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## Of Bodies Politic and Pecuniary: A Brief History of Corporate Purpose

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# OF BODIES POLITIC AND PECUNIARY: A BRIEF HISTORY OF CORPORATE PURPOSE

David B. Guenther\*

These artificial persons are called bodies politic, bodies corporate (*corpora corporata*) or corporations: of which there is a great variety subsisting, for the advancement of religion, of learning, and of commerce.

— William Blackstone,  
*Commentaries on the Laws of England*<sup>1</sup>

## ABSTRACT

*American corporate law has long drawn a bright line between for-profit and non-profit corporations. In recent years, hybrid or social enterprises have increasingly put this bright-line distinction to the test. This Article asks what we can learn about the purpose of the American business corporation by examining its history and development in the United States in its formative period from roughly 1780-1860. This brief history of corporate purpose suggests that the duty to maximize profits in the for-profit corporation is a relatively recent development. Historically, the American business corporation grew out of an earlier form of corporation that was neither for-profit nor non-profit in today's parlance but rather, served a multitude of municipal, religious, charitable, educational, and eventually business purposes in early nineteenth-century New England. The purposes of early American business corporations—rather than maximization of profit to private shareholders—were often overtly public, involving development of local transportation, finance, and other much-needed economic infrastructure. With the rise of factory-based manufacturing, railroads, and other capital-intensive industries in the middle decades of the nineteenth century and the advent of general incorporation statutes, the purpose of the American business corporation shifted fundamentally from public to private. By 1860, the stage was set for the modern firm.*

*This Article concludes that the corporation has no intrinsic purpose. The corporation's defining features are separate legal personality and the ability to aggregate capital toward any otherwise lawful end, whether for-profit or nonprofit. Social enterprises today more closely resemble the early American business corporation than the profit-maximizing modern firm. Social enterprise should be seen less as a legally uncertain novelty than a return to*

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*the business corporation's nineteenth-century American roots. Finally, this Article suggests potential limitations for social enterprise.*

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#### I. INTRODUCTION

American corporate law has long drawn a bright line between for-profit and non-profit corporations. For-profits and non-profits generally have different purposes, different organizing statutes, different regulatory regimes, and different governance. For-profits typically seek to earn revenues and to maximize profits to their shareholders, while non-profits are customarily expected to solicit grants and contributions in pursuit of a charitable public mission and to ab-

stain from private inurement.<sup>2</sup> Some courts have held and commentators have suggested that these differences are inherent in the for-profit corporate form.<sup>3</sup>

In recent years, hybrid or social enterprises have increasingly put this bright-line distinction to the test.<sup>4</sup> Many social enterprises are essentially for-profits with a non-profit mission; others are non-profits that seek to use for-profit tools to earn revenues to be sustainable; still others are tandem structures aimed at combining desirable features of both for-profit and non-profit entities.<sup>5</sup> New forms of legal entity, such as the benefit corporation and the low-profit limited liability company or L3C, have attempted to unite basic non-profit and

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2. On the duty of for-profit corporations to maximize profits, *see, e.g.*, *Dodge v. Ford*, 170 N.W. 668 (Mich. 1919); *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010). On the obligation of non-profit corporations to abstain from private inurement, *see, e.g.*, I.R.C. §501(c)(3) (1986).

3. *See, e.g.*, *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010) (“The ‘Inc.’ after the company name has to mean at least that.”); Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 776-77 (2015) (“*Dodge v. Ford* and *eBay* are hornbook law because they make clear that if a fiduciary admits that he is treating an interest other than stockholder wealth as an end in itself, rather than an instrument to stockholder wealth, he is committing a breach of fiduciary duty.”); *but see* David B. Guenther, *The Strange Case of the Missing Doctrine and the “Odd Exercise” of eBay: Why Exactly Must Corporations Maximize Profits to Shareholders?*, 12 VA. L. & BUS. REV. 427, 479 (2018). The benefit corporation movement, which since 2010 has led to the adoption of benefit corporation statutes in more than thirty U.S. jurisdictions, is premised on the notion that a non-profit-maximizing mission cannot lawfully be pursued in a for-profit corporate form without legislative sanction. *See, e.g.*, WILLIAM H. CLARK, JR. & LARRY VRANKA, WHITE PAPER: THE NEED AND RATIONALE FOR THE BENEFIT CORPORATION: WHY IT IS THE LEGAL FORM THAT BEST ADDRESSES THE NEEDS OF SOCIAL ENTREPRENEURS, INVESTORS, AND, ULTIMATELY, THE PUBLIC 5-6 (2013), [http://benefitcorp.net/sites/default/files/Benefit\\_Corporation\\_White\\_Paper.pdf](http://benefitcorp.net/sites/default/files/Benefit_Corporation_White_Paper.pdf); William H. Clark, Jr. & Elizabeth K. Babson, *How Benefit Corporations are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. R. 817, 838 (2012).

4. While there is no single accepted definition, the term “social enterprise” may be defined for purposes of this Article as a for-profit enterprise with a social, environmental, or other non-financial purpose in addition to profit. For a discussion of the definition of “social enterprise,” *see, e.g.*, Alicia E. Plerhoples, *Representing Social Enterprise*, 20 CLINICAL L. REV. 215, 223 (2013). *See also* Alicia E. Plerhoples, *Nonprofit Displacement and the Pursuit of Charity through Public Benefit Corporations*, 21 LEWIS & CLARK L. REV. 525, 526 (2017) (“Charity is increasingly being conducted through for-profit entities”); Dana Brakman Reiser, *Blended Enterprise and the Dual Mission Dilemma*, 35 VERMONT L. REV. 105, 105 (2010) (noting that “the boundary between charity and business has become a moving target” and that nonprofits, social enterprises and philanthropy divisions of for-profits “all attempt to use business models and practices to pursue charitable objectives.”).

5. For purposes of this Article, a “tandem structure” may be defined as a structure in which a non-profit entity and a for-profit entity cooperate, by means of cross-ownership, contract, or otherwise, to achieve a common goal. *See, e.g.*, Ingrid Mittermaier & Joey Neugart, *Operating in Two Worlds: Tandem Structures in Social Enterprise*, THE PRACTICAL TAX LAWYER, Fall 2011, at 1; Marya Besharov, Jean-Baptiste Litrico & Susanna Kislenco, *The Many Roads to Revenue Generation*, STAN. SOC. INNOVATION REV. 35-39 (Fall 2019).

for-profit features in a single legal entity.<sup>6</sup> Various other hybrids have arisen in the increasingly murky no-man's-land in between.<sup>7</sup>

In this Article, I ask what, if anything, we can learn about the purpose of the American business corporation by examining its history and development in the United States in its formative period from roughly 1780-1860.<sup>8</sup> This brief his-

6. On benefit corporations and social enterprise generally, *see, e.g.* J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 10 (2012). On the L3C, *see, e.g.*, John E. Tyler, *Negating the Legal Problem of Having Two Masters: A Framework for L3C Duties and Accountability*, 35 VT. L. REV. 117 (2010).

7. *See, e.g.*, CAL. CORP. CODE §§ 2500 – 2517 (Deering 2011) (the flexible purpose corporation in California) and WASH. REV. CODE §§ 23.B.25.150 (2012) (the social purpose corporation in Washington).

8. On the utility of corporation history, *see, e.g.*, Harwell Wells, *The Rise of the Close Corporation and the Making of Corporate Law*, 5 BERKELEY BUS. L.J. 263, 266, n.11 (2008) [hereinafter Wells, *Close Corporation*] (“[t]he history of corporation law is in general under-studied . . . .”); Douglas Arner, *Development of the American Law of Corporations to 1832*, 55 SMU L. REV. 23, 23-24 (2002) (“[L]ittle study has been devoted to the development of corporate law in the United States and the United Kingdom.”). *See infra* note 9 for a definition of the term “business corporation” as used in this Article. Sources most useful for this Article include JOSEPH STANCLIFFE DAVIS, ESSAYS IN THE EARLIER HISTORY OF CORPORATIONS I, III, IV (1917); E. MERRICK DODD, AMERICAN BUSINESS CORPORATIONS UNTIL 1860 WITH SPECIAL REFERENCE TO MASSACHUSETTS (Harvard Univ. Press 1954); RONALD E. SEAVOY, THE ORIGINS OF THE AMERICAN BUSINESS CORPORATION 1784-1855 (1982) [hereinafter, SEAVOY, ORIGINS]; Ronald E. Seavoy, *The Public Service Origins of the American Business Corporation*, 52 BUS. HIST. REV. 30 (1978) [hereinafter, Seavoy, *Public Service Origins*]; Ronald E. Seavoy, *Laws to Encourage Manufacturing: New York Policy and the 1811 General Incorporation Statute*, 46 BUS. HIST. REV. 85 (1972) [hereinafter, Seavoy, *Laws to Encourage Manufacturing*]; Pauline Maier, *The Revolutionary Origins of the Business Corporation*, 50 WM. & MARY Q. 51 (1993); Oscar Handlin & Mary F. Handlin, *Origins of the American Business Corporation*, 5 J. ECON. HIST. 1 (1945); Henry Hansmann & Mariana Pargendler, *The Evolution of Shareholder Voting Rights: Separation of Ownership and Consumption*, 123 YALE L.J. 948 (2014); Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387 (2003) [hereinafter Blair, *Locking in Capital*]; Margaret M. Blair, *Reforming Corporate Governance: What History Can Teach Us*, (Georgetown University Law Center, Bus., Econ. and Regulatory Policy Working Paper No. 485663, 2003) [hereinafter Blair, *Reforming Corporate Governance*]; Richard Sylla & Robert E. Wright, *Corporation Formation in the Antebellum United States in Comparative Context*, 55 BUS. HIST. REV. 653 (2013); JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780–1790 (The Univ. Press of Va. 1970); WILLIAM J. NOVAK, THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (Univ. of N.C. Press 1996) [hereinafter NOVAK, PEOPLE’S WELFARE]; Susan Pace Hamill, *From Special Privilege to General Utility: A Continuation of Willard Hurst’s Study of Corporations*, 49 AM. U. L. REV. 81 (1999); Eric Hilt, *Early American Corporations and the State*, in CORPORATIONS AND AMERICAN DEMOCRACY 37 (Naomi R. Lamoreaux and William J. Novak, Eds., (Harvard Univ. Press, 2017) [hereinafter Hilt, *Early American Corporations*]; Eric Hilt, *Corporation Law and the Shift Toward Open Access in the United States*, (Nat’l Bureau of Econ. Research, Working Paper 21195 2015) [hereinafter Hilt, *Open Access*]; Eric Hilt, *Corporate Governance and the Development of Manufacturing Enterprises in Nineteenth-Century Massachusetts*, in ENTERPRISING AMERICA: BUSINESSES, BANKS, AND CREDIT MARKETS IN HISTORICAL PERSPECTIVE 73 (William J. Collins & Robert A. Margo, eds., Univ. Chicago Press, 2015) [hereinafter Hilt, *Corporate Governance*]; Eric Hilt & Jacqueline Valentine, *Democratic Dividends: Stockholding, Wealth and Politics in New York, 1791-1826*, (Nat’l Bureau of Econ. Research, Working Paper 17147, 2011) [hereinafter Hilt & Valentine, *Dem-*

tory of corporate purpose suggests that the ostensible duty to maximize profits in the for-profit corporation is a relatively recent juridical development. Historically, the for-profit or business corporation grew out of an earlier form of corporation that was neither for-profit nor non-profit in today's parlance but rather, served a multitude of municipal, religious, charitable, educational, and eventually business purposes in early nineteenth-century New England. The purposes of early American business corporations—rather than maximization of profit to private shareholders—were often overtly public, involving development of local transportation, finance, and other much-needed economic infrastructure and even the delegation to business corporations of public powers such as eminent domain, at a time when local governments lacked the resources to build such infrastructure. The doctrine of profit maximization did not develop until nearly a century later, after the rise of factory-based manufacturing and other capital-intensive industries in what I will call private “pecuniary” corporations over the course of the nineteenth century.<sup>9</sup>

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*ocratic Dividends*]; Eric Hilt, *When Did Ownership Separate from Control? Corporate Governance in the Early Nineteenth Century*, (Nat'l Bureau of Econ. Research, Working Paper 13093, 2007) [hereinafter Hilt, *Ownership and Control*]; MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1790-1869* (Harvard Univ. Press 1977); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (2d ed. Simon and Schuster 1985); Harwell Wells, *A Long View of Shareholder Power: From the Antebellum Corporation to the Twenty-First Century*, 67 FLA. L. REV. 1033 (2015) [hereinafter Wells, *Shareholder Power*]; Douglas Arner, *Development of the American Law of Corporations to 1832*, 55 SMU L. REV. 23 (2002); Simeon Baldwin, *American Business Corporations Before 1789*, in 1 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1902, 449 (Gov't Printing Office 1903); and COLIN MAYER, *PROSPERITY* (Oxford Univ. Press 2018).

9. In this Article, when referring to business corporations, I avoid using the terms “for-profit,” “nonprofit,” and to some extent “public” and “private,” since these terms and the concepts underlying them were not generally current in the eighteenth and early nineteenth centuries. *See, e.g.*, Handlin & Handlin, *supra* note 8 at 19 (“[N]either the division into public and private laws nor the distinction between public and private corporations was accepted by eighteenth-century law.”); NOVAK, *PEOPLE’S WELFARE*, *supra* note 8 at 84 (“The first hurdle blocking a reconstruction of the notion of public economy in nineteenth-century America is a twentieth-century perspective that separates public and private. . . .”); Wells, *Shareholder Power*, *supra* note 8 at 1042 (“The earliest discussions of ‘corporations’ often made little distinction between for-profit and not-for-profit organizations, perhaps because all corporations, even those for profit, were assumed to provide some public benefit.”). *See also* the discussion *infra* accompanying notes 203 to 218. Instead, I propose – admittedly somewhat arbitrarily – to use the term “corporation” to refer to the all-purpose corporation of the first period of this history prior to 1780; the term “business corporation” to refer to the internal improvement companies and other primarily publicly-oriented business enterprises of the second period from 1780 to roughly 1830; and the term “pecuniary corporation” to refer to the primarily profit-oriented business corporations of the third period from roughly the 1820s forward.) I consider each of these terms to be a subset of its predecessor. The term “pecuniary corporation” (or “monied corporation”) occurs with some regularity from at least the late eighteenth century through the early twentieth to describe primarily profit-oriented enterprises. *See, e.g.*, *State ex rel. Kilbourn v. Tudor*, 5 Day 329, 333 (Conn. 1812) (hereinafter *State v. Tudor*) (distinguishing “a corporation instituted for the public good” from a “monied corporation”); *Congregational Society v. Ashley*, 10 Vt. 241, 244 (Vt. 1838) (distinguishing an ecclesiastical corporation from “mere pecuniary corporations for private emolument”); *Town of West Hartford v. Bd. of Water Comm’rs*, 44 Conn. 360, 370 (Sup. Ct. of Errors of Ct. 1877) (opining on claim that “a municipality holding property for the pub-

Part I of this Article surveys the landscape of early English and early American corporation law.<sup>10</sup> In 1780, few American corporations, and hardly any business corporations, had been organized. Little or no American corporation law existed, and the few available English precedents were concerned primarily with what we would today call charities or non-profits. American law and practice drew no meaningful distinction between business and municipal, religious, educational, or charitable corporations; the business corporation was not a meaningful legal concept; and early American lawyers, jurists, and legislators were accordingly obliged to invent the law of the American business corporation more or less from scratch.

Part II traces the first of two historic transformations in corporate purpose, namely the emergence of the early American business corporation from its all-purpose colonial predecessor.<sup>11</sup> After the American Revolution, particularly after 1800, great numbers of turnpikes, toll-bridges, canals, and other “internal improvement companies,” along with railroads, banks, and insurance companies were rapidly organized. Specially chartered by an act of the state legislature, the business corporation was the entity of choice. The purposes of these early business corporations were avowedly public. State governments—poor in both cash and expertise but in desperate need of local infrastructure—provided corporations with grants of eminent domain, immunity from taxes, monopoly, and direct investment, and some charters provided for the enterprise to revert to the State. Shareholders in many of these early business corporations did not expect an economic return on their shares;<sup>12</sup> rather, their purpose was often to take advantage of the economic infrastructure—what one might call the public or community benefit—that these enterprises were organized to provide. Farmers, for example, wanted a nearby road or canal to transport their produce to market, while merchants needed a local bank from which they could borrow. In most of these developments, New England, and particularly Massachusetts, took prominence, due in part to the presence of a larger merchant class in the towns, but more fundamentally, to a long prior experience of organizing new municipalities, congregations, and schools and a widespread spirit of association and enterprise—in other words, an existing entrepreneurial culture that quickly

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lic good . . . has descended to the level of a pecuniary corporation using property for profit”); *Tweedy v. Bogart*, 15 A. 374, 375 (Sup. Ct. of Errors of Ct. 1887) (“During the lapse of time, private pecuniary corporations have greatly increased in number.”); *Bray v. Town of Wallingford*, 20 Conn. 416, 418 (Conn. 1887) (distinguishing “pecuniary corporations”); *Read v. Tidewater Coal Exch., Inc.*, 116 A. 898, 904 (Del. Ch. 1922) (citing 1 CLARK & MARSHALL ON PRIVATE CORPORATIONS, 83 (1st ed. 1902) and 1 FLETCHER’S CYCLOPEDIA OF CORPORATIONS, 92 (1919) on “corporations for pecuniary profit”); Maier, *supra* note 8 at 64-65 (citing one eighteenth-century essayist on “pecuniary” corporations) (citation omitted).

10. See *infra* discussion accompanying notes 20 to 166.

11. See *infra* discussion accompanying notes 167 to 421.

12. See discussion *infra* Section II.A.

adapted from its all-purpose corporate origins to the business-oriented corporate form.<sup>13</sup>

Part III of this Article briefly outlines the second great transformation of the early American corporation. Beginning in the second and third decades of the nineteenth century with the rise of factory-based manufacturing and other comparatively more capital-intensive industries, the purpose of the business corporation shifted fundamentally from public to private.<sup>14</sup> Massachusetts and other states chartered great numbers of manufacturing corporations; railroads gradually replaced turnpikes and canals as the primary means of inland transport; and the chartering of publicly oriented internal improvement companies declined.<sup>15</sup> Based initially on religious precedents, to keep up with growing demand, states adopted general incorporation statutes that no longer required an action of the state legislature. By 1860, state corporation statutes had become largely enabling rather than prescriptive, the purpose of the business corporation was widely understood to be private pecuniary gain, and the early American business corporation gradually took its familiar “pecuniary” or profit-maximizing modern form. The stage had been set for the advent of the modern firm.

In Part IV of this Article, based on this brief history of corporate purpose, I draw conclusions about the corporation and the implications for social enterprise.<sup>16</sup> I conclude that the corporation as such has no intrinsic purpose; the corporation’s defining features are separate legal personality and the ability to aggregate capital toward any otherwise lawful end, whether for-profit or non-profit; and the profit-maximizing imperative of the modern for-profit corporation is a historical development rather than anything intrinsic to the corporate form.<sup>17</sup> The “pecuniary” or profit-oriented corporation emerged from the “body

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13. Amer, *supra* note 8 at 44; Seavoy, *Public Service Origins*, *supra* note 8 at 60. See also ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, (George Lawrence, trans., J.P. Mayer ed.) (1969) (“Americans of all ages, all stations in life, and all types of dispositions are forever forming associations. There are not only commercial and industrial associations in which all take part, but others of a thousand different types – religious, moral, serious, futile, very general and very limited, immensely large and very minute. . . . In every case, at the head of any new undertaking, where in France you would find the government or in England some territorial magnate, in the United States you are sure to find an association.”).

14. See discussion *infra* accompanying notes 422 to 516.

15. See, e.g., Dodd, *supra* note 8, at 314 (stating that in Massachusetts, by 1848, the average annual number of manufacturing company charters had come to be greatly in excess of that of any other type of business company) and at 134 (discussing the substitution of railroads for turnpikes and canals as the principal arteries of inland transportation); SEAVOY, *ORIGINS*, *supra* note 8, at 213 (discussing the comparative advantages of railroads over canals and the role of railroads in the transformation of New York’s economy by 1855).

16. See discussion *infra* accompanying notes 517 to 547.

17. On the profit maximization doctrine, I have argued elsewhere that (i) the Michigan Supreme Court in *Dodge v. Ford* based its holding that directors had a fiduciary duty to maximize profits to shareholders on the then-declining doctrine of ultra vires and shareholders’ equitable right to a dividend, which is to say, based on reasonable shareholder expectations arising from the particular provisions of Ford’s corporate charter, and (ii) *eBay* ultimately should be understood as an ultra vires case. See Guenther, *supra* note 3.

politic,” and there is nothing inherent in the corporation to separate the two, only a different orientation of purpose. I also conclude that social enterprises today much more closely resemble the early American business corporation than the profit-maximizing modern firm;<sup>18</sup> that social entrepreneurs and investors operating in developing economies today frequently use for-profit corporations in much the same way, for the same reasons, and to accomplish the same objectives as early American corporations, namely, to build economic and financial infrastructure where other means are not available—to use business to improve society,<sup>19</sup> in addition to obtaining a financial return on their capital. Social enterprise should be seen less as a legally uncertain novelty than an operational return to the business corporation’s nineteenth-century American roots. Finally, based on this brief history, I suggest potential limitations for social enterprise today.

## II. EARLY ENGLISH AND AMERICAN CORPORATION LAW

### A. England.

Historically, while the corporate form had long existed in England, the ordinary business corporation was practically unknown.<sup>20</sup> English corporations had been used almost exclusively for municipal, ecclesiastical, charitable, and educational purposes.<sup>21</sup> Only a small number of ordinary business corporations

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18. On the modern firm, *see generally* A. BERLE JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

19. *See, e.g.*, Antony Page & Robert A. Katz, *Freezing Out Ben & Jerry: Corporate Law and the Sale of a Social Enterprise Icon*, 35 VT. L. REV. 211, 217 (citing Ben Cohen describing Ben & Jerry’s as “an experiment to see if it was possible to use the tools of business to repair society.”) (citation omitted).

20. *See* SEAVOY, *ORIGINS*, *supra* note 8, at 47 (noting that the English Parliament passed very few individual charters for business enterprises and no general incorporation statutes for business until 1844); Maier, *supra* note 8, at 83 (observing that the corporation was an “all-but-moribund institution” in eighteenth-century England); Dodd, *supra* note 8, at 195 (explaining that English courts prior to the American Revolution had very little opportunity to develop legal principles relating to corporate problems peculiar to joint-stock companies); Handlin & Handlin, *supra* note 8, at 3 (noting that the whole of eighteenth-century England chartered a half-dozen corporations for manufacturing purposes and hardly more in any other business sphere; not until the Companies Act of 1844 did the corporation become common); Philip I. Blumberg, *Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity*, 24 HASTINGS INT’L & COMP. L. REV. 297, 300 (stating that Coke wrote “at a time when there were virtually no business corporations in England”). *But cf.* Dodd, *supra* note 8, at 14 (referring to the substantial number of English business corporation cases decided before 1800); Davis, *supra* note 8, at 3 (noting that the corporation, including for trading and business purposes, was well-matured in England during American colonial period).

21. *See, e.g.*, SEAVOY, *ORIGINS*, *supra* note 8 at 46-47.

appear to have been chartered in England in the whole of the eighteenth and early nineteenth centuries.<sup>22</sup> Corporate charters were difficult to obtain.<sup>23</sup>

The rules for organizing an English corporation were first summarized in 1612 by Sir Edward Coke in *The Case of Sutton's Hospital*, perhaps the first significant case in the common law of corporations.<sup>24</sup> An English corporation could be created in one of four ways: by the common law; by prescription; by an act of the English Parliament; or by a charter or “letters patent” from the King, though the first three routes were generally deemed to require, or to have already received, the implicit or explicit assent of the monarch.<sup>25</sup>

The predominant forms of association for early English business enterprises were the general partnership and the joint-stock company.<sup>26</sup> Both suffered from significant disadvantages. At common law, the general partnership was an unincorporated association that lacked separate legal personality, could not sue or be sued, and dissolved automatically upon the death or involuntary withdrawal of any member; partnership interests were not freely transferable.<sup>27</sup> Partners were jointly and severally liable for the partnership’s debts and any actions taken by any other partner on behalf of the partnership.<sup>28</sup> Due to their uncertain lifespan and non-transferable interests, partnerships usually consisted of a small number of people, often family members, and generally engaged in commercial trading or land-based or other activities that did not require significant pooling of capital.<sup>29</sup>

For larger ventures that required greater aggregation of capital, the joint-stock company was preferred. Initially, English joint-stock companies were an unincorporated contractual form created by articles of association among the company’s members without reference to a charter or statute.<sup>30</sup> Through the

22. See SEAVOY, ORIGINS, *supra* note 8, at 47; Handlin & Handlin, *Origins of the American Business Corporation*, *supra* note 8, at 3.

23. JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 1:14 (3d ed. 2018).

24. See, e.g., *Case of Sutton's Hospital* (1612) 77 Eng. Rep. 960(K.B.); Arner, *Development of the American Law of Corporations to 1832*, *supra* note 8, at 28; W.S. Holdsworth, *English Corporation Law in the 16<sup>th</sup> and 17<sup>th</sup> Centuries*, 31 YALE L. J. 382, 382 (1922).

25. *Case of Sutton's Hospital* (1612) 77 Eng. Rep. 960, 975 (K.B.) (“[N]one but the King alone can create or make a corporation . . . .”); cf. EDWARD COKE, FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; OR, A COMMENTARY UPON LITTLETON \*250a [hereinafter, COKE ON LITTLETON] (recognizing only three ways to incorporate: by prescription, by letters patents, or by act of Parliament); BLACKSTONE, *supra* note 1, at \*472, \*474 (“[T]he king’s consent is absolutely necessary . . . none but the king can make a corporation . . . .”); STEWART KYD, A TREATISE ON THE LAW OF CORPORATIONS 40-41 (noting that it had been “long established that the king’s consent is absolutely necessary” to create a corporation); Holdsworth *supra* note 23, at 382 (citations omitted).

26. See, e.g., SEAVOY, ORIGINS *supra* note 8, at 47.

27. See, e.g., Wells, *Close Corporation*, *supra* note 8, at 276, 306 (citation omitted).

28. BLAIR, *supra* note 8, at 410.

29. BLAIR, *supra* note 8, at 409, n.68 (citing ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 8 (1970)).

30. COX & HAZEN, *supra* note 23, at § 2:2.

articles of association, joint-stock companies were able to provide for quasi-corporate characteristics, including continuity of existence, free transferability of shares, and centralized management by a board of directors, and for real assets to be held by a trustee rather than jointly by the members.<sup>31</sup> The company did not dissolve upon the death of a member or other changes in membership, and members were not authorized to act as agents on behalf of the company.<sup>32</sup> Due to the defects of the general partnership and the difficulty of obtaining corporation charters, unincorporated joint-stock companies came into wide use in England in the seventeenth and eighteenth centuries.<sup>33</sup> The unincorporated joint-stock company suffered from the same basic defect as the general partnership, however, in that courts applied rules of general partnership liability, so that each company member was jointly and severally liable for all of the company's debts.<sup>34</sup> In addition, in suits against the company, courts applied the rule of joinder, requiring all members of the company to be named in the suit, and the common law rule prohibiting partners from suing the partnership (i.e., themselves) with the result that members could not bring suit against the company.<sup>35</sup>

In the early 1600s, the English Crown and Parliament began granting corporate charters to joint-stock companies. As corporations, chartered joint-stock companies had true separate legal personality and free transferability of shares. Charters were generally granted, however, only to large-scale enterprises that required significant pooling of capital and were seen as advancing important state interests overseas.<sup>36</sup> As privileged ventures with quasi-state powers, incorporated joint-stock companies were instrumental in the developing English mercantile economy. The East India Company was a typical example. Granted a royal charter by Queen Elizabeth in 1600, the company had not only a monopoly on trade, but the right to maintain an army, control territory, wage war and conduct diplomacy, make and enforce laws through its own courts, and maintain a "massive bureaucracy" of civil servants.<sup>37</sup> The East India Company became the foundation for the British Empire in India.<sup>38</sup> As one historian has noted, "the ambiguous and flexible relationship between the Company's status as a public and private actor was in many ways part of its constitution from the very beginning."<sup>39</sup>

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31. *Id.* at § 1:14.

32. *Id.*

33. *See id.* at § 2:2; § 1:14.

34. *Id.* at § 2:2.

35. *Id.*

36. *See, e.g.,* Samuel Williston, *History of the Law of Business Corporations Before 1800 I*, 2 HARV. L. REV. 105, 110 (1888).

37. Philip J. Stern, *The English East India Company and the Modern Corporation: Legacies, Lessons and Limitations*, 39 SEATTLE U. L. REV. 423, 433 (2016).

38. *Id.* at 426.

39. *Id.* at 435.

Any nascent development of the English business corporation through the joint-stock company, however, was soon cut short. In the late seventeenth century, the proliferation of unincorporated joint-stock companies and a boom in trading of company shares led to a speculative bubble.<sup>40</sup> One of the most notorious speculators, the South Sea Company, inspired Parliament to enact the Bubble Act of 1720, ostensibly to protect unwary investors against fraud.<sup>41</sup> Though poorly drafted and its basic terms ill-defined, the Act was understood to make illegal, under severe penalty, the formation of new joint-stock companies with transferable shares except by royal or parliamentary charter.<sup>42</sup> The direct impact of the Act was uncertain, and in any event it was repealed in 1825, but if nothing else, the Bubble Act created a century of uncertainty and doubt about the legality of transferable shares issued by unincorporated companies.<sup>43</sup> Together with the relative rarity of royal and parliamentary charters, the Bubble Act “drastically limited the development of business corporations in Britain.”<sup>44</sup> As one scholar put it, the business corporation in late eighteenth-century England was “an all-but-moribund institution.”<sup>45</sup>

In English law, then, and in the eyes of English courts and legal commentators, the corporation was originally—and until at least the mid-nineteenth century largely remained—a non-business form. English courts did not generally even distinguish between non-business and business corporations.<sup>46</sup> Instead,

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40. COX & HAZEN, *supra* note 23, at § 2:2; Seavoy, *Public Service Origins*, *supra* note 8, at 31; L. C. B. Gower, *Some Contrasts Between British and American Corporation Law*, 69 HARV. L. REV. 1369, 1370 (1956).

41. COX & HAZEN, CORPORATIONS § 2:2; Seavoy, *Public Service Origins*, *supra* note 8 at 31.

42. Arner, *Development of the American Law of Corporations to 1832*, *supra* note 8, at 33; Blair, *Locking in Capital*, *supra* note 8, at 415 (citations omitted); Paul G. Mahoney, *Contract or Concession? An Essay on the History of Corporate Law*, 34 GA. L. REV. 873, 887 (2000).

43. COX & HAZEN, *supra* note 23, at § 2:2.

44. Seavoy, *Public Service Origins*, *supra* note 8, at 32; Arner, *Development of the American Law of Corporations to 1832*, *supra* note 8, at 33 (the Bubble Act “retarded the development of the private business corporation in England for over one hundred years”); Blair, *Locking in Capital*, *supra* note 8, at 415 (the Bubble Act “slowed the development of this organizational form in England for more than one hundred years”) (citations omitted) and note 88 (noting that England did not pass an effective general incorporation act until 1844); Mahoney, *Contract or Concession?*, *supra* note 42 at 888 (“the real impact of the Bubble Act was to cut off any possibility of further development of a common law of joint-stock companies.”); Gower, *Some Contrasts Between British and American Corporation Law*, *supra* note 42, at 1371-1372 (“Hence the modern English business corporation has evolved from the unincorporated partnership, based on mutual agreement, rather than from the corporation, based on a grant from the state, and owes more to partnership principles than to rules based on corporate personality.”).

45. Maier, *supra* note 8, at 83 (referring to corporations generally). *See also* Handlin & Handlin, *supra* note 8, at 3 (“Throughout the whole of the eighteenth century England chartered some half-dozen corporations for manufacturing purposes, and hardly more in any other business sphere.”).

46. Dodd, *supra* note 8, at 13, 18, 195; *id.* at 18, note 6 (noting that the first English case to put an incorporated trading company in a separate category from an incorporated borough was decided in 1819).

they developed rules that purported to apply to all corporations alike.<sup>47</sup> Not surprisingly, English precedents, while purporting to establish rules that applied to all corporations, were ill-suited to business enterprises.<sup>48</sup>

As noted above, the first major case in English corporation law—*The Case of Sutton's Hospital* in 1612—involved a charity.<sup>49</sup> Sir Edward Coke does not restrict his opinion to charitable corporations or even distinguish between charitable and non-charitable corporations. Among the five things he describes as “of the essence of a Corporation,” Coke does not mention corporate purpose.<sup>50</sup>

Similarly, in his subsequent *Institutes of the Laws of England*, first published in 1628, Coke does not appear to acknowledge the existence of business corporations.<sup>51</sup> Coke defines a corporation or “body politike” as

. . . a body to take in succession, framed (as to that capacity) by policie, and there-upon it is called here by Littleton a body politike; and it is also called a corporation, or a body incorporate, because the persons are made into a body, and are of capacity to take and grant, etc.”<sup>52</sup>

By this account, the distinguishing characteristics of the corporation appear to be only two: separate legal personality and the ability to aggregate capital.<sup>53</sup> Coke’s ensuing discussion of corporations, while brief, are concerned only with ecclesiastical and municipal organizations, without mentioning trade or business:

Every body politike, or corporate, is either ecclesiasticall or lay: ecclesiasticall, either regular as abbots, priors, etc., or secular, as bishops, deans, archdeacons, parsons, vicars, etc.; lay, as maior and communalitie, baylifes and burgesses, etc. Also every body politike is either elective, presentative, collative or donative. And in the case of these againe it is either sole, or aggregate of many . . . . And this body poli-

47. *Id.* at 195.

48. *Id.* at 195; HURST, *supra* note 8, at 7.

49. Arner, *supra* note 8, at 28 (*Sutton's Hospital* “is generally regarded as one of the most important early cases on corporations.”). *See also* Holdsworth, *supra* note 23, at 382, n. 1 (“The legal sense of the word hospital is a corporate foundation, endowed for the perpetual distribution of the founder’s charity, in the lodging and maintenance of a certain number of poor persons, according to the regulation and statutes of the founder. Such institutions are not necessarily connected with medicine or surgery, and in their original establishment had no necessary reference to sickness of accident.”) (citation omitted).

50. *Case of Sutton's Hospital* (1612) 77 Eng. Rep. 960, 968-969 (KB). These five things are (i) lawful authority of incorporation; (ii) persons to be incorporated; (iii) a name; (iv) a place; and (v) words sufficient in law to indicate the intent to form a corporation. *See also* Arner, *supra* note 8, at 29.

51. *See* Blumberg, *Accountability of Multinational Corporations*, *supra* note 20 at 300 (stating that Coke wrote “at a time when there were virtually no business corporations in England”); *see also* Arner, *Development of the American Law of Corporations to 1832*, *supra* note 8 at 29.

52. COKE ON LITTLETON, *supra* note 25, at \*250a.

53. *See infra* discussion accompanying notes 518 to 525.

tike, corporate, aggregate of many, is by the civilians called collegium or universitas.<sup>54</sup>

Other early English commentators paid similarly scant attention to business corporations. William Blackstone, in his *Commentaries on the Laws of England*, first published in 1765, also identifies five “powers, rights, capacities, and incapacities,”<sup>55</sup> which are “necessarily and inseparably incident to every corporation,”<sup>56</sup> but like Coke, he does not mention corporate purpose. With respect to the types of corporations, Blackstone follows a schema similar, but not identical, to that of Coke: corporations may be sole or aggregate, ecclesiastical or lay, but within the latter category, Blackstone distinguishes between eleemosynary and civil.<sup>57</sup> Eleemosynary corporations are charities “constituted for the perpetual distribution of the free alms, or bounty, of the founder of them, to such persons as he has directed.”<sup>58</sup> Civil corporations “are such as are erected for a variety of temporal purposes.”<sup>59</sup> As examples of civil corporations, Blackstone lists the King; “corporations erected for the good government of a town or particular district”; church wardens; the college of physicians and company of surgeons in London; the royal society of antiquarians; the universities of Oxford and Cambridge; and most significantly for our purposes, corporations “for the advancement and regulation of manufactures and commerce; as the trading companies of London and other towns.”<sup>60</sup> Blackstone may thus be the first English commentator to mention business corporations as such, though it should be noted that, rather than putting them in a separate category, he still includes them with municipal, educational, and other non-business corporations in the broad category of civil corporations established for some “temporal purpose.”<sup>61</sup>

Perhaps the first English treatise devoted specifically to corporation law was published in 1793.<sup>62</sup> Stewart Kyd, in his *Treatise on the Law of Corporations*, defines a corporation, or “body politic,” as

54. COKE ON LITTLETON, *supra* note 25, at \*250a; *see* the very similar language in *Case of Sutton’s Hospital*, (1612) 77 Eng. Rep. 960, 968 (KB) (“That every Corporation or Incorporation, or body Politick and Incorporate, who are all one, either stand upon one sole person, as the King, Bishop, Parson, &c. or aggregate of many, as Mayor and Commonalty, Dean and Chapter, &c., and these are in the Civil Law are [sic] called *Universitas sive Collegium*.”).

55. BLACKSTONE, *supra* note 25, at \*475; *see also* Arner, *supra* note 8, at 37.

56. BLACKSTONE, *supra* note 25, at \*475. The five essential powers or rights are (i) to have perpetual succession; (ii) to sue or be sued; (iii) to purchase and hold lands “for the benefit of themselves and their successors”; (iv) to have a common seal; and (v) to make by-laws or private statutes for the better governance of the corporation. *Id.* at \*475-76.

57. BLACKSTONE, *supra* note 25, at \*469-471.

58. *Id.* at \*471.

59. *Id.* at \*470.

60. *Id.* at \*471.

61. *Id.* at \*470; *but see* the restriction Blackstone notes on trading company bylaws at \*476.

62. JOSEPH K. ANGELL & SAMUEL AMES, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE I, vi (1832); *but see* Arner, *supra* note 8, at 42. *See also* WILLIAM SHEPPARD, OF CORPORATIONS, FRATERNITIES AND GUILDS (Garland Pub., Inc. 1978) (1659) (cited in Arner, *supra* note 8, at 31-33, n. 45) (discussing Sheppard as potentially the first English book on

. . . a collection of many individuals, united into one body, under a *special denomination*, having perpetual succession under an *artificial form*, and vested, by the policy of the law, with the capacity of acting, in several respects, as an *individual*, particularly of taking and granting property, of contracting obligations, and of suing and being sued, of enjoying privileges and immunities in *common*, and exercising a variety of political rights, more or less extensive, according to the design of its institution, or the powers conferred on it, either at the time of its creation, or at any subsequent period of its existence.<sup>63</sup>

Like Coke and Blackstone, Kyd enumerates the “essential characteristics”<sup>64</sup> of the corporation.<sup>65</sup> Consistent with Coke and Blackstone, Kyd identifies separate legal personality, or perpetual succession, and the ability to aggregate property as two key attributes of the corporate form, regardless of the nature of the corporate activity. Kyd’s types of corporation are otherwise much the same as Blackstone’s.<sup>66</sup> Unlike Coke and Blackstone, however, Kyd specifically discusses corporate purpose as the criterion that distinguishes one category of corporation from another: “It is not the description of the persons who are the members of a corporation, but the purpose of its institution which characterises it to be a lay or a spiritual foundation.”<sup>67</sup> Civil corporations are, as with Blackstone, those established “for a variety of temporal purposes.”<sup>68</sup> This category includes the King; cities, towns, and other local government; “the two universities”;<sup>69</sup> corporations for “the maintenance and regulation of some particular object of public policy,”<sup>70</sup> such as regulating navigation, “the Bank,” and insurance companies in London;<sup>71</sup> the College of Physicians, the Company of Surgeons in London, the Royal Society, the Society of Antiquarians, the Royal Academy of Arts, and others for the advancement of science and the arts; and corporations for “the regulation of trade, manufactures, and commerce, such as the East India Company, and the companies of trades in London and other towns.”<sup>72</sup>

Two points may be noted. First, while Kyd’s list of civil corporations appears to rely on Blackstone’s, the number, variety, and specificity of description

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the law of corporations but noting that Sheppard did not advance much beyond Coke in Sutton’s Hospital).

63. KYD, *supra* note 25, at 13 (emphasis in original).

64. *Id.* at 6.

65. *See id.* at 6-10. These “essential characteristics” are: (i) perpetual succession; (ii) possessing and transmitting property; (iii) “common burthens,” as examples of which Kyd cites certain taxes, customs and duties; (iv) “some peculiar privileges,” such as exemption from tolls and duties; and (v) the ability to sue and be sued.

66. *See id.* at 20-32.

67. *Id.* at 23.

68. *Id.* at 27.

69. *Id.* at 28.

70. *Id.* at 28.

71. *Id.* at 28-29.

72. *Id.* at 29.

of business-like corporations have grown. While the East India Company existed during Coke's and Blackstone's lifetimes, Kyd appears to be the first to mention it by name, perhaps reflecting its rise to prominence, along with other mercantilist joint-stock corporations, in the eighteenth century.<sup>73</sup> It would also not appear coincidental that Kyd mentions corporations engaged in transportation and finance.<sup>74</sup> The second point, however, is that Kyd nonetheless continues to group business enterprises with municipal, educational, and other non-business organization in the category of corporations pursuing some "temporal purpose."

Prior to the American Revolution, then, and even for some decades thereafter, the ordinary business corporation cannot be said to have had a meaningful existence in English law. Few English business corporations existed; those that did exist, such as the East India Company, often were not ordinary; and English courts and legal commentators such as Coke, Blackstone, and Kyd did not typically consider the business corporation to exist as a distinct legal form.<sup>75</sup> To the contrary, English corporation law taught that all organizations, business and non-business like, used essentially the same form of corporation with the same essential features, and to the extent such organizations pursued some "civil" purpose, there was no significant difference between them.

#### B. *The American Colonies.*

Early American corporation law was based on available English precedent and, as might be expected, largely resembled English law. Corporations in the American colonies required a special charter from the King or the English parliament, directly or by delegated authority.<sup>76</sup> As in England, corporations were few, and business corporations even fewer.<sup>77</sup> The purposes of most corporations, to the extent clearly set forth in their charters, were municipal, religious, educational, or charitable, or in the case of incorporated joint-stock companies, often one or more of the foregoing intertwined with commercial or trade-related

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73. See also *id.* at 61 (mentioning the East India Company's exclusive right of trading).

74. See *infra* discussion accompanying notes 219 to 349 on the importance of the transportation and finance sectors for internal improvement companies in the former colonies after the Revolution.

75. The notion of the business corporation as a distinct form of legal entity does not appear to have occurred to Blackstone or Kyd; Blackstone made no mention of the few existing English decisions relating to business corporations, and Kyd cited very few of them in his two-volume treatise. See, e.g., DODD, *supra* note 8, at 14, 196; SEAVOY, ORIGINS, *supra* note 8, at 46 ("Blackstone had not clearly distinguished between municipal corporations, benevolent public service corporations, and business corporations, and the other classes of English corporations he discussed did not exist in the legal and social structure of the United States.").

76. DAVIS, *Corporations in the American Colonies*, *supra* note 8, at 7-8; Hamill, *supra* note 8, at 88-89.

77. DAVIS, *Eighteenth Century Business Corporations in the United States*, *supra* note 8, at 329; Hamill, *supra* note 8, at 84.

aims.<sup>78</sup> As in England, most colonial business associations remained partnerships or unincorporated joint-stock companies.<sup>79</sup>

### 1. Mixed Trade and Municipal Corporations.

The earliest English corporate charter for a primarily American enterprise appears to have been granted in 1587 by Sir Walter Raleigh, by royal letters patent the Governor of Virginia, to John White and twelve other “Gentlemen” of London, who were constituted a body corporate with the title, “Gouverneur and Assistants of the Citie of Raleigh in Virginia.”<sup>80</sup> Whether the “Citie of Raleigh” was intended to be a trade or municipal corporation is difficult to determine,<sup>81</sup> a difficulty compounded by John White’s return to England in 1591 with the news that the colonists had disappeared.<sup>82</sup> The Virginia Company, established by charters granted in 1606, 1609, and 1612 with the company title, “The Treasurer and Company of Adventurers and Planters of the City of London, for the first Colony in Virginia,” seems to have been primarily a business corporation modeled on the East India Company, with many of the same shareholders, but again, as an intended colony, the corporation’s municipal aspect seems implicit, and fundraising for the new venture also appealed to religious motives.<sup>83</sup> The “Council established at Plymouth, in the County of Devon, for the plant-

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78. Blair, *supra* note 8, at 423 (citations omitted). Regarding early corporate charters, several challenges should be noted. Determining whether a given colonial enterprise was indeed a corporation is often difficult. Records were sketchy and poorly kept; whether a legislative body or official had lawful authority to charter a corporation was frequently unclear; the terms “corporation” and “body politic” were used very loosely in the eighteenth century; some corporations were chartered multiple times, with uncertain effect, under different circumstances; and many purported colonial corporations never got off the ground or were short-lived and ineffectual. See DAVIS, *Corporations in the American Colonies* *supra* note 8, at 60 ff.; William B. Stoebuck, *Reception of English Common Law in the American Colonies*, 10 WM. & MARY L. REV. 393, 395 (1968). Dissensus among legal scholars and historians as to the actual roster of colonial American business corporations accordingly persists. See *infra* discussion *infra* accompanying notes 117 to 149. In addition, while early American corporate charters often set forth in their charters “only a relatively narrow and specific set of corporate purposes,” (Hansmann & Pargendler, *supra* note 8, at 139), there was no standard format, and drafting conventions were sometimes dramatically different. Legal concepts and categories such as nonprofit versus for-profit, charitable versus business, and public versus private did not exist. See *infra* discussion accompanying notes 203 to 218. See also Hilt, *supra* note 8, at 52, on the problem of enforcement of charter provisions (“‘Not even the finest administrative system could have enforced’ the charters ‘welter of variety and inconsistency.’”)(citation omitted).

79. SEAVOY, *ORIGINS* *supra* note 8, at 47 (regarding English law); Blair, *supra* note 8, at 404.

80. DAVIS, *Corporations in the American Colonies*, *supra* note 8, at 30 (citations omitted); see COX & HAZEN, *supra* note 23, at § 2:2 n.2 (“Cumbersome names such as this seem to go back to the quaint, obsolete, old concept ‘that a corporation consists of a head and members, that, if for a while it is headless, it is capable of no act save that of electing a new head. . . .’”) (citation omitted).

81. DAVIS, *Corporations in the American Colonies*, *supra* note 8, at 30-32.

82. DAVIS, *Corporations in the American Colonies*, *supra* note 8, at 32, *but cf.* 32-33.

83. *Id.* at 33-35. See also Stoebuck, *supra* note 78, at 396 (noting that the quarterly court, or council, had the power to make laws).

ing, ruling and governing of New-England, in America,” established in 1620 by a Crown charter, was organized as a business corporation to promote the fishing industry.<sup>84</sup> The “body corporate” consisted of a council of forty persons rather than stockholders, however, and the establishment of settlements and the emphasis on governing of New England would again seem to constitute a municipal rather than business purpose.<sup>85</sup> The Massachusetts Bay Company, incorporated in 1629 as “The Governor and Company of the Massachusetts Bay in Newe-England,” was similarly organized as a business corporation like the East India and Virginia companies, but “soon lost what little financial character it originally possessed. It was rather dominated by the desire to establish in the New World a colony in which certain ways of living and thinking might find unhampered expression.”<sup>86</sup> The Massachusetts Bay Company eventually lost its private corporate character altogether and evolved into the government of the colony of Massachusetts, being granted a “province charter” in 1691.<sup>87</sup> Nor was Massachusetts an exception in this regard; the colonies of Connecticut and Rhode Island were originally organized as corporations with Crown charters, Connecticut in 1662 and Rhode Island perhaps in 1643 or more definitively in 1663.<sup>88</sup> According to Joseph S. Davis, the corporate charters of Connecticut and Rhode Island were the source of their legislative powers, even “the fundamental law in these two colonies down to the Revolution.”<sup>89</sup> Indeed, Rhode Island’s corporate charter was not replaced by a state constitution until 1842.<sup>90</sup>

Other more clearly municipal corporations in the colonies included chartered boroughs, cities, and towns. The first of these appears to have been incorporated in 1641 in Maine by the proprietor of the newly chartered province, Sir Fernando Gorges, who organized “the Planters and Inhabitants of Acomenticus” into “one bodie politique and corporate” to be known as the “Towne of Acomenticus,” which a year later was supplanted by the “Cittie” of Gorgeana, the first formally established American city.<sup>91</sup> The second of these was New York.<sup>92</sup> In 1665, after taking possession of the city, then known as New Amsterdam, from the Dutch authorities, the English governor declared that city officials would henceforth be known as mayor, alderman, and sheriff, “according to the Custome of England in other his Majesties Corporacons,” and that the inhabitants of Manhattan would thenceforth “bee for ever accounted, nominated and Established, as one Body Politique and Corporate.”<sup>93</sup> A total of seven mu-

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84. *Id.* at 34.

85. *Id.*

86. *Id.* at 39. *See also* Maier, *supra* note 8, at 56.

87. DAVIS, *Corporations in the American Colonies*, *supra* note 8, at 40.

88. *Id.* at 20, 40-41.

89. *Id.* at 41

90. *Id.*

91. *Id.* at 50-51.

92. *Id.* at 51.

93. *Id.* at 51-52.

nicipalities in the seventeenth century, and more than double that number in the eighteenth century prior to the Revolution, were incorporated in the colonies.<sup>94</sup>

## 2. Ecclesiastical Corporations.

The most numerous corporations in the early American colonies were religious or ecclesiastical in nature.<sup>95</sup> Several colonies codified the common law principle that the parson of the established church was a variety of corporation.<sup>96</sup> In 1755, for example, the Massachusetts legislature passed an act providing that deacons, church wardens, and other governing bodies of Protestant churches should be

. . . deemed so far as bodies corporate, as to take in succession all grants and donations, whether real or personal, made either to their several churches, the poor of their churches, or to them and their successors, and to sue and defend in all actions touching the same.<sup>97</sup>

The same principle may have been recognized generally in the colonies.<sup>98</sup> Other colonies granted churches more typical corporate charters. The earliest of these appear to include the charters granted in New York, first in 1696 to the “Minister Elders and Deacons of the Dutch Protestant Congregation in the City of New York,” and again in 1697 to Trinity Church (Episcopal) of New York.<sup>99</sup> New Jersey chartered Episcopal church corporations in 1709-10 and 1718 and a Presbyterian church corporation in 1734.<sup>100</sup> Churches were granted corporate charters in Pennsylvania after 1760 and in Rhode Island in the 1770s.<sup>101</sup>

## 3. Charitable and Benevolent Corporations.

After churches, the most common corporations in the colonies were those with charitable or benevolent purposes, many of whose activities were not clearly separable from those of churches.<sup>102</sup> Among the earliest of these were missionary societies, such as “the President and Society for the propagation of the Gospell in New England,” incorporated by the English Parliament in 1649 and known as the New England Company, aimed at evangelizing Native Amer-

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94. Albany, New York, received a charter in 1686, and Westchester in 1696; Baltimore, as “St. Mary’s City,” in 1667; Philadelphia in 1691; and Germantown, Pa. in 1689. Some twenty-four municipal corporations were created in the American colonies; sixteen or seventeen survived until the Revolution. *Id.* at 52-54, 59-60.

95. *Id.* at 75.

96. *Id.*

97. *Id.* at 79 (citation omitted).

98. *Id.* at 76.

99. *Id.*

100. *Id.* at 77-78 (noting that New Jersey did not separate from New York until 1738).

101. *Id.* at 78 (Pennsylvania); *id.* at 78-79 (Rhode Island).

102. *Id.* at 82.

ican populations.<sup>103</sup> Organizations charged with administering public charity or correction included The Corporation for the Relief of Poor and Distressed Presbyterian Ministers, and of the Poor and Distressed Widows and Children of Presbyterian Ministers, chartered in 1759 in Pennsylvania;<sup>104</sup> Boston's Overseers of the Poor, established by the Massachusetts General Court in 1772;<sup>105</sup> and The Contributors to the Pennsylvania Hospital, incorporated by the Pennsylvania General Assembly in 1750 "for the relief of the sick poor of this province."<sup>106</sup> The entire colony of Georgia was chartered as a charitable corporation in 1732 by King George II and nineteen other trustees.<sup>107</sup> Colonial charitable corporations also included marine societies, whose purpose was to bring together the mariners of a particular port, in order to provide mutual aid and to increase knowledge of navigation;<sup>108</sup> libraries;<sup>109</sup> and The New York Chamber of Commerce, chartered by the governor in 1770.<sup>110</sup>

#### 4. Educational Corporations.

Colonial corporations with an educational purpose were typically colleges; nine colleges were chartered prior to the Revolution.<sup>111</sup> The only one directly incorporated by royal charter was the College of William and Mary in Virginia in 1693.<sup>112</sup> The President and Fellows of Harvard College were initially incorporated in 1650 by the Massachusetts General Court.<sup>113</sup> Yale College, established in 1701 as a "collegiate school" with a governing board on the model of a business partnership, in 1745 received the first corporate charter granted by the Connecticut assembly.<sup>114</sup> A group of Presbyterians were initially denied a corporate charter for Princeton University, then known as The College of New Jersey, by the state's governor, who refused, probably on ecclesiastical grounds; the governor died in 1746, however, and the college obtained a charter in 1748

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103. *Id.* at 38.

104. Baldwin, *supra* note 8, at 457.

105. Maier, *supra* note 8, at 56; DAVIS, *Corporations in the American Colonies*, *supra* note 8, at 73.

106. DAVIS, *Corporations in the American Colonies*, *supra* note 8, at 83 (citation omitted).

107. *Id.* at 35.

108. *Id.* at 101; Baldwin, *supra* note 8, at 452 (discussing the marine societies chartered in Boston in 1754, Salem in 1772, Marblehead in 1773, New York City in 1770, and the Society for the Relief of the Poor and Distressed Masters of Ships, their Widows and Children, chartered by the Pennsylvania assembly in 1770).

109. *See, e.g.*, DAVIS, *supra* note 8, at 100 (discussing libraries chartered in Philadelphia in 1742, Rhode Island in 1747, Charlestown, South Caroline in 1757 and New Jersey in 1765).

110. *Id.* at 102.

111. *Id.* at 84; *cf.* Seavoy, *Public Service Origins*, *supra* note 8 at 41 (identifying ten such colleges).

112. DAVIS, *Corporations in the American Colonies*, *supra* note 8, at 45.

113. *Id.* at 84.

114. *Id.* at 85.

from his successor, a “zealous Presbyterian.”<sup>115</sup> Five other colleges—Penn, Columbia, Brown, Rutgers, and Dartmouth—were incorporated between 1750 and 1770.<sup>116</sup>

### 5. Business Corporations.

Of all the types of corporations in the early American colonies, the least common and the least important was the business corporation.<sup>117</sup> No consensus exists as to how many strictly American business corporations existed in the colonies, or exactly which corporations they were. Samuel Williston describes only a single “joint-stock business corporation” chartered in the colonies before the Revolution;<sup>118</sup> Joseph S. Davis counts seven colonial business corporations;<sup>119</sup> and Simeon Baldwin lists six.<sup>120</sup> Only one corporation is agreed on by all three commentators, while Davis and Baldwin concur on three more. In the aggregate, the three scholars appear to have identified (but not agreed on) only nine or ten colonial business corporations.<sup>121</sup>

The sole colonial business corporation achieving consensus was the Philadelphia Contributionship for the insuring of Houses from Loss by Fire, formed in 1752 but first incorporated by the Pennsylvania general assembly in 1768.<sup>122</sup> Williston considers the Philadelphia Contributionship the first American business corporation and the only one chartered before the Declaration of Independence.<sup>123</sup> Davis calls it the colonial business corporation of the greatest lasting significance, noting that it had existed continuously up to Davis’ own time in the early 1900s.<sup>124</sup> As its name suggests, the company appears to have been a

115. *Id.*

116. *Id.* at 86.

117. DAVIS, *Eighteenth Century Business Corporations in the United States*, *supra* note 8, at 4; DAVIS, *Corporations in the American Colonies*, *supra* at 87, 90 (noting that even the demand for such charters seems to have been relatively slight); FRIEDMAN, *supra* note 8, at 188.

118. Williston, *supra* note 36, at 165-166. *But see*, Williston, *supra* note 36, at 165-66 (describing five other corporations chartered before 1787).

119. DAVIS, *Eighteenth Century Business Corporations in the United States*, *supra* note 8, at 4-5 (“These [six] comprise the total list of fully American, clearly corporate business associations in those English colonies which developed into the United States.”); *id.* at 24; DAVIS, *Corporations in the American Colonies*, *supra* note 8 at 85-88.

120. Baldwin, *supra* note 8, at 452.

121. Regarding nine or ten, *see* DAVIS, *Corporations in the American Colonies*, *supra* note 8 at 99; DAVIS, *Eighteenth Century Business Corporations in the United States*, *supra* note 8, at 4 (describing but not listing highway corporation); *see also* Leo E. Strine & Nicholas Walter, *Originalist or Original: The Difficulties of Reconciling Citizens United with Corporate Law History*, 91 NOTRE DAME L. REV. 877, 892-93 n.100 (2016).

122. Williston, *History of the Law of Business Corporations Before 1800 II*, *supra* note 118 at 165; DAVIS, *Corporations in the American Colonies*, *supra* note 8, at 88-89; Baldwin, *supra* note 8, at 456-57.

123. Williston, *supra* note 36, at 165; *see also* Arner, *Development of the American Law of Corporations to 1832*, *supra* note 8 at 43 (citing Williston).

124. DAVIS, *Corporations in the American Colonies*, *supra* note 8, at 88-89.

kind of mutual fire insurance company, to secure householders against the risk of fire; contributors do not appear to have expected any direct return on invested capital.<sup>125</sup>

The New London Society United for Trade and Commerce, incorporated in Connecticut in 1732, is described by Davis as “probably” the first American business corporation<sup>126</sup> and by Baldwin as the first and last “purely trading company” chartered in any colony.<sup>127</sup> The English Parliament in 1741 extended the Bubble Act to the colonies, so that “not even a joint-stock association for business purposes of more than six persons, the shares of which were transferable, could be formed after 1741.”<sup>128</sup> The purposes of the New London Society were:

. . .for the promoting and carrying on Trade and Commerce to Great Britain and His Majesties Islands and Plantations in America, and other of His Majesties Dominions, and for encouraging the Fishery, &ca, as well for the common good as their own private interests. . .<sup>129</sup>

In relatively short order, however, the company’s promoters turned it into a “land bank” that issued bills of credit.<sup>130</sup> Connecticut authorities apparently considered such bills an abuse of the Society’s privileges, and in 1733, the Connecticut assembly repealed the act that had created the corporation.<sup>131</sup>

The other two colonial corporations on which Davis and Baldwin agree were the Union Wharf Company in New Haven, chartered in 1760, and the Proprietors of Boston Pier, or the Long Wharf in the Town of Boston in New England, chartered in 1772.<sup>132</sup> New Haven and Boston had shallow harbors, and at a time when water was a primary mode of transport and trade, an adequate wharf was essential for a commercial seaport.<sup>133</sup> Long wharf companies have

125. Baldwin, *supra* note 8, at 456, DAVIS, *Corporations in the American Colonies*, *supra* note 8, at 88-89.

126. DAVIS, *Corporations in the American Colonies*, *supra* note 8, at 87, but only if the Free Society of Traders is excluded. It is also unclear whether New London Society was actually incorporated. *See id.* at 22-25, 87.

127. Baldwin, *supra* note 8 at 456; see above on Bubble Act; *see also* DAVIS, *Corporations in the American Colonies*, *supra* note 8, at 87.

128. Baldwin, *supra* note 8, at 456.

129. Cited in DAVIS, *Corporations in the American Colonies*, *supra* note 8, at 22 (citation omitted). *See also id.* at 87; DAVIS, *Eighteenth Century Business Corporations*, *supra* note 8, at 4.

130. DAVIS, *Eighteenth Century Business Corporations*, *supra* note 8, at 24 (citations omitted); Baldwin, *supra* note 8, at 456.

131. 4 DAVIS, *ESSAYS IN THE EARLIER HISTORY OF CORPORATIONS* *supra* note 8 at 24 (citations omitted).

132. 1 DAVIS, *ESSAYS IN THE EARLIER HISTORY OF CORPORATIONS* *supra* note 8, at 88 (discussing Union Wharf and Boston Pier); DAVIS, *ESSAYS IN THE EARLIER HISTORY OF CORPORATIONS* IV *supra* note 8, at 4-5; Baldwin, *American Business Corporations Before 1789* *supra* note 8, at 456 (discussing Union Wharf), 457 (discussing Boston Pier).

133. 1 DAVIS, *ESSAYS IN THE EARLIER HISTORY OF CORPORATIONS*, *supra* note 8, at 87-88; Baldwin, *American Business Corporations Before 1789*, *supra* note 8, at 456.

thus been seen as a form of public enterprise.<sup>134</sup> The Union Wharf does not appear to have been a profitable undertaking; up to 1799, at least, it does not appear ever to have paid a dividend to shareholders.<sup>135</sup>

The other two corporations listed by Baldwin, but not by Williston or Davis, are the New York Company “for Settling a Fishery in these parts,” chartered in New York in 1675,<sup>136</sup> and the Free Society of Traders in Philadelphia, chartered by Governor William Penn in 1682.<sup>137</sup> The objects of the Free Society were apparently speculation in land and trade with native and other populations.<sup>138</sup> The preface to the Free Society’s articles of settlement describes it as

. . . a very unusual Society, for it is an Absolute Free One, and in a free Country: a Society without oppression; wherein all may be concerned that will; and yet have the same Liberty of private Traffique, as though there were no Society at all.<sup>139</sup>

The Free Society set up a tannery, a gristmill, a sawmill and a glass factory and had, among other extraordinary privileges, the right to have three representatives in the provincial assembly.<sup>140</sup> The Free Society went out of business in a few years, however, and was wound up by the provincial assembly by 1723.<sup>141</sup>

By Davis’ account, the only other colonial business corporations were apparently water supply companies.<sup>142</sup> Davis lists three such “fountain societies” chartered by the Rhode Island assembly in 1772 and 1773.<sup>143</sup> These societies built wooden aqueducts to convey fresh water into the towns of Providence and East Greenwich, though it is not clear that they intended to furnish water to anyone who was not a member, or that they were particularly successful, or that their members anticipated any “direct pecuniary profit.”<sup>144</sup> Curiously, Davis also describes, but elsewhere declines to count, an eighth colonial corporation, The Trustees of the Road and Ferries from Newark to the Road Leading from

134. Baldwin, *American Business Corporations Before 1789* *supra* note 8, at 456.

135. 1 DAVIS, *ESSAYS IN THE EARLIER HISTORY OF CORPORATIONS*, *supra* note 8, at 88.

136. Baldwin, *American Business Corporations Before 1789* *supra* note 8 at 450, 452.

137. *Id.* at 453.

138. *Id.* at 453-54.

139. 1 DAVIS, *ESSAYS IN THE EARLIER HISTORY OF CORPORATIONS*, *supra* note 8, at 42 (citation omitted).

140. Baldwin, *American Business Corporations Before 1789* *supra* note 8, at 453.

141. *Id.* at 455; Davis declines to count the Free Society as an American corporation because it was chartered, in his account, by William Penn before he left England and owned chiefly in England. See Davis, *supra* note 8, at 41, 87; Davis, *supra* note 8, at 4.

142. 1 DAVIS, *ESSAYS IN THE EARLIER HISTORY OF CORPORATIONS*, *supra* note 8, at 89; *but see infra* text accompanying note 8 on one highway corporation.

143. *Id.*

144. *Id.* at 90. A similar company in Conduit Street in Boston was designated a “corporation” by the Massachusetts General Court in 1652, evidently as another kind of mutual company to provide water for daily use by members’ families and for protection against fire, but the company lacked a corporate name – one of the formal requirements for corporate status – and Davis accordingly declines to recognize it as such. Davis, *supra* note 8, at 89; DAVIS, *supra* note 8, at 4; *see also* Baldwin, *supra* note 8, at 451 (who apparently regards it as a “quasi-corporation”).

Bergen Point to Paulus Hook, a highway company incorporated by the New Jersey assembly in 1765 with the purpose of keeping part of the highway between Philadelphia and New York in good condition.<sup>145</sup>

Most colonial business associations remained partnerships or unincorporated joint-stock companies.<sup>146</sup> Large numbers of such unincorporated associations existed for a great variety of business purposes, such as fishing and whaling, mining for iron and copper, as so-called “land companies,” and in smaller numbers, for manufacture of glass and textiles, banking, insurance, firefighting, and erecting bridges, building or repairing roads, and improving navigation of small waterways, and other purposes.<sup>147</sup> All of these associations probably constituted mere partnerships or tenancies in common under the applicable law.<sup>148</sup>

Overall, then, alongside the comparative proliferation of municipal, religious, charitable and educational corporations in the American colonies, there appear to have existed fewer than a dozen business corporations. Their purposes were mutual water supply (three or four); wharfage (two); mutual fire insurance (one); fishing (perhaps one); highways (perhaps one); and trade (one or perhaps two).<sup>149</sup> The most common purposes thus appear to have involved public or quasi-public infrastructure. With the possible exception of the trading companies and a few others, most of these early corporations do not appear to have been organized around investor expectations of profits.<sup>150</sup> In law and in fact, today’s for-profit business corporation was more or less unknown. No classification of the business corporation as a separate type of legal entity had been developed.<sup>151</sup> Corporations of all sorts were treated alike under the same

145. 1 DAVIS, *ESSAYS IN THE EARLIER HISTORY OF CORPORATIONS*, *supra* note 8, at 99. *But see* 4 DAVIS, *ESSAYS IN THE EARLIER HISTORY OF CORPORATIONS*, *supra* note 8, at 24 (not listing any highway corporation). *See also* 1 DAVIS, *ESSAYS IN THE EARLIER HISTORY OF CORPORATIONS*, *supra* note 8, at 48 (describing “more than a dozen corporations” active in the colonies before the Revolution, “each of which possessed one or more charters granted in England”).

146. HAMILL, *From Special Privilege to General Utility*, *supra* note 8, at 92; HANDLIN & HANDLIN, *supra* note 8, at 5; BLAIR, *Locking in Capital*, *supra* note 8, at 405, 414; BLAIR, *Reforming Corporate Governance*, *supra* note 8, at 9.

147. 1 DAVIS, *ESSAYS IN THE EARLIER HISTORY OF CORPORATIONS*, *supra* note 8, at 91-98; 4 DAVIS, *ESSAYS IN THE EARLIER HISTORY OF CORPORATIONS*, *supra* note 8, at 34 (stating no banks of discount and deposit in the colonies).

148. 1 DAVIS, *ESSAYS IN THE EARLIER HISTORY OF CORPORATIONS*, *supra* note 8, at 91.

149. These corporations were (i) in water supply, the three “fountain societies” in Rhode Island in 1772 and 1773 and perhaps the company set up in Conduit Street in Boston in 1652; (ii) in wharfage, the Union Wharf Company in 1760 and the Proprietors of Boston Pier, or the Long Wharf in the Town of Boston in New England, in 1772; (iii) in mutual fire insurance, the Philadelphia Contributionship for the insuring of Houses from Loss by Fire in 1752; (iv) in fishing, perhaps the New York Company “for Settling a Fishery in these parts” in 1675; (v) in highways, perhaps The Trustees of the Road and Ferries from Newark to the Road Leading from Bergen Point to Paulus Hook in 1765; and (vi) in trade, The New London Society United for Trade and Commerce in 1732 and perhaps the Free Society of Traders in Philadelphia in 1682. *See supra* text accompanying notes 122 to 145.

150. *See supra* discussion accompanying notes 81 to 125.

151. 4 DAVIS, *ESSAYS IN THE EARLIER HISTORY OF CORPORATIONS*, *supra* note 8, at 3-4.

rules, largely without distinction.<sup>152</sup> As Davis puts it, “[i]n the eye of the law a corporation was a corporation—that was all there was to it.”<sup>153</sup>

Colonial corporation law was consistent in this respect with English law. As previously noted, American courts, jurists, and lawyers relied on available English precedents, which involved primarily municipal, charitable, and other corporations that were not organized for business or pecuniary purposes.<sup>154</sup> The extent of the transmission and reception of English corporation law in the colonies, however, remains unclear in several respects. First, it was not clear that English common law, including non-statutory corporation law, applied to the colonies. There was no coherent theory, and the question was never settled by English courts, to which, in any event, few colonial appeals were made.<sup>155</sup> Second, there was no coherent or consistent approach to English law, including corporation law, in the colonies, and each colony developed its own legal system.<sup>156</sup> In different colonies, widely disparate circumstances and attitudes prevailed, and English law was received differently. English law and English lawyers were more influential in middle and southern colonies, such as Virginia and South Carolina, while the New England colonies, and most significantly Massachusetts, tended to go their own way.<sup>157</sup> Third, and most importantly, much of English corporation law may have been unfamiliar or unavailable. English-trained lawyers and judges were few and far between, especially in New England.<sup>158</sup> Colonial lawyers were almost entirely dependent on materials imported from England,<sup>159</sup> but no English case reports or treatises were reproduced, except for the first American edition of Blackstone’s *Commentaries* in 1771-1772,<sup>160</sup> and the legal works available appear to have consisted chiefly of *Coke on Littleton*.<sup>161</sup> English cases on business corporations decided before 1800 were therefore probably unknown to American judges and lawyers until

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152. Maier, *The Revolutionary Origins of the Business Corporation*, *supra* note 8, at 55 (citation omitted).

153. 4 DAVIS, *ESSAYS IN THE EARLIER HISTORY OF CORPORATIONS*, *supra* note 8, at 3-4.

154. *But see* DODD, *supra* note 8, at 13, 196; HURST, *supra* note 8, at 6; *See* DAVIS, *supra* note 8, at 309-10; FRIEDMAN, *supra* note 8, at 511.

155. Stoebeck, *supra* note 78, at 417-418.

156. *Id.* at 401.

157. *See, e.g., id.* at 401 (“Massachusetts was always the sulky child, rebellious against all things English.”) and 417 (“The New England colonies, of course, were less disposed to pattern their affairs upon things English.”).

158. *Id.* at 413.

159. *Id.* at 405. The first American legal treatise on corporation law, the *Treatise on the Law of Private Corporations Aggregate* by Joseph K. Angell and Samuel Ames, did not appear until 1832. *See* discussion *infra* accompanying notes 477 to 479.

160. Stoebeck, *Reception of English Common Law*, *supra* note 81 at 405.

161. *Id.* at 406. *But see id.* at 416 (noting that there may have been far more English law books in eighteenth century America than generally supposed).

long thereafter.<sup>162</sup> The first American treatises on corporate law did not appear until the 1820s and 1830s.<sup>163</sup>

In 1780, then, at the inception of the American republic, there was not only a paucity of business corporations, but little or no legal precedent, either in England or in the colonies, for the business corporation as we know it today. For eighteenth-century American lawyers, jurists and entrepreneurs looking for new business tools, there was very little law to borrow. American corporation law stood at the beginning.<sup>164</sup> In the words of Merrick Dodd, the law of the business corporation was as yet an “uncharted sea” through which American legislators, courts, and lawyers would have to plot their own course, unaided by English precedents.<sup>165</sup> American lawyers would need to invent the business corporation more or less from scratch.<sup>166</sup>

### III. EARLY AMERICAN BUSINESS CORPORATIONS 1780-1860

In 1780, the average American in the thirteen former colonies lived and worked on a family farm.<sup>167</sup> Most Americans were engaged in farming, hunting, fishing, or seafaring in wind-driven vessels.<sup>168</sup> Farms generally aimed at self-sufficiency, with any surplus available for barter.<sup>169</sup> Towns were few and far between; in 1776, in all thirteen colonies, there were fewer than a dozen towns with a population greater than five thousand people.<sup>170</sup> Transportation networks and supply chains were poor. Roads were typically built and maintained, if at all, by towns and counties, and were generally bad or nonexistent.<sup>171</sup> Commercial trade, including import and export of goods, was largely confined to port cities; large-scale transportation of goods overland from the

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162. DODD, *supra* note 8, at 14, 17, 196.

163. See discussion *infra* notes 474 to 479.

164. HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION, *supra* note 8, at 8; Williston, *History of the Law of Business Corporations Before 1800 II*, *supra* note 118, at 166 (“[N]ot even a beginning of this development was made prior to the year 1800.”).

165. DODD, *supra* note 8, at 196.

166. SEAVOY, ORIGINS, *supra* note 8, at 46 (“The early commentators on American law observed that the development of American law was almost wholly indigenous, especially in matters of corporation creation and contracts. It appears they were correct.”); Wells, *Shareholder Power*, *supra* note 8, at 1040 (citations omitted) (“[T]he American business corporation was, whatever its distant ancestry, largely home grown.”) (citation omitted).

167. See generally Blair, *Locking in CapitalPublic Service Origins*, *supra* note 8, at 404, n.44 (citation omitted); Seavoy, *Public Service Origins*, *supra* note 8, at 34.

168. DODD, *supra* note 8, at 6, 7.

169. Hamill, *From Special Privilege to General Utility*, *supra* note 8 at 92.

170. Richard D. Brown, *The Emergence of Urban Society in Rural Massachusetts, 1760-1820*, 61 J. AM. HIST. 29, 32-33 (1974) (“In Massachusetts, urban society was almost exclusively a Boston phenomenon.”).

171. Daniel B. Klein, *The Voluntary Provision of Public Goods? The Turnpike Companies of Early America*, 28 ECON. INQUIRY 788, 789 (1990).

coast was prohibitively expensive.<sup>172</sup> Communication was limited.<sup>173</sup> Manufacturing was minimal; goods were typically home-produced by artisans in small shops or “cottages.”<sup>174</sup> “There were no banks, no insurance companies, no factories, no canals or railroads, no telegraph lines, no steam-propelled vessels, no gas-lighting, not even a reasonably good road system or bridges across the larger rivers.”<sup>175</sup> The primary business forms remained the sole proprietorship, partnership, and unincorporated joint-stock company.<sup>176</sup> Businesses were typically family-owned or closely held, with a small net worth, and identity of ownership and control.<sup>177</sup> Capital was hard to raise, and small firms, if indeed the need ever arose, faced systemic obstacles to scale.

After the Revolution came transformative changes. Population grew dramatically.<sup>178</sup> Settlement expanded, large Eastern towns sought improved trade routes, and demand for transportation and other infrastructure surged.<sup>179</sup> “The need for assembling capital for improving inland transportation facilities, for supplying cities and towns with water, and for carrying on banking and insurance was one which came to be felt immediately after the close of the Revolution.”<sup>180</sup> Local governments did not generally have the financial or logistical wherewithal, nor popular support or historical precedent, to provide such infrastructure themselves.<sup>181</sup> Local tax powers and revenues were severely limited,

172. Hamill, *supra* note 8, at 92 (explaining that the undeveloped transportation system made hauls beyond 30 or 40 miles more expensive than the goods).

173. Brown, *supra* note 170, at 43 (noting that in 1760, in all of Massachusetts, for example, there were nine print shops and five newspapers, virtually all in Boston).

174. See Hamill, *supra* note 8, at 92; Brown, *supra* note 170, at 44; Blair, *Reforming Corporate Governance*, *supra* note 8, at 9.

175. DODD, *supra* note 8, at 7.

176. See *supra* note 146.

177. Blair, *Locking in Capital*, *supra* note 8, at 404 n.44 (“[U]ntil well after 1840, ‘the family remained the basic business unit.’”) (quoting ALFRED D. CHANDLER, JR., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS*, at 16).

178. DODD, *supra* note 8, at 123 (stating that the population grew from 12,866,020 in 1830 to 31,443,321 in 1860); Brown, *supra* note 170, at 32 (noting that the population in the American colonies grew ninefold from 1776 to 1850); Donald J. Smythe, *Shareholder Democracy and the Economic Purpose of the Corporation*, 63 WASH. & LEE L. REV. 1407, 1416 (2006) (stating that the population of New York tripled from 1790 to 1820).

179. FRIEDMAN, *supra* note 8, at 182 (“[T]he great bulk of farmer-settlers had a desperate hunger for transport: bridges, ferries, canals, turnpikes and later railroads. These were necessary to carry their goods to market, to bring settlers to their region, to stimulate business, and to raise the overall value of their lands.”); KLEIN, *supra* note 171, at 789; Smythe, *supra* note 178, at 1416; see also 2 DAVIS, *ESSAYS IN THE EARLIER HISTORY OF CORPORATIONS*, *supra* note 8, at 7 (noting the influx of new capital from war, labor from the disbanded colonial army, and a new spirit of enterprise and experimentation).

180. DODD, *supra* note 8, at 367. See also *id.* at 196; FRIEDMAN, *supra* note 8, at 188 (“The economy had an unquenchable thirst for infrastructure.”); 2 DAVIS, *ESSAYS IN THE EARLIER HISTORY OF CORPORATIONS*, *supra* note 8, at 6.

181. FRIEDMAN, *supra* note 8, at 185 (“Two pillars of the modern state were missing: a strong tax base and a trained civil service.”); Hansmann & Pargendler, *supra* note 8, at 110; Smythe, *supra* note 178, at 1416.

generally consisting only of property and excise taxes, and municipalities had few if any administrative personnel.<sup>182</sup> Public infrastructure projects were widely opposed for fear of tax increases.<sup>183</sup> State and local governments in the former colonies thus faced a dilemma. Public infrastructure—particularly transportation—was urgently needed, but without significant revenues, people, or expertise, how could public authorities finance, build, and maintain it?

The answer was the business corporation. After the Revolution, state legislatures had assumed the authority to charter corporations.<sup>184</sup> Beginning at the end of the eighteenth century, state legislatures across the colonies, but particularly in New England and the Middle Atlantic states, began to use state law aggressively to promote economic development by granting corporate charters to groups that would finance and manage publicly beneficial transportation and other infrastructure projects on their own.<sup>185</sup> Such projects typically required the ability to aggregate capital, often from a large number of small sources, given the comparative absence of large fortunes in the colonies,<sup>186</sup> in an entity with potentially indefinite life. Unlike the partnership or unincorporated joint-stock company, the corporation was ideally suited for this role.<sup>187</sup> As an alternative to public financing and construction, states increasingly enlisted or encouraged corporations—“internal improvement companies”—to perform this function.<sup>188</sup> State legislatures often delegated state powers and immunities to such companies, thus promoting the “volunteer muster” of both capital and managerial talent at a time when such capital and talent were scarce and the state’s taxing and

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182. FRIEDMAN, *supra* note 8, at 185 (stating that state governments depended primarily on property taxes supplemented by excise taxes).

183. Smythe, *supra* note 178, at 1416.

184. Maier, *supra* note 8, at 51; 4 DAVIS, *ESSAYS IN THE EARLIER HISTORY OF CORPORATIONS*, *supra* note 8, at 8. *See supra* discussion accompanying notes 22 to 25 regarding charters from Crown or Parliament. *See also* 4 DAVIS, *ESSAYS IN THE EARLIER HISTORY OF CORPORATIONS*, *supra* note 8, at 6.

185. Handlin & Handlin, *supra* note 8, at 22; HORWITZ, *supra* note 8, at 109; SEAVOY, *ORIGINS*, *supra* note 8, at 256-57; Hansmann & Pargendler, *supra* note 8, at 974; Hilt, *Corporate Governance*, *supra* note 8, at 77; Hilt & Valentine, *Democratic Dividends*, *supra* note 8, at 34; Sylla & Wright, *supra* note 8, at 656 (noting that by 1830, New England had only 43% of the nation’s population but 76% of the corporations created after 1789). *See generally* John Joseph Wallis, *Constitutions, Corporations and Corruption: American States and Constitutional Change, 1842 to 1852*, 65 J. ECON. HIST. 211 (2005).

186. HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW, 1836-1937*, at 24 (1991); Maier, *supra* note 8, at 75.

187. *See* Hamill, *From Special Privilege to General Utility*, *supra* note 8, at 93-94; Maier, *supra* note 8, at 58 (observing that the need to assemble capital from a large number of relatively small investors and put it under “firm central direction” has long been accepted as the practical imperative that alone can explain triumph of business corporations in the United States (citation omitted) and at 73; HURST, *supra* note 8, at 25-26; but *accord* WELLS, *supra* note 8, at 1042 (citing Blair, *Locking in Capital*, *supra* note 8). *See also* KENT, *supra* note 202, at 219.

188. SEAVOY, *ORIGINS*, *supra* note 8, at 50; *see also* Hilt, *Early American Corporations*, *supra* note 8, at 52.

other powers were insufficient to obtain them.<sup>189</sup> Delegated powers and immunities were often substantial, including (particularly in the early years) monopoly rights, eminent domain, power to charge tolls, and immunity from taxation and civil actions for nuisance.<sup>190</sup>

Two early commentators on American corporation law, Joseph K. Angell and Samuel Ames in their *Treatise on the Law of Private Corporations Aggregate*, first published in 1832, described this state arrangement with turnpikes, bridges, canals and railroads as a straightforward “quid pro quo”:

The latter kind [of corporations] have a concern with some of the expensive duties of the State, the trouble and charge of which are undertaken and defrayed by them in consideration of a certain emolument allowed to their members; and in cases of this sort there are the most unquestionable features of a contract, and manifestly a *quid pro quo*.<sup>191</sup>

The delegation of such powers, and the effective deputizing of business corporations to serve public or governmental purposes, were not radically new—one might recall the colonial water supply corporations in Boston and Rhode Island,<sup>192</sup> or even the earlier East India Company and other joint-stock companies chartered to advance mercantile policies of the English state in the seventeenth and eighteenth centuries—but the scope and scale of new public needs in the United States after 1780, and state legislatures’ efforts to charter new business corporations to meet them, were unprecedented.

American state legislatures in the late eighteenth and early nineteenth century proceeded to charter more business corporations than the world had ever known.<sup>193</sup> According to Davis, the newly independent states chartered three hundred twenty-eight new business corporations in the twenty-five years between 1776 and 1801.<sup>194</sup> Massachusetts alone, notes Dodd, chartered over eight

189. HURST, *supra* note 8, at 23, 24; HORWITZ, *supra* note 8, at 116 (on immunities); FRIEDMAN, *supra* note 8, at 179; Smythe, *supra* note 178, at 1416; *see also* Maier, *supra* note 8, at 55; Hansmann & Pargendler, *supra* note 8, at 103.

190. DODD, *supra* note 8, at 132, 170; 4 DAVIS, *ESSAYS IN THE EARLIER HISTORY OF CORPORATIONS*, *supra* note 8, at 283 (with respect to manufacturers); HOVENKAMP, *supra* note 186, at 22.

191. ANGELL & AMES, *supra* note 62, at 33. *See also* NOVAK, *supra* note 8, at 105 (“The right of incorporation as practiced in early America was a special gift (accompanied by special privileges) bestowed by the polity upon select associations as quid pro quo for the performance of special duties and obligations.”).

192. *See* discussion *supra* accompanying notes 142 to 144.

193. Hilt & Valentine, *supra* note 8, at 2; Blair, *supra* note 8, at 8 (“By 1890, there were nearly 500,000 chartered business corporations in the United States, far more than in any other country.”); Maier, *supra* note 8, at 51-52 (stating that charters in the United States were recognized by 1830 to be “more frequent . . . than in any other country.”); Sylla & Wright, *supra* note 8, at 661 (stating that by 1860, the top five or six U.S. states together appear to have created more corporations than any of France, the United Kingdom or Prussia).

194. 4 DAVIS, *ESSAYS IN THE EARLIER HISTORY OF CORPORATIONS*, *supra* note 8, at 22-24. *Cf.* Handlin & Handlin, *supra* note 8, at 4.

hundred business companies by 1830.<sup>195</sup> Similarly, between 1790 and 1825, New York chartered more than eight hundred new business corporations.<sup>196</sup> Overall, as tabulated by Sylla and Wright, the number of new charters rose from the colonial handful to twenty or thirty in the 1780s; two hundred forty-seven in the 1790s; seven hundred seventy-nine from 1800 to 1809; more than fifteen hundred from 1810 to 1819; and a total of more than twenty-two thousand in the period from 1790 to 1860.<sup>197</sup>

By 1827, James Kent, New York's Chancellor, was drawn to observe in his *Commentaries on American Law* that civil corporations in the United States "have increased in a rapid manner, and to a most astonishing extent."<sup>198</sup> Corporate charters

. . . occupy by far the largest volumes of the statute law. The demand for acts of incorporation is continually increasing, and the propensity is the more striking, as it appears to be incurable; and we seem to have no moral means to resist it.<sup>199</sup>

Much of this demand was in New England and the Middle Atlantic states; in 1830, these two regions accounted for forty-three percent of the nation's population but seventy-six percent of the number of corporations chartered since 1789.<sup>200</sup> A majority of the new corporations—more than half in all regions except New England, presumably due to its smaller geographic size—were transportation companies, including primarily turnpikes, bridges, and canals.<sup>201</sup> Banks, insurance companies, and other financial enterprises were also incorporated in significant numbers.<sup>202</sup>

These new transportation and financial ventures were "business corporations" in the sense that they were privately owned, financed, and managed, for the most part without significant state involvement,<sup>203</sup> and their shareholders

195. DODD, *supra* note 8, at 271.

196. Hilt, *Ownership and Control*, *supra* note 8, at 10; Hilt, *Early American Corporations*, *supra* note 8, at 48 ("By 1830, New York alone had incorporated more than a thousand businesses.")

197. Sylla & Wright, *supra* note 8, at 653-54; cf. Wells, *Shareholder Power*, *supra* note 8, at 1041.

198. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 219 (O. Halstead, 1827).

199. *Id.* at 220.

200. Sylla & Wright, *supra* note 8, at 656; *see also* Handlin & Handlin, *supra* note 8, at 7.

201. Sylla & Wright, *supra* note 8, at 656 (on majority in transportation except New England), 661 (on breakdown); DODD, *supra* note 8, at 349 (stating that turnpikes, toll bridges and canals together accounted for more than half of the corporations chartered in Massachusetts before 1800); *see also* 4 DAVIS, ESSAYS IN THE EARLIER HISTORY OF CORPORATIONS, *supra* note 8, at 22-23. State legislatures did not begin to charter railroads until the 1820s. *See infra* discussion accompanying notes 286 to 291.

202. *See* Sylla & Wright, *supra* note 8, at 661; *see also* 4 DAVIS, ESSAYS IN THE EARLIER HISTORY OF CORPORATIONS, *supra* note 8, at 22-23; Hamill, *supra* note 8, at 93 (citations omitted).

203. On direct state investments in internal improvement companies, *see* DODD, *supra* note 8, at 271 (contrasting states such as Pennsylvania and Virginia with Massachusetts). *Cf.* Hilt, *supra* note 8, at 80 (claiming that "much of the early investment was either purely public or a combination of public and private funds.") (citation omitted).

typically expected some kind of return on their investment. As will be seen below, that return was less likely to be any kind of profit on their shares, but rather an indirect benefit to their farms or trading operations, land values, and cost of goods.<sup>204</sup> Nonetheless, that the purposes of these new business corporations—particularly the internal improvement companies—were inherently “public” was universally understood.<sup>205</sup>

Three important points should be noted. First, the new American business corporations were no different in this respect from their colonial American and English predecessors; virtually all corporations up to that time had been deemed to have a public purpose. What was novel was not the concept that the corporation had a public purpose, but the growth of the business corporation into that concept in the decades after the Revolution. The business corporation was new; the notion of public corporate purpose was not. Second, while it may be tempting to describe the purposes of these early business corporations as “private,” in that they were not appendages of the state, the distinction between public and private purposes in corporation law did not become broadly meaningful until

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204. See *infra* discussion accompanying notes 239 to 340.

205. See, e.g., Maier, *supra* note 8, at 55 (“Nowhere were corporations more alike than in the requirement, based on English precedent, that they serve a public purpose, which the acts of incorporation often specified . . . . Everywhere, in fact, corporations were considered ‘agencies of government . . . for the furtherance of community purposes.’”) (citation omitted) HURST, *supra* note 8, at 15 (“[A]lmost all of the business enterprises incorporated here in the formative generation starting in the 1780s were chartered for activities of some community interest – supplying transport, water, insurance, or banking facilities.”); FRIEDMAN, *supra* note 8, at 182 (noting that states freely lent the power of eminent domain to businesses that served “public” purposes such as canal or turnpike companies); SEAVOY, ORIGINS, *supra* note 8, at 50 (“In the beginning, almost all business corporations had some degree of franchise relationship to the state, or performed services or made products that New York wished to encourage as a means of making the state and nation economically self-sufficient.”); Blair, *Locking in Capital*, *supra* note 8, at 428 (“[M]any of these businesses might more appropriately be regarded as public works projects, which the states did not want to have to use their taxing authority to finance.”); Hamill, *supra* note 8, at 92, 96 (stating that corporations, other than those organized strictly for public purposes, were extremely rare); Handlin & Handlin, *supra* note 8, at 22 (characterizing the corporation as an agency of government, designed to serve social function for state); Wells, *Close Corporation*, *supra* note 8, at 278 (noting that most early corporations performed public functions and provided some kind of public service); David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 207 (1990) (stating that through the mid-nineteenth century, early corporations were assumed to pursue some public function); D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 291 (1998) (“Even the chartering of general business corporations, however, was justified on the grounds that these corporations served the public interest.”); Smythe, *supra* note 178, at 1416 (“Profits were not the real objective [of franchise corporations]; the real objective was to provide a public good.”); Liam Séamus O’Melinn, *Neither Contract Nor Concession: The Public Personality of the Corporation*, 74 GEO. WASH. L. REV. 201, 231 (2006) (“Even formal incorporation was justified on the basis of public benefit, and the corporation could be seen as a species of state aid intended to benefit manufacturing, worship, agriculture, and political endeavor.”). See also Novak, *PEOPLE’S WARFARE*, *supra* note 8, at 9 (citing 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 265 (1826) for the proposition that “[p]rivate interest must be made subservient to the general interest of the community.”); DODD, *supra* note 8, at 158 (noting the tendency of judges even after 1830 to refer to privately owned transportation projects such as turnpikes, toll-bridges, canals and railroads as “public highways”).

the middle decades of the nineteenth century and was one of the defining characteristics, if not *the* defining characteristic, of the ensuing transition of the early American business corporation to the modern for-profit firm.<sup>206</sup> In discussions of late eighteenth- and early nineteenth-century American corporation law, the term “private” is an anachronism. Third, as the foregoing suggests, the concept of public corporate purpose as used in the late eighteenth and early nineteenth centuries was not exclusive and did not prevent business corporations—their public purpose notwithstanding—from being understood to provide a pecuniary return or other personal, non-public benefit to their owners.<sup>207</sup> The absence of any bright line between “public” and “private” purposes—in today’s parlance, between nonprofit or charitable purposes and private pecuniary profit—was as typical of the early American business corporation as of its predecessors.<sup>208</sup>

Early courts and commentators made this understanding clear. In 1805, in *Trustees of the University of North Carolina v. Foy*, a North Carolina court, in examining “the nature of corporations,” declared that corporations were formed “for the advancement of religion, learning, commerce, or other beneficial purposes.”<sup>209</sup>

Indeed, it seems difficult to conceive of a corporation established for merely private purposes. In every institution of that kind, the ground of the establishment is some public good or purpose to be promoted; but in many, the members thereof have a private interest, coupled with the public object.<sup>210</sup>

The same understanding was voiced more emphatically by the Virginia Supreme Court of Appeals in *Currie’s Administrators v. The Mutual Assurance Society* in 1809:

With respect to acts of incorporation, they ought never to be passed, but in consideration of services rendered to the public. . . . It may often be *convenient* for a set of associated individuals, to have the privileges of a corporation bestowed upon them, but if their object is merely *private* or selfish; if it is detrimental to, or not promo-

206. See *supra* note 9; *infra* discussion accompanying notes 422 to 502. Discussion of the concession, contract, aggregate entity, artificial entity, real entity, and other theories of the corporation is beyond the scope of this Article. See generally Mahoney, *supra* note 42; Liam Séamus O’Melinn, *supra* note 205; see Reuven S. Avi-Yonah, *The Cyclical Transformation of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767 (2005).

207. See Maier, *supra* note 8, at 56, 82.

208. See, e.g., Handlin & Handlin, *supra* note 8, at 19 (“Neither the division into public and private laws nor the distinction between public and private corporations was accepted by eighteenth-century law.”). See also DAVIS, *supra* note 8, at 3-4 (“[i]n the eye of the law, a corporation was a corporation – that was all there was to it.”); Larry D. Thompson, *The Responsible Corporation: Its Historical Roots and Continuing Promise*, 29 NOTRE DAME J.L. ETHICS & PUB. POL’Y 199, 208 (2015) (“American law in the seventeenth and eighteenth centuries did not draw sharp distinctions between the corporation and the state.”).

209. Trustees of the Univ. of N.C. v. Foy, 1 Mur. 58, 84 (1805).

210. *Id.* at 88-89.

tive of, the public good, they have no adequate claim upon the legislature for the privileges.<sup>211</sup>

Even ten years later, in *Trustees of Dartmouth College v. Woodward*, which has been seen as the origin of the public/private distinction in American corporation law,<sup>212</sup> Chief Justice John Marshall, writing for the U.S. Supreme Court, expressed a fundamentally similar view of the public purposes of corporations:

The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country; and this benefit constitutes the consideration, and in most cases, the sole consideration of the grant. . . . If the advantages to the public constitute a full compensation for the faculty it gives, there can be no reason for exacting a further compensation, by claiming a right to exercise over this artificial being, a power which changes its nature, and touches the fund, for the security and application of which it was created.<sup>213</sup>

In the case of Dartmouth College, in other words, it was not the college's purpose, but the nature of its assets, which had been endowed and funded by private persons,<sup>214</sup> that made Dartmouth a "private" corporation, notwithstanding it being "an Indian charity school."<sup>215</sup> A public purpose remained coupled with a private interest—eleemosynary rather than pecuniary, but "private" nonetheless—and the Supreme Court was tasked for the first time with drawing a line between the two. It should be noted, however, that the line the Court drew was effectively only around municipal corporations. In the corporate taxonomy of the day, all the other types of lay corporations, whether eleemosynary or civil, with what we today would consider their various disparate purposes—charitable, educational, and professional as well as business—remained comprehended, without further distinction, in the same "private" category.<sup>216</sup>

211. Currie's Adm'r. V. Mut. Assurance Soc'y., 4 Hen. & M. 315, 347-348 (Va. 1809) (emphasis in original); see also HORWITZ, *supra* note 8, at 112.

212. See, e.g., NOVAK, *supra* note 8, at 107 ("The classical liberal story begins with the *Dartmouth College* case which initiated the great transformation of the business corporation from public into private entity."); R. Kent Newmyer, *Justice Joseph Story's Doctrine of Public and Private Corporations and the Rise of the American Business Corporation*, 25 DEPAUL L. REV. 825, 836 (1975-1976) ("the *Dartmouth College* decision played a crucial role in the transformation of the corporation from an association of individuals vested with a portion of sovereignty designed to accomplish public service to an association whose corporate status was a promotional device employed by the state to facilitate the pursuit of private goals by private individuals.") See also *Terrett v. Taylor*, 9 Cranch 43, 51-52 (1815) (Story, J.) (distinguishing private and public corporations). On the public/private distinction generally, see Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PENN. L. REV. 1423 (1982) [hereinafter Horwitz, *Public/Private Distinction*]. With regard to the historiography of the public/private distinction, see Joan Williams, *The Development of the Public/Private Distinction in American Law*, 64 TEX. L. REV. 225 (1985). See also *infra* discussion accompanying notes 450 to 458.

213. *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 637-638 (1819).

214. *Id.* at 661.

215. *Id.* at 520. See also Maier, *supra* note 8, at 80 (referencing Story's concurring opinion for this proposition).

216. D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 292 (1998).

The understanding that corporations, including business corporations, necessarily had a public purpose survived at least into the 1830s.<sup>217</sup> Angell and Ames in 1832 describe this understanding as policy and custom, perhaps not surprisingly, citing both *Currie's Administrators* and *Dartmouth College*:

. . . it has generally been the policy and custom (especially in the United States) to incorporate all associations which tend to the public advantage in relation to municipal government, commerce, literature, charity, and religion. . . . The public benefit is deemed a sufficient consideration of a grant of corporate privileges; and hence, when a grant of such privileges is made (being in the nature of an executed contract), it cannot, in case of a private corporation, which involves private rights, be revoked. [citing *Dartmouth College*]. . . . the corporation may, at the same time, be established for the advantage of those who are members of it. The principle is. . . that the design of the corporation is to provide for some good that is useful to the public. "With respect to acts of incorporation," says one of the judges of the Court of Appeals of Virginia [sic], "they ought never be passed, but in consideration of services to be rendered to the public." [citing *Currie's Admin.*]<sup>218</sup>

This understanding of the corporation as a body with a public purpose, but which at the same time provided direct pecuniary or other indirect benefits to its members, arguably defines the internal improvement companies and other business corporations of the early American era.

#### A. *Transportation.*

Transportation companies, comprising turnpikes, toll-bridges and inland navigation enterprises, were the most common early business corporations, accounting for nearly two-thirds of all special charters in the period from 1780 to 1801.<sup>219</sup> Organization required a special charter enacted by the state legislature, in which the corporation's purpose—often down to the specific route of the turnpike or canal—was set forth in detail.<sup>220</sup> Changes in corporate purpose required a corresponding legislative act.

##### 1. Turnpikes.

The turnpike corporation was the most common and perhaps the most typical of the internal improvement companies. Of all the public infrastructure needs after the Revolution, improved overland transport was the greatest.<sup>221</sup> In some regions, the cost of transporting goods overland for even relatively short

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217. Maier, *supra* note 8, at 80.

218. ANGELL & AMES, *supra* note 62, at 6-7; *but see id.* at 25 (where this understanding seems to be weakening significantly); *see also* Arner, *supra* note 8, at 53; and *see infra* discussion accompanying notes 443 to 479.

219. HURST, *supra* note 8, at 17.

220. Hilt, *Early American Corporations*, *supra* note 8, at 51; DODD, *supra* note 8, at 327 (stating that the Massachusetts act of 1833 required every charter petition in Massachusetts).

221. SEAVOY, ORIGINS, *supra* note 8, at 41.

distances exceeded the cost of the goods.<sup>222</sup> Turnpikes were perhaps the most common form of American business corporation and represented a substantial portion, in some states even a majority, of new corporate charters in the late eighteenth and early nineteenth centuries.<sup>223</sup> According to Davis, turnpikes overall accounted for seventy-two of a total of three hundred twenty-eight, or twenty-two percent of, new corporations chartered between 1776 and 1801.<sup>224</sup> In New York and Connecticut, approximately half of the corporations chartered in the eighteenth century were turnpikes.<sup>225</sup> The consequences were dramatic; the turnpike “movement built new roads at a rate previously unheard of in America.”<sup>226</sup>

The nation’s first turnpike was chartered in Pennsylvania in 1792 between Philadelphia and Lancaster.<sup>227</sup> Massachusetts and New York quickly followed suit, chartering their first turnpikes in 1796 and 1797, respectively.<sup>228</sup> As with other corporations of the time, turnpike charters required a special act of the state legislature.<sup>229</sup> In an era of local trade rivalries, state legislatures used turnpikes primarily to extend the trading radius of existing towns.<sup>230</sup> State legislatures often wrote detailed regulations into turnpike charters, including not only such common provisions as limitations on capital, limited duration, and restrictions on voting,<sup>231</sup> but precise delineation of the turnpike route, grants of

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222. Hamill, *supra* note 8, at 92 (explaining that the undeveloped transportation system made hauls beyond 30 or 40 miles more expensive than the goods) (citation omitted).

223. SEAVOY, ORIGINS, *supra* note 8, at 50 (citing DAVIS, *supra* note 8, at 24-25); Hansmann & Pargendler, *supra* note 8, at 959 (citations omitted); Hilt, *Ownership and Control*, *supra* note 8, at 16, Tbl.2.

224. DAVIS, *supra* note 8, at 26, tbl.II; *cf. Id.* at 27, tbl.III (showing total of 317 corporations in the eighteenth century); DAVIS, *supra* note 8, at 27, tbl.III (on 23 turnpikes out of 45 new corporations in CT). *See also* SEAVOY, ORIGINS, *supra* note 8, at 39-40 (stating that turnpikes were the most frequently incorporated business in New York for the first fifty years of the nineteenth century, with about 500 charters passed between 1797 and 1847); Seavoy, *Public Service Origins*, *supra* note 8, at 45; Sylla & Wright, *supra* note 8, at 661, tbl. 4 (showing 4831 road corporations, or about 22 percent, of the total number of business corporations chartered between 1790 and 1860); Hilt, *Ownership and Control*, *supra* note 8, at 16, Tbl. 2 (showing 304 turnpikes of 812 charters granted in New York from 1790 to 1825).

225. DAVIS, *supra* note 8, at 27.

226. Klein, *supra* note 171, at 797.

227. *Id.* at 790; DAVIS, *supra* note 8, at 218.

228. DODD, *supra* note 8, at 242 (regarding Massachusetts); Seavoy, *Public Service Origins*, *supra* note 8, at 45 (regarding New York).

229. Some states, such as Massachusetts in 1805 and New York in 1807, where legislators were seen to be spending too much time on special charters, passed general regulatory statutes applying many of these provisions to all turnpike corporations, which continued to be specially chartered through a short-form act. *See, e.g.*, Seavoy, *Public Service Origins*, *supra* note 8, at 46 (New York).

230. SEAVOY, ORIGINS, *supra* note 8, at 40; Seavoy, *Public Service Origins*, *supra* note 8, at 45; *see also* Klein, *supra* note 171, at 790.

231. Hilt, *supra* note 8, at 6; Millon, *supra* note 209, at 208. On voting restrictions, *see infra* discussion accompanying notes 392 to 408.

existing trails or public roadbeds, specifics of toll rates, collection, and dividends, and details of construction.<sup>232</sup>

Privileges granted to turnpike corporations reflected the extent to which their purposes were understood to be public. Such privileges typically included the power of eminent domain, with the right to appraise and take land, and sometimes monopoly rights against parallel or competing routes.<sup>233</sup> States sometimes granted immunity from taxation.<sup>234</sup> Not infrequently, turnpike and other charters provided for subscription by states, counties, and cities to shares of the corporation.<sup>235</sup> Turnpike charters also frequently included some kind of provision for the turnpike reverting to the state, for example after the organizers had received their costs plus a specified rate of interest, or after expiration of a certain period of time.<sup>236</sup> Many turnpikes ultimately reverted to the state through abandonment.<sup>237</sup> More generally, turnpikes were done in by the competition of the railroads.<sup>238</sup>

Turnpike shares were almost invariably owned locally.<sup>239</sup> The vast majority of stockholders in turnpike corporations were local farmers, landowners, and merchants along the route of the turnpike.<sup>240</sup> At a time when large fortunes were scarce, capital markets poorly developed, and government financing generally not available, local residents may well have been “the most effective source of capital.”<sup>241</sup> More fundamentally, however, local farmers, landowners, and merchants appear to have invested in turnpike corporations to procure for themselves the larger indirect benefits of living along a turnpike route, without regard to direct return on capital. As a financial investment, turnpikes were notorious money-losers. The “nearly universal and well-documented poverty of the turnpikes” has been noted by commentators<sup>242</sup> and appears to have been

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232. On turnpike charters generally, *see generally* DAVIS, *supra* note 8, at 227-30; Klein, *supra* note 171, at 790; Seavoy, *Public Service Origins*, *supra* note 8 at 40-41; DODD, *supra* note 8, at 242, 327; Hilt, *supra* note 8, at 6.

233. DAVIS, *supra* note 8, at 227-230; DODD, *supra* note 8, at 44, 128, 242; Klein, *supra* note 171, at 790; Millon, *supra* note 209, at 208; Seavoy, *Public Service Origins*, *supra* note 8, at 40-41; Hilt, *supra* note 8, at 6.

234. DODD, *supra* note 8, at 132.

235. DODD, *supra* note 8, at 162, 271; FRIEDMAN, *supra* note 8, at 192.

236. DODD, *supra* note 8, at 245.

237. Klein, *supra* note 171, at 793; DODD, *supra* note 8, at 246-47.

238. DODD, *supra* note 8, at 246.

239. Klein, *supra* note 171, at 789.

240. *See id.* at 796; Smythe, *supra* note 178, at 1417; Hansmann & Pargendler, *supra* note 8, at 112-13.

241. Hansmann & Pargendler, *supra* note 8, at 103. *See also supra* discussion accompanying notes 184 to 192 regarding the state’s use of the business corporation for this purpose.

242. DODD, *supra* note 8, at 246; Hansmann & Pargendler, *supra* note 8, at 960-61; Klein, *supra* note 171, at 791, 794, 796-797; Seavoy, *Public Service Origins*, *supra* note 8, at 45-46; *see also* Hansmann & Pargendler, *supra* note 8, at 960 (“[T]urnpikes were the industry in which the interests of shareholders in the firm’s output (the road), rather than in the firm’s profits, were most conspicuous.”).

widely recognized at the time.<sup>243</sup> “Turnpikes rarely paid dividends to their investors, and were not expected to.”<sup>244</sup> Turnpike corporation shares were low par value and widely held, and many turnpike stockholders made no cash investment in the corporation; rather, local farmers frequently received their shares in exchange for contributions in kind, in the form of labor and equipment to help build the turnpike in the first place.<sup>245</sup> As Ronald Seavoy notes,

Turnpikes were popular investments, not necessarily because they were expected to be profitable but because they raised local land values, improved a community’s access to markets, and lowered the cost of goods that had to be teamed in.<sup>246</sup>

What turnpike investors expected from their contribution was effectively a return in kind: not company earnings, capital gains, or other pecuniary return to shareholders on invested capital, but rather, economic benefits that would inure to them indirectly, outside the corporation, in their capacity as members of the community served by the turnpike. As put by Henry Hansmann and Mariana Pargendler, “turnpikes were the industry in which the interests of shareholders in the firm’s output (the road), rather than in the firm’s profits, were most conspicuous.”<sup>247</sup> Local residents may also have had a strong investment incentive as consumers; by controlling turnpike companies and ensuring that they charged competitive tolls, turnpike users may have protected themselves from price exploitation.<sup>248</sup> Turnpike corporations in this respect have been seen to resemble a consumer cooperative.<sup>249</sup>

The paramount importance of the turnpike corporation’s indirect—one is tempted to say, social—benefits is widely attested in writings of the time. One essayist from New York in 1795 proclaims that the turnpike “lays open all the unexploited resources of the country to come forth to daylight, and to market.”<sup>250</sup> Another in 1807 avers that turnpikes “encourage settlements, open new

243. See, e.g., *Essex Tpk. Corp. v. Collins*, 8 Mass. 292, 296 (1811) (“It is well known that in this country enterprises of this description have not been productive of profit to those who have engaged in them; nor is this generally a primary object of consideration with the subscribers. They are well aware that the community is benefited by them and they agree to take a share of the burden.”); see also DODD, *supra* note 8, at 79 n. 27 (citing *Essex Tpk. Corp.*); DODD, *supra* note 8, at 247 (citing counsel in *Franklin Glass Co. v. White*, 14 Mass. 286, 287 (1817), stating that a turnpike is “an affair or public concern and public convenience, seldom entered upon or prosecuted for the sake of the profits contemplated to arise to the undertakers.”).

244. Hansmann & Pargendler, *supra* note 8, at 113 (citing *Essex Tpk. Corp.*, 8 Mass. at 297); see also Blair, *supra* note 8, at n. 158, citing DODD, *supra* note 8, at 79, n.27, on *Essex Tpk. Corp.*

245. SEAVOY, ORIGINS, *supra* note 8, at 41; Seavoy, *Public Service Origins*, *supra* note 8, at 45.

246. SEAVOY, ORIGINS *supra* note 8, at 41; Seavoy, *Public Service Origins*, *supra* note 8, at 45; Hansmann & Pargendler, *supra* note 8, at 113 (citing SEAVOY, ORIGINS, *supra* note 8, at 41); Klein, *supra* note 171, at 789, 795-797.

247. Hansmann & Pargendler, *supra* note 8, at 112.

248. *Id.* at 103, 115 (in connection with voting restrictions).

249. *Id.* at 103.

250. Klein, *supra* note 171, at 795 (citing Elkanah Watson [A Friend to Turnpikes], *Turnpike Roads*, in ALBANY GAZETTE, Dec. 27, 1795 reprinted in ALBANY REG., June 13, 1796, at 2).

channels for the transportation of produce and merchandise, increase the products of agriculture, and facilitate every species of internal commerce.”<sup>251</sup> An 1811 tract from Pennsylvania praises turnpike investment for “enabling you to carry your produce and manufactures to every market; and in raising the value of your woods as well as your cleared lands.”<sup>252</sup> The importance of such benefits was recognized by contemporary courts. A Massachusetts court in 1811 allowed a subscriber in a turnpike corporation to renege on his subscription because the legislature had subsequently changed the turnpike’s route.<sup>253</sup> The subscriber’s counsel argued successfully in his client’s defense that his client

. . . never consented to become a proprietor in the turnpike, as it was in fact located and made. He was induced to subscribe originally, on account of the particular convenience to him of the turnpike as originally directed. He would perceive no such convenience in the other route. He would never have subscribed to aid the latter. . . .<sup>254</sup>

Counsel for another defendant subscriber in Pennsylvania in 1831, though not successful in his defense, made the point even more clearly:

It was not at all contemplated that the profits of the road would compensate the individuals for their money subscribed; it was the facilities and benefits that would result to their property; and it was upon this consideration that [defendant] entered into the agreement to pay.<sup>255</sup>

In short, far from being renters of capital, purchasers of shares in turnpike corporations saw themselves as paying for public road benefits,<sup>256</sup> or perhaps even, in the words of Hansmann and Pargendler, making a “voluntary payment of taxes toward a public good.”<sup>257</sup>

## 2. Bridges.

Bridges were another category of transportation infrastructure that was sorely needed after Independence. In the last decades of the eighteenth century,

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251. *Id.* at 795-96 (citing Benjamin Dewitt, *A Sketch of the Turnpike Roads in the State of New York*, reprinted in THE NEW AMERICAN STATE PAPERS, VOL. 1 at 215-18 (1972)).

252. *Id.* at 796 (citing WILLIAM J. DUANE, LETTERS ADDRESSED TO THE PEOPLE OF PENNSYLVANIA RESPECTING THE INTERNAL IMPROVEMENT OF THE COMMONWEALTH BY MEANS OF ROADS AND CANALS 5 (Jane Aitken, 1811)).

253. *See* Hansmann & Pargendler, *supra* note 8, at 962 (citing *Middlesex Tpk. Corp.*, 8 Mass 267 (1811)).

254. Hansmann & Pargendler, *supra* note 8, at 114 (citing *Middlesex Tpk. Corp.*, 8 Mass at 270-71).

255. Hansmann & Pargendler, *supra* note 8, at 114 (citing *Irvin v. Susequehanna & Phillipsburg Tpk. Corp.*, 2 Pen. & W. 466, 469 (Pa. 1831); *see also* DODD, *supra* note 8, at 247 (citing *Franklin Glass Co. v. White*, 14 Mass. 286, 287); DODD, *supra* note 8, at 133.

256. Klein, *supra* note 171, at 789, 796-797 (citation omitted).

257. Hansmann & Pargendler, *supra* note 8, at 113. English turnpike companies were nonprofit corporations that sold bonds and kept tolls high enough to pay the interest; English turnpikes were thus effectively profit-making ventures in nonprofit form, while American turnpikes were essentially nonprofit ventures in profit-making form. *Id.* at 115, n. 47.

seventy-three toll bridges were chartered, of which fifty-six were in New England and eleven in the Middle Atlantic states.<sup>258</sup> In New York, of a total of eight hundred and twelve business corporations chartered between 1790 and 1826, eighty-six, or about eleven percent, were bridge companies.<sup>259</sup> Overall, according to Sylla and Wright, nearly fourteen hundred bridge companies were chartered between 1790 and 1860.<sup>260</sup> The greatest number of such corporations were created between 1800 and 1820.<sup>261</sup>

Although privately owned, early bridge corporations show the same pattern as the turnpikes of public purposes and public benefits. Bridge company charters often included grants of state or quasi-state powers. A number of early bridge companies were expressly given monopoly privileges.<sup>262</sup> In *Piscataqua Bridge v. New-Hampshire Bridge*, decided in 1834, a New Hampshire court upheld such monopoly privileges on the grounds that the bridge was “a great public highway” and “of great public utility.”<sup>263</sup> Courts similarly sustained grants of eminent domain.<sup>264</sup> Other charter provisions commonly specified toll rates, the kind of bridge to be built, and that the bridge would revert to the State after the organizers had recouped the cost of constructing the bridge and a specified percentage of annual interest.<sup>265</sup>

The Charles River Bridge Company, chartered by the Massachusetts legislature in 1785 and the first American toll-bridge corporation,<sup>266</sup> was fairly typical. Despite being the capital and largest city of Massachusetts, Boston “was situated on what was then a peninsula nearly surrounded by water and was cut off from the towns and countryside to the north by the Charles River and the Back Bay.”<sup>267</sup> The Charles River Bridge Company was organized to construct a bridge to connect Boston to Charlestown. The charter included detailed governance provisions, fixed rates of toll for forty years, prescribed the kind of bridge to be built, and provided that the charter would be void if the bridge were

258. DAVIS, *supra* note 8, at 26, tbl.II; *Id.* at 27, tbl.III.

259. Hilt, *Ownership and Control*, *supra* note 8, at 16, tbl.2.

260. Sylla & Wright, *supra* note 8, at 661, tbl.4. This number represented about six percent of the total number of business corporations chartered between 1790 and 1860.

261. SEAVOY, ORIGINS, *supra* note 8 at 43.

262. See DODD, *supra* note 8, at 161 (citing *Piscataqua Bridge v. New Hampshire Bridge*, 7 N.H. 35 (1835)).

263. DODD, *supra* note 8, at 161 (quoting *Piscataqua Bridge v. NH Bridge*, 7 N.H. 35, 64 (1834)); See also DODD, *supra* note 8, at 161 (citing *Charles River Bridge v. Warren Bridge*, 36 U.S. 420, 639 (1837) (Story, J., dissenting), where the court declined to find that monopoly privileges were implied in the charter). See also Hansmann & Pargendler, *supra* note 8, at 117 (citing *Taylor v. Griswold*, 14 N.J.L. 222, 234 (1834) (court emphasized “public nature” of corporations operating as turnpikes, bridges and railroads)).

264. See, e.g., DODD, *supra* note 8, at 160, 238 (citations omitted).

265. See, e.g., *id.* at 161, 238-40; Hilt, *Ownership and Control*, *supra* note 8, at 6.

266. DAVIS, *supra* note 8, at 187; DODD, *supra* note 8, at 237 (citing DAVIS, *supra* note 8, at 187).

267. DODD, *supra* note 8, at 236.

not completed within three years.<sup>268</sup> While the charter did not contain an express grant of monopoly privileges and the U.S. Supreme Court later held in *Charles River Bridge v. Warren Bridge* that no grant of monopoly privileges should be implied, Justice Story, in his dissenting opinion, declared that such grants were made “for the common benefit of the people” and contrasted them with grants of “a mere corporate privilege for the benefit of the stockholders.”<sup>269</sup> As with the turnpikes, “expectations of improvements in local business and in land values played a large part in the promotion [of the bridge], besides the prospect of revenues from tolls.”<sup>270</sup> In contrast to the turnpikes, however, the Charles River Bridge and some other early toll-bridges proved profitable.<sup>271</sup>

### 3. Canals and Inland Waterways.

Canals and inland waterways were a third important category of transportation infrastructure, particularly given the difficulty and expense of overland transport in many regions. Improvement of inland navigation, whether by building canals or constructing locks or otherwise, was particularly important in the early years of the republic; before 1791, more than half the corporations chartered were for improvement of inland navigation.<sup>272</sup> As Joseph S. Davis observes, “this branch of enterprises called forth more corporate charters, more legislative acts, and more state support than any other branch.”<sup>273</sup> Massachusetts played a leading role, chartering twelve private corporations for canals or other inland navigation by 1800, more than any state except Virginia.<sup>274</sup> Overall, four hundred forty-six canal corporations and six hundred fifty-two navigation corporations were chartered in the United States between 1790 and 1860.<sup>275</sup> New York State itself undertook construction of the Erie Canal beginning in 1817, after which most canal corporations constructed only short feeder lines.<sup>276</sup>

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268. *Id.* at 237; *see also infra* discussion of governance accompanying notes 381 to 404.

269. *Charles River Bridge*, 36 U.S. at 639 (Story, J., dissenting); *see also* DODD, *supra* note 8, at 161.

270. Hansmann & Pargendler, *supra* note 8, at 965 (citing DAVIS, *supra* note 8, at 187).

271. On the profitability of the Charles River Bridge Company, *see, e.g.*, DAVIS, *supra* note 8, at 187 (stating that, after financial corporations, toll-bridge companies were the most successful of the early corporations); HORWITZ, *supra* note 8, at 130; and Klein, *supra* note 171, at 794.

272. DAVIS, *ESSAYS IN THE EARLIER HISTORY OF CORPORATIONS IV*, *supra* note 8, at 25; *see also* NOVAK, *supra* note 8, at 131 (emphasizing the importance of rivers in the early American economy).

273. DAVIS, *ESSAYS IN THE EARLIER HISTORY OF CORPORATIONS IV*, *supra* at 184-185 (noting that “[t]he results were entirely disproportionate to the efforts.”) *See also* DODD, *supra* note 8, at 247.

274. DODD, *supra* note 8 at 248.

275. Sylla & Wright, *Corporation Formation in the Antebellum United States*, *supra* note 8 at 661, tbl.4. These numbers in aggregate represented about five percent of the total number of business corporations chartered between 1790 and 1860.

276. Seavoy, *Public Service Origins*, *supra* note 8 at 47.

While canal charter provisions were less uniform than those of turnpike and bridge corporations,<sup>277</sup> they generally reflected the same public purpose and public benefits as the other types of internal improvement corporations. Most early canal charters included grants of eminent domain.<sup>278</sup> As with the turnpike and bridge companies, courts upheld these state grants of eminent domain as takings for public use.<sup>279</sup> Unlike turnpike and bridge company charters, however, canal charters—presumably because of the comparatively greater risk of harm from flooding—commonly contained provisions making shareholders liable for eminent domain damages.<sup>280</sup>

Canal charters typically included a plan of the proposed route,<sup>281</sup> and canal company shareholders, as with other internal improvement companies, were typically local residents and merchants who stood to benefit from the canal's construction. The founders of the Middlesex Canal, for example, chartered in 1793 and the most notable eighteenth-century canal corporation in Massachusetts,<sup>282</sup> were merchants, landholders and professional men of Medford, the endpoint of the canal, who stood to benefit most from the canal, thus “uniting to establish a public utility.”<sup>283</sup> Commercially, the Middlesex Canal and other canal corporations generally were unsuccessful.<sup>284</sup> By 1830, with the Erie Canal completed and the coming of early railroads, canal building in New York, Massachusetts and other states by business corporations was coming to an end.<sup>285</sup>

#### 4. Early Railroads.

The earliest American railroads date from the 1820s.<sup>286</sup> The first American railroad corporations were chartered in Massachusetts in 1826, for transporting granite from a quarry into town, and in 1829, for carrying coal from a mine to a canal in town.<sup>287</sup> New York also chartered a railroad corporation in 1826, Maryland in 1827 and New Jersey in 1831.<sup>288</sup> The number of railroad corporations

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277. DODD, *supra* note 8, at 255.

278. *Id.* at 44.

279. *Id.* (citing *Chesapeake & Ohio Canal Co. v. Key*, 3 D.C. 599 (3 Cranch) (1829)).

280. DODD *supra* note 8, at 256.

281. *See supra* note 220.

282. DODD, *supra* note 8, at 249.

283. Hansmann & Pargendler, *supra* note 8, at 967 (quoting CHRISTOPHER ROBERTS, *THE MIDDLESEX CANAL 1793-1860*, at 45 (HARVARD UNIV. PRESS, HARVARD ECONOMIC SER. NO. 61, 1938)).

284. *See* DAVIS, *ESSAYS IN THE EARLIER HISTORY OF CORPORATIONS IV*, *supra* note 8, at 185; DODD, *supra* note 8, at 251; Blair, *Locking in Capital*, *supra* note 8, at 428.

285. DODD, *supra* note 8 at 253; Hansmann & Pargendler, *supra* note 8, at 968.

286. Hansmann & Pargendler, *supra* note 8, at 969; DODD, *supra* note 8, at 258-259; HORWITZ, *supra* note 8, at 137.

287. DODD, *supra* note 8, at 258.

288. HORWITZ, *supra* note 8, at 137.

in New York grew from two in 1829 to forty-eight in 1834.<sup>289</sup> In New York, almost all of these were short lines connecting cities to each other or to navigable water.<sup>290</sup> In Sylla and Wright's count, more than twenty-six hundred railroad corporations, or about twelve percent of the total number of business corporations, were chartered from 1790 to 1860.<sup>291</sup>

The purposes of early railroad corporations broadly resembled those of other internal improvement companies, in that they were explicitly public, and benefits to investors were primarily indirect and public rather than direct financial returns on their shares.<sup>292</sup> Railroads were viewed as public highways.<sup>293</sup> One of the main reasons for chartering early railroad corporations was "the desire to deflect trade from a rival commercial town."<sup>294</sup> Some early railroad corporations were granted monopolies;<sup>295</sup> many railroad corporation charters contained grants of eminent domain similar to those of the turnpikes, bridges, and canals.<sup>296</sup> In a decision from 1830, at least one federal court upheld such a grant of eminent domain on the grounds that it was a taking for a public use.<sup>297</sup> On similar grounds, railroad corporation property was treated as exempt from taxation in some states, even without a charter provision; courts in Massachusetts and Pennsylvania, for example, held that railroad property was impliedly exempt from taxation by reason of the railroad's character as a public use.<sup>298</sup> In addition to grants of monopolies and eminent domain, some state legislatures provided in railroad corporation charters for direct investment by state and local governments.<sup>299</sup> In a case decided in 1852, the Pennsylvania Supreme Court upheld a statute authorizing the city of Philadelphia to issue bonds and invest the proceeds in the shares of two railroads; as noted by Merrick Dodd, a majority of the court held that "although the legislature could not constitutionally create a public debt for a mere private purpose, a railroad was a public highway in which the public had an interest despite its ownership by a private corpora-

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289. *Id.*

290. SEAVOY, ORIGINS, *supra* note 8, at 199.

291. Sylla & Wright, *supra* note 8, at 661.

292. *See infra* discussion accompanying notes 436 to 442 regarding later development of railroads.

293. DODD, *supra* note 8, at 333.

294. Hansmann & Pargendler, *supra* note 8, at 971 (citing WINTHROP M. DANIELS, AMERICAN RAILROADS: FOUR PHASES OF THEIR HISTORY 3 (1932)).

295. *See, e.g.*, DODD, *supra* note 8, at 162 (discussing a Massachusetts court decision of 1854 upholding a railroad monopoly).

296. *See, e.g.*, DODD, *supra* note 8, at 260.

297. *Bonaparte v. Camden & A. R. Co.*, 3 F. Cas. 821 (C.C.D.N.J. 1830), *cited in* DODD, *supra* note 8, at 44.

298. DODD, *supra* note 8, at 170; *but see* DODD, *supra* note 8, at 170 (noting Rhode Island's refusal to exempt railroad property); FRIEDMAN, *supra* note 8, at 193.

299. DODD, *supra* note 8, at 162; *see also* FRIEDMAN, *supra* note 8, at 192-93.

tion.”<sup>300</sup> Like those of other internal improvement companies, railroad corporation charters also contained provisions reserving to the Commonwealth the right to purchase “the road” after a specified period of time for a price equal to cost plus a certain amount of interest per annum.<sup>301</sup> “By 1853, the Commonwealth had loaned or otherwise contributed over \$6,000,000 to Massachusetts railroads.”<sup>302</sup>

Most early New England railroad financing, however, came from individual investors rather than from the state.<sup>303</sup> As with other internal improvement companies, railroad charters typically were required to include a plan of the proposed route,<sup>304</sup> and early railroad corporation investors were “commonly animated by the prospect of indirect benefits stemming from improved means of communication.”<sup>305</sup> Early railroad promoters generally pitched the “incidental advantages” rather than the profitability of the railroad;<sup>306</sup> shareholders agreed to subscribe for the stock of one railroad corporation despite “a certainty of no direct profits,”<sup>307</sup> and another promoter stressed that subscriptions were not meant to be “an investment” for “financial return,” but rather “to secure the benefits for himself and community.”<sup>308</sup> Early railroads were closely connected to local communities; as late as 1850, New England railroads covered an average distance of thirty-six miles,<sup>309</sup> and most of the shareholders of many early railroads—in some cases, more than ninety-five percent—lived along the route.<sup>310</sup> The organizers of the Boston and Lowell railroad, for example, were owners of Lowell textile mills who were dissatisfied with the Middlesex Canal

300. DODD, *supra* note 8, at 162 (citing *Sharples v. Mayor of Philadelphia*, 21 Pa. St. 147, 168 (1853)).

301. *See, e.g.*, DODD, *supra* note 8, at 260.

302. *Id.* at 338.

303. Hansmann & Pargendler, *The Evolution of Shareholder Voting Rights*, *supra* note 8 at 121 (noting that “domestic and foreign finance capital, which became important financing sources in later decades, did not play a major role in funding early railroad construction”); *see also* Sylla & Wright, *Corporation Formation in the Antebellum United States*, *supra* note 8 at 661 (stating that about half of all minimum authorized capital of all corporations formed in the period 1790-1860 was for railroads, which did not appear and begin to attract investment until late 1820s).

304. *See supra* note 220 and accompanying text.

305. Hansmann & Pargendler, *supra* note 8, at 969; SEAVOY, ORIGINS, *supra* note 8, at 206-07.

306. Hansmann & Pargendler, *supra* note 8, at 969 (citation omitted).

307. Hansmann & Pargendler, *supra* note 8, at 970 (citation omitted), THELMA H. KISTLER, *THE RISE OF RAILROADS IN THE CONNECTICUT RIVER VALLEY* 81 (1938).

308. *Id.*

309. WINTHROP M. DANIELS, *AMERICAN RAILROADS: FOUR PHASES OF THEIR HISTORY* 4 (1932) (cited in Hansmann & Pargendler, *supra* note 8, at 971).

310. Hansmann & Pargendler, *supra* note 8, at 971 (noting that 95% of Western Railroad’s Massachusetts shareholders, holding 96.6% of its total stock, resided along the route); *see also* SEAVOY, ORIGINS, *supra* note 8, at 199 (stating with respect to railroads in New York through 1833 that “[m]ost were built with local capital”).

as a transportation link between their mills and Boston.<sup>311</sup> “All in all, the vast majority of early railroad promoters and shareholders were local merchants, manufacturers, or landowners who expected to benefit from the railroad’s operations.”<sup>312</sup>

### B. *Financial Corporations.*

In addition to transportation infrastructure, financial infrastructure—consisting primarily of banks and to a lesser degree insurance companies—had been lacking in the colonies and was greatly needed after Independence.<sup>313</sup>

#### 1. Banks.

Following the Revolution, in most states, two key pieces of banking infrastructure were missing: sound paper currency and reliable sources of credit for merchants.<sup>314</sup> Currency in use typically consisted, among other things, of paper notes issued by banks, sometimes from other regions.<sup>315</sup> In Boston, for example, and New England as a whole, most currency was paper notes issued by country banks, “which passed from hand to hand because of the difficulty of presenting them to the issuing bank for payment.”<sup>316</sup> Sources of credit for merchants were scarce; prior to the Revolution, such credit had generally been provided, if at all, by English merchants or individual capitalists.<sup>317</sup> The colonies had no banks of discount and deposit.<sup>318</sup>

Again, it was the business corporation that provided the necessary vehicle. Thirty-four charters were issued to American banking corporations in the eighteenth century, including eighteen in New England (of which seven were in Massachusetts) and nine in the Middle Atlantic states (of which four were in New York).<sup>319</sup> Of the more than eight hundred business corporations chartered in New York from 1790 to 1826, forty-three, or about five percent, were

311. DODD, *supra* note 8, at 263.

312. Hansmann & Pargendler, *supra* note 8, at 971 (citation omitted).

313. The long, complex, and well-covered history of banking in the early United States is outside the scope of this Article. See generally DAVIS, *ESSAYS IN THE EARLIER HISTORY OF CORPORATIONS II*, *supra* note 8; Joseph H. Sommer, *The Birth of the American Corporation of Banks, Corporate Governance, and Social Responsibility*, 49 *BUFF. L. REV.* 1011 (2001).

314. SEAVOY, *ORIGINS*, *supra* note 8, at 259; Hamill, *From Special Privilege to General Utility*, *supra* note 8 at 93; Seavoy, *Public Service Origins*, *supra* note 8, at 49.

315. See, e.g., DODD, *supra* note 8, at 216; SEAVOY, *ORIGINS*, *supra* note 8, at 55, 259 (listing five types of currency).

316. DODD *supra* note 8, at 217.

317. 2 DAVIS, *ESSAYS IN THE EARLIER HISTORY OF CORPORATIONS*, *supra* note 8, at 34; see also DODD, *supra* note 8, at 205 (noting that banking in Massachusetts prior to the incorporation of the Massachusetts Bank in 1784 had been done by individuals, partnerships or unincorporated associations).

318. 2 DAVIS, *ESSAYS IN THE EARLIER HISTORY OF CORPORATIONS*, *supra* note 8, at 34.

319. *Id.* at 37. The remaining five were in Virginia and Maryland.

banks.<sup>320</sup> Boston merchants secured a charter for the Massachusetts Bank in 1784;<sup>321</sup> the Bank of New York, which had opened as an unincorporated company in April 1784 only a few months after the British left New York, was incorporated in 1791,<sup>322</sup> and the four chief mercantile cities of the nascent republic—Philadelphia, New York, Boston and Baltimore—were provided with banking facilities by 1790.<sup>323</sup> By 1827, there were fifteen banking corporations in Boston and sixty in Massachusetts.<sup>324</sup> Overall, in the period between 1790 and 1860, more than 2,400 banks were incorporated, representing about eleven percent of the business corporations chartered in that period in the United States.<sup>325</sup>

Early bank charters varied from state to state and were sometimes based on national precedents,<sup>326</sup> but they differed in other important ways from the charters of other early business corporations. Banks resembled the internal improvement companies in that banks also typically served public or quasi-public purposes;<sup>327</sup> grants of exclusive or monopoly banking rights, for example, were considered, if not enacted, in some state legislatures.<sup>328</sup> As Davis notes, “[t]he functions of discount, deposit, and issue were exercised almost solely by these incorporated institutions.”<sup>329</sup> Banking corporations thus “played a prominent role in supplying credit to the nation’s rapidly growing business economy through the circulation of bank notes, which served as a medium of exchange within the nation’s currency.”<sup>330</sup>

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320. Hilt, *supra* note 8, at 16.

321. 2 DAVIS, ESSAYS IN THE EARLIER HISTORY OF CORPORATIONS, *supra* note 8, at 47.

322. Hilt & Valentine, *supra* note 8, at 8-9.

323. 2 DAVIS, ESSAYS IN THE EARLIER HISTORY OF CORPORATIONS, *supra* note 8, at 49.

324. DODD *supra* note 8, at 214 (stating that the Mass. Bank charter a verbatim copy of Congressional charter of Bank of North America).

325. Sylla & Wright, *supra* note 8, at 661; *see also* HURST, *supra* note 8, at 17.

326. 2 DAVIS, ESSAYS IN THE EARLIER HISTORY OF CORPORATIONS, *supra* note 8, at 105; DODD, *supra* note 8, at 201.

327. *See, e.g.*, Hilt & Valentine, *supra* note 8, at 8-9 (stating that the Bank of New York in 1791 was typical in serving a quasi-public purposes); SEAVOY, PUBLIC SERVICE ORIGINS, *supra* note 8, at 50 (stating that the Massachusetts Bank was conceived as a public service institution); Edward L. Symons, *The ‘Business of Banking’ in Historical Perspective*, 51 GEO. WASH. L. REV. 676, 686 (1983) (“Generally, these banks were considered governmental or quasi-governmental entities, because their most important function was issuance of notes, which served as money”). *See also* DODD, *supra* note 8, at 217 (observing that, as late as 1851, the Massachusetts Board of Bank Commissioners described savings banks in Massachusetts as charitable rather than business corporations).

328. 2 DAVIS, ESSAYS IN THE EARLIER HISTORY OF CORPORATIONS, *supra* note 8, at 69-70 (with respect to Massachusetts); DODD, *supra* note 8, at 208.

329. 2 DAVIS, ESSAYS IN THE EARLIER HISTORY OF CORPORATIONS, *supra* note 8, at 102.

330. Hamill, *supra* note 8, at 93 (citation omitted).

Perhaps more significantly, however, unlike many other early business corporations, banks were known to be profitable enterprises.<sup>331</sup> In general, bank charters—rather than providing for delegation of state or quasi-state powers to banking corporations in order to enable banks to operate and sustain themselves—often instead required the bank to provide special rights to the state as a shareholder or borrower. Many early bank charters reserved to the state the right to subscribe to a significant portion of the bank’s shares or required the bank to loan the state a specified sum of money.<sup>332</sup> Others required state funds to be deposited with the bank, or the bank to make advances for carrying out state works, or the directors to make reports directly to the state governor, in some cases approaching the creation of “state” banks.<sup>333</sup>

Union Bank, chartered in Massachusetts in 1792, was typical. The charter gave the Commonwealth the right to subscribe to one-third of the bank’s shares; required the bank to lend the Commonwealth one hundred thousand dollars at a specified rate of interest; authorized a legislative committee to examine the bank’s “doings”; and if the charter’s terms were violated, authorized the Commonwealth to have it forfeited.<sup>334</sup> State funds were to be deposited with the bank.<sup>335</sup> The Commonwealth indeed wound up holding one-third of the bank’s stock, giving the bank a “semi-official” character in Massachusetts.<sup>336</sup>

Notwithstanding the profitability of banking enterprises, much of the demand for the creation of early banks, like other early business corporations, came not from would-be investors seeking profits on bank shares, but from potential borrowers and other parties who hoped to receive the indirect or public benefits of the bank’s services.<sup>337</sup> Local merchants were both the principal owners and the principal customers of most early banking corporations.<sup>338</sup> The “primary purpose” of the Bank of New York, for example, was “to provide

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331. 2 DAVIS, *ESSAYS IN THE EARLIER HISTORY OF CORPORATIONS*, *supra* note 8, at 60-61, 66; Hilt, *supra* note 8, at 60.

332. *See, e.g.*, DODD, *supra* note 8, at 203, 207-208; DAVIS, *ESSAYS IN THE EARLIER HISTORY OF CORPORATIONS II*, *supra* note 8, at 75, 95-97.

333. DAVIS, *ESSAYS IN THE EARLIER HISTORY OF CORPORATIONS II*, *supra* note 8, at 96-97 (stating that the Bank of Pennsylvania in 1793, the first “state” bank, was required by charter to loan the state \$500,000; the state required the state’s funds and other funds over which state had control to be deposited with the bank; the bank came increasingly into the control of the state, held most state loans negotiated, made advances for carrying on state works, and defrayed state expenses out of its dividends; and was the largest “state” bank of this century.); DODD, *supra* note 8, at 203 (noting that the Nantucket Bank of 1795 was required to make semi-annual reports directly to governor).

334. DODD, *supra* note 8, at 203.

335. DAVIS, *ESSAYS IN THE EARLIER HISTORY OF CORPORATIONS II*, *supra* note 8, at 75.

336. *Id.* at 74-75; *see also* DODD *supra* note 8, at 211-212 (describing similar provision in Massachusetts general act of 1829 prescribing powers of all banks).

337. DODD, *supra* note 8, at 214; *see also* SEAVOY, *ORIGINS*, *supra* note 8, at 53.

338. *See, e.g.*, Sommer, *supra* note 313, at 1028 (“[T]he mercantile banks could be considered merchants’ utilities, chartered perhaps as public corporations, but operated as private credit clubs.”); Hansmann & Pargendler, *supra* note 8, at 127.

commercial credit to the merchants who organized it.”<sup>339</sup> New York’s Citibank, first established in 1812, “was intended to be a kind of credit union for its merchant-owners.”<sup>340</sup>

Banks rapidly became the most important and commercially successful of the early business corporations.<sup>341</sup> By the second or third decade of the nineteenth century, the profitability of the banking business was demonstrated so thoroughly that state investment in banking corporations declined and was largely supplanted by private capital.<sup>342</sup> The Commonwealth of Massachusetts acquired no further holdings in banks after 1820.<sup>343</sup>

## 2. Insurance Companies.

Many of the earliest American insurance corporations were mutual companies, organized to hold property for the benefit of their members, and were accordingly difficult at times to distinguish from early charitable corporations.<sup>344</sup> The corporation—whether for benevolent or other risk management purposes—offered a sustainable means of aggregating property to be held in trust. Insurance underwriting in the former colonies had previously been done by individuals and partnerships.<sup>345</sup>

The earliest insurance products were marine insurance, followed by fire insurance.<sup>346</sup> Corporations offering marine and fire insurance “functioned as public service franchises in urban areas where they protected businessmen from the dangers of bankruptcy caused by fire and marine disasters.”<sup>347</sup> As with other early business corporations, a financial return on investment was often a secondary consideration.<sup>348</sup> Overall, in the period between 1790 and 1860, more than 2,100 insurance companies were incorporated, representing about nine percent of the business corporations chartered in that period in the United States.<sup>349</sup>

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339. Seavoy, *Public Service Origins*, *supra* note 8, at 50.

340. HAROLD VAN B. CLEVELAND & THOMAS F. HUERTAS, *CITIBANK 1812-1970*, at 8 (cited in Hansmann & Pargendler, *supra* note 8 at 975).

341. DAVIS, *ESSAYS IN THE EARLIER HISTORY OF CORPORATIONS II*, *supra* note 8, at 108.

342. *See, e.g.*, DODD, *supra* note 8, at 213 (with respect to Massachusetts).

343. *Id.*

344. Hansmann & Pargendler, *supra* note 8, at 984 (on mutual companies); *see, e.g.*, Seavoy, *Public Service Origins*, *supra* note 8, at 47 (describing the Corporation for the Relief of Widows and Children of Clergymen in the Communion of the Church of England, chartered in 1769 simultaneously in New York, New Jersey and Pennsylvania, which was effectively both a charity and a mutual insurance corporation, deriving and distributing most of its income from income on donated real property).

345. DODD, *supra* note 8, at 218.

346. *Id.*

347. Seavoy, *Public Service Origins*, *supra* note 8, at 47.

348. Hansmann & Pargendler, *supra* note 8, at 984; *see also* Seavoy, *Public Service Origins*, *supra* note 8, at 48 (stating that the New York legislature incorporated early insurance companies “with no discernable distinction regarding their profit or benevolent motives.”).

349. Sylla & Wright, *supra* note 8, at 661 tbl. 4; *see also* Hilt, *supra* note 8, at 16 tbl. 2.

### C. *Early Manufacturing.*

At the close of the Revolution, there were virtually no American manufacturing corporations. Manufacturing in this early period was generally done in households, on a small scale, by artisans organized as sole proprietors or partnerships.<sup>350</sup> Economic conditions for the manufacturing corporation had not yet developed.<sup>351</sup>

In the early nineteenth century, economic conditions changed very rapidly. Power-driven machinery, particularly spinning equipment in the cotton-textile industry, was introduced in Rhode Island in 1790.<sup>352</sup> The use of machinery increasingly required a factory system of organization and greater aggregation of capital.<sup>353</sup> The United States entered into the embargo of 1807 and the War of 1812, resulting in acute shortages of textiles and other consumer goods formerly imported from England.<sup>354</sup> The business corporation was quickly taken up as a form of organization for manufacturing enterprises, becoming unexceptional for manufacturers after 1809.<sup>355</sup> In 1809, Massachusetts adopted a general incorporation act for textile and certain other manufacturers.<sup>356</sup> In 1811, New York adopted a general incorporation act for manufacturers, one of the first such acts for business corporations.<sup>357</sup> Under the general incorporation statute, a special act of the legislature was no longer required; five or more persons engaged in manufacturing textiles, glass, bar iron, steel, and certain other products were allowed to self-incorporate.<sup>358</sup> The New England states, too, adopted a policy of

350. DAVIS, *supra* note 8, at 255-56; DODD, *supra* note 8, at 365; *see also* HURST, *supra* note 8, at 17 (stating that general business corporations other than internal improvement, bank and insurance, and public service corporations from 1780-1801 were only four percent of charters).

351. DAVIS, *supra* note 8, at 255.

352. DODD, *supra* note 8, at 367.

353. *Id.* at 365, 367; Seavoy, *Public Service Origins*, *supra* note 8, at 55; SEAVOY, ORIGINS, *supra* note 8, at 63; *see also* Hilt, *Corporate Governance*, *supra* note 8, at 95, 99.

354. Seavoy, *Public Service Origins*, *supra* note 8, at 55; Seavoy, *Laws to Encourage Manufacturing*, *supra* note 8, at 87.

355. DODD, *supra* note 8, at 368.

356. Massachusetts Manufacturing Corporation Act of 1809; Blair, *supra* note 8, at 425-6; *see also* Seavoy, *Laws to Encourage Manufacturing*, *supra* note 8, at 90 (calling the New York act of 1811 “the first effective general incorporation statute for business corporations passed by any state.”).

357. *See* Act Relative to Incorporations for Manufacturing Purposes, Ch. LXVII, 1811 N.Y. Laws 34; Seavoy, *Laws to Encourage Manufacturing*, *supra* note 8, at 90; Hilt, *supra* note 8, at 54; *see also* Seavoy, *Public Service Origins*, *supra* note 8 at 56; DODD, note 8, at 263-64 (stating that the general Aqueduct Act of 1799 enacted in Massachusetts may be regarded as the earliest general act of incorporation for business enterprises in Anglo-American law). On general incorporation, *see also infra* discussion accompanying notes 480 to 496.

358. SEAVOY, ORIGINS, *supra* note 8, at 65; Blair, *Locking in Capital*, *supra* note 8, at 426 (noting that the act provided for “any five or more persons who shall be desirous to form a company for the purpose of manufacturing woolen, cotton or linen goods, or for the purpose of making glass, or for the purpose of making from ore bar-iron, anchors, millirons, steel, nail rods, hoop-iron and ironmongery, sheet copper, sheet lead, shot, white lead and red lead.”).

granting or encouraging charters for manufacturing enterprises in large numbers.<sup>359</sup> By 1815, Massachusetts alone had chartered one hundred fifteen textile companies and a considerable number of other manufacturing corporations.<sup>360</sup> This number grew to nearly five hundred and fifty new manufacturing corporations in Massachusetts by 1850.<sup>361</sup> Cotton textiles went from being a nascent American industry in 1800 to employing an estimated forty million dollars in capital and a hundred thousand workers by 1815.<sup>362</sup> In New York, more than two hundred manufacturing companies, or about twenty-seven percent of all business corporations, were chartered between 1790 and 1826.<sup>363</sup> Overall, more than three thousand three hundred manufacturing corporations, or about fifteen percent of all business corporations, were chartered in the United States between 1790 and 1860.<sup>364</sup>

Notwithstanding these and other later developments, early manufacturing corporations—like the internal improvement, early bank and early railroad corporations—were considered to have a public purpose.<sup>365</sup> The corporate charter or general incorporation act specified the types of products the corporation was allowed to manufacture.<sup>366</sup> A majority of early manufacturing corporations were textile companies.<sup>367</sup> On a purely local level, the stated purpose of many early textile or spinning corporations was to employ the poor.<sup>368</sup> More broadly, in states such as Massachusetts and New York, the incorporation of textile and other early manufacturers was part of a public policy of making the state and

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359. DODD, *supra* note 8, at 365; *See* Hamill, *supra* note 8, at 97-98; HURST, *supra* note 8, at 18.

360. DODD, *supra* note 8, at 368.

361. Hilt, *Corporate Governance*, *supra* note 8 at 77.

362. DODD, *supra* note 8, at 368.

363. Hilt, *Ownership and Control*, *supra* note 8, at 16 tbl.2.

364. Sylla & Wright, *supra* note 8, at 661 tbl.4.

365. *See, e.g.*, Seavoy, *Public Service Origins*, *supra* note 8, at 55-56; SEAVOY, ORIGINS, *supra* note 8, at 64; Seavoy, *Laws to Encourage Manufacturing*, *supra* note 8, at 90-93 (noting, however, that entrepreneurs found New York's 1811 statute convenient because they did not have to "relate their business to a narrow definition of public service . . ."); Hilt & Valentine, *Democratic Dividends*, *supra* note 8, at 8 (characterizing the Society for the Establishment of Manufactures as typical in serving a "quasi-public purpose").

366. Hilt, *Corporate Governance*, *supra* note 8 at 6.

367. SEAVOY, ORIGINS, *supra* note 8, at 67 (noting that 226 of 362 charters granted under the New York general incorporation act of 1811 from 1811-1848 were for textile manufacturers).

368. *See, e.g.*, DAVIS, *supra* note 8, at 264-65 (citing the constitution of the Pennsylvania Society for the Encouragement of Manufacture, which provided "[f]or better employment of the industrious poor, . . ." and noting that the legislature subscribed for 100 shares); *Id.* at 270-71 (describing the Beverly Cotton Manufactory of 1789 and "the importance of employment to great number of women and children, many of whom would otherwise be useless or burden to society.") (internal quotation marks omitted); *Id.* at 275 (describing the New York Manufacturing Society, formed in 1789 "for the purpose of establishing useful manufactures . . . and furnishing employment for the honest industrious poor.") (internal quotation marks omitted); *see also* Hilt & Valentine, *Democratic Dividends*, *supra* note 8, at 9 (noting that the New York Manufacturing Society was a spinning company).

the nation self-sufficient in the production of basic manufactured goods.<sup>369</sup> The 1789 incorporating act for the Beverly Cotton Manufactory in Massachusetts, notes Pauline Maier, provided that

. . . “the promotion of useful manufactures, and particularly such as are carried on with materials of American produce within this Commonwealth,” would advance “the happiness and welfare thereof, by increasing the agriculture and extending the commerce of the country.”<sup>370</sup>

The New York general incorporation act of 1811 was an “emergency statute” designed to promote manufacture of textiles and other consumer goods to replace foreign imports.<sup>371</sup> In the context of wartime shortages and emergencies, American manufacturing in general was seen as a public service.<sup>372</sup>

To promote these public purposes, many state legislatures again delegated state or quasi-state powers to early manufacturers. The Society for Establishing Useful Manufactures (“S.U.M.”), for example, was incorporated in New Jersey in 1791 as a large textile manufactory.<sup>373</sup> Its charter contained an exceedingly broad purpose clause authorizing it to carry on “the Business of Manufacture in this State” and to engage in “Manufacturing or making all such Commodities or Articles as shall not be prohibited by Law.”<sup>374</sup> The charter exempted the corporation’s employees from taxes and military duties (except in case of invasion); allowed the corporation to raise funds through a public lottery; granted the right to construct canals and take private land and materials in doing so; to charge tolls for the use of those facilities; and, curiously, to incorporate the future town of Paterson.<sup>375</sup> The legislative grants to S.U.M. were not unusual. As Joseph S. Davis observes,

Time and again, in nearly every state, legislative “encouragement” in one form or another was granted to manufacturers. Bounties were granted. . . . Taxes on property or on the polls of workmen were abated. Lottery privileges were granted. . . . Loans were given at low rates of interest or without any. National laws established protective duties. Patents were granted. And in several instances, as in the case of . . . The New York Manufacturing Society, and the “S.U.M.,” subscriptions were made by the state to the shares of corporations.<sup>376</sup>

Early manufacturing corporations differed sharply, however, in one key respect from the internal improvement companies, early banks and early railroads: shareholders in early manufacturing corporations were usually investors rather

369. SEAVOY, ORIGINS, *supra* note 8, at 74.

370. Maier, *supra* note 8, at 55 (citation omitted).

371. SEAVOY, ORIGINS, *supra* note 8, at 74; *see also* Seavoy, *Public Service Origins*, *supra* note 8, at 56.

372. Seavoy, *Public Service Origins*, *supra* note 8, at 55–56.

373. *See* Maier, *The Revolutionary Origins of the Business Corporation*, *supra* note 8, at 67.

374. 1 DAVIS, *supra* note 8, at 380; *see also* Hansmann & Pargendler, *supra* note 8, at 980 fn.138 (citing Davis).

375. Maier, *supra* note 8, at 67.

376. 4 DAVIS, *supra* note 8, at 283.

than local merchants, farmers, landowners, or consumers.<sup>377</sup> Factory machinery required comparatively greater capital and more pooling of funds. The S.U.M., for example, was a New Jersey corporation, but most of its subscribers were New York capitalists and speculators.<sup>378</sup> Operationally as well as financially, manufacturers essentially de-localized. Manufacturing corporations were likely to be part of a larger, competitive market with dispersed consumers.<sup>379</sup> Textile mills with new equipment, which would produce far more thread than local communities could weave into cloth, had to sell their products on a broad anonymous market.<sup>380</sup> Other than perhaps employment, manufacturing offered comparatively few local public benefits.

#### D. Governance.

The public purposes and public benefits of the internal improvement companies, early banks and early railroads—though less so for early manufacturing corporations<sup>381</sup>—were reflected in important ways in the corporate governance provisions of their charters. Differences may be noted initially on the level of terminology. In corporate documentation, until the 1830s, the term “member” appeared more often than the new term “shareholder.”<sup>382</sup> The earliest use of “shareholder” appears to be from the late 1820s, with “stockholder” appearing in the 1750s, apparently in connection with the joint-stock company.<sup>383</sup>

More significantly, as the foregoing suggests, early governance norms put much less weight on the amount of investment.<sup>384</sup> English company law had regarded each shareholder as a member of the corporation rather than the owner of a portion of the company’s capital.<sup>385</sup> Rights tended to be allocated per shareholder rather than per share. This principle was forcefully enunciated in 1834 by Chief Justice Joseph Hornblower of the New Jersey Supreme Court in *Taylor v. Griswold*:

To my mind, the answer to this question is perfectly plain, whether it is considered upon general and common law principles, or upon the terms of the charter it-

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377. Hansmann & Pargendler, *supra* note 8, at 987.

378. *Id.* at 986.

379. *Id.* at 987.

380. SEAVOY, ORIGINS, *supra* note 8 at 63.

381. *See infra* discussion accompanying notes 365 to 380.

382. Wells, *supra* note 8, at 1042 (citing ANGELL & AMES, *supra* note 62, at 62).

383. Wells, *supra* note 8, at 1042, n.51 (citation omitted).

384. Colleen A. Dunlavy, *From Citizens to Plutocrats: Nineteenth Century Shareholder Voting Rights and Theories of the Corporation*, in CONSTRUCTING CORPORATE AMERICA 66, 67.

385. *Id.* at 73 (citations omitted); Maier, *The Revolutionary Origins of the Business Corporation*, *supra* note 8 at 77.

self. . . . Every corporator, every individual member of a body politic, whether public or private, is, *prima facie*, entitled to equal rights.<sup>386</sup>

Perhaps not surprisingly, in many respects, early American corporate governance was in some respects a step closer to partnership. Early business corporations typically had only a single class of common stock.<sup>387</sup> Merger, dissolution, and other major corporate transactions required—in addition to legislative action—unanimous shareholder approval.<sup>388</sup> Corporations were chartered for specific purposes, subject to geographic, capital and ultra vires restrictions, and for a limited period of time.<sup>389</sup> Shareholders typically had preemptive rights,<sup>390</sup> and corporations were required to pay out profits in regular dividends.<sup>391</sup>

Most importantly, early American business corporation charters tended to impose schemes of restricted or graduated voting. Graduated voting schemes fell in between the “democratic” partnership model of one vote per partner and the “plutocratic” approach of one vote per share.<sup>392</sup> As outlined by Colleen Dunlavy, graduated voting limited the management power of larger investors by diminishing voting power relative to shareholdings as shareholdings increased; for example, a shareholder with one or two shares might get one vote; for the next eight shares, one vote for every two shares; for the next twenty shares, one vote for every four shares; and so forth, up to a fixed cap on the total number of possible votes, regardless of the total number of shares owned.<sup>393</sup> The effect of graduated voting, in other words, was to limit the role of capital in determining management of the company, particularly when many small shareholders were present.<sup>394</sup>

Graduated voting schemes were thus well-suited to enterprises where shareholders’ primary interests were in the company’s public purpose and benefits rather than in protecting or securing a financial return on their shares<sup>395</sup>—in

386. Taylor v. Griswold, 14 N.J.L. 222, 237 (1834); *see also* Dunlavy, *supra* note 384 at 78; Hansmann & Pargendler, *supra* note 8, at 117.

387. DODD, *supra* note 8, at 269; *see also* Hilt, *supra* note 8, at 75–77.

388. BERLE & MEANS, *supra* 17, at 132 (citing ANGELL & AMES, *supra* note 62); Hilt, *Corporate Governance*, *supra* note 8, at 79; Wells, *Shareholder Power*, *supra* note 8, at 1046.

389. *See, e.g.*, Hilt, *Early American Corporations*, *supra* note 8 at 51; Wells, *Shareholder Power*, *supra* note 8, at 1046, 1051.

390. Wells, *Shareholder Power*, *supra* note 8, at 1046.

391. Hilt, *Corporate Governance*, *supra* note 8, at 84; Wells, *Shareholder Power*, *supra* note 8, at 1046; *see also* Guenther, *supra* note 3, at 450 ff. (discussing the doctrine of shareholders’ equitable right to dividends).

392. Dunlavy, *supra* note 384, at 73-74 (noting that one shareholder, one vote was the common law rule); *see also* Wells, *Shareholder Power*, *supra* note 8, at 1049 (citing Dunlavy, *supra* note 384, at 73); Maier, *supra* note 8, at 77, note 74.

393. Dunlavy, *supra* note 384, at 74-75. In Dunlavy’s example of the first Bank of the United States, chartered in 1791, the maximum vote cap was set at thirty votes.

394. Analysis of separation of ownership and control is beyond scope of this Article. *See, e.g.*, BERLE & MEANS, *supra* note 17; Hilt, *Corporate Governance*, *supra* note 8, at 7 ff.

395. Smythe, *supra* note 178, at 1417-18.

Hansmann and Pargendler's words, where shareholders were more interested in the firm's output than its profits.<sup>396</sup> Graduated voting was particularly prevalent in turnpikes; according to Hansmann and Pargendler's multistate analysis, from 1790 to 1859, sixty-five percent of turnpike and plank road corporations had graduated voting charters.<sup>397</sup> Graduated voting was also common in charters of bridge corporations (almost thirty-eight percent);<sup>398</sup> canal corporations (more than forty-two percent);<sup>399</sup> banks (fifty-three percent);<sup>400</sup> insurance corporations (almost thirty-eight percent);<sup>401</sup> and even early railroads (more than twenty-seven percent, down from forty-eight percent in the 1820s).<sup>402</sup> Graduated voting provisions were also more common in some states (Massachusetts, New York, and New Jersey)<sup>403</sup> than others (Connecticut).<sup>404</sup>

Once again, manufacturing corporations were the outlier. In sharp contrast to virtually all other early American business corporations, "one vote per share was from the outset the dominant voting rule in U.S. manufacturing corporations."<sup>405</sup> Of the manufacturing corporations chartered in New York from 1790 to 1825, only two percent had graduated voting provisions in their charters.<sup>406</sup> Percentages were similarly miniscule in New Jersey and Connecticut.<sup>407</sup> Indeed, one vote per share was the rule in New York's general incorporation act of 1811 for manufacturing companies, which set the precedent for the many other states that subsequently enacted general incorporation statutes for manufacturing.<sup>408</sup>

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396. Hansmann & Pargendler, *supra* note 8, at 960; *cf.* DUNLAVY, *supra* note 384, at 74 (arguing that graduated voting was intended to make corporations more democratic); Wells, *Shareholder Power*, *supra* note 8, at 1050. *See generally* Hansmann & Pargendler, *supra* note 8, at 951–54.

397. Hansmann & Pargendler, *supra* note 8, at 960, 1012 tbl.1; *see also* Smythe, *supra* note 178, at 1417.

398. Hansmann & Pargendler, *supra* note 8, at 964, 1012 tbl.1; *see also* Smythe, *supra* note 178, at 1417.

399. Hansmann & Pargendler, *supra* note 8, at 966–67, 1012 tbl.1; *see also* DODD, *supra* note 8, at 255.

400. Hansmann & Pargendler, *supra* note 8, at 1012 tbl. 1; *id.* at 126; DODD, *supra* note 8, at 215; Maier, *supra* note 8 at 77-78; *but cf.* IV DAVIS, *supra* note 8, at 69.

401. Hansmann & Pargendler, *supra* note 8, at 1012, tbl. 1; *id.* at 981-982; Hilt, *Corporate Governance*, *supra* note 8, at 84 tbl. 1.

402. Hansmann & Pargendler, *supra* note 8, at 1012 tbl. 1; *see also id.* at 970 (noting that graduated voting most present in early railroad charters).

403. *Id.* at 116 (citations omitted).

404. *See id.* at 966 (citations omitted).

405. *Id.* at 985.

406. *Id.*

407. *Id.* (noting that the thirty-one percent figure from their multistate analysis is “. . . almost certainly, misleadingly high.”).

408. *Id.* at 986. *See also* Dunlavy, *supra* note 384, at 74; Hilt, *Corporate Governance*, *supra* note 8, at 12.

Perhaps even more tellingly, in many jurisdictions, most notably Massachusetts, charters of early manufacturing corporations did not provide shareholders with limited liability. At English common law, the rule had long been that shareholders of stock companies in general did not have limited liability.<sup>409</sup> The common law rule does not appear to have been followed in the United States, where from the inception of the business corporation in the late eighteenth and early nineteenth centuries, state legislatures were generally willing to include limitations on shareholder liability in corporate charters; where the charter was silent, limited liability was ordinarily implied.<sup>410</sup> Nonetheless, limited liability was not universal, and there were significant exceptions.<sup>411</sup> Manufacturing in the northeastern U.S. states, where manufacturing first developed, was the most significant exception. Legislative policy with respect to granting limited liability to manufacturing corporations “differed radically” in these states from the policy toward other types of business corporations.<sup>412</sup> The same state legislatures in New England, New York and Pennsylvania that were willing to include broad grants of limited liability to shareholders in charters for turnpikes, bridges, canals, and banks refused in the early years of the nineteenth century to include such provisions in manufacturing charters.<sup>413</sup> In particular, the Massachusetts state legislature followed a policy of unlimited shareholder liability for manufacturing corporations from 1809—when the state’s Manufacturing Corporation Act expressly imposed full personal liability on shareholders if debts against the corporation could not be satisfied out of corporate property<sup>414</sup>—until 1830, when the state’s new Manufacturing Corporation Act abolished personal liability of shareholders, but only after the whole amount of the corporation’s capital stock had been actually paid in and certified.<sup>415</sup> Massachusetts—the very state where factory-based manufacturing arose most rapidly, until Massachusetts became the leading cotton-textile state in the country—was the first state to adopt and, except for Rhode Island, the last to abolish, unlimited shareholder liability for manufacturers.<sup>416</sup>

No consensus appears to exist as to why Massachusetts and other states imposed unlimited liability on early manufacturing corporations.<sup>417</sup> Even early on,

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409. DODD, *supra* note 8, at 364 n.1 (noting that the privilege of limited liability was not granted to registered joint-stock companies in England until Companies Act of 1855); Handlin & Handlin, *supra* note 8, at 11 (“Early English law knew nothing of limited liability.”).

410. DAVIS, *supra* note 8, at 317; DODD, *supra* note 8, at 365.

411. See DODD, *supra* note 8, at 373-77; see also *infra* text accompanying notes 521 to 524.

412. DODD, *supra* note 8, at 365.

413. *Id.*

414. *Id.* at 376.

415. *Id.* at 381; see also Hilt, *Corporate Governance*, *supra* note 8, at 77.

416. DODD, *supra* note 8, at 365.

417. See, e.g., DODD, *supra* note 8, at 369 (noting that even in England, evidence on what people of the eighteenth century thought on the subject of limited liability is extremely meager and in the United States almost nonexistent); HOVENKAMP, *supra* note 186, at 49 (“Voluminous writings on the history of American corporate law have not adequately explained either the evolution of

the public purpose in manufacturing corporations may have been perceived to be not as strong as in the internal improvement companies. Shareholders in such corporations may have been deemed to be “co-adventurers” for their own profit—as opposed to providing a public service in the “quid pro quo” of the internal improvement companies, in the words of Angell and Ames<sup>418</sup>—who therefore deserved to bear some personal risk. Ultimately, however, the policy against limited liability may have been less significant than it appears in hindsight. As the Handlins note:

Until well into the eighteenth century in England, and through the whole period of origins in the United States, the internal organization of the corporation made unlikely the raising of the question. Generally, there was no specific capital stock and no par value for shares. Funds were collected by assessments against the shareholder, and there was, at first, no legal limit to the total number of assessments.<sup>419</sup>

Under such circumstances, limited liability may have been, on a practical level, something of an illusion. Even if shareholders’ personal assets were not exposed to creditors of the corporation, if such creditors could compel an assessment, shareholders might have wound up in the same position.<sup>420</sup> Acceptance of limited liability for shareholders in 1830 did not, in any event, have an appreciable effect on the rate of incorporation of manufacturing corporations in Massachusetts.<sup>421</sup>

#### IV. TRANSITION TO THE MODERN FIRM.

The period after 1780, as I have argued above, saw the dramatic rise of the business corporation out of its all-purpose predecessor. A second gradual but equally historic transformation occurred, beginning in about the 1830s, with the rapid growth and industrialization of the American economy. The purpose of

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limited liability in the nineteenth century or its meaning.”); Thompson, *supra* note 208, at 211 (“In 1830, the Massachusetts legislature declared that petitioners for corporate charters no longer had to be engaged in public works to be awarded the privilege of limited liability.”). See also SEAVOY, ORIGINS, *supra* note 8, at 104 (stating that the New York legislature’s revised statutes of 1828 granted full limited liability to all corporation stockholders provided their shares were fully paid in; the great exception was banks).

418. ANGELL & AMES, *supra* note 62, at 33; see *supra* discussion accompanying notes 191 to 192.

419. Handlin & Handlin, *Origins of the American Business Corporation*, *supra* note 8, at 12-13; see also *id.* at 10 (“In the first thirty years of Massachusetts development no grant or petition for an act of incorporation mentioned [limited liability.]”); DODD, AMERICAN BUSINESS CORPORATIONS UNTIL 1860, *supra* note 8 at 369 ff.; Hilt, *Corporate Governance*, *supra* note 8 at 78.

420. See, e.g., Handlin & Handlin, *supra* note 8, at 13 ff.; DODD, *supra* note 8, at 369.

421. DODD, *supra* note 8, at 383; Hilt, *Corporate Governance*, *supra* note 8, at 78-79; Handlin & Handlin, *supra* note 8, at 17. See also DODD, *supra* note 8, at 376 (noting that unlimited liability in 1809 Act “did not prevent large numbers of Massachusetts industrialists from seeking incorporation”); Hilt, *Corporate Governance*, *supra* note 8, at 78 (noting that in spite of unlimited shareholder liability, manufacturing enterprises sought to incorporate in Massachusetts at very high rates).

the American business corporation shifted from fundamentally public to private goals.<sup>422</sup> The special charter granting quasi-state powers for improvement of public infrastructure, with primarily indirect public benefits to shareholders, gave way to general incorporation and an increasing shareholder focus on direct financial returns on shares. The American understanding of the purpose of the corporation gradually transitioned from the pronouncement of the court in *Trustees of the University of North Carolina v. Foy* in 1805 that “[i]ndeed, it seems difficult to conceive of a corporation established for merely private purposes,”<sup>423</sup> to the confident assertion a little more than a century later in *Dodge v. Ford* that “[a] business corporation is organized and carried on primarily for the profit of the stockholders.”<sup>424</sup> The first transformation in corporate purpose created the American business corporation; the second transformation gave rise to the modern American profit-maximizing firm.<sup>425</sup>

Over the first half of the nineteenth century, the importance of early turn-pike, toll-bridge, canal, and other local improvement corporations was gradually eclipsed by capital-intensive regional and national private concerns, particularly in banking, manufacturing, and railroads. Banking, manufacturing and railroad corporations, in turn, gradually ceased to be seen as having a public purpose.<sup>426</sup> As noted above, the profitability of banks had been manifest since the early decades after the Revolution.<sup>427</sup> In the early nineteenth century, state legislatures steadily increased the number of chartered banks.<sup>428</sup> Other forms of credit institutions arose.<sup>429</sup> Bank finance became the realm of primarily private capital.<sup>430</sup> Banks may have been the earliest American business corporations to

422. See HORWITZ, *supra* note 8, at 136-37; see also *id.* at 111-12 (“The change in the conception of the corporation marks one of the fundamental transitions from the legal assumptions of the eighteenth century to those of the nineteenth. The archetypical American corporation of the eighteenth century is a municipality, a public body charged with carrying out public functions; in the nineteenth, it is the modern business corporation, organized to pursue private ends for individual gain.”); HOVENKAMP, *supra* note 186, at 43 (“The classical business corporation became a device for managing capital and investment, not a special privilege from the state.”); but see MAYER, *supra* note 8, at 83 (asserting that “[i]t is only as we move into the twentieth century. . . that we find the corporation progressively losing its public sense of purpose. . .”).

423. *Trs. of the Univ. of North Carolina v. Foy*, 5 N.C. (1 Mur.) 58, 88 (1805).

424. *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1 919). See also Maier, *supra* note 8, at 81 (noting that the view that the purpose of the corporation was primarily for private profit was accepted in Massachusetts only after 1900).

425. See, e.g., BERLE & MEANS, *supra* note 17, at 127 (“Briefly, the last century has seen the corporate mechanism evolve from an arrangement under which an association of owners controlled their property on terms closely supervised by the state to an arrangement by which many men have delivered contributions of capital into the hands of a centralized control.”).

426. See, e.g., SEAVOY, ORIGINS, *supra* note 8, at 74-76.

427. See, e.g., DODD, *supra* note 8, at 213; see also *supra* discussion accompanying notes 331 to 343.

428. Symons, *supra* note 327, at 689.

429. *Id.* at 688.

430. See, e.g., DODD, *supra* note 8, at 213; SEAVOY, ORIGINS, *supra* note 8, at 76. See also *supra* discussion accompanying notes 341 to 343.

shift in the public perception from serving the public interest to pursuing strictly private profit-seeking goals.<sup>431</sup>

From the second or third decade of the 1800s, manufacturing corporations proliferated. By 1848, in Massachusetts, the average annual number of manufacturing corporation charters had come to greatly exceed that of any other type of business corporation.<sup>432</sup> In the New England states overall, more than two thousand six hundred manufacturing and mining corporations were chartered in the period from 1831 to 1862, representing about forty percent of all corporations chartered.<sup>433</sup> Nationwide, more than seventeen thousand manufacturing corporations were created in the ten years between 1849 and 1859. With the resumption of English imports after 1815 and the rise of well-established domestic industries, the perceived urgency of public purpose of many American manufacturers had waned, so that manufacturing as such no longer seemed vital to public welfare, and manufacturing purposes seemed increasingly profit-oriented in a broad anonymous market.<sup>434</sup> Manufacturing corporations may best illustrate the transition from public service to private gain.<sup>435</sup>

Perhaps the most decisive influence, however, on the changing conception of the American business corporation was the railroad.<sup>436</sup> Beginning in the 1830s, railroads rapidly replaced turnpikes and canals as principal arteries of inland transport.<sup>437</sup> In 1830, there existed thirty miles of railroad track in the United States; by 1860, this number had grown to more than thirty thousand.<sup>438</sup> Investors in railroad shares were no longer local residents, but rather, financial renters of capital. According to Sylla and Wright, about half of all the minimum authorized capital of American business corporations from 1790 to 1860 was for railroads, even though railroads did not begin to attract investment until the late 1820s.<sup>439</sup> “Railroading was the key industry that accelerated industrial growth into the self-sustaining stage.”<sup>440</sup> The expansion of local railroads into large fast-changing interstate systems posed particular problems for state legis-

431. See SEAVOY, ORIGINS, *supra* note 8, at 76 (stating that “with the multiplicity of banks, the franchise relation was obscured”).

432. DODD, *supra* note 8, at 315.

433. *Id.* at 123.

434. SEAVOY, ORIGINS, *supra* note 8, at 74-75; see also Hilt, *Early American Corporations*, *supra* note 8, at 54 (“[M]anufacturing firms . . . were among the least controversial corporations . . . because they served no major public purpose, . . . were perceived to have only localized effects . . . [and] produced . . . [largely] homogenous goods . . .”).

435. SEAVOY, ORIGINS, *supra* note 8, at 74.

436. HORWITZ, *supra* note 8, at 137; see also BERLE & MEANS, *supra* note 17, at 12; Blair, *Locking in Capital*, *supra* note 8, at 442.

437. DODD, *supra* note 8, at 134, 349; SEAVOY, ORIGINS, *supra* note 8, at 213.

438. DODD, *supra* note 8, at 123.

439. Sylla & Wright, *supra* note 8, at 661, 661 tbl.4; see also Avi-Yonah, *supra* note 206, at 793 (noting the “massive amounts” of capital were required with the rise of railroads, steel and oil companies, and other large corporate enterprises).

440. SEAVOY, ORIGINS, *supra* note 8, at 214.

latures, which could not keep up with demand for legislative amendments to special charters every time a route changed or two companies merged.<sup>441</sup> The rise of the railroads increasingly drove fundamental changes to state incorporation law.<sup>442</sup>

Early signs of this transition in corporate purpose are already apparent in the first decades of the nineteenth century. In 1809, in *Currie's Administrators v. The Mutual Assurance Society*, the Virginia Supreme Court of Appeals still advances a solidly eighteenth-century view of the corporation as necessarily having a public purpose. As noted above, in the court's estimation, "merely private or selfish" purposes had "no adequate claim" upon the privilege of incorporation.<sup>443</sup> Importantly, *Currie's Administrators* involved an issue fundamentally similar to the one raised ten years later in *Dartmouth College*. In 1805, the Virginia General Assembly had amended the original 1794 charter of the Mutual Assurance Society, a Virginia mutual fire insurance corporation. Based on the amendment, the corporation levied an assessment on certain members, one of whom challenged the assessment on the grounds, among others, that it was made not under the original charter, but a subsequent amendment without his consent.<sup>444</sup> While the facts of the Virginia case are different from those of *Dartmouth College*,<sup>445</sup> in *Currie's Administrators*, the court expressly declined to recognize the corporation's charter as a contract:

A charter is not a compact between the state and the grantee of the charter. On the part of the state there is no contract express or implied. The state is not bound either to give to, or to receive, to do, or to abstain from doing, any thing. On the part of the society, there is no obligation to the state. On what ground, then, can it be said that there is a contract, when neither of the parties enter into any sort of obligation. The idea is absurd.<sup>446</sup>

To the contrary, the court declared, "the contract is only between the individual subscribers."<sup>447</sup> The charter of incorporation was not a contract, but a "law":

The real character of the act of 1794, is this: it is in truth a charter of incorporation; a grant of certain rights for the benefit of the grantees only; a law authorizing certain persons to become insurers for each other. . . .<sup>448</sup>

441. DODD, *supra* note 8, at 134-35.

442. See, e.g., HORWITZ, *supra* note 8, at 137.

443. *Currie's Adm'rs v. Mut. Assurance Soc'y*, 14 Va. (4 Hen. & M.) 315, at 347-48 (1809).

444. *Id.* at 315-16.

445. The Society's bylaws, adopted under authority of the original act of incorporation of 1794, provided that fourteen directors and a president would manage the Society's business. The General Assembly's amendment in 1805 provided for only three directors, out of whom a president was to be elected. Per the Society's charter, however, the members of the Virginia General Assembly were also, ex officio, the representatives of the unrepresented shareholders of the corporation, so that, in the view of the court, the 1805 amendment was made "at the prayer and application of the incorporated body." *Id.* at 323, 329.

446. *Id.* at 329.

447. *Id.* at 333.

448. *Id.* at 329.

Since the corporate charter was a law rather than a contract, and since—in light of the relevant factual circumstances—the corporation had arguably assented to the 1805 amendment anyway, the Virginia court held that “the Constitution of the *United States* does not prohibit the legislature of a state from changing the fundamental laws of a corporation, with its assent, given in its corporate charter.”<sup>449</sup>

Only ten years later in 1819, from a similar beginning, the U.S. Supreme Court in *Dartmouth College* arrived at a very different conclusion. Chief Justice Marshall’s statement that corporate purposes were inherently public has been noted above.<sup>450</sup> Notwithstanding this statement, Marshall distinguishes “public” from “private” purposes:

This is the point on which the cause essentially depends. If the act of incorporation be a grant of political power, if it create a civil institution, to be employed in the administration of the government, or if the funds of the college be public property, or if the state of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the legislature of the state may act according to its own judgment. . . .

But if this be a private eleemosynary institution, endowed with a capacity to take property, for objects unconnected with the government, whose funds are bestowed by individuals, on the faith of the charter; if the donors have stipulated for the future disposition and management of those funds, in the manner prescribed by themselves, there may be more difficulty in the case. . . .<sup>451</sup>

In his concurring opinion, Justice Story appears to go a step further:

Another division of corporations is into public and private. Public corporations are generally esteemed such as exist for public political purposes only, such as towns, cities, parishes and counties. . . . But a bank, whose stock is owned by private persons, is a private corporation, although it is erected by government, and its objects and operations partake of a public nature. The same doctrine may be affirmed of insurance, canal, bridge and turnpike companies. In all these cases, the uses may, in a certain sense, be called public, but the corporations are private.<sup>452</sup>

Justice Marshall, writing for the Court, famously held that *Dartmouth College*’s charter was a contract, the obligations of which could not be impaired by the New Hampshire legislature without violating the U.S. Constitution.<sup>453</sup> As noted above, the Court’s holding was based on the private nature of the college’s assets rather than its eleemosynary purpose.<sup>454</sup> In eighteenth-century law, no such distinction between public and private law or public and private corporations

449. *Id.* (emphasis added).

450. *See supra* discussion accompanying notes 212 to 216.

451. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 629-30 (1819).

452. *Id.* at 668-69.

453. *Id.* at 650.

454. *Id.* at 661. *See also* Maier, *supra* note 8, at 80; *supra* discussion accompanying notes 212 to 216.

was accepted.<sup>455</sup> Only ten years after *Currie's Administrators*, then, the public/private distinction in *Dartmouth College*, and particularly Justice Story's explicit division of corporations into public and private, therefore appear comparatively novel.<sup>456</sup> As one historian notes:

Armed with Story's concurrence, the *Dartmouth College* decision played a crucial role in the transformation of the corporation from an association of individuals vested with a portion of sovereignty designed to accomplish public service to an association whose corporate status was a promotional device employed by the state to facilitate the pursuit of private goals by private individuals.<sup>457</sup>

That the Court in *Dartmouth College* bases the public/private distinction and the contractual nature of the college's charter on the private status of the corporation's assets, specifically, the funds donated by the college's founder—i.e. the corporation's aggregated capital—seems significant. At its inception in the 1810s, the public/private distinction appears to reflect a new but already widening divide between, on the one hand, public powers, privileges, and obligations, granted by the state through enactment of laws for public purposes, and on the other hand, private resources, organized largely without such public power, privilege, or obligation, to be managed and controlled for private purposes by private contract—in other words, between state power and private property.<sup>458</sup>

The public/private distinction becomes increasingly prominent in other early nineteenth-century cases. In *Taylor v. Griswold* in 1834, the New Jersey Supreme Court, in considering whether a bridge corporation could adopt bylaws providing for voting by proxy and a one-share one-vote rule, appears to have wrestled with the question. The court cited *Dartmouth College* for the proposition that

There is, no doubt, a plain and obvious distinction, important for many purposes, between public and private corporations; between such as are created for political and municipal purposes; and such as are instituted for the government of particular societies, or the management and protection of private property.<sup>459</sup>

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455. Handlin & Handlin, *supra* note 8, at 19; *see also supra* note 211; *supra* discussion accompanying note 9, notes 206 to 208.

456. *See Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 51-52 (1815) (Story, J.) (distinguishing between private and public corporations); Newmyer, *supra* note 212, at 834 (discussing *Terrett*); *see also* DODD, *supra* note 8, at 25 (discussing Story's opinion in *Terrett* as the "earliest judicial affirmation" of the division of corporations into two classes, public and private); Horwitz, *Public/Private Distinction*, *supra* note 212, at 1425 (describing the separation between public and private corporations in *Dartmouth College* as "entirely novel"); Williams, *supra* note 212, at 240 (describing *Dartmouth College* as helping introduce into American constitutional law the "New England [tradition]" of "bifurcat[ing] corporations in particular, and the world in general, into dichotomous public and private spheres").

457. Newmyer, *supra* note 212, at 836; *see also* O'Melinn, *supra* note 206, at 245 (describing the shift from special to general incorporation as "a transfer of sovereignty from the government to the corporation").

458. *See infra* discussion accompanying notes 542 to 544.

459. *Taylor v. Griswold*, 14 N.J.L. 222, 234 (1834).

As in Justice Story's opinion, the public/private distinction—now “plain and obvious”—appears to be based directly on the corporation's purpose rather than its assets. In the “class of private corporations,” the court includes “canal, rail road, bridge, turnpike, banking, manufacturing and trading companies.”<sup>460</sup> The court then appears to retreat from this conclusion, arguing, with Justice Story:

But public good, is the avowed object of all such institutions; and however private property and emolument may be involved, the public have a deep and important interest in the government and success of every one of them. In short, they are all, in an important sense, public institutions. A bank, whose stock is exclusively owned by individuals, is in legal sense, a *private* corporation, but its objects and operations, partake of a public nature, and the same may be affirmed of insurance, canal, bridge, turnpike and rail road companies. *Per Story, Just. 4 Wheat.* 669. If, however, the right of voting by proxy, is to be conceded to banking, insurance and mercantile companies, upon the ground that they are strictly *private corporations*, the same cannot be predicated of bridge, nor perhaps, of canal, turnpike and rail road companies. They certainly partake more of a public nature; and the public have a more direct and immediate interest in their management.<sup>461</sup>

While all corporations are concerned with the public good, banks and insurance companies appear in the court's view to be less public, and more private, than bridges, canals, turnpikes and railroads, since the latter cannot discontinue, but rather, are obligated by their charters to maintain, their operations for the benefit of the public.<sup>462</sup> In the court's thinking, a public/private spectrum is thus beginning to emerge, with political and municipal corporations on the public end, banks and insurance companies on the “strictly” private end, and internal improvement companies in the hybrid middle. Ultimately, the court considers, but declines to follow—at least for purposes of upholding a proxy bylaw—the distinction previously drawn in *State v. Tudor*<sup>463</sup> between incorporated societies “whose object is the acquisition of property” and those which are “instituted for the public good, either for the good of the whole state, or of a particular town or society”:<sup>464</sup>

With all due deference to that very able and learned court, I cannot follow in their steps, in a path so newly trod, and upon a line so undefined and undefinable as the one they have attempted to mark out. In this day of corporations, it is not easy to point out so distinctly, the separating line between such as are created merely for the acquisition of property, and such as are instituted purely for the public good, or the good of a particular district of country, as to render it a safe and certain criterion, by which to determine this question.<sup>465</sup>

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460. *Id.*

461. *Id.*

462. *Id.*; see also Hansmann & Pargendler, *supra* note 8, at 117 (citing *Taylor*, 14 N.J.L. at 234).

463. *State v. Tudor*, 5 Day 329 (Conn. 1812).

464. *Taylor*, 14 N.J.L. at 232 (citing *State*, 5 Day at 333).

465. *Id.* at 232-33, 235.

In 1834, then, the public/private distinction—even though it had become “plain and obvious” since *Dartmouth College*—remained in its specifics “newly trod” and ill-defined.

In *Charles River Bridge* in 1837, the U.S. Supreme Court accepted a largely similar distinction between banks, insurance companies, and manufacturers on the one hand, and internal improvement companies on the other. Some time ago, the Court noted,

[T]he difference was pointed out in argument, between such grants as involve public duties and public matters for the common benefit of the people, and such as are for mere private benefit, involving no such consideration. If a bank, or insurance company, or manufacturing company, is established in any town, by an act of incorporation; no one ever imagined that the corporation was bound to do business, to employ its capital, to manufacture goods, to make insurance. The privilege is a mere private corporate privilege, for the benefit of the stockholders, to be used or not, at their own pleasure; to operate when they please; and to stop when they please. Did any man ever imagine, that he had a right to have a note discounted by a bank, or a policy underwritten by an insurance company? Such grants are always deemed *privati juris*. No indictment lies for a *non-user*. But in cases of ferries and bridges, and other franchises of a like nature (as has been shown), they are affected with a *jus publicum*. Such grants are made for the public accommodation; and pontage and passage are authorized to be levied upon travellers (which can only be by public authority); and in return, the proprietors are bound to keep up all suitable accommodations for travellers, under the penalty of indictment for their neglect.<sup>466</sup>

The Court here draws a bright line between a “mere corporate privilege, for the benefit of the stockholders,” which was private law, and grants to ferries and bridges “made for the public accommodation,” which were affected by a *jus publicum*. Already in 1837, the Court is approaching a clear public/private distinction based primarily on corporate purpose.<sup>467</sup>

In 1852, the public/private distinction was articulated in great detail in a Michigan Supreme Court case. *Swan v. Williams* involved a challenge to a rail-

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466. Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 36 U.S. 420, 639 (1837); see also HOVENKAMP, *supra* note 186, at 57 (citing ANGELL & AMES, *supra* note 62, at 510, on the obligation of the incorporators to fund and build the public improvement contemplated by the charter).

467. See DODD, *supra* note 8, at 161 (noting that the court does not controvert Story’s contention that toll-bridge companies differ substantially from purely private corporations); Horwitz, *Public/Private Distinction*, *supra* note 212, at 134 (“As public service corporations were transformed into private, profit-making organizations, the historic legal categories were no longer practical guides for determining the course of public policy.”); *id.* at 136 (“This recognition of the private nature of business corporations goes as far back as the *Dartmouth College* decision and reflects the changing nature of economic relationships.”); Wells, *Shareholder Power*, *supra* note 8, at 1043 (stating that in the 1830s, only a blurry line existed between business and other kinds of corporations, until sharper legal distinctions were drawn in the 1840s and 1850s).

road taking by eminent domain.<sup>468</sup> In upholding the railroad's taking, the court declares it "most certain" that "three grand classes of corporations exist":<sup>469</sup>

1<sup>st</sup>. Political or municipal corporations, such as counties, towns, cities and villages, which, from their nature, are subject to the unlimited control of the Legislature; 2d. Those associations which are created for *public benefit*, and to which the government delegates a portion of its sovereign power, to be exercised for public utility, such as turnpike, bridge, canal, and railroad companies; and 3d. *strictly private corporations*, where the *private interest* of the corporators is the primary object of the association, such as banking, insurance, manufacturing and trading companies; and in this class may also be included eleemosynary corporations, generally. . . . The *object*, defines the *character* of these associations. . . .

The object of *strictly private associations* is to aggregate the capital, the talents, and the skills of individuals, to foster industry and encourage the arts. Private advantage is the ultimate, as well as the immediate object of their creation, and such as results to the public is incidental. . . .

But the object and the origin of that class of corporations represented by the defendants in this case, and which might with far more propriety be styled *public* rather than *private* corporations, are of an altogether different nature and character. Their very existence is based upon the delegation to them of the sovereign power to take private property for public use, and upon the continued exercise of that power in the use of the property for the purposes for which it was condemned. . . . That private property can be taken by the government from one and bestowed upon another for private use, will not for a moment be contended, and these corporations can be sustained only upon the assumption that the powers delegated, are to a public agent, to work out a public use. . . .

Nor can it be said that the property when taken is not used by the public, but by the corporators for their own profit and advantage. It is unquestionably true that these enterprises may be, and probably always are, undertaken with a view to private emolument on the part of the corporators, but it is none the less true that the object of the government in creating them is public utility, and that private benefit, instead of being the occasion of the grant, is but the reward springing from the service.<sup>470</sup>

For our purposes, this opinion is remarkable in several ways. First, the court has moved decisively away from the rationale of *Dartmouth College*; it is no longer the source of the assets of the corporation, but expressly the corporate "object"—i.e. its purpose—that defines the corporation's character. Second, based on the types of corporate purposes then existing, the implicit three-part spectrum of *Taylor v. Griswold* has been made explicit, with municipal corporations at the wholly public end, internal improvement companies created "for public benefit" (for the time being still including railroads) in the middle, and banking, insurance, manufacturing, trading, and eleemosynary corporations at

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468. *Swan v. Williams*, 2 Mich. 427 (1852); see also DODD, *supra* note 8, at 159.

469. *Swan*, 2 Mich. at 434; see also DODD, *supra* note 8, at 159.

470. *Swan*, 2 Mich. at 434-35 (emphasis in original); see also DODD, *supra* note 8, at 161 (citing *Swan*).

the “strictly private” end.<sup>471</sup> Third, banking, insurance, and manufacturing corporations have lost all meaningful trace of the public purpose with which they were formerly seen to be endowed; their purpose is now only “private advantage,” and any public benefit is “incidental.”<sup>472</sup> Conversely, the pursuit of “private emolument” does not render railroads and other internal improvement companies private; rather, their purpose is public utility, and any private benefit received is merely “the reward springing from the service”—the “quid pro quo” of Angell and Ames.<sup>473</sup> Finally, it may be observed that as the antebellum American economy developed and the internal improvement companies faded away, the two segments that remained in the spectrum of corporate purpose—wholly public and strictly private, at opposite ends—increasingly resembled the conventional binary universe of the twentieth century, consisting of nonprofit and for-profit corporations with nothing in between.

Similar developments are reflected in American corporation law treatises of the time. James Kent, in his *Commentaries* of 1827, applies largely the same corporate taxonomy as Coke, Blackstone and Kyd before him, classifying corporations into aggregate and sole, ecclesiastical and lay, and within the latter, eleemosynary and civil.<sup>474</sup> But unlike his English predecessors, Kent further divides civil corporations into public and private, perhaps not surprisingly along the same general lines as in *Dartmouth College*:

Civil corporations are established for a variety of purposes, and they are either public or private. Public corporations, are such as exist for political purposes only, such as counties, cities, towns, and villages. They are founded by the government, for public purposes, and the whole interest in them belongs to the public. But if the foundation be private, the corporation is private, however extensive the uses may be to which it is devoted by the founder, or by the nature of the institution. A bank, created by the government, for its own uses, and where the stock is exclusively owned by the government, is a public corporation. . . . But a bank, whose stock is owned by private persons, is a private corporation, though its objects and operations partake of a public nature. The same thing may be said of insurance, canal, bridge and turnpike companies. The uses may, in a certain sense, be called public, but the corporations are private. . . .<sup>475</sup>

Kent’s distinction in 1827 does not advance much further, however: in banking, insurance, and internal improvement corporations, public and private purposes still coincide.<sup>476</sup>

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471. Eleemosynary corporations also remain, somewhat anomalously, in the “strictly private” category, apparently out of deference to *Dartmouth College*.

472. See DODD, *supra* note 8, at 160 (noting that the strictly private character of the incorporated manufacturing or insurance company had become well-established in mid-nineteenth century thinking).

473. See *supra* discussion accompanying note 191.

474. See *supra* discussion accompanying notes 51 to 74.

475. KENT, *supra* note 198, at 304-06; see Newmyer, *supra* note 212, at 838 (observing that Story’s distinction was presented as established law in KENT, *supra* note 198).

476. See DODD, *supra* note 8, at 24; Blair, *Locking in Capital*, *supra* note 8, at 424.

Only five years later in 1832, however, Angell and Ames, in their *Treatise on the Law of Private Corporations Aggregate*—the first American legal treatise dedicated to corporate law—appear to demonstrate in the course of their own work the transformation in American thinking on corporate purpose. They begin their “Introduction” by reciting a fairly standard late eighteenth-century view of corporate purpose as inherently public, even if accompanied by private gain:

The object in creating a corporation is, in fact, to gain the union, contribution and assistance of several persons for the successful promotion of some design of public utility, though the corporation may, at the same time, be established for the advantage of those who are members of it. The principle is. . .that the design of a corporation is to provide for some good that is useful to the public.<sup>477</sup>

In their first chapter on “Meaning, Several Kinds, and History of Private Corporations,” they proceed to lay out the rule of *Dartmouth College*:

The main distinction between public and private corporation is, that over the former, the legislature, as the trustee or guardian of the public interest, has the exclusive and unrestrained control. . . . Such institutions are the auxiliaries of the government in the important business of municipal rule. . . . Private corporations, on the other hand, are created by an act of the legislature, which, in connection with its acceptance, is regarded as a compact, and one which, so long as the body corporate faithfully observes, the legislature is constitutionally restrained from impairing. . . .<sup>478</sup>

Only a page later, however, perhaps building on Justice Story, they then draw a sharp distinction between public and private corporate purposes:

Private corporations are indisputably the creatures of public policy, and, in the popular meaning of the term, may be called public; but yet, if the whole interest does not belong to the government (as if the corporation is created for the administration of civil or municipal power), the corporation is private. A bank, for instance, may be created by the government for its own uses; but, if the stock is owned by private persons, it is a private corporation, although it is erected by the sanction of public authority, and its objects and operations partake of a public nature. Railroads are private corporations, and “generally speaking,” say the court. . . . “public corporations are towns, cities, counties, parishes, existing for public purposes; private corporations are for banks, insurance, roads, canals, bridges, &c., where the stock is owned by individuals, but their use may be public.” In all the last named, and other like corporations, the acts done by them are done with a view to their own interest, and if thereby they incidentally promote that of the public, it cannot reasonably be supposed that they do it from any spirit of liberality they have beyond that of their fellow citizens. Both the property and the sole object

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477. ANGELL & AMES, *supra* note 62, at 7-8; *see also* Maier, *supra* note 8, at 80-81 (citing this principle as evidence that the assumption that the corporation served some public good outlived the 1830s).

478. ANGELL & AMES, *supra* note 62, at 21-22 (citing *Dartmouth College*).

of every such corporation are essentially private, and from them the individuals composing the company corporate are to derive profit.<sup>479</sup>

Initially, the spectrum of corporate purpose in this passage also appears to be tripartite—as it does thereafter in *Taylor v. Griswold* and *Swan v. Williams*—with municipal corporations at the public end, private corporations existing for a “public use” in the middle, and profit-seeking private corporations at the private end. Upon closer examination, however, the distinction here between private corporations whose “use may be public” and strictly private corporations arguably collapses. Private corporations with a “public use” cannot be said to have a public “purpose”; indeed, the acts done by them are “with a view to their own interest.” Any benefit to the public is incidental, rather than from “any spirit of liberality,” and the “sole object” of every such corporation is ultimately to derive profit. As early as 1832, then, Angell and Ames seem to be approaching the modern bright-line divide between public or “nonprofit” corporations and private “for-profit” firms.

Perhaps nowhere was the transformation in the American understanding of corporate purpose more clearly reflected than in the shift from special to general incorporation in the 1840s and 1850s. The advent of general incorporation has been described as “perhaps the major event” in American corporation law in the second half of the nineteenth century.<sup>480</sup> General incorporation constituted a sea change from the early years of the business corporation. To incorporate, political influence, and a special act of the (increasingly overburdened) state legislature, were no longer required; grants of public or quasi-public powers from the state to the incorporators were no longer presumed; public utility was no longer the implicit purpose of the corporation; and private profit was no longer a “reward” for public service, but a legitimate end in its own right. With general incorporation, the purpose of the corporation had arguably privatized.<sup>481</sup> General incorporation statutes typically allowed a small number of individuals to self-incorporate for any purpose allowed under the statute.<sup>482</sup> All that was required was generally to file with a state government office and record a certificate.<sup>483</sup> Incorporation became a routine and inexpensive procedure outside the

479. *Id.* at 25-26; *see also* Newmyer, *supra* note 212, at 838 (“Story’s definition was accepted as a starting point . . . [by Angell and Ames], the standard work on corporate law for the period.”).

480. *See, e.g.*, FRIEDMAN, *supra* note 8, at 512 (describing the advent of general incorporation as perhaps the major event in corporation law 1850-1900); BERLE & MEANS, *supra* note 17, at 137 (describing the changes brought about by general incorporation “revolutionary in corporation law”); O’Melinn, *supra* note 205, at 244 (stating that the shift from special to general corporation “brought about a change in the fundamental theory under which incorporation was granted”).

481. Hilt, *Open Access*, *supra* note 8, at 1.

482. *See, e.g.*, SEAVOY, ORIGINS, *supra* note 8 at 65 (discussing the New York act of 1811).

483. Hilt, *Open Access*, *supra* note 8, at 1; *but see* Wells, *Shareholder Power*, *supra* note 8 at 1059 (noting the ways in which general incorporation laws continued to restrict corporations); Lamoreaux & Novak, *supra* note 487, at 12 (“most early general incorporation laws were full of regulations that imposed strict limits on what corporations could do, how big they could grow, how long they could last, and what forms their internal governance could take.”).

realm of political influence.<sup>484</sup> In Jacksonian fashion, general incorporation statutes made the opportunity to participate in business corporations with limited liability available on a broadly democratic basis.<sup>485</sup>

The earliest general incorporation acts were for charitable and religious corporations.<sup>486</sup> General incorporation acts for business corporations were modelled directly on such charitable and religious precedents.<sup>487</sup> The first general incorporation act for business corporations appears to have been the Massachusetts Aqueduct Act of 1799.<sup>488</sup> New York enacted the first general incorporation act for manufacturing companies in 1811.<sup>489</sup> Massachusetts followed suit in 1830,<sup>490</sup> Pennsylvania in 1836,<sup>491</sup> and Connecticut in 1837.<sup>492</sup> New York adopted a general incorporation act for railroads in 1848<sup>493</sup> and Massachusetts in 1851 for banks.<sup>494</sup> Enactment of general incorporation statutes for a wide variety of business corporations accelerated nationwide in the 1840s and 1850s.<sup>495</sup> By 1859, twenty-four of thirty-eight states, and by 1875, forty-four of forty-seven states or territories, offered general incorporation.<sup>496</sup>

484. *Id.*

485. SEAVOY, ORIGINS, *supra* note 8, at 182; Hamill, *supra* note 8, at 103; Hilt, *Early American Corporations*, *supra* note 8 at 38; Hilt, *Open Access*, *supra* note 8, at 12; *see also* SEAVOY, ORIGINS, *supra* note 8, at 258.

486. DAVIS, *supra* note 8, at 16-17 (citations omitted).

487. SEAVOY, ORIGINS, *supra* note 8, at 64; Lamoreaux and Novak, *supra* note 483, 1, 10. The term “trustee” in the New York act of 1811 was borrowed from the 1784 general incorporation act for religious congregations. *Id.* at 65. *See also* Seavoy, *Public Service Origins*, *supra* note 8, at 38 (observing that the 1784 New York statute “was designed to prevent political interference in an activity (religious worship) that a large portion of the population considered a matter of private concern,” and that the same pattern was repeated with general incorporation statutes for business corporations in the 1840s and 1850s); Hilt, *Open Access*, *supra* note 8 at (manuscript at 6).

488. DODD, *supra* note 8, at 264.

489. Hamill, *supra* note 8, at 101; Seavoy, *Laws to Encourage Manufacturing*, *supra* note 8, at 90; Lamoreaux & Novak, *supra* note 483, at 12; *see also* Seavoy, ORIGINS, *supra* note 8, at 64-65; Hilt, *Open Access*, *supra* note 8 (manuscript at 6-7).

490. DODD, *supra* note 8, at 310.

491. Hamill, *supra* note 8, at 314. n.22 (“Pennsylvania . . . did not have a general manufacturing corporations act of importance until 1849 . . .”).

492. Hamill, *supra* note 8, at 101; *see also* Lamoreaux & Novak, *Corporations and American Democracy: An Introduction*, *supra* note 487, at 12 (noting that by 1850, fourteen states, and by 1860, twenty-seven states had adopted general incorporation statutes for manufacturing); BERLE & MEANS, *supra* note 17, at 136 (characterizing the Connecticut statute, which permitted incorporation “for any lawful business,” as “the first really modern type of statute”).

493. SEAVOY, ORIGINS, *supra* note 8, at 201.

494. DODD, *supra* note 8, at 284 n.65; *see also* Hilt, *Early American Corporations*, *supra* note 8, at 39 n. 9, (commencing on New York’s general incorporation law of 1838 for banks).

495. Hilt, *Open Access*, *supra* note 8, at 5; *see also* SEAVOY, ORIGINS, *supra* note 8, at 191-192 (listing the general incorporation statutes passed from 1847 to 1855); SEAVOY, ORIGINS, *supra* note 8, at 265.

496. Hamill, *From Special Privilege to General Utility*, *supra* note 8, at 103, 105. *See generally* HOVENKAMP, ENTERPRISE AND AMERICAN LAW, *supra* note 186.

At the same time, state legislatures gradually withdrew from direct involvement in private corporations, particularly those such as manufacturing that lacked an obvious public purpose.<sup>497</sup> After about 1840, state governments refused to participate in further internal improvement company projects.<sup>498</sup> Many states affirmatively prohibited direct investment in private enterprise; by 1874, sixteen state constitutions provided that the state could not own stock in private corporations, and in twenty states, providing state credit to corporations was banned.<sup>499</sup> Many states with general incorporation statutes no longer allowed special charters.<sup>500</sup> In New York, for example, a new state constitution was adopted in 1846 that in most circumstances prohibited special charters and forbade the state to lend its credit to any corporation or individual.<sup>501</sup> The effect of these provisions, notes Ronald Seavoy, was to reverse New York's earlier state policy of encouraging internal improvement projects and to complete "the radical separation of the state government from all business corporations."<sup>502</sup>

Governance of business corporations gradually aligned with the new private corporate purpose.<sup>503</sup> Statutory limits on corporate capital and duration and other restrictions eroded.<sup>504</sup> Limited liability for shareholders became the general rule, even for manufacturing corporations with no public purpose, after about 1830.<sup>505</sup> In the 1840s and 1850s, graduated voting became increasingly rare, and by the 1880s, one-share, one-vote—Colleen Dunlavy's "plutocratic voting"—became the norm.<sup>506</sup> General incorporation laws typically specified one vote per share.<sup>507</sup> A Massachusetts act of 1848 allowed for the first time for the issuance of a senior class of shares;<sup>508</sup> another Massachusetts statute in 1851

497. Wells, *supra* note 8, at 1043 (citations omitted). *See generally* BERLE & MEANS, *supra* note 17 at 141 ff.

498. SEAVOY, ORIGINS, *supra* note 8 at 180, 181. *See also* Smythe, *supra* note 178, at 1418 ("As the nineteenth century proceeded, state and local governments increasingly began to displace franchise corporations as the providers of local infrastructure.")

499. FRIEDMAN, *supra* note 8, at 512-13.

500. FRIEDMAN, *supra* note 8, at 512; Hamill, *supra* note 8, at 123.

501. SEAVOY, ORIGINS, *supra* note 8, at 182-183; Hamill, *From Special Privilege to General Utility*, *supra* note 8, at 125.

502. SEAVOY, ORIGINS, *supra* note 8, at 183, 266-267.

503. *See generally* BERLE & MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY, *supra* 17, at 138 ff.; Wells, *Shareholder Power*, *supra* note 8, at 1053 ff.; *but see* Lamoreaux & Novak, *Corporations and American Democracy: An Introduction*, *supra* note 487 at 12 ("most early general incorporation laws were full of regulations that imposed strict limits on what corporations could do, how big they could grow, how long they could last, and what forms their internal governance could take.")

504. Maier, *supra* note 8, at 80.

505. *See, e.g.*, Massachusetts Manufacturing Corporation Act, ch. 53, 1831 Mass. Acts 325 (1830); ANGELL & AMES, *supra* note 62, at 34.

506. Dunlavy, *From Citizens to Plutocrats*, *supra* note 384 at 79, 82; Wells, *Shareholder Power*, *supra* note 8 at 1050.

507. Wells, *supra* note 8, at 1050-1; Hansmann & Pargendler, *supra* note 8, at 970.

508. DODD, *supra* note 8, at 335.

authorized the first issuance of railroad bonds;<sup>509</sup> and in 1855 the Massachusetts legislature authorized Massachusetts corporations to carry on business outside the state.<sup>510</sup> Further liberalization of corporate charters followed.<sup>511</sup>

By 1860, the stage had been set for the advent of the modern profit-maximizing firm. The corporation had become the business organization of choice not just for manufacturing enterprises, but for all enterprises.<sup>512</sup> With general incorporation, “[m]ore business corporations were organized in the decade of the 1850s than during the whole previous history of business corporations in the United States.”<sup>513</sup> The most visible interstate business corporations were railroads, followed by banks and textile manufactories.<sup>514</sup> “Late nineteenth-century railroads came to be seen as the paradigm of the modern, large-scale business corporation requiring massive amounts of capital, specialized management, and dispersed ownership.”<sup>515</sup> The purpose of the corporation was increasingly understood to be private and pecuniary, until in 1919, in a case about a manufacturing company not paying dividends, the Michigan Supreme Court famously declared, as if it had always been true, that “[a] business corporation is organized and carried on primarily for the profit of the stockholders.”<sup>516</sup>

#### V. CONCLUSIONS.

I have argued in this Article that three distinct periods may be discerned in the history of the early American corporation: (i) what I call the pre-corporate period prior to about 1780, when corporations in England and the American colonies were rare and served as an all-purpose vehicle for associations of any kind, whether municipal, religious, charitable, educational, or pecuniary; (ii) a second period from 1780 to the 1830s, particularly in New England, marked by the rapid and unprecedented rise of the American business corporation in the form of specially chartered turnpike, bridge, canal, early railroad, early banking, and early manufacturing corporations, whose purposes were all understood to be fundamentally public, with public powers granted by the state for the purpose of building urgently needed local transportation and finance infrastructure, and private gain (if any) to investors only incidental; and (iii) a third period beginning in the 1820s and continuing beyond 1860, particularly in manufactur-

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509. *Id.* at 337.

510. *Id.* at 324.

511. *See generally* BERLE & MEANS, *supra* note 18.

512. Hamill, *supra* note 8, at 103 (citation omitted).

513. SEAVOY, ORIGINS, *supra* note 8 at 249.

514. SEAVOY, ORIGINS, *supra* note 8 at 249.

515. Hansmann & Pargendler, *The Evolution of Shareholder Voting Rights*, *supra* note 8, at 122; Blair, *Locking in Capital*, *supra* note 8, at 442 (citing ALFRED D. CHANDLER, JR., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* 41 (1977)).

516. Dodge, 170 N.W. at 684. *See infra* discussion Part III.

ing, railroads and banking, during which the private corporation emerged, which was chartered under a general incorporation statute, and whose purpose was almost wholly pecuniary return on investment to the corporation's shareholders, with any benefit to the public only incidental.<sup>517</sup> These last corporations were the immediate forerunners of the profit-maximizing modern firm.

What, then, does this brief history tell us about the purpose of the corporation? First, I would argue, this history demonstrates that the essential or intrinsic characteristics of the American business corporation are only two: (i) separate legal personality<sup>518</sup> and (ii) the ability to aggregate financial and informational capital.<sup>519</sup> From the earliest days of the common law corporation, the ability of the corporate form to outlive its members and to aggregate economic and informational assets in an enduring vehicle have been recognized by commentators, courts, investors and entrepreneurs alike.<sup>520</sup> These two characteristics

517. See Reuven Avi-Yonah, *The Cyclical Transformation of the Corporate Form*, *supra* note 206, at 770-771 (outlining four major transformations in the corporation since the Roman era). My second and third periods would be sub-components of Professor Avi-Yonah's second transformation.

518. See Blair, *Reforming Corporate Governance*, *supra* note 8, at 21 ("I regard legal separateness as the singular accomplishment of corporate law, the characteristic that provided the benefit business organizers so eagerly sought."). Other traditional characteristics of the corporation such as perpetual succession, the ability to sue and be sued, the power to make bylaws, and the right to have a seal arguably flow from, and are only incidents or elaborations of, separate legal personality.

519. On informational and organizational capital, see generally Blair, *Locking in Capital*, *supra* note 8, at 393 (creation of a governance mechanism or "organizational capabilities" as a second critical contribution of corporation law as it evolved in the nineteenth century) (citation omitted); Alfred D. Chandler, *Organizational Capabilities and the Economic History of the Industrial Enterprise*, 6 J. ECON. PERSP. 79, 79 (1992) (identifying four attributes of the firm: a legal entity, an administrative entity, a "pool of physical facilities, learned skills and liquid capital," and the primary instrument for the production and distribution of goods and services and for planning and allocation for future production and distribution); and R.H. Coase, *The Nature of the Firm*, 4 ECONOMIC 386 (1937).

520. See, e.g., COKE ON LITTLETON, *supra* note 25, at \*250a; 1 Blackstone, *supra* note 25, at 475; 1 KYD, *supra* note 25, at 10; ANGELL & AMES, *supra* note 62, at 92, 120, 121; KENT, *supra* note 202, at 219, 224; Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518 at 636; FRIEDMAN, *supra* note 8, at 198 (discussing "the concept of the corporation as an occasion for aggregating capital toward a single venture or purpose"); HURST, *supra* note 8, at 25 ("capacity for indefinite life, uninterrupted by change of shareholders, was an enterprise-continuity value peculiar to the corporate form") and 26 ("from the outset, the corporation was an instrument to provide firm central direction for the enterprising use of pooled assets"); Seavoy, *Public Service Origins*, *supra* note 8, at 31 ("[t]he principal advantages of incorporation were the right to own real property in the name of an organization that had a perpetual legal existence and to defend this property at law"); Hamill, *supra* note 8, at 91 ("At that time, the principal legal benefits offered by the corporation. . . revolved around the corporation's ability to exist beyond the natural life of the shareholders, to pool large amounts of capital, and to own property.") (citation omitted); DAVIS, *ESSAYS IN THE EARLIER HISTORY OF CORPORATIONS IV* *supra* note 8, at 283 (discussing "[t]he advantages in the raising of capital and the greater possibility of continuous life"); Blair, *Locking in Capital*, *supra* note 8, at 387, 389, 413 ("The central hypothesis of this Article is that demand for the corporate form surged in the mid-nineteenth century United States because this form of entity uniquely facilitated the establishment of lasting enterprises that could accumulate substantial enterprise-specific physical assets, and form extensive specialized organizational structures."); HERBERT HOVENKAMP,

were vital to virtually all corporations in the period from 1780 to 1860 without regard to their particular corporate purpose. Furthermore, contrary to the standard view, as Oscar and Mary Handlin have argued, a third characteristic—limited liability for shareholders—was not clearly among the key attributes of the early American corporation.<sup>521</sup> As discussed above, manufacturing corporations in Massachusetts—in which “the birth of the American business corporation” may be located<sup>522</sup>—were governed in their formative period from 1809 to 1830 by a statute that expressly provided for *unlimited* shareholder liability.<sup>523</sup> The establishment of limited liability as a standard corporate characteristic after 1830 should perhaps be seen less as a precondition than a consequence of the success of manufacturing and other pecuniary corporations.<sup>524</sup> Beyond these two enduring characteristics (separate legal personality and the ability to aggregate capital), I would argue that the corporation per se has no inherent purpose, least of all an obligation to maximize—or for that matter, to prohibit private inurement of—corporate profits to shareholders.<sup>525</sup>

I accordingly conclude that the profit maximization doctrine, pursuant to which corporate directors today are held to have a fiduciary duty to maximize profits to shareholders, is merely a historical development, and not an intrinsic or indispensable characteristic of the for-profit corporation.<sup>526</sup> For at least the

ENTERPRISE AND AMERICAN LAW, *supra* note 186, at 12 (“[T]he corporation became nothing more than a device for assembling large amounts of capital so it could be controlled efficiently by a few managers.”); MAYER, *supra* note 8, at 82; and Gower, *Some Contrasts Between British and American Corporation Law*, *supra* note 42, at 1375. As a linguistic matter, the corporation is a body (*corpus*) in need of a head (*caput*, the root of “capital” – “pertaining to the head”). THE OXFORD DICTIONARY OF ENGLISH ETYMOLOGY, ed. C.T. Onions (Oxford University Press: 1966) 143.

521. Handlin & Handlin, *supra* note 8, at 2, 21, 22; Blair, *Locking in Capital*, *supra* note 8, at 437-38; Arner, *supra* note 8, at 45-46 (discussing Handlins).

522. Handlin & Handlin, *supra* note 8, at 22.

523. See, e.g., Blair, *Locking in Capital*, *supra* note 8 at 437 ff.; see also discussion *supra* accompanying notes 409 to 416.

524. The topic of limited liability in early American business corporations is beyond the scope of this Article. For now, in addition to the Massachusetts 1809 statute, other important differences from today’s concept of limited liability may be noted: (i) subscriptions for shares were not generally paid in up front, but rather, only when assessed, so that shareholders even with limited liability remained liable for unpaid amounts on their shares; (ii) even after 1830 in Massachusetts and other states, limited liability was available only after all shareholder had been capital fully paid in and a certificate filed to that effect; (iii) there were initially no limitations on the corporation’s ability to assess shareholders for more capital, and it was also not clear that creditors could not compel a corporate assessment for the purpose of paying out a corporate debt to creditors; (iv) shareholders were typically liable for double the amount of their shares in some industries; and (v) shareholders had unlimited liability for particular kinds of debts. See, e.g., Handlin & Handlin, *supra* note 8, at 8 ff.; Blair, *Locking in Capital*, *supra* note 8 at 437 ff.; Mahoney, *Contract or Concession?*, *supra* note 42, at 893 (“Limited liability. . . never mattered much in a world without products liability, class actions, and other twentieth-century legal innovations.”).

525. Obligations may of course be imposed by statute, but – assuming the demise of the ultra vires doctrine – I contend that such statutory obligations are not intrinsic to the corporate form.

526. See Guenther, *supra* note 3, at 427 (analyzing the profit maximization doctrine in American corporation law today).

first fifty years of the American business corporation's existence, no such doctrine existed. Thousands of business corporations were organized and operated in the United States for avowedly public purposes and public benefits, as well as private profits, without conceiving of any such duty to maximize such private profits. The purposes of these corporations were set forth in their charters and upheld for many decades with regularity by American courts.<sup>527</sup> Indeed, according to Merrick Dodd, before 1830, there does not appear to have been a single case "in which the principles of fiduciary law were applied to the directors or officers of business corporations."<sup>528</sup>

To be clear, this is by no means to say that a fiduciary duty to maximize profits cannot or should not be applied to directors and officers of for-profit corporations—only that it *need* not be so applied, and for long periods *was not* applied, presumably because no one considered it applicable or important. Rather, directors' fiduciary duty to maximize profits arose only gradually over the course of the nineteenth century as business conditions changed, most notably in the context of large capital-intensive manufacturing corporations, whose shareholders—numerous, dispersed, de-localized, and largely anonymous, in sharp contrast to the resident farmers and merchants who hoped primarily to benefit from a new turnpike or railroad in their immediate locale—understood themselves to be renters of capital, interested primarily, if not exclusively, in profits. The profit-maximization doctrine arose only late in what I have called the third period of the American corporation.

This Article is not intended as a normative critique of profit-maximization as a corporate purpose. Businesses change, and corporation law must change with them, and if shareholders' purpose in investing in a business corporation is to maximize the dividends on their shares, then, I would argue, the corporate directors should, indeed *must*, remain loyal to that (perfectly legitimate) corporate purpose. By the same token, however, if investors' purpose is not primarily maximization of profits, but—in addition to some measure of profit—a public or social or environmental benefit of some kind, I would argue based on this history that there is nothing inherent in the American business corporation, not in 1800 and not today, to make that shareholder purpose unlawful.<sup>529</sup> If, as a

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527. See, e.g., *supra* discussion accompanying notes 253 to 255.

528. DODD, *supra* note 8, at 70; Harwell, *supra* note 8, at 1047 (citing Dodd). See also D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. at 296 ("[T]he shareholder primacy norm was not developed by courts until the 1830s.") (1998). For a broader critique of the application of the profit-maximization view to early nineteenth-century American corporations, see William J. Novak, *Public Economy and The Well-Ordered Market: Law and Economic Regulation in 19<sup>th</sup>-Century America*, 18 L. & SOCIAL INQ. 1 (1993).

529. See Guenther, *The Strange Case of the Missing Doctrine*, *supra* note 3. See also Hilt, *Early American Corporations*, *supra* note 8, at 40 (discussing critics of modern corporations who have claimed that "the legal regime of the early American republic forced early corporations to serve the public good and offers a model that should be reintroduced today to restrain corporate power.") (citation omitted). The focus of this Article is not on reintroduction of the early American model by U.S. state legislatures, but rather, on the freedom of corporate shareholders to choose such a model for themselves, without compulsion or prohibition by the state. *But see* Avi-Yonah, *The*

matter of law, the purpose of the American business corporation can change, then the purpose of the American business corporation can change. If that purpose can shift from public to private, it can also shift back. The American corporation is a remarkably effective and maneuverable vehicle; like most vehicles, it does not come with a built-in destination. It will move in whatever direction the directors, at the behest of shareholders, point it. If that direction is unlawful, so be it—the drivers should be liable. But plaintiffs should not be heard to claim that the unlawfulness arises from the nature of the corporation itself, any more than one should receive a traffic ticket for driving the wrong direction on the grounds that the one-way obligation, while not a rule of the road, is built into the vehicle. As long as the driver obeys the posted traffic laws, driving the vehicle in any direction on the compass should not be held to constitute an unlawful act “beyond the powers” of the driver.<sup>530</sup> With respect to corporate purpose, the doctrine of ultra vires should be declared—or redeclared, or certified by the applicable legal coroner—to be permanently and truly dead.<sup>531</sup> Given sufficient manifestation of shareholder intent in the corporate charter, American courts should uphold non-profit maximizing purposes of American business corporations.

Based on this brief history, I also conclude that many social enterprises today strongly resemble early American business corporations, particularly internal improvement companies in the hybrid middle. Many social enterprises today are using business corporations—“for-profits” with “nonprofit” missions, or nonprofits using for-profit tools to be sustainable—in the same ways, for the same reasons, and with the same corporate purposes as early American entrepreneurs.<sup>532</sup> Social enterprises today are typically organized to pursue some so-

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*Cyclical Transformation of the Corporate Form*, *supra* note 206, at 768 (2005) (“Thus, an important question arises: given that corporations are frequently in the best position to help human development, should they be *permitted* to do so when there is no clear benefit for their shareholders? This is a question which has been frequently addressed by academics in the last half century, and overwhelmingly they have answered in the negative.”).

530. Cf. *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1; see also Lyman P.Q. Johnson, *Unsettledness in Delaware Corporate Law: Business Judgment Rule, Corporate Purpose*, 38 DEL. J. CORP. L. 405, (“In effect, in eBay the crafty investor was fortuitously saved by a modern rendition of the slumbering ultra vires doctrine.”) (citation omitted); Guenther, *supra* note 3 at 479 (arguing that the holding in *eBay* is best understood as a version of the ultra vires doctrine).

531. On the ostensible demise of the ultra vires doctrine, see Guenther, *supra* note 3 at 445 ff.

532. This statement is based in part on the author’s experience as the Director of the International Transactions Clinic at the University of Michigan Law School working with social enterprises operating in Africa, India, Latin America and other jurisdictions outside the United States. See, e.g., David Guenther, *Doing Good by Doing Deals: How Law Students Help Social Entrepreneurs Help Small Farmers*, NEXT BILLION (Nov. 7, 2016), <https://nextbillion.net/doing-good-by-doing-deals-how-law-students-help-social-entrepreneurs-help-small-farmers/>; David Guenther & David W. Koch, *International Microfranchising: The International Transactions Clinic’s Experience*, MICH. B.J., Oct. 2017, at 34-38; Lori Atherton, *Michigan Law Student-Attorneys Gain Transactional Experience in Ethiopia*, UNIVERSITY OF MICHIGAN (May 30, 2019), <https://www.law.umich.edu/newsandinfo/features/Pages/Michigan-Law-Student-Attorneys-Gain->

cial, environmental, or other public purpose; in many parts of the world, those purposes revolve around building or improving local transportation, financial, agricultural, healthcare, energy, and other urgently needed economic infrastructure; social enterprises are frequently active in developing economies where local governments do not have tax revenues, civil servants, or expertise to undertake such projects themselves; and social entrepreneurs and their shareholders—while nonetheless pursuing financial returns to be sustainable or even for personal gain—are frequently more interested in the public benefit they can thus create, i.e., the firm’s output, than its profits.<sup>533</sup> Rather than being seen in today’s corporation law as controversial outliers, whose directors are potentially liable for violating their fiduciary duties to shareholders, or which need special new statutes to authorize their public purposes to avoid such liability, social enterprises today should be understood to stand squarely within the historical and legal traditions of the American business corporation. No change in American corporation law should be required. The proliferation of manufacturing and other pecuniary corporations in the nineteenth century did not thereby effectuate a ban on earlier internal improvement corporations, nor, and as I have argued elsewhere, did the rise of the profit-maximization doctrine prohibit business corporations from having a public purpose.<sup>534</sup>

I therefore suggest that the plethora of new statutes enacted since 2008 in jurisdictions across the United States and, increasingly, Europe creating new forms of legal entity—benefit corporations, low-profit limited liability companies, flexible purpose corporations, social purpose corporations, and so forth—are unnecessary.<sup>535</sup> These new statutes resemble nothing so much as the early nineteenth-century regulatory statutes adopted as precursors to general incorporation laws.<sup>536</sup> These nineteenth-century regulatory statutes were incorporated as a kind of legislative shorthand into the charters of all corporations specially organized in a particular industry and prescribed standard terms relating to capi-

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Transactional-Experience-in-Ethiopia\_053019.aspx. See generally Acha Leke & Saf Yeboah-Amankwah, *Africa: A Crucible for Creativity*, HARV. BUS. REV. (Nov. – Dec. 2018) at 116-25.

533. Hansmann & Pargendler, *supra* note 8, at 112; see *supra* discussion accompanying notes 239 to 376.

534. Guenther, *supra* note 3.

535. See, e.g., the Vermont Low-Profit Limited Liability Companies Act, H.0775, 2007-08 Leg. Sess. (Vt. 2008) (enacted), codified at Vt. Stat. Ann. § 3001(27) (LexisNexis Supp. 2010); the Maryland Benefit Corporation Act of Apr. 13, 2010, ch. 97, 2010 MD. LAWS 980, (codified as amended at MD Code, Corps. & Ass’ns §§ 5-6C-01-08 (2012)); [https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000005&cite=DESTT8S361&originatingDoc=I66a98febfb3b11e79bf099c0ee06c731&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=\(sc.Search\)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000250&cite=MDCRPASS5-6C-01&originatingDoc=I66a98febfb3b11e79bf099c0ee06c731&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search); Delaware Public Benefit Corporation Act, Del. Code Ann. tit. 8, §§ 361-368 (2013), <a href=).

536. See *supra* note 232; see generally Wells, *supra* note 8, at 1059.

talization, duration, voting and so forth.<sup>537</sup> They continued to be used for some period after the spread of general incorporation laws but gradually faded away as corporate charters liberalized and states increasingly regulated corporations by means of independent statutes rather than provisions of the corporate charter.<sup>538</sup> The new legal entity statutes being enacted today, which typically require specific provisions in the corporate charter, are a throwback to these nineteenth-century regulations—an attempt, as it were, to build a purpose back into the corporate vehicle, rather than to regulate the vehicle’s direction by means of regulatory street signs.<sup>539</sup> What is more, while special charters in the nineteenth century typically granted important public or quasi-public powers and privileges to business corporations, as discussed above, the new legal entity statutes grant little or nothing from the state—largely only the (in my view already existing) right to pursue a social mission in a for-profit corporate form.<sup>540</sup> In the words of Angell and Ames, there is little or no state *quid* given for the social enterprise *quo*.<sup>541</sup> From a nineteenth-century perspective, for social entrepreneurs, the new legal entity statutes are weak tea indeed.

More broadly, this brief history alludes to the deeper historical tension not only between public and private corporate purposes, but between public power and private property in the United States.<sup>542</sup> This tension is evident from the

537. See, e.g., Naomi R. Lamoreaux, *Revisiting American Exceptionalism: Democracy and Regulation of Corporate Governance in Nineteenth-Century Pennsylvania*, [Nat’l Bureau of Econ. Research, Working Paper 20231 1, 9 (2014) (“[M]ost of the early general incorporation laws imposed strict limits on what corporations could do, how big they could grow, how long they could last, and what forms their internal governance could take.”).

538. Hilt, *supra* note 8, at 53 (discussing “general regulating acts” that specified the terms of all charters).

539. In this respect, the new legal entity statutes arguably constitute an attempt to resuscitate the ultra vires doctrine.

540. Some state statutes creating new for-profit legal entities may be seen to grant minor state powers or privileges to such entities. In comparison to nineteenth-century charters, these provisions do not seem like significant delegations of state power. Those state statutes that are based on the Model Benefit Corporation Act, for example, often exclude monetary damages in the event of certain shareholder suits against the corporation and limit the standing of benefit corporation shareholders to sue the corporation. See, e.g. Model Benefit Corporation Legislation, April 17, 2017, § 305(b) (eliminating the corporation’s liability for monetary damages for failing to pursue a public benefit) and § 305(c) (limiting shareholder standing to sue the corporation), [https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20\\_4\\_17\\_17.pdf](https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf) (last visited August 20, 2019).

541. This is not to argue that the state powers or privileges delegated to today’s new for-profit legal entities need to be the same as those granted to business corporations in the early nineteenth century – only that today’s delegations are comparatively insubstantial.

542. See, e.g., *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518 at 572-573 (1819) (“Individuals have a right to use their own property for purposes of benevolence, either towards the public or towards other individuals. They have a right to exercise this benevolence in such lawful manner as they may choose; and when the government has induced and excited it, by contracting to give perpetuity to the stipulated manner of exercising it, to rescind this contract, and seize on the property, is not law, but violence.”); O’Melinn, *Neither Contract Nor Concession*, *supra* note 205, at 249 (“the feeling that corporate behavior must be regulated is tempered by the fear that true government

earliest days of the American corporation, first surfacing in *Dartmouth College*, with respect to an eighteenth-century eleemosynary corporation, and becoming increasingly conspicuous over the course of the nineteenth century.<sup>543</sup> At bottom, I suggest, this tension is not a feature of the corporation at all, but rather of changing socio-economic conditions and public policy in society at large. Historically speaking, the acceptable level of state control over corporations appears to be a function of the perceived extent of the state powers and privileges granted to the corporation. In the internal improvement companies, where grants of state power and privilege were significant, so were the corporation's public obligations, and corporations were understood to be legally obligated to deliver the *quid pro quo* described by Angell and Ames.<sup>544</sup> In the absence of such grants, however, in the succeeding era of general incorporation for manufacturers and other pecuniary corporations, the corporation was increasingly understood to be a matter of "strictly private" contract, for purposes of private pecuniary gain, unaffected by the public interest. As the state *quid* waned, so did the corporate *quo*.

Since 1860, multitudinous other arguments have been raised as to the privileges, powers, and proper public obligations versus private rights of business corporations.<sup>545</sup> Such arguments are beyond the scope of this Article. My conclusions here are only two: first, the public/private tension is socio-historical and political rather than intrinsic to the corporate form. Ultimately the question is who decides how to allocate—who controls—private wealth. This question would not seem to arise from, or be solvable by means of, corporate law. Second, the indeterminacy surrounding this question—the boundary between public and private, law and contract, the sovereign state and the individual—not only has been negotiated for two hundred years, but continues to be negotiated in American corporate law today and will likely continue to be negotiated in the future, so long as entrepreneurs and investors, courts and commentators, and politicians and the public attempt to move the corporation back and forth be-

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regulation amounts to the violation of the social compact by treating a constituent as if it were merely a creature of the state."); Horwitz, *Public/Private Distinction*, *supra* note 212, at 1428 ("Private power began to become increasingly indistinguishable from public power precisely at the moment, late in the nineteenth century, when large-scale corporate concentration became the norm.").

543. See WILLIAMS, *supra* note 212, at 240 (describing Story's opinions in *Terrett v. Taylor* and *Dartmouth College* as "exaggerated" and suggesting that "the result read into the Constitution the twin Federalist obsessions of protecting private property and limiting the role of government.").

544. See ANGELL & AMES, *supra* note 191, at 33.

545. See e.g., William J. Novak, *Public Economy and The Well-Ordered Market: Law and Economic Regulation in 19<sup>th</sup>-Century America*, 18 L. & SOCIAL INQ. at 1 ("The relationship of law, state and economy in America has been at the center of legal-historical research for almost 50 years now."); Michael DeBow & Dwight R. Lee, *Shareholders, Nonshareholders and Corporate Law: Communitarianism and Resource Allocation*, 18 DEL. J. CORP. L. 393, 393 (1993) ("For years now, debates over the proper scope and content of corporate behavior and corporate law have exhibited one regularity: they almost always involve a clash between those who treat corporations as contractually-based, profit-maximizing entities, and those who wish corporations could be made to be something else."); see generally MAYER, *supra* note 8.

tween the opposing poles of public and private corporate purpose. In the meantime, we should not mistake mutable public policies for intrinsic components of the corporate form.

Finally, based on this brief history, I suggest that there may be limitations on social enterprise. The internal improvement companies, for example, typically sought to build transportation and financial infrastructure rather than manufacturing, which required comparatively more capital, attracted more financially oriented investors, and was not long perceived to have a public purpose. If history is any guide, the manufacturing sector may not be well-suited for social enterprise. The same may be said of banking. After the Revolution, early American banks quickly became profitable and were among the first American business corporations to start down the path from public to private purpose. Private capital may crowd out more public-minded investors.

Large-scale national or regional enterprises may also be ill-suited for social enterprise. The internal improvement companies and early banks, railroads and manufacturers were all comparatively small local enterprises that were able to raise sufficient capital from the immediately neighboring public, which in turn understood itself to benefit economically from the firm's (local) public goals. Where local benefits are small, or an enterprise's customers are geographically dispersed, the enterprise's owners, employees, suppliers and customers seem less likely to be motivated by non-financial concerns—i.e. to be interested primarily in the firm's output rather than its economic performance—in turn making a public purpose or social or environmental mission more difficult to sustain.

By the same token, social enterprises with an insufficient profit motive may not be viable. It is important to note that even where shareholders of early American corporations were not interested in company profits, the benefits they received from their investments remained largely economic, in the form of the public-purpose turnpike, bridge or canal that, once built, would advance their other local business interests as farmers, merchants, or landowners. Business corporations that sought to provide no economic benefit to their shareholders, either directly or indirectly, are not well-represented in early America and are likely to be difficult to sustain today.

Overall, then, business enterprises that are capital-intensive, regional or national in scale, or potentially highly profitable seem least likely to sustain a public or other non-profit-maximizing purpose. Historically, American railroads may be the best example. From their humble origins as local internal improvement companies in the 1820s, railroads grew by the late nineteenth-century into the capital-intensive backbone of the robber-barons' relentlessly profit-seeking empires.<sup>546</sup> Social enterprises that grow significantly in geographic scope or capitalization—i.e., social enterprises that dramatically succeed?—may thereby

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546. See, e.g., *In re Penn Cent. Transp. Co.*, 484 F.2d 323, 326 (citing M. JOSEPHSON, *THE ROBBER BARONS* 66-74 (1962); see also Hamill, *supra* note 8, at 147 (commenting on the railroads' high profile and "potential for enormous profits").

cease to be social enterprises. The public mission of a booming social enterprise may drift right out of the company, or the company out of the public mission into pecuniary territory.

Social enterprise may accordingly not be suitable at either extreme of the profit spectrum. Social enterprise may best succeed where some, but not too much, profit can be returned to shareholders, directly or indirectly—where economic gain is neither too little nor too much. If the public/private dynamic were a dialectical process, one might see in the early all-purpose pre-corporation a kind of public/private synthesis, whose inherent contradictions gave rise to the thesis of the public-purpose corporation, then the antithesis of the profit-maximizing modern firm. Is a new synthesis, or at least some *détente*, possible in the for-profit corporation with a (shareholder-chosen) public purpose, i.e. the social enterprise?

Alternatively, social enterprise itself may be only a transition or historical phase in the longer development of the business corporation. In that case, students of American corporate history may be left to wonder, with nineteenth and twentieth-century theoreticians, whether ontogeny indeed recapitulates phylogeny.<sup>547</sup>

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547. See, e.g., SIGMUND FREUD, *TOTEM AND TABOO* (1913).

