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CORPORATE LAW FEDERALISM IN HISTORICAL CONTEXT: COMPARING CANADA AND THE UNITED STATES

*Camden Hutchison**

Although American and Canadian corporate law share many similarities, they are also marked by important institutional differences. Among the most notable are the differing roles of federal versus state/provincial policymaking in the two countries: while American corporate law has been deeply influenced by jurisdictional competition among the states, Canadian law has instead been shaped by federal legislative activity, as seen today in the standardizing influence of the Canada Business Corporations Act. These different institutional histories have led to distinct evolutionary paths, with important substantive consequences for contemporary corporate law.

Despite considerable academic attention to the subject of corporate law federalism, these historical differences between Canada and the United States are not well understood. This article explains why jurisdictional competition arose in the United States but not Canada by examining the "Great Merger Movement" of the late nineteenth and early twentieth centuries. Specifically, this article makes three related arguments: (1) in the United States, the rise of jurisdictional competition was driven not by corporate governance issues, as is often assumed, but rather by the desire to avoid state and federal antitrust restrictions; (2) for a variety of reasons, cartelization and price fixing were more viable in Canada than the United States, delaying the onset of consolidative mergers; and (3) when the Canadian merger movement finally arrived, Canadian federal company law readily facilitated industrial consolidation, reducing the incentives for individual provinces to compete to attract company charters.

The different experiences of Canada and the United States reveal an intriguing historical irony—while Canadian corporate law is sometimes criticized as lacking in competitive responsiveness, the roots of this complacency are closely tied to the turn-of-the-century merger movement, in which Canadian law was less restrictive than its traditional American counterpart.

Malgré les nombreuses similitudes que partagent le droit des affaires américain et canadien, ils sont aussi marqués par des différences institutionnelles importantes. On compte parmi les plus notables les rôles du fédéral par rapport à ceux des états ou des provinces dans l'élaboration des politiques des deux pays; tandis que le droit des affaires américain fut grandement influencé par une compétition juridictionnelle entre les états, le droit canadien a plutôt été façonné par l'activité législative fédérale, tel qu'on le voit aujourd'hui avec l'influence de standardisation de la *Loi canadienne sur les sociétés par actions*.

En dépit de l'attention considérable des académiciens sur le sujet du fédéralisme en droit des affaires, ces différences historiques entre le Canada et les États-Unis ne sont pas très bien comprises. Cet article entend expliquer pourquoi une compétition juridictionnelle est survenue aux États-Unis et non au Canada, en analysant le « Grand mouvement des fusions » de la fin du dix-neuvième et du début du vingtième siècle. Plus particulièrement, cet article propose trois arguments : (1) aux États-Unis, la montée de la compétition juridictionnelle était motivée non pas par les problèmes de gouvernance des entreprises, tel qu'on le suppose souvent, mais plutôt par le désir d'éviter les restrictions anti-trust étatiques et fédérales; (2) pour plusieurs raisons, la cartellisation et la fixation des prix étaient plus viables au Canada qu'aux États-Unis, entraînant un retard à l'émergence des fusions par consolidation; et (3) lorsque le mouvement canadien des fusions survint finalement, les lois sur les compagnies fédérales canadiennes ont grandement facilité la consolidation industrielle, réduisant de ce fait les incitatifs pour les provinces à compétitionner seules pour attirer les compagnies à charte.

Les expériences différentes du Canada et des États-Unis révèlent une intéressante ironie historique — alors que le droit des affaires canadien est parfois critiqué pour son manque de réactivité à la concurrence, les racines de cette complaisance sont étroitement reliées au tournant du siècle du mouvement des fusions, lors duquel le droit canadien était moins restrictif que sa contrepartie américaine conventionnelle.

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Introduction

A defining feature of American corporate law is its decentralized institutional structure. Alone among developed nations, the United States has never adopted a national corporation law, leaving the formation and governance of business organizations to the laws of the individual states. This subnational system may seem quaint in an era of globalized economic activity, but it has given rise to one of the world's most influential business jurisdictions—the state of Delaware.[1] Indeed, Delaware's success is widely attributed to the nature of the US system itself, which has incentivized states to tailor their laws in order to attract out-of-state firms.[2] Many scholars argue that state competition has undermined corporate governance standards,[3] while others praise it as an important source of

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1 Today, Delaware is the legal home to over one million business entities (many of which are based outside the United States), including over two-thirds of the Fortune 500. See Jeffrey W Bullock, "Delaware Division of Corporations 2015 Annual Report" (2015) at 1, online: *State of Delaware* <corpfiles.delaware.gov> [perma.cc/ZP3J-VAMU].

2 Under the US constitutional system, corporations organized under the laws of a particular state are free to do business in any other state, regardless of geographic location. For practical purposes, this ability means corporations may freely select their preferred body of corporate law. See Jesse H Choper, John C Coffee, Jr, & Ronald J Gilson, *Cases and Materials on Corporations*, 8th ed (New York: Wolters Kluwer Law & Business, 2013) at 229–34. Moreover, because states obtain economic benefits by attracting out-of-state firms—including incorporation fees, franchise taxes, and business for corporate service providers—states have strong incentives to adapt their laws to the preferences of corporations themselves. As discussed in this article, Delaware has long been the most successful participant in this competition. For the classic analyses of state law competition, see generally William L Cary, "Federalism and Corporate Law: Reflections upon Delaware" (1974) 83:4 Yale LJ 663; Ralph K Winter, Jr, "State Law, Shareholder Protection, and the Theory of the Corporation" (1977) 6:2 J Leg Stud 251 [Winter, "State Law, Shareholder Protection"]; Roberta Romano, *The Genius of American Corporate Law* (Washington, DC: American Enterprise Institute Press, 1993) [Romano, *The Genius of American Corporate Law*].

3 For a variety of critical perspectives on state law competition, see e.g. Oren Bar-Gill, Michal Barzuza & Lucian Bebchuk, "The Market for Corporate Law" (2006) 162:1 J Institutional & Theor Econ 134 at 137–41, 145–46; Lucian Arye Bebchuk, "Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law" (1992) 105:7 Harv L Rev 1435 at 1440–45; Lucian Bebchuk, Alma Cohen & Allen Ferrell, "Does the Evidence Favor State Competition in Corporate Law?" (2002) 90:6 Cal L Rev 1775 at 1806–20; Lucian A Bebchuk & Assaf Hamdani, "Federal Corporate Law: Lessons From History" (2006) 106:7 Colum L Rev 1793 at 1823–38; Cary, *supra* note 2; Ralph Nader, Mark Green & Joel Seligman, *Taming the Giant Corporation* (New York: WW Norton & Company, 1976) at 54–61; Donald E Schwartz, "Federalism and Corporate Governance" (1984) 45:3 Ohio St LJ 545 at 546–51; Joel Seligman, "A Brief History of Delaware's General Corporation Law of 1899" (1976) 1:2 Del J Corp L 249 at 283–87; Gordon G Young, "Federal Corporate Law, Federalism, and the Federal Courts" (1977) 41:3 Law & Contemp Probs 146 at 150–51.

economically efficient legal rules.[4] Regardless of perspective, nearly all agree that jurisdictional competition has profoundly shaped American law.[5]

Superficially, Canadian corporate law appears to share a similar decentralized character. In Canada, the provinces, territories, and federal government each have the power to form corporations, and—as in the United States—corporations are not required to be physically located in their "home" jurisdiction.[6] Despite these structural similarities, significant jurisdictional competition has never emerged in Canada. Indeed, Canadian corporate law has instead been characterized by increasing uniformity, particularly in recent decades.[7] Rather than develop their own distinct legal rules, many provinces have followed the *Canada Business*

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4 See e.g. Barry D Baysinger & Henry N Butler, "The Role of Corporate Law in the Theory of the Firm" (1985) 28:1 JL & Econ 179 at 184–91; Robert Daines, "Does Delaware Law Improve Firm Value?" (2001) 62:3 J Fin Econ 525; Frank H Easterbrook & Daniel R Fischel, *The Economic Structure of Corporate Law* (Cambridge, Mass: Harvard University Press, 1991) at 212–27; Daniel R Fischel, "The 'Race to the Bottom' Revisited: Reflections on Recent Developments in Delaware's Corporation Law" (1982) 76:6 Nw UL Rev 913; Roberta Romano, "Corporate Law as the Paradigm for Contractual Choice of Law" in FH Huckley, ed, *The Fall and Rise of Freedom of Contract* (Durham: Duke University Press, 1999) 370 at 373–74; Roberta Romano, "Law as a Product: Some Pieces of the Incorporation Puzzle" (1985) 1:2 JL Econ & Org 225 [Romano, "Law as a Product"]; Romano, *The Genius of American Corporate Law*, *supra* note 2 at 32–47; Ralph K Winter, *Government and the Corporation* (Washington, DC: American Enterprise Institute for Public Policy Research, 1978) at 28–42; Winter, "State Law, Shareholder Protection", *supra* note 2.

5 Although jurisdictional competition has been historically significant, it is doubtful whether any states seriously compete with Delaware today. See generally Marcel Kahan & Ehud Kamar, "The Myth of State Competition in Corporate Law" (2002) 55:3 Stan L Rev 679.

6 See Poonam Puri et al, *Cases, Materials and Notes on Partnerships and Canadian Business Corporations*, 6th ed (Toronto: Thomson Reuters, 2016) at 68–69, 167–71.

7 See Stanley M Beck et al, *Cases and Materials on Partnerships and Canadian Business Corporations* (Toronto: Carswell, 1983) at 152; Douglas J Cumming & Jeffrey G MacIntosh, "The Rationales Underlying Reincorporation and Implications for Canadian Corporations" (2002) 22:3 Intl Rev L & Econ 277 at 280 [Cumming & MacIntosh, "Rationales Underlying Reincorporation"]; Douglas J Cumming & Jeffrey G MacIntosh, "The Role of Interjurisdictional Competition in Shaping Canadian Corporate Law" (2000) 20:2 Intl Rev L & Econ 141 at 159–60, 189 [Cumming & MacIntosh, "Interjurisdictional Competition"]; Jeff MacIntosh, "The Role of Interjurisdictional Competition in Shaping Canadian Corporate Law: A Second Look" (1993) University of Toronto Law and Economics Working Paper No 18 at 22–23 [MacIntosh, "Working Paper"]; Puri et al, *supra* note 6 at 170–71; Romano, *The Genius of American Corporate Law*, *supra* note 2 at 118–28. Note, however, that competition can also result in uniformity (prices will be uniform in a perfectly competitive market, for example).

Corporations Act, a federal act passed in 1975 to modernize Canadian corporate law.[8]

In the United States, the costs and benefits of state competition have long been subject to academic debate. The question of whether state competition leads to greater or lesser economic efficiency—often referred to as the "race to the top" versus "race to the bottom" debate—is one of the classic research issues in American corporate legal scholarship.[9] Despite the attention it has received in the United States, the possibility of similar competition in Canada remains underexplored. For a time, the only published research on the subject was by Ronald Daniels, then at the University of Toronto. Writing in the early 1990s, Daniels questioned the benefits of standardization, a goal he saw as unduly emphasized by the Canadian corporate legal community.[10] In his article "Should Provinces Compete? The Case for a Competitive Corporate Law Market," Daniels argued in favour of jurisdictional competition in the model of the United States. Despite his enthusiasm, however, Daniels acknowledged institutional obstacles to greater provincial competition in Canada. According to Daniels, these obstacles included (1) the broad and overlapping jurisdiction of the provincial securities regulators and (2) the centralized appellate authority of the Supreme Court of Canada, both of which served to limit the development of distinctive provincial corporate law.[11]

In response to Daniels, Jeffrey MacIntosh and Douglas Cumming have expressed skepticism as to the viability of Canadian jurisdictional competition.[12] Unlike Daniels, who sees provincial conformity around the *CBCA* as the product of competitive pressures, MacIntosh and Cumming find little evidence that provinces compete for corporations. Employing a variety of statistical measures, the authors conclude that provincial legislatures have pursued a strategy of uniformity, not competition, and that a number of institutional barriers have discouraged provincial legal innova-

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8 RSC 1985, c C-44 [*CBCA*]. The current corporation acts of Alberta, Manitoba, New Brunswick, Newfoundland and Labrador, Ontario, Prince Edward Island, and Saskatchewan are based on the *CBCA*. British Columbia, Nova Scotia, and Quebec each have their own distinctive acts, though these have also been influenced by the *CBCA*.

9 See *supra* note 3 and note 4 and accompanying text.

10 See generally Ronald J Daniels, "Should Provinces Compete? The Case for a Competitive Corporate Law Market" (1991) 36:1 McGill LJ 130.

11 See *ibid* at 182–84, 186–88. Daniels also addressed (and dismissed) a number of other possible obstacles, including the inability of the provinces to realize minimum efficient scale, professional conservatism on the part of Canadian legal practitioners, and the geographic concentration of businesses in central/eastern Canada (*ibid* at 180–188).

12 See MacIntosh, "Working Paper", *supra* note 7; Cumming & MacIntosh, "Rationales Underlying Reincorporation", *supra* note 7 at 288–97; Cumming & MacIntosh, "Interjurisdictional Competition", *supra* note 7.

tion.[13] Like Daniels, MacIntosh and Cumming cite provincial securities regulation and the centralized appellate authority of the Supreme Court of Canada as factors undermining provincial competition.[14] But they also point to broader obstacles, including the relatively sparse body of Canadian corporate legal precedent (which encourages provincial courts to rely on cases from other provinces),[15] protectionist regulations of provincial law societies (which have discouraged Canadian lawyers from recommending out-of-province incorporation),[16] and a general lack of "competitive consciousness" among the Canadian legal and policy communities.[17] Writing from the American perspective, Roberta Romano has cited many of these same factors as discouraging jurisdictional competition in Canada.[18] Finally, Christopher Nicholls offers a simpler explanation—given the smaller size of the Canadian economy, there may not be enough revenue at stake to incentivize provinces to actively compete.[19] Ultimately, although perspectives on the issue vary, the existing literature broadly suggests that competition among the provinces has been limited by institutional factors distinctive to Canadian federalism.

Without disputing these factors, this article takes a different approach to the question of Canadian legal competition. Rather than analyzing the current institutional environment, this article provides a historical explanation of how that environment came to exist. More specifically, this article argues that divergent patterns of jurisdictional competition in Canada and the United States can be traced to the corporate merger movements of the late nineteenth and early twentieth centuries.[20] During this period,

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13 See Cumming & MacIntosh, "Interjurisdictional Competition", *supra* note 7.

14 See *ibid* at 154–56.

15 See *ibid* at 155.

16 See *ibid* at 169–71.

17 *Ibid* at 151.

18 See Romano, *The Genius of American Corporate Law, supra* note 2 at 118–28.

19 See Christopher C Nicholls, *Corporate Law* (Toronto: Emond Montgomery, 2005) at 35. But see Daniels, *supra* note 10 (who anticipates this argument in his original article at 180).

20 In the American historiography, this movement is referred to as the "Great Merger Movement." See e.g. Naomi R Lamoreaux, *The Great Merger Movement in American Business, 1895–1904* (Cambridge, Mass: Cambridge University Press, 1985). Although historians invariably describe this movement in terms of "mergers", relatively few transactions of the period were mergers (or amalgamations) in the legal sense. Under most corporation acts, mergers were restricted to domestic corporations incorporated in the same jurisdiction, limiting the usefulness of statutory mergers as a means of creating national firms. As discussed in this article, most national firms during the Great Merger Movement were created by stock or asset purchases. To minimize confusion and to remain consistent with the existing literature, this article adopts the historical convention of using the term "merger" to refer to any consolidation of two or more busi-

both Canada and the United States experienced unprecedented industrial consolidation, as thousands of formerly independent firms disappeared into "trusts" or "combines".[21] Although the merger movements in the two countries shared many similarities, they occurred within very different legal contexts. In the United States, prohibitions on consolidation at both the state and federal levels channeled businesses toward jurisdictions offering an "escape" from corporate merger restrictions. By the time of the Canadian merger movement, neither the federal government nor the individual provinces imposed meaningful limits on consolidation, and companies were generally free to merge and expand as they saw fit. Significantly, Canadian *federal* company legislation was relatively liberal,[22] such that a majority of the largest Canadian businesses chose to incorporate under federal law.[23] Thus, while legal conditions in the United States led to a "race" to dismantle corporate restrictions, there was less opportunity for Canadian provinces to offer similar advantages. In effect, the permissiveness of federal law precluded provincial competition.

Given current perceptions of Canadian corporate law, this history presents an intriguing irony: today, Canadian law is sometimes criticized as insufficiently attentive to business needs, and a number of scholars have suggested the benefits of a more competitive, US-style system.[24] Though

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nesses, no matter how consummated. Similarly, this article refers to the combined firms resulting from mergers as "combinations".

21 *Ibid*. See generally Gregory P Marchildon, *Profits and Politics: Beaverbrook and the Gilded Age of Canadian Finance* (Toronto: University of Toronto Press, 1996) at 245–59 [Marchildon, *Profits and Politics*]. The popular term for these combinations in the United States was "trusts," whereas in Canada they were referred to as "combines." Neither were technical terms, but were used generically to refer to large corporations (*ibid*). As discussed in this article, the timing of the merger movements in the two countries was somewhat different, with the first Canadian merger wave lagging the United States' by about a decade (*ibid* at 258). Similar merger movements also occurred in the United Kingdom and Germany, though on a smaller scale than in North America (*ibid* at 247–48).

22 For purposes of this article, the word "liberal" means legally permissive. Thus, Canadian law was "liberal" in that it placed few constraints on business activities.

23 See Part II B below. The Parliament of Canada adopted successive companies acts (providing for federal incorporation of joint stock companies) in 1869, 1877, 1902, and 1934. The current *CBCA* is a descendant of these earlier acts.

24 See Cumming & MacIntosh, "Interjurisdictional Competition", *supra* note 7 at 142; Daniels, *supra* note 10; Ronald J Daniels & Jeffrey G MacIntosh, "Toward a Distinctive Canadian Corporate Law Regime" (1991) 29:4 Osgoode Hall LJ 863 at 898–99; Stéphane Rousseau, "The Evolution of Corporate Law in Canada: Towards Regulatory Competition?" (2016) at 3, 10–13, online (pdf): *SSRN* <papers.ssrn.com/sol3/papers.cfm?abstract_id=2752131>. Many scholars have questioned recent corporate law decisions of the Supreme Court of Canada. Given the Court's authority over the Canadian judicial system, these criticisms raise questions regarding Canada's centralized corporate law jurisprudence. See e.g. Sarah P Bradley, "*BCE Inc. v. 1976 Debentureholders*:

not directly related, these criticisms run parallel to more general conceptions of Canadian law, particularly its greater solicitude for corporate social responsibility. These conceptions—that Canadian jurisprudence has rejected the shareholder primacy norm, that directors' duties are fundamentally tied to notions of the "good corporate citizen," and that Canadian courts are increasingly responsive to environmental, social, and community interests[25]—distinguish Canadian law, in the eyes of many scholars, from the more narrow focus on economic profits that has traditionally characterized American law.[26] Recent amendments to the *CBCA* have only strengthened this impression.[27] But while Canadian corporate law may be moving toward a broader conception of social responsibility, its focus during the early twentieth century could hardly have been more different.

The New Fiduciary Duties of Fair Treatment, Statutory Compliance and Good Corporate Citizenship?" (2009–2010) 41:2 Ottawa L Rev 325; Edward Iacobucci, "Indeterminacy and the Canadian Supreme Court's Approach to Corporate Fiduciary Duties" (2009) 48:2 Can Bus LJ 232; Mohamed F Khimji, "*Peoples v. Wise* – Conflating Directors' Duties, Oppression, and Stakeholder Protection" (2005) 39:1 UBC L Rev 209; Jeffrey G MacIntosh, "*BCE* and the Peoples' Corporate Law: Learning to Live on Quicksand" (2009) 48:2 Can Bus LJ 255; J Anthony VanDuzer, "*BCE v. 1976 Debentureholders*: The Supreme Court's Hits and Misses in its Most Important Corporate Law Decision Since *Peoples*" (2010) 43:1 UBC L Rev 205; Jacob S Ziegel, "The *Peoples* Judgment and the Supreme Court's Role in Private Law Cases" (2005) 41 Can Bus LJ 236.

25 For a discussion of the status of non-shareholder "stakeholder" constituencies under Canadian law, see Stephanie Ben-Ishai, "A Team Production Theory of Canadian Corporate Law" (2006) 44:2 Alta L Rev 299 at 300–02; Jeffrey Bone, "Corporate Environmental Responsibility in the Wake of the Supreme Court Decision of *BCE Inc. and Bell Canada*" (2009) 27 Windsor Rev Legal Soc Issues 5 at 7; Carol Liao, "The Next Stage of CSR for Canada: Transformational Corporate Governance, Hybrid Legal Structures, and the Growth of Social Enterprise" (2013) 9:1 JSDLP 53 at 69–73; Carol Liao, "A Critical Canadian Perspective on the Benefit Corporation" (2017) 40:2 Seattle UL Rev 683 at 700–03; PM Vasudev, "Corporate Stakeholders in Canada—An Overview and a Proposal" (2013–2014) 45:1 Ottawa L Rev 137 at 165–71. As these authors emphasize, the power of corporate directors to consider broader stakeholder interests has significantly expanded in the wake of *Peoples Department Stores v Wise*, 2004 SCC 68 [*Peoples Department Stores*] and *BCE v 1976 Debentureholders*, 2008 SCC 69 [*BCE*].

26 Even under Delaware law, the status of shareholder primacy as an enforceable legal norm is unclear. Shareholder primacy has nearly overwhelming influence as a practical and normative matter, however. For discussion of the legal force of the shareholder primacy norm, see generally Henry Hansmann & Reinier Kraakman, "The End of History for Corporate Law" (2001) 89:2 Geo LJ 439; Robert J Rhee, "A Legal Theory of Shareholder Primacy" (2018) 102:5 Minn L Rev 1951; Leo E Strine, Jr, "Our Continuing Struggle with The Idea That For-Profit Corporations Seek Profit" (2012) 47:1 Wake Forest L Rev 135. See also *Ebay Domestic Holdings, Inc v Newmark*, 16 A 3d 1 at 34–35 (Del Ch 2010). For a forceful academic challenge to this norm, see Margaret M Blair & Lynn A Stout, "A Team Production Theory of Corporate Law" (1999) 85:2 Va L Rev 247.

27 *Budget Implementation Act, 2019, No 1*, SC 2019, c 29, ss 141–44. See also *An Act to Amend the Canada Business Corporations Act, the Canada Cooperatives Act, the Canada Not-for-Profit Corporations Act, and the Competition Act*, SC 2018, c 25.

At the time of the Canadian merger movement, Canadian law was primarily focused on the interests of the business class, eschewing the restrictive antitrust[28] provisions that were common in the United States. Ironically, it was the restrictive nature of American law—and the resulting economic and political pressures—that eventually led to the United States' distinctive pattern of jurisdictional competition. As similar restrictions on corporations were largely absent from Canadian law, pressures to eliminate them never organically emerged.

Following this introduction, the remainder of this article proceeds as follows. Part II describes how merger restrictions led to competition among the states. In the context of the industrial consolidation of the late nineteenth and early twentieth centuries—during which many states' corporate laws prevented or discouraged mergers—the state of New Jersey attracted corporations by facilitating national combinations. New Jersey's success in drawing corporations (and the associated tax revenues) led to a decades-long period of state competition, in which Delaware was the eventual winner. Part III examines the Canadian experience, in which jurisdictional competition was relatively muted. In Canada, the absence of meaningful antitrust restrictions and the permissiveness of federal company law reduced both demand-side pressure (from the business community) and supply-side pressure (from provincial governments) for major corporate law reform. Part IV concludes, assessing (1) how historical differences between Canada and the United States have influenced the substance of corporate law and (2) whether circumstances exist for increasing competition in Canada today.

I. State Corporate Chartermongering[29] and the Rise of Delaware

American corporate law is often identified with the law of Delaware, the country's leading jurisdiction for business organizations. Through its dominance of the incorporation market for the largest American firms, Delaware exerts an outsized influence on the American corporate legal landscape.[30] In the academic literature, Delaware's prominence is often attributed to its accommodating corporate governance standards, which

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28 In this article, the term "antitrust" refers not only to federal competition legislation, but also state corporate law restrictions on mergers and acquisitions. Both federal antitrust legislation and state corporate law restrictions were products of the same populist movement of the late nineteenth century.

29 For a definition of "chartermongering", see Christopher Grandy, "New Jersey Corporate Chartermongering, 1875–1929" (1989) 49:3 J Econ Hist 677 ("the active solicitation of corporation Charters for the purpose of bolstering state revenues" at 677).

30 See Romano, *The Genius of American Corporate Law*, *supra* note 2 at 6–12.

appeal to the managers who control incorporation decisions.[31] Although corporate governance is an important factor in Delaware's success, the origins of the state's rise to prominence are actually grounded in antitrust policy. As this Part explains, it was legal restrictions on industrial consolidation at both the state and federal levels that incited the race toward permissive corporation laws. Given the focus of corporate legal scholarship on the relationship between management and shareholders, and its conception of jurisdictional competition almost exclusively in terms thereof, recovering the role of antitrust policy in state competition is an important corrective. Moreover, this history provides a revealing contrast to the Canadian consolidation experience, in which meaningful restrictions on mergers and combinations were largely absent.

A. Mounting Industrial Consolidation

During the late nineteenth century, technological, economic, and demographic developments led to a major increase in American industrial consolidation.[32] By the late 1880s, improvements in transportation, communication, and manufacturing technologies significantly increased returns to scale across a range of emerging industries.[33] Combined with rapid population growth, this "second industrial revolution" led to profound economic change—creating new markets, increasing productivity, and giving rise to ever larger firms.[34] In the 1890s, these changes culminated in a sudden, sweeping wave of industrial mergers. During the ten-year period of 1895–1904, more than 1,800 independent firms disappeared into business combinations.[35] Many of the firms resulting from these mergers—commonly referred to as "trusts"—obtained dominant positions within their respective industries.[36]

Several factors contributed to this "Great Merger Movement," the most extensive period of business consolidation in American history. The leading explanation is that of economic historian Naomi Lamoreaux, whose monograph *The Great Merger Movement in American Business,*

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31 See e.g. Cary, *supra* note 2 at 669; Winter, *supra* note 2 at 252–55. Whereas Cary criticizes Delaware's "race for the bottom" (at 705), Winter argues that states cannot "rig" their corporate law because the ensuing capital flight and threat of takeovers would deter managers from choosing inefficient jurisdictions (at 254, 289).

32 See generally Alfred D Chandler, Jr, *Scale and Scope: The Dynamics of Industrial Capitalism* (Cambridge, Mass: Harvard University Press, 1994) at 47–233 [Chandler, *Scale and Scope*].

33 See *ibid*.

34 See *ibid*.

35 See Lamoreaux, *supra* note 20 at 2.

36 See *ibid* at 1–5; Chandler, *supra* note 32 at 315–44.

1895–1904 provides a theoretical and empirical account of why and how the movement occurred.[37] According to Lamoreaux, while the movement reflected fundamental changes in the structure of the American economy, it was triggered by a "particular conjunction" of specific historical circumstances: (1) the rapid expansion of capital-intensive (and thus high-fixed-cost) industries in the early 1890s, (2) the financial panic of 1893, which caused a sudden reduction in aggregate demand and a subsequent increase in price competition, and (3) efforts to combat falling prices through anti-competitive business combinations.[38] This conjunction of high fixed costs and depressed economic conditions in the 1890s created an environment of "ruinous" price competition (i.e., pricing below average cost) that businessmen were desperate to alleviate.[39] However, given the size, diversity, and competitiveness of the American economy, cartel and other price-fixing arrangements proved difficult to enforce.[40] To make matters worse, price fixing was declared illegal by the *Sherman Act* of 1890.[41] Given these practical and legal constraints on agreements among independent firms, mergers became the favoured means of reducing competition.[42]

Although Lamoreaux's account is foundational, other scholars have offered additional explanations for the Great Merger Movement. Business historians such as Alfred Chandler have explained the merger movement primarily in terms of the efficiency of large-scale management processes.[43]

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37 See Lamoreaux, *supra* note 20.

38 *Ibid* at 12.

39 Mary A O'Sullivan, *Dividends of Development: Securities Markets in the History of US Capitalism, 1866-1922* (Oxford: Oxford University Press, 2016) at 155–61.

40 On the intensity of competition and the failure of anticompetitive devices, see e.g. Gabriel Kolko, *The Triumph of Conservatism: A Reinterpretation of American History, 1900-1916* (Chicago: Quadrangle Books, 1967) at 27–28. The inherent weakness of cartel arrangements was compounded by the fact that they were unenforceable at common law. John D Rockefeller, who consolidated the Standard Oil empire, famously referred to cartel agreements as "ropes of sand" (see Brian R Cheffins, "Mergers and Corporate Ownership Structure: The United States and Germany at the Turn of the 20th Century" (2003) 51:3 Am J Comp L 473 at 483).

41 See Lamoreaux, *supra* note 20 at 162–69. The *Sherman Act* was enacted as *An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies*, c 647, 26 Stat 209 (1890) [*Sherman Act*].

42 The economic pressures that often-undermined price-fixing efforts are described in Lamoreaux, *supra* note 20 at 46–117. The legal advantages of mergers over traditional anticompetitive devices are described in Herbert Hovenkamp, *Enterprise and American Law, 1836–1937* (Cambridge, Mass: Harvard University Press, 1991) at 244–67.

43 See generally Chandler, *Scale and Scope*, *supra* note 32; Alfred D Chandler, Jr, *The Visible Hand: The Managerial Revolution in American Business* (Cambridge, Mass: Harvard University Press, 1977) [Chandler, *The Visible Hand*].

According to Chandler, the development of modern business management was critical to the success of integrated firms, as it facilitated the harnessing of new technologies and the resultant economies in production and distribution.[44] Another explanation for the Great Merger Movement is the development of a national equity market, which first emerged for "industrial" corporations (i.e., manufacturers) in the 1890s.[45] As financial markets recovered from the panic of 1893, increasing demand for industrial securities encouraged "promoters"[46] to organize large business combinations financed by public shares.[47] Due to the monopoly profits available from merging competing firms (as per Lamoreaux), the greater economic efficiency of large, integrated businesses (as per Chandler), or simply the market speculation of the late 1890s and early 1900s, stock offerings by industrial combinations sold readily and at high premiums.[48] Finally, federal tariff policy—which impeded foreign price competition—also encouraged the merger movement by protecting domestic monopolies.[49] Ulti-

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44 See Chandler, *The Visible Hand, supra* note 43.

45 See Jonathan Barron Baskin & Paul J Miranti, Jr, *A History of Corporate Finance* (Cambridge, Mass: Cambridge University Press, 1997) at 196–98. Prior to the 1890s, private issues on American securities markets were dominated by railroad bonds (see Chandler, *The Visible Hand, supra* note 43 at 91–93, 331–32).

46 "Promoter" being the historical term for a financier who orchestrated mergers.

47 See generally Thomas R Navin & Marian V Sears, "The Rise of a Market for Industrial Securities, 1887–1902" (1955) 29:2 Bus Hist Rev 105 at 127–31; Ralph L Nelson, *Merger Movements in American Industry, 1895–1956* (Princeton: Princeton University Press, 1959) at 90–91; see generally Gene Smiley, "The Expansion of the New York Securities Market at the Turn of the Century" (1981) 55:1 Bus Hist Rev 75 at 79.

48 See George J Stigler, "Monopoly and Oligopoly by Merger" (Paper delivered at the Sixty-Second Annual Meeting of the American Economic Association, 27–30 December 1949), (1950) 40:2 Am Econ Rev 23; Jesse W Markham, "Survey of the Evidence and Findings on Mergers" in *Business Concentration and Price Policy: A Conference of the Universities-National Bureau Committee for Economic Research* (Princeton: Princeton University Press in association with the National Bureau of Economic Research, 1955) 141 at 162 (however, Markham asserts that "many early mergers... obtained no significant degree of market control" at 158); Nelson, *supra* note 47 at 91; Baskin & Miranti, *supra* note 45 at 194.

49 The consequences of tariff policy for trusts were widely recognized at the time. No less than Henry Havemeyer, president of the notorious "Sugar Trust," believed that "[t]he mother of all trusts is the customs tariff bill" (US, Industrial Commission, 56th Cong, *Preliminary Report on Trusts and Industrial Combinations, Together with Testimony, Review of Evidence, Charts Showing Effects on Prices, and Topical Digest* (Doc No 476) (Washington, DC: Government Printing Office, 1900) at 101 (Henry O Havemeyer) [*Testimony Before the Industrial Commission*]. See also Byron W Holt, "The Relation of the Protective Tariff to the Trusts" (Paper delivered at the Nineteenth Annual Meeting of the American Economic Association, 26–28 December 1906) (1907) 8 Publications of the American Economic Association 212 at 217; Byron W Holt, "The Tariff the Mother of Trusts" (Paper delivered at the Chicago Conference on Trusts, 14 September 1899) [unpublished] at 1.

mately, each of these various factors played a role, providing firms with a number of reasons to merge with their competitors.

Consolidation was hindered, however, by state and federal antitrust law. At the federal level, the *Sherman Act* of 1890 prohibited a range of anticompetitive activity. Section 1 of the act barred "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States."[50] Section 2 spoke to monopoly directly, declaring "[e]very person who shall monopolize, or attempt to monopolize, ... any part of the trade or commerce" to be guilty of a misdemeanor.[51] Despite this broad language, however, the act's practical significance was limited. Private and government enforcement was minimal, meaning few cases were brought to clarify the act's provisions.[52] Due to weak enforcement by the federal government and the inherent ambiguity of the act's language, voluntary compliance on the part of businesses was indifferent, at best.[53] In the years following the act's adoption, many firms continued to engage in anticompetitive business practices.[54]

Moreover, under the historical conception of the division of power between the federal government and the states, federal prosecutors had greater scope to attack price fixing among independent firms (which Lamoreaux refers to as "loose" combinations) than monopolies organized as single, integrated corporations (which Lamoreaux refers to as "tight" combinations).[55] According to the constitutional understanding of the time, the regulation of corporations—no matter how large or powerful—was properly reserved to the state governments responsible for their creation.[56] This conception of the states' role in regulating corporations was strengthened by the US Supreme Court's early *Sherman Act* decisions. In a series of cases in the 1890s, the US Supreme Court interpreted the

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50 *Sherman Act*, *supra* note 41 at § 1.

51 *Ibid* at § 2.

52 See Hans B Thorelli, *The Federal Antitrust Policy: Origination of an American Tradition* (Baltimore: Johns Hopkins Press, 1955) at 369–70. The Antitrust Division of the Department of Justice—the office responsible for antitrust enforcement—was not created until 1903 (see *ibid* at 534–37).

53 See Brian Cheffins, "The Development of Competition Policy, 1890–1940: A Reevaluation of a Canadian and American Tradition" (1989) 27:3 Osgoode Hall LJ 449 at 457 [Cheffins, "Development of Competition Policy"].

54 See Thorelli, *supra* note 52 at 308.

55 Lamoreaux, *supra* note 20 at 164.

56 See Charles W McCurdy, "The Knight Sugar Decision of 1895 and the Modernization of American Corporation Law, 1869–1903" (1979) 53:3 Bus Hist Rev 304 at 305–06.

Sherman Act to prohibit "restraints of trade,"[57] but to allow the formation of monopolies by directly acquiring competitors.[58] This legal result—in which price fixing was illegal but mergers to monopoly were not—incentivized mergers as a means of reducing competition.[59] Ironically, the practical effect of the *Sherman Act* was to *encourage* combinations, which significantly increased in size and number in the decade following its enactment.[60]

Federal law was not the only obstacle to consolidation, however. During the late nineteenth century, state corporation acts placed major limits on the size and structure of corporations.[61] These acts, reflecting the historical legacy of Jacksonian democracy and an enduring suspicion of concentrated power, imposed substantial limits on corporate capitalization, duration of corporate existence, and the scope of corporations' business activities.[62] By the late 1880s, public concern over the emergence of trusts had become a major political issue, and state lawmakers and Attorneys General became increasingly aggressive in attacking combinations.[63] These attacks came in two forms—legislative and prosecutorial. On the legislative front, a common approach was to add antitrust provisions di-

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57 See *United States v Trans-Missouri Freight Ass'n*, 166 US 290 (1897); *United States v Joint Traffic Ass'n*, 171 US 505 (1898); *Addyston Pipe & Steel Co v United States*, 175 US 211 (1899), each holding price fixing to be illegal. Note that such "restraints of trade" were already unenforceable at common law, see William Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* (Chicago: University of Chicago Press, 1965) at 39–52.

58 See *United States v E C Knight Co*, 156 US 1 (1895), in which the Supreme Court held that a series of transactions resulting in control of 98% of American sugar manufacturing did not violate the *Sherman Act*. Although the court's decision was predicated on a (since-abandoned) constitutional distinction between manufacturing and "interstate commerce," and not the structure of the transactions itself, the decision was widely interpreted as validating mergers to monopoly.

59 See Alfred S Eichner, *The Emergence of Oligopoly: Sugar Refining as a Case Study* (Baltimore: Johns Hopkins Press, 1969) at 14–17; Lamoreaux, *supra* note 20 at 162–69; *cf* George Bittlingmayer, "Did Antitrust Policy Cause the Great Merger Wave?" (1985) 28:1 JL & Econ 77 (for a view not solely based on monopoly gain). For a more tempered view of the role of antitrust law in the Great Merger Movement, see Cheffins, "Development of Competition Policy", *supra* note 53 at 451–60.

60 See Thorelli, *supra* note 52 at 306. See also Chandler, *The Visible Hand*, *supra* note 32 at 288–94; John C Coffee, Jr, "The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control" (2001) 111:1 Yale LJ 1 at 33; Morton J Horwitz, "*Santa Clara* Revisited: The Development of Corporate Theory" (1985) 88:2 W Va L Rev 173 at 199.

61 See Hovenkamp, *supra* note 42 at 243–49.

62 See Seligman, *supra* note 3 at 256–64.

63 See Charles M Yablon, "The Historical Race Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880–1910" (2007) 32:2 J Corp L 323 at 338.

rectly to corporate or criminal statutes, a measure taken by twenty seven states as of 1890.[64] Many of these provisions forbade corporations from purchasing or holding other corporations' stock, thereby preventing the "holding company" structure as a means of effecting corporate mergers.[65] With respect to litigation, several states brought successful actions against large combinations, claiming they had exceeded their powers under the state's corporate franchise.[66] These cases were generally predicated on one of two legal doctrines: (1) the common law principle of ultra vires or (2) statutory grants to state Attorneys General of the power to bring *quo warranto* proceedings.[67] In light of these corporate law devices—and notwithstanding the weakness of the *Sherman Act*—state law served as a major impediment to large-scale industrial mergers.

Specific examples illustrate these laws' general character. New York and Illinois—along with twenty-five other states—expressly prohibited combinations for the purpose of reducing competition.[68] New York's *Stock Corporation Law* barred mergers "for the creation of a monopoly or the unlawful restraint of trade or for the prevention of competition in any necessary of life,"[69] while Illinois' *Trusts and Conspiracies Against Trade* act provided that any corporation guilty of fixing prices, restricting output, or otherwise reducing competition "shall thereby forfeit its charter and franchise, and its corporate existence shall cease."[70] Pennsylvania and Massachusetts limited corporate size and capital structure, another common approach. In both states, industrial corporations were prohibited from having more than one million dollars' capital stock, along with other

64 See Seligman, *supra* note 3 at 263. In addition, fifteen states added antitrust provisions directly in their constitutions (*ibid*).

65 See Melvin I Urofsky, "Proposed Federal Incorporation in the Progressive Era" (1982) 26:2 Am J Leg Hist 160 at 162–63.

66 Cases against major combinations were brought by California, Illinois, Louisiana, Nebraska, New York, and Ohio: see Yablon, *supra* note 63 at 338, n 64; *People ex rel Peabody v Chicago Gas Trust Co*, 130 Ill 268 (Ill Sup Ct 1889) [*Chicago Gas Trust*]. See also Seligman, *supra* note 3 at 264.

67 The common law doctrine of ultra vires (meaning "beyond the powers") held that corporations could not take action outside the scope of their specific legal authority. Similarly, *quo warranto* proceedings (meaning "by what warrant?") were a legal means of preventing corporations from acting contrary to state law.

68 See Seligman, *supra* note 3 at 263.

69 Charles A Collin, *The Revised Statutes of the State of New York* (Albany: Banks & Brothers, 1896) vol 2 at 1003, 1008.

70 Harvey B Hurd, *The Revised Statutes of the State of Illinois* (Chicago: Chicago Legal News Company, 1893) at 516–18, 519.

restrictions.[71] Finally, *quo warranto* laws were a powerful means of attacking monopolistic trusts, as demonstrated by the dramatic prosecution of the Standard Oil Company of Ohio (discussed below). Armed with statutory proscriptions, *quo warranto* powers, and the common law doctrine of ultra vires, states were equipped with a variety of tools for combatting corporate consolidation.[72]

Many states used these tools aggressively. Each of the states listed in Annex A pursued major legal actions against the large combinations that began to emerge in the late 1880s and early 1890s. To give but a few prominent examples, the Attorney General of Illinois brought a successful *quo warranto* proceeding against the Chicago Gas Trust Company in the late 1880s, challenging the company's strategy of buying out its major competitors.[73] Deciding the matter on appeal in 1889, the Illinois Supreme Court held, as a matter of Illinois law, that corporations were not permitted to acquire the stock of other corporations, particularly if their motive was to reduce competition.[74] A year later, the New York Court of Appeals approved a similar *quo warranto* action against a constituent corporation of the infamous Havemeyer "Sugar Trust."[75] After holding that the corporation had exceeded its legal authority by joining a horizontal combination, the Court invoked the "extreme rigor of the law," sentencing the defendant to "corporate death."[76] As a final example, the famous attempt by the Attorney General of Ohio to destroy the Standard Oil Trust provides evidence of both the strengths and weaknesses of state corporate law as a means of imposing antitrust restrictions.[77] Although the Ohio Supreme Court ruled in favour of Standard Oil Company on statute of limitations grounds, it also prohibited the corporation from continuing to participate

71 See John Purdon, *A Digest of the Statute Law of the State of Pennsylvania from the Year 1700 to 1894* (Philadelphia: Kay and Brother, 1894) vol 1 at 404, 417; *The Public Statutes of the Commonwealth of Massachusetts* (Boston: Rand, Avery & Company, 1882) at 573, 577. Limiting capitalization to $1 million (approximately $30,100,000 in 2017 dollars) was a significant restriction. To put this amount in perspective, the United States Steel Corporation, one of the largest combinations of the era, was incorporated in New Jersey with a capitalization of $1.4 billion. For more detailed information on these provisions, see Annex A.

72 Annex A summarizes key antitrust provisions and other restrictions on corporations enacted by the five most prosperous states as of 1895.

73 See *Chicago Gas Trust*, *supra* note 66.

74 See *ibid* at 303.

75 *People v North River Sugar Refining Co*, 24 NE 834 at 841 (NY 1890); aff'g 7 NYS 406 (NY Gen Term 1889); aff'g 3 NYS 401 (NY Cir Ct 1889).

76 *Ibid* at 834.

77 See *State ex rel Attorney General v Standard Oil Co*, 30 NE 279 (Ohio Sup Ct 1892).

in the larger trust.[78] This prohibition proved ineffective—following the ruling, Standard Oil abandoned its trust structure and reorganized as a New Jersey corporation.[79] Standard Oil was not alone in its decision to reincorporate.[80] By the 1890s, New Jersey had emerged as a protective haven from the "extreme rigor" of its sister states.

B. New Jersey Chartermongering

As American industry consolidated, New Jersey took advantage of the obstacles imposed by other states. Even before the 1890s, New Jersey was a welcoming home to corporations—its 1875 corporation act was relatively permissive for its time[81] and its conservative judiciary was well regarded by the Wall Street bar.[82] Capitalizing on its reputation, New Jersey embarked on a series of reforms that made it more attractive to out-of-state firms.[83] New Jersey's liberal policy toward corporations—motivated by a desire to attract corporate tax and franchise revenues—precipitated the race in corporate law reform, as legislators in other states sought to replicate New Jersey's strategy.[84]

The ability of New Jersey to draw businesses from other states was a result of the peculiar status of corporations under American federalism. Since the US government had never enacted a federal corporation act, corporations could only be formed under the laws of individual states.[85] In

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78 See *ibid* at 291. Standard Oil Company, the named defendant, was one of the constituent corporations controlled by the Standard Oil Trust.

79 See Daniel Yergin, *The Prize: The Epic Quest for Oil, Money, and Power*, (New York: Simon & Schuster, 1991) at 97–98; *Testimony Before the Industrial Commission, supra* note 49 at 574–76 (John D Archbold); John Moody, *The Truth About the Trusts: A Description and Analysis of the American Trust Movement* (New York: Moody Publishing Company, 1904) at 109–26.

80 See *supra* notes 96−99 and accompanying text. See also McCurdy, *supra* note 56 at 321–23.

81 See *The General Law of the State of New Jersey Concerning Corporations* (Trenton: Naar, Day & Naar, 1889); Edward Quinton Keasbey, "New Jersey and Trusts" in *Chicago Conference on Trusts: Speeches, Debates, Resolutions, Lists of the Delegates, Committees, Etc* (Chicago: Lakeside Press in association with the Civic Federation of Chicago, 1900) 383 at 385, 389.

82 See Keasbey, *supra* note 81 at 385, 389; Lincoln Steffens, "New Jersey: A Traitor State" (1905) 24:6 *McClure's Magazine* 649 at 658.

83 See Yablon, *supra* note 63 at 331–45.

84 See generally Grandy, *supra* note 29; Urofsky, *supra* note 65 at 163–64; Yablon, *supra* note 63.

85 Although Congress created a small number of corporations through specific legislation (the transcontinental railroads, for example), general incorporation remained the exclusive domain of the states. For the history of political efforts to pass a federal corporation

addition, the Commerce Clause[86] limited states' power to discriminate against "foreign" (out-of-state) corporations, preventing state governments from excluding corporations organized in other states.[87] Finally, under the "internal affairs" doctrine, a corporation's internal governance was regulated by its state of incorporation, not the laws of other states in which it did business.[88] Together, these principles allowed corporations to avoid unfavourable legal rules through jurisdictional selection. Having dispensed with any legal requirement that shareholders or directors be state residents, and having explicitly empowered corporations to do business in other states, New Jersey emerged as a favoured destination for large industrial combinations.[89]

Beginning in the late 1880s, New Jersey revised its corporation act specifically to attract out-of-state capital. In response to lobbying efforts by James B. Dill, a talented and ambitious Wall Street attorney, New Jersey enacted a number of reforms presumably for the purpose of attracting New York promoters.[90] Among these reforms, the most significant was an 1889 amendment allowing corporations to freely purchase the stock and/or assets of out-of-state firms.[91] Attracted by these reforms, industri-

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act, see generally Camden Hutchison, "Progressive Era Conceptions of the Corporation and the Failure of the Federal Chartering Movement" (2017) 2017:3 Colum Bus L Rev 1017 [Hutchison, "Progressive Era Conceptions"].

86 See US Const, art I § 8 cl 3.

87 Note that as a matter of constitutional law, these limits remained uncertain until the twentieth century (see Horwitz, *supra* note 60 at 188–90). Even before these limits were clarified, states faced practical and economic obstacles to excluding out-of-state corporations (see Hovenkamp, *supra* note 42 at 258–63).

88 For a historical analysis of the complex relationship between the Commerce Clause and the internal affairs doctrine, see generally Frederick Tung, "Before Competition: Origins of the Internal Affairs Doctrine" (2006) 32:1 J Corp L 33.

89 New Jersey expressly empowered corporations to do business outside the state in the corporation act of 1875. This power was broadened by *An Act Concerning Corporations*, NJ Laws, c 185 (1896) [*Act Concerning Corporations*]. Neither the 1875 act nor the 1896 act placed any residency requirements on shareholders or directors.

90 See Urofsky, *supra* note 65 at 163. Significantly, the content of these reforms was largely inspired by Dill's admiration for English company law and his concomitant view that American law was overly restrictive. See discussion in *Testimony Before the Industrial Commission*, *supra* note 49 at 1082–83 (James B Dill). For discussion of Dill's central role in New Jersey legal reform, see generally Elizabeth Ann Schiller, *James Brooks Dill: Father of the Trusts* (MA Thesis, Seton Hall University, 2009) [unpublished].

91 See *An Act Concerning Corporations*, NJ Laws, c 265 at § 4 (1889). By its terms, this provision applied only to the purchase of stock of "any company or companies owning, mining, manufacturing or producing materials, or other property, necessary for [the business of the purchaser]" (*ibid).* A comprehensive provision applicable to any and all stock acquisitions was passed in 1893 (see *An Act Concerning Corporations*, NJ Laws, c 171 (1893)).

alists and promoters fearing legal attack in their home states began to incorporate in New Jersey.[92] In 1896, the entirety of the New Jersey corporation act was comprehensively rewritten by a revision commission chaired by Dill.[93] This 1896 act is widely credited by US scholars as the first modern, "enabling" corporation act.[94] Its logical organization and minimal legal requirements were a far cry from other state corporation statutes of the time, which were needlessly complex and arbitrarily restrictive by modern standards. Even more important to corporate promoters—and in keeping with New Jersey tradition—the act included no prohibitions on trusts, monopolies, or combinations.[95]

As the merger movement accelerated in the mid-1890s, New Jersey reaped the fiscal benefits of its liberal corporation act. By several measures, the state quickly became the dominant corporate jurisdiction in the United States: between 1895 and 1904, 50% of combinations by number and nearly 80% of combinations by value were incorporated in New Jersey.[96] Between 1896 and 1901, New Jersey incorporations increased nearly 200%, eventually providing more than 60% of the state's total tax revenue.[97] By 1904, all seven of financial analyst John Moody's "greater industrial trusts"—the largest corporations in the country—were incorporated in New Jersey, as were 162 of 311 "lesser" (but still significant) trusts.[98] Despite its much smaller industrial base compared to wealthier states such as New York, New Jersey became infamous as "the cradle of monopolies."[99]

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92 See Yablon, *supra* note 63 at 344.

93 See Urofsky, *supra* note 65 at 163–64. The new act was passed as *An Act Concerning Corporations, supra* note 89 at 277.

94 See Cary, *supra* note 2 at 664; Theodore H Davis, Jr, "Corporate Privileges for the Public Benefit: The Progressive Federal Incorporation Movement and the Modern Regulatory State" (1991) 77:3 Va L Rev 603 at 617; Seligman, *supra* note 3 at 265. Note, however, that many of the act's most significant reforms already existed under English (and Canadian) law. This was no coincidence, as Dill was an outspoken proponent of the English model of corporate law.

95 See *An Act Concerning Corporations*, *supra* note 89 at 277–317. See also Keasbey, *supra* note 82 at 385.

96 See Nelson, *supra* note 47 at 67. The fact that the proportionate value of New Jersey combinations exceeded their proportionate number indicates that the country's largest combinations were concentrated in New Jersey.

97 See Grandy, *supra* note 29 at 681–82; Urofsky, *supra* note 65 at 164.

98 Moody, *supra* note 79 at 453–69. The "greater industrial trusts" 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.

99 *Testimony Before the Industrial Commission, supra* note 49 at 743 (George Rice).

As the merger movement peaked, other states attempted to emulate New Jersey's success. A number of states, including Delaware, Maine, South Dakota, and West Virginia, attempted to compete with New Jersey by passing similar corporation acts and/or charging lower corporate franchise taxes.[100] Even leading industrial states such as New York and Massachusetts were forced to reform their corporation acts to avoid losing corporations to New Jersey or "one of the chartering states."[101] By the first decades of the twentieth century, American corporate law was being transformed by the pressures of jurisdictional competition.[102] Ironically, it was the traditional rigour of American corporate law and its hostility toward monopolies that created the opportunity for a race toward corporate laxity.

C. State Law Competition and the Rise of Delaware

Given its first-mover advantage, New Jersey was the original leader of the American incorporation market. Other states attempted to compete, but New Jersey's leadership position remained secure. Incorporators had little reason to venture into untested waters given the predictability and reliability of the New Jersey legal system.[103] As New Jersey had invested heavily in its corporate-friendly reputation, businesses could be reasonably assured it would not engage in radical reform.[104] These assurances evaporated in the second decade of the twentieth century, however, when the New Jersey legislature suddenly passed a series of strict antitrust provisions.[105] Following this unwelcome political development, the nation's largest corporations migrated to the state of Delaware—where, by and large, they remain today.

Prior to New Jersey's political reversal, Delaware was its most active competitor. In 1899, Delaware enacted a corporation act that was substantially similar to the New Jersey statute.[106] The biggest difference be-

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[100] See Yablon, *supra* note 63 at 358–67.

[101] *Ibid* at 370.

[102] See *ibid* at 367–71.

[103] See discussion of James B Dill, "National Incorporation Laws for Trusts" (Address before the Seminary in Economics of Harvard University, 10 March 1902), (1902) 11:6 Yale LJ 273 at 281; Keasbey, *supra* note 82 at 385–87, 389; *Testimony Before the Industrial Commission*, *supra* note 49 at 964–65 (William H Moore); *ibid* at 970–71, 975–76 (Francis Lynde Stetson); *ibid* at 996 (Elbert H Gary); *ibid* at 1081–82 (James B Dill); *ibid* at 1109–11 (Charles N King).

[104] See Grandy, *supra* note 29 at 685–91.

[105] See *ibid* at 689.

[106] *An Act Providing A General Corporation Law*, c 273, 21 Del Laws 445 (1899).

tween the two states was that Delaware charged lower franchise taxes.[107] Given these lower taxes, Delaware lawyers and corporate service providers could essentially compete on price, marketing their state as a lower-cost alternative to New Jersey.[108] This strategy saw some, albeit limited, success. By the end of the Great Merger Movement, Delaware had attracted thirteen of the country's major industrial trusts—more than its small state competitors such as Maine and West Virginia, but far fewer than New Jersey or even traditional industrial states such as New York.[109] Although Delaware earned a reputation as a corporate-friendly jurisdiction, New Jersey continued to lead the incorporation market.[110]

This state of affairs continued until the presidential election of 1912, an unusual three-way contest among Woodrow Wilson, the Democratic governor of New Jersey, William Howard Taft, the incumbent Republican president, and former Republican president Theodore Roosevelt, who ran on an independent progressive party ticket.[111] Wilson campaigned on a Democratic platform of progressive economic reform, a position at odds with his home state's image as the "mother of trusts."[112] When Wilson called for stronger antitrust laws on the campaign trail, Roosevelt—who was popularly regarded as a "trust buster" for his administration's prosecution of antitrust cases—taunted Wilson for his inaction against the trusts during his tenure as New Jersey governor.[113] Although Wilson won the election, the trust issue remained a source of political embarrassment. In his final annual message as governor of New Jersey, Wilson called for

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[107] Delaware franchise taxes were levied and calculated in accordance with a separate act (see *An Act To Raise Revenue For the State By Taxing Certain Corporations*, c 166, 21 Del Laws 303 (1899). See S Samuel Arsht, "A History of the Delaware Corporation Law" (1976) 1:1 Del J Corp L 1 at 7, n 38.

[108] See Civic Federation of Chicago, *Chicago Conference on Trusts: Speeches, Debates, Resolutions, Lists of the Delegates, Committees, Etc.* (Chicago: Civic Federation of Chicago, 1900) at 504–05; Russell Carpenter Larcom, *The Delaware Corporation* (Baltimore: Johns Hopkins Press, 1937) at 17–26; Seligman, *supra* note 3 at 271–72.

[109] See Larcom, *supra* note 108 at 13 ("trusts" are defined as combinations with a capitalization greater than one million dollars, which was significant at the time); The American Presidency Project, "Statistics: 1912", online: *The American Presidency Project* <www.presidency.ucsb.edu/statistics/elections/1912> [perma.cc/7TQQ-UP2D].

[110] New York had more corporations in total following the Great Merger Movement, but the largest corporations (by capitalization) were concentrated in New Jersey. See Yablon, *supra* note 63 at 379.

[111] The Socialist Eugene Debs also ran in the election, winning six per cent of the popular vote.

[112] Joseph F Mahoney, "Backsliding Convert: Woodrow Wilson and the 'Seven Sisters'" (1966) 18:1 Am Q 71 at 71–73.

[113] *Ibid* at 72–73; Hutchison, "Progressive Era Conceptions", *supra* note 85 at 1052.

legislation to bring corporations under stricter control.[114] The Democrat-controlled state legislature obliged, passing seven broad antitrust provisions in early 1913.[115] Among other restrictions, these provisions prohibited any "combination or agreement between corporations, firms, or persons" in restraint of trade; the purchase, holding, or disposition by any corporation of the securities of any competing corporation; and price discrimination between different buyers, markets, or areas within the state.[116] These enactments, known popularly as the "seven sisters," were an abrupt and unexpected shift in New Jersey's policy toward corporations,[117] imposing many of the same antitrust restrictions that firms came to New Jersey to avoid. Virtually overnight, New Jersey transformed from a corporate haven to a minefield of legal and political risk.

The reaction was foreseeable. Following enactment of the seven sisters, New Jersey incorporations declined as firms opted for other states. Delaware was the primary beneficiary of this shift, likely because its corporation act was so similar to New Jersey's.[118] During the period 1912–1920, annual incorporations in Delaware increased more than 400% (from 1,427 to 5,747), while annual corporation revenues increased over 900% (from $168,244 to $1,570,620).[119] Over the same period, New Jersey's corporation revenues gradually declined, as new corporations shunned the state and existing corporations choose to leave it.[120]

Realizing the consequences of its actions, the New Jersey legislature attempted to reverse course by weakening the seven sisters in 1917.[121] The damage had already been done, however. By enacting the seven sisters, New Jersey irreparably damaged its pro-corporate reputation.[122] Reversing its decision could not restore the business community's trust.[123]

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[114] See *ibid*.

[115] See *ibid* at 78.

[116] FA Updyke, "New Jersey Corporation Laws" (1913) 7:4 Am Pol Sci Rev 650.

[117] *Ibid* at 650.

[118] Geographic proximity and low franchise taxes were also factors.

[119] See Larcom, *supra* note 108 at 156, 167. Delaware's franchise tax was calculated based on capitalization. Thus, the fact that corporation revenues increased more than twice as much as the number of incorporations indicates larger firms were more likely to incorporate in Delaware.

[120] See Grandy, *supra* note 29 at 689–90. The negative impact of the seven sisters was mitigated by the fact that the provisions were not retroactive—corporations that already existed under New Jersey law were not affected; several major corporations chose to leave New Jersey regardless (see Mahoney, *supra* note 112 at 75–77).

[121] See Grandy, *supra* note 29 at 689.

[122] See *ibid*.

[123] See *ibid*.

Delaware, New Jersey's closest competitor, was able to capture its leadership position.[124] In the decades since, the corporate laws of most American states have become increasingly similar to that of Delaware—itself originally based on the 1896 New Jersey act. In this fashion, the Great Merger Movement played an important role in the direction of US corporate law. By placing intense economic and political pressure on legal restrictions upon corporate power, it gave rise to the jurisdictional competition that led to those restrictions' eventual repeal.

II. Industrial Consolidation and Canadian Corporate Law

The demographic, technological, and economic developments that led to the Great Merger Movement were not unique to the United States. Similar developments also occurred in other industrialized countries—including Canada, Great Britain, and Germany—though the timing and intensity of merger activity varied.[125] In Canada, the pattern of industrial consolidation was similar to that of the United States. Although the merger movement in Canada was much smaller in absolute size, it was comparable in proportion to the size of the national economy.[126] The greatest difference between the two countries is when their merger movements occurred. While the Great Merger Movement in the United States lasted from 1895 to 1904 (peaking in 1899),[127] the first Canadian merger wave occurred roughly a decade later, from 1909 to 1913 (peaking in 1910).[128] The reasons for this lapse were primarily economic—the Canadian movement arrived later due to the country's smaller economy, slower pace of industrialization, and less-developed capital market.[129] It was not until the "Laurier boom" of the first decade of the twentieth century, and the resulting flow of foreign capital into Canadian equity securities, that "tight" combinations became financially viable.[130] The legal environment was also a factor. In general, Canadian businesses faced fewer constraints on price fixing and cartelization, reducing their incentives to merge. As discussed below, the delayed onset of the Canadian merger movement had important consequences—by the time of the 1909–1913 merger wave, Ca-

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124 See *ibid*.

125 See Marchildon, *Profits and Politics*, *supra* note 21 at 245–59.

126 See *ibid* at 257–58.

127 See Lamoreaux, *supra* note 20 at 1–2.

128 See Marchildon, *Profits and Politics, supra* note 21 at 255. In both countries, a second merger wave occurred during the stock market boom of the 1920s (*ibid* at 258).

129 See *ibid* at 259.

130 *Ibid* at 7–13, 258–59.

nadian law had already experienced significant liberalization, precluding the jurisdictional competition witnessed in the United States.

The American and Canadian merger movements make for a particularly useful historical comparison due to the similarity of their economic causes and the differences in their legal effects. Although the American economy was much larger, the two countries' merger movements were otherwise similar from an economic perspective. Both countries featured (1) expansive geographic territories, (2) diversified economies based on agriculture, commodities, and industrial manufacturing, and (3) a shared Anglo-Saxon commercial tradition. These similarities influenced the industries that were most likely to consolidate, including rail transportation; food processing; agricultural and transportation equipment; and cement, steel, and other heavy manufacturing industries.[131] In the United States, this consolidation was primarily financed by a growing domestic capital market, while Canadian mergers relied much more heavily on foreign (primarily British) capital.[132] In both countries mergers took similar forms, with promoters arranging combinations of large numbers of smaller competitors.[133] Although the specific economic events that precipitated the movements were different—the American movement being a direct response to the financial panic of 1893—the broader economic motivations in both countries were similar: to organize firms large enough to meaningfully reduce market competition.[134]

Notwithstanding these similarities, the American and Canadian merger movements occurred in different legal and political contexts. In the United States, a long tradition of political hostility toward concentrated economic power meant that state law often tightly restricted corporations.[135] In Canada, the situation was less antagonistic. Although populist "anti-combines" sentiment certainly existed, it failed to influence government policy to the same extent as in the United States. For this reason, the wide variety of antitrust provisions common in US state corporation

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[131] See *ibid* at 253.

[132] See Gregory Philip Marchildon, *Promotion, Finance and Mergers in Canadian Manufacturing Industry, 1885–1918* (PhD Dissertation, University of London School of Economics and Political Science, 1990) at 42–48, 205–09 [Marchildon, *Promotion, Finance and Mergers*]; Navin & Sears, *supra* note 47 at 119–26, 129–38.

[133] See generally Marchildon, *Promotion, Finance and Mergers, supra* note 132 at 20–42, 96–99, 189–209; Lamoreaux, *supra* note 20 at 110–17.

[134] See Marchildon, *Promotion, Finance and Mergers, supra* note 132 at 96–99. This goal was difficult to achieve, however—in both countries, the ability of even the largest combinations to charge monopoly prices was often undermined by the arrival of new market entrants.

[135] See Thorelli, *supra* note 52 at 80–83, 89, 155–60.

laws never appeared in Canadian federal and provincial incorporation acts. As discussed in this Part, the permissiveness of Canadian law during the first Canadian merger wave had important institutional consequences: given the absence of major legal obstacles to consolidating mergers, there was little pressure on Canadian jurisdictions to engage in regulatory competition, and thus little likelihood of the organic emergence of a "Canadian New Jersey."

A. Canadian Anti-Combines Law

Many of the same political factors that led to antitrust legislation in the United States were also present in Canada. Throughout the late nineteenth century, Canadian businesses actively sought to limit competition through the use of cartels, industry agreements, and other forms of pricing collusion.[136] These practices were encouraged by Canada's "National Policy" of protective tariffs, which facilitated domestic price fixing by limiting foreign competition.[137] As many businesses engaged in open restraints of trade, Canadian consumers—facing artificially high prices—grew increasingly resentful.[138] Echoing political developments in the United States, the strongest opposition to anticompetitive business practices came from western farmers, who blamed the railways, industrial cartels, and eastern capital generally for their high input and distribution costs.[139] Nevertheless, western agricultural populism was weaker in Canada than the United States, where it grew into a national political movement.[140] In Canada, despite widespread resentment toward large corporations, legal reform was staunchly (and successfully) opposed by business interests, with which the Canadian political elite was broadly sympathetic.[141]

Although Parliament passed a series of anti-combines acts in the late nineteenth and early twentieth centuries, their purpose and effect were

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[136] See Michael Bliss, *A Living Profit: Studies in the Social History of Canadian Business, 1883-1911* (Toronto: McClelland & Stewart, 1974) at 34–38 [Bliss, *A Living Profit*].

[137] See Michael Bliss, "Another Anti-Trust Tradition: Canadian Anti-Combines Policy, 1889–1910" (1973) 47:2 Bus Hist Rev 177 at 182 [Bliss, "Another Anti-Trust Tradition"]; Marchildon, *Promotion, Finance and Mergers*, *supra* note 132 at 130–33 .

[138] See Marchildon, *Profits and Politics, supra* note 21 at 209; Bliss, "Another Anti-Trust Tradition", *supra* note 136 at 184.

[139] See Bliss, "Another Anti-Trust Tradition", *supra* note 137 at 187; Marchildon, *Profits and Politics, supra* note 21 at 15, 210–11.

[140] For a classic account of the American Populist movement, see generally Richard Hofstadter, *The Age of Reform*: *From Bryan to FDR* (New York: Alfred A Knopf, 1956) at 131–73.

[141] See Bliss, "Another Anti-Trust Tradition", *supra* note 137 at 182, 185–87.

largely symbolic.[142] In response to public outcry over a particularly noxious grocers' cartel, combines became a parliamentary issue in the late 1880s. In 1888, Conservative MP Nathaniel Clarke Wallace called for the creation of a parliamentary committee to investigate the "nature, extent and effect of certain combinations."[143] Once formed, the committee conducted extensive hearings and issued a voluminous parliamentary report documenting the existence of anticompetitive cartels in at least eleven major industries.[144] Although the committee determined that the evils of combines were not yet as advanced as in the United States, it nevertheless recommended parliamentary action to prevent existing combines from growing any stronger.[145] Following the report, Wallace introduced an anti-combines bill which became law (in amended form) in early 1889.[146]

The material language of the anti-combines act was contained in section 1:

> 1. Every person who conspires, combines, agrees or arranges with any other person, or with any railway, steamship, steamboat or transportation company, unlawfully—
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> (a) to unduly limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade and commerce; or—
>
> (b) to restrain or injure trade or commerce in relation to any such article or commodity; or—
>
> (c) to unduly prevent, limit, or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof; or—
>
> (d) to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property—
>
> Is guilty of a misdemeanor and liable on conviction, to a penalty not exceeding four thousand dollars and not less than two hundred dollars, or to imprisonment for any term not exceeding two years; and if

142 See *ibid* at 188.

143 *House of Commons Debates*, 6-2, vol 22 (16 May 1888) at Appendix 3 (Nathaniel Wallace Clarke) cited in Charles Paul Hoffman, "A Reappraisal of the Canadian *Anti-Combines Act* of 1889" (2013) 39:1 Queen's LJ 127 at 133.

144 See House of Commons, *Report of the Select Committee Appointed 29th February, 1888, to Investigate and Report Upon Alleged Combinations in Manufactures, Trade and Insurance in Canada* (16 May 1888) (Chair: NC Wallace) at 3–10.

145 See *ibid* at 10.

146 See *An Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade*, SC 1889, c 41.

> a corporation, is liable on conviction to a penalty not exceeding ten thousand dollars and not less than one thousand dollars.[147]

From a legal standpoint, little in the act was actually new. It was essentially a reformulation of the common law doctrine of restraint of trade, with the addition of criminal penalties.[148] Arguably, the act *weakened* existing common law prohibitions, as it was conditioned throughout by qualifying language such as "unlawfully," "unduly," and "unreasonably."[149] It also provided no resources for investigation or prosecution, begging the question of enforcement. The act appears to have been passed primarily for its expressive value, Wallace proclaiming that "the Parliament of Canada have put on record their condemnation of [restraints of trade]."[150] Whatever Parliament's intent, the language of the act rang hollow as a source of effective criminal prohibitions. In the words of Richard Gosse, "not only did a criminal offence have to be committed, it had to be committed 'unduly.'"[151]

Unsurprisingly, the act had little effect. Its greatest weakness was its lack of an enforcement mechanism. As a general criminal statute, prosecutions under the act were the responsibility of provincial Attorneys General, who—likely recognizing the act's infirmity—simply ignored it.[152] Only a single indictment was brought in the entire first decade of the act's existence, resulting in an acquittal.[153] Although Wallace and other like-minded MPs sought to strengthen the act in the 1890s, Wallace's proposed amendments were defeated by the business lobby. Canadian business interests, which wielded significant influence in Parliament, claimed "reasonable" restrictions on competition were necessary for their viabil-

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147 *Ibid* at s 1.

148 See Bliss, "Another Anti-Trust Tradition", *supra* note 137 at 179.

149 See "Bill (No. 11) for the Prevention and Suppression of Combinations formed in restraint of Trade", *House of Commons Debates*, 6-3, vol 28 (30 April 1889) at 1689–91 [*House of Commons Debates, 30 April 1889*]. This qualifying language was added by the Senate, presumably in order to weaken the bill. Supporters of the bill in the House of Representatives, recognizing the effect of the Senate's amendments, chose to pass the bill regardless, rather than risk failing to enact any anti-combines legislation (*ibid*).

150 See Bliss, "Another Anti-Trust Tradition", *supra* note 137 at 182. Bliss goes as far as to label the act a "political sham" (*ibid*).

151 Richard Gosse, *The Law on Competition in Canada* (Toronto: Carswell, 1962) at 73.

152 See Cheffins, "Development of Competition Policy", *supra* note 53 at 456. According to Thomas Sproule, MP, provincial prosecutors ignored the act because "it would be almost impossible to secure a conviction under the law as it reads" (see "Bill (No. 40) to amend the Criminal Code, 1892, with respect to combinations in restraint of trade", 2nd reading, *House of Commons Debates*, 8-4, vol 48 (20 April 1899) at 1937). Louis Davies, MP, a critic of the act, claimed "[i]t need not be opposed; it will die of sheer inanition" (see *House of Commons Debates, 30 April 1889*, *supra* note 149 at 1690).

153 See *R v American Tobacco Co of Canada* (1897), 3 Revue de Jurisprudence 453 at 464.

ity.[154] Following several failed attempts, the federal anti-combines act was finally strengthened in 1900,[155] but enforcement remained limited.[156] Into the early twentieth century, Canadian business continued to be characterized by "loose" combinations among competing firms.

Circumstances changed, however, with the arrival of the Canadian merger movement, roughly a decade after the United States. Suddenly, mergers became the dominant means of limiting competition. Although comprehensive data on Canadian mergers are unavailable, Gregory Marchildon has estimated that during the years 1909–1913, at least 195 industrial firms disappeared in at least seventy-one distinct transactions.[157] Many of these transactions combined multiple competing firms into a single industry-wide monopoly, the same pattern observed in the United States. The logic behind consolidation in the two countries was the same—by combining competing firms, promoters could offer outside investors the promise of monopoly profits.[158]

Despite similar motivations, the specific events triggering the movements in Canada and the United States were different. The American movement began in the wake of a serious economic depression, in a legal environment in which antitrust policy discouraged agreements to maintain prices. In Canada, the merger movement was an organic response to the inherent instability of such agreements, made possible by the economic boom of the early twentieth century. As the economy grew, it became increasingly apparent to Canadian businesses that "loose" combinations such as cartels and trade associations were difficult to enforce. As economic theory would predict, the higher a cartel attempted to set prices, the greater the temptation for its members to cheat. Unsanctioned price cut-

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[154] Carman D Baggaley, "Tariffs, Combines and Politics: The Beginning of Canadian Competition Policy, 1888–1890" in RS Khemani & WT Stanbury, eds, *Historical Perspectives on Canadian Competition Policy* (Halifax: Institute for Research on Public Policy, 1991) 1 at 32–37; Bliss, "Another Anti-Trust Tradition", *supra* note 137 at 181.

[155] Legislation in 1900 removed the word "unlawfully" from the anti-combines section of the *Criminal Code* (see Baggaley, *supra* note 154 at 41).

[156] Note that antitrust enforcement was equally weak in the United States. On a population basis, prosecution rates in the two countries were similar (see Cheffins, "Development of Competition Policy", *supra* note 53 at 457–60).

[157] See Marchildon, *Profits and Politics, supra* note 21 at 255. For the longer period of 1885–1918, Marchildon estimates that at least 464 industrial firms disappeared in at least 174 distinct transactions (*ibid*). Marchildon's figures are necessarily an undercount, as his findings (1) are limited to manufacturing and related industries, (2) are limited to large transactions included in financial publications (Marchildon's primary sources), and (3) exclude all transactions for which he found incomplete information (see Marchildon, *Promotion, Finance and Mergers*, *supra* note 132 at 175–90).

[158] See *ibid* at 238–39, 245–47.

ting by cartel members was rampant, undermining cartels' effectiveness and often leading to their dissolution. "Tight" combinations eliminated this problem by bringing competition within a single firm. It was not until the economic boom of the early twentieth century, however, that promoters gained access to the large amounts of capital required to finance mergers. Once this capital became available, mergers arose as a natural evolution of long-standing efforts to limit competition.[159]

These differences in competition policy between Canada and the United States had important consequences for the development of corporate law. In the United States, antitrust law was an important factor in jurisdictional selection. When early decisions under the *Sherman Act* struck down "loose" pricing and output agreements, corporations gravitated to the jurisdiction most amenable to "tight" combinations—New Jersey. In Canada, on the other hand, competition law had little bearing on the structure of the merger movement. As discussed above, cartels had shown their practical limitations as a means of controlling competition.[160] At the same time, tariff increases in 1907 further disadvantaged foreign imports, increasing potential monopoly profits and encouraging domestic consolidation.[161] Most importantly, buoyant conditions in the securities markets and greater availability of foreign capital—both results of Canada's ongoing economic boom—provided the necessary financing.[162] Together, these multiple factors set the stage for the 1909–1913 merger movement.

When it finally arrived, the sudden wave of industrial consolidation led to renewed calls for stronger anti-combines law.[163] The Liberal government of Wilfrid Laurier responded by proposing a new bill "to provide for the investigating of combines, monopolies, trusts and mergers which may enhance prices or restrict competition to the detriment of consumers."[164] This bill, introduced in 1910 by Minister of Labour (and future

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159 See generally *ibid* at 1–48, 75–129.

160 See Bliss, *A Living Profit*, *supra* note 136 at 53. Interestingly, the most "frantic and varied" anticompetitive practices occurred in the retailing and wholesaling industries, which did not experience significant merger activity (but which were challenged by disruptive competitors such as chain stores, department stores, and mail-order retailers) (*ibid*).

161 See RT Naylor, *The History of Canadian Business 1867–1914* (Montreal: McGill-Queen's University Press, 2006) at 186–89.

162 See generally CA Curtis, *Consolidations in Canadian Industry and Commerce, January 1, 1900, to December 31, 1933* (Kingston, Ont: Queen's University, 1976) at 8. See also Marchildon, *supra* note 132 at 20–48; Naylor, *supra* note 161 at 228–55.

163 See Marchildon, *supra* note 132 at 134–44.

164 "Bill (No. 101) to provide for the investigation of combines, monopolies, trusts and mergers which may enhance prices or restrict competition to the detriment of consumers",

Prime Minster) William Lyon Mackenzie King, addressed the enforcement problem that had plagued previous anti-combines acts by empowering private citizens to initiate judicial investigations of combinations.[165] The bill was also broader in scope than previous anti-combines acts, encompassing "all forms of combination" including "monopolies, trusts, mergers and combines."[166] This language was more expansive than the act of 1889, which, by its terms, was arguably limited to "loose" arrangements among independent companies. Notwithstanding these reforms, the bill's policy ambitions were limited. According to King, the bill was "not aimed against combines or mergers as such," but merely against their exercise of power "in an unfair manner."[167] Like many Liberals, King believed industrial consolidation was a natural aspect of economic progress, which so long as it was properly regulated, stood to benefit society as a whole. King therefore declined to follow the *Sherman Act*, which some Canadian lawmakers considered overly restrictive.[168] King's bill, successfully passed in 1910 as the *Combines Investigation Act*, reflected the ambivalence at the heart of Canadian competition policy. Despite the act's broader language and its inclusion of judicial investigations, it provided no effective mechanism for enforcement of its terms.[169] The act was successful from a political standpoint, in that it signaled the government's ostensible concern, but it had almost no practical impact. It was invoked only once (against an American company) before being repealed in 1919.[170]

This is all to say that Canadian competition law had little effect on industrial organization. Although Canadian businesses eventually adopted the "tight" organizational structures common in the United States, their reasons for doing so were primarily related to exogenous economic factors, rather than changes in competition law.[171] Indeed, given the timing of the initial merger wave (beginning in 1909) and the passage of the *Combines Investigation Act* (adopted in 1910), it is more likely economic changes influenced legislation than the other way around. Of course, anti-combines

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House of Commons Debates, 11-2, vol 94 (18 January 1910) at 2056–57 (Hon William Lyon Mackenzie King).

165 See *ibid* at 2057–60.

166 *Ibid* at 2057 (Hon William Lyon Mackenzie King).

167 *Ibid* (Hon William Lyon Mackenzie King).

168 See Bliss, "Another Anti-Trust Tradition", *supra* note 137 at 185.

169 According to the act, investigations were not initiated by government prosecutors, but rather by private citizens who bore the full costs of the judicial application process and received no monetary award from a successful investigation: see generally *The Combines Investigation Act*, SC 1910, c 9, ss 5–7.

170 See Bliss, "Another Anti-Trust Tradition", *supra* note 137 at 185.

171 See Marchildon, *Promotion, Finance and Mergers*, *supra* note 132 at 237–44.

legislation was only one aspect of the regulatory environment—company law, discussed below, played an equally important role.

B. Canadian Company Law

Beyond anti-combines legislation, company law played a major role in Canadian merger activity. Two characteristics of Canadian law stand out: first, unlike the United States, Canada enacted *federal* legislation regarding the creation of limited companies. Canadian promoters therefore had access to a national body of corporate law. Second, by 1909, Canadian law was less restrictive than the traditional corporate law of most American states. Since federal company law—available anywhere across the country—imposed few restrictions on mergers, neither corporate promoters nor the provinces themselves had reason to advance an alternative system. More than any other factor, it was the permissive nature of company law at the time of the Canadian merger movement that precluded the jurisdictional competition experienced in the United States.

Canada's tradition of parallel federal and provincial corporate law emerges from the Confederation period. By its terms, the *British North America Act, 1867* granted the power of incorporation solely to the provinces, providing them exclusive authority to form "Companies with Provincial Objects."[172] However, the federal division of power under the Canadian constitution system—by which the provinces are granted plenary authority over specific enumerated subjects, and all subjects not so enumerated are reserved to the national government—left open the possibility that the Dominion government could incorporate companies with *national* objects.[173] Although the existence of this power was uncertain, the Parliament of Canada passed a joint stock companies act shortly following Confederation.[174] The federal act was largely based on preexisting legislation of the Province of Canada, itself derived from a combination of English and American influences.[175] The federal act was amended several times over subsequent decades, but its structure remained grounded in Confederation-era legislation.

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172 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 92(11), reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*].

173 In the 1881 case of *Citizens Insurance Company of Canada and The Queen Insurance Company v Parsons* [1881] UKPC 49 [*Parsons*], the Privy Council confirmed as a matter of constitutional law that the federal government was empowered to create companies with extra-provincial objects.

174 See *Canada Joint Stock Companies Letters Patent Act, 1869*, SC 1869, c 13 [*CJSCLPA*].

175 See AW Currie, "The First Dominion Companies Act" (1962) 28:3 Can J Econ & Pol Sci 387 at 401–02 .

Like the provincial statute on which it was based, the first federal companies act featured a distinctive "letters patent" system, by which companies were formed under the executive authority of the Governor-in-Council.[176] Although the letters patent system was unique to Canada, it was similar to English law in its approach to corporate governance.[177] Both English and Canadian law permitted wide discretion in organizing company affairs and imposed relatively few restrictions on substantive business activities. This was in contrast with many American states, which generally imposed stricter limits on size, structure, and business practices. These differences are evident from comparing (1) the Canadian *Companies Act, 1902*,[178] (2) the English Companies Acts, 1862 to 1907,[179] and (3) the state corporation acts described in Annex A. Although their details varied, English and Canadian company law were broadly similar in that neither included the antitrust provisions that were common in American statutes.[180] If anything, the Canadian act was even more permissive than English legislation.

None of this to say Canadian law was a model of corporate liberalism, however. Prior to the *Companies Act, 1902*, incorporating a business was an onerous, time-consuming process, requiring application to the Secretary of State and a full month's prior notice in the *Canada Gazette*.[181] Early Canadian law also made consolidation difficult. As in many US states, the pre-1902 stock companies act prohibited intercompany stock purchases, preventing companies from using their funds to acquire the shares of other companies.[182] The federal act also required that a majority of directors be resident Canadians and subjects of the Crown, which likely discouraged foreign investment.[183] Indeed, although the delay in the Canadi-

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176 In practice, this authority was exercised by the Secretary of State.

177 For discussion of the letters patent system, see Currie, *supra* note 175 at 400–02. For discussion of philosophical/theoretical differences between the letters patent system and the English memorandum-registration system, see Bruce Welling, Lionel Smith & Leonard I Rotman, *Canadian Corporate Law: Cases, Notes & Materials*, 4th ed (Markham: LexisNexis, 2010) at 110–18.

178 SC 1902, c 15 [*The Companies Act, 1902*].

179 English company law was consolidated in 1862 and further modernized in subsequent acts: see John D Turner, "The Development of English Company Law Before 1900" in Harwell Wells, ed, *Research Handbook on the History of Corporate and Company* Law (Cheltenham: Edward Elgard, 2018) 121 at 135.

180 The exception being New Jersey and the other states that sought to emulate it.

181 See *CJSCLPA*, *supra* note 174, s 4. This lengthy incorporation process was one of the primary motivations for reforming the act in 1902 (see *supra* notes 184–191 and accompanying text).

182 See *ibid*, s 41.

183 See *ibid*, s 18.

an merger movement was primarily due to economic factors, restrictions in Canadian company law may have also played a role.

As the years passed, the federal joint stock companies act was amended several times, but major changes to its core provisions did not arrive until 1902, with the passage of the revised and restated *Companies Act, 1902*. These revisions significantly liberalized Canadian company law. The most important changes "assimilated the law of Canada to the law of England, and removed many obstructions to the obtaining of charters which formerly existed under [the] old statute."[184] Parliament's intentions in revising the act were unmistakably pro-business. The goal of the revisions was to maximize the freedom of "private enterprises to unite together" and to remove "any obstructions or obstacles" to the formation of joint stock companies.[185] In this spirit, the act simplified the incorporation process and removed any requirement of prior public notice.[186] According to Liberal Senator and Secretary of State Richard Scott, the primary drafter of the act, the reforms greatly simplified federal law, reducing the incorporation process from a matter of months to a matter of days.[187] The act also included broader reforms intended to attract companies to Canada. For example, the act expressly provided that foreign companies could reincorporate under Canadian law, a provision meant to attract British and American capital.[188] For similar reasons, the requirement that company directors be Canadian residents or British subjects was removed.[189] Finally, although the act adopted the English rule allowing shareholders to initiate judicial inspections, the Canadian legislation—unlike the English companies acts—did *not* require full public disclosure.[190] Canadian law-

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184 According to Charles M. Holt, a leading Montreal commercial practitioner (see Charles M Holt, "The Canada Companies' Act, 1902" (1902) 2:2 Can L Rev 71 at 71).

185 "Bill (R), An act respecting the incorporation of Joint Stock Companies by Letters Patent", 1st reading, *Debates of the Senate*, 9-2 (8 April 1902) at 169 (Hon Richard Scott) [*Senate Debates, 8 April 1902*].

186 See *The Companies Act*, *1902*, *supra* note 178, s 5–10.

187 See *Senate Debates, 8 April 1902*, *supra* note 185 at 169 (Hon Richard Scott); "Bill (R.), An Act respecting the incorporation of Joint Stock Companies by letters patent", *Debates of the Senate*, 2nd reading, 9:2, vol 1 (17 April 1902) at 233–34 (Hon Richard Scott) [*Senate Debates, 17 April 1902*].

188 See *The Companies Act, 1902*, *supra* note 178, s 13; *Senate Debates, 8 April 1902*, *supra* note 185 at 171−72 (Hon Richard Scott).

189 See *Senate Debates*, *Debates of the Senate,* 9-2 (22 April 1902) [*Senate Debates, 22 April 1902*] at 278. Ironically, a requirement that at least twenty-five per cent of directors be Canadian residents was reinserted into the *CBCA* in 2001 in response to increasing foreign investment in Canada. See *CBCA*, *supra* note 8, s 105(3); *An Act to amend the Canada Business Corporations Act and the Canada Cooperatives Act and to amend other Acts in consequence*, SC 2001, c 14, s 37.

190 See *The Companies Act*, *1902*, *supra* note 178, s 79.

makers felt that public disclosure was overly burdensome, especially for smaller firms.[191]

Under the revised act, companies enjoyed a variety of means of combining into larger firms. Some of these methods already existed, while others were introduced by the 1902 revisions. Under existing law, Canadian companies had long been able to purchase the assets of other firms,[192] a common means of transferring a business from one corporate owner to another.[193] Under the 1902 act, companies were also empowered to purchase and hold company stock, if authorized by their letters patent or by-laws.[194] This power allowed holding companies to purchase the stock of independent firms, consolidating separate businesses under a single corporate ownership structure. Companies were also permitted to issue shares in exchange for property, allowing them to finance acquisitions by issuing their own stock.[195] Together, these powers enabled promoters to organize combinations by (1) forming a holding company (or using an existing firm as a holding company) and (2) acquiring competing businesses, using the holding company's shares as consideration.[196] This acquisition process was similar to the merger structure used by New Jersey corporations.[197] Indeed, James B. Dill was cited in Parliament as an instructive American authority.[198] A final method of combining firms was legal "amalgamation," the melding of two companies into one. Although the *Companies Act, 1902* did not specifically address amalgamation, it was apparently permitted under general law if both companies claimed the

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191 See *Senate Debates*, *8 April 1902*, *supra* note 185 at 172 (Hon James Alexander Lougheed).

192 See Victor E Mitchell, *A Treatise on the Law Relating to Canadian Commercial Corporations* (Montreal: Southam Press, 1916) at 1210–16, 1397.

193 See Curtis, *supra* note 162 at 6–7.

194 See *The Companies Act*, *1902*, *supra* note 178, s 35.

195 See Marchildon, *Profits and Politics*, *supra* note 21 at 148, 166, 169 (this technique is described with respect to the notorious Canada Cement Company Ltd. merger).

196 Companies could also be acquired by issuing other forms of securities, including preferred stock, bonds, and so forth (see Mitchell, *supra* note 192 at 1392–97). In the parliamentary debates on the *Companies Act, 1902*, there was confusion over whether the legislation actually allowed this practice. According to Senator Scott, s 6(g) of the act, which required disclosure of the method by which the company's shares were purchased, implied that shares could be validly acquired by tendering shares of another company. Apparently, this argument satisfied his colleagues, as more specific language was never added. See discussion in *Debates of the Senate*, *17 April 1902*, *supra* note 187 at 236–38.

197 See Grandy, *supra* note 29 at 681.

198 See *Senate Debates 17 April 1902*, *supra* note 187 at 238 (James Alexander Lougheed).

power in their letters patent.[199] That said, true amalgamations were rare. Instead, combinations were typically organized as stock or asset purchases.[200]

The legislative history of the 1902 act reveals its pro-business orientation. The parliamentary debates surrounding the act showed strong support for joint stock companies.[201] Senator Scott stated explicitly that the goal of the legislation was to attract joint stock companies to Canada, particularly those financed by British and American capital.[202] He specifically praised English law for attracting "enormous sums of money" to that country in the form of corporate investment.[203] In the House of Commons, Clifford Sifton, the minister of the interior, expressed a similar view, stating that "in respect to that class of companies which can be described as industrial companies every possible facility should be given for incorporation" and that "incorporation should be made as speedy, as free from unnecessary difficulty and as inexpensive as possible."[204]

Equally as significant as these positive views was the notable absence of *anti*-corporate political rhetoric. Unlike the United States—where leading figures in the Democratic Party sought harsh restrictions on corporations, and even the most pro-business Republicans felt compelled to denounce corporate excesses—there was little discussion in the Parliament of Canada of limiting the power of joint stock companies. At a time when fear of corporate monopoly was at a high point in American politics, Canadian politicians were instead concerned with encouraging capital formation. What can explain these differences? First, in 1902, Canada had not yet experienced the massive combinations that dominated the US economy.[205] For this simple reason, controlling combinations was less of a concern among the Canadian electorate.[206] Although Canadians certainly

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199 See *ibid* at 237–38; Mitchell, *supra* note 192 at 1375–76.

200 See Curtis, *supra* note 162 at 6–7.

201 But see the comments of Senator James McMullen at *Senate Debates, 22 April 1902, supra* note 189 at 270–71 (James McMullen).

202 See *Senate Debates*, *8 April 1902*, *supra* note 185 at 171–72 (Hon Richard William Scott).

203 *Senate Debates*, *22 April 1902*, *supra* note 189 at 272 (Hon Richard William Scott).

204 "Bill (No. 16) respecting the incorporation of Joint Stock Companies by letters patent", *House of Commons Debates*, 9-2, vol 57 (15 May 1902) at 5057 (Hon Clifford Sutton) [*House of Commons Debates, 15 May 1902*].

205 See Marchildon, *Profits and Politics*, *supra* note 21 at 254.

206 The ambivalent attitude toward combinations and competition is described in Baggaley, *supra* note 153 at 20–21. The politics of the National Policy, which promoted domestic combinations by limiting foreign competition, are described in Bliss, *A Living Profit*, *supra* note 136 at 95–113.

resented cartels, the economy had not yet experienced the outright monopolization of entire industries.[207] Second, to a greater extent than in the United States, Canadian politics was dominated by a conservative, patrician political elite which was generally sympathetic to the country's business and financial community.[208] Not only were the parliamentary debates on the *Companies Act, 1902* marked by general pro-business sentiment, but several lawmakers discussed the bill in terms of their own involvement in forming companies.[209] This sympathy toward the business class was reflected throughout Canadian economic policy, as illustrated by the lack of effective prohibitions on price and output collision, the awarding of public "bonuses" for private economic development, and—last but not least—the National Policy itself, which benefited Canadian producers at the expense of Canadian consumers.[210] A final factor may have been the peripheral status of Canada itself, which remained less developed than both the British metropole and the rapidly developing United States.[211] Although Canada was a prosperous country by world standards, its relative underdevelopment compared to its two primary trading partners may have contributed to a political culture particularly amenable to industrial support. Whatever the exact reasons, the Canadian government was primarily concerned with helping, not hindering, joint stock companies.[212]

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[207] Thus, according to Canadian businessmen, "evil" combinations were limited to the United States (Bliss, *A Living Profit*, *supra* note 136 at 46). When monopolization did arrive with the merger movement in 1909, Canadians were incensed (see Marchildon, *Promotion, Finance and Mergers*, *supra* note 132 at 134–39).

[208] See Bliss, "Another Anti-Trust Tradition", *supra* note 137 at 186–87; Naylor, *supra* note 161 at xxxi, 4, 57–58, 86.

[209] See e.g. *Senate Debates, 8 April 1902*, *supra* note 185 at 170–72; *Senate Debates, 17 April 1902*, *supra* note 187 at 236, 238; *Senate Debates, 22 April 1902*, *supra* note 189 at 266, 275, 276, 280. Beyond Senator Scott, who as Secretary of State had experience with the incorporation process from the perspective of the government, Senators Dandurand, Lougheed, and Béique were each accomplished solicitors who were routinely involved in forming companies.

[210] See generally Naylor, *supra* note 161 at 187, 193–94. Although high tariffs also existed in the United States, they were far more controversial. Second only to corporations themselves, tariffs were one of the primary targets of populist political agitation. At the turn of the century, for example, tariff reduction was a central plank of the Democratic Party (see Camden Hutchison, "The Historical Origins of the Debt-Equity Distinction" (2015) 18:3 Fla Tax Rev 95 at 115).

[211] See Marchildon, *Profits and Politics*, *supra* note 21 at 257.

[212] Note that my assessment of Canadian law is at odds with that of Fenner Stewart, who has argued that the effectiveness of Canadian company law was hindered by differences between letters patent and memorandum jurisdictions. See generally Fenner L Stewart, "A History of Canadian Corporate Law: A Divergent Path from the American Model?" in Harwell Wells, ed, *Research Handbook on the History of Corporate and Company Law* (Cheltenham: Edward Elgar, 2018) 451. According to Stewart, these differences

Although Canadian lawmakers' major concern was encouraging business development, revenue considerations were also important. In fact, the politics surrounding the *Companies Act, 1902* display elements of the jurisdictional competition witnessed in the United States. By the turn of the century, Ontario had surpassed the federal government in enacting company law reform, such that it had become easier to incorporate under Ontario law than under federal legislation.[213] During the years 1895–1900, Ontario's incorporation revenues grew nearly 500% as an increasing number of businesses chose to incorporate in the province.[214] Given the rapid increase in provincial incorporations, there was concern within Parliament that the slow, cumbersome nature of the federal incorporation process was discouraging its use by businesses. During the debates on the 1902 act, Senator Scott argued that Ontario law had become more attractive than federal incorporation. To make his point, Scott gave the example of "[o]ne of the largest companies recently established" in Canada, which, although based in Quebec, had chosen to incorporate in Ontario.[215] According to Scott, the company would have preferred to "come to Ottawa," but the existing federal legislation was inadequate to its needs.[216] It appears that Scott and other officials believed the federal government was failing to provide an important service. There was even concern that Canadian companies might be leaving for the United States. In the words of Clifford Sifton, the Minister of the Interior:

> The effect of the law as it exists at the present time has been to drive the business away from the federal government. Persons have been compelled to go to the various provinces and the various states of the Union for the purpose of getting charters of incorporation. It will be agreed by the House that we should have our law in such a state

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had the effect of "distracting jurists, judges, regulators, and lawyers with issues of needless complexity" (*ibid* at 458).

213 It was widely believed at the time that Ontario company law reform had led to an increase in Ontario incorporations: see *Senate Debates, 22 April 1902*, *supra* note 189 at 265 (Hon Richard William Scott); *House of Commons Debates, 15 May 1902*, *supra* note 204 at 5057–58 (Hon Clifford Sifton); "Big Increase in Receipts: Revenue From Incorporation of Joint Stock Companies Grows Enormously in the Last Five Years", *The Globe* (4 January 1900) 7 ["Big Increase in Receipts"]. See also "Ontario Companies: Rapid Increase in the Number Incorporated", *The Globe* (16 August 1902) 28. In the federal parliamentary debates on the *Companies Act, 1902*, British Columbia and Nova Scotia, which had each adopted companies acts inspired by English legislation, were also mentioned as potential sources of competition. See *Senate Debates, 8 April 1902*, *supra* note 185 at 170 (Hon Richard William Scott).

214 See "Big Increase in Receipts", *supra* note 213.

215 *Senate Debates*, *22 April 1902*, *supra* note 189 at 265 (Hon Richard William Scott). Scott stated that incorporation under Quebec law was not a viable option, as Quebec had "an old-fashioned law that nobody can work under" (*ibid*).

216 *Ibid.*

> that persons would not have to go somewhere else to get a charter to do business in Canada.[217]

The possibility of competition between the federal government and the provinces was a source of controversy within Parliament. Different lawmakers had different views on the appropriate scope of federal legislation, some considering it a source of revenue, others considering it a threat to the provinces.[218] For example, former prime minister Mackenzie Bowell suggested the goal of reform was to "get more money."[219] Similarly, future prime minister Robert Borden proposed reducing incorporation fees because "the fees secured by the government would be more if they were somewhat lower."[220] On the one hand, these statements suggest that at least some MPs conceived federal incorporation as a source of revenue. On the other hand, several legislators warned that increasing federal incorporations would deprive the provinces of needed funds. Conservative Senator Josiah Wood opposed federal incorporation altogether, claiming it would "take away from the provinces a source of revenue that is of considerable importance to many of the smaller provinces."[221] Liberal Senator James McMullen raised similar concerns, warning that a reduction in provincial revenues could destabilize Canada's provincial revenue transfer system.[222] In response to Senator Wood, Senator Scott, the architect of the bill, assured the Senate that federal incorporation fees would be set "at least as high as, if not higher than the provinces" so as not to cannibalize provincial revenues.[223] As passed, the act's intent seemed to be that large, national firms would incorporate federally, while smaller, more local firms would incorporate under provincial law.

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217 *House of Commons Debates*, *15 May 1902*, *supra* note 204 at 5057 (Hon Clifford Sifton).

218 See *Senate Debates*, *22 April 1902*, *supra* note 189 at 263–67. The primary source of incorporation revenues (for both the federal government and the provinces) was evidently chartering fees, as this was the only source of revenue discussed in the parliamentary debates (*ibid*).

219 *Senate Debates*, *17 April 1902*, *supra* note 187 at 233 (Sir Mackenzie Bowell).

220 *House of Commons Debates*, *15 May 1902*, *supra* note 204 at 5060 (Hon Robert L Borden).

221 *Senate Debates, 22 April 1902*, *supra* note 189 at 263 (Hon Josiah Wood). Senator Wood represented New Brunswick.

222 See *ibid* at 267 (Hon J McMullen).

223 *Ibid* at 265 (Hon Richard William Scott). This issue—the reduction of provincial revenues due to competition from federal law—has remained relevant into the contemporary period. See Daniels, *supra* note 10 at 168–69, who suggests that the federal government may have increased incorporation fees in 1985 in order to *reduce* its competitiveness and allow Quebec greater market share. If Daniels is correct, this phenomenon is best understood as the literal opposite of competition.

Such were Parliament's intentions. What, then, was the practical effect of the *Companies Act, 1902*? Although the empirical evidence is thin, the act appears to have been successful in encouraging federal incorporation. A 1902 *Globe*[224] article praising the new act reported that companies could now be formed in as little as 48 hours. According to *The Globe*, the act's reforms were "highly appreciated" by the Canadian business and legal communities.[225] A year later, *The Globe* reported incorporations in Canada had reached unprecedented levels.[226] However, this tally included *all* joint stock companies—both federal and provincial—making it difficult to determine the extent to which the increase was attributable to federal reform. During the 5-year period of 1899–1903, there were 285 federal incorporations with a total capitalization of over $70 million.[227] Over the same period, there were 339 Ontario incorporations with a total capitalization of over $92 million.[228] News reports from later years suggest the 1902 act may have been succesful in attracting new investment, both from within Canada and abroad.[229] Again, however, the share of companies that incorporated federally as opposed to provincially is unclear.

This proportion becomes clearer in the context of the 1909–1913 merger wave. As Canadian industry consolidated, more than half of Canada's largest firms incorporated under federal law, suggesting its attractiveness to Canadian promoters. Although comprehensive historical data on federal incorporations are unavailable, I was able to estimate the percentage of large Canadian combinations that incorporated federally by cross-referencing Gregory Marchildon's 1885–1918 industrial merger series[230] against federal incorporation records from Library and Archives Canada.[231] Based on this estimate, 97 of 174—roughly 56%—of large combina-

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224 Predecessor to *The Globe and Mail.*

225 "Welcomed at Ottawa: The New Companies Act", *The Globe* (26 July 1902) 9.

226 See "Hundreds of Millions Invested by Canadians: During Past Four Years", *The Globe* (8 April 1903) 4.

227 See *ibid.*

228 See *ibid.*

229 See e.g. "Britain's Small Gain from Canadian Tariff: Decrease in its Trade Not Wholly Stopped by Favors", *The New York Times* (27 November 1905) 5; "More U.S. Companies: American Corporations are Entering Canada", *The Globe* (17 August 1903) 10. See also "New Enterprise Starts: MacMillans to Have a Branch in Canada", *The Globe* (26 December 1905) 9.

230 See Marchildon, *Promotion, Finance and Mergers*, *supra* note 132 at 262–66. Marchildon describes his sources and methods (*ibid* at 175–88).

231 To perform this estimate, I used the following procedure: first, I relied on Marchildon's merger series as a sample of large combinations formed between 1885 and 1918. The Marchildon series includes 174 distinct mergers, primarily in manufacturing industries. Although not comprehensive (the series is skewed toward the largest mergers),

tions were incorporated federally.[232] When limiting the analysis to the years 1909–1913, this figure becomes 50 of 71, or roughly 70%. Because the Marchildon series includes valuation estimates for only a small number of combinations, it is impossible to calculate similar percentages based on total transaction value. That said, there is reason to believe that the largest combinations were the most likely to incorporate federally, implying that the share of federal corporations would be even greater on a valuation basis. Judging from an impressionistic review of the companies in the Marchildon series, large, well-known combinations such as Canadian Canners, Limited, the Dominion Bridge Company, and the Dominion Cotton Mills Company tended to use the federal act, while smaller and more obscure combinations such as "Badgerow Faulkner Vinegar Manufacturing Company," "Berlin Brush Works," and "Edward Partington Pulp and Paper Company Ltd." tended to use provincial acts. Although difficult to verify quantitatively, this pattern suggests that larger combinations were particularly attracted to federal law. Moreover, additional evidence suggests federal law maintained its appeal over time. According to C. A. Curtis, between 1921 and 1933, the years encompassing the second Canadian merger wave, the percentage of combinations incorporating federally remained greater than 66%.[233]

There are several reasons corporate promoters may have preferred federal law. First, at the time of the first merger wave, the ability of pro-

Marchildon's data are the most complete and most recent available for Canada. Unfortunately, for most mergers, the Marchildon series does not include the jurisdiction of incorporation of the surviving firm, making it difficult to determine whether the resulting combination was incorporated under federal or provincial law. This problem led to the second step of my procedure, which was to search the Corporations Branch records of Library and Archives Canada for every combination in the Marchildon series. The archival records of the Corporations Branch (the predecessor of Corporations Canada) include organizational files for all companies incorporated, amalgamated, and/or dissolved under federal law between 1867 and 1973. In order to determine whether a particular combination was organized under federal law, I simply searched for it using the archive's search engine. I deemed combinations whose organizational documents are included in the archive to be federal companies and combinations whose organizational documents are *not* included in the archive *not* to be federal companies. Note that this procedure only reveals whether a given company was organized under federal law—it provides no information as to which jurisdiction non-federal companies were organized.

232 This is likely a conservative estimate, as false negatives (due to incorrect company names or missing files) seem far likelier than false positives (due to companies appearing in the federal archives that were not in fact federal companies).

233 See Curtis, *supra* note 162 at 7. Federal incorporation was popular enough in 1920 for Thomas Mulvey to write: "It may fairly be said that all the large corporations in Canada are incorporated under Dominion law. Undoubtedly some of them are carrying on business under Provincial legislation, but the number is negligible" (Thomas Mulvey, "Some Phases of Canadian Company Law" (1920) 40:10 Can LT 832 at 848).

vincial companies to conduct national business remained uncertain.[234] This issue was not definitively resolved until the 1916 case of *The Bonanza Creek Gold Mining Company Limited v. The King and Another*.[235] In this case, the Privy Council held that provincial companies could conduct extra-provincial business so long as they received authorization from the hosting jurisdiction.[236] In reality, provincial companies had already been engaging in extra-provincial business for years, but their constitutional authority in doing so was uncertain before 1916.[237]

Canadian promoters may have also seen federal law as a means of marketing their firms to foreign investors. In light of Canada's marginal status within the British economic empire, many promoters emphasized the "national" scope of their merger projects to assure London-based investors of their credibility and financial soundness.[238] Combinations often had names beginning with "Canada," "Canadian," or "Dominion," highlighting their national reach.[239] This spirit of aggrandizement may have extended to the incorporation process itself, with promoters choosing Dominion incorporation for its national *cachet*. Even in recent decades, the legitimacy that federal law is believed to communicate to investors has remained a factor in jurisdictional selection.[240] In the early twentieth century, this factor was likely even more important.[241]

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[234] The *Constitution Act, 1867*, *supra* note 172, s 92(11) granted the provinces exclusive authority over "The Incorporation of Companies with Provincial Objects." It was uncertain whether companies with "provincial objects" could also do business outside their province.

[235] [1916] UKPC 11.

[236] See *ibid*. Together with *Parsons*, *supra* note 173, this case provides the constitutional basis for Canadian corporate law federalism.

[237] The parliamentary debates on the *Companies Act, 1902* indicate Ontario companies were already being formed specifically to do business in other provinces, despite the constitutional uncertainties (see *Senate Debates, 22 April 1902*, *supra* note 189 at 265 (Hon Richard William Scott); *House of Commons Debates, 15 May 1902*, *supra* note 204 at 5057–58 (Hon Clifford Sifton). Although Marchildon does not identify the jurisdiction of incorporation for the majority of the combinations in his series, he specifically identifies a number of combinations, including large enterprises such as Canada Bread Co., Ltd., Canadian Canners Limited, and the Spanish River Pulp and Paper Co., Ltd., as Ontario companies (see Marchildon, *Promotion, Finance and Mergers, supra* note 132 at 261–66).

[238] See Marchildon, *Profits and Politics, supra* note 21 at 10–12.

[239] See *ibid.*

[240] See Cumming & MacIntosh, "Rationales Underlying Reincorporation", *supra* note 7 at 300.

[241] See Marchildon, *Profits and Politics, supra* note 21 at 12.

Finally, federal law was popular for the simple reason that it facilitated mergers.[242] In this regard, it is important to consider the typical means by which Canadian combinations were formed. According to Curtis' study, the most common method of forming combinations was through outright purchases of business assets, followed closely by purchases of stock.[243] Out of 374 business consolidations between 1900 and 1933 (a period encompassing the first and second Canadian merger waves), a total of 189, or just over 50%, were structured as asset purchases, a total of 155, or approximately 41%, were structured as stock purchases, and a total of 21, or approximately 6%, were structured as a hybrid of asset and stock purchases.[244] Clearly, stock and asset purchases were the dominant means of forming combinations.

Consummating these purchases was a straightforward process under the federal joint stock companies act. Unlike the corporation acts of most American states (aside from New Jersey and its progeny), the *Companies Act, 1902* included no antitrust, anti-combination, or anti-monopoly provisions. Nor did it include limits on maximum capitalization, an important issue for promoters seeking to issue public securities.[245] Aside from railroad, telephony, and financial services companies, which were governed by specific acts of Parliament, companies were not limited to specific lines of business and were free from the *quo warranto* proceedings faced by corporations in the United States. Finally, Canadian companies were expressly permitted to purchase the stock of other companies,[246] a power that remained uncertain under many state corporation acts.[247] Given the permissiveness of federal law, Canadian promoters had little reason to seek alternative jurisdictions.

Even if they had, the companies acts of the individual provinces were similarly liberal. The *Ontario Companies Act*, revised in 1897, was itself

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242 Again, despite the ubiquitous use of the term "merger" in the academic literature, very few "mergers" in the early twentieth century were mergers (or amalgamations) in the legal sense. See Lamoreaux, *supra* note 20 and accompanying text.

243 See Curtis, *supra* note 162 at 7.

244 See *ibid*. The structure of nine combinations is listed as "not known" (*ibid*). Curtis does not identify a single combination as being structured as a legal amalgamation.

245 Prior to the Great Merger Movement, Massachusetts and Pennsylvania limited capitalization to one million dollars (see Annex A). Many Canadian mergers were capitalized in excess of $10 million (see Marchildon, *Profits and Politics*, *supra* note 21 at 146–47).

246 Assuming they were so empowered by their letters patent or by-laws (see *The Companies Act*, *1902*, *supra* note 178, s 35).

247 This uncertainty was part of what made New Jersey's legal reforms so attractive. See Vincent P Carosso, *Investment Banking in America: A History* (Cambridge, Mass: Harvard University Press, 1970) at 42–43; Chandler, *supra* note 43 at 319–20; Thorelli, *supra* note 52 at 84.

an important inspiration for the *Companies Act, 1902*.[248] In 1897, the legislature of Ontario "very nearly assimilated their practice to the English practice"[249] by allowing the creation of joint stock companies without prior public notice.[250] Following earlier Canadian legislation, the Ontario act included no antitrust provisions and few restrictions on business activities. Companies were allowed to purchase other companies' shares if authorized by a by-law approved by two-thirds of the shareholders.[251] As discussed above, these reforms were associated with a significant increase in Ontario incorporations, which encouraged the federal government to reform its own companies act.[252] Other provinces, including British Columbia and Nova Scotia, adhered even more closely to English law by maintaining the English practice of incorporation by registration.[253] By 1907, even Quebec had enacted companies legislation closely based on the *Companies Act, 1902*.[254] Thus, although the largest combinations tended to incorporate federally, the substantive content of provincial law was not significantly different.

In sum, the legal environment in Canada during the country's first merger wave differed from the American environment roughly a decade earlier. During the Great Merger Movement in the United States, both antitrust law and market forces reduced the viability of "loose" combinations. At the same time, many states' corporate laws also inhibited "tight" combinations. In this environment, New Jersey provided an avenue of escape from the restrictive laws of its sister states. The success of New Jersey (and later Delaware) in attracting corporations eventually led to most other states adopting similarly permissive legal regimes.[255]

In Canada, analogous provincial competition was relatively muted. By the time the Canadian merger movement arrived, promoters enjoyed significant latitude in organizing combinations, mitigating the competitive

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248 See *supra* notes 213–216 and accompanying text.

249 *Senate Debates*, *8 April 1902*, *supra* note 185 at 170 (Hon Richard William Scott).

250 See *The Ontario Companies Act*, RSO 1897, c 191, s 9.

251 See *ibid*, s 82. This requirement was stricter than the analogous provision in the *Companies Act, 1902*, which allowed share purchases if authorized by the by-laws or letters patent (see *Companies Act, 1902*, *supra* note 178, s 35).

252 See *supra* notes 213–217 and accompanying text.

253 See *Companies Act, 1897*, RSBC 1897, c 44, s 9–18; *Nova Scotia Companies' Act*, SNS 1900, c 11, s 6–15. The Nova Scotia act was so similar to the English Companies Acts that it expressly cross-referenced English statutory provisions.

254 See *The Quebec Companies' Act, 1907*, SQ 1907, c 48.

255 The complex historical influence of Delaware corporate law is described in Harwell Wells, "The Modernization of Corporation Law, 1920–1940" (2009) 11:3 U Pa J Bus L 573 at 585–86, 590–91.

pressures witnessed in the United States. Since Canadian businesses could easily combine under existing federal company law, there was no opportunity for any single province to capture the incorporation market. Ultimately, the reason there was never a "Canadian New Jersey" is that there was never any need for one—federal law already provided nearly everything New Jersey offered. Had he cast his attentions northward, James B. Dill would have approved.[256]

Conclusion

The industrial consolidation of the late-nineteenth and early-twentieth centuries had lasting consequences in both Canada and the United States. Following New Jersey's early success in attracting corporations, the US entered a decades-long period of active jurisdictional competition. In the 1920s and 1930s, after Delaware had succeeded New Jersey, many states embarked on comprehensive reforms to modernize their corporation statutes.[257] These reforms were partly driven by the changing needs of modern business, but they were also an attempt by state politicians to halt the "exodus" of corporations to Delaware.[258] As the years passed, this competitive pressure toward legal convergence led to an "S-curve" pattern in corporate reform, as an accelerating number of state governments adopted various features of Delaware law.[259] This process was hastened by promulgation of the *Model Business Corporation Act* (MBCA), a model corporation statute published by the American Bar Association in 1950, which itself drew heavily on the Delaware-influenced Illinois *Business Corporation Act of 1933*.[260] Although the *MBCA* differed from Delaware law in a number of important respects, it was far closer to the Delaware act than to the traditional state acts of the nineteenth century.[261] Today, the similarities among the different states largely outweigh their differences, and American corporate law—despite its diffusion among fifty states—has grown increasingly standardized around the liberal Delaware model.

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[256] Significantly, during the Parliamentary debates on the *Companies Act, 1902*, Dill's work was cited favourably by Senator James Lougheed (see *Senate Debates, 17 April 1902*, *supra* note 187 at 238).

[257] See Wells, *supra* note 255 at 590.

[258] *Ibid* at 573–76.

[259] See Romano, "Law as a Product" *supra* note 4 at 233–42.

[260] See Jeffrey M Gorris, Lawrence A Hamermesh & Leo E Strine, Jr, "Delaware Corporate Law and the Model Business Corporation Act: A Study in Symbiosis" (2011) 74:1 Law & Contemp Probs 107 at 109.

[261] See *ibid* at 109–12.

Canadian corporate law has seen even greater standardization, but unlike in the United States, the major driver of policy convergence has been federal legislation. While state corporate law rapidly evolved during the first half of the twentieth century, Canadian company law remained relatively static until the legislative reforms of the 1970s. These reforms began with the Ontario *Business Corporations Act, 1970* and continued with the adoption of the *CBCA* in 1975.[262] In the decades between the *Companies Act, 1902* and the *CBCA*, the only major revision of federal corporate law was the *Companies Act, 1934*, which maintained the letters patent system of earlier legislation.[263] According to the 1971 Dickerson Report—the federal expert committee report that led to the *CBCA*—Canadian corporate law had been "sadly neglected" for much of the preceding century, having not experienced significant change within "the last hundred years."[264] Breaking from this tradition, the *CBCA* brought major reforms, most notably by replacing the letters patent system with an American-style incorporation process.[265] The impact of the *CBCA* has extended beyond federal law. Moreover, in the years following the C*BCA*'s adoption, a majority of the provinces enacted substantially similar acts, resulting in considerable standardization of Canadian corporate law.[266] Although this standardization was possibly a result of competition,[267] it appears more likely that provincial governments have pursued a strategy of uniformity.[268] Lacking an institutional tradition of competition among the provinces, and with a number of legal and practical obstacles to an active incorporation market, Canadian law has modernized through a collective, consensual process.[269]

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[262] RSO 1970, c 25; see Stewart, *supra* note 212 at 465–69. Ontario initiated this reform process by appointing a company law reform committee in the 1960s, the recommendations of which led to the *Business Corporations Act, 1970* (*ibid*). Following the subsequent adoption of the *CBCA*, most Canadian provinces, including Ontario, adopted very similar versions of the federal statute (*ibid*).

[263] SC 1934, c 33, s 5.

[264] Robert WV Dickerson, John L Howard & Leon Getz, *Proposals for a New Business Corporations Law for Canada*, vol 1 (Ottawa: Information Canada, 1971) at 2.

[265] See *CBCA*, *supra* note 8, s 5–9; Robert WV Dickerson, John L Howard & Leon Getz, *Proposals for a New Business Corporations Law for Canada* (Ottawa: Information Canada, 1971) vol 1 at 6, 18–19, 26.

[266] See *supra* note 8 and accompanying text.

[267] See Daniels, *supra* note 10 at 150–51.

[268] See Cumming & MacIntosh, "Interjurisdictional Competition", *supra* note 7 at 179–80.

[269] See *ibid* at 179–80. This consensus can also be seen in Canadian securities regulation, which takes the form of collective instruments jointly issued by the provincial securities commissions.

These differences in legal reform between the United States and Canada have contributed to substantive differences in American and Canadian corporate law. As a competitive supplier of a specialized legal product, Delaware has been sensitive to the preferences of corporate managers, as conveyed to the state legislature by the Delaware corporate bar. The drafting of the *CBCA* was a more deliberate, technocratic process, informed by issues broader than the preferences of the business community.[270] These differences are reflected in key aspects of the *CBCA* today. For example, compared to Delaware, the *CBCA* provides greater protections to minority shareholders.[271] Similarly, neither the *CBCA* nor any provincial act includes express anti-takeover provisions of the type adopted by many states (including Delaware) in the 1980s.[272] Finally—and somewhat incongruously, given its strong shareholder protections—Canadian law allows for greater recognition of non-shareholder "stakeholder" interests. While fiduciary duties under Delaware law are generally owed to shareholders,[273] the *CBCA* specifies that directors' duties are owed to the "corporation,"[274] a broader concept which has facilitated appeals to corporations' social responsibilities. In *Peoples Department Stores Inc. v. Wise*[275] and *Re BCE Inc.*,[276] the Supreme Court of Canada responded to these appeals by expressly allowing directors to consider a wide range of non-shareholder constituencies, a principle which was recently codified in the CBCA itself.[277] For better or worse, each of these features of Canadian law have been shaped by general policy concerns, rather than by their desirability to business managers. The irony, of course, is that Canadian law's greater independence from the preferences of the business community is a

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270 This process is both described in, and evidenced by Dickerson, Howard, & Getz, *supra* note 264.

271 These protections stem in large part from Canada's broad oppression remedy. See Stephanie Ben-Ishai & Poonam Puri, "The Canadian Oppression Remedy Judicially Considered: 1995–2001" (2004) 30:1 Queen's LJ 79 at 81–82, 102; Brian Cheffins, "The Oppression Remedy in Corporate Law: The Canadian Experience" (1988) 10:3 U Pa J Intl Bus L 305 at 338–39; Puri et al, *supra* note 6 at 797–98. The barriers to shareholder involvement in management are also much lower under the *CBCA* than under Delaware law (see *CBCA*, *supra* note 8, s 143(1) and *Delaware General Corporation Law*, tit 8 c 1 § 211(d) (2017)).

272 Although NI 62-104 imposes obstacles to hostile tender offers (see e.g. *Multilateral Instrument 62-104 Take-Over Bids and Issuer Bids*, BCSC MI 62-104 (1 February 2008) ss 2.2, 2.4–2.5, 2.8. 2.23–2.27, 2.28, 2.29).

273 See note 26 *supra* and accompanying text.

274 See *CBCA*, *supra* note 8, s 122.

275 *Peoples Department Stores Inc (Trustee of) v Wise*, 2004 SCC 68, [2004] 3 SCR 461.

276 *Re BCE Inc*, 2008 SCC 69, [2002] 3 SCR 560.

277 *Budget Implementation Act, 2019, No 1*, SC 2019, c 29, ss 141–44.

result of business' *satisfaction* at the height of the Canadian merger movement.

In conclusion, American and Canadian corporate law have both been influenced by historical factors. American law changed dramatically as a result of the Great Merger Movement, while Canadian law evolved more slowly until the legislative reforms of the 1970s, but both embody a liberal approach to key issues of corporate governance. Despite the differences described in this article, American and Canadian corporate law are in many respects quite similar, partly due to the ongoing convergence of international corporate law and partly due to the specific influence of American law on Canada, of which the *CBCA* is an important example. Even at the fundamental institutional level, the distinction between the "competitive" and "uniform" models may be weakening. Given Delaware's decades-long dominance of the US incorporation market, it is increasingly doubtful whether other states compete for corporations at all.[278] Moreover, considering Delaware's pervasive influence on the corporate law of other states, it is difficult to characterize the American system as a continuing laboratory of innovation.

In Canada, conversely, provincial competition is increasing. In the years since Cumming and MacIntosh found an absence of provincial competition,[279] several provinces have enacted reforms intended to attract business organizations. Following the discovery in the 1990s that Nova Scotia unlimited liability companies ("ULCs") could be used as a tax-saving device by firms doing business in both the United States and Canada, Alberta and British Columbia adopted their own ULC legislation to attract cross-border subsidiaries of American corporations.[280] Indeed, Alberta's and British Columbia's entrance into the ULC market led to significant price competition in ULC registration fees.[281] Another sign of

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[278] See generally Kahan & Kamar, *supra* note 5. Although there is some evidence that Nevada attempts to compete with Delaware, it has achieved only limited success (see Bruce H Kobayashi & Larry E Ribstein, "Nevada and the Market for Corporate Law" (2012) 35:4 Seattle UL Rev 1165 at 1168–69).

[279] See Cumming & MacIntosh, "Interjurisdictional Competition", *supra* note 7 at 67–68.

[280] Prince Edward Island has also recently adopted ULC legislation. *Business Corporations Act*, RSPEI 1988, B-6.01, Part III.

[281] See Gail Lilley & Michael Wager, "Creating Entrepreneurships: Form of Entity; Management Provision Concerns; Dispute Resolution Provisions; Growth Provisions – Identification of Rights and Responsibilities of Participants in Entrepreneurship Including Allocation of Risks" (Paper delivered at the Proceedings of the Canada-United States Law Institute Conference on Comparative Legal Aspects of Entrepreneurship in Canada and the United States, 13, 14 April 2010) (2007) 33:1 Can-USLJ 47 at 64–67; Robert Flannigan, "Immunity Shopping" (2011) 37:1 Queen's LJ 39 at 44, n 7. Note that changes to the Canada-US tax treaty in 2010 reduced the usefulness of these structures

competition is Quebec's 2009 *Business Corporations Act*, which comprehensively restated Quebec corporate law.[282] The new act includes several reforms designed to enhance Quebec's reputation as a business-friendly jurisdiction and retain domestic corporations that would otherwise incorporate under the *CBCA*.[283] Finally, in a clear (and apparently successful) attempt to appeal to international investors, British Columbia eliminated all residency requirements for corporate directors, making British Columbia particularly attractive for business entities with foreign ownership.[284] Although the significance of these efforts remains a question for future research, the current literature likely understates the full extent of provincial competition.

Ultimately, this convergence between American and Canadian law is unsurprising. The geographic, economic, and cultural proximity of the two countries has ensured close parallels between their respective approaches to business law. With respect to corporations, these parallels are particularly strong, though they have manifested historically in surprising and unexpected ways. While recent developments in Canadian corporate law have broadened its approach to social responsibility, particularly compared to Delaware law's more narrow conception of corporate interest, these developments are in fact a historical reversal of the traditional priorities of Canadian law. At the turn of the twentieth century, it was *Canadian* law that was more attentive to the interests of the business community and *American* law that was more reflective of social and political concerns. Indeed, this political responsiveness was precisely the problem

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(see E Miller Williams & Jeffrey Shafer, "The Canada-United States Tax Regime" (2011) 36:1 Can-USLJ 209 at 227).

[282] RSQ 2018, c S-31.1.

[283] See Glenford Jameson, "Competing with Ourselves: Supply-side Competition for Corporate Charters in Canada" (2013) 50:4 Alta L Rev 843 at 858–60; Rousseau, *supra* note 24 at 8–9.

[284] See Kareen A Zimmer, "Canada: Good Reasons to Incorporate in British Columbia" (12 January 2010), online: *Mondaq* <www.mondaq.com> [perma.cc/ECK3-BRHC]; Doing Business in Canada: A Practical Guide (Cassels Brock, 2011) at 3.4; "Directors' Residency Requirements for Companies / Corporations for Each Canadian Jurisdiction" online (pdf): Corporate Research and Analysis Centre <www.crac.com/Documents/tableau_exig_rescan_admin_en.pdf>. Currently, New Brunswick, Nova Scotia, Prince Edward Island, Quebec, and all three Canadian territories also impose no residency requirements on boards of directors. Indeed, the decision by British Columbia to eliminate residency requirements was partly a response to competition from Yukon, which—despite its small population, remote location, and limited infrastructure—had managed to attract a number of corporations, particularly in resource extraction industries. For discussion of Yukon's past and present efforts to compete with British Columbia, see Paul Haavardsrud, "Go North, not West: Yukon Lures Businesses with New Company Rules", *CBC News* (1 May 2015), online: <www.cbc.ca/news/business/go-north-not-west-yukon-lures-businesses-with-new-company-rules-1.3057441>.

from the perspective of American business leaders—and the underlying cause of the "race to the bottom" experienced in the United States.[285] As a result of this process, American corporate law abandoned its concern with limiting the power of corporations, thereby becoming increasingly similar to the existing Canadian system.

[285] During the early twentieth century, American business leaders also lobbied intensely—and unsuccessfully—for a pro-business federal corporation act. See generally Hutchison, "Progressive Era Conceptions", *supra* note 85 at 1051–85.

Annex A: State Law Restrictions on Corporations

This Annex A summarizes key antitrust provisions and other restrictions on corporations enacted by the five most prosperous states as of 1895 (immediately preceding the Great Merger Movement). The five wealthiest states as of 1895 were New York, Pennsylvania, Illinois, Ohio, and Massachusetts, as measured by "true valuation of real and personal property," according to US, *Statistical Abstract of the United States*.[286] These states were selected under the assumptions that (1) measured wealth is a proxy for business activity and (2) prior to the rise of New Jersey, most corporations were legally organized under the law of their state of origin.

STATE	LEGAL RESTRICTIONS (organized by specific statute)
1. New York	*Stock Corporation Law*[287] **§ 7. Combinations prohibited:** corporations were prohibited from combining "for the creation of a monopoly or the unlawful restraint of trade or for the prevention of competition in any necessary of life."[288] **§ 42. Consideration for issue of stock and bonds:** corporations were prohibited from issuing stock for less than par value.[289]

[286] (Washington: Government Printing Office, 1896) at 340–41.

[287] See *Stock Corporation Law*, as amended in Charles A Collin, *The Revised Statutes of the State of New York: Together with All the Other General Statutes (except the Civil, Criminal, and other Penal Codes)* (Albany, NY: Banks & Brothers, 1896) vol 2 at 1003 [*The Revised Statutes of the State of New York, vol 2*].

[288] *Ibid* at 1008.

[289] See *ibid* at 1019. Acquiring stock for less than par value was the preferred means by which inside promoters compensated themselves for organizing mergers: see Gabriel Kolko, *The Triumph of Conservatism: A Reinterpretation of American History, 1900-1916* (Chicago: Quadrangle Books, 1967) at 17–24. Stock issued for an aggregate par value in excess of the real value of the corporation's tangible assets was referred to as "watered stock" (*ibid*). For an overview of the meaning of "watered stock", see "Watering Stock" in Gary Giroux, ed, *Business Scandals, Corruption, and Reform: An Encyclopedia* (Santa Barbara: ABC-CLIO, LLC, 2003) vol 2 at 645–46). This phenomenon (referred to by Marchildon as promotional stock) is described in the Canadian context in

Business Corporations Law[290]

§ 8. Consolidation of corporations: any two or more corporations organized under the laws of New York and conducting business "of the same or of a similar nature" could consolidate into a single corporation. However, the capitalization of any such consolidated corporation could not exceed the aggregate value of "the property, franchises, and rights" thereof.[291]

An Act to Prevent Monopolies in Articles of General Necessity[292]

§ 1. Combinations whereby competition would be "restrained or prevented, for the purpose of advancing prices" were prohibited.[293]

2. Pennsylvania

Corporations[294]

§ 65. Corporations were prohibited from issuing capital stock in an

Gregory P Marchildon, *Profits and Politics: Beaverbrook and the Gilded Age of Canadian Finance* (Toronto: University of Toronto Press, 1996) at 30–31, 69–71, 145–51.

290 See *Business Corporations Law*, as amended in *The Revised Statutes of the State of New York*, *vol 2*, *supra* note 2 at 1384. While the *Stock Corporation Law* applied to all corporations, the *Business Corporations Law* applied to the narrower subset of corporations organized for business purposes (*ibid* at 1384).

291 *Ibid* at 1385. Again, the limitation on capitalization was intended to prevent the issuance of watered stock: see Kolko, *supra* note 4 at 17–24.

292 See *An Act to Prevent Monopolies in Articles of General Necessity*, as amended in Charles A Collin, *The Revised Statutes of the State of New York: Together with All the Other General Statutes (except the Civil, Criminal, and other Penal Codes)* (Albany, NY: Banks & Brothers, 1896) vol 3 at 2953.

293 *Ibid*.

294 See *Corporations*, as amended in Frank F Brightly, *A Digest of the Statute Law of the State of Pennsylvania from the Year 1700 to 1894* (Philadelphia: Kay and Brother, 1894) vol 1 at 403.

amount greater than one million dollars.[295]

§ 67. Shareholders were prohibited from purchasing capital stock with a note or other debt obligation. Corporations were prohibited from purchasing or holding the stock of any other corporation.[296]

Manufacturing Companies[297]

§ 1. Manufacturing corporations were prohibited from issuing capital stock in an amount greater than $5 million. This section also imposed various limitations on the issuance of preferred stock.[298]

§ 13. All manufacturing, mining, and quarrying corporations were strictly limited to the purpose of their creation as specified in their charters.[299]

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295 See *ibid* at 404. Limiting capitalization to one million dollars (approximately $30,100,000 in 2017 dollars) was a significant restriction on corporate size. To put this amount in perspective, the United States Steel Corporation, one of the largest combinations of the era, was incorporated in New Jersey with a capitalization of nearly $1.4 billion (see John Moody, *The Truth About the Trusts: A Description and Analysis of the American Trust Movement* (New York: Moody Publishing Company, 1904) at 453).

296 See Brightly, *supra* note 9 at 404.

297 See *Manufacturing Companies*, as amended in Frank F Brightly, *A Digest of the Statute Law of the State of Pennsylvania from the Year 1700 to 1894* (Philadelphia: Kay and Brother, 1894) vol 2 at 1291. The *Manufacturing Companies* act applied specifically to manufacturing corporations.

298 See *ibid*.

299 See *ibid* at 1293.

3. Illinois

An Act Concerning Corporations[300]

§ 5. Powers—restrictions as to real estate: corporations were permitted to hold real and personal estate, but only to the extent necessary for the transaction of their business.[301]

Trusts and Conspiracies Against Trade[302]

§ 1. Defines a trust: "any combination of persons, firms, corporations, or associations for the purpose of fixing prices, restricting output, or otherwise reducing competition" was defined as a "trust."[303]

§ 2. Forfeiture of franchise: any corporation violating the act (i.e., fixing prices, restricting output, or otherwise reducing competition) forfeited its charter and franchise, thereby ceasing to exist.[304]

§ 10. Purchaser liable: any customer of any person, firm, corporation, or association violating the act was not liable to pay for the goods or services purchased.[305]

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300 See *An Act Concerning Corporations*, as amended in Harvey B Hurd, *The Revised Statutes of the State of Illinois, 1893* (Chicago: Chicago Legal News Company) at 364.

301 See *ibid* at 365. As discussed in Part II A, this section was interpreted by the Supreme Court of Illinois to limit the ability of corporations to purchase the shares of other corporations (see *People ex rel Peabody v Chicago Gas Trust Co*, 130 Ill 268 (Ill Sup Ct 1889)).

302 Hurd, *supra* note 15 at 519.

303 *Ibid*.

304 See *ibid*.

305 See *ibid* at 520.

	Quo Warranto[306] **§ 1.** Any corporation exercising "powers not conferred by law" was subject to a *quo warranto* proceeding.[307]
4. Ohio	*Corporations*[308] **§ 3863.** Manufacturing and mining corporations were permitted to purchase the stock of railroad and other transportation corporations, but only with the consent of two-thirds of the shareholders of the target corporation.[309] *Quo Warranto*[310] **§ 6761.** Any corporation that "misused a franchise, privilege, or right conferred upon it by law" or that "exercised a franchise, privilege, or right in contravention of law" was potentially subject to a state civil action.[311]
5. Massachusetts	*Of Certain Powers, Liabilities, and Duties of Corporations*[312]

306 See *Quo Warranto*, as amended by Hurd, *supra* note 15 at 1087.

307 *Ibid*.

308 See *Corporations*, as amended in Florian Giauque, *The Revised Statutes of the State of Ohio* (Cincinnati: The Robert Clarke Company, 1896) vol 1 at 801.

309 See *ibid* at 974. Although this provision is somewhat unclear, it seems to imply that stock purchases were generally prohibited.

310 See *Quo Warranto*, as amended in Florian Giauque, *The Revised Statutes of the State of Ohio* (Cincinnati: The Robert Clarke Company, 1896) vol 2 at 1662.

311 *Ibid* at 1662–63. This section provided the basis for the Ohio Attorney General's lawsuit to dissolve the Standard Oil Trust: see *State ex rel Attorney General v Standard Oil Co*, 30 NE 279 (Ohio Sup Ct 1892) at 287–88.

312 See *Of Certain Powers, Liabilities, and Duties of Corporations*, as amended in *The Public Statutes of the Commonwealth of Massachusetts* (Boston: Rand, Avery & Company, 1882) at 564.

§ 17. Corporations were prohibited from issuing shares for less than par value.[313]

Of Manufacturing and Other Corporations[314]

§ 7. Manufacturing, mechanical, and mining corporations were prohibited from issuing capital stock in excess of one million dollars.[315]

§ 37. When any manufacturing, mechanical, or mining corporation increased its capital stock, all shareholders were entitled to participate in proportion to their shareholdings.[316]

§ 42. Imposed various limitations on the issuance of preferred stock.[317]

§§ 46–49. Corporations were prohibited from issuing stock in exchange for debt or personal services.[318]

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313 See *ibid* at 567. Again, acquiring stock for less than par value was the preferred means by which inside promoters compensated themselves for organizing mergers (see Kolko, *supra* note 4 at 17–24).

314 See *Of Manufacturing and Other Corporations*, as amended in *The Public Statutes of the Commonwealth of Massachusetts*, *supra* note 27 at 570 [*Of Manufacturing and Other Corporations*].

315 See *ibid* at 573.

316 See *ibid* at 577–78. Since many combinations acquired individual corporations by issuing shares in exchange for the target corporation's stock or assets, this section made mergers more difficult (see Alfred D Chandler, Jr, *The Visible Hand: The Managerial Revolution in American Business* (Cambridge, Mass: Harvard University Press, 1977) at 319–20, 323, 332, 387, 415).

317 See *Of Manufacturing and Other Corporations* at 578.

318 See *ibid* at 579. This rule discouraged large consolidative mergers by preventing the surviving corporation from issuing free or discounted shares to inside promoters. Promoters were often issued shares as compensation for organizing a combination (see Kolko, *supra* note 4 at 17–24).