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Corporations and American Democracy: An Introduction

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Introduction

The United States Supreme Court's decisions in *Citizens United* and *Hobby Lobby* have once again thrust controversies about the proper role of corporations in American democracy onto the national stage.[1] Debates about corporate personhood, corporate power, and corporate responsibility proliferate throughout the public sphere—from political stump speeches to newspaper editorial pages, from the televised verbal wrestling of cable news to the distinctly untelevised sparring in Supreme Court opinions and dissents. To date, however, the level of discourse has remained primarily political if not polemical. Participants have made bold assertions about the nature of corporations and corporate rights without much empirical basis. Moreover, they have legitimized their positions by grounding them in claims about the history of corporations in the United States that are at best outdated if not entirely lacking in scholarly foundation. The purpose of this volume is to provide a better historical foundation for these important debates and discussions.

Although much has been written about corporations and American democracy over the last century—from Louis Brandeis's *Other People's Money* to John Commons's *Legal Foundations of Capitalism* to Adolf Berle and Gardiner Means's *The Modern Corporation and Private Property* to John Kenneth Galbraith's *American Capitalism*—important aspects of the history, law, and economics of corporate policymaking remain poorly understood.[2] What was the original understanding of the corporation at the time of the American founding? When and where did the corporation first begin to proliferate as a preferred mode of organization for businesses and other associations? What rights, privileges, and obligations attended the corporate form? And how and why did these change over time? To what extent over the course of American history have the rights of corporations as legal persons been differentiated from those of human persons? Should all corporations be treated the same, or are there vital differences that demand recognition between for-profit and not-for-profit corporations, public service corporations and private manufacturing corporations, media corporations and incorporated charities or religious associations? What were the factors driving changes in the relationship between the corporation and American democracy over time?

The chapters that follow begin filling in answers to these questions. The first essays document the fundamental nature of the shift from special charters to general incorporation in the first half of the nineteenth century; the last provide historical context for the Supreme Court's recent decisions in *Citizens United* and *Hobby Lobby*. In between, they detail the development of new types of corporations, new types of regulatory initiatives, and the interaction between the two. Although the chapters cover different time periods and topics with distinctive authorial voices, taken together they offer a remarkably coherent perspective on the relationship between the corporation and American legal, economic, and political institutions. Here we highlight three major themes that thread through the volume.

Theme one concerns Americans' longstanding love/hate relationship to the corporation—their enthusiastic embrace of the corporation as an engine of opportunity and prosperity and their simultaneous skeptical distrust of it as a source of corruption and driver of inequality. This deep ambivalence has shaped public policy concerning the corporation throughout American history. On the one hand, the corporation has long been seen as a useful and alluring vehicle for harnessing and distributing the collective energies of individuals—an engine of economic growth and a bulwark of democratic prosperity. On the other hand, that same corporate vehicle has been viewed with suspicion as a potentially dangerous threat to that same democracy—a site of coercion, monopoly, and the agglomeration of excessive social, economic, and political power. Competing visions of the corporation as alternatively a source of extraordinary public material benefit and a font of democratically unaccountable private power have animated much of the history of the corporation in America.

Distrust was there from the beginning. It originated in the habit of monarchs, as well as America's first state legislatures, of doling out corporate charters to reward political favorites. The desire to distribute access to such privileges more equitably and democratically fueled opposition to the enactment of special charters in the Jacksonian period. The general incorporation laws that followed were rooted in the aspiration of allowing anyone who wanted to form a corporation to do so without special dispensation from the legislature. Nonetheless, the democratic worry remained that the playing field was not level and that the wealthy and powerful were better positioned to use the corporate form to perpetuate private advantage. Consequently, most early general incorporation laws were laden with regulatory restrictions. As larger and larger American corporations emerged in the late nineteenth century, this regulatory apparatus expanded beyond states' direct powers over charters, as first the states and then the federal government pioneered new ways of regulating corporate behavior—from special commissions to tax policy. At the same time, the unprecedented rise of big business raised the specter that corporations would use their economic power to manipulate the political system. This discovery "that business corrupts politics" spurred a series of early twentieth-century campaign finance laws barring corporations from contributing to candidates running for election.[3]

These strict corporate campaign finance laws posed no constitutional problems at the time because corporations were not thought to have the same set of rights as human persons. The second major theme of this volume underscores this basic fact: historically American corporations were never granted the same legal and constitutional rights as natural persons or individual citizens. To be sure, corporations always had some aspects of legal personhood. The whole reason for forming them was to allow an association of human persons to hold property and sue and be sued in their collective name. But corporations did not thereby gain the full panoply of rights belonging to human persons. Chief Justice John Marshall laid out the basic principle in the famous *Dartmouth College* case in 1819, and that principle remained the basic governing rule deep into the twentieth century:

> A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.[4]

Corporations were also, of course, composed of human beings, and the courts sometimes found it necessary to extend constitutional protections to corporations in order to safeguard the rights of the people who formed them. Until the mid-twentieth century, however, they only intervened in this way to protect the associates' rights in corporate property. Although the famous *Santa Clara* case is often mistakenly cited as extending Fourteenth Amendment protections to corporations *per se*, the decision had the much more limited aim of protecting citizen shareholders from discriminatory taxation on their property and the Court applied the precedent narrowly, subsequently ruling that the liberty guaranteed by the Fourteenth Amendment "is the liberty of natural, not artificial persons."[5] Only in the second half of the twentieth century, in cases such as *NAACP v. Alabama*, did the Supreme Court move to extend broader constitutional protections to corporations.[6] But again, the goal was to protect the human beings associated in these corporations—in these instances from violent retaliation for their involvement in Civil Rights organizations—and the corporations involved were incorporated advocacy associations rather than more conventional business corporations.

This second theme has an important corollary that also threads through the volume. The dominant American legal tradition concerning corporations not only denied them the same rights as individuals but also held them to a higher standard of public care, public responsibility, and public accountability. Along with the special privileges that the corporate form offered its associated members came special duties. From the regulations written into special charters to the regulatory provisions in general incorporation acts to the rise of the independent regulatory commissions to the emergence of new kinds of social regulations amid the rights revolutions of the late twentieth century, Americans have determinedly held corporations to higher obligations. The persistent growth in the scale and scope of the largest business corporations frequently challenged extant regulatory rubrics—most famously with the development of interstate trusts and holding companies in the late nineteenth century. But Americans proved surprisingly creative and versatile in generating new legal, administrative, and regulatory tools to bring even the most powerful corporations under democratic control.

The corporation has never, however, been a form used just by large-scale businesses or even just by businesses. The third major theme of the volume is the diversity of the organizations that took the corporate form. From the beginning corporate advantages were sought by many types of associations, from cities to businesses, charities to banks, libraries to bridges, and use of the form has only become more widespread and heterogeneous over time. When the Internal Revenue Service first began to collect corporate income taxes in the second decade of the twentieth century, there were already about 300,000 business corporations operating in the

United States, some enormous but many of them very small.[7] Over the next century, the number multiplied fifteen-fold to approximately 4.5 million, meaning that there is now about one business corporation for every seventy men, women, and children in the country.[8] There are also around 1.5 million nonprofit corporations (not counting churches). The corresponding number of religious congregations is only about 300,000, so even nonprofit corporations today are much more ubiquitous than churches.[9]

Although the number, size distribution, and variety of corporations have changed dramatically over time, the basic legal framework within which they operated remained fairly constant: corporations were artificial entities that governments allowed human beings to create in order accomplish certain ends; and governments had the authority to determine not only the ends for which corporations might be created but also the means by which they attained those ends. By the early twenty-first century, however, this framework was subjected to unusually severe stresses as new types of advocacy organizations challenged long-standing rules that prevented business from corrupting politics and evading regulatory standards. Here the volume's three major themes come together to highlight the radical break with the past that the Supreme Court's recent decisions in *Citizens United* and *Hobby Lobby* represent. Contrary to the claims of several of the justices in the majority, these decisions reflected neither the Framers' original position on corporations nor the vision of corporate rights articulated by Marshall in his early-nineteenth-century *Dartmouth College* opinion. Nor, contrary to the assertions of many critics of these decisions, did they represent the culmination of precedents set in motion by the Court's interpretation of the Fourteenth Amendment in *Santa Clara*. To the contrary, as the essays in this volume collectively show, the Court's recent decisions mark an aggressive and unprecedented assertion of corporate rights and authority—a sharp break with two centuries of history that has sent the relationship between corporations and American democracy reeling off in a new direction. There were other possible ways the Court could have moved—other ways to adapt the law to the growing heterogeneity of corporations in American society. It is our hope that by recovering the long and contested history of corporations in the United States, we can recapture a sense of possibility—a sense of what else might have been and still can be.

English and American Origins

The essays in this volume pick up the story of corporations and American democracy in the early nineteenth century. But the narrative to which the essays contribute really starts much earlier. Corporations were already a contentious political issue in early modern England—coveted for their advantages and feared for their special powers. On the one hand, corporate charters offered towns, guilds, universities, and similar self-governing bodies an important degree of autonomy from the King. On the other hand, they constituted a set of privileges that monarchs could grant to ensure loyalty or as *quid pro quo* for loans or other public and private favors. Battles between the King and Parliament were often waged over such privileges. After Parliament enacted the Statue of Monopolies of 1624, prohibiting the King from making outright grants of monopoly except as temporary rewards for technological innovation, corporate charters became an important, though unreliable, way of evading the restriction. James I and Charles I took advantage of challenges to the status of the East India and other chartered trading companies to try to extract revenue. By the 1630s, royal meddling with the companies' trading privileges was such a hot-button political issue that it reinforced lines of division within elites, leading shareholders in Parliament to provide key support for measures that precipitated the

English Civil War.[10] After the Restoration, James II's efforts to gain control of local parliamentary elections by revoking the charters of a number of incorporated boroughs played a similar role in sparking the Glorious Revolution.[11]

Although the settlement that followed the Glorious Revolution guaranteed the boroughs' autonomy, corporations remained a lightning rod for political and social conflict. Supporters of the new regime deployed antimonopoly rhetoric to attack charters that the Stuarts had awarded to their favorites. Some corporations such as the Royal African Company saw their privileges eroded. Others managed to hold on through intense lobbying efforts and by joining forces with challengers.[12] The East India Company, for example, lost its charter in 1697 to a new company formed by rivals, but by making some large, strategically timed payments to the government, its officers were able to effect a merger of the two groups.[13] The Bank of England, chartered in 1694 in the aftermath of the Glorious Revolution, soon faced an attempt to form a competing institution. It not only defeated the challenge but secured (in exchange for substantial loans to the government) an explicit monopoly on banking.[14] In 1720, Parliament at the behest of the South Sea Company passed the Bubble Act, requiring joint stock companies to secure charters from the government before they could raise capital on the market. Newcomers henceforth found it more difficult to form corporations.[15]

Opposition to such "corrupt" corporate privileges mounted in Britain in the eighteenth century and spread from there to the colonies, where it helped fuel the American Revolution.[16] Virtually every tax or regulatory act that the colonists protested in the 1760s and 1770s involved some sort of favored economic interest. The most obvious example was the Tea Act of 1773, which had the joint purpose of bailing out the East India Company and asserting Parliament's right to tax the colonies. Writing under the pen name Causidicus, one dissenter complained that the Tea Act was a case of "taxation without consent and monopoly of trade. . . . Let the trade be monopolized in particular hands or companies, and the privileges of these companies lye totally at the mercy of a British ministry and how soon will that ministry command all the power and property of the empire?"[17] The concern that corrupt ruling elites would use corporate privileges to solidify political control would persist in American politics long after the Revolution.[18]

As much as American colonists feared corporations as vehicles of oppression, however, they also embraced them as bulwarks against British interference. Many of the early colonies, especially in New England, took the form of chartered companies, and they were repeatedly forced to defend their corporate privileges against attacks by the Stuarts. The most serious assault came in the 1680s, when James II revoked the charters of Massachusetts, Connecticut, and the other New England colonies and sought to consolidate them into a new Dominion of New England under the authority of Sir Edmund Andros, James's governor-general. After Andros was overthrown, the colonies regained their charters, but often with strings attached. Massachusetts, for example, had to accept a royal governor.[19] There was also ongoing uncertainty about the status of towns and other corporations (especially colleges like Harvard and Yale) that had been chartered by colonial governments without explicit authorization from the King, an uncertainty exacerbated by the extension of the Bubble Act to the colonies in 1741.[20] As colonists defended the corporations they had created and petitioned the king formally to ratify their grants, they articulated a more positive view of the form. Incorporation, as one New York lawyer put it, was "the only way to render the project permanent, to secure wisdom and council equal to the work, to defend it against opposition, and to encourage future donations."[21]

After independence, the idea that corporations were a useful way to fund socially useful endeavors such as public works grew in popularity. The new state governments faced insistent demands to provide their citizens with the infrastructure they needed for economic development, from transportation improvements to financial services. Popular aversion to taxes, itself a heritage of the Revolution, led many states to finance such projects by incorporating private groups of citizens to undertake them.[22] Most early charters were for religious, educational, and charitable purposes, but over time a growing proportion went to these so-called public service franchises—transportation companies, utilities, and banks.[23] Although states justified awarding charters for these businesses on grounds of public interest, it was well understood that shareholders would only invest in them if they could earn an attractive rate of return. Consequently, states often included in such acts an array of special privileges as inducements. Charters for turnpike, bridge, and canal companies, for example, typically conveyed a monopoly right to levy tolls, as well powers of eminent domain. Perks granted to incorporators of the Society for Useful Manufactures, a textile company chartered in New Jersey in 1791, included permission to raise funds through a public lottery and exemptions for the company's employees from taxes and military service. Bank charters conveyed the right to issue currency in the form of bank notes and thus privileged access to cheap credit.[24]

The special privileges that legislatures awarded to recipients of corporate charters reawakened old fears of inequality, monopoly, and corruption. Resentment mounted in particular against banks' control of the currency and the rising tolls of transportation companies. Sometimes opposition was strong enough to force governments to respond. In Massachusetts, for example, objections to the 1784 charter of the Massachusetts Bank led the legislature to pass an "Addition" in 1792 that placed greater limits on the bank's operations. In the face of similar challenges, Pennsylvania's assembly repealed the charter of the Bank of North America in 1785 and then later reincorporated the bank on more restrictive terms.[25] After the Virginia assembly chartered the Richmond James River Company in 1804, a deluge of complaints led the legislature to amend the charter and exempt small boats from having to pay tolls.[26] The famous *Charles River Bridge* case originated when Massachusetts chartered a company in 1828 to build a bridge directly next to a rival bridge company with an exclusive right to collect tolls.[27]

Such legislative tinkering was not limited to business corporations. Conflict over the disestablishment of the Anglican Church led the Virginia legislature in 1786 to repeal an act incorporating the Episcopal Church it had passed just two years earlier. Disestablishment also spurred an effort to amend the charter of the College of William and Mary so as to shift control of the institution from the Anglican Church to the state legislature. After Harvard's Board of Overseers became increasingly Unitarian and Federalist in the early nineteenth century, a Federalist state legislature passed a statute changing the makeup of the Board. When Democratic Republicans subsequently took control of the statehouse, they repealed the statute. King's College (Columbia) in New York, Yale College in Connecticut, the College of Philadelphia in Pennsylvania, the University of North Carolina, and Dartmouth College in New Hampshire all faced similar legislative intervention in this early period.[28]

The *Dartmouth College* case, of course, ended up in the U.S. Supreme Court, where Chief Justice John Marshall famously declared in 1819 that a corporate charter was a contract that the state could not unilaterally abrogate.[29] The case is often taken to have put a stop to *ex post* government interference with corporations. But state legislatures quickly learned to imbed reservation clauses in charters that enabled them to impose new regulations on corporations in the future.[30] Moreover, not long afterwards, in the *Charles River Bridge* case, the Court under the leadership of Chief Justice Roger Taney signaled its intent to construe corporate privileges in the narrowest possible terms, giving state legislatures even more room for subsequent regulation and control.[31]

Both the *Dartmouth College* and *Charles River Bridge* cases arose at a time when most charters required special acts of the legislature and thus corporations were in a very immediate sense creatures of the states that gave them existence. In his *Dartmouth College* opinion, Marshall defined a corporation as “an artificial being, invisible, intangible, and existing only in contemplation of law.”[32] Taney shared this view. Neither decision constrained in any way states’ powers to create corporations with special privileges or to regulate what corporations could do, so long as both the privileges and the regulatory authority were laid out in the charters. In combination, therefore, the two decisions focused political attention squarely on state legislatures and the policies they pursued in chartering corporations. By the middle of the nineteenth century, this heightened attention would bring about significant changes in what legislatures were able to do. In state after state, egalitarian pressures led to new constitutional provisions that stripped legislatures of their power to enact special corporate charters.

From Special Charters to General Incorporation

The shift from special charters to general incorporation wrought a profound change in the relationship between corporations and American democracy. The first two essays in this volume—by Eric Hilt and by Jessica Hennessey and John Wallis—investigate the complexities of this important transformation.[33] Although the number of corporations in the United States increased steadily after the Revolution, it did not prove easy for Americans to strip the corporate form of its ancient association with special privilege and allow all comers to take out charters.[34]

First, elites who benefited from the special charter system vigorously opposed broadening access. Second, to the degree the corporate form remained bound up with monopoly, many reformers pushed in the opposition direction, making it more difficult, if not impossible, to obtain charters, or even enacting outright prohibitions on certain types of corporations. The fraught struggle to enact general incorporation laws was a response to this impasse and, in the end, revolutionized the way American government functioned by stripping the legislature of the power to pass private laws of all types.[35]

Because general incorporation was such a contentious issue, the earliest enactments applied, not surprisingly, to popular types of non-business associations that were flooding legislatures with charter petitions. Pennsylvania, for example, passed a statute in 1791 enabling associations for "any literary, charitable, or for any religious purpose" to incorporate by a simple registration process, aiming thereby to reduce "the great portion of the time of the legislature [that] has heretofore been employed in enacting laws to incorporate private associations." New York sought to ease the "great difficulties" imposed on public worship by "the illiberal and partial distribution of charters of incorporation" in 1784 by allowing all religious denominations in the state to appoint trustees and constitute themselves "a body corporate."[36] It followed that act with a general incorporation law for colleges in 1787 and for medical societies in 1806.[37] Even in these relatively easy cases, however, concerns about potential abuses of the corporate form led legislators to imbed safeguards and restrictions into the statutes. Churches organized under New York's 1784 law, for example, were not permitted to earn more than £1,200 a year in rent off their real estate; and local medical societies, according to the 1806 law, could not hold more than $1,000 in real and personal estate. As late as the 1830s, religious and charitable corporations organized under Pennsylvania's general laws were limited to $2,000 in real and personal estate.[38]

If the general incorporation of churches, schools, and charitable associations was relatively uncontroversial, banks were another story. A bank charter was a valuable concession, not least because those who were able to secure one gained privileged access to credit in an economy where capital was still very scarce and expensive.[39] In the increasingly competitive political environment of the early republic, factions struggling to hold on to power used control over bank charters to reward supporters and bolster political coalitions. Thus the first banks organized after the Revolution—the Bank of North America (in Pennsylvania), the Bank of New York, and the Massachusetts Bank—were all dominated by prominent members of what would become known as the Federalist Party. In "Early American Corporations and the State," Hilt details the story for New York, but the broad outlines were much the same in Massachusetts, Pennsylvania, and elsewhere.[40] The Bank of New York, founded by Alexander Hamilton in 1784 and chartered in 1791, gave the Federalists a monopoly of banking in the state until Democratic-Republican Aaron Burr took advantage of a loophole in the charter for a water works to found the Manhattan Bank in 1799.[41] When power finally shifted to the Democratic-Republicans on the eve of the War of 1812, Martin Van Buren's faction used the party's new control over bank charters to build a powerful political machine, the "Albany Regency," that dominated state politics for a quarter century. During the economic boom of the 1830s the New York legislature received on average about 70 petitions for banks a year, but under the machine's tight control only about ten percent of that number ultimately received charters. When the collapse of the banking system in the Panic of 1837 finally brought the Regency down, the opposition (now called the Whig Party) responded to this pent-up demand for charters by passing

New York's famous free banking law in 1838, thereby insuring that bank charters would never again be awarded for political purposes. To counter worries that open access to banking would undermine the soundness of the banking system, the legislature included an important regulatory provision in the act that required banks fully to back their currency issues by investing in specific categories of government bonds. The result was a dramatic expansion in the number of banks and a decline in the number of bank failures.[42]

New York's successful experience with free banking pointed the way to change elsewhere, although as Hilt points out, some states initially moved in the opposite direction and either prohibited banking outright or made charters more difficult to obtain. Only with the passage of the National Banking Acts in 1862-64—a product of the federal government's dire need for funds during the Civil War—would general incorporation in banking spread throughout the nation. Banking was one of the few sectors in which the federal government chartered corporations. As Daniel Crane's essay shows, in the absence of such a national emergency, later moves to secure a federal general incorporation law for other types of businesses failed.[43]

Manufacturing was an intermediate case between banking and churches or schools. New York enacted the first general incorporation statute for manufacturing in 1811, but not until the 1840s and 1850s did the movement gain momentum. By 1850 fourteen states had enacted such statutes, and by 1860 twenty-seven states.[44] One reason for the slowness to pass these laws was the ongoing fear that the corporate form would exacerbate privilege and inequality. Not surprisingly, therefore, 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. Ohio's 1846 law, Massachusetts's 1851 statute, and Illinois's 1857 act, for example, all placed ceilings on the amount of capital a corporation could raise (though New York and Pennsylvania did not). Pennsylvania set the term of a corporate charter at 20 years, Ohio at 40 years, and New York and New Jersey 50 years (while Massachusetts allowed corporations perpetual life). All of these states except Ohio limited the amount of debt that corporations could take on to some multiple of their capital stock (usually one). General incorporation laws typically prescribed the number of directors, sometimes requiring them to be shareholders and/or citizens of the state. The laws of New York, Ohio, and Pennsylvania mandated one share one vote (though in Pennsylvania, no shareholder could vote more than a third of the total number of shares), and statutes often imposed additional liabilities on shareholders, particularly in cases where companies owed workers back wages.[45]

Because early general incorporation laws were so restrictive, businesses continued to petition the legislature for special charters in the hopes of securing better terms. Five years after the passage of Pennsylvania's 1849 general law for manufacturing, for example, less than a dozen companies had incorporated under it. Yet in 1855 alone the legislature passed 196 private bills chartering or amending the charters of for-profit business corporations.[46] As Hennessey and Wallis describe in their chapter, this spate of special charters in the shadow of general laws convinced corporate critics of the need for state constitutional amendments mandating general incorporation. The push for these reforms in turn mushroomed into a more general movement to prohibit legislatures for passing private bills or granting exclusive privileges for many purposes, including granting divorces, authorizing adoptions, settling estates, absolving insolvents, and exempting property from taxation. It is difficult to imagine such a fundamental restructuring of the workings of American democracy without the spur provided by opposition to corporate privilege.[47]

A Race to the Bottom?

As Hennessey and Wallis point out, however, the movement to abolish special legislation came with a catch. The general laws that enabled anyone to form a corporation were often laden with regulatory provisions, yet in most states it was no longer possible to get around the rules by seeking special charters, even when there were good economic reasons to create exceptions. Some states, however, had more lenient regulatory rules than others. Although such state-by-state differences often had idiosyncratic origins,[48] this variation would become increasingly salient with the development of large firms in the capital- and resource-intensive industries of the Second Industrial Revolution.

Before the last quarter of the nineteenth century, it was relatively uncommon for a company to secure a corporate charter from a state other than the one in which it had its principal place of business. Large firms were still disproportionately found in sectors (such as finance, transportation, and utilities) where successful operation depended on special rights and prerogatives (such as permission to issue bank notes or powers of eminent domain to secure essential rights of way) that states typically conferred in corporate charters. However, as manufacturing firms grew in size during the late nineteenth century and acquired operating units in different parts of the country, the benefits of securing a charter from a state with more permissive laws increased. New Jersey's relatively liberal general incorporation statute of 1875, which imposed no ceilings on capital or restrictions on the type of businesses in which corporations could engage, had already induced a growing trickle of firms to take out charters in the state.[49] Famously in 1888 and 1889, the legislature moved explicitly to increase New Jersey's attractiveness to large out-of-state enterprises. Until that time, most states prohibited corporations from buying stock in other corporations, so the only way one firm could acquire another was for the second firm's stockholders to dissolve their company and sell off its assets to the acquiring firm. New Jersey's 1888-89 amendments eliminated this problem by allowing corporations to hold stock in other corporations and by creating a set of procedures that routinized corporate mergers. These changes made New Jersey a very attractive domicile for the many consolidations formed during the period's merger wave. And the state, which taxed corporations on the basis of their authorized capital stock, found its public revenues soaring.[50]

New Jersey's flush treasury inspired a number of other states (most notably Delaware, but also West Virginia, Maryland, Maine, and New York) to enter the competition for corporate charters. At the same time, the surge of giant corporations taking out New Jersey charters set off alarm bells in the state, stimulating a resurgence of anti-corporate politics that helped elect Democratic candidate Woodrow Wilson governor in 1910 and climaxed with the passage of a set of antitrust statutes in 1913 that effectively undid the amendments of the late 1880s. When New Jersey's revenues from chartering corporation plunged, the legislature reversed course again. But the state never regained its previous position, and Delaware, which had done little more than enact New Jersey's law with lower fees, emerged victorious from the charter-mongering competition.[51]

As more and more large firms took out charters in New Jersey and Delaware, legislatures elsewhere reacted to the resulting loss of revenue by liberalizing their own general incorporation laws, generating fears of a regulatory "race-to-the-bottom" as discussed in Daniel Crane's essay.[52] This much-discussed race, however, was less full-throttled than is generally recognized. For one thing, many states did not even bother to race, as only small states like Delaware could actually cut incorporation fees and still gain enough revenue to make the competition worthwhile.[53] For another, states did not lose the power, or the will, to continue to regulate the business of corporations that shifted their chartering homes out-of-state, becoming so-called "foreign corporations."[54] To the contrary, the rise of large corporations and their move to escape to restrictive general incorporation laws provoked a strong democratic counter reaction. At least thirteen states passed antitrust laws by July 1890, the month Congress passed the Sherman Antitrust Act, and the passage of the federal act did not slow the pace of state activity. By 1929, all but eight states (not surprisingly Delaware and New Jersey were among the laggards) had enacted antitrust laws, written anti-monopoly provisions into their constitutions, or both.[55]

In addition, the U.S. Supreme Court issued a series of opinions in the late nineteenth century that bolstered the regulatory powers of states over corporations. The popular notion that the Supreme Court's *Santa Clara* decision stripped states of their regulatory authority over corporations is simply incorrect. As Ruth Bloch and Naomi Lamoreaux show in their essay, "Corporations and the Fourteenth Amendment," *Santa Clara* was only one of a number of decisions handed down by the Court during this period that laid out the parameters of state regulatory authority over corporations. Just as significant was the Court's determination, first in *Paul v. Virginia* in 1869 and then in *Pembina Consolidated Silver Mining v. Pennsylvania* in 1888, that corporations did not possess the privileges and immunities of citizens under either Article Four of the original constitution or the Fourteenth Amendment.[56] Justice Stephen J. Field recognized that if states were required to grant free access to corporations formed in other jurisdictions—if they had to allow foreign corporations as a matter of course the privileges and immunities of citizens—the result could well be a race to the bottom. Instead, he used the power of the Court to prevent this outcome from occurring.

The Supreme Court's support for the states' antitrust efforts built directly on these precedents. Beginning with *Waters-Pierce Company v. Texas* in 1900, a case that arose from an attempt by a Standard-Oil affiliate to appeal its ouster for violating Texas's antitrust laws, the Supreme Court handed down a long line of decisions upholding the constitutionality of state antitrust laws against charges that they violated the equal protection clause of the Fourteenth Amendment or took property without due process.[57] This stream of cases petered out by the 1920s, not because the Court became less willing to uphold state regulatory authority but because states found it increasingly difficult to move against corporations whose operations were national in scope without harming their own economies.[58] Not coincidentally, a turn to national legislative and administrative regulation had already begun that would reshape the relationship of the corporation and American democracy in the next century.

The Progressive Roots of Modern Corporate Regulation

Legal and economic historians have long considered the late nineteenth and early twentieth century to be a pivotal era in the development of new and modern forms of corporate regulation.[59] Indeed, most commentators equate the enactment of the Interstate Commerce Act (1887), the Sherman Antitrust Act (1890), and the Federal Trade Commission Act (1914) with the actual birth or origin of regulation in America.[60] But as the preceding discussion makes clear, the regulation of corporations on behalf of a larger set of public interests was already a constant feature of American economic and political history. The dominant American legal tradition involving corporations was not only one of restricting corporations to a more limited set of rights than humans. It has consisted, from the very beginning, of a more affirmative objective: that is, holding corporations to higher standards of action, purpose, accountability, and public responsibility. The early American corporation regime just discussed, in both its special charter and general incorporation guises, was not merely concerned with creation, proliferation, and access. It was preoccupied as well, from beginning to end, with regulation. As the chapters by Hilt and Hennessey and Wallis make clear, special charters and general incorporation statutes were filled with legislative conditions, political reservations, and special regulatory mandates.[61] Corporations were "artificial beings," "existing only "by force of law," and consequently subject to a range of legislative restrictions and regulations.[62] Such special regulatory provisions for bridge, turnpike, canal, railroad, insurance, and banking corporations were the basis for Willard Hurst's influential observation that most early American corporations were essentially public service franchises.[63]

So, it would be a historical mistake to suggest that corporate regulation in America *began* in the late nineteenth or early twentieth century.[64] To the contrary, it has always been there. Nonetheless, it is important to recognize and explain the significant shifts in legal and political technology that occurred as the United States moved from a corporate regulatory regime focused primarily on state special charters and general incorporation laws to the brave new world launched by the emergence of public utilities, antitrust, modern competition policy, and regulatory taxation.[65] For a new and distinctive mode of regulation did emerge in the late nineteenth and early twentieth century as corporate regulatory policy moved steadily from particularity to generality.

Here the story of the corporation and democracy becomes intimately linked with the historical rise of the modern legislative police power—that is, the power of the state to regulate private property, contract, conduct, and interest in the name of general public health, safety, and welfare. This story too has roots in the antebellum period. Ernst Freund, the most important theorist and chronicler of American police power, found in the original nineteenth-century regulatory bargain between state and corporations the beginnings of what he dubbed "an enlarged police power." As his vast work on the emergence of American legislation and regulation made clear, nothing in the legal nature, source, status, or rights of the American corporation ever exempted corporations from the general operation of general regulatory laws.[66] The classic early American corporate police power case in this regard was not *Dartmouth College* or *Charles River Bridge*, it was *Thorpe v. Rutland and Burlington Railroad Company* (1855). At issue in that case was an 1849 Vermont police regulation requiring railroads to fence their lines and maintain cattle guards at farm crossings. The railroad corporation claimed explicitly that its 1843 corporate charter insulated it from such costly and *ex post* regulatory statutes, viewing the corporate charter as granting "immunity and exemption from [subsequent] legislative control." The argument stood little chance of success in a nineteenth century in which state regulatory police power was expanding almost at the same rate as corporations. Vermont Chief Justice Isaac Redfield, an early authority on corporation and railway law, dispensed with the rights claim from corporate status handily, citing both Marshall and Taney to the effect that corporate grants had to be construed narrowly and always "in favor of the public." Incorporation did not abridge or restrict the general "lawmaking power of the state," Redfield argued. Rather, through the police power, the state legitimately subjected property and corporations to a "thousand" kinds of "restraints and burdens" so as "to secure the general comfort, health, and prosperity of the state."[67]

Little in the "race-to-the-bottom" in state general incorporation laws or the Supreme Court's decision in *Santa Clara* changed this regulatory foundation. Surely by the late nineteenth century, certain earlier regulatory techniques, especially rules embedded in state corporate charters, were less effective. And many state initiatives were more generally displaced by the increasingly interstate (and international) character of corporate commerce, as well as by the rapid rise of more national independent regulatory agencies.[68] They were also challenged by the unprecedented scale and scope of the new concentrations of corporate wealth that characterized the period before and after the so-called great merger movement.[69] But, despite persistent myths about the so-called "Gilded Age" and "*Lochner* Era" as periods of conservative constitutional retrenchment in an "age of enterprise," not much blunted the continued expansion of the regulatory impulse to assert democratic control over newly expansive forms of corporate power and concentration.[70] To the contrary, this volume documents the rise of an entirely new era in the history of corporate regulation during this period. From muckraking texts like Frank Norris's *The Octopus* to public appeals like Brandeis's *Other People's Money* to influential academic treatments like Berle and Means's *The Modern Corporation and Private Property*, this era was simply saturated with public (and sometimes polemical calls) for something to be done about corporate power, corporate consolidation, and corporate domination.[71] And a new regulatory response was swift in coming.

The essays by Dan Crane, William Novak, and Steven Bank and Ajay Mehrotra move us from the specific issue of the corporate charter and corporate status to the new mechanisms of democratic control and corporate regulation that emerged in the late nineteenth and early twentieth centuries—the years of early Progressive and pre-New Deal reform. In this period especially, the impulse to regulate corporations became even more historically thoroughgoing and transparent. Indeed, from politically-charged populist and agrarian efforts to control the expanding economic power of railroad corporations to the diverse and widespread political movements to gain control over trusts and corporate monopolies, the relationship of the corporation and American democracy assumed center stage from 1867 to 1937 with an unprecedented degree of public visibility, political controversy, and democratic debate.[72] Older traditions of "public trust," "public franchise," "public service," and "public responsibility" took on new forms in a revolutionary spate of legislative and administrative innovation, much of it intent on curbing and regulating the new and threatening structures of corporate power. From state railroad and public utility commissions to the Interstate Commerce Act and Sherman Antitrust Act, from new proposals on federal incorporation and corporate taxation to the establishment of the Federal Reserve, the Federal Trade Commission, the Federal Power Commission, and the Securities and Exchange Commission, the legal site, scale, and scope of corporate regulation changed as a modern American administrative and regulatory state burst into a new legal self-consciousness and national political visibility. The corporate regulatory impulse animating and re-animating Franklin Roosevelt's ever-changing New Deal had deep roots precisely in the major public law innovations of this formative period.

Crane opens the door on this new era of corporate regulation in his essay "The Dissociation of Incorporation and Regulation in the Progressive Era and the New Deal." He explores the fate of regulation via corporate charter through a discussion of that regulatory technology's last gasp—two failed efforts at federal incorporation in the early twentieth century, the Hepburn Bill of 1907 and the Borah-Mahoney Bill of 1937. In the late nineteenth century, when the increased interstate competition for chartering revenues allowed incorporators to shop around for the lowest state tax rates and the most permissive state regulations, advocates of reform began to push in powerful new directions. One of the most ambitious reform proposals involved an effort to use federal (rather than state) incorporation to achieve the comprehensive federal regulation of corporations. As Crane suggests, "Progressives believed that federal charter of large interstate corporations would create a framework for comprehensive federal regulation of large business enterprises that were thus far subject to only piecemeal regulation under state and federal law."[73] If the federal government had the ultimate power to create large numbers of national corporations, the argument went, it would also have the constitutional power to regulate them. Such comprehensive efforts at national incorporation ultimately failed with, Crane argues, important ramifications for the future—most notably, the increased susceptibility of national corporate regulation to constitutional challenges like those involved in *Citizens United*. But Crane also suggests, in sync with the other essays in this section, that the failure of federal incorporation did not mean the end of corporate regulation per se. Far from it. Rather, some of the very same goals of the national incorporation movement were pursued and ultimately achieved through alternative regulatory techniques.

The essays by Novak and Bank and Mehrotra highlight two of those important alternatives: public utility regulation and tax policy. Novak's "The Public Utility Idea and the Origins of Modern Business Regulation" recounts the legal and intellectual origins of the public utility concept. He argues that "the public utility idea" was self-consciously re-created in the late nineteenth century as a direct response to the transformation of the state special charter and general incorporation regimes. As regulatory objectives were disentangled from the issue of the corporate charter or originating statute, they coalesced again in the powerful and comprehensive notion of public utilities or public service corporations—corporations affected with a public interest. Whereas traditionally the public utility concept has been treated as a residual technique for dealing with a subset of specialized "public" corporations, Novak argues that progressive reformers used the idea of public utility to pioneer a more general and robust conception of economic and corporate regulation in the public interest. From *Munn v. Illinois*

(1877) to *Nebbia v. New York* (1934), reformers consciously and constructively used the legal idea of public utility to enlarge the concept of state police power, moving beyond old common law and new constitutional limitations in an extraordinary era of democratic political struggle and corporate regulatory innovation.[74]

If the public utility idea was central to the creation of the modern American administrative and regulatory state, tax policy was key to its perpetuation. Indeed, most of the basic techniques of modern administration and corporate regulation were first hammered out in the law concerning public utilities and tax policy. And they continue to this day to shape American regulatory and corporate policy across the board. Bank and Mehrotra's "Corporate Taxation and the Regulation of Modern American Business" picks up this theme and describes the intentions of fiscal reformers at a key moment in the development of U.S. corporate taxation, when a constitutionally sanctioned income tax was first put in place. Their essay chronicles the discussions through which political economists, jurists, and lawmakers from across the political spectrum generated a new conception of the tax code as a technique of public control over corporate power. There was general agreement that corporations had a civic duty to contribute to the common welfare. But there was also general agreement about tax policy's potential as a tool of reform. As President William Howard Taft himself proclaimed, a well-designed corporate income tax could curb rampant abuses of corporate capitalism.

Taken together, these essays make clear that the story of democratic control of the American corporation did not come to a halt after the charter mongering race-to-the-bottom in the late nineteenth century. To the contrary, new methods of regulation were quickly invented and deployed in a fairly continuous effort to deal with the rapidly changing conditions of corporate consolidation, concentration, and expansion. Some, like the effort at federal incorporation, failed. Others, like the public utility regime, performed important work before giving way to even more capacious regulatory changes in the New Deal and Great Society eras. Still others, like corporate taxation, remain important sites for the ongoing democratic control of corporations to this very day.

The early New Deal was in many ways the culmination of the kind of structural, vertical, and systemic regulation of American corporations in the antimonopoly, public utility, and unfair competition modes pioneered in the late nineteenth and early twentieth century. And the administrative regulatory road from the ICC, the Sherman Act, and the FTC to the National Recovery Administration, the Securities and Exchange Commission, and the Temporary National Economic Committee ran fairly straight if not so narrow.[75] Beyond the distinctive economic emergency posed by the Great Depression, the growth and concentration of industry through incorporation remained a first-order concern of New Deal democracy just as it fueled earlier progressive regulatory innovations. By 1931, for example, the Aluminum Company of America essentially controlled the entire domestic market for bauxite. The International Nickel Company owned more than 90 percent of the world's nickel resources, and Texas Gulf Sulphur and Freeport Sulphur together nearly matched that percentage in sulphur. Almost one half of American copper reserves were owned by four companies—Anaconda, Kennecott, Phelps Dodge, and Calumet & Arizona Mining, and a handful of entities predominated in lead and zinc. United States Steel Corporation single handedly owned 50 to 75 percent of iron reserves and together with Bethlehem Steel controlled over 50 percent of steelmaking capacity. Examples could be extended out across the economy as corporate concentration persisted as a public policy problem. As Thomas McCraw noted, "Almost half of the largest American firms at the *close* of the twentieth century (manufacturing and other types as well) originated during the period 1880-1930."[76]

As they had since the original great merger movement, such conditions were met again with regulatory innovations—in this case, the bold federal initiatives of the New Deal. Bank and Mehrotra suggest the degree to which the early New Deal brought an aggressive new attitude to corporate regulatory taxation through the interventions of Berle, Rexford Tugwell, the Pecora Hearings, and the Revenue Act of 1935. For Bank and Mehrotra, the New Deal's corporate tax policy from 1935 to 1937 reflected a regulatory approach in sync with progressive critiques of large-scale business corporations. Similarly, in the area of securities regulation, the Securities Act of 1933, the Securities Exchange Act of 1934, and the Public Utility Holding Company Act of 1935 were something of a regulatory trifecta in this regard, signifying the consolidation, nationalization, and expansion of earlier techniques of corporate regulation. Though frequently over-looked, the Public Utility Holding Company Act, aimed at the intense concentration and the perceived unfair pyramidical structures and securities practices associated with public utility holding companies, was an especially prime indicator of the potential extent of New Deal corporate regulation. As one Senator opened his discussion of the bill, "The people of this Nation have been regaled with stories of the railroad manipulation of politics, but in their palmiest days the railroad kings were cheap pikers compared to the clever, ruthless, and financially free-handed political manipulators of the power trust. Compared to them, all the so-called 'lobbyists and political fixers' of all time are as moonlight unto sunlight and water into wine."[77] The final act essentially turned over to the Securities and Exchange Commission the restructuring of the entire public utility industry. As a recent Secretary of the Commission explained, "People forget about it, but it really was epochal. . . . Imagine today if Congress gave a government agency the authority to study the entire high-tech industry and the responsibility to reorganize it."[78]

As the essays of Bank and Mehrotra, as well as Jonathan Levy and Nelson Lichtenstein suggest, the New Deal cemented in place certain fundamental aspects of the symbiotic relationship between government and corporations that would continue well into the postwar period. Levy places the New Deal at the center of the story of the creation of a "new fiscal triangle" involving the increasingly close relationship between the federal government, for-profit corporations, and nonprofits. Lichtenstein describes how, at the height of the New Deal, many large corporations like General Foods and General Electric themselves adopted progressive reform rhetoric, "describing themselves not so much as a competitive business entity but as an 'institution' infused with all of the connotations of civic beneficence characteristic of other non-market entities, including hospitals, foundations, and even government agencies."[79] Yet, already by the late New Deal, the seeds of change were being planted. The outlines of a new approach to the corporation and regulation were already being drawn in ways that continue to influence our present.

From New Deal Liberalism to the Neoliberal Corporation

As Alan Brinkley's provocative title *The End of Reform* suggests, the priority given to democracy over economy in the Progressive and New Deal eras was increasingly challenged in the decades surrounding World War II. The basic relationship between government regulation and corporate form was reinterpreted and readjusted yet again, leading directly to some of the fraught terms that dominate current debate on corporate responsibility and corporate constitutional rights. As the New Deal increasingly moved from welfare state to "warfare state," the Progressive/New Deal model of corporate regulation in a mixed economy came under increased strain.[80]

On the one hand, a close partnership between government and corporation, public sector and private sector, developed as wartime public spending fueled an unprecedented wave of private corporate expansion and innovation in Franklin Roosevelt's "arsenal of democracy." From vast domestic infrastructure projects like the Grand Coulee Dam to the extraordinary expansion of the Kaiser Shipyards to the incipient emergence of large multinational construction firms like Bechtel, postwar economic expansion was in many ways underwritten by the extension of webs of public-private collaboration rooted in New Deal policy initiatives.[81] At the same time, a certain strand of progressive skepticism regarding the corporation (emphasizing public interest, public service, and regulatory and administrative oversight) proliferated into the postwar era—most notably in works like those of John Kenneth Galbraith on American capitalism, countervailing power, and the industrial state and C. Wright Mills on the power elite.[82]

On the other hand, an unmistakably new chapter was opening in the long and conflicted American conversation about corporate virtue and corporate vice, corporate power and corporate rights. As early as 1939, Friedrich Hayek had already thrown down the gauntlet in a short University of Chicago pamphlet on *Freedom and the Economic System* substantially reversing the prevailing progressive penchant for democracy over economy: "It is often said that democracy will not tolerate capitalism. If 'capitalism' here means a competitive society based on free disposal over private property, it is far more important to observe that only capitalism makes democracy possible. And if a democratic people comes under the sway of an anti-capitalist creed, this means that democracy will inevitably destroy itself."[83] Hayek's re-evaluation of the basic relationship of capitalism and freedom was an integral part of what Edward Purcell called a "crisis of democratic theory" and what Angus Burgin has more recently synthesized as "the great persuasion"—the beginnings of the road to contemporary neoliberalism.[84] A product of the veritable intellectual revolution that accompanied the American ideological confrontation with totalitarianism (from a hot war against fascism to a cold war against communism), the implications of this fundamental shift in perspective for attitudes and polices vis-a-vis the American corporation reverberate to this very day. Gary Becker made clear the dramatic reversal in perspective in an audacious five-page essay on "Competition and Democracy" in the very first issue of the *Journal of Law and Economics* in 1958 asking, "Does the existence of market imperfections justify government intervention." "The answer would be 'no,'" he contended, "if the imperfections in government behavior were greater than those in the market. . . . It may be preferable not to regulate economic monopolies and to suffer their bad effects, rather than to regulate them and suffer the effects of political imperfections."[85] In coming years, more legal and economic scholars would come to support Becker's basic re-prioritization of economy over polity. And for the moment, political democracy seemed to take a back seat to market economy.

As the essays of Adam Winkler, Nelson Lichtenstein, and Jonathan Levy describe, the postwar conception of the nature and purpose of the corporation (and consequently the proper scope of governmental regulation) began a slow and steady transformation in turn. Both the nineteenth-century vision of the corporation as a distinctly "artificial entity"—a "creature of the state"—as well as the administrative-regulatory apparatus of progressive and New Deal political economy came under sustained intellectual critique. Ronald Coase distanced himself from the empirical, institutionalist legacy of the likes of Thorstein Veblen, Walton Hamilton, and Berle and Means with his famous quip that "the American institutionalists were not theoretical but anti-theoretical. . . . [w]ithout a theory they had nothing to pass on except a mass of descriptive material waiting for a theory, or a fire."[86] Such forceful critiques of a previous generation's work on corporations, democracy, and political economy were but prelude to a new effort to reconfigure the nature of the corporation for a new age.

As Lichtenstein and Winkler contend, Ronald Coase's pioneering "theory of the firm" soon gave rise to an entirely new view of corporate governance wherein the corporation was no longer seen as primarily as an artificial state entity, but as a "nexus of contracts"—"a web of voluntary agreements among corporate stakeholders."[87] Part of the more general re-orientation of law and economic thinking associated primarily with Mont Pelerin and the Chicago school, this new perspective on corporate management, finance, and regulation squared more completely with the revival of neoclassical price theory and the return of free market competition as a lodestar of American political economy. In place of the progressive emphasis on economic power, corporate concentration, monopoly, and the unequal distribution of wealth, scholars like Eugene Rostow, Milton Friedman, and Henry Manne returned to contract, property rights, competition, and economic efficiency as the fundamentals with which to rethink the corporation and its place in American democracy. Shareholder democracy or better yet "shareholder primacy" emerged as the new paradigm in law and corporate governance circles, where maximizing profit and shareholder value was treated as the proper goal of corporate enterprise. As Milton Friedman succinctly entitled his influential non-communist manifesto in the *New York Times*: "The Social Responsibility of Business is to Increase Profits."[88]

This long and powerful intellectual transformation had direct and consequential corporate policy effects. Alan Brinkley dates the beginning of the end of reform to 1937 with a general turn in policy away from progressive antitrust, critiques of corporate capital, and demands for regulation, administration, and planning in the direction of a more Keynesian, fiscally-oriented, capital-friendly, and "compensatory" liberalism. Thus Richard Hofstadter was able to ask poignantly circa 1964 "What Happened to the Antitrust Movement?"[89] Levy corroborates this basic idea, noting the Tocquevillian celebration of voluntarism and "civil society" during and after World War II – part of a fundamental redefinition of the nature of Americanism and the basic relationship of public and private sectors in American history. And Mehrotra and Bank highlight a similar shift by the end of World War II away from "a more punitive approach to corporate taxation" and towards programs "designed to improve the cash position of business" as early as 1945.[90] Indeed, many histories of the American corporate and economic policymaking continue to associate the postwar period primarily with the rise of various new forms of deregulation and privatization and the slow but perhaps inevitable demise of old-school techniques of progressive and New Deal regulation, administration, and planning. And from the early genesis of the Chicago school critiques of public utility and regulatory capture to more public interest attacks on airline and trucking regulation to the more global assault on planning and public ownership that accompanied the so-called "end of history" in 1989, there is no mistaking a historical turning away from some of the basic assumptions that guided earlier American regulatory efforts vis-à-vis the corporation.[91] Something of the global aspirational spirit of that re-orientation was perhaps captured in the World Development Report of the World Bank in 1996 entitled simply "From Plan to Market."[92] And in the wake of *Citizens United* and *Hobby Lobby*, even critics seem to concede an unprecedented shift in perspective, asking things like "Is the First Amendment Being Misused as a Deregulatory Tool?"[93]

But it would be a mistake to overstate the general turn away from corporate regulation in this most recent period. As David Vogel among others has reminded us, the period after World

War II was just as notable for the rise of new and bold forms of regulation and administration – what he dubs "the new social regulation."[94] The development of a new wave of cross-cutting, economy-wide regulations regarding worker safety, consumer safety, environmental protection, and civil rights continued greatly to affect corporate policymaking long after the demise of the Civil Aeronautics Board and the Interstate Commerce Commission. Indeed, Cass Sunstein has characterized the extraordinary expansion of the American administrative and regulatory state in the 1960s and 70s as involving nothing less than "a rights revolution."[95] Similarly, the emergence of new techniques of corporate self-regulation and co-regulation in the same period also expanded the repertoire of corporate regulatory techniques.[96] In the field of American labor law amid the enormous challenges posed by globalization and de-industrialization, new methods of corporate and regulatory control continue to predominate.[97] Once again, the story of this most recent historical periods is not a simple, linear tale of deregulation or corporate ascendancy, but yet another recalibration of the underlying relationship of the corporation to American democracy. Once again, important innovations in corporate form and corporate governance were joined by repeated and sustained attempts by the polity to regulate and keep corporations and their economic and political power under some form of democratic control.

The complex implications of this new postwar dispensation are perhaps on best display in Lichtenstein's essay "Two Cheers for Vertical Integration: Corporate Governance in a World of Global Supply Chains." Lichtenstein sees the most recent era in the history of the American corporation as characterized by a seismic shift in the organization of corporate and market power and control. Mega-corporations like Walmart, he argues, exercise immense market power through their capacity to operate through international supply chains rather than through the vertical integration techniques of industrial corporate capitalism. Such international supply chains – together with the increased predominance of forms of subcontracting and contracting out – pose major challenges to traditional forms of governmental and democratic control. This is especially the case with regard to unionization and labor law, where the jurisdictional focus and force of traditional restrictions and protections was eclipsed as corporations moved their labor beyond the borders of the United States and the reach of the conventional countervailing powers of unions, legislatures, and regulators. Yet even here, Lichtenstein suggests, new international (as well as national) forms of control proliferated in the guise of innovations like "jobbers agreements" and the international Accord on Fire and Building Safety. Lichtenstein's chapter captures both the challenges of the new structure of international corporate governance and organization as well as the continued struggle of democratic constituencies to influence corporate behavior in a newly globalized and divided economic environment.

The postwar transformation of corporate governance and regulation also sets the stage for the final set of issues engaged by this volume—the new Supreme Court constitutional jurisprudence in *Citizens United* and *Hobby Lobby*. As Winkler makes quite clear in his concluding chapter "*Citizens United*, Personhood, and the Corporation in Politics," the road from this more general reconsideration of the nature of the corporation and its responsibilities to contemporary constitutional struggles over constitutional rights and corporate personhood runs straight and narrow. For Winkler, Justices Antonin Scalia, Anthony Kennedy, and Samuel Alito's views on the corporation and constitutional rights as developed in the post-*Bellotti* cases that run from *Austin* to *Hobby Lobby* were rooted originally in the transformation of corporate theory and corporate law in the shadow of law and economics in the postwar period. As Winkler provocatively concludes, "The empowerment of shareholders undermined shareholder protection as a rationale to justify government interference with both the economy and election financing."[98] And it is perhaps this explicitly legal and constitutional development that is in some ways the most unprecedented in the history of the corporation and American democracy.

Varieties of Corporations and the Emerging Problem of *Citizens United* and *Hobby Lobby*

From the early nineteenth century on, the kinds of businesses and associations taking the corporate form have ranged from small closely held "incorporated partnerships" to larger enterprises with dispersed ownership interests. Over the course of the twentieth century, however, the differences between firms across the spectrum and at both ends of the size distribution have only increased dramatically, posing challenges for the treatment of corporations in constitutional law as well as the protection of the rights of the persons making up such diverse legal institutions.

Margaret Blair and Elizabeth Pollman's essay "The Supreme Court's View of Corporate Rights," examines the Supreme Court's jurisprudence surrounding corporate rights. For most of U.S. history, they suggest, the Court treated corporations as artificial persons whose rights and responsibilities were determined by the specific statutes that created them. To the extent that the Court found it necessary to look beyond statute and decide questions involving corporations on constitutional grounds, it based its decisions on the rights of the individuals who associated with each other in corporations, not on any abstract idea that corporations themselves were rights-bearing legal persons. Thus, they show that the 1886 *Santa Clara* decision was only one in a long line of nineteenth-century cases in which the justices looked through the corporation to assess the extent to which injury was inflicted on shareholders. Bloch and Lamoreaux make a similar point in their chapter, suggesting in addition that when the Court did look through the corporation to the shareholders, it focused primarily on property interests not on other constitutional rights. As Justice Field described the basic distinction: "The lives and liberties of the individual corporators are not the life and liberty of the corporation."[99]

The Court's "associational" approach, Blair and Pollman argue, made sense in the nineteenth century, when most corporations were small and relatively closely held and constitutional questions mainly concerned protections for contract and property interests. But that fit has gotten worse over time, exacerbated in the late twentieth century by the development of First Amendment jurisprudence and its extension to corporations. Although it was perhaps reasonable to think of all the shareholders in a corporation as having a common property interest in protecting their companies from the kinds of discriminatory taxation at issue in *Santa Clara*, it is not at all clear that shareholders (especially shareholders in large-scale enterprises characterized by a separation of ownership from control) have a similar interest in allowing managers to use company funds to "speak" politically on their behalf, even when the speech involves matters directly related to the business of the company. To the contrary, as Winkler shows, the first federal campaign finance law (the Tillman Act of 1907) was a reaction to the revelation that shareholders' money was being used to elect candidates who opposed regulatory reforms that were obviously in the shareholders' interest.[100]

Recently, this problem has been further complicated as the use of the corporate form in the twentieth century has spread to so many new types of entities. Throughout history, of course, the corporate form has always been used for many purposes other than business—in the early modern period for towns, universities, churches, and charities; in the early nineteenth century for libraries, scientific associations, fraternal societies, social clubs, and moral reform organizations. In the twentieth century, however, use of the corporate form broadened further still to include advocacy organizations ranging from the Ku Klux Klan (KKK) to the National Association for the Advancement of Colored People (NAACP).[101] The latter in particular raised new issues concerning the constitutional rights of the incorporated.

The Supreme Court's refusal to contemplate the consequences for corporate-rights jurisprudence of the variety of different types of organizations that increasingly took the corporate form posed new legal and constitutional problems in the 1950s and '60s. As Bloch and Lamoreaux show, a series of cases came before the Courts in which states were using their regulatory powers over corporations to suppress civil rights organizations. Until this point the Court had consistently applied its nineteenth-century precedents to corporations of all types. As late as 1939, for example, while upholding a suit brought by individuals against a Jersey City ordinance restricting the right of assembly, the justices had denied a similar challenge by the American Civil Liberties Union (a corporation) on the grounds that liberty and privileges and immunities clauses of the Fourteenth Amendment applied to "natural persons," not corporations, so "only the individual respondents may … maintain the suit."[102] However, when faced with southern states' attempts to exploit these same precedents to block desegregation efforts by the NAACP (a corporation), efforts that the Court was already on record as supporting, it reversed its positon. Looking through the corporation to its members, it handed down a series of decisions granting the organization standing to assert rights claims on behalf of its constituents. But it did so, again, without articulating how this particular corporation might differ from other types of corporations, most importantly, those organized for business purposes.[103]

These mid-twentieth-century decisions expanding corporations' ability to claim constitutional rights without seriously considering the types of corporations involved—not an original understanding of corporations, nor even the late-nineteenth-century Court's interpretation of the Fourteenth Amendment—lie at the heart of current controversies over the role of corporations in American democracy. As Winkler, Blair and Pollman, and Bloch and Lamoreaux all show, the effect can be clearly seen in the area of campaign finance law, when in 1978 in *First National Bank v. Bellotti*, the Court first posed constitutional objections to statutory restrictions on corporate political speech. Justice Lewis F. Powell, who wrote the majority opinion, refused to address directly the question of "whether and to what extent corporations have First Amendment rights." That, he insisted, was "the wrong question," because the First Amendment served broader "societal interests" in protecting the free flow of information to members of the electorate.[104] Nonetheless, Powell confused the issue by insisting, citing the NAACP cases and other decisions pertaining to freedom of the press, that "freedom of speech and other freedoms encompassed by the First Amendment always have been viewed as fundamental components of the liberty safeguarded by the Due Process Clause, ... and the Court has not identified a separate source for the right when it has been asserted by corporations."[105] Writing in dissent, Justice William H. Rehnquist chastised Powell for not understanding the special nature of the corporations involved in those cases.[106] He did not prevail, however, and the same elisions show up in later cases, most notably *Citizens United*. Here again, Justice Kennedy, writing for the majority, based the Court's opinion on the public's right to uncensored information. Quoting Powell, he asserted that "political speech does not lose First Amendment protection 'simply because its source is a corporation,'" and like Powell he cited the NAACP and freedom of the press cases. Refusing again to take note of the special features of the corporations involved in those cases, he pushed the implications further still. The Court, he claimed, "has recognized that First Amendment protection extends to corporations."[107]

This last assertion was quoted in the headnotes to the case and quickly found its way into new legal actions seeking to expand corporate rights. A good example of its proliferating effect is the suit brought by Hobby Lobby Stores, Inc., a for-profit retailer seeking a religious exception from the contraception mandate in the Affordable Health Care Act. In finding in favor of the company, the Court's majority dodged the constitutional issue and instead claimed to base its finding on statute, the Religious Freedom Restoration Act (RFRA) of 1993.[108] Writing for the majority, Justice Alito also claimed to distinguish among types of corporations. The ruling, he wrote, was limited in its application to closely held, family run corporations whose members share sincere religious beliefs. However, at various points in his opinion Alito indulged in a more expansive logic, suggesting that the decision had larger constitutional ramifications and that it potentially applied to corporations whose members disagreed about religious matters and even to large, public companies. In determining, for example, that RFRA's definition of a person included corporations, Alito asserted that "no known understanding of the term 'person' includes *some* but not all corporations." Also speaking generally, he pointed out that "a corporation is simply a form of organization used by human beings to achieve desired ends" and that when the courts extend rights to corporations ("whether constitutional or statutory") the purpose is to protect the rights of the people who make them up. "Protecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies," he proclaimed, just as "protecting corporations from government seizure of their property without just compensation protects all who have a stake in corporations' financial well-being."

In other words, under the guise of extending a statutory protection to owners of closely held corporations, Alito took logic that historically had rationalized the extension of constitutional protections to corporations in order to safeguard their members' property and analogized it so as to provide (perhaps all) corporations with constitutional protection for a much broader set of rights. In combination with *Citizens United*, the decision challenges one of the key legal pillars that had supported government regulatory authority over corporations since the nation's beginning. As the response that greeted these decisions indicates, moreover, they have certainly opened up a new chapter in the centuries-long conflict over the relationship between corporations and American democracy.

Conclusion

As the essays in this volume make clear, the relationship between the American corporation and American democracy has been anything but simple, singular, or uniform. Not only has this relationship developed and changed since the founding of the republic, but so have both corporations and democracy. The Framers could never have foreseen the scale and economic power (globally as well as nationally) attained by today's largest business corporations. Nor would they have been able imagine the diversity of uses to which the corporate form has been put, or the role that corporations formed for advocacy purposes have come to play in American society. As much as they abhorred the privilege-based factions of their own time, they would have been bewildered by the mass media-driven politics that ultimately replaced it. And they would never have been able to predict the innovative legal and political technologies that policy makers would devise to control, regulate, and hold corporations accountable to the people, as both democracy and the corporation evolved.

The essays in this volume document the contours of this ever-changing relationship but they also show that there were parameters that defined the boundaries of change. One is the persistent double vision that has always been at the heart of American attitudes toward the corporation. As Dorothy Thompson wrote in the *New York Times* at the height of the New Deal:

“Two souls dwell in the bosom of this Administration, as indeed, they do in the bosom of the American people. The one loves the Abundant Life, as expressed in the cheap and plentiful products of large-scale mass production and distribution . . . . The other soul yearns for former simplicities, for decentralization, for the interests of the ‘little man,’ revolts against high-pressure salesmanship, denounces ‘monopoly’ and ‘economic empires,’ and seeks means of breaking them up.”[109] Or as Morton Keller put it perhaps more accurately, “The land of trust was also the land of antitrust.”[110] Americans have alternatively seen the corporation as both a bulwark of democracy and its persistent menace. On the one hand, they have long embraced corporations as vehicles to achieve a wide variety of purposes, ranging from the efficient production of goods and services to the effective promotion of social and political goals. And they have vigorously participated in them as employees, managers, investors, and consumers, members, organizers, donors, and followers. On the other hand, from the Jacksonian critique of special privilege to the Progressive worry about the political consequences of market power to today’s concern with the millions of corporate dollars flowing into political advertising, they have continued to view the corporation as a potentially undemocratic form of unaccountable private power.

The other parameter that the essays in this volume underscore is the long and largely uninterrupted history of regulating corporations in the public interest. In contrast to popular American rhetoric about natural rights or neoliberal economics or originalist constitutionalism, the fact of the matter is that the history of the American corporation has been bound up from its inception with continuous, insistent, and rigorous forms of state intervention and regulation. This seems to have been the American way. Although the history of corporations in America has passed through different regimes of regulation—from the special charter to general incorporation and from public utility to the new social regulation—it has never been a simple story of the defense of private rights or laissez-faire or of granting corporations the rights of natural persons. Rather, from 1787 to the recent past the dominant American legal tradition has been to hold corporations to higher standards of public trust, public service, public a responsibility—to hold them accountable to the democracy. Though we currently live in an era when that tradition, and that regulatory state built to enforce it, have come in for rather sustained criticism, it would be a mistake to underestimate its historic strength and its future potential.

Finally, the essays in this volume highlight the importance of the history of American democracy to the history of the American corporation. At almost every stage of its development—from the founding period to the present—the American corporation has been shaped, cultivated, regulated, and restrained by the force that is American democracy. For most of American history, as Oliver Wendell Holmes, Jr. reminded his Supreme Court colleagues in his classic dissent in *Lochner*, democracy was given priority over economy, and the people successfully defended their right to "embody their opinions [on corporations] in law."[111] In the Jacksonian, Progressive, and New Deal eras, questions of the scale of corporations, their rights, their possibilities, and their corruptions spurred the demos to push for structures of accountability—for general incorporation statutes and regulatory legislation—that harnessed corporate powers for the public good. Today, these same questions remain on the front burner of American policymaking. We do not yet know how the demos will ultimately respond, but the history of the corporation and American democracy makes one thing clear. Since the founding, corporations have been the creations of we, the people. The future direction of corporate power, possibility, and responsibility still remains in our hands.

Endnotes

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[97] See for example, Kate Andrias, "The New Labor Law," *Yale Law Journal* (forthcoming, 2016).

[98] Winkler, "*Citizens United*, Personhood, and the Corporation in Politics," __, __.

[99] *The Railroad Tax Cases*, 13 F. 722 (1882) at 746-47. See also Justice John M. Harlan's opinions in *Northwestern National Life Insurance Co. v. Riggs*, 203 U.S. 243 (1906); and *Western Turf Association v. Greenberg*, 204 U.S. 359 (1907).

[100] See Winkler, "Other People's Money," as well as his essay in this volume.

[101] See Levy's essay in this volume. See also Bloch and Lamoreaux, "Voluntary Associations."

[102] *Hague v. CIO*, 307 U.S. 496 (1939) at 514 and 527. For additional cases from the 1930s and 1940s, see the essay by Bloch and Lamoreaux.

[103] *NAACP v. Alabama*, 357 U.S. 449 (1958); *NAACP v. Button*, 371 U.S. 415 (1963); *NAACP v. Alabama*, 377 U.S. 288 (1964). See also *Congress of Racial Equality v. Douglas*, 318 F.2d 95 (1963), which the Supreme Court refused to hear on appeal in *Burt v. Congress of Racial*

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[104] *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) at 775-76.

[105] *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) at 779.

[106] *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) at 822.

[107] *Citizens United v. FEC*, 558 U.S. 310 (2010) at 340, 342.

[108] *Burwell v. Hobby Lobby Stores* (2014), http://www.supremecourt.gov/opinions/13pdf/13-354_olp1.pdf, accessed 22 July 2014. The quotations below are from pp. 18-20.

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