Three Regimes: Corporations and Regulation in US History

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Abstract

This paper lays out three successive regimes in the history of incorporation in the United States and draws out the implications of each for government's ability to regulate business enterprises. During the first, the regime of special charters, regulatory provisions were often imbedded in corporate charters, but they did not have much bite. Charters could only be obtained by special legislative acts. Because they were typically used as political patronage, the same factors that determined who obtained these awards militated against the enforcement of any regulatory provisions they might contain. It was only under the second regime, when general laws made corporate privileges broadly available, that enforcement became a serious possibility. States embodied significant regulatory provisions in their general incorporation laws, and they enacted additional regulatory statutes as needed—for example, when corporations evaded restrictions in the statutes by forming trusts or incorporating in other states. Although businesses lobbied against these regulations, farm, labour, and other reform organizations, newly empowered by the same general laws, pushed to strengthen them with a fair degree of success. Reformers never achieved everything they wanted, but regulation reached its apogee under the regime of general incorporation. In the late twentieth century, the start of the third regime, states enacted statutes that enabled businesses to secure corporate advantages with other organizational forms, undermining the government's ability to regulate corporations as corporations. Progressives who continue to argue for placing special regulatory burdens on corporations are fighting the last war and are likely only to speed the shift to non-corporate forms. It would be more effective to tackle specific regulatory problems with targeted statutes that apply to all businesses regardless of organizational form.

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Reformers today blame "the corporation" for a variety of social ills. They argue that an emphasis on shareholder primacy has led to practices that undermine workers' pay and working conditions, damage the environment, and hurt the communities in which firms operate. Somewhat contradictorily, they also argue that sky-high executive compensation, normally thought not to be in shareholders' interest, has increased inequality.[1] To remedy these ills reformers target corporations and propose changes in corporate-governance rules that would encourage, or even require, managers to take the social effects of their decisions into account.[2] Some have also turned to history, arguing that, once upon a time, governments granted charters to corporations for specific public purposes. Shareholders in these corporations could earn profits, but their charters were contingent on the fulfilment of their obligations to the public. According to this view, the shift to general incorporation laws disrupted this productive quid pro quo and ushered in a period of laissez faire. Reformers who embrace this perspective seek to return to a world where corporations once again must fulfil public purposes in exchange for the remunerative privileges they receive.[3]

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[1] A prominent example is Joel Bakan, whose book, *The Corporation: The Pathological Pursuit of Profit and Power* (New York, Free Press, 2004), was made into a popular documentary film by March Achbar, Jennifer Abbott, and Bakan. See also Bakan's sequel, *The New Corporation: How 'Good' Corporations are Bad for Democracy* (New York, Vintage, 2020).

[2] For a thoughtful example, see Rebecca Henderson, 'Moral Firms?' (2001) 152 *Daedalus* 198.

[3] As Eric Hilt has pointed out, this view traces back at least to Adolph A. Berle, Jr., and Gardiner C. Means, *The Modern Corporation and Private Property* (New York, Macmillan, 1932). In addition to popular books such as *The People's Business: Controlling Corporations and Restoring Democracy* by Lee Drutman and Charlie Gray (San Francisco, Barrett-Koehler, 2004), see scholarly works such as David Ciepley, 'Beyond Public and Private: Toward a Political Theory of the Corporation' (2013) 107 *American Political Science Review* 139. See Hilt's critique in 'Early American Corporations and the State' in Naomi R. Lamoreaux and William J. Novak (eds), *Corporations and American Democracy* (Cambridge, MA, Harvard University Press, 2017).

As I argue in this essay, this view gets the history backward. Contrary to the romantic notion that special charters fostered the public good, I show that they were primarily patronage instruments. The political relationships that business people used to obtain charters in the first place also protected them from regulation. It was only when the special-charter era came to end—when legislatures were required to enact general incorporation laws and were prohibited from granting special charters to their political favourites—that governments gained the ability to regulate corporate behaviour. The advantages that the corporate form conveyed were still very real, however, and governments continued to use them to justify a variety of economic regulations. They also used them to justify tax policies and campaign finance legislation that treated corporations differently from businesses that took other organizational forms.

Today corporations are no longer uniquely privileged. In the late twentieth century, states began to enact enabling legislation for a variety of new organizational forms, including limited liability companies and limited liability partnerships, that extend to the businesses that adopt them advantages previously limited to corporations. Firms can now avoid regulatory restrictions on corporations by organizing under one of these statutes, and they are doing so in ever larger numbers. Yet businesses that take these new, noncorporate forms can be responsible for the same social ills as corporations. They can even grow large; only the very biggest enterprises need a form that supports huge numbers of shareholders. Moreover, there is mounting evidence that unincorporated businesses account for a major proportion of the recent rise in inequality in the United States.[4]

[4] Michael Cooper, et al., 'Business in the United States: Who Owns It, and How Much Tax Do They Pay?' in Jeffrey R. Brown (ed), *Tax Policy and the Economy*, vol. 30 (Chicago, University of Chicago Press, 2016); Matthew Smith, et al., 'Capitalists in the Twenty-First Century' (2019) 134 *Quarterly Journal of Economics* 1675.

Reformers continue to seek new regulations to force corporations to behave in pro-social ways, but these policies are rooted in a by-gone era and might even be counterproductive. To the extent that such legislation binds, it is likely to encourage business to switch to other organizational forms. Anti-corporate rhetoric has long been (and still is) a powerful means of rallying political support for regulation, but to be effective in this new organizational environment, reformers need to find ways of cultivating support for solutions that target specific economic and social problems, not a particular business form.

Regime 1: The Special-Charter Era

In the aftermath of the American Revolution, cash-strapped state governments began to charter corporations to provide badly needed public services. Some of these corporations were what we would today call non-profits and were created to found schools, hospitals, libraries, and various types of charities. But others, such as banks, bridge companies, and turnpikes, aimed to turn a profit for their members. Like the charters awarded to non-profits, grants to for-profit enterprises were justified as serving the public good. Behind them was an explicit quid pro quo: in exchange for investing their wealth in infrastructural improvements that benefited society, shareholders in these corporations would be able to earn a reasonable profit.[5]

From early on, however, critics charged that the special charters legislatures were granting mainly benefited the favoured few who received them, not the public in general. Banks were a case in point. Promoters of banks promised that their institutions would provide all sorts of social benefits. For example, the founders of the Massachusetts Bank of 1784, the first bank

[5] See especially Oscar Handlin and Mary Flug Handlin, *Commonwealth: A Study of the Role of Government in the American Economy: Massachusetts, 1774-1861* (New York, New York University Press, 1947).

chartered in that state, promised in their petition for a charter that the bank 'would prove beneficial to the Public in general & particularly to all Persons concerned in Trade' by granting credit at reasonable rates of interest and thereby ensuring that 'the enormous advantages made by the griping Usurer from the Necessities of those who want to borrow Money will be immediately checked & in great Measure Destroyed'.[6] In practice, however, the bank seems mainly to have lent its funds to a small group of elite merchants associated with the dominant Federalist political faction. Part of the problem was that the bank's resources were much too limited to meet the burgeoning demand for credit. When the legislature responded to the resulting pressure to create more banks, however, the new charters all went to the same kinds of people as had founded the Massachusetts Bank—that is, wealthy Federalist merchants. Elite members of opposing political factions, such as Democratic-Republic merchants in Salem, found their requests for charters repeatedly rebuffed, fuelling the belief that bank charters were awarded less for the good of the public than for benefit of the Federalist party.[7]

This belief became self-fulfilling in New York in the runup to the election of 1800. Alexander Hamilton and other Federalist leaders associated with the Bank of New York had successfully blocked all attempts by rival political groups to organize their own banks. In 1799, however, Republican Aaron Burr cleverly exploited a loophole in the charter for a water works to start the Manhattan Bank. Burr's allies later credited the new bank with the destruction of the destruction of the Federalist empire, crowing that it 'emancipated hundreds who were held in bondage by the old institutions'. Although the claim was overblown, there is no question that the

[6] Reprinted in N. S. B. Gras, *The Massachusetts First National Bank of Boston, 1784-1934* (Cambridge, MA, Harvard University Press, 1937), 212-14.
[7] Qian Lu, *From Partisan Banking to Open Access: The Emergence of Free Banking in Early Nineteenth Century Massachusetts* (London, Palgrave, 2017), 22-32; Naomi R. Lamoreaux, *Insider Lending: Banks, Personal Connections, and Economic Development in Industrial New England* (New York, Cambridge University Press, 1994), 11-18.

Republicans made deliberate use of the bank to further the fortunes of their candidates, offering supporters accommodation in reward for their loyalty.[8] The Federalists responded in kind by denying credit to Republican merchants, and from that point on, the award of bank charters in New York was thoroughly politicized. As Howard Bodenhorn has shown, under the control of Martin Van Buren's Democratic political machine (the 'Albany Regency') in the 1830s, the legislature severely limited the number of bank charters and funnelled the resulting monopoly rents to supporters.[9]

Banking is an extreme example, but the idea that early corporations served the public interest is belied as well by conflicts over transportation companies such as the Charles River Bridge Company. The Massachusetts legislature had chartered the company in 1785 to build a bridge across the Charles River. At the time of the grant, it was not at all certain that the venture would succeed—that the bridge could be built at all or that it could be built and maintained at a reasonable cost. To compensate investors for their risk, the legislature granted the corporation the right to collect tolls for forty years. In fact, however, the bridge earned handsome profits for its shareholders from the time it opened. Nonetheless, when the legislature chartered another bridge company at a different location in 1792, the original company's politically powerful investors complained that the new structure would cut into their returns, and the assembly extended the corporation's right to collect tolls for an additional thirty years. Despite the new bridge, the company continued to earn monopoly rents. Indeed, by 1814 the company's stock sold for an advance of 600 percent over its original price. Residents who used the bridge chafed

[8] Brian Phillips Murphy, '"A Very Convenient Instrument": The Manhattan Company, Aaron Burr, and the Election of 1800' (2008) 65 *William and Mary Quarterly* 233.

[9] Howard Bodenhorn, 'Bank Chartering and Political Corruption in Antebellum New York: Free Banking as Reform' in Edward L. Glaeser and Claudia Goldin (eds), *Corruption and Reform: Lessons from America's Economic History* (Chicago, University of Chicago Press, 2006); Bodenhorn, 'The Political Distribution of Economic Privilege in Van Buren's New York' (2021) 35 *Studies in American Political Development* 127.

under tolls they regarded as excessive and finally prevailed upon the legislation to charter yet another bridge nearby. The new company would collect tolls for a maximum of six years (less if it recouped its investment sooner), at which point the bridge would become free. The Charles River Bridge Company sued to retain its monopoly position and famously lost in the US Supreme Court. Insisting that corporate charters must be construed narrowly, the Court ruled that the old company could not block the new bridge because its charter did not explicitly grant it a monopoly. There was nothing in the decision that prevented a state from granting a corporation a monopoly if it so chose, but it could no longer hide such a boon behind general rhetoric about the public good.[10]

Charters for manufacturing corporations sometimes also conferred extraordinary privileges during this early period. In one of the most extreme examples, New Jersey granted a charter in 1791 to the Society for Establishing Useful Manufactures (SUM), a textile corporation associated with Alexander Hamilton, that exempted the company from property taxes and its workers from both taxes and militia service. The charter gave the company authority to build bridges, cut canals and improve existing waterways, and to charge tolls for the use of these improvements. It also enabled the company to raise funds by holding public lotteries.[11] To give another example, New York granted the New-York Manufacturing Company, a corporation formed in 1812 to manufacture iron and brass wire and cards to process cotton and wool, permission to operate a bank on the grounds it was difficult to induce ‘persons to invest their money in untried enterprises, however important to the general welfare’.[12]

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[10] Stanley I. Kutler, *Privilege and Creative Destruction: The Charles River Bridge Case* (Baltimore, Johns Hopkins University Press, 1971); *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837).
[11] New Jersey, General Assembly, ‘An Act to incorporate the Contributors to the Society for establishing useful Manufactures and for the further Encouragement of the said Society’, 22 Nov. 1791. Unless otherwise noted, all citations to state statutes are from Session Laws collection on heinonline.org.
[12] New York, Legislature, ‘An Act to incorporate the New-York Manufacturing Company,’ 15 June 1812.

Although these kinds of boons quickly disappeared from charters for manufacturing companies, the advantages of the corporate form were valuable enough in and of themselves that businesses continued to seek them. What were these advantages? Much of the debate at the time revolved around limited liability, or what Henry Hansmann, Reinier Kraakman, and Richard Squire have called 'owner shielding'.[13] Shareholders, especially those with significant assets, wanted to be protected from creditors if their company was not able to pay its debts, but lenders worried that companies with limited liability would become havens for crooks. Because of lenders' opposition, many early corporate charters did not confer limited liability, and only later did owner shielding become routine.[14] However, there were other benefits of the form. Probably the most important were what Margaret Blair has called 'lock-in'—preventing members from withdrawing their investments—and what Hansmann, Kraakman, and Squire have called 'entity shielding'—protecting the assets of the firm from the creditors of its members.[15] These benefits corrected two major disadvantages of the partnership form of organization: first, the ability of members to dissolve the enterprise at will and require the remaining partners to sell off valuable assets; and, second, the ability of creditors to force similar sales to collect on insolvent members of the firm. These risks of what Jean-Laurent Rosenthal and I have called 'untimely dissolution' were greatest for industrial enterprises with significant investments in firm-specific assets—that is, assets that could not easily be repurposed and hence lost much of their value if they had to be

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[13] Henry Hansmann, Reinier Kraakman, and Richard Squire, 'Law and the Rise of the Firm' (2006) 119 *Harvard Law Review* 1333.

[14] For example, the terms of all charters for manufacturing corporations granted by the Massachusetts legislature between 1809 and 1830 were set by 'An Act defining the general powers and duties of Manufacturing Corporations', 3 March 1809, which did not allow limited liability. The law was revised by the enactment on 23 Feb. 1830 of a bill with the same title that made members 'jointly and severally liable for all debts and contracts made by such Corporation, until the whole amount of the capital stock … shall have been paid in.'

[15] Margaret M. Blair, 'Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century' (2003) 51 *UCLA Law Review* 387; Hansmann, Kraakman, and Squire, 'Law and the Rise of the Firm'.

sold.[16] Moreover, they meant that partnerships faced serious size constraints. Because firms could not take on new partners without increasing these risks, it was rare to find partnerships with more than three members in the early nineteenth century, and most had only two.[17] In addition, the potential liabilities associated with adding new partners meant that firms could not reward valuable employees by giving them an ownership share. Thus, when George Corliss and Edwin J Nightingale wanted to grant top managers in their steam-engine business ownership stakes, they reorganized as a corporation, the Corliss Steam Engine Company.[18]

Even without additional perks, therefore, corporate charters conferred advantages that were valuable enough that political elites could use them as an important source of patronage. Complaints about the award of corporate privileges had a long history, but they soared in the early nineteenth century as rising political competition increased their use and turned them into a hot-button political issue. Elites out of power vociferously decried this form of corruption, asserting that the award of charters was fundamentally undemocratic, that corporations were 'incompatible with equality of rights'.[19] But they behaved in exactly the same way when they

[16] On the relative advantages of partnerships and corporations, see Naomi R. Lamoreaux and Jean-Laurent Rosenthal, 'Legal Regime and Contractual Flexibility: A Comparison of Business's Organizational Choices in France and the United States during the Era of Industrialization' (2005) 7 *American Law and Economics Review* 28.
[17] On the size of partnerships in early nineteenth-century Boston, see Naomi R. Lamoreaux, 'The Partnership Form of Organization: Its Popularity in Early-Nineteenth-Century Boston', in Conrad Edick Wright and Katheryn P. Viens (eds), *Entrepreneurs: The Boston Business Community, 1750-1850* (Boston, Massachusetts Historical Society, 1997), 281. On financing constraints, see Duol Kim, 'Firm Financing, Ownership Structure and Market Competition in United States Manufacturing during the Nineteenth Century', unpublished Ph.D. Dissertation, University of California, Los Angeles (2003).
[18] For the award of shares to managers, see 'Business from 1847 to 1861', Box 4, Folder 6, George H. Corliss Papers, Ms. 80.3, John Hay Library, Brown University.
[19] From William Gouge's *Short History of Banking and Paper Money in the United States* (1833), quoted in James Willard Hurst, *The Legitimacy of the Business Corporation in the Law of the United States, 1780-1970* (Charlottesville, University Press of Virginia, 1970), 30. See also Pauline Maier, 'The Revolutionary Origins of the American Corporation', (1993) 50 *William and Mary Quarterly* 51, 71-2; and Louis Hartz, *Economic Policy and Democratic Thought: Pennsylvania, 1776-1860* (Cambridge, MA, Harvard University Press, 1948), 72.

were in office, favouring supporters and freezing out opponents. To do otherwise would be to risk being ousted from power and losing access to these valuable privileges.[20]

In response to mounting criticism, legislatures began in the early nineteenth century to enact general incorporation statutes that ostensibly levelled the economic playing field by making the corporate form available to anyone who registered under the terms of the act and paid the requisite fees.[21] So long, however, as legislatures retained the power to grant special charters, they could reward political favourites with privileges that those who secured charters under general laws did not possess. As a result, those who were politically well connected still sought special charters, and the number of corporations chartered under general laws stalled.[22] For example, five years after the enactment of Pennsylvania's 1849 general incorporation law for manufacturing less than a dozen companies had actually incorporated under it, while in 1855 alone the legislature passed 196 special bills chartering or amending the charters of for-profit business corporations. Many of these bills were sought by enterprises whose businesses were not yet covered by the general laws, but others allowed favoured corporations to escape restrictive features of the laws. Thus, in the iron industry, companies obtained special charters in order to buy stock in other companies (purchases that were otherwise prohibited), engage in lines of business not permitted by their charters (such as building a railroad or a telegraph), borrow

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[20] Naomi R. Lamoreaux and John Joseph Wallis, 'Economic Crisis, General Laws, and the Mid-Nineteenth-Century Transformation of American Political Economy', (2021) 41 *Journal of the Early Republic* 403.

[21] As Eric Hilt has shown, most states enacted this type of legislation in the 1840s and 1850s. See 'Corporation Law and the Shift toward Open Access in the Antebellum United States', in Naomi R. Lamoreaux and John Joseph Wallis (eds), *Organizations, Civil Society, and the Roots of Development* (Chicago, University of Chicago Press, 2017).

[22] An important exception to this generalization was New York, which enacted a general incorporation law for manufacturing in 1811, before it was common to charter this type of corporation by special act. Even in New York, however, in the 1830s special charters outnumbered general ones in half the years. W. C. Kessler, 'A Statistical Study of the New York General Incorporation Act of 1811', (1940) 48 *Journal of Political Economy* 877, 879. See also Eric Hilt, 'When did Ownership Separate from Control? Corporate Governance in the Early Nineteenth Century', (2008) 68 *Journal of Economic History* 645.

money in amounts greater than allowed by the general statute, escape limits imposed on real estate holdings, and institute non-standard voting rules for elections for directors.[23]

It was not until states revised their constitutions to ban special charters that general incorporation prevailed. A small number of states modified their constitutions in this way in the antebellum years. These were mainly states that defaulted on their debts in the early 1840s and as a result had to call constitutional conventions that opened the way for more egalitarian reforms. Most other states followed suit over the next several decades. Whenever they took this step, business use of the corporate form increased dramatically. Some idea of the magnitude of the effect can be obtained by comparing the number of incorporations in Ohio, which banned special charters in 1851, with those in New Jersey and Pennsylvania, which enacted general incorporation laws in the 1840s but did not ban special charters for three more decades. In the ten years following the Civil War, Ohio chartered 2.2 times as many corporations under its general law as New Jersey did under both its general and special laws. After New Jersey banned special charters in 1875, the gap began to close. During the 1880s (that is, before New Jersey's liberal revision of its general incorporation statute), the ratio of new corporations in Ohio relative to New Jersey fell to 1.5, at the same time as the numbers of corporations founded in both states rose dramatically. Although there are gaps in the data for Pennsylvania, the story there seems to

[23] See, for examples, Pennsylvania Legislature,'AN ACT To enable the Sharon Iron Company, of Mercer county, to subscribe to the Stock of the Pittsburg and Erie Railroad Company', 5 April 1855; 'AN ACT To incorporate the Hopewell Coal and Iron Company', 7 May 1855; 'AN ACT To incorporate the Saucona Iron Company, in the county of Northampton', 8 April 1857; 'AN ACT To incorporate the Sullivan Coal and Iron Company', 2 March 1868; 'AN ACT To incorporate the Emaus Iron Company', 11 March 1870; 'AN ACT Relative to the Bloomsburg Iron Company', 12 March 1870; 'A Further Supplement To an act, entitled "An Act to incorporate the Emaus Iron Company ..."' 2 April 1872. See also Hartz, *Economic Policy and Democratic Thought*, 39-41. This discussion draws on Naomi R. Lamoreaux, 'Revisiting American Exceptionalism: Democracy and the Regulation of Corporate Governance: The Case of Nineteenth-Century Pennsylvania in Comparative Context', in William J. Collins and Robert A. Margo (eds), *Enterprising America: Businesses, Banks, and Credit Markets in Historical Perspective* (Chicago, University of Chicago Press, 2015), 40.

have been much the same, with the number of corporations converging on the number in Ohio only after the imposition of the ban on special charters in 1874.[24]

As I argue in the next section, an unintended consequence of the shift to general incorporation was to facilitate economic regulation. Although regulatory provisions had sometimes been imbedded in special charters, they had little bite because the political connections recipients had used to secure the charters in the first place also protected them from enforcement actions. Significant efforts to enact and enforce economic regulations only began after it became routine to charter corporations under general laws.

Regime 2: General Incorporation

The general incorporation laws that states began to enact in large numbers in the 1840s have often been viewed by scholars as marking a shift toward laissez-faire.[25] That is not a correct characterization, however. The movement for general incorporation was certainly anti-government in the sense that it aimed to curb the power of legislators to award privileges to political favourites, but the statutes contained regulatory provisions that reflected proponents' fears that the same wealthy and powerful business people who had benefited from legislative largess would reap disproportionate gains from the new regime. When the shift to general laws was coupled with a ban on special charters, moreover, the regulatory provisions would begin really to matter. Businesses organized to weaken their provisions, but other interest groups

[24] George Heberton Evans, Jr., *Business Incorporations in the United States, 1800-1943* (New York, National Bureau of Economic Research, 1948), 12, and Appendix 3. This paragraph draws on Lamoreaux and Wallis, "Economic Crisis," 426.
[25] For examples of the equation of general incorporation and laissez-faire, see Hurst, *Legitimacy of the Business Corporation*; Hartz, *Economic Policy and Democratic Thought*; Ronald E. Seavoy, 'Laissez-Faire: Business Policy, Corporations, and Capital Investment in the Early National Period', in Jack P. Greene (ed), *Encyclopedia of American Political History: Studies of the Principal Movements and Ideas* (New York, Scribner, 1984).

emerged and pushed to strengthen them. The relative strength of these groups varied from state to state, but as a rule, the scope of business regulation and the government's capacity to enforce the law increased everywhere in the late nineteenth century. Although some regulations applied to businesses regardless of organizational form, the special advantages that corporate charters conferred provided a powerful rationale for linking incorporation and regulation.

The general incorporation statutes that states enacted in the 1840s and 1850s contained numerous regulatory provisions that aimed to level the economic playing field and keep it as flat as possible. Most limited the size to which corporations could grow by restricting the amount of capital a company could raise or the amount of money it could borrow. Most denied incorporated enterprises perpetual life, insisting instead that they periodically secure the approval of their shareholders to extend their existence. Some imposed voting rules that curbed the power of the wealthiest shareholders. And most required corporations to submit regular financial reports. In addition, the statutes typically laid out detailed procedures that corporations had to follow to declare dividends or raise or lower their capital stock, making officers and directors personally liable if they failed to follow the law. Generally, mergers required the unanimous consent of all the stockholders in the affected companies, and corporations could not hold stock in other corporations.[26]

Most states revised their general incorporation statutes in the 1870s, at the height of what scholars have considered the laissez-faire policies of the Gilded Age. In some respects, the new statutes were less regulatory than their predecessors, but in other respects they were not. Ceilings on capital and duration gradually were relaxed, but most states still had them, and most states

[26] Naomi R. Lamoreaux, 'Antimonopoly and State Regulation of Corporations in the Gilded Age and Progressive Era', in Daniel A. Crane and William J. Novak (eds), *Antimonopoly and American Democracy* (New York, Oxford University Press, 2023), 122-25.

continued to limit corporate borrowing and require annual financial reports. Most states now mandated specific voting rules for electing directors, with an increasing number requiring that shareholders be allowed to cumulate their votes (a measure that aimed to increase the power of small shareholders).[27] Most states also continued to impose detailed procedures that corporations had to follow to declare dividends and increase or decrease their capital stock (again making directors personally liable for violations), to prohibit corporations from owning stock in other corporations, and to make mergers difficult to effect.[28]

The regulatory provisions that states embedded in their general incorporation laws were meant to be self-enforcing in the sense that corporations that violated them risked lawsuits from shareholders and others with a stake in their provisions. However, once Standard Oil and other large companies demonstrated that it was possible to evade these provisions and monopolize their industries using ordinary contracts like the trust device, states responded by enacting antitrust laws that made such workarounds illegal, if they served anticompetitive purposes. At the same time, states began to invest in acquiring the bureaucratic capacity to enforce the antitrust statutes. In most cases that meant beefing up the office of the attorney general, but many western states established—sometimes by constitutional mandate, sometimes by statute—independent regulatory agencies called corporation commissions tasked with insuring that companies operating in their jurisdictions conformed to the law.[29]

In 1888, in response to a budgetary shortfall, New Jersey set off a chartermongering competition by liberalizing its general incorporation laws to facilitate mergers and permit

[27] Under cumulative voting rules, shareholders received as many votes as there were directors being elected and had the option of spreading them over an equal number of candidates, casting all of them for one candidate, or anything in between. By 1900, seventeen states had such rules. Charles M. Williams, *Cumulative Voting for Directors* (Boston, MA, Graduate School of Business Administration, Harvard University, 1951), 20.
[28] Lamoreaux, 'Antimonopoly and State Regulation of Corporations', 125-28.
[29] Lamoreaux, 'Antimonopoly and State Regulation of Corporations', 129-30.

corporations to hold stock in other corporations. Standard Oil and many other large-scale enterprises responded by moving their corporate home to New Jersey, leading several other states to make similar changes to their corporate statutes in order similarly to attract charters. New Jersey's action, however, did not stimulate a full-blown regulatory race to the bottom. A 1903 study showed that, all told, only thirteen states revised their laws to enable mergers, and a mere six allowed corporations to hold stock in other corporations. Even most of the states that liberalized their statutes in this way retained the regulatory provisions they had previously embedded in their general incorporation statutes. Moreover, although businesses that incorporated in New Jersey no longer had to conform to other states' corporate-governance strictures, they did have to obey the antitrust laws of the jurisdictions in which they operated, as well as any state labour, environmental, or tax regulations in effect.[30]

Businesses, of course, lobbied to forestall or weaken these regulations, but now opposition groups—"the people's lobby" in the words of sociologist Elisabeth Clemens—emerged to counter those efforts.[31] As John Wallis and I have argued, these associations were themselves an outgrowth of the enactment of general laws, which granted voluntary associations access to the same organizational advantages that incorporated businesses could exploit.[32] Farmers were initially the most important beneficiaries of these developments, and the waves of organizations they formed in the last three decades of the century achieved notable success in securing legislation regulating railroads and other public service corporations. State after state

[30] Christopher Grandy, 'New Jersey Corporate Chartermongering, 1875-1929' (1989) 49 *Journal of Economic History* 677; Massachusetts, *Report of the Committee on Corporation Laws* (Boston, Wright & Potter, 1903), 157-204; Lamoreaux, 'Antimonopoly and State Regulation of Corporations', 129-38.
[31] Elisabeth S. Clemens, *The People's Lobby: Organizational Innovation and the Rise of Interest Group Politics in the United States, 1890-1925* (Chicago: University of Chicago Press, 1997).
[32] Lamoreaux and Wallis, 'Economic Crisis', 429-32.

formed commissions to regulate railroads and utilities, and the federal government followed suit with the creation of the Interstate Commerce Commission in 1887.[33]

More generally, once the rules to which corporations were subject were uniform and not a product of the privileged status of their owners, it was possible to set up bureaucracies to enforce them. In the case of banking, for example, regulatory authorities emerged quickly with the enactment of the first general incorporation laws—the so-called 'free banking' acts. New York's pioneering act of 1838 required banks to deposit government bonds and to file reports on their condition with the state controller, who had authority to sell off the bonds in the event of trouble.[34] Ohio's variant of New York's law, enacted in 1851, mandated that state officials order yearly examinations of all the banks in the state.[35] The federal government's National Banking Acts, enacted during the Civil War on the model of Ohio's statute, required banks to maintain reserves against deposits, limited the amounts they could lend to any single party, and restricted the purposes for which they could lend. These provisions were enforced by the newly created office of the US Comptroller of the Currency, whose staff of professional examiners was required to inspect the books of all banks in the system at least once each year, with more frequent inspections of institutions authorized to hold other banks' reserves. Of course, these measures did not eliminate bank failures, but they were an important start.[36]

Although some regulatory acts—for example, the antitrust laws—applied to all businesses regardless of organizational form, others applied only to corporations and were justified by the special advantages that charters conferred. A good example was the corporate

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[33] By the 1880s at least two dozen states had railroad commissions. See also William J. Novak, 'The Public Utility Idea and the Origin of Modern Business Regulation' in Lamoreaux and Novak (eds), *Corporations and American Democracy*.
[34] New York Legislature, 'An Act to authorize the business of banking', 18 April 1838.
[35] Ohio General Assembly, 'An Act to authorize free banking', 21 March 1851.
[36] On the National Banking Acts, see Richard S. Grossman, *Unsettled Account: The Evolution of Banking in the Industrialized World since 1800* (Princeton, NJ, Princeton University Press, 2010), 230-43.

income tax. Congress had passed a law imposing an income tax in 1894, but the Supreme Court overturned it the very next year in *Pollock v. Farmers' Loan and Trust Company*, declaring that the Constitution required such direct taxes to be apportioned relative to population.[37] Congress tried again in 1909, enacting a corporate 'excise' tax that was in effect a levy on corporate income. The Court held this new tax constitutional in 1911 in *Flint v. Stone Tracy Company* on the grounds that the 'thing taxed is not the mere dealing in merchandise … but … the privileges which exist in conducting businesses with the advantages which inhere in the corporate capacity of those taxed, and which are not enjoyed by private firms or individuals'. Corporations were artificial entities granted privileges by the state, and it was their special advantages that justified the imposition of the tax.[38]

The ratification of the Sixteenth Amendment subsequently made this rationalization unnecessary, but corporate privileges were invoked to justify other regulations, such as the prohibition on corporate campaign contributions. As Adam Winkler has shown, Congress passed the first federal campaign finance statute, the Tillman Act of 1907, at a time of rising concern about the rights of investors in corporations. In the wake of a scandal in the life insurance industry, the New York legislature held hearings in 1905 that uncovered many types of corporate malfeasance. But it was the revelation that the companies spent large sums on political contributions that provoked the most outrage. Commentators stressed the harm these expenditures inflicted on policy holders (the true owners of these companies). Not only were

[37] *Pollock v. Farmers' Loan and Trust Co.*, 157 U.S. 429 (1895); and *Pollock v. Farmers' Loan and Trust Co.*, 158 U.S. 601 (1895).

[38] *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911) at 161-62. The Court subsequently faced many cases in which it had to decide whether particular taxes levied on corporations but not on other businesses were discriminatory. Sometimes, it found the taxes discriminatory; sometimes it did not. Contrast, for example, *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389 (1928) with *New Jersey Bell Telephone Co. v. New Jersey*, 280 U.S. 338 (1930). See also Ruth H. Bloch and Naomi R. Lamoreaux, 'Corporations and the Fourteenth Amendment', in Lamoreaux and Novak (eds), *Corporations and American Democracy*, 305-6.

corporate funds being deployed to help elect politicians whose positions the owners did not necessarily support, but, still more galling, the executives were using the increased political influence they gained from these contributions to push for policies, such as weaker regulatory oversight, that were directly counter to policy holders' interests. Riding the wave of public outrage, Congress barred corporations from contributing to political campaigns for federal offices, and many states adopted similar laws around the same time.[39]

The first constitutional challenge to the Tillman Act came nearly a full decade later, in 1916, when several breweries that had been prosecuted under the law claimed that the act violated their First-Amendment rights. They did not prevail, and the opinion of the federal judge who heard the case again emphasized the special character of corporate privileges. Corporations were the creatures of government, 'artificial creatures, and 'must at all times be held subservient and subordinate to the government and the citizenship of which it is composed'.[40] The breweries did not appeal the decision, and there were no more challenges of this kind to the campaign finance law until the passage in 1947 of the Taft-Hartley Act, when labour unions, which were not corporations, challenged the act's extension of the prohibition against corporate campaign contributions to them.[41] In the end, the litigation over Taft Hartley led to a compromise, ratified by the Supreme Court in 1972, that enabled unions to funnel voluntary contributions from their members through political action committees (PACs) that they organized and controlled.

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[39] Adam Winkler, '"Other People's Money": Corporations, Agency Costs, and Campaign Finance Law' (2004) 92 *Georgetown Law Journal* 871; Bloch and Lamoreaux, 'Corporations and the Fourteenth Amendment', 307-8.

[40] *United States v. United States Brewers' Ass'n*, 239 F. 163 (1916) at 168; Bloch and Lamoreaux, 'Corporations and the Fourteenth Amendment', 308.

[41] T. Richard Mager, 'Past and Present Attempts by Congress and the Courts to Regulate Corporate and Union Campaign Contributions and Expenditures in the Election of Federal Officials' (1976) 1 *Southern Illinois University Law Journal* 338. There was one challenge on the very different grounds that Congress did not have the authority to regulate the selection of presidential electors, which was the responsibility of state legislatures. See *United States v. Burroughs*, 65 F.2d 796 (1933).

Corporations adopted similar strategies, and Congress legalized the use of PACS by both labour unions and corporations in the Federal Election Campaign Act of 1972.[42]

This compromise held until 2010, when the limits on corporate political donations were effectively repealed by the Supreme Court in the case of *Citizens United v. Federal Election Commission*.[43] As the next section argues, the emergence of new organizational forms paved the way for this outcome by enabling businesses to secure corporate advantages without incorporating, thereby undercutting the quid pro quo that had justified these kinds of special regulations.

Regime 3: New Organizational Forms

The shift from special to general incorporation ushered in a long period of expanding economic regulation that culminated in the early 1970s with the creation of the Environmental Protection Agency, the Occupational Health and Safety Administration, and the Consumer Product Safety Commission, among other agencies.[44] During the last quarter of the twentieth century, however, this trend reversed, and deregulation became the order of the day. Much has been written about the revolt against excessive regulation, the ascendancy of neoliberalism, and the rise of the idea that corporations' primary goal should be to maximum returns for their shareholders.[45] What has less often been noticed is the spread during this period of new organizational forms that enabled unincorporated businesses to secure advantages traditionally

[42] For the history of PACs and campaign finance litigation, see Adam Winkler, '*Citizens United*, Personhood, and the Corporation in Politics', in Lamoreaux and Novak (eds), *Corporations and American Democracy*.
[43] *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).
[44] David Vogel, 'The "New" Social Regulation in Historical and Comparative Perspective', in Thomas K. McCraw (ed), *Regulation in Perspective: Historical Essays* (Boston, MA, Harvard Graduate School of Business Administration, 1981).
[45] For a recent survey of, and critical addition to, this literature, see Gary Gerstle, *The Rise and Fall of the Neoliberal Order* (New York, Oxford University Press, 2022).

reserved for corporations. The new forms were a response to dramatic shifts in the relative incidence of the corporate and personal income taxes. Their appearance undermined the idea that the corporations obtained special privileges from the state that, in turn, entailed special obligations.

Before the last decade of the twentieth century, American businesses effectively had two organizational forms from which to choose: partnerships and corporations. As already noted, corporations had important advantages over partnerships. But the corporate form also entailed disadvantages, the main one being that controlling shareholders had full decision-making power and could run roughshod over the desires of minority owners. There was little the latter could do to increase their influence. The courts followed a business-judgment rule that gave controlling shareholders the benefit of the doubt unless they engaged in outright fraud, even if the results of their decisions were disastrous to the firm's bottom line.[46] Moreover, the rules prescribed by most states' general incorporation laws made the problem worse by ruling out governance structures that could mitigate the problem—for example by requiring supermajority votes for certain kinds of decisions. In Britain and on the European continent, such solutions were both available and in common use. In addition, on the continent there were other organizational forms that offered corporate advantages without such severe disadvantages. These ranged from the *commandite par action* in France (a limited partnership with tradable shares) to the *Gesellschaft mit beschränkter Haftung* (GmbH) in Germany (a limited liability company).[47] In the late nineteenth century, Pennsylvania and a few other states enacted legislation to allow similar forms

[46] Naomi R. Lamoreaux and Jean-Laurent Rosenthal, 'Corporate Governance and the Plight of Minority Shareholders in the United States before the Great Depression', in Glaeser and Goldin (eds), *Corruption and Reform*.
[47] Timothy W. Guinnane, Ron Harris, Naomi R. Lamoreaux, and Jean-Laurent Rosenthal, 'Putting the Corporation in its Place', (2007) 8 *Enterprise and Society* 687.

in the US, but these alternatives did not thrive in the American legal environment of the time. Courts sometimes held limited partners fully liable for misstatements in the partnership agreement, and states did not always recognize the statutory innovations of other jurisdictions. Although the enabling statutes remained on the books until deep into the twentieth century, the forms were comparatively rarely used.[48]

The disadvantages of the corporate form meant that most multi-owner businesses continued to be organized as partnerships rather than corporations. As late as 1949, 61 percent were partnerships and only 39 percent corporations. By 1963, however, the percentages had almost completely reversed, and 41 percent were partnerships and 59 percent corporations.[49] At the root of the reversal was the persistence of extremely high personal income tax rates in the aftermath of the Second World War. Partnerships were 'pass-through' entities. That is, their profits passed through to their owners and were taxed as personal income. During the postwar decades, when the top marginal bracket for the personal income tax was 90 percent or even higher, many successful business owners reorganized their enterprises as corporations, which paid a flat tax of 52 percent on their income.[50] As more and more small businesses became corporations, their owners successfully lobbied state legislatures to revise their general incorporation statutes to allow close corporations to adopt supermajority voting rules or other governance structures that mitigated the potential for minority oppression. As a consequence,

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[48] The first year for which counts of limited partnerships are available is 1976, when they amounted only to about 2 percent of multi-owner firms. Susan B. Carter, et al., *Historical Statistics of the United States: Earliest Times to the Present, Millennial Edition* (New York, Cambridge University Press, 2006), Vol. 3, Tables Ch 10, 13, 163. See also Guinnane, et al., 'Putting the Corporation in its Place'.

[49] Carter, et al., *Historical Statistics*, Vol. 3, Tables Ch 10, 13. Limited partnerships are included in the figures for partnerships, but as noted above, they amounted to only a couple of percent of the total.

[50] W. Elliot Brownlee, *Federal Taxation in America: A Short History* (New York, Cambridge University Press, 1996), 89-129; Thomas Piketty, *Capital in the Twenty-First Century* (Cambridge, MA, Harvard University Press, 2014), 639, 647-50.

corporations whose shares were closely held were able to function internally more like partnerships, a change that further increased the popularity of organizing as a corporation.[51]

After the Reagan tax cuts, however, personal income taxes fell relative to corporate income taxes, and the corporate form became less attractive again, especially for small- and medium-sized businesses. In 1958, Congress had given corporations with small numbers of shareholders the ability to file their taxes as 'S corporations' and pass their income through to shareholders as in partnerships. That option was not generally attractive when personal income tax rates were higher than corporate income tax rates, but in the 1980s filing as S corporations increased in popularity. More importantly, under lobbying pressure from small businesses, states began again to enact enabling legislation for limited liability companies (LLCs). After the Internal Revenue Service (IRS) signalled in 1988 that businesses organized as LLCs would be taxed as partnerships, the form exploded. This time the courts were supportive, and states followed with enabling legislation for a plethora of other pass-through forms: limited liability partnerships (LLPs), limited liability limited partnerships (LLLPs), business trusts, and so on. By the early twenty-first century, in most states a majority of new firms were registering as LLCs or other novel types of business entities rather than as corporations.[52]

One consequence of the changes in tax rates and the shift to new organizational forms was to make the corporate income tax in relative terms a diminishing source of revenue for the US government. In 1950, the amount of revenue raised from the corporate and personal income

[51] F. Hodge O'Neal, 'Developments in the Regulation of the Close Corporation', (1965) 50 *Cornell Law Quarterly* 641; Kelvin H. Dickinson, 'Partners in a Corporate Cloak: The Emergence and Legitimacy of the Incorporated Partnership', (1984) 33 *American University Law Review* 559.

[52] Guinnane, et al., 'Putting the Corporation in its Place', 721-2; Brownlee, *Federal Taxation in America*, 130-55; Thomas B. Petska and Robert A. Wilson, 'Trends in Business Structure and Activity, 1980-1990' (1994) 13 *SOI Bulletin* 27; and Petska, 'Taxes and Organizational Choice: An Analysis of Trends, 1985-1992' (1996) 15 *SOI Bulletin* 86. The last sentence is based on my own compilation of data on business registrations that formerly were publicly available on the website of the International Association of Commercial Administrators (IACA).

taxes were about the same. By 2022, revenue from personal income taxes was more than six times as great.[53] Progressives continue to defend the corporate income tax and even demand that it be raised, and there is a lot of popular support for that position. According to a 2019 Gallup poll, 69 percent of respondents thought corporations paid too little tax.[54] But such a position may now be counterproductive. Although it is true that large publicly traded companies have little choice but to organize as corporations, they tend to operate globally and can take their profits in jurisdictions with lower corporate income tax rates. Other firms can shift their organizational form to one or another type of pass-through entity and reduce their tax burden accordingly. Moreover, though higher corporate income taxes are often justified on equalitarian grounds—excessive executive compensation is a perennial complaint—pass-through entities have become a more important driver of income inequality. Recently, researchers using IRS microdata have estimated that pass-through entities accounted for about 40 percent of the rise in income equality between 1980 and 2014. In 2014, the top one percent of the income distribution included about 10,000 corporate executives but about a *million* owners of other types of multi-owner firms. About 15,000 of the latter were in the top 0.01 percent. Their total income alone was about three times that of *all* the executives in the top one percent, even when perks like stock options were included in executive compensation.[55]

Since the mid-twentieth century, the use of the corporate form by non-profit organizations has grown as well, further undermining the justification for regulations that specifically target corporations. Circa 2020, there were approximately 6.5 million business

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[53] Brownlee, *Federal Taxation in America*, 107; 'Federal Revenue Trends Over Time', https://fiscaldata.treasury.gov/americas-finance-guide/government-revenue/#federal-revenue-trends-over-time, accessed 29 May 2023.
[54] In comparison, 62 percent of respondents think that upper-income people pay too little taxes. 'Taxes', https://news.gallup.com/poll/1714/taxes.aspx, accessed 29 May 2023.
[55] Cooper, et al., 'Business in the United States', 93; Smith, et al., 'Capitalists in the Twenty-First Century', 1692.

corporations in the United States, but there were also about 1.5 million nonprofit corporations.[56] Nonprofit corporations included hospitals, colleges, charities, and the like, but they also included organizations formed for political purposes, such as Citizens United, a corporation created to aggregate small donations in service of a conservative political agenda. When Citizens United sought to fund the distribution of a film critical of presidential candidate Hillary Clinton during the 2008 primary season, the Federal Election Commission (FEC) objected that the action violated the campaign finance laws barring such spending by corporations. Although the FEC won in the lower court, the Supreme Court sided with the corporation, declaring that the First Amendment prohibited the government from censoring speech according to the identity of the speaker and thus effectively overturning the restrictions on corporate political contributions that had been in effect since 1907.[57] The Court had other options that would have left the restrictions in place. As Justice John Paul Stevens pointed out in his dissent, it had already created an exemption for nonprofit corporations formed to promote specific causes in a case involving Massachusetts Citizens for Life, an incorporated voluntary association dedicated to stopping abortions. This exemption, Stevens argued, could easily have been expanded to include entities like Citizens United.[58] However, the majority was unwilling to narrow the scope of its ruling. Indeed, as the Court would declare a few years later in interpreting the meaning of another statute, 'The term "person" sometimes encompasses artificial persons, … and it sometimes is limited to natural persons. But no conceivable definition of the term includes natural persons and nonprofit corporations, but not for-profit corporations'.[59]

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[56] IRS, 'Corporate Income Tax Returns, Tax Year 2019', *Statistics of Income*, https://www.irs.gov/pub/irs-pdf/p5655.pdf, accessed 9 June 2023; and Statista, 'Nonprofit Organizations in the U.S.—Statistics & Facts', https://www.statista.com/topics/1390/nonprofit-organizations-in-the-us/#topicOverview, accessed 9 June 2023.
[57] *Citizens United v. FEC*, 558 U.S. 310 (2010).
[58] *Citizens United v. FEC*, 558 U.S. 310 (2010) at 406-8.
[59] *Burwell v. Hobby Lobby Stores*, 573 U.S. 682 (2014) at 708.

In response to the *Citizens United* decision, Senator Bernie Sanders proposed a constitutional amendment in 2011 that would make precisely that distinction. His draft amendment prohibited the extension of constitutional rights belonging to ‘natural persons’ to ‘for-profit corporations’ and, in recognition of the growing popularity of alternative organizational forms, extended the ban to limited liability companies and ‘other private entities established for business purposes’.[60] Because Citizens United was a nonprofit corporation, however, the most the amendment could achieve would be to ratify the exemption from the campaign finance laws that Stevens had proposed. But even that outcome was unlikely, as a careful reading of the precedents for *Citizens United* shows. Historically, whenever the Court seemed to extend constitutional rights to corporations, it grounded its decisions in the rights of the people who constituted the entity—not in the rights of the entity itself. The most famous example was Justice Stephen J Field’s application of the Fourteenth Amendment’s due process protections for property to corporations. Siding with the Southern Pacific and other railroads against California’s effort to tax railroad property differently from other property, he insisted that it would be ‘a most singular result if a constitutional provision intended for the protection of every person against partial and discriminating legislation by the states, should cease to exert such protection the moment the person becomes a member of a corporation’.[61]

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[60] ‘Resolution Proposing an amendment to the Constitution of the United States to expressly exclude for-profit corporations from the rights given to natural persons …’ www.sanders.senate.gov/wp-content/uploads/S.J.Res_..pdf, accessed 7 Dec. 2023.

[61] *San Mateo v. Southern Pacific Railroad Co.*, 13 F. 722 (1882) at 744. For a similar statement, see *Santa Clara v. Southern Pacific Railroad Co.*, 18 F. 385 (1883) at 398-9. These were district-court opinions that Field wrote while riding circuit. Although the Supreme Court ducked the constitutional issue when it decided the case in 1886 (see *Santa Clara v. Southern Pacific Railroad*, 118 U.S. 394), the reported version of the decision paraphrased a statement that Chief Justice Morrison R. Waite made at the start of oral arguments: ‘The Court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion that it does’. Field then used that statement to make his circuit court opinions into precedent. See Morton J. Horwitz, ‘*Santa Clara* Revisited: The Development of Corporate Theory’, (1985) 88 *West Virginia Law Review* 173; Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (New York, Oxford University Press, 1992), 66-70; Gregory A. Mark, ‘The Personification of the Business Corporation in

The growing use of the corporate form by small, closely held entities, as well as the popularity of alternative organizational forms with corporate advantages, has only reinforced the Court's determination to protect the rights of the members of corporations. This solicitousness was especially clear in its 2014 decision in the case of *Burwell v. Hobby Lobby Stores*.[62] The owners of Hobby Lobby Stores, a closely held corporation, sued to block the government's attempt to force it to include coverage for contraception in the health insurance it provided its employees, as required by the Patient Protection and Affordable Care Act of 2010 (ACA). Congress had earlier enacted the Religious Freedom Restoration Act of 1993 (RFRA) to prevent the federal government from 'substantially burden[ing] a person's exercise of religion' unless in 'furtherance of a compelling governmental interest ... [in] the least restrictive means'. Finding that there were less restrictive ways besides the contraception mandate for the government to fulfil the purpose of the ACA—ways that it already allowed nonprofit corporations to pursue—the Court noted that a person who operated a business as a sole proprietorship would be able to assert a free-exercise claim and escape the contraception mandate. Why was not Hobby Lobby, a closely held corporation 'owned and controlled by members of a single family', allowed to do the same, given that 'the sincerity of [the members'] religious beliefs' was not in doubt? The Court concluded that there was no good reason to require the family members to violate their beliefs just because they had used the corporate form to organize their affairs: 'we reject [the government's] argument that the owners of the companies forfeited all RFRA protection when they decided to organize their businesses as corporations rather than sole proprietorships or

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American Law', (1987) 54 *University of Chicago Law Review* 1447; Margaret M. Blair and Elizabeth Pollman, 'The Supreme Court's View of Corporate Rights: Two Centuries of Evolution and Controversy', in Lamoreaux and Novak (eds), *Corporations and American Democracy*, 252-6; and Bloch and Lamoreaux, 'Corporations and the Fourteenth Amendment', 289-92.

[62] *Burwell v. Hobby Lobby Stores*, 573 U.S. 682 (2014).

general partnerships'. The contraceptive mandate, the Court concluded, 'as applied to closely held corporations, violates RFRA'.[63]

Although the free-exercise clause would not, of course, be a limiting factor in the case of most regulatory legislation, the Court's language in *Hobby Lobby*, as in *Citizen's United*, was broader than it needed to be. Justice Samuel Alito's decision for the Court echoed Field's opinion in the *Railroad Tax Cases*:

> A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.[64]

The idea that a corporation was just 'a form of organization used by human beings to achieve desired ends' carried new conviction in a world where the overwhelming majority of corporations were closely held and where they were, for all practical purposes, indistinguishable from enterprises that took non-corporate forms.[65]

Conclusion

The last section of Sanders's proposed constitutional amendment declares in broad language, 'Congress and the States shall have the power to regulate and set limits on all election

[63] *Burwell v. Hobby Lobby Stores*, 573 U.S. 682 (2014) at 691, 694-5, 717, 736.
[64] *Burwell v. Hobby Lobby Stores*, 573 U.S. 682 (2014) at 706-7.
[65] When Field expressed a similar position in the 1880s, the railroads involved in the tax cases he adjudicated were closely held. Although they were important economic entities, they raised capital by selling bonds, not equities, and consequently had small numbers of shareholders. See David Haward Bain, *Empire Express: Building the First Transcontinental Railroad* (New York, Viking, 1999); and Richard White, *Railroaded: The Transcontinentals and the Making of Modern America* (New York, Norton, 2011).

contributions and expenditures, including a candidate's own spending …'[66] A constitutional amendment that focused on this important principle would render the Supreme Court's *Citizens United* decision void, and Sanders could have led with it. But instead he prioritized his determination to deny for-profit corporations the rights of natural persons—a move that was not only more controversial but less likely to be effective. We cannot know why he chose this ordering, but the crowd-pleasing power of anticorporate rhetoric surely played a role. Antipathy to the corporation has a long history in American politics. During the special-charter era, corporations were an apt symbol of the corruption that pervaded state legislatures, and opposition to them helped propel the reforms that brought that regime to an end. Even after the adoption of state constitutional provisions banning special charters, however, the negative connotations of the word corporation persisted and so did the utility of anticorporate rhetoric. General incorporation laws still conferred advantages on companies that took the corporate form, and reformers could make effective use of popular antipathy to corporations to build support for regulations that reigned in the large-scale businesses that emerged in this period. Antipathy to corporations remains powerful in the present era, but it is much less useful in an environment where neither corporate advantages nor the evils reformers seek to eliminate are restricted to corporations. Of course, in some sense the word corporation is just a synonym for big business. But it is a synonym with the potential to mislead. Indeed, to the extent that reform proposals single out corporations, they are likely to miss their target. Thus, raising the corporate income tax will do little to reduce inequality now that pass-through entities are more important generators of the super-rich. Similarly, stripping corporate entities of their constitutional rights will do little to staunch the flow of money into electioneering. As the Supreme Court's decision in *Hobby Lobby*

[66] 'Resolution Proposing an amendment to the Constitution'.

suggests, moreover, there is a real risk that a focus on corporations will render a regulatory policy ineffectual or, even worse, unenforceable.