worth of official reports. The commission's work on the subject of trusts and industrial combinations included a comprehensive survey of state corporation laws,[75] a detailed study of corporate business and financial practices,[76] and extensive testimony from corporate managers.[77] This management testimony is particularly germane, as it reveals that while many businessmen favored federal chartering legislation, their support had little to do with limiting corporate power.

Unlike anti-corporate reformers who believed state laws were too permissive, many witnesses before the Industrial

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73 *See* Act of June 18, 1898, 30 Stat. 476 (1898).

74 Simon North, *The Industrial Commission,* 168 N. AM. REV. 708, 709 (1899).

75 *See generally* 2 INDUSTR. COMM'N, TRUSTS AND INDUSTRIAL COMBINATIONS (1900).

76 *See generally* 13 INDUSTR. COMM'N, TRUSTS AND INDUSTRIAL COMBINATIONS (1901).

77 *See generally* INDUSTR. COMM'N, PRELIMINARY REPORT, *supra* note 27.

Commission believed that state laws were too burdensome. Although these "corporatist" reformers also desired federal law, their ideal vision of corporate law was more in line with that of New Jersey. Notwithstanding the freedom of promoters to incorporate in any state of their choosing, the antitrust laws of certain states reached all activities within their jurisdiction, creating legal risks for corporations operating on a national basis. Business leaders hoped that national legislation would preempt these troublesome state laws, eliminating the danger of legal attack by state attorneys general and private plaintiffs. More ambitiously, they also hoped that federal legislation would supersede *federal* antitrust law by creating a process through which industrial combinations could apply for and receive federal regulatory approval.

The witnesses before the Industrial Commission represented many of the country's largest businesses. Perhaps the most notable was Standard Oil, among the most powerful—and controversial—of all American industrial trusts.[78] The commission questioned several members of Standard Oil's senior management on a range of issues related to conditions in the oil industry. Although most of this questioning focused on the details of Standard Oil's business practices, three Standard Oil witnesses were also asked for their views on federal incorporation: John D. Rockefeller, the founder of the company; John D. Archbold, the company's de facto chief executive; and Henry H. Rogers, another important senior manager. In their responses, each of these men supported the prospect of federal incorporation as a means of reforming, standardizing, and rationalizing corporate law.

Despite being semi-retired from active management,[79] John D. Rockefeller was questioned on the history and structure of the oil industry. Responding to written

[78] "Standard Oil" was formally "Standard Oil Co. of New Jersey," the holding company of what had existed as the "Standard Oil Trust" until 1892.

[79] *See* DANIEL YERGIN, THE PRIZE: THE EPIC QUEST FOR OIL, MONEY & POWER 82–84 (2008).

interrogatories in late 1899, Rockefeller suggested that the federal government *encourage* the process of industrial consolidation. He staunchly defended his company's domination of the oil industry and unequivocally maintained that industrial combinations benefited American consumers. Although he addressed the specific question of a federal corporation law only briefly, his views on the subject could not have been clearer—he strongly recommended "federal legislation under which corporations may be created and regulated."[80] If federal legislation proved impossible, Rockefeller recommended uniform state laws as a second-best alternative. The important point for Rockefeller was that corporate reform, whether enacted at the federal or state level, be directed toward "encouraging combinations of persons and capital," and "not of a character to hamper industries."[81] While he criticized federal antitrust legislation as fundamentally misguided, Rockefeller was open to the concept of federal regulation and control. As had William Howe at the Chicago Conference on Trusts, Rockefeller compared industrial combinations to the instrumentality of steam power: potentially dangerous if employed irresponsibly, but immensely beneficial if properly governed. Just as "steam is necessary and can be made comparatively safe," he wrote, "combination is necessary and its abuses can be minimized."[82]

John D. Archbold—Standard Oil's chief executive—took a similar position on the subject of federal corporate law.[83] Archbold believed that the natural "next step" in American business was "national or federal corporations."[84] According to Archbold, "lack of uniformity in the laws of the various states, as affecting business corporations, is one of the most vexatious features attending the business life of any great

[80] INDUSTR. COMM'N, PRELIMINARY REPORT, *supra* note 27, at 797.

[81] *Id.*

[82] *Id.*

[83] Archbold's official position was Vice President of Standard Oil Co. of New Jersey, but he effectively controlled the entire firm by 1899. *See* YERGIN, *supra* note 79, at 82–84.

[84] INDUSTR. COMM'N, PRELIMINARY REPORT, *supra* note 27, at 565.

corporation."[85] Standardizing corporate law would not only benefit "great" corporations, but could also encourage new competition to enter existing markets. Archbold claimed that if a federal corporation law were passed, "any branch of business could be freely entered upon by all comers, and the talk of monopoly would be forever done away with."[86]

Of the three Standard Oil executives who specifically discussed federal chartering, Henry Rodgers—President of Standard Oil's pipeline subsidiary and a key figure within the larger firm—addressed the issue in greatest detail. Like Rockefeller and Archbold, Rogers favored enactment of a single national corporation act. Specifically, Rogers proposed a federal law in the model of the English Companies Acts.[87] Rogers found the English law "most desirable in its operation," as it provided management with substantial flexibility in organizing and running the business, while at the same time providing outside investors with considerable information rights.[88] Another source of Rogers's views was his negative experiences with the state law system. In particular, Rogers hoped that a federal law would reduce the amount of antitrust litigation that could be brought in multiple states.[89] Finally, Rogers was also concerned about the economic interests of shareholders, as indicated by his strong support for generous information rights. Although he believed that attempts by government to "regulate speculation" would prove futile, he also believed that investors should be entitled to accurate financial information.[90] In Rogers's words: "I think we should say to

85 *Id.*

86 *Id.*

87 English corporate law was set forth in an extended series of parliamentary acts, referred to in this Article collectively as the "English Companies Acts." English law had a major influence on liberal state corporation acts, most notably that of New Jersey. James B. Dill himself stated that the New Jersey corporation act was "largely founded upon the English act." *See id.* at 1082.

88 *Id.* at 585.

89 *See id.*

90 *Id.* at 586.

the public, 'Here is this property. You can investigate it if you want to, and if you are satisfied with the security you can put your money into it, and if you are not satisfied with the security don't put the money in.'"[91] In this sense, Rogers anticipated the regulatory philosophy of the federal securities laws, in that he advocated disclosure rather than policing the substantive fairness of securities transactions.

Standard Oil was but one of the corporations represented at the commission's hearings—senior executives of several other firms also testified on federal chartering.[92] Many of these executives shared John D. Rockefeller's willingness to accept federal regulation in the form of corporate law. A notable example was John W. Gates, chairman of the American Steel and Wire Company. Gates not only recommended federal incorporation, but also suggested that the federal government take an active role in supervising the market. Like many businessmen, Gates viewed federal chartering primarily in terms of limiting state law. Under his proposal, corporations would be protected from the corporate laws of the individual states in exchange for "substantial" chartering fees payable to the federal government.[93] Gates's proposal extended beyond mere legal protection, however. Drawing on his observations of German industrial syndicalism, Gates envisioned the federal government taking an active role in managing key industries—overseeing and subsidizing America's largest corporations. Highly mindful of European competition, Gates believed that government stewardship was necessary to

[91] *Id.*

[92] In addition to Standard Oil, the organizations represented at the commission's hearings on trusts and combinations included the American Smelting and Refining Company, American Steel and Wire Company, American Steel Hoop Company, American Sugar Refining Company, American Thread Company, American Tin Plate Company, Distilling Company of America, Federal Steel Company, Glucose Refining Company, International Silver Company, National Shear Company, National Starch Company, National Steel Company, Pittsburg Coal Company, and many others. *Id.* at 1263–64.

[93] *Id.* at 1022.

ensure American dominance in globalizing markets.[94] This statist vision of industrial policy was unusually ambitious for the time, reaching far beyond the more modest suggestions of Gates's fellow witnesses. As discussed in Part III, however, the cooperative conception of the government-business relationship expressed in Gates' proposals would become a major feature of legislative efforts during the Theodore Roosevelt Administration.

Although many additional witnesses—including among others Archibald White, President of the National Salt Company, Max Pam, general counsel for the American Steel and Wire Company, and the pro-business publicist George Gunton—also recommended federal chartering, support for federalization before the commission was not unanimous. A significant minority of witnesses opposed federal chartering. William H. Moore, the successful trust promoter,[95] believed that while American corporate law should emulate the English Companies Acts, replacing state with federal legislation was both unnecessary and undesirable. According to Moore, states with restrictive corporation laws would face no choice but to liberalize, or else lose their domestic corporations to permissive states such as New Jersey. This prediction was similar to that of many anti-corporate activists; the difference, of course, being that Moore welcomed such a development.[96] Similar testimony was given by the corporate attorney Francis L. Stetson—a close associate of J.P. Morgan and legal counsel to several Morgan trusts—who also viewed a national corporation law as unnecessary, as well as unconstitutional. In Stetson's view, even if the federal government had constitutional authority to control corporations (which he doubted), regulation of monopoly was best left to natural economic forces. In terms strikingly similar to those of later free-market economists,

[94] *Id.* at 1016–18.

[95] Moore was involved in the creation of United States Steel and several other large industrial combinations. *See id.* at 960–65; JOHN N. INGHAM, BIOGRAPHICAL DICTIONARY OF AMERICAN BUSINESS LEADERS, at 959–60 (1983).

[96] *See id.* at 994–96.

Stetson reasoned that even if a corporation monopolized a particular market (Stetson used the specific example of the Havemeyer sugar trust), supracompetitive pricing would naturally attract new competition, and the problem would resolve itself without any need for government involvement.[97] Finally, John Dos Passos—another prominent Wall Street attorney and, incidentally, counsel to the Havemeyer sugar trust—also advised a hands-off approach to the question of federal corporate law. According to Dos Passos, issues of corporate governance were best left to private decision making, into which federal legislation would only constitute unhelpful interference. Quoting Edmund Burke, Dos Passos admonished the federal government to avoid involvement in private affairs—be they family, business, or otherwise—unless its legal authority was unambiguous and the policy necessity was overwhelming.[98] Neither condition was satisfied in his conception of the chartering issue. It should be noted that during the Progressive Era, in which even members of the business community often supported federal regulation, Dos Passos's (as well as Moore's and Stetson's) laissez-faire perspective was a minority view. Interestingly, this perspective is highly resonant with modern corporate legal scholarship, illustrating, perhaps, that all things come around again in time.

A final witness worthy of special note is James B. Dill, the primary drafter of New Jersey's permissive corporation act. In light of his involvement with the New Jersey statute, one might have expected Dill to oppose federal chartering legislation. In fact, both in his testimony before the Industrial Commission and in his published legal writing, Dill was a strong *supporter* of federal incorporation. The reason seems to have been his sincere belief in the liberal principles of the English Companies Acts, which he had endeavored to incorporate into the New Jersey statute. Dill

[97] *See id.* at 980. Stetson would soon abandon this free-market position, however, as he became deeply involved in federalization efforts under the Roosevelt Administration. *See infra* Part III.

[98] INDUSTR. COMM'N, PRELIMINARY REPORT, *supra* note 27, at 1162–63.

was so convinced of the legal advantages of English law (and, by extension, New Jersey law) that he called for its implementation on a nationwide basis. During his testimony, Dill passionately defended the New Jersey statute, emphasizing its requirement that financial information be made available to shareholders (a requirement that he conceded was not always respected in practice),[99] its condition that stock be issued only in exchange for cash or property,[100] and its fair and predictable system of chartering fees and taxes.[101] In order to secure New Jersey's advantages for all corporations across the country, and to prohibit discrimination on the part of more restrictive states, Dill recommended that a liberal corporation law be enacted at the federal level. According to Dill, federal legislation would curb the worst of corporate abuses, while also providing every corporation "the right to do as it sees fit" with respect to internal governance.[102]

Dill's advocacy of federal chartering was not limited to his commission testimony. Three years later, Dill presented a more detailed proposal before the Harvard Economics Seminary.[103] In his Harvard address, Dill set forth his outline for a federal incorporation act meant to protect corporations from the vagaries of state laws and ensure minimum standards of publicity and capitalization. Like many commentators, Dill believed that the states were incapable of coordinating corporate law: The political and financial rewards of attacking successful foreign corporations—or, alternatively, of attracting corporations with overly permissive corporate laws—were far too great to lead to convergence on optimal corporate governance standards.[104] Dill's view, of course, was that the New Jersey

[99] *See id.* at 1079.

[100] *Id.* at 1080–81. This condition prohibited corporations from issuing stock in exchange for services. It was actually a fairly restrictive provision, even compared to other states at the time.

[101] *See id.* at 1086–87.

[102] *Id.* at 1087.

[103] *See* Dill, *supra* note 50.

[104] *See id.* at 278–95.

standard was optimal, and his suggestions for drafting a federal law traced the substance of the New Jersey act. Specifically, Dill recommended legislation that would, *inter alia*, (1) allow corporations the option of incorporating under federal law (without expressly preempting state corporation acts), (2) shield federally chartered corporations from state lawsuits, regulation, and taxation, and (3) assure corporations the privileges and immunities of natural persons under the Constitution.[105] Unlike anti-corporate reformers who sought to limit the power of corporations, Dill called upon the federal government to facilitate their development.

As the testimony of these witnesses shows, the speakers at the Chicago conference and the witnesses before the Industrial Commission shared a common goal of federalizing corporate law, but their political motivations were fundamentally different. Anti-corporate populists such as William Jennings Bryan saw federal legislation as the solution to *permissive* state laws. Representatives of big business, such as Rockefeller, Gates, and Dill, saw federal legislation as the solution to *restrictive* state laws. Given their very different political perspectives on the nature of the corporation—a threat to economic freedom versus the engine of economic progress—their hopes for legislation would prove mutually incompatible.

Interestingly, nearly all commentators agreed on one specific policy goal: disclosure of corporate financial information to the government and/or the public. Among anti-corporate reformers, "publicity" was widely viewed as a safeguard against monopolistic pricing (though again, the mechanism of this protection was rarely explained in detail). To these commentators, shareholder protection was generally not a major concern, though it was sometimes cited as an additional benefit of corporate publicity. It was actually corporatist figures, many of whom were corporate insiders, who tended to take a greater interest in providing information to investors. Even laissez-faire conservatives

105 *Id.* at 294.

who opposed federal legislation entirely (John Dos Passos, for example) often supported the general concept of mandatory corporate disclosure.[106] Why, one might ask, would corporate insiders favor disclosure rules? The most likely answer is that mandatory disclosure would help sound, profitable corporations differentiate themselves in financial markets from their lower-quality rivals. Those firms able to credibly demonstrate their financial heath would enjoy favorable access to securities markets and a lower cost of capital. At the turn of the twentieth century, the American stock market remained underdeveloped and opaque. By reducing the information asymmetries between corporations and outside investors, mandatory disclosure could provide an advantage to well-governed corporations.[107] Although this reasoning was not expressly articulated by any witness before the Industrial Commission, many witnesses made disparaging comments regarding unsound, ill-conceived corporations, reflecting not only the historical reality that many corporations were entirely speculative, but also the fact that more profitable firms were eager to differentiate themselves.[108]

In the end, the Industrial Commission itself recommended mandatory corporate publicity, even as it declined to endorse federal incorporation. In its final report to Congress, the commission took a moderate position on federal legislation, recommending mandatory disclosure, federal corporate taxation, and stronger federal antitrust law, but advising against federal incorporation as too radical

[106] INDUSTR. COMM'N, PRELIMINARY REPORT, *supra* note 27, at 1168–69. Francis. L. Stetson and Elbert H. Gary (President of Federal Steel) also favored corporate publicity. *See Talk for Corporations: Stetson and Gary Before the Industrial Commission*, CHI. DAILY TRIB., Oct. 20, 1899, at 10.

[107] For an analysis of information asymmetry in the early history of the American stock market, see BASKIN & MIRANTI, *supra* note 53, at 189–97, 305–11.

[108] For just a few examples of these comments, see, e.g., INDUSTR. COMM'N, PRELIMINARY REPORT, *supra* note 27, at 68–69, 586, 975–76, 997, 1070–74, 1154. Even James B. Dill admitted that many corporations were formed for purely speculative purposes. *Id.* at 1079–81.

a policy measure.[109] According to the commission's report, not only were the practical advantages of federalization uncertain, its political implications merited a cautious legislative approach.[110] Although the commission recommended against federalization in the near term, its report allowed that, if more conservative measures proved ineffective, federal chartering might yet prove necessary at some point in the future.[111] Indeed, further consideration of the chartering issue would not be long in coming—over the next decade, the federal incorporation question would play an important role in national politics, moving from the realm of abstract proposals to specific congressional legislation. But as politicians grappled with how best to regulate national businesses, the anti-corporate and corporatist perspectives would continue to define the debate, ultimately preventing any agreement on a federal incorporation law.

III. FEDERALIZATION EFFORTS DURING THE ROOSEVELT ADMINISTRATION

The attention brought to the federal chartering issue by the Chicago Conference on Trusts and the Industrial Commission hearings (both of which were widely covered in the national press) led to a number of legislative proposals during the first decade of the twentieth century. As early as 1900, in the immediate wake of the Chicago conference, Congress considered the first federal licensing bill, as well as a constitutional amendment granting the federal government general incorporation powers.[112] Although additional bills soon followed, chartering legislation did not become politically viable until the active involvement of the Roosevelt Administration. From the beginning of his presidency (following the assassination of William

[109] *See* INDUSTR. COMM'N, FINAL REPORT OF THE INDUSTRIAL COMMISSION 643–52 (1901).

[110] *See id.* at 645.

[111] *See id.*

[112] H.R. 5756, 56th Cong. (1st Sess. 1900); H.R.J. Res. 138, 56th Cong. (1st Sess. 1900). Neither proposal was successful.

McKinley), regulation of big business was a major focus of Roosevelt's Administration, and as the years passed, corporate law became increasingly central to his legislative agenda. Despite his reputation as a trustbuster, Roosevelt was in fact a decidedly "corporatist" progressive, viewing large corporations as an essential feature of modern economic life, to be attacked by government if and only if they abused their economic power. Over the course of his presidency, Roosevelt sought a cooperative relationship between the government and large corporations, to be managed by an empowered federal executive.[113] This vision was in direct conflict with that of many populist Democrats, who feared *any* concentration of economic power, even (and perhaps especially) if controlled by the federal government. Thus, the stage was set for continued disagreement over the direction of corporate law, as the corporatist agenda of the Roosevelt Administration clashed with the populist concerns of the Democratic opposition (as well as the "insurgent" wing of the Republican party itself). In the end, despite Republican control of both houses of Congress for all of Roosevelt's presidency, not one of the federal chartering bills proposed during his Administration would pass.

A. Roosevelt's Early Approach to Corporations

While perhaps more conservative than the most ambitious reformers of the Progressive Era, Roosevelt was in many ways the quintessential progressive, deeply committed to social progress and confident in the abilities of government. Following his sudden ascension to the presidency in September 1901, Roosevelt became the leader, not only of the United States, but also of the Republican Party's legislative and regulatory agenda. Motivated by his personal belief in the government's competence to regulate the market, encouraged by the pro-regulation views of many leading businessmen, and pressured by the antitrust rhetoric of his Democratic opponents, Roosevelt embarked on an

[113] For a detailed history of the Roosevelt Administration's perspective on corporate regulation, see generally SKLAR, *supra* note 16.

extended effort to establish federal regulation of corporations. This effort, which initially focused on publicity, would soon lead to the creation of the federal Bureau of Corporations, an agency tasked with studying and (potentially) supervising interstate corporations. As discussed in Section III.B below, the Bureau would reinforce Roosevelt's increasingly ambitious regulatory goals, eventually leading to his direct support for federal chartering legislation.

In the early years of his presidency, prior to the creation of the Bureau of Corporations, Roosevelt faced strong antitrust sentiment from the American public and calls from leading Democrats to substantially limit corporate power. William Jennings Bryan had been the Democratic presidential candidate in 1900, and the Democratic platform called for legislation similar to Bryan's licensing proposals.[114] Although Bryan lost the election, his calls for stricter corporate law retained considerable public appeal, all the more so as the Great Merger Movement continued. Federal chartering was not just a partisan issue, moreover, pro-business publications such as the Wall Street Journal strongly favored federal incorporation[115] and the constitutional amendment effort in 1900 had been led by Republicans.[116] These pressures, combined with Roosevelt's personal belief in the need for federal business regulation, ensured that corporate law would be an important feature of his Administration's agenda.

In his first message to Congress in December 1901, Roosevelt struck a cautious tone on the subject of corporate legislation, while at the same time outlining policy proposals

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[114] Democratic Party Platform of 1900 (July 4, 1900), *in* AMERICAN PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley, eds., 2017), http://www.presidency.ucsb.edu/ws/index.php?pid=29587 [perma.cc/G3GY-K749].

[115] *See, e.g.*, *The Needed Reform: A Federal Law for Corporations*, WALL ST. J., May 23, 1904, at 2; *Federal Laws for Corporations*, WALL ST. J., Oct. 12, 1903, at 1; *Proposed National Incorporations*, WALL ST. J., Feb. 21, 1903, at 1.

[116] *See supra* note 112 and accompanying text.

that would later appear in specific bills. Implicitly criticizing populist reformers, Roosevelt warned that attacking the trusts would weaken American industry, especially relative to the European powers with which the United States was increasingly competitive. Roosevelt reserved particular scorn for those who opposed all concentrated wealth, proclaiming that their broad denouncements of industrial combinations "appeal especially to hatred and fear . . . precisely the two emotions, particularly when combined with ignorance, which unfit men for the exercise of cool and steady judgment."[117] Rather than destroy large corporations, Roosevelt argued that "combination and concentration should be, not prohibited, but supervised and within reasonable limits controlled."[118]

Roosevelt's proposals for effecting this control were threefold. The first was corporate publicity, a goal with broad, bipartisan support. Roosevelt called for the federal government to "inspect and examine" corporations—rather than requiring corporations to disclose information to the public.[119] The second proposal addressed the "utter lack of uniformity in the State laws" by recommending that the federal government "assume power of supervision and regulation over all corporations doing an interstate business."[120] Roosevelt claimed this would not constitute "interfering with the power of the States in the matter itself,"[121] but this proposal would evolve into more intrusive efforts during Roosevelt's second term. Finally, given the increasingly national scope of the economy, Roosevelt recommended creation of a cabinet-level Department of Commerce and Industries. Although Roosevelt left the exact responsibilities of this new department unspecified, its

[117] Theodore Roosevelt, First Annual Message (Dec. 3, 1901), *in* AMERICAN PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley, eds., 2017), http://www.presidency.ucsb.edu/ws/index.php?pid=29542 [perma.cc/L3ZK-PS96].

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *Id.*

authority would include “all matters affecting the great business corporations.”[122]

Roosevelt’s perspective—that large corporations were socially beneficial if properly regulated by the federal government—was compatible with that of many business leaders. On the other hand, Roosevelt had little sympathy for laissez-faire conservatism. In an address to the Boston business community in August 1902, Roosevelt sharpened his case for regulation by criticizing those who opposed federal action. In his speech, Roosevelt admitted it was often difficult to precisely identify corporate evils, but criticized wealthy conservatives “who deny that the evils exist.”[123] This criticism ran parallel to the President’s emerging distinction between “good” and “bad” trusts—that is, “good” trusts cooperated with government regulation, while “bad” trusts attempted to oppose it.[124] In reality, Roosevelt was probably less concerned with any “evils” of corporations than with the risk that lack of government action could fuel support for socialism.[125] Roosevelt thus struck a careful balance in denouncing “destructive” or “radical” legislative proposals, while at the same time meeting the public’s demand for some form of federal control.

This balance between economic practicality and corporate accountability was well received by the American public.[126] Although Roosevelt’s proposals were not immune from criticism, few observers fundamentally opposed federal

[122] *Id.*

[123] *One Law for All, Says Roosevelt*, CHI. DAILY TRIB., Aug. 25, 1902, at 1.

[124] The upshot of this distinction was that the federal government could cooperate with publically-responsible “good” trusts, while legal action should be reserved for publically-abusive “bad” trusts. For discussion of Roosevelt’s attitudes toward trusts, see KOLKO, *supra* note 16, at 127–32.

[125] This concern was a common theme in Roosevelt’s approach to business regulation.

[126] *See Country Backs Roosevelt in Trust Fight*, CHI. DAILY TRIB., Oct. 11, 1901, at 1.

supervision.[127] Unsurprisingly, populist Democrats such as William Jennings Bryan criticized the President for being soft on trusts,[128] but nearly all concerned accepted the inevitability of federal corporate regulation.[129] While specific questions of scope and emphasis remained subject to debate, the broader necessity of federal law was not itself controversial.

In fact, even as the Roosevelt Administration was working on its own proposals, the 57th Congress was already considering several corporate regulatory bills. In late 1901, for example, Representative Charles Littlefield (R-ME) introduced legislation that would have imposed extensive publicity requirements on newly-formed corporations.[130] Littlefield's bill found inspiration in both the Chicago Conference on Trusts and the Industrial Commission, as well as in Roosevelt's calls for corporate regulation. Littlefield endorsed the view, expressed repeatedly at the Chicago Conference on Trusts, that publicity was a powerful weapon against inflated dividends and monopolistic pricing.[131] With respect to the Industrial Commission hearings, Littlefield cited the testimony of both John D. Rockefeller and James B. Dill in support of corporate publicity.[132] When the House Judiciary Committee reported Littlefield's bill, the committee emphasized that many states had inadequate publicity requirements and that remedial action would be most effective if taken at the federal level.[133] The Democratic minority, while also supporting corporate publicity, criticized

127 *Cf. Mr. Roosevelt and the Corporations,* INDEP., Dec. 17, 1903 (reporting that Roosevelt's approach was disfavored by certain industrialists as hostile to capital).

128 *See Mr. Cockran Welcomed by Tammany's Hosts*, N.Y. TIMES, July 5, 1902, at 2; *Bryan in Johnson Circus: Nebraskan Speaks in Ohioan's Tent at Toledo*, CHI. DAILY TRIB., Sept. 14, 1902, at 5; *Trusts Called Foes of People*, CHI. DAILY TRIB., July 19, 1903, at 7.

129 *See, e.g.*, Joseph Auerbach, *President Roosevelt and the Trusts*, 175 N. AM. REV. 877, 878 (1902).

130 *See* H.R. 17, 57th Cong. (2d Sess. 1901).

131 *See* H.R. REP. NO. 57-3375, pt. 1, at 22–23, 25 (1903).

132 *Id.* at 2–6. *See also* THORELLI, *supra* note 51, at 538–39.

133 H.R. REP. NO. 57-3375, pt. 1, at 17–19 (1903).

Republicans' casting it as a panacea for the trust problem. The Democrats on the Judiciary Committee called for stronger limits on corporate power, including automatic bankruptcy proceedings against overcapitalized corporations, confiscation of goods shipped in violation of the antitrust laws, and, perhaps most importantly, an end to the protective tariff.[134] Despite their misgivings, however, the Democratic minority recommended passage. Ironically, the Littlefield bill proved too strict for conservative Republicans—the legislation passed the House, but Senate Republicans refused to vote on it.

From the Democratic perspective, Representative Ashton C. Shallenberger (D-NE) introduced more ambitious legislation in 1901.[135] His bill provided for the creation of a "Foreign and Internal Commerce Commission," similar in structure to the Interstate Commerce Commission created in 1887.[136] This proposed commission would have had the power to grant (and withhold) federal charters.[137] The commission would enforce the charter system by taxing the capital stock of corporations that engaged in interstate business without obtaining a federal charter.[138] Like the Littlefield proposal, Shallenberger's bill would have also imposed disclosure requirements on chartered firms. More so than Littlefield, however, Shallenberger was explicit as to whom this disclosure was meant to protect, investors not being among them. Alleging that dividends on watered stock enriched shareholders and increased prices for consumers, Shallenberger disclaimed any concern for the economic interests of investors. In his view, it was wholly incumbent

134 H.R. REP. NO. 57-3375, pt. 2, at 4–6 (1903).

135 H.R. 6521, 57th Cong. (1st Sess. 1901).

136 *Id.*

137 *Id.* § 5. In the bill's original text, the legal significance of this federal charter was unclear. Shallenberger was apologetic regarding the imprecisions in his bill, emphasizing that he was "not a lawyer." *Hearings Before the Subcomm. on Trust Legis. of the H. Comm. on the Judiciary*, 57th Cong. 17, 24 (1902) [hereinafter *Hearings Before the Subcommittee on Trust Legislation*] (statement of Rep. Ashton Shallenberger).

138 H.R. 6521 § 7.

upon investors themselves to investigate securities before they purchased them.[139] Shallenberger's bill stalled and died in the Republican-controlled House Judiciary Committee, but his attitude toward investor protection was common among lawmakers at the time. During the early twentieth century, corporate disclosure was often viewed as a remedy for excessive profits and was, therefore, framed in implicit tension with the economic interests of shareholders.

The Littlefield and Shallenberger bills were representative of early chartering proposals. Essentially the products of individual Congressmen, they reflected the widely-felt need for federal action, but lacked the cohesiveness of a broader legislative program. This political dynamic changed with the creation of the Bureau of Corporations, which used its investigative powers to develop a more organized legislative agenda. The Bureau's recommendations—supported by the prestige and authority of the President—would take a central role in political debates over federal chartering legislation.

B. The Bureau of Corporations

The Department of Commerce and Labor, proposed by Roosevelt upon taking office, was finally established by congressional legislation in February 1903.[140] Pursuant to discussions between Roosevelt and congressional Republicans, the department included within it a specialized Bureau of Corporations, tasked with investigating the business practices of corporations in interstate commerce.[141]

139 *Hearings Before the Subcommittee on Trust Legislation*, *supra* note 137, at 22–23 (statement of Rep. Ashton Shallenberger).

140 An Act to Establish the Department of Commerce and Labor, ch. 552, 32 Stat. 825 (1903). Roosevelt's original proposal had referred to a Department of Commerce and Industries, the authority of which would include "among many other things whatever concerns labor." Theodore Roosevelt, First Annual Message (Dec. 3, 1901), *in* AMERICAN PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley, eds., 2017), http://www.presidency.ucsb.edu/ws/index.php?pid=29542 [perma.cc/S4HG-UVC8].

141 § 6, 32 Stat. at 828.

The Bureau's mandate reflected the view that publicity was central to corporate regulation. Specifically, the Bureau was empowered to make "diligent investigation into the organization, conduct, and management of the business of any corporation, joint stock company or corporate combination" and to report its findings to the President for the purpose of recommending legislation.[142] Consistent with the Administration's evolving regulatory agenda, these recommendations would soon include direct federal supervision.

Roosevelt's own regulatory philosophy—marked by a strong belief in executive power—was closely interwoven into the very creation of the Bureau. As originally drafted, the legislation creating the Bureau defined its publication responsibilities broadly, requiring the Bureau to make its findings publicly available.[143] When the legislation reached the conference committee, however, Senator Knute Nelson (R-MN), acting at Roosevelt's behest, introduced an amendment requiring the Bureau to report its findings directly to the President. The President would then, using his executive discretion, determine whether to make such information available to the public.[144] This change reflected three characteristics of Roosevelt's approach to corporations. First, by placing the Bureau's investigative findings under the direct control of the President, it accorded with Roosevelt's expansive view of presidential authority. Second, by granting the President the practical option to either act on the Bureau's findings or keep them private (depending on the particular firm), it was consistent with Roosevelt's political distinction between "good" and "bad" industrial trusts.[145] Finally, by preventing the Bureau itself from releasing its findings to the public, it underscored the fact that disclosure to investors was not one of the Administration's priorities.

142 *Id.*

143 THORELLI, *supra* note 51, at 552.

144 *Id.* at 553–54.

145 *See supra* note 124 and accompanying text.

Pursuant to the final version of the act, the Bureau was led by a Commissioner of Corporations appointed by (and reporting to) the President.[146] The Bureau's first Commissioner was James R. Garfield (son of the late President James A. Garfield), a friend and advisor to President Roosevelt who shared many of his views on corporate regulation. Garfield envisioned the Bureau taking an active role in investigating corporations, but also believed that its central mission was to "cooperate with, not antagonize, the business world."[147] During its first year of existence, the Bureau embarked on an ambitious research program that included a thorough study of state legislation.[148] The conclusions Garfield drew from this study—that differences among state corporation laws amounted to legal "anarchy," that states' attempts to regulate corporations had been "unequal and disastrous," and that state competition to attract corporate charters was no less than "thoroughly vicious"—led naturally to recommendations for federalizing corporate law.[149]

Based on its findings, the Bureau recommended that the federal government assume authority over corporations by requiring all corporations in interstate commerce to receive and maintain a federal license.[150] In the Bureau's 1904 report, Garfield rejected the possibility that the states could reform corporate law themselves, stating that it was "obviously impossible that forty-five jurisdictions should agree on anything like a uniform system in so important a matter."[151] Having dismissed state action, the report discussed the possibility of direct federal incorporation. Although Garfield believed the federal government could constitutionally incorporate firms active in interstate

[146] § 6, 32 Stat. at 828.

[147] *See* U.S. DEP'T OF COMMERCE & LABOR, REPORT OF THE COMMISSIONER OF CORPORATIONS, H.R. DOC. NO. 58-165, at 36 (3d Sess. 1904) [hereinafter REPORT OF THE COMMISSIONER OF CORPORATIONS].

[148] *Id.* at 16–42.

[149] *Id.* at 37–40, 46.

[150] *Id.* at 44–48.

[151] *Id.* at 44.

commerce—and, conversely, could bar firms not so incorporated from interstate commerce—he was less confident that Congress had power over firms engaged purely in manufacturing.[152] Thus, while Garfield considered federal incorporation a promising method of regulation, he worried that it was overly fraught with constitutional uncertainties. The approach that Garfield more strongly recommended, and that the Administration eventually proposed, was the substantively similar option of comprehensive federal licensing.

Although not federal incorporation per se, the Bureau of Corporation's licensing proposal was similar in substance. As set forth in the Bureau's 1904 report, any corporation engaged in interstate commerce would be required to maintain a federal license. Receipt of this license would be conditioned on two requirements: (1) providing the government with "reports and returns" regarding business and financial information, and (2) satisfaction of "all necessary requirements as to corporate organization and management."[153] This second condition meant that the federal government could dictate corporate governance standards, even if state law remained nominally intact. In its report, the Bureau proposed that the licensing system leave only local matters to the states—e.g., protecting health and welfare, adjudicating commercial contracts, and all matters concerning real property. Federal control over corporate governance was made even more explicit in an appendix, which outlined the Bureau's plans for future legislation in detail. In addition to providing "reports and returns," licensed corporations would be required to conform their capitalization, management structure, and even commercial business practices to federal standards.[154] Taken as a whole,

152 REPORT OF THE COMMISSIONER OF CORPORATIONS, *supra* note 147, at 44–45. Although essentially nonexistent today, the constitutional distinction between "commerce" and "intrastate manufacturing" was an important (and controversial) issue during the Progressive Era.

153 *Id.* at 45.

154 *Id.* at 56–60.

the Bureau's licensing proposal was federal incorporation by another name.

Even before the release of the Bureau's report, Roosevelt announced his strong support for the direction of the Bureau's work. Roosevelt argued that in an era of *national* industry, federal legislation was a matter of common sense. Free from the political pressures of interstate competition, federal law was uniquely capable of transcending the race toward "easy terms," while at the same time avoiding any harmful expression of "intemperate, destructive, or demagogic spirit."[155] In his praise of "moderation, good sense, the earnest desire to avoid doing any damage," Roosevelt's stance on corporations was consistent with his broader economic philosophy[156]: Concentrated wealth, in and of itself, was inevitable in industrial society and should be limited by government if and only if it were used to the detriment of the general public.[157] As Roosevelt saw it, "[g]reat corporations are necessary, and only men of great and singular mental power can manage such corporations successfully, and such men must have great rewards."[158] At the same time, however, he also believed that "corporations should be managed with due regard to the interest of the public as a whole."[159] Without specifically endorsing the Bureau's proposal (which had not yet been published), Roosevelt expressed confidence that the Bureau had struck the correct political balance, seeking as it did to regulate "by co-operation, not antagonism; by making constructive legislation, not destructive prosecution."[160] Agreeing with Garfield's position that state law was inadequate, but that federal legislation should also be "cooperative" and

155 Theodore Roosevelt, Fourth Annual Message (Dec. 6, 1904), *in* AMERICAN PRESIDENCY PROJECT, (Gerhard Peters & John T. Woolley, eds., 2017), http://www.presidency.ucsb.edu/ws/index.php?pid=29545 [perma.cc/NYS8-DNFD].

156 *Id.*

157 *Id.*

158 *Id.*

159 *Id.*

160 *Id.*

"constructive,"[161] Roosevelt appeared fully prepared to support the Bureau's recommendations.

Once these recommendations were actually made public, however, Roosevelt was slow to commit to any specific regulatory structure.[162] Although he consistently recommended that Congress pass some form of corporate law, he tended to emphasize the need for legislation rather than its specific details. In his 1905 annual address to Congress, Roosevelt stressed that national corporations could only be effectively controlled by the national government. He urged that legislation be passed "in some manner which the wisdom of the Congress may suggest," without addressing the specific form (incorporation, licensing, or otherwise) he thought such legislation should take.[163] Although he criticized "negative" antitrust prohibitions and advocated their replacement by "affirmative" regulation, Roosevelt was not yet ready to propose specific legislation of his own, and seemed to prefer further deliberation before committing to any reform program.[164]

This lack of urgency was partly due to the ongoing regulatory activity of the Bureau itself, which had already entered into "constructive" agreements with many of the nation's largest trusts.[165] Behind the scenes, Garfield had entered into investigative relationships with several major corporations that were willing to share internal records in exchange for deferring stricter antitrust enforcement. These informal relationships were suggestive of how a formal licensing system would have worked in practice. Between

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161 *See* REPORT OF THE COMMISSIONER OF CORPORATIONS, *supra* note 147, at 13–14.

162 The recommendations were published in U.S. DEP'T OF COMMERCE & LABOR, REPORT OF THE COMMISSIONER OF CORPORATIONS (1905).

163 Theodore Roosevelt, Fifth Annual Message (Dec. 5, 1905), *in* AMERICAN PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley, eds., 2017), http://www.presidency.ucsb.edu/ws/index.php?pid=29546 [perma.cc/RH5Q-PAEZ].

164 *Id.*

165 *See* KOLKO, *supra* note 16, at 79–87.

1904 and 1906, the Bureau entered into agreements with a number of major corporations that allowed it to receive access to internal business and financial records. In return, the cooperating corporations were protected from antitrust enforcement; if the Bureau determined that a disclosing corporation was in violation of federal law, it would warn management in advance, allowing the firm to alter its practices and avoid formal enforcement action.[166] The Bureau entered into many of these agreements with firms controlled by J.P. Morgan & Co., with which the Administration had cordial relations and whose companies were therefore considered "good" trusts. Only firms that failed to cooperate with the Administration were considered "bad" trusts. Constructive supervision, rather than legal enforcement, was the ideal. As Garfield described the Bureau's activities, a "policy of obtaining heavy cooperation rather than arousing the antagonism of business and industrial interests has been followed."[167]

One can imagine that a licensing system would have been used in similar fashion—as a protective shield for "good" trusts and as political leverage against "bad" trusts. In any case, though it was already engaged in informal regulation, the Bureau remained committed to the enactment of a formal licensing system. In his reports of 1905 and 1906, Garfield reiterated the need for formal licensing legislation, emphasizing the advantages of "preventive rather than remedial" law.[168] Other members of the Administration echoed this emphasis until Roosevelt himself finally endorsed licensing in late 1906. In his annual address to Congress, Roosevelt affirmed that the time had come for federal control over business corporations, and that such control be implemented "by a national license law or in other

[166] *Id.* at 74–76; SKLAR, *supra* note 16, at 187–92; WIEBE, *supra* note 15, at 45–47.

[167] *See* KOLKO, *supra* note 16, at 75.

[168] *See* U.S. DEP'T OF COMMERCE & LABOR, ANNUAL REPORT OF THE COMMISSIONER OF CORPORATIONS 7–9 (1905); U.S. DEP'T OF COMMERCE & LABOR, ANNUAL REPORT OF THE COMMISSIONER OF CORPORATIONS 5–7 (1906).

fashion."[169] Consistent with his broader economic outlook, Roosevelt called for preventing the evils of the minority of abusive corporations, while protecting the business and legal environment for the majority of beneficial corporations. Sounding a familiar chord, Roosevelt cast corporate licensing as the safest defense against socialism, which he warned could be easily inflamed by unchecked corporate excess.[170] Roosevelt chastised business magnates who resisted government regulation, proclaiming "it is these reactionaries and ultraconservatives who are themselves most potent in increasing socialistic feeling."[171] As evidenced by his abiding concern for defusing the threat of socialism, Roosevelt saw federal regulation as a means of protecting *all* corporate stakeholders, including labor, consumers, and even capitalists themselves.[172]

Roosevelt's most forceful call for regulation came in late 1907, when he argued in support of a major chartering bill drafted in part by the Bureau of Corporations.[173] Repeating themes from earlier addresses, including the "ineffective chaos" of state corporate law, Roosevelt laid even stronger emphasis on the need for a federal solution.[174] Endorsing the Bureau's proposals, the President recommended a licensing system combining (1) publicity, (2) securities regulation, and (3) a broad prohibition of "unhealthy competition" (including price discrimination, predatory pricing, and exclusive dealing requirements).[175] In keeping with Roosevelt's corporatist outlook, however, combinations and pricing

169 Theodore Roosevelt, Sixth Annual Message (Dec. 6, 1906), *in* AMERICAN PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley, eds., 2017), http://www.presidency.ucsb.edu/ws/index.php?pid=29547 [perma.cc/35WB-K6K3].

170 *Id.*

171 *Id.*

172 *Id.*

173 This legislation is discussed in detail in Section III.C, *infra*.

174 Theodore Roosevelt, Seventh Annual Message (Dec. 6, 1907), *in* AMERICAN PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley, eds., 2017), http://www.presidency.ucsb.edu/ws/index.php?pid=29548 [perma.cc/9HEC-2BBZ].

175 *Id.*

agreements would be permitted, so long as they were approved by the federal government.[176]

The Administration's proposals received a wide range of political responses. Many of the nation's major newspapers supported federal chartering, as did smaller, more specialized publications catering to the business community.[177] Notably, the editorial board of the Wall Street Journal consistently supported the Administration's plans. In several editorials, the Journal argued that federal legislation in the form proposed by the President would help, not hinder, American corporations.[178] Many anti-corporate political figures, including William Jennings Bryan, agreed with this assessment. They considered it an argument *against* the President's proposals, however, given their distrust of corporate power.[179] From yet another perspective, many corporatist reformers who supported federal chartering nonetheless found the Administration's proposals overly restrictive. For example, James B. Dill, who continued

[176] *Id.*

[177] *See, e.g.*, Opinion, *Corporation Oversight*, N.Y. TRIB., Dec. 22, 1904, at 6; Opinion, *Mr. Garfield and the Corporations*, PLAIN DEALER, Dec. 24, 1904 (aggregating other newspapers' opinions on federal corporate legislation); Opinion, *Conservative, Not Radical*, DULUTH NEWS-TRIB., Jan. 8, 1905; John C. Richberg, Opinion, *Need of a National Incorporation Law*, CHI. TRIB., Dec. 30, 1906, at B5; Opinion, *Shortsighted Leaders*, L.A. TIMES, Oct. 27, 1907, § 2, at 4; Opinion, *Federal Corporations*, PLAIN DEALER, June 3, 1908 (summarizing business support for federal incorporation); Opinion, *Federal Incorporation*, OHIO STATE J., June 16, 1908.

[178] *See, e.g.,* Opinion, *Federal Incorporations*, WALL ST. J., Dec. 19, 1904, at 1; Opinion, *Federal Incorporations or Licenses*, WALL ST. J., Dec. 22, 1904, at 1; *National Regulation of Corporations*, WALL ST. J., Dec. 18, 1905, at 1; Opinion, *The Nation and the States*, WALL ST. J., Aug. 27, 1907, at 1; Opinion, *Federal Incorporations*, WALL ST. J., May 28, 1908.

[179] Bryan (who was preparing to run for President in 1908) emerged as a major critic of the Administration's proposals, which he warned would emasculate vigorous state regulations. This position was somewhat ironic given that Bryan had long supported federal licensing. *See* Opinion, *Attacks Idea of President*, L.A. TIMES, Oct. 7, 1907, at 12; Opinion, *Bryan Opposed to Roosevelt's Plan*, BALTIMORE AM., Oct. 11, 1907; Opinion, *Bryan the Star at Peoria Show*, CHI. TRIB., Sept. 10, 1908, at 4.

to support federal incorporation, felt that the Administration's proposals would place undue burdens on national firms. Dill preferred that federal chartering be optional for corporations, allowing them to remain under permissive state statutes (such as that of New Jersey) if they chose.[180] Finally, a minority of conservative commentators opposed federal legislation entirely. The editorial board of the *New York Times*, one of the most conservative major newspapers of the era, consistently represented this position.[181]

Each of these perspectives would play a role in the looming battle over federal chartering, a political conflict which would reach its height in the final years of the Roosevelt presidency. As Roosevelt pushed for federal legislation near the end of his second term, he faced an ironic political situation: Nearly all major political interests supported federal chartering, but disagreed as to the fundamental goals that chartering legislation was meant to accomplish. Anti-corporate reformers, represented by Bryan Democrats, sought to strictly constrain all large corporations and therefore distrusted the Administration's plans for supervising (and protecting) "good" trusts. Corporatist reformers, for their part, sought to empower corporations, but were also beginning to grow suspicious of Roosevelt's ambitious regulatory agenda. As the Administration tried to shepherd corporate legislation through Congress, Roosevelt would eventually alienate both sides. Even though his own approach sought to empower large corporations, his increasingly interventionist stance alarmed conservatives as well as Democrats. In the end, the Administration would fail

[180] Opinion, *For Federal Franchise, but Optional—J. B. Dill*, N.Y. TIMES, Dec. 23, 1904, at 5; Opinion, SPRINGFIELD DAILY REPUBLICAN (Springfield, Mass.), Dec. 24, 1904, at 6; Opinion, *Dill on the Garfield Report: His View of Federal Franchises,* WALL ST. J., Dec. 24, 1904, at 2. Dill moderated his opposition to the Administration's proposals after becoming a judge of the New Jersey Court of Errors and Appeals in 1905.

[181] *See, e.g.,* Opinion, *State or Federal Control?*, N.Y. TIMES, Dec. 27, 1904, at 6; Opinion, *Groping for Remedies*, N.Y. TIMES, Aug. 28, 1907, at 6; Editorial, N.Y. TIMES, Sept. 5, 1907, at 8.

to navigate the political hazards in Congress and would run aground between the anti-corporate and corporatist reform positions.

C. The Hepburn Bill

Late in Roosevelt's second term, as the President and the Bureau of Corporations pressed the case for federal chartering, several licensing, registration, and incorporation bills were introduced in Congress. The most important of these proposals—supported by much of the business reform community—was the so-called "Hepburn Bill," which was drafted by the Roosevelt Administration in close cooperation with business interests and introduced in Congress by Administration-ally Representative William Hepburn (R-IA). Among the many federal chartering bills introduced during this period, the Hepburn Bill initially appeared the most likely to become law. Once in Congress, however, the bill foundered in the committee process, as the various interests supporting the legislation divided over its core provisions. Representing the Progressive Era's most serious attempt at chartering legislation, the history of the bill provides a telling example of the difficulties of corporate reform.

As the Administration was intensifying calls for corporate legislation, private interests were also exploring the potential advantages of federal law. In October 1907, the National Civic Federation (the "NCF") held a "National Conference on Trusts and Combinations" to develop private opinion on government responses to the trust issue.[182] The NCF was the organizational successor to the Civic Federation of Chicago, and at the National Conference on Trusts and Combinations (also held in Chicago) it consciously revisited the issues addressed at the Chicago Conference on Trusts in 1899. Since the original conference had never issued an official policy position, and new momentum for corporate legislation seemed to be building in Washington, the second conference was seen as an

182 *See* PROCEEDINGS OF THE NATIONAL CONFERENCE ON TRUSTS AND COMBINATIONS (Nat'l Civic Fed'n ed., 1908) (hereinafter PROCEEDINGS).

opportunity for businesses to express their policy views to hopefully influence the substantive content of any forthcoming legislation. Like the first conference, most participants at the second conference advocated corporate regulatory reform, with many recommending some form of direct federal chartering. This time, however, the recommendations leaned toward the corporatist perspective, due to a narrower curation of political views on the part of the NCF. Hoping to avoid the inconclusive outcome of the 1899 conference, the NCF leadership abandoned the goal of ideological diversity and instead ensured that most invitees generally supported pro-business regulation.[183] Due in part to this ideological cohesiveness, the Chicago conference had a significant influence on the Roosevelt Administration's policymaking efforts: Following the conference, the NCF would become directly involved in the legislative drafting process, and positions expressed during the conference proceedings would be incorporated into the bill itself.[184]

Although the conference was marked by broad support for federal legislation, the specific form such legislation should take remained subject to dispute. Federal chartering—whether licensing or incorporation—was specifically called for by several conferees, but different speakers had different conceptions of what federal chartering would specifically accomplish. Representative Henry W. Palmer (R-PA), who spoke at the Chicago conference in support of *optional* federal incorporation, exemplified the corporatist view. Although Palmer did not call for the preemption of state law, he believed that if a federal alternative became available, most firms would choose federal law to avoid the "limitations, exactions, and annoyances imposed on them by the states."[185] Approvingly citing the English Companies Acts, Palmer maintained that "proper regulation and

183 SKLAR, *supra* note 16, at 208–09.

184 *See infra* notes 197–204 and accompanying text.

185 Representative Henry W. Palmer, Federal Incorporation, Address to the National Conference on Trusts and Combinations (Oct. 24, 1907), *in* PROCEEDINGS, *supra* note 182, at 351, 361.

control" should entail no hostility to honest business.[186] The investment banker Edwin Seligman (brother to the famous public finance economist, Edwin R. A. Seligman) took a similar view. Federal incorporation, he maintained, would be "desirable in the interests of the corporations themselves."[187] Seligman believed that a federal statute would "protect such companies as remain within the law and would defend them from harassment by forty-five separate legislatures."[188] Finally, the Administration's views were represented by Herbert Knox Smith, who had recently succeeded Garfield as Commissioner of Corporations.[189] Smith argued that federal legislation would solve the many problems of the state-law system, which was "a chaos of conflicting legal conditions resulting in inefficiency and uncertainty."[190] According to Smith, a centralized body of uniform law would facilitate industrial cooperation, allowing business and government to work together to further national prosperity.[191]

Not everyone at the conference shared Smith's optimistic vision, however. Certain conference participants, while not actively hostile to corporations, were less sanguine as to the policy benefits of protecting them under federal law. Wade Ellis, the Attorney General of Ohio (one of the stricter

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186 *Id.* at 361–62. Palmer's position was similar to that of James B. Dill.

187 Edwin Seligman, The Trust Problem, Address to the National Conference on Trusts and Combinations (Oct. 23, 1907), *in* PROCEEDINGS, *supra* note 182, at 159, 164.

188 *Id.* at 165. Note that Seligman also believed that certain state laws were overly permissive, however.

189 Roosevelt appointed Garfield to be Secretary of the Interior in 1907. Knox had served as Garfield's deputy at the Bureau of Corporations and shared many of Garfield's regulatory views. If anything, Knox was even friendlier with the trusts, expanding his predecessor's informal investigative relationships. *See* KOLKO, *supra* note 16, at 117–22; SKLAR, *supra* note 16, at 186–88; WIEBE, BUSINESSMEN AND REFORM, *supra* note 15, at 47.

190 Herbert Knox Smith, Comm'r of Corps., Administrative Regulation of Corporations, Address to the National Conference on Trusts and Combinations (Oct. 24, 1907), *in* PROCEEDINGS, *supra* note 182, at 288, 296.

191 *Id.* at 294–95.

corporate law jurisdictions), called for Congress to impose minimum standards on interstate corporations. Absent such standards, Ellis predicted a race to the bottom among chartermongering states. His primary grievance was intercorporate stockholding—freely allowed by New Jersey—which Ellis believed should be universally prohibited by the federal government.[192] Bartlett Tripp, a prominent attorney from South Dakota, also argued that federal law should bring corporations under stricter control. Although he conceded the inevitability of large combinations of capital ("[t]he little red shop around the corner has gone out of business forever"), Tripp believed that existing laws placed inadequate limits on corporate power.[193] He warned, "The means that have brought us wealth and the luxuries of life [i.e., corporations] must not become instruments of oppression and tyranny."[194] One of the few judges at the conference, Judge Peter Grosscup of the Seventh Circuit struck a populist note in his convention comments. Arguing for federal regulation, Grosscup claimed that several state governments allowed the formation of corporations without any oversight whatsoever: "Put your nickel in the slot and take out a charter," as he described the incorporation process.[195]

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[192] Wade H. Ellis, Attorney Gen. of Ohio, Present Principles Enunciated by the New Organization of Attorneys-General, Address to the National Conference on Trusts and Combinations (Oct. 22, 1907), *in* PROCEEDINGS, *supra* note 182, at 41.

[193] Bartlett Tripp, Powers of the State and Nation over Corporations and Trusts, Address to the National Conference on Trusts and Combinations (Oct. 22, 1907), *in* PROCEEDINGS, *supra* note 182, at 128, 136–38.

[194] *Id.* at 137.

[195] Peter S. Grosscup, Judge, U.S. Circuit Court, Anti-Trust Laws, Address to the National Conference on Trusts and Combinations (Oct. 23, 1907), *in* PROCEEDINGS, *supra* note 182, at 221, 227. Ironically, Grosscup was well known as a pro-business judicial figure, having issued several injunctions against striking labor unions, most notably during the Pullman strike. Richard Hofstadter describes Grosscup as a jurist of "impeccable conservatism." *See* HOFSTADTER, *supra* note 15, at 222–24.

Notwithstanding the occasional instance of anti-corporate populism, the majority of participants at the Chicago conference expressed relatively corporatist views. This loose consensus was reflected in the conference's formal resolutions, which went further in recommending federal legislation than the noncommittal resolutions of 1899. Even the 1907 resolutions were relatively cautious, however, being limited to the creation of a federal commission to study and recommend corporate reform. Specifically, the resolutions advised Congress to consider, by way of a federal commission: (1) allowing railroads to cooperatively agree on "reasonable" freight and passenger rates (subject to approval from the Interstate Commerce Commission); (2) removing labor unions and agricultural collectives from the prohibitions of the Sherman Act; (3) removing business combinations and industrial agreements "in the public interest" from the prohibitions of the Sherman Act; (4) enacting a corporate licensing or direct incorporation law; and (5) requiring corporate disclosure to the Department of Commerce and Labor.[196]

Despite the conference's recommendation that these issues be studied by a government commission, key figures within the NCF sought to bypass this intermediate step and push for federal legislation immediately. Given the (seemingly) broad consensus at the conference and the supportive attitude of the Roosevelt Administration, NCF leaders believed the time was right for the passage of a federal chartering law. Seth Low and Ralph Easely, the NCF's president and founder, respectively, sought to push forward an activist version of the conference's resolutions.[197] In cooperation with Herbert Knox Smith of the Bureau of Corporations (who had spoken at the conference himself), Low, Easley, and other NCF members began preliminary work on a chartering bill. The timing seemed fortuitous—congressional Republicans had indicated their support and several major industrialists had signaled their receptiveness

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196 PROCEEDINGS, *supra* note 182, at 453–56.

197 *See* SKLAR, *supra* note 16, at 228–29.

to the President. In early 1908, drafting work began in earnest on what would become the Hepburn Bill.[198]

The drafting process soon became a highly collaborative effort, which included a range of representatives from business, government, and organized labor. Key contributors included business figures with strong corporatist sensibilities. Most notably, J.P. Morgan associates George W. Perkins, Francis L. Stetson, and Victor Morawetz were all closely involved in the drafting process. Other representatives of big business who consulted on the bill included Elbert H. Gary, Edgar Addison Bancroft, August Belmont, Isaac Seligman, and James Speyer (all members of the NCF and supporters of federal chartering).[199] Gary and Bancroft were also key figures in the J.P. Morgan financial empire, further strengthening J.P. Morgan's influence on the Hepburn Bill.[200] National labor leaders including Samuel Gompers, President of the American Federation of Labor (the "AFL"), also played an important role. Moderate labor interests such as the AFL strongly supported federal chartering. They were particularly enthusiastic regarding the NCF's recommendation that labor unions be excluded from the antitrust laws.[201]

Early drafts of the bill were structured as amendments to the Sherman Act, adding a comprehensive system of registration and publicity. Corporations could register with the Bureau of Corporations by providing detailed information regarding their business and financial structure. Once registered, corporations would then be able to "preclear" mergers, combinations, and other strategic transactions by filing the relevant transaction documents with the Bureau in advance. Corporations that chose not to

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198 *Id.*

199 *Id.*

200 Gary was the president and chairman of United States Steel, while Bancroft was counsel to International Harvester. Belmont, Seligman, and Speyer were each prominent New York bankers. *See generally* SKLAR, *supra* note 16, at 179–332 for a thorough discussion of antitrust reform efforts and the key actors involved.

201 KOLKO, *supra* note 16, at 133–38; SKLAR, *supra* note 16, at 228–29.

register were not prohibited from engaging in combinations, but would continue to run the risk of Sherman Act prosecution. This system would provide the federal government with oversight over industrial combinations while also providing national businesses one of their most sought-after policy goals: eliminating the legal risk of antitrust prosecution by obtaining regulatory clearance *before* consummating major transactions. Essentially, rather than using the Sherman Act as an *ex post* enforcement mechanism, this system would give the federal government the power of prophylactic supervision. For their part, labor unions would be granted even stronger protection under the bill, allowing them to escape the Sherman Act entirely by making specified organizational disclosures. Under this proposed framework, the Administration, big business, and organized labor each seemed to be getting what they wanted.[202]

Soon, however, the influence of Francis L. Stetson and Victor Morawetz—both Morgan-associated corporate attorneys—began to push the bill in an even more pro-business direction. In late February 1908, Stetson and Morawetz submitted a revised draft limiting Sherman Act prosecution to "unfair" and "unreasonable" agreements and combinations, even for corporations that chose *not* to register with the Bureau of Corporations.[203] This change would have significantly weakened the Sherman Act, which contained no exception for "reasonable" restraints of trade. The Administration rejected Stetson and Morawetz's proposal, which would have undermined the government's supervisory authority. Still, the bill underwent several revisions as the Morgan interests pressed for advantage. Eventually, Roosevelt himself became personally involved and wrenched the bill back to his own regulatory preferences. Central to Roosevelt's vision was a strong oversight role for the federal government, including the assertion of executive authority

[202] SKLAR, *supra* note 16, at 231–33; KOLKO, *supra* note 16, at 134; WIEBE, BUSINESSMEN AND REFORM, *supra* note 15, at 80–81.

[203] SKLAR, *supra* note 16, at 233–34.

over the private decision making of corporations. Roosevelt added stricter registration requirements and an expanded, quasi-managerial role for the federal government. The bill was finalized in March and sent to Representative Hepburn, who introduced it in Congress in early 1908 as the Hepburn amendments to the Sherman Act.[204] Although the Administration was surprisingly reserved in its endorsement of the final bill (Roosevelt described it to Congress as a tentative suggestion), political support appeared strong.[205]

Once in Congress, however, the bill attracted serious criticism. Much of the controversy centered around the bill's favorable treatment of labor unions. Although large corporations were willing to accommodate unions to secure their political support, smaller businesses reacted extremely negatively to the protection of unions from the antitrust laws. The National Association of Manufacturers ("NAM"), representing a broad cross-section of American business, strongly opposed the bill, as did dozens of smaller commercial and trade associations.[206] Although the NAM was supportive of the general concept of federal chartering, it refused to accept any legislation that would strengthen the position of labor unions. This opposition was hardly surprising, as the NAM was a deeply anti-labor organization,[207] yet its intensity seemed to catch the NCF leadership off guard.

Anti-labor opposition was strengthened by many businesses' worry that the government was aiding dominant trusts at the expense of small and medium-sized enterprises. The National Council of Industrial Defense, an umbrella

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204 H.R. 19745, 60th Cong. (1908).

205 SKLAR, *supra* note 16, at 239.

206 Many of these associations were represented before Congress by the attorney and lobbyist James A. Emery. *See An Act to Regulate Commerce: Hearings on House Bill 19745 Before the H. Comm. on the Judiciary*, 60th Cong. 470–95, 663–93, 740–47 (1908) [hereinafter *Hearings on H.R. 19745*]. The Hepburn Bill hearings also included more than 100 letters and telegrams from individual firms and regional trade associations, the majority of which expressed vociferous opposition to favorable treatment of labor unions. *See id.* at 8–9, 432–70.

207 SKLAR, *supra* note 16, at 225–26.

group of 130 commercial associations (led by the NAM), voiced this concern to Administration officials directly, stating that powerful unions *and* powerful trusts would unfairly benefit from the legislation.[208] From the opposite end of the political spectrum, anti-corporate and pro-labor interests also criticized the bill. The American Antitrust League, for example, supported the protection of labor unions, but feared that the bill provided large corporations with undue latitude to merge and consolidate.[209] Finally, even corporatist reformers involved in drafting the legislation had misgivings over the direction in which Roosevelt had taken the bill. Corporate lawyers such as Stetson and Morawetz, who had hoped for protective legislation, now faced a much more expansive system of federal supervision and control.[210]

In just a few short weeks, support for the bill unraveled. As soon as Roosevelt realized that his preferred version was unlikely to pass, he abandoned any serious efforts to promote the legislation in Congress. Although Roosevelt continued to call for congressional action, he spent little political capital supporting corporate legislation that lacked what he considered its most important feature—executive power to approve or disapprove corporate combinations and horizontal agreements.[211] Seth Low and other NCF leaders tried to persuade Roosevelt to strengthen his support, but the President drew increasingly disengaged.[212] Without Roosevelt's active backing, and amidst growing criticism from across the political spectrum, the Hepburn Bill stalled in the House Judiciary Committee by late spring.

[208] *See id.* at 266–67.

[209] *See Hearings on H.R. 19745*, *supra* note 206, at 336–64.

[210] *See* SKLAR, *supra* note 16, at 235–53.

[211] *See* Theodore Roosevelt, Special Message to Congress on Labor (Mar. 25, 1908), *in* AMERICAN PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley, eds., 2017), http://www.presidency.ucsb.edu/ws/index.php?pid=69676 [perma.cc/29H7-L95K].

[212] *See* KOLKO, *supra* note 16, at 136–38; SKLAR, *supra* note 16, at 274–76.

The legislation fared even worse in the Senate, where it was expressly rejected in January 1909 by the Senate Judiciary Committee.[213] The Committee refused to allow the executive branch to make unilateral exceptions to the Sherman Act. Not shying away from dramatic rhetoric, the Committee report compared the presidential powers granted under the bill to the dispensing prerogative of James II at the time of the Glorious Revolution. According to the Committee, the bill would allow the executive to punish or excuse legal violations "without notice or hearing and wholly ex parte—a course of procedure that would not be tolerated in any court of our country."[214] The Committee broadly opposed any weakening of the Sherman Act, which the bill would "emasculate," "undermine," and render "nugatory as a remedial statute."[215] In the Senate Judiciary Committee, at least, anti-corporate sentiment remained strong.

The Hepburn Bill was the Roosevelt Administration's final attempt at corporate legislation, and its defeat represented the broader failure of Roosevelt's vision of corporate reform. Despite the support for federal chartering throughout Roosevelt's presidency, the political consensus needed to pass concrete legislation proved illusory. In a sense, Roosevelt's proposals included ideological aspects of both the corporatist *and* anti-corporate perspectives: his administration sought close cooperation between government and big business but also insisted that corporate decision making be subject to executive authority. Rather than achieving compromise, Roosevelt alienated both camps. Anti-corporate traditionalists, who valued the Sherman Act in its original form, mistrusted any proposal to selectively facilitate anticompetitive behavior. On the other hand, many corporatists became increasingly uncomfortable with Roosevelt's regulatory proposals, which appeared to reach considerably beyond their preferred level of government control. Finally, favorable treatment of labor unions—

[213] *See* S. REP. NO. 60-848 (1909).

[214] *Id.* at 9.

[215] *Id.* at 11.

included to secure the support of the AFL—probably did more than anything to ensure the failure of the Hepburn Bill. While it is tempting to conclude that Roosevelt's political approach undermined the Hepburn Bill, the succeeding administration proved no more successful in passing similar legislation. As the experience of the Taft Administration shows, disagreement over the purpose of corporate reform was an insurmountable obstacle.

IV. FEDERALIZATION EFFORTS DURING THE TAFT ADMINISTRATION

The end of Roosevelt's presidency was not the end of the federal chartering movement. Although the Hepburn Bill had failed, proponents of federal chartering had much to hope for in the Taft Administration. As Roosevelt's political protégé and hand-picked successor, Taft shared Roosevelt's views regarding the economic necessity of large corporations and the importance of preventing them from abusing their economic power. Many observers considered Taft even more business-friendly than Roosevelt, giving optimism to large corporations lobbying for protective regulation. Once in office, however, Taft disappointed such expectations. Although Taft supported federal chartering, his views on corporate regulation proved more market-oriented than his predecessor's. Most notably, he was less inclined to favor the legal protections sought after by big business.[216] Taft found himself in an awkward position between anti-corporate and corporatist reformers, unable to build significant support for his preferred (mildly corporatist) chartering legislation. Taft did succeed, however, in enacting a corporation "excise" tax, which included certain regulatory features that had long been called for in chartering debates. In the context of

[216] *See* SKLAR, *supra* note 16, at 364–81. To this day (and despite the best efforts of historians), the popular image of Roosevelt is that of the aggressive trust buster. Taft, on the other hand, is often considered more conservative. See HOFSTADTER, *supra* note 15, at 236–54. As discussed herein, these popular conceptions of Roosevelt and Taft are inaccurate in important respects.

repeated failure to pass a federal chartering bill, this tax satisfied some of the demand for federal action toward corporations and partially relieved the political pressure for more comprehensive legislation.

A. Corporatist Proposals

Upon taking office in March 1909, Taft appeared likely to continue the agenda of the Roosevelt Administration. Like his mentor, Taft believed that large corporations were inevitable in modern society and that federal law should concern itself with actual economic abuses, not corporate size per se. Unlike Roosevelt, however, Taft was not a proponent of executive discretion and rejected the use of informal relationships as a basis for distinguishing between "good" and "bad" trusts. A jurist above all else, Taft was deeply committed to the rule of law and strove for consistent enforcement of existing antitrust prohibitions.[217] Although he supported federal chartering throughout his administration, Taft invested greater effort in prosecuting trusts under the Sherman Act. Partly for this reason, he had little success in promoting chartering legislation in Congress.

Notwithstanding the failure of the Hepburn Bill, the 1908 presidential election had primed Washington for further regulatory proposals. The Democratic platform of 1908 called for federal licensing of any corporation controlling "as much

[217] Taft's antitrust perspective—his belief in the jurisprudential wisdom of allowing reasonable restraints of trade, coupled with his strong commitment to impartial enforcement of the law—derived directly from his experience as a federal judge for the Sixth Circuit Court of Appeals, where he was considered a leading expert on antitrust law. His decision in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898) holding that ancillary restraints of trade should be subject to a reasonableness standard was later adopted by the Supreme Court. This "rule of reason" is today considered one of the most important developments in antitrust law. *See* Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775, 801 (1965).

as twenty-five percent of the product in which it deals."[218] Although less specific, the Republican platform also called for the regulation of large corporations, recommending that the government enforce "greater supervision and control over, and secure greater publicity in, the management of that class of corporations" active in interstate commerce.[219] Underscoring the bipartisan support for corporate reform, Taft referenced both platforms favorably during his campaign and called for legislation "inducing or compelling" large corporations to submit "to registry and to proper publicity regulations and supervision of the Department of Commerce and Labor."[220]

The first year of Taft's presidency showed little progress on the chartering front, however, as the Administration focused its efforts on enacting a corporate income tax.[221] In early 1910, once the corporation tax had been enacted, Taft formally proposed an incorporation law covering all firms engaged in interstate commerce capitalized at $100,000 or more.[222] This proposal, which was introduced in Congress as the "Clark-Parker bills,"[223] would have subjected large corporations to structural and operational constraints, but

[218] Democratic Party Platform of 1908 (July 7, 1908), *in* AMERICAN PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley, eds., 2017), http://www.presidency.ucsb.edu/ws/?pid=29589 [perma.cc/p3qn-8rmp].

[219] Republican Party Platform of 1908 (June 16, 1908), *in* AMERICAN PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley, eds., 2017), http://www.presidency.ucsb.edu/ws/?pid=29632 [perma.cc/g3aw-6mqf].

[220] William H. Taft, Address Accepting the Republican Presidential Nomination (July 28, 1908), *in* AMERICAN PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley, eds., 2017), http://www.presidency.ucsb.edu/ws/index.php?pid=76222 [perma.cc/ezm5-vf7l].

[221] *See infra* Section IV.C.

[222] Urofsky, *supra* note 16, at 180–81.

[223] The Clark-Parker bills were named after Administration allies who sponsored the legislation: Senator Clarence Clark (R-WY), who introduced a bill in the Senate, S. 6186, 61st Cong. (1910), and Representative Richard Wayne Parker (R-NJ), who introduced the same bill in the House, H.R. 20142, 61st Cong. (1910). As discussed below, Parker's support was particularly notable, as he represented the state of New Jersey.

would also have protected corporations from state and federal antitrust laws. Taft heralded the proposal as beneficial both to individual corporations and the broader economy, emphasizing the economic benefits of industrial consolidation.[224] Business interests praised the proposal and the legal certainty that it offered.[225] The measure was opposed by the insurgent wing of the President's own party, who wanted a stricter, more punitive approach to corporate regulation.[226] Allying themselves with anti-corporate Democrats, these insurgent Republicans demanded an amendment allowing the government to revoke federal charters, which would have provided a means of punishing corporations that acted against the public interest.[227] A revocation provision was unacceptable to the corporatist reformers supporting the bill, as it undermined the very legal certainty that business interests most desired.[228] The legislation was thus condemned to yet another congressional stalemate, in which Taft could do little to effectively intervene.

The failure of the Clark-Parker bills speaks to the awkward position of the Taft Administration, which had managed to offend both business conservatives and economically progressive Republicans. The history of the bills also highlights an intriguing feature of the political environment, however: the lack of organized political resistance to federal legislation from New Jersey. Given the

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224 *See* William H. Taft, Special Message (Jan. 7, 1910), *in* AMERICAN PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley, eds., 2017), http://www.presidency.ucsb.edu/ws/index.php?pid=68486 [perma.cc/3p5t-agxm].

225 *Topics in Wall Street*, N.Y. TIMES, Jan. 14, 1910, at 13.

226 In the politics of the era, "insurgent" Republicans were a large element within the Republican Party who advocated a distinctly progressive social, political, and economic agenda.

227 *Hard Fight Ahead on Taft Trust Bill*, N.Y. TIMES, Jan. 14, 1910, at 1; *Has Repeal Clause: Federal Incorporation Bill Strengthened*, N.Y. TRIB., Jan. 22, 1910, at 1; *Taft's Trust Bill Put in Final Form*, N.Y. TIMES, Jan. 28, 1910, at 5.

228 *Incorporation Bill Will Not Be Pushed*, L.A. TIMES, Feb. 8, 1910, at 1.

state's financial interest in attracting and maintaining corporate charters, one might have expected active opposition from New Jersey political figures. By displacing state corporate law—or by superimposing stricter national standards—federal legislation would have undermined the advantages of incorporating in New Jersey. Given the state's fiscal policies and the importance of corporate tax revenues, New Jersey politicians had strong incentives to oppose legislation at the federal level. Surprisingly, however, there is no evidence of such opposition either in congressional discussions or in journalistic coverage at the time. On the contrary, Richard Parker, a long-serving Representative from New Jersey, not only chaired the House Judiciary Committee that oversaw the Clark-Parker bills, but personally sponsored the legislation in cooperation with the President, which strongly suggests that at least some New Jersey politicians were motivated by non-parochial interests. This suggestion is strengthened by the political circumstances in which New Jersey lost its chartering crown to Delaware—when the New Jersey legislature suddenly passed several strict antitrust provisions in 1913.[229] These actions seem puzzling: Why did New Jersey political figures fail to protect the state's golden goose? The complacency of New Jersey politicians in the face of threats to the state's chartering leadership may have reflected the decreasing importance of franchise taxes to the state's budget.[230] According to the economic historian Christopher Grandy, a developing industrial economy and rapidly increasing population meant that corporate taxes were shrinking as a portion of New Jersey's total budget, particularly as the state funded infrastructure spending with inheritance, property, and railroad taxes.[231] As the state became less reliant on

[229] These provisions, known as the "seven sisters," had been advocated by outgoing governor Woodrow Wilson—a political figure with a distinctly national (rather than local) political agenda. The immediate result of these provisions was to drive corporations to relocate in Delaware. *See* Grandy, *supra* note 42, at 688–91.

[230] *Id.* at 685, 689.

[231] *Id.* at 689–91.

corporation revenues, legislators became more amenable to Wilsonian progressivism.[232]

Following the failure of the Clark-Parker bills, Taft continued to call for federal legislation, but his efforts are best described as dutiful, rather than enthusiastic. Comprising only two sentences, his request for a federal chartering act in his second annual address to Congress was perfunctory at best, seeming to acknowledge the unlikelihood of successful congressional action. Reminding Congress that he had previously recommended legislation, Taft merely stated, "I renew my recommendation in that behalf."[233]

Although the President himself seemed to have lost interest, large corporations and their political allies continued to lobby for corporatist legislation. These lobbying efforts remained intensive throughout the Taft Administration, eventually leading to further consideration of the chartering issue in Congress. The most notable lobbying efforts were led by the NCF, which conducted a survey of over 16,000 "representative Americans" (actually weighted toward businesspeople and other professionals) whom the NCF claimed overwhelmingly supported federal incorporation.[234] In 1911, the Senate Committee on

[232] This is consistent with Roberta Romano's explanation of Delaware's continuing dominance of incorporations. According to Romano, a small state such as Delaware, which derives a major portion of its revenues from corporation taxes, can more credibly commit to maintaining favorable corporate law. Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 277–78 (1985). In addition, scholars of American federalism have observed that state officials do not reliably promote state institutional interests. Developments in New Jersey may have been an example of state officials failing to defend state autonomy because federal regulation would advance their own "partisan, ideological, or constituent interests." Meriam Seifter, *States as Interest Groups in the Administrative Process*, 100 VA. L. REV. 953, 983 (2014).

[233] William H. Taft, Second Annual Message (Dec. 6, 1910), *in* AMERICAN PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley, eds., 2017), http://www.presidency.ucsb.edu/ws/index.php?pid=29551 [perma.cc/rzj4-6b6v].

[234] *See generally* DEP'T ON REGULATION OF INDUS. CORPS. OF THE NAT'L CIVIC FED'N, THE TRUST PROBLEM (1912).

Interstate Commerce responded to NCF lobbying by holding hearings on federal control over interstate corporations. These hearings addressed a variety of approaches to the corporation issue, with particular emphasis on federal licensing or direct federal incorporation. They featured copious amounts of testimony from NCF-affiliated business representatives, many of whom continued to advocate for protective federal law. Much of this testimony advocated federal protection not just from state antitrust prosecution, but from price competition as well. Seth Low (the NCF's president) called for a federal licensing system that would have allowed horizontal combinations and even explicit price fixing, so long as such combinations and collusive pricing were approved by a federal agency.[235] Elbert Gary, of U.S. Steel, favored a somewhat stricter licensing law, though he also envisioned the federal government approving combinations and pricing agreements (and possibly even setting prices itself). According to Gary, the Sherman Act subjected businesses to paralyzing uncertainty, since it was impossible to know prior to an enforcement action whether a given transaction was lawful. Gary also claimed that allowing firms to enter horizontal agreements would benefit the economy by reducing economically destructive "unrestrained" competition.[236] As a final example, coal industry lobbyist Walter Bogle called for protecting corporations from state statutes, while also allowing them to

[235] *See Control of Corporations, Persons, and Firms Engaged in Interstate Commerce: Hearing on S. 2941 Before the S. Comm. on Interstate Commerce*, 62nd Cong. 499–557 (1913) [hereinafter *Hearing on S. 2941*] (statement of Seth Low, President, National Civic Federation).

[236] *Id. at* 639–95, 726–30 (statement of Elbert H. Gary, Chairman and CEO, U.S. Steel Corp.). Gary's enthusiasm for price fixing was not merely academic. Between 1907 and 1911, he had presided over the "Gary dinners," industry gatherings at which American steel companies reached collusive (if informal) pricing agreements. These meetings had enjoyed the tacit blessing of the Roosevelt Administration, and were not challenged under the Sherman Act until the stricter antitrust enforcement of the Taft presidency. Gary's statist vision of business regulation was similar to that of Roosevelt, and the two men maintained a friendly relationship throughout Roosevelt's tenure.

enter into explicit price fixing agreements. Bogle's testimony was representative of many witnesses before the committee, arguing that federal legislation should "eliminate or destroy disastrous competition."[237]

These various proposals were coolly received by the Committee on Interstate Commerce, which saw little reason to grant legal protections to already-powerful corporations and which rejected the broadly statist implications of many of the witnesses' testimony. Indeed, the Senate was more favorably disposed to moving in the opposite direction, by strengthening the Sherman Act and more tightly regulating combinations. To the disappointment of big business, President Wilson adopted this approach in 1914.[238] The corporatist vision would not be realized, either during the Taft Administration or after.

B. Anti-Corporate Proposals

The Committee on Interstate Commerce also considered anti-corporate proposals. While the NCF was lobbying for corporatist legislation, Democrats and insurgent Republicans also introduced several bills. The most politically significant of these bills were inspired by the writings of Robert R. Reed, a New York attorney who had published an influential incorporation proposal in 1909.[239] Reed's perspective was diametrically opposed to the goals of the NCF. Reed believed that monopoly power would only become *more* dangerous if domesticated by the federal government. Rather than seeking to control corporations through centralized regulation, which would constitute "the beginning of the end of those sound principals of government which are our special heritage as a people," Reed advocated strictly limiting

[237] *Id.* at 2323–24 (statement of Walter S. Bogle, Coal Operator).

[238] In addition to creating the FTC, the Federal Trade Commission Act of 1914 prohibited a number of "unfair" trade practices. Similarly, the Clayton Act (of the same year) strengthened federal antitrust law by prohibiting certain acquisition transactions as well as "incipient" monopolization.

[239] *See* Robert R. Reed, *American Democracy and Corporate Reform*, ATLANTIC, Jan. 1909, at 114.

the size and scope of corporations themselves.[240] Although none of the bills inspired by Reed's writings became law, they illustrate the deep divide between corporatist and anti-corporate ideologies.

Among Reed-inspired bills, the proposal that attracted the greatest support was the so-called Williams Bill, introduced in 1911 by Senator John Sharp Williams (D-MS).[241] In its original form, the Williams Bill was not an incorporation measure per se, in that it nominally preserved the existing system of state corporation acts. However, the bill included strict rules regarding the business activities, governance, and capitalization of any corporation engaged in interstate commerce, such that the corporate laws of the several states would have been rendered largely irrelevant. The bill attracted little attention when first introduced in Congress, but was taken more seriously when Williams reintroduced a revised version in 1912, when it was assigned for consideration to the Committee on Interstate Commerce.[242]

In presenting his bill to the Committee, Williams emphasized Robert R. Reed's direct influence on the legislation. Not only had Williams drawn inspiration from Reed's articles, he had directly corresponded with Reed throughout the drafting process and gave the New Yorker substantial credit for formulating the details of the bill.[243] The bill reflected both men's view that government and business should be kept separate, and that corporate regulation was best administered through non-discretionary statutory rules. Claiming to be an opponent of centralization, Williams insisted that his bill was *not* a federal incorporation measure, even though its implementation would federalize most aspects of corporate law. This incongruence notwithstanding, the bill did address Williams's fear of business/government corruption by removing discretionary

240 *Id.*

241 S. 1377, 62nd Cong. (1911).

242 S. 4747, 62nd Cong. (1912).

243 *Hearing on S. 2941, supra* note 235, at 2503–05 (statement of Sen. John Sharp Williams).

decision making from the hands of the federal executive. The bill set forth clear, narrow, *ex ante* limits on corporations that no government official could waive, modify, or reinterpret. Criticizing the regulatory proposals favored by many Republicans, Williams warned, "I can imagine nothing more dangerous to the American Republic than control of great corporations by a Federal bureau subject in its turn to a political administration of either party."[244]

Reed himself also testified in support of the Williams Bill. Like Williams, Reed insisted that the legislation did not federalize corporate law. In Reed's view, the real issue was not state versus federal law, but rather the distinction between *ex ante* legal rules, which would clearly and specifically limit corporate abuses, and *ex post* discretion over the enforcement of malleable standards, which lent itself to a dangerous intercourse of government and corporate power.[245] Reed's perspective on corporations was shared by many of the nation's newspapers, and several editorials were entered into the legislative record. The *Indianapolis Star*, for example, criticized protective regulation, calling instead for a "punitive and prohibitive" federal corporation act.[246] The *Grand Rapids Herald* expressed a similar view, praising Reed's plan for "radical reform."[247] The *Pittsburg Dispatch* supported vesting corporate law in the federal government, thereby freeing it from state-level corruption and restoring its focus on the public interest.[248] This support for Reed's proposals reflected widespread public demand for strict, forceful, and public-oriented legislation.

Notwithstanding this support, the Committee on Interstate Commerce declined to report any corporation bill, whether of the NCF or the Williams/Reed variety. Given the major differences of opinion regarding the basic goals of corporate regulation, the committee concluded that federal

[244] *Id.* at 2508 (quoting an earlier letter to Congress).

[245] *See id.* at 446–72 (statement of Robert R. Reed, Attorney).

[246] *Id.* at 2515 (statement of Sen. John Sharp Williams).

[247] *Id.* at 2516.

[248] *Id.* at 2517.

legislation was "neither necessary nor desirable."[249] In explaining its decision, the committee emphasized the intellectual divide between the two sides of the debate, which it characterized as an ideological contest between "competition," on the one hand, and "regulated monopoly or concentration," on the other.[250] Acknowledging that "there are many distinguished students and highly trained thinkers who believe that the age of competition is past," the committee nonetheless rejected the NCF's proposals for government supervision of output and pricing agreements.[251] The committee was also unwilling to support restrictive measures such as the Williams Bill. Given the difficulty of reaching political agreement on any form of corporate legislation, the Williams Bill was no more viable than the pro-corporate NCF proposals. Rather than support either, the committee issued a vague recommendation to convert the Bureau of Corporations into an independent commission tasked with investigating corporations, enforcing federal antitrust law, and providing advance review of mergers and combinations.[252] That the committee sought to defer any actual policymaking to a hypothetical future commission, the powers of which would be an unlikely combination of both anti-corporate and corporatist reform proposals, is testament to the political difficulties of corporate legislation during the Taft Administration. Once again, federal chartering had been rendered politically infeasible—not by any particular support for the existing system of state corporate law—but rather by intractable disagreement over the nature of its replacement.

C. Successful Enactment of the Corporation Tax

Although the chartering efforts of the Taft Administration failed, Taft *did* succeed in working with Congress to pass an alternate form of corporate legislation.

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[249] S. REP. NO. 62-1326, at 2 (1913).

[250] *Id.* at 2–3.

[251] *Id.* at 3.

[252] *Id.* at 12–13.

In 1909, the Administration oversaw passage of a federal corporate income tax—the immediate predecessor to the personal income tax of 1913.[253] While primarily a tax measure, the 1909 Act also responded to more general demands for corporate reform, and its enactment had the practical effect of reducing pressure for broader legislation.

As Marjorie Kornhauser has documented, the corporation tax of 1909 advanced several progressive policy objectives, including mandatory corporate publicity and reduced overcapitalization.[254] Partly due to these objectives, the tax was an unusual piece of legislation, serving multiple political goals that were often at cross-purposes. Indeed, the tax itself had originally been conceived by conservative Republicans as a means of deflecting political pressure for a federal personal income tax. Facing growing criticism of economic inequality and mounting demands for federal income taxation, many congressional Republicans believed a (small) corporate income tax was preferable to enactment of a "radical" personal income tax. During the legislative process, however, this deflection strategy was joined together with debates over corporate law, and the corporation tax acquired an additional aspect as a mild form of corporate regulation.[255] Under the new tax law, corporations were required to submit financial information to the federal government, achieving—to a significant degree—the publicity desired by corporate reformers.[256] The tax was also designed to discourage overcapitalization and overleveraging by limiting the amount of interest on debt that corporations could deduct from taxable income. Specifically, interest deduction was

[253] Payne-Aldrich Tariff Act of 1909, Pub. L. No. 61-5, § 38, 36 Stat. 11 (1909) (providing revenue, equalizing duties, and encouraging the industries of the United States among other purposes). "Although Congress characterized this tax as a special excise tax on corporate profits, it was a corporate income tax for all intents and purposes." Hutchison, *supra* note 19, at 102 n.19.

[254] *See generally* Marjorie E. Kornhauser, *Corporate Regulation and the Origins of the Corporate Income Tax*, 66 IND. L.J. 53 (1990).

[255] *Id.* at 94–114.

[256] § 38, 36 Stat. at 112–17 (providing revenue, equalizing duties, and encouraging the industries of the United States among other purposes).

limited to debt "not exceeding paid-up capital," reducing the incentives for corporations to carry large amounts of debt or unpaid stock in their capital structures.[257]

The tax's disclosure requirement addressed a variety of corporate evils, including monopolistic pricing, abusive trade practices, and the sale of overvalued stock. Although protecting investors from overcapitalization (that is, protecting them from the sale of overpriced stock) was an early motivation for the Act, the final version focused on disclosure to the government, rather than disclosure to the general public. Earlier versions included a provision that all corporate tax returns "and all documentary evidence and notes of testimony taken and filed in connection therewith, shall constitute public records and be open to inspection as such."[258] This language providing for public inspection was removed from the final bill, however. In addition, the final version prohibited federal officials from disclosing any corporate information without authorization from the President.[259] This change was a direct response to conservative opposition to public disclosure—in the view of many business figures, disclosure to the government was more acceptable than disclosure to the general public. Although many politicians supported corporate publicity, and some specifically supported shareholder disclosure, investor protection was simply not a political priority and was easily discarded as part of the political bargaining process.

As enacted, the corporation tax satisfied some of the demand for federal corporate regulation, but it was not a substitute for comprehensive federal law. Many progressive lawmakers had sought broader publicity requirements and were therefore disappointed with the final version of the Act. More to the point, the tax provided little in the way of substantive regulation, and beyond providing the

[257] Kornhauser, *supra* note 254, at 113.

[258] *Id.*

[259] § 38(7), 36 Stat. at 116 (providing revenue, equalizing duties, and encouraging the industries of the United States among other purposes). Kornhauser, *supra* note 254, at 113–14.

information necessary for assessing tax liability, it was unclear as to what purpose its reporting provisions were meant to serve. The best evidence of the Act's inadequacy in the view of many corporate reformers was the fact that federal chartering legislation continued to be introduced in Congress.[260]

Nevertheless, the tax's symbolism remained important. It demonstrated that the Republican-controlled government was willing to enact corporate legislation, while at the same time assuring the business community that it would not enact anything radical. Despite disappointment with the tax's relatively weak substantive provisions, it likely diffused at least some of the energy behind more ambitious chartering proposals. The enactment of additional reforms under the Woodrow Wilson Administration—combined with the seeming impossibility of agreement on federal chartering—would eventually lead to the end of chartering as a congressional legislative goal. Ultimately, in an era marked by ambitious reforms, the chartering movement would distinguish itself, both in the breadth of its political appeal and the decisiveness of its failure.

V. CONCLUSION

Woodrow Wilson's victory in the election of 1912 spelled the end of federal chartering as a viable political movement. Despite his political identity as a Democrat and his support among anti-corporate populists (including William Jennings Bryan), Wilson himself showed little enthusiasm for any form of federal chartering. Like many congressional Democrats, Wilson rejected the Rooseveltian distinction between "good" and "bad" industrial trusts, and was suspicious of big business's enthusiasm for federal regulation. Unlike his party's populist wing, however, Wilson accepted the inevitability of large, integrated corporations and declined to support legislative attempts to dramatically

[260] Nor did the corporation tax placate personal income tax proponents. Following the Sixteenth Amendment, a personal income tax was enacted in 1913.

limit their economic power. Although Wilson's political discourse included its share of anti-corporate rhetoric, a strict system of federal chartering was simply not on his political agenda.[261]

The Wilson Administration did enact several alternative regulatory measures, however, that reduced the demand for comprehensive legislation. Under Wilson, the Senate finally adopted the Committee on Interstate Commerce's recommendation for an independent commission by enacting the Federal Trade Commission Act in September 1914.[262] Less than a month later, the Senate enacted the Clayton Act, which reinforced the Sherman Act by prohibiting several types of "unfair" trade practices as well as "incipient" monopolization.[263] In tandem, these two acts achieved important goals of both factions of corporate reformers. The Clayton Act appealed to anti-corporate populists who demanded stronger antitrust enforcement. The creation of the FTC, on the other hand, gave many business figures the greater outcome certainty of a centralized, non-judicial regulatory body. Although neither Act could fully satisfy corporate reformers' conflicting goals, they nevertheless dulled the political momentum behind more ambitious chartering proposals. Federal incorporation was eclipsed altogether by the economic and political exigencies of World War I, and remained forgotten during the stock market boom and economic prosperity of the 1920s. Moreover, with the rise of widespread public shareholding in the decade following the war, corporate law would come to embody a new and different political character. As the public became increasingly involved with corporations as *investors*, their protection as such became the primary goal of federal

[261] The new President endorsed none of the seven incorporation bills introduced in the year following his inauguration. Urofsky, *supra* note 16, at 182.

[262] Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41–58 (2012)).

[263] Clayton Act, ch. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53 (2012)).

corporate regulation—a change evidenced by the federal securities laws of the early 1930s.

Although the Progressive Era was the period of strongest support for federal chartering, similar proposals have reemerged twice since in American history—first during the New Deal, and again following the corporate governance scandals of the 1970s. In 1935, as the country struggled to recover from the Great Depression, Senator Joseph O'Mahoney (D-WY) proposed a federal licensing system that explicitly borrowed its core provisions from the Williams Bill of 1912.[264] Responding to the political shift toward greater concern for investors, O'Mahoney framed his bill in terms of protecting corporate shareholders. In presenting his bill to the Senate, O'Mahoney explained that its goal was not only "to maintain high standards of living for labor [and] to make possible the adoption of fair methods of competition," but also "to protect the investor from the obvious abuses of corporate power from which the country has suffered for a generation."[265] However, O'Mahoney's bill sought to achieve these goals by way of a mandatory federal license that would have required strict adherence with labor, antitrust, and consumer protection standards—many of which were directly at odds with shareholders' economic interests. When first introduced, O'Mahoney's proposal attracted considerable political support and seemed to have a real possibility of eventually becoming law. Cast by its supporters as a spiritual successor to the National Industrial Recovery Act, the proposal was variously endorsed by President Roosevelt, the American Federation of Labor, and the influential Senator William Borah (R-ID) (who would co-sponsor a revised version of the bill). But as the proposal advanced in Congress, it was bitterly opposed by business interests, which had set themselves in committed opposition to any and all New Deal legislation.[266] Even the mainstream press

[264] S. 3363, 74th Cong. (1935).

[265] 79 CONG. REC. 12,551 (1935).

[266] *Borah License Bill Lashed as Dictator Peril*, CHI. DAILY TRIB., Dec. 2, 1937, at 29; *Assail License Bill as Doom of Home Rule*, CHI. DAILY TRIB., Feb. 7, 1938, at 21; *Chamber Denounces Corporation Licensing*, L.A.

harshly criticized the measure, reflecting broader disillusionment with the ambitious policies of the "second" New Deal.[267]

Beset by political criticism, the bill became stranded in Congress. In 1938, Roosevelt abandoned the fight for his most controversial economic proposals and instead recommended, as a face-saving measure, creation of the Temporary National Economic Committee (the "TNEC"), a special investigative body chaired by O'Mahoney and charged with recommending economic legislation. But the onset of World War II again sidelined corporate reform. After the war, O'Mahoney resumed his campaign to implement the TNEC's legislative recommendations. But, given the surprisingly strong postwar economy, there was no longer significant political interest in fundamentally reforming corporate law. Although the decades following World War II saw major tax and antitrust legislation, Congress appeared increasingly willing to leave corporate law to the states.

Federal chartering's second revival occurred in the mid-1970s, following a rash of corporate governance scandals at major American corporations. Highly publicized instances of fraud, negligence, and managerial incompetence at several major firms—combined with revelations of foreign bribery and illegal campaign contributions—led to new proposals for federalizing corporate law. In 1974, Columbia law professor and former SEC Chairman William Cary called for federal minimum standards to be imposed on state corporations.[268] In presenting his proposal, Cary specifically criticized Delaware, denouncing the system of state corporate law "in

TIMES, Jan. 30, 1938, at 7; *Manufacturers Attack Federal Licensing Bill*, N.Y. HERALD TRIB., Feb. 7, 1938, at 5; *Federal Licensing of Trade Opposed*, N.Y. TIMES, Feb. 10, 1938, at 4.

267 *A Bill To Halt Progress*, CHI. DAILY TRIB., Jan. 9, 1938, at 16; *The Licensing Threat*, N.Y. HERALD TRIB., Dec. 31, 1937; *Out of the Moth Balls*, N.Y. HERALD TRIB., Feb. 8, 1938, at 10. Historians refer to Roosevelt's ambitious economic proposals of 1935–1936 as the "second" New Deal (as distinguished from the emergency measures of the original New Deal). Following the onset of a "double dip" recession in 1937–1938, these proposals faced significant political backlash.

268 Cary, *supra* note 11, at 700–03.

which a pygmy among the 50 states prescribes, interprets, and indeed denigrates national corporate policy as an incentive to encourage incorporation within its borders."[269] Cary's proposal sparked a vigorous debate among legal scholars but had less of an impact in politics than in academia.[270]

A more politically salient proposal came in 1976, when the consumer advocate Ralph Nader—together with his associates Mark Green and Joel Seligman—proposed federal incorporation of all major industrial, retail, and transportation firms.[271] In addition to federalizing corporations outright, the Nader proposal called for a dramatic restructuring of corporate boards, assigning each director specific oversight over one of several "corporate responsibility" issues, including employee welfare, consumer protection, and environmental responsibility.[272] Nader's proposal was published in the form of an accessible, well-written monograph, which partly inspired congressional hearings on federal incorporation in 1976 and 1977.[273] Although Nader's proposal was not the sole subject of the hearings, it featured prominently in witness testimony, either as an inspiration or a foil (depending on the witness). In any case, these hearings failed to culminate in any concrete legislation, and the renascent interest in federal incorporation soon faded from the political scene. Part of the reason for this lack of legislative action was the ambitious nature of the Nader proposal itself, which sought to reform,

[269] *Id.* at 701.

[270] The major rejoinder to Cary's proposal came from Yale law professor Ralph Winter, who argued that Delaware law provided an economically efficient level of shareholder protection. Winter, *supra* note 12, at 254. This debate over the efficiency of Delaware law has become a defining feature of the corporate law literature. *See supra* notes 8–12 and accompanying text.

[271] NADER ET AL., *supra* note 11, at 62–74.

[272] *Id.*

[273] *Corporate Rights and Responsibilities: Hearings Before the Comm. of Commerce*, 94th Cong. (1976); *The Role of the Shareholder in the Corporate World: Hearing Before the Subcomm. on Citizens and S'holders Rights and Remedies of the Comm. on the Judiciary*, 95th Cong. (1977).

in dramatic fashion, nearly every aspect of corporate law, reaching far beyond the practical limits of what was politically feasible at the time. Perhaps more damning, the various objectives of the Nader plan were often in direct (if unacknowledged) conflict. Nader presented his chartering proposal as protecting the interests of shareholders, for example, while at the same time advocating expansive duties to consumers, labor, and community interests that would have almost certainly reduced shareholder value. Echoing both the New Deal-era O'Mahoney Bill and the Progressive Era chartering movement, Nader's proposal was undermined by mutually inconsistent goals.

Although debates over the merits of Delaware law continue,[274] and federal incorporation proposals still occasionally appear in the academic literature,[275] comprehensive federalization of corporate law has not been politically viable since the 1970s. This is partly due to the piecemeal federalization that has occurred over the last several decades. Developments in federal securities regulation, on the part of both Congress and the SEC, have made increasing inroads into the internal governance of state-chartered corporations, steadily reducing the practical significance of placing corporations under direct federal control.

Even more important has been the long-term shift in academic and political opinion regarding the fundamental policy objectives that corporate law is meant to achieve. During the Progressive Era, corporate law was often conceived as defining the fundamental relationship between corporations and society. Differing perspectives on this relationship gave rise to the political conflicts that defined the federal chartering movement. Anti-corporate reformers believed corporations should be limited to the small,

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[274] *See supra* notes 8–12 and accompanying text.

[275] *See, e.g.*, Bebchuk & Hamdani, *supra* note 13, at 610–14; George W. Dent, Jr., *For Optional Federal Incorporation*, 35 J. CORP. L. 499, 499–500 (2010); Steven A. Ramirez, *The End of Corporate Governance Law: Optimizing Regulatory Structures for a Race to the Top*, 24 YALE J. ON REG. 313, 347–58 (2007).

independent businesses that had traditionally formed the American economy. They therefore conceived the purpose of corporate law to be restricting corporations' economic and political power. For their part, corporatist reformers saw large corporations as an inevitable feature of modern economic life, holding within them the economic potential to benefit all strata of American society. They therefore considered corporate law a protective form of regulation, curbing corporations' excesses, perhaps, but also providing them with legal certainty. The modern conception of the corporation as a politically neutral nexus of contracts—and the emphasis of corporate law on reducing the agency costs of professional management—simply did not exist, partly due to a closer identity between the management and ownership of many large firms, but also due to a fundamentally different political conception of corporations themselves. Rather than simply a legal technology for organizing business and allocating capital, corporations were viewed, whether positively or negatively, as the political embodiment of economic change.

Today, popular hostility to corporations remains a powerful force in American politics, but it no longer plays a meaningful role in actual corporate lawmaking.[276] The

[276] In general, popular agitation has shifted from the existence of large corporations themselves to more specific manifestations of their economic and political influence. *Citizens United*, corporate tax avoidance, and financial sector regulation have all become causes célèbres among the political left (and among some on the right). Hillary Clinton—widely considered a centrist—addressed each of these issues in her 2016 presidential campaign, illustrating the populist influence on contemporary mainstream politics. *See* Benjamin Oreskes, *Clinton Pledges Constitutional Amendment to Overturn* Citizens United *Ruling*, POLITICO (July 16, 2016, 1:28 PM), http://www.politico.com/story/2016/07/hillary-clinton-citizens-united-225658 [perma.cc/FBW8-ZHMU]; Bob Bryan, *Hillary Clinton Rips into Wall Street and Corporate America in a Fiery Speech*, BUS. INSIDER (Oct. 3, 2016, 5:47 PM), http://www.businessinsider.com/hillary-clinton-rips-wall-street-corporations-wells-fargo-in-speech-2016-10 [perma.cc/7NEP-JUF8]. Even Donald Trump criticized Wall Street on the campaign trail, though his administration now favors reducing financial regulation. *See* Brent A. Sutton, *Eight Questions About the Future of Banking Regulation Under*

central issue of modern corporate law is no longer the corporation's political legitimacy, but rather the narrower concern of maximizing shareholder value. In an economy in which most Americans are directly or indirectly corporate investors,[277] this change in the focus of corporate law is entirely understandable. Moreover, assuming investor returns and social returns are at least roughly correlated, this shift is likely a positive development from a broader normative policy perspective. In terms of our historical understanding of the evolution of corporate law, however, it risks obscuring the much different perspectives of an earlier political era, in which the public interest and the interests of investors were often considered to be in conflict, and in which the former was granted intellectual and political priority over the latter. It is important to remember these earlier perspectives and the regulatory visions to which they aspired, if only to realize that modern corporate law could have taken a different form.

Had corporate law been successfully federalized in the early years of the twentieth century, it may have evolved to reflect the same economic concerns that dominate corporate law today. The institutional structure of American business would surely look much different, however. It would likely be more uniform, less flexible, and subject to stricter national standards. It would likely be more closely attuned to the policy agenda of the federal government, and therefore beholden to the changing priorities of changing political leadership. Finally, the legal issues historically resolved by the Delaware judiciary would likely have been instead

Trump, WASH. POST: MONKEY CAGE (Nov. 23, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/11/23/8-questions-about-the-future-of-banking-regulation-under-trump/ [perma.cc/U8ZW-GXRG].

277 If not through direct exposure to the stock market (mutual funds, pension funds, etc.), then through health, life, or property-casualty insurance. Judge Leo Strine suggests that ordinary Americans' exposure to capital markets constitutes a form of "forced capitalism." Leo E. Strine, Jr., *Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labor in a More Rational System of Corporate Governance*, 33 J. CORP. L. 1, 4–5 (2007).

resolved by non-specialist federal courts. Whether these institutional differences would have been for better or for worse, it is important to emphasize that their failure to occur was *not* due to a commitment to corporate law federalism—a concept of relatively recent vintage espoused by neither side of the chartering debate. Both anti-corporate and corporatist reformers sought to replace the state-based system, but held fundamentally different notions regarding the nature of its successor. In the wake of this political conflict between opposing regulatory perspectives, the liberal conception of corporate law as embodied by the New Jersey act—in which size, structure, and business operations are freely determined by private decision making—has evolved into a functional and (for the most part) stable national system, despite the absence of direct supervision on the part of the federal government. Were they alive to see it, this result would come as a profound surprise to the corporate reformers of the Progressive Era, who saw federalization as the necessary, inevitable future of corporate law.