ABSTRACT

Origins of Corporate Power:
The Historical Growth and Transformation of Corporations

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Corporate business today has become instrumental component of our economy and our society as a whole; however, there is comparatively little discussion of how this came to be. How did corporations develop and change overtime, and what do these changes imply about how they are currently considered? The idea of corporations grew out of a combination of more basic forms of human commercial association, and the idea of organizations that could be considered as a group to be an "artificial person." Over the course of only about 300 years, the corporate institution in the United States swung from a rarely used, specially granted, device for state-economic regulation to a centrally important, generally available, system for business organization. At the same time, the growing notion of corporate constitutional rights has substantially reduced the government's ability to manage and regulate corporations. In reaction to the unprecedented corporate growth of the last century, there have been several popular movements that aim to grant new authorities to government in order to counter corporate power; however, this has largely only served to increase government involvement in the economy, while not significantly reducing the influence held by corporate entities. Given all this, it is important to understand the historical development of corporate power in order to determine what might be problematic in the current corporate order, and how such issues should be addressed.

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ORIGINS OF CORPORATE POWER:

THE HISTORICAL GROWTH AND TRANSFORMATION OF CORPORATIONS

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CHAPTER ONE

Introduction

Corporations, the actions they take, and the products they make affect the lives of all of us in a number of profoundly influential ways. This simple fact often escapes our attention, but if you were to look around the space in which you are currently sitting, you would likely be hard pressed to identify an object which has not been touched at some point by some massive corporate entity. Everything from the clothes you are now wearing to the paper from which you are reading these words almost certainly owes its existence in some part to the efforts of some rather large company. Our society has come to accept this condition of corporate ubiquity as a given, but things have not always been this way. There was a time when the average person's experience with a corporation would have simply been the passing thought of some far of organization that was responsible for importing textiles into their country. Corporate businesses were at one time a rarity, and used to even require special permission from a monarch in order to be created.

Considering the sheer magnitude of corporate influence today, the advent of the modern corporation is a surprisingly recent phenomenon. While the basic concept of incorporated legal associations between persons dates back to the Roman Empire, and the idea of partnering with other merchants in business dates back even further, the notion of today's generally accessible, limited-liability, joint-stock company did not arise until after the American Civil War. It was only with the the business boom of the late 19th century that corporations in their present sense began to exert a significant influence on

the global economy. Prior to this, there was the odd large corporate entity here and there, but the primary focus of the economy centered around individual merchants and agriculture.

Properly tracing the true origins of what is today referred to as a corporation necessitates some examination of what that term, “corporation,” actually means. Businessmen have been organizing themselves into groups designed to facilitate their endeavors almost since the dawn of human commerce. The Latin word *corpus*, from whence the modern English “corporation” was originally derived, was used to refer to various different commercial orders and associations that were recognized under the law in ancient Rome. Even following the collapse of the Rome empire, throughout medieval Europe there still continued to exist legally organized groups and guilds that served to promote the business interests of their members. The risky nature of maritime trade has motivated merchants throughout history to create partnerships and agreements designed to distribute their risk, and many early banks organized their business empires through multiple separate partnerships following that same principle. By all accounts it would seem that people have been going into business together for quite some time.

All of these business arrangements neatly fulfil the description of an organization of persons that is engaged in business, and thus they can in one sense be termed as “corporations” or “companies”; however, such arrangements are still along way off from satisfying the criteria we associate with corporations today. A more modern definition of a corporation must first distinguish the concept of a corporation as a distinct legal entity that is incorporated (i.e. granted the right to establish the aforementioned legal status) by some government. Additionally, most of today’s incorporated entities are owned by

multiple parties via a joint-stock distribution of shares, and also afford their share holders with limited liability for any debts and penalties the company might incur through its business dealings. For clarity sake, I will only use the word "corporation" to describe more modern companies that qualify as incorporated, limited-liability, joint-stock entities, and I will use the word "company" to refer less specifically to any legally organized business association. Additional, I will use the adjective "corporate" to refer to some of the qualities of a corporation, without implying that all the aforementioned criteria are present. These distinctions are largely based on my own determinations, though they do have some etymological and historical justification.

Before there were corporations in the modern sense, there had already been many businesses that would qualify simply as companies. Organized business associations in the form of guilds, companies, and later corporations have played a significant role in driving the history of economic development throughout the western-world. Properly examining why this is the case requires us to discover what potential benefits business people might have gained from arranging themselves in this way. The way in which these institutions have organized the processes of commerce (starting on a local level and working all the way up to today's system of global trade) is not accidental. At each step along the way, organizing business within the context of a company (or some variant there of) provided distinct advantages that enabled increased growth of revenues. Partnerships created distributed risk, and later limited liability eliminated personal risk almost completely from the corporate equation. Incorporation created artificial legal persons that could outlive their creators, and general laws of incorporations opened these advantages to anyone who could fill out the paperwork. Each new innovation in corporate

advantage seems to have spurred on economic progress by some new order of magnitude; thus, it could be said that the story of today's corporation is also the story of global economic development, with the corporation being a key form of economic organization that worked to drive advancement. With that in mind that, understanding the history of corporations (and their predecessors) is important, not only for its own sake, but also for understanding the overall development of human commerce.

The evolution of the corporate institution and the attending commercial expansion seems to have primarily been driven by the simultaneous political and social developments that occurred in the western world. There certainly were significant advancements in commerce in various places throughout the eastern world that bore a striking similarity to the developments that will be described in the the west. That being said, the economic developments of the east tended to have little bearing upon the modern corporate phenomenon, which finds most of its roots in either European colonialism or American capitalism. Thus, while the economic histories, of China, India, and the Middle East are certainly notable and interesting, they are of passing relevance to the topic at hand.

This discussion of corporate history will examine four key stages of corporate development in order to determine specifically how the corporate idea has changed over time and how corporations have been perceived by people and other institutions at various point in history. The central focus of this examination will be to identify various instances in which there have been major shifts in corporate understanding and what the result of those shifts has been. Overall, I will endeavor to answer the question: How have

corporations changed overtime, and what might these changes imply about the modern corporate approach?

The first stage of corporate history to be considered will be concerning the early origins of corporate ideas. The roots of business incorporation lie primarily in the improvement of simple business association between multiple parties. From this point the development of laws designed to mange commerce created a corporate framework through which commercial association could be formalized and thereby stabilized. The institution of the corporation turned out from its inception to be quite an effective one, and thus there was a considerable amount of skepticism on the part of many rulers leveled toward corporate bodies. The resulting restrictions that ensued meant that corporations would be required to exist at the will of the state for many centuries to come.

The colonial period brought about a prime example of state control and utilization of the immense effectiveness contained within a corporate organizational structure. Several European monarchies chartered trading companies in order to better facilitate the extraction of the abundant resources that had been discovered in the New Worlds. While access to charters was tightly controlled by the state, once they were charted, companies like the British East India Company were essentially granted *carte blanche* to increase their yield by any means necessary. The eventual result was corporate power and corporate corruption on a massive scale. Still, the role of these corporations in the overall economy at the time was such that their abuses did not tend to have a significant impact on commerce or society as a whole. Yet, the excesses of these early corporate monopolies had a distinct impact on the perception of corporations in the American colonies, and

many of the abuses the early colonists suffered as the result of corporate influence would come to resonate in the principles enshrined in the new American government.

Following the American Revolution and the ratification of the U.S. Constitution there was a profoundly different climate in the United States towards corporations. This period in history marks the very first time that there began to be wide spread access to the corporate system. Initially, corporate charters still had to be formally granted by state legislatures, but the charters were being granted at a rate that far exceeded what had been available under British control. Eventually, the legislatures began to step out of the process all together, allowing for anyone meeting certain criteria to incorporate a business under general acts of incorporation. This, along with an increase in other business protections (such as limited-liability), ensured an even friendlier corporate climate for new businesses. This time in history marks a fundamental shift in the way American law approached corporations, as more and more courts recognized corporations as entities that possessed protected rights that could restrict the ability of legislatures to place controls on their activities. The result was a massive transformation from the corporation's former status as a tightly controlled mechanism granted by special permission of the legislature to a widely available system of organization that allowed for the creation of massively powerful and protected entities.

Finally, this unshackling of the corporate institution in early American history set the stage for the massive corporate growth of the Gilded Age. Beginning with railroad companies shortly after the Civil War, there was a wave of massive new businesses that began to take advantage of these newly available organizational structures and started to grow at a massive scale by utilizing new industrial technologies and techniques. Natural

market forces tended to push large corporations toward becoming even larger with even more integration and control in their industries, ultimately resulting in the adoption of the practice of large-scale collusion and the consolidation of various firms. Eventually, the power and influence of big business reached a tipping point, and the government was forced to respond. Various new regulations were passed to restrict corporations from colluding or from growing too large, and workers fought for reforms that would improve their workings conditions. This marks somewhat of a reversal for the growth of corporate power, but at the same time, it is important to recognize that in many respects, these new restrictions were superficial in their overall effect. Despite the alarm that corporate growth had elicited, the response did not significantly curtail the power amassed by large corporate institutions, and in many cases the instituted reforms actually allowed for expanded corporate involvement in certain areas (e.g. welfare programs for employees).

Having more thoroughly tracked all of these developments in the evolution of the corporate system, it then becomes necessary to examine what implications these facts might hold for the way in which corporations are currently considered. While there may be some alarming trends in the expansion of corporate power that should be highlighted, the overall takeaway appears to be the great extent to which the corporate institution has transformed through history, and especially through the last 200 years. While the notion of corporate change may seem a superficial insight to emphasize when discussing thousands of years of history (obviously one should expect considerable change to have occurred between ancient Rome and modern America), the extent to which the corporate institution has changed, the manner in which it has changed, and the causes of those

changes are all quite informative in considering whether a reevaluation in the modern approach to corporations is necessary, and what such a reevaluation might entail.

CHAPTER TWO

Commercial Association in Ancient and Medieval Times

A study of the historical development of the corporation from its very beginning reveals several key principles that seem central to both corporate history, as well as to the history of human commerce as a whole. From the earliest trade associations, going back nearly to the dawn of civilization, people have found that combining resources towards a common cause is an effective means of better reaching a goal. Early business partnerships enabled their participants to take on projects that might have been to costly for individuals to fund on their own, and they also had the natural benefit of distributing the risk of any particular venture across multiple parties. In many ways, it appears that the story of human economic progress is one simply of people finding more and more effective ways in which to go into business together. One key way people have found to improve their economic cooperation lies in the notion of some outside power enforcing the terms under which a partnership is agreed to. Economic association that is protected by some form of legal guarantee is substantially less risky to investors, and thus spurs on more participation. Thus, like many of the innovations that occurred with early guilds and companies, the development of corporate law was also aimed at improving the ability of businesses to generate wealth.

At the same, time rulers at various points throughout ancient and medieval history have been wary of the influence of business, and the potential threat that large commercial organizations might pose to their power. This has especially been true in societies that have granted increased protection and privileges to certain types of business

association. Such legal principles that benefit businesses are granted and maintained by the society that established them; therefore, the use of those principles by business should be in some way in the society's interest. Otherwise, it would be unwise for that society to continue to grant business access to such principles. Naturally, a business must derive some benefit from this arrangement as well, or it becomes equally impractical. Clearly, some balance must be struck here. The skepticism with which many rulers viewed corporate entities stems from a recognition of this principle. In the Middle Ages many monarchs made agreements with and allowances to companies, and did so with their own benefit in mind. As the governments of the world began to democratize, naturally it would seem reasonable to expect that the people, as rulers of themselves, would seek a similar state of affairs. Thus, it would seem that the corporate project should be equally devoted to improving business performance and to providing benefits to society at large.

A closer examination of early history is important to understanding more modern corporate structures both because of the similarities and the differences that it highlights. There is something uncanny about the way in which the workings of early businesses resemble those of modern corporations; however, it is important to note the differences in scale that exist, as well as the many institutional differences that are not always obviously apparent. Overall, it is important to note how certain principles of our modern corporate system were developed, and how particular circumstances in which they originated affected their use and purpose. This careful approach to corporate history is the only way that valid comparisons can be made between the features of such disperse points in time.

The Early Roots of Corporate Principles

A simple partnership between two businessmen is the most basic form of human commercial collaboration, and this idea seems to be at least as old as business itself. Nearly 5000 years ago, the ancient Mesopotamian civilization of Sumer had already developed sophisticated trading practices and organization among its merchants. The Sumerians even developed some of the earliest contracts designed to guarantee property ownership.[1]Business partnerships of even this most basic kind afford their participants with an advantage that will be a central concern of every company structure devised in the subsequent years, namely the reduction of individual risk. In any kind of partnership (especially one composed of multiple partners) any losses that are incurred in the course of doing business can be distributed evenly among the various partners, thus drastically reducing the damage done to any one individual. Reduced risk will naturally act as a motivating force that will make potential entrepreneurs more likely to engage in a new venture, thus driving the whole economy forward. This principle was already at work early in human commercial history, especially in risky business sectors. Sea trading expeditions under taken by the ancient Phoenicians around 1200 B.C. were often organized and financed by multiple backers. Traders in Athens would later adopt a similar arrangement (in order to account for the particular time, expense, and risk involved in maritime commerce), and more notably, the Athenian system would come to have a novel basis in law.[2]

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[1] Jonathan Barron Baskin and Paul J. Miranti, *A History of Corporate Finance* (Cambridge: Cambridge University Press, 1997) 29.

[2] John Micklethwait and Adrian Wooldrigdge, *The Company: A Short History of a Revolutionary Idea* (New York: Modern Library, 2003) 3-4.

Though the principle of distributed risk seems to have been discovered early on, other central ideals of the modern corporate system were not as obvious. Partnerships and contracts are effective ways to organize a business, but such agreements are utterly useless if there is no mechanism for their enforcement. Thus, the advent of rules for companies codified in law asserts itself as the next major turning point in corporate development; such rules appear for the first time around 450 B.C. in ancient Athens. Law was not always a central component of Greek business; breaking from the tradition of state-run palace economies that were employed by most Bronze Age empires, the development of early Greek commerce took on a uniquely individualistic and entrepreneurial flavor. Independent farmers and traders were the most common participants in business, and the partnerships that did exist tended to be small and well distributed among many different enterprises. Most businesses employed only 2 or 3 people, and the law had very little to say regarding working conditions or wages.[3] The reign of Pericles in Athens ushered in a time of tremendous economic success, and fostered an incredibly open attitude toward free trade. The Greek economy was largely self-regulating by way of market forces, but still, it cannot be said that ancient Greece was a completely *laissez-faire* economic paradise. The time of Pericles was also transformational in Athenian law. A system of law governing business practices did emerge, though it tended to avoid any drastic interference in commerce. Mostly these laws consisted of organizational requirements, modest tolls, and safety inspections, but the laws were still notable in that they established for the first time an economy that was built upon the basis of market forces and predictable regulation under codified public

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[3] Karl Moore and David Lewis, *Foundations of Corporate Empire: Is history repeating itself?* (London: Prentice Hall, 2000) 67.

laws.[4] This melding of law and business will be an essential turning point in the story of the corporation as it continues its progression.

The advent of commerce organized within a legal framework sets the stage for one of the most influential innovations in corporate law, legal persons. Like many other concepts in the modern western legal system, the idea of artificial legal entities, or "artificial persons" under the law, originated in Athens. Various organizations ranging from religious societies to trading societies were treated as singular entities in the law's eyes, and the by-laws of such organizations were treated as lawfully binding upon their members as well as upon their interactions with outsiders.[5] This notion of the artificial legal person developed from its origins in Athens to be a cornerstone of modern corporate law, but the Athenians could not carry it to its full potential. Athenian law did not confer the status of artificial personhood upon businesses, and even the Athenian banks that became ubiquitous in the aftermath of the Peloponnesian War were organized as personal enterprises that legally belonged to a single owner.[6] Not long after experiencing the commercial success and the legal progress ushered in by Pericles, Athens soon began a period of steep decline. Making a living in business would once again come to be looked upon with scorn by Athenian society, as it had been in the early days of Homer, and eventually the entire Athenian empire would collapse and be incorporated into Macedonia by Alexander the Great around the mid 3rd century B.C. Understandably, the early Greek innovations in corporate law would have to fall by the wayside until they could be revived again under more amenable circumstances.

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[4] *Ibid*., 65.
[5] John M. Zane, *The Story of Law* (Indiana: Liberty Fund, 1998) 114.
[6] Moore and Lewis, *Corporate Empire*, 68-70.

Corporate Personhood Finds a Home in Rome

Corporate personhood, like many of today's modern legal artifices, would soon come to be adapted from the laws of Ancient Greece and reimagined in the legal codes of Rome. The development of this idea was shaped by several factors within the history of Rome's economic and legal development. Roman law borrowed heavily from the Athenian principles of allowing the people to determine their body of law, while also managing to establish a much more stable system that shored up some of the more volatile democratic elements by relying upon professional jurists, judges, and scholars to see to the law's day to day functions.[7] Meanwhile, the development of the early Roman economy drew much of its organizational structure from the patriarchal familial culture of the various Latin warrior clans that would eventually come to be unified under Roman control in 338 B.C.[8] The concept of *familia* developed into a powerful societal force in the Roman world, and ultimately manifested itself in the form of many established households of slaves and dependents that were subject to a *paterfamilias*. Most Roman businesses were also operated under this structure. The family commerce of Rome stands in contrast to the individualist nature that has been noted in economies such as Athens; however, the Roman economy did share in common with that of Athens a predilection towards free enterprise and a tendency to avoid any central organization of commerce. The commercial culture of early Rome was one that favored entrepreneurship and risk-taking, and these principles were further entrenched when they helped to propel Rome to victory in the First Punic War.[9] Roman enterprise was able to overcome a significant

[7] Zane, *Story of Law*, 149-150.
[8] T.J. Cornell, *The Beginnings of Rome: Italy and Rome from the Bronze Age to the Punic Wars (c. 1000-264 B.C.)* (London: Routledge, 1995), 284, 380.
[9] Moore and Lewis, *Corporate Empire*, 90-92.

disadvantage in naval technology, and a flexible and free Roman market won out against the carefully planned and centrally controlled Carthaginian economic system. This free and enterprising spirit along with a strong familial bond will come to have a profound impact on the development of the Roman corporate system.

The noted 18th century English legal scholar, William Blackstone, regarding the advent of the corporation, claimed that "the honour of originally inventing these political constitutions entirely belongs to the Romans."[10] This might be a bit of an over-statement; as we have seen, the Roman legal and economic system did not spring into existence on its own accord. However, it is clear that the height of Roman Republic, and its transition into empire marks the first point in history that there begins to be organizations reminiscent of the modern business corporation. More specifically, Blackstone traces the origins of corporate bodies in Rome all the way back to Numa Pompilius, the legendary 2nd King of Rome in about 715 B.C. Numa, having ascended to the Roman throne during a time of political division, attempted to dilute the power of the main Roman and Sabine factions by instituting various societies and guilds for manual laborers. Over the course of Rome's history these *universitates* and *collegia*, as they were known, became further integrated into Roman culture and law, and eventually the institution was expanded and used to organize various religious orders. Finally, there came the option for Roman business ventures between multiple partners to organize as *societas*, and engage in commerce as one legal entity. The economic boom in Rome resulting from the Punic Wars and the eventual defeat of Carthage in 149 B.C. spurred the creation of numerous

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[10] William Blackstone, *Commentaries on the Laws of England*, Vol. 1 (Illinois: Chicago University Press, 1979), 456.

partnerships and corporations, and solidified many of the commercial and corporate elements of Roman law.[11]

The most notable of this new breed of Roman business association was the various Publican firms that sprung up throughout Rome under government contracts to collect taxes, and create equipment for the military. These firms are particularly relevant to this discussion because their organizational structure bears a striking resemblance to the modern corporate system. Each of the Publican firms had its own internal leadership structure along the lines of the previously discussed *familia* model. Since they were constituted within Roman law as *societas*, each firm continued to exist as its own entity, with the same members and agreements, even if the the lead partner were to die.[12] The partners, or *socii*, were at the head of the firm, and beneath them there was an organization of various managers that oversaw different divisions of the company. This hierarchy extended all the way down to a regional level, where different branches of a large firm could exist spread out through many of the (at this point, rapidly expanding) Roman territories. Various branch managers, would be employed by the company to administer its affairs within each territory. The Publican firms were also highly competitive amongst themselves to acquire new contracts, that promised expanded business in newly acquired Roman territories. Despite this competition the managing factions of the Publicans were all closely related within the upper cultural class of Rome, and tended to be very cooperative. By the time republic gave way to empire in Rome around 27 B.C. many of the Publicans were openly colluding as a cartel, in order to more

[11]Zane, *Story of Law*, 157.
[12] E. Badian, *Publicans and Sinners: Private Enterprise in the Service of the Roman Republic* (New York: Cornell University Press, 1972) 70.

favorably distribute contracts, thus creating what is likely the earliest corporate monopoly.[13]

In *Foundations of Corporate Empire*, Karl Moore and David Lewis's presentation of the Publican companies, and Roman enterprise generally, heavily emphasizes the similarity of Roman *societates* to modern corporations, going so far as to call them "Publican multinationals." All this seems to be done with an eye toward bolstering the book's primary thesis, that the components of today's modern corporate and economic structure have existed in some similar form since ancient history.[14] So far, it seems that this may be the case to some extent; however, it would be rather silly to think that nothing substantial has changed in the human economy since the time of ancient Rome. While Moore and Lewis do their best to highlight the similarities between the Roman economic order and the modern one, there are several important differences that should be noted at this point.

Firstly, it should be realized that the scale of the Publican firms, while quite impressive for their time, does compare to the scale of modern multinational corporations. Moore and Lewis themselves acknowledge that the Publican firms did not operate within the largest sectors of the Roman economy.[15] Most of the wealth in Rome was tied up in agriculture or private estates, and the contracts that these firms dealt in also tended to be very short term.[16] Thus, while the Publicans must have wielded great economic and political power, they seemed to be some ways away from exerting any major control on the overall economy.

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[13] *Ibid.*, 107.
[14] Moore and Lewis, *Corporate Empire*, 1-3.
[15] *Ibid*., 97.
[16] Micklethwait and Wooldrigdge, *The Company*, 5.

Secondly, several historical sources indicate that even prior to more recent corporate developments, the Roman system was already regarded as outdated. William Blackstone, writing in only 1765, is happy to boast of how English law has "considerably refined and improved upon the invention" of the Romans.[17] Max Weber, writing in 1889, undertook a direct comparison of the functions of *societates* and the general partnerships of his day, and identified several key areas where the institutions diverged. The difference in their functions seems to lie in the responsibilities the partners, or the *socii* have to one and other, but the most significant discrepancy is the manner in which the organizations are considered in law.[18] While the modern corporation has developed into a unique and sophisticated legal system, and spawned an entire (incredibly substantial) field of law concerned solely with its inner workings, *societates* existed only as a special case of an institution that was not principally aimed at business.[19] *Societates* were essentially appropriating a legal associative framework that was designed for guilds or religious orders in the form of *universitates* and *collegia*, thus making any equation of Roman corporate system with the current paradigm all the more shaky.

Lastly, and perhaps most importantly, corporate law in Rome was in its infancy, and there are several important innovations in corporate law that had yet to be discovered. Among such innovations is the principle of limited liability. It has been shown that early partnerships were used as measures to distribute risks in business, and the *societas* would appear to operate on a similar principle. Each of the *socii* were to be

[17] Blackstone, *Laws of England*, 457.
[18] Max Weber, *The History of Commercial Partnerships in the Middle Ages*, trans. Lutz Kaelber (Maryland: Rowman & Littlefield Publishers, 2003), 54-55.
[19] *Ibid*., 53.

equally liable for the payments of any debts incurred in the name of the *societas*.[20] This principle did serve to distribute risk, but it did not serve to limit liability (as Moore and Lewis suggest)[21], as it could actually result in a partner being held liable for debts taken by the other partners. Furthermore, Roman corporate institutions never attained anything even remotely resembling general incorporation; in fact, it was quite the opposite. The Roman legal code only recognized the right of certain specific groups to form corporate organizations at the discretion of the emperor and the senate, and allowance for such groups could be suspended altogether at times when it was thought politically expedient.[22] This is quite different from what has become an almost guaranteed right of any person to establish a corporation in the modern western world. Limited liability and general incorporation will be further considered below, but suffice it to say that they are significant corporate features that are conspicuously lacking in the Roman system.

Overall, it should be clear that while the Romans made major leaps in the development of corporate law, they still fell substantially short of realizing anything like the modern corporate order. It has been shown thus far that many of the components of the modern corporation are in fact very, very old; however, this should not be used to dismiss the significance of the modern corporate expansion. Rather than characterize the history of corporations as a semi-static reimagining of a single institution again and again, it would seem more correct to view it as an idea that has grown exponentially over time. While it is possible to look back and see institutions that look remarkably similar to modern corporations, they will tend to be less fully formed, and exist in a context that is

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[20] Baskin and Miranti, *Corporate Finance*, 38.
[21] Moore and Lewis, *Corporate Empire*, 98.
[22] Antony Black, *Guild & State: European Political Thought from the Twelfth Century to the Present* (New Jersey: Transaction Publishers, 2003), 4, 19.

drastically different from the modern corporate system. At each time throughout history human commerce has been shaped by the circumstances and the needs of any given society. As we chart the history of corporate development, it should become apparent how various innovations have changed companies overtime, and this information can be applied to examine how those innovations are utilized in modern companies. It should then be possible to consider whether there has been any substantial divergence in the practices of modern corporations that would seem to go against the justification for the establishment of certain innovations.

The Revival of European Business

The collapse of the Western Roman Empire in 476 A.D. resulted in massive social, political, and economic shifts across Europe. The economic implications of the fall are particularly relevant to the story of corporate development. Without a central political hub in Rome, the corporate model of *societas* (which, as has been shown, was rooted in legal principles) seemed to fade from memory. Europe in general was thrown into a period of deep economic turmoil as the relative political stability of empire quickly deteriorated into near total anarchy. Barbarian pillaging was rampant, the flow of trade virtually halted, and people began to flee their towns and farms in droves. Ultimately it seemed that the western world was fated to suffer a protracted period of population decline and economic decay.[23] It should be easy to understand why economic catastrophe might act as a drag on the growth of commercial enterprise, but we should also note the effects of the political/legal breakdown. This combination of legal and economic failures

[23] Baskin and Miranti, *Corporate Finance*, 31.

is especially significant to this topic, since corporate development seems to have largely resulted from a unique intersection of both law and commerce.

The political and legal fallout of Rome's collapse was far reaching and varied, but generally it can be said that the rule of law, as it it had been previously conceived, came to an abrupt end at much the same time that Rome did. The only institution which retained any semblance of an organized and consistent legal code was the Church; however, their political position was such that their law had little to no effect on the people of Europe since it lacked the power of the empire to enforce their rulings. Most of the power in the post-Roman world was held by various barbarian kings who were largely unwilling to surrender any of their control to the church, and who were hesitant to accept any Roman notions of law that might diminish their own standing (such as even the most basic idea that rulers should themselves be subject to the law). [24] This political climate led to massive uncertainty and instability, and by the time of the 6th century people across Europe were scrambling to ally themselves with one or another military leader that might serve as their protector.[25] The final result was several classes of serfs spread across variously controlled areas of land, organized as estates or manors, each ruled by some lord who would provide safety for his tenants so long as they surrendered some share of their crop to him. The solidification of these various highly isolated political communities served only to cause further fragmentation in law. Furthermore, trade and contact with other settlements became increasingly rare, and most business was

[24] Zane, *Story of Law*, 189-190.
[25] Baskin and Miranti, *Corporate Finance*, 31.

limited to solitary, traveling Jewish or Syrian merchants that operated without any kind of formal commercial association.[26]

With the new feudal economy firmly established, Europe was condemned to undergo several centuries of political, technological, and economic stagnation. Eventually, as various regions of the former empire began to become consolidated into larger territories and states, under more powerful rulers, the legal practice seems to have experienced a resurgence. The Roman law, having been meticulously maintained by the Church (despite the resistance they had faced from early post-Roman rulers) began to make a resurgence, as more and more monarchs allowed additional power to ecclesiastical courts to hear cases in certain matters.[27] Additionally, certain technological innovations in agriculture (such as the heavy plow and crop rotation) helped to propel the various feudal communities towards economic surplus, and increased growth in trade.[28] Once the European economy was finally able to turn itself around from its post-Roman slump more and more opportunities for large and profitable business ventures began to assert themselves once more. During this recovery, starting in the late 11th century there emerged, two significant new schemes of commercial association: one which effectively illustrated the massive opportunities for profit that had developed from the ever increasing accessibility of maritime trade in addition to the growing importance of coinage and banks, and another which represented a rediscovery of the Roman legal principles of corporate organization after its multi-century dormancy.

By the end of the 12th century the various city states of Italy had become home to massive commercial enterprises, and Italy itself had become a leading center of global

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[26] *Ibid*., 31.
[27] Zane, *Story of Law*, 202-203.
[28] Moore and Lewis, *Corporate Empire*, 142.

trade. Various family businesses, known in Italian as *compagnie* or *collegantie*, began to grow rapidly. In coastal cities such as Genoa, Pisa, and particularly Venice, there was a massive uptick in ship building and maritime technology that paved the way for large Italian gains in foreign markets. Various Italian shipping *collegantie* became the "middlemen of Europe," and were able to import goods on a massive scale from new markets in the Levant and West Asia that had recently been made more accessible in the aftermath of the Crusades.[29] Like the maritime partnerships noted in earlier civilizations, merchants in these *collegantie* distributed their risk on any particular voyage by splitting the cost with other partners. These partnerships were organized under joint-liability contracts, and thus all participants would be liable for any losses or penalties. As a result of this, like most Roman *societates*, these Italian companies were also kept strictly in the family.[30] Meanwhile, in more inland cities, such as Florence, banking was on the rise. This was the business of the Medici family, that expanded their particular bank to have branches all across Europe. These Italian merchant banks were responsible for major innovations in accounting, such as the development of double-bookkeeping, that allowed branches to issue bills of exchange that could serve as a stand-in for actual coinage (which was becoming more and more perilous to transport as the bank branches expanded across the continent).[31]

The Medici bank in particular grew to wield quite a substantial amount of both economic and political power all over Europe. The bank was a major creditor to the rulers of many major European states, and the Holy See was one of their most profitable clients. Additionally, four members of the Medici family themselves ascended to the papacy, and

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[29] *Ibid*., 142-143.
[30] Micklethwait and Wooldrigdge, *The Company*, 8.
[31] Moore and Lewis, *Corporate Empire*, 151.

two of the Medici sat on the throne of France.[32] Once again it seems we are confronted with an incredibly powerful commercial entity; however it is important to note that, like past examples that have been presented, the *compagnia* organization of the Medici firm still falls short of the modern corporate scheme. The *compagnia* in some ways was an improvement upon the Roman *societas*, in that it allowed potential investors to limit their stake in a company, instead of having to go in for one of just a few equally divided large shares. This allowed for an increased ability to diversify one's holdings by simply buying small stakes in many companies.[33] While this is a substantial advance in business finance, it is important to note that the *compagnia* system is not without its limitations. Despite the opportunity for diversification, this type of firm is still lacking in any liability protection, and thus all partnerships were effectively limited to family, because the terms of the arrangement would necessarily make it difficult to trust outsiders to uphold their end.[34] The other major limitation of this arrangement is the fact that there was no corporate component to the organization, and the business really was essentially a standard partnership. The *compagnia* was not its own legal person, and in the case of the Medici bank, each branch was itself organized as its own separate partnership, that was not technically related to the other branches.[35] This diversification method was no doubt necessary in order to maintain such a large business arrangement within the very primitive terms of a non-corporate partnership, but it falls very short of the organizational advantages provided by more modern corporate structures.

[32] Micklethwait and Wooldrigdge, *The Company*, 9.
[33] Baskin and Miranti, *Corporate Finance*, 31.
[34] Micklethwait and Wooldrigdge, *The Company*, 8.
[35] Baskin and Miranti, *Corporate Finance*, 43.

While the various forms of Italian merchant companies made incredible leaps in banking and finance during the 12th and 13th centuries, there are several modern elements of corporate organization that are conspicuously absent from their partnerships. Interestingly, one of the crucial legal devices, that had for all intents and purposes been birthed in Italy, was undergoing something of a revival many hundreds of miles away in Northern Europe and England. Like most surviving legal principles carried down from ancient Rome, the notion of "corporate persons" was revived from the Roman Digest by the Church's system of Canonical Law that wielded influence across Europe by the year 1000. Mirroring the rise of corporate thought in Rome, corporate privileges in early Medieval Europe were originally granted primarily to religious communities and trade guilds, as well as to towns and universities. The corporate structure was ideal for such institutions, especially given the turbulent nature of Medieval life. A formal recognition of the distinct character of a community as its own entity served to establish increased structure and security, as well as to provide a mechanism through which traditions and resources could be passed on successively between generations.[36] The permanence of these kinds of associations was an integral part of rebuilding the institutional fabric of Northern European society that had largely been left in ruin by the Roman collapse.

Eventually, the notion of corporate organization was also expanded to include "regulated companies," which were associations of independent merchants who were granted monopolies in particular foreign markets. These companies, along with the trade guilds were easily the most commercially influential of any other corporate bodies. As these organizations grew in their scope and influence they began to attract significant attention from the monarchy. While the corporations had the legal character of a person,

[36] Micklethwait and Wooldrigdge, *The Company*, 12.

their structure was such that they managed to avoid paying many of the fees that a typical person would be required to pay upon such events as their coming of age, marriage, or death. Once again following the path laid out by Rome, these Medieval monarchs sought to restrict the flow of capital through these companies by putting in place limits on how assets could be transferred to and from them, and on when and how they could be formed. [37] The advent of the regulated company marked an attempt by European monarchs to control the creation of corporate institutions and to harness their natural efficiency to the Monarch's advantage. Regulated companies were granted their status and privileges only by way of a royal charter, and the granting of such a charter was conditioned upon a company's willingness to provide certain monetary benefits to the monarch or economic benefits to the realm.[38] Thus, while the early rulers of Europe were concerned about the threat of this powerful new institutional structure, they were able to simultaneously limit its power and extract a personal gain. This system of a government granting certain privileges to an organization in exchange for certain advantages to the government and/or society would come to define the way in which corporations were created for many centuries to come.

Business and commerce have seemingly never been an entirely individual affair. The very notion of commerce would seem to imply a requirement of multiple participants. It seems also that collaboration in commerce is also something of a given. People working together is largely what has moved society, on all fronts, forward. As human history developed people found that working together in business helped to

[37] *Ibid*., 13.
[38] Baskin and Miranti, *Corporate Finance*, 59.

minimize the individual risk that any one person might suffer by distributing that risk between multiple people. Eventually, innovations in law led to the idea that people might better collaborate if their interactions are regulated and guaranteed by some external mechanism. It appeared that these commercial interactions were so valuable that they should be organized and specified by way of some permanent association between people, a kind of collaboration so complete and unified that the collaboration itself might become its own distinct entity. It is this idea that underlies the principle of incorporating a business. However, once the legal innovation of incorporation had dawn, it seemed that the power of this kind of organization was such that it could potentially pose a threat to the sovereign who allowed it to exist in the first place. Thus, many rulers decided that such associations should be granted permission to exist based on some degree of benefit to the public (or to the ruler).

What might the development of this idea tell us about the modern corporate system? It should be noted that many of the aims of business association as it advanced through history were to surmount certain obstacles to growth and to overcome certain dangers that threatened to undermine human commerce. (Progress in maritime trade was only possible by distributing the risk of voyages, large financial institutions could only function if the risk of losses at one branch did not threaten to bring down all the others, etc.) It is also important to understand that from their very inception, corporate commercial entities have attracted incredible skepticism from rulers who suspected their capacity to easily accumulate power. This uneasiness on the part of monarchs should signal an early recognition of the potential influence inherent to corporate organization and the need for restrictions to present excess and abuse. Finally, it should be apparent

that while commerce, and collaboration in commerce are ancient ideas they have substantially developed and changed as time went on. While early companies like the Publican firms or the Medici bank *compagnia* bear many striking similarities to modern corporations, there are key differences in scale and organization that make it clear that the modern system has developed several novel features that distinguish it from similar structures in the the past. Continued attention to all of these strands from the early history of the corporate idea will be useful in obtaining a deeper understand of the development of the corporate institution from this point forward.

CHAPTER THREE

Corporations and the Age of Colonialism

After the fall of Rome, Europe began to stabilize and realign itself, and it finally returned towards a path of growth and progress. It would not be long before the discovery of two entirely new and virtually untouched continents across the Atlantic opened even more doors of opportunity for European expansion. The corporation was a major component of the new global trading efforts being undertaken by many European countries. Innovations in law and and commerce were making it easier than ever to do business on a massive scale, generating previously unheard of revenues. Naturally, as one might expect, the corporate institutions that engaged in such profitable business acquired quite a lot of power and influence; and corruption began to pop up all over the place. Despite all this, it is important to keep in mind the several key differences between the mercantilist monopolies and modern corporations. The primary difference is the scope of their influence; while the monopolies were certainly powerful, there were relatively few of them, and they still did not exert significant control of the overall economy.

At the same time, it is important not to gloss over the truly unprecedented authority that was given to these non-governmental entities by European monarchs. In many places, especially in the British colonies in North America, these excesses left a lasting anti-corporate sentiment that deeply influenced the formation of new institutions of government. Further examination will illustrate how the American rejection of Great Britain can in many respects be viewed as an equal rejection of British corporatist policies. Additionally, we should also note the enduring effects that this corporate

domination had on the founding of the new American government. Several of the founding fathers were specifically outspoken about the danger of unrestrained corporate and monopoly power and the need to protect against it. Overall, it seems that the consequences of the corporate mercantilist period are characterized by both the far reaching changes that were enacted by the various corporate monopolies as well as by a particularly fierce reaction against the abuses of those entities.

The First Monopolies

The first examples of what could arguably be called a modern corporation were the join-stock monopolies that were chartered as part of the mercantilist policies of colonial Europe during the 17th and 18th centuries. Corporate entities (most notably the British East India Company) were granted royal charters by their governments in order to capitalize on the newly available resources in far off lands that had become more accessible following the Age of Discovery. These early corporations developed into astoundingly prosperous trading businesses and brought in immense wealth, both to their share holders and to their home countries; however, the success of these companies can hardly go without qualification. The level of corruption and sheer largess that was bred by the activities of the British East India Company alone would be enough to make the "robber barons" of the Gilded Age blush. The early mercantilist trading companies seemed to have pioneered not just the trading of corporate stocks, but also the abuse and manipulation of stock trading and the disastrous consequences those actions can reap. After examining the history of a group such as the East India Company for any amount of time, it is rather difficult to avoid drawing parallels between the corporate excesses of

that time and the ones that we know in our own present day. These companies easily bent the rulers of whole countries to their will, not by shady backroom contracts, but with full scale military conquest. These companies were also the first true monopolies, but they did not achieve dominance through shrewd planning and anti-competitive strategy: their iron grip on certain economic sectors came by order of the king and his armies. The likes of Halliburton and Standard Oil almost seem tame by comparison.

This ruthless corporate mercantilism was not without its limitations, however. Though companies like the East India Company had immense power in the domains in which they operated, their net effect on the population as a whole pails in comparison to the scale of corporate influence that developed in the centuries to come. The unrestrained corporate domination of the colonial age did eventually begin to fade, but a coinciding increase in the role of corporations in the economy served to usher in a new kind of corporate control.

The difference between the influence wielded by the mercantilist monopolies of old and modern corporations is really one of control versus reach. [1] Today corporations have a vast amount of reach in effecting the overall economy; whereas, corporations like the East India Company had comparatively little sway over the economy as a whole. Despite a more limited corporate scope, the immense power of companies like the East India Company to control whatever domain they acquired is not in question. The mercantilist period of corporate organization in Britain (spanning most of the 17th and 18th centuries) was widely characterized by a lack of legal structures in which businesses could incorporate. As a result of this, most companies that were actually able to incorporate did

[1] Venkatesh Rao, "A Brief History of the Corporation: 1600 to 2100," *Ribbonfarm*, http://www.ribbonfarm.com/2011/06/08/a-brief-history-of-the-corporation-1600-to-2100/.

so with a letter of royal patent, and were able to fully embrace the natural desire to establish full monopolistic control over their respective industries.[2] The existence of only a handful of officially incorporated companies in Britain, all with close ties to the power of crown, coupled with the relative novelty of the corporate institution, allowed companies to have almost free reign and behave in a manner that would be intolerably dominating by modern standards.

The British East India Company, founded in 1600, is one of the earliest corporate entities in history, and is perhaps also the most grandiose example of the unrestrained corporate practice that characterized the colonial era. Having been guaranteed a monopoly over trading in India by the crown, and with its activities protected by the British navy, the East India Company was, for all intents and purposes, allowed to operate as if it were simply an arm of the British state; it was almost completely unrestricted in its actions, and its members engaged in whatever practices seemed likely to increase their own personal wealth, along with that of the company. The East India Company's idea of a "corporate takeover" involved physically invading far off territories with private troops to seize valuable resources. The occupation of Bengal in the 1750's might have at first glance appeared to be some sort of colonial conquest by the British state, but in actuality it was simply a coup organized by the East India Company to install a regime that was more amenable to Company activities.[3]

Corruption within the company was also rampant; in fact, it was such common practice that "corruption" might not even really be the right word, since the ability to trade goods on the side and to take in bribes was widely considered a perfectly acceptable

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[2] Robert E. Wright, *Corporation Nation* (Philadelphia: University of Pennsylvania, 2014), 22.
[3] Nick Robins, *The Corporation that Changed the World: How the East India Company Shaped the Modern Multinational* (London: Pluto Press, 2012), 64.

perk of having a post with the company. Even when the company did begin to crack down on these side activities, their efforts were almost wholly ineffectual.[4] The sheer importance of the company to the British state rendered the East India Company nearly untouchable, even in instances of gross misconduct. So, even when rampant insider trading and stock speculation drove up the share price of the company to incredibly overvalued levels, and caused a bubble which burst in the Crash of 1769 and nearly ruined the British economy, the company escaped from the debacle with a mere slap on the wrist from parliament and even gained expanded monopoly control granted in the Tea Act of 1773.[5] A new era of corporate governance and the technological boom of the Industrial Revolution would soon render the East India Company obsolete, but in its heyday there can be little doubt that the company wielded control and influence to an extent that no modern company could come close to matching.

When weighed next to the many excesses of the East India Company, the overreaching of more modern corporations would seem not even to tip the scale; however, this does not tell the whole story of corporate power in the mercantilist period. While corporations like the East India Company may have wielded tremendous control within their own spheres of power, their effect on the overall economy was relatively insignificant. In 1695, only 1.3% of all British wealth was held in corporations, and the numbers of individual corporations in existence were incredibly low by modern standards.[6] The formation of new corporations was strongly discouraged by the lack of easy legal mechanisms for incorporation outside of royal letters of patent. In the likely event that potential new business ventures could not obtain such a letter, their only option

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[4] *Ibid*., 86.
[5] Ibid., 92, 100.
[6] Wright, *Corporation Nation*, 22.

was to organize as unincorporated joint-stock companies (a status which carried with it all sorts of legal uncertainties). Looking more directly at corporations' effects on individuals, the same pattern continues to emerge. Even as late as 1780 we find that the majority of laborers (estimated at about 80%) were self employed in jobs such as farming, and craftsmanship; meanwhile, only about 20% worked for a salary or wage in the employ of some corporation.[7] So, despite the shocking impunity with which companies like the East India Company were able to operate, it appears that their overall economic influence on the average individual was rather low.

Following the history of the rise of corporate influence by focusing on mercantilist monopolies like the East India Company seems as if it would leave us with remarkably little room in which to see any actual growth; however, for as much power as the East India Company had in carrying out its activities, we have seen that its overall hold on the British economy was relatively minute. So, while individual corporate control will necessarily wane somewhat from the over the top lawlessness of East India Company operations, the net level of corporate influence in the economy still has plenty of room in which to develop. Going forward, we will see that the shift away from monopolistic trading companies to a more modern model resulted in a massive expansion in corporation driven economic activity, and thus also an expansion of corporate influence in general. As corporate systems continued to develop from this point they tended to move towards a more streamlined and competitive approach, that emphasized innovation and efficiency over power and domination. Thus, while the overall level of control a corporation is capable of exerting has clearly decreased since the height of the

[7] Gareth Morgan, *Images of Organization* (Beverly Hills: Sage Publications, 1986), 282.

mercantilist period, we will see that corporate influence overall has continued to increase due to corporations becoming more numerous and more central to economic life.

A Corporate Rebellion

While the East India Company certainly broke new ground in the area of corporate influence and control, the net effect of their dominance may not have advanced the likelihood for future corporate grants of power all that much. In fact, in some cases the excess of the East India Company seems to have inspired open rebellion. Given the ubiquity and dominance of American corporations in the modern economy, it might seem somewhat odd that the Revolutionary War, through which the country was founded, was as much a rebellion against the abusive practices of a corporate monopoly as it was of the British Crown. The American Revolution is often characterized as being primarily a tax revolt, and there is some truth to that; however, what is notable here is the kinds of taxes the early colonists were objecting to. A closer examination of the American Colonies leading up to 1776 reveals a widespread distaste for British policies that were seen as being specifically designed to benefit large British corporations. In fact, reaction to these pro-corporatist policies was the spark for some of the most significant flashpoints of the Revolutionary conflict. Even after the war, oppressive monopolizing wrought by by the British corporations weighed heavy on the minds of many of the Founding Fathers, and had a clear influence on their plans for a new government.

Like most of Britain's territories at the time, international trade in the American Colonies during the 18th century was dominated by the East India Company, and beginning around the year 1770 the company had begun to take an even larger interest in

the continent. The East India Company by that time had been plagued by numerous scandals, and desperately needed to start showing higher returns in new markets. Additionally, the role of the company in helping the British government to manage its holdings abroad had grown so large by this point that the two institutions had become almost inseparably intertwined. Much of Parliament and even the King himself were shareholders in the company, and therefore would receive dividends of the company's profits. So naturally, the interests of the East India Company were in nearly all cases the interests of the British government. These are the circumstances that lead to the much despised Tea Act, and a literally violent rejection of British corporatism by the American colonists.

The Tea Act is just one example of what turns out to be a quite old practice of governments creating laws specifically designed to further the interests of particular corporations. To better understand what those interests were, a little bit of context is in order. Tea was big business for the East India Company, and the American Colonies were distinctly voracious customers. By the year 1760 the colonies were importing nearly 1 million pounds of tea per year; however, only a quarter of that amount was being supplied by British sources such as the East India Company.[8] The rest was being smuggled in to avoid the increasingly burdensome British import taxes. This problem was further exasperated by the 1767 Townshend Acts which raised tariffs on many imported goods (tea especially), and also established new customs authorities in the colonies to curtail smuggling. The colonial reaction to the new duties on imports was one of severe indignation, and various protests grew up around the country, including a fairly wide spread boycott on all British tea. Most of the Townshend tariffs were eventually

[8] Robins, *Corporation that Changed the World*, 113.

relaxed in 1770, but the tariff on tea remained. This was much to the dismay of the East India Company, which had suffered mightily from the new taxes and the various boycotts, and which had an excess stock of nearly 18 million pounds of tea sitting unsold in a warehouse in London. In an effort to pad the profits of the East India Company and quell the unrest among the colonies, parliament passed the Tea Act in 1773.

Given its stated goals, the Tea Act was quite a spectacular failure. The basic idea of the act was to allow the East India Company to sell its backlogged tea stocks at a lower price without being charged an export tax. This would allow the company to sell its stock to the colonies at a competitive price to smuggled tea, while still paying the import tax levied under the Townshend Acts. Additionally, Parliament hoped that lowering the price of tea while still collecting a duty would help more of the colonists to warm to the tariffs.[9] Instead of easing tensions, the Tea Act only served to further enrage the colonists. Many tea protests had actually been starting to fizzle out on their own, and the act only served to remind colonists about the oppressive taxes. Even more outrageous to the colonists, however, was the idea that the East India Company was to be given special treatment and advantages in importing tea. This incensed the smaller American based importers that had seen their business virtually crippled by tariffs and would now have to compete with artificial subsidized company tea prices. The end result, of course, was the Boston Tea Party wherein nearly 90 thousand pounds of company tea was tossed into the harbor. The inevitable retaliation from that incident would spark an atmosphere of escalating hostilities that finally culminated in the first shots of revolution at Lexington and Concord in 1775.

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[9] *Ibid.*, 114.

It is important to note the distinctly anti-corporate, anti-monopoly attitude that was on display during the time leading up to the Boston Tea Party. The effects of the Tea Act should have been largely positive for most colonists. There were no new taxes instituted and a large stock of well priced tea was being made available. On financial terms this should have been a win for the average consumer, but it was the principle of the thing that seemed to really motivate the colonists. While colonists would still be subject to a tax on tea, the East India Company would be able to offload its stock at a considerable margin, while simultaneously squelching American competition. A firsthand account of the Boston Tea Party and the events leading up to it, by George R. T. Hewes, makes particular note that under the Tea Act: "it was no longer the small vessels of private merchants, who went to vend tea for their own account in the ports of the colonies, but, on the contrary, ships of an enormous burthen, that transported immense quantities of this commodity."[10] Additionally, there are numerous examples from tracts that were circulating in the colonies at the time of incredibly hostile depictions of the East India Company and its business practices. Take for instance *The Alarm* newsletter which asked in an October 15th, 1773 issue:

> Has it not been proved, that the Company obtained the Monopoly of that Trade, from the People of England, by the moſt vile and pernicious Arts? And ſhall we, becauſe they duped and robber their Country, be involved in the ſame Rein, with the Deſcendants of thoſe who bought the commerce of it?[11]

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[10] James Hawkes, *A Retrospect of the Boston Tea-Party: with a memoir of George R.T. Hewes, a survivor of the little band of patriots who drowned the tea in Boston Harbour in 1773* (New York: S.S. Bliss, 1834) 155.

[11] Hampden Pseud, "The Alarm, Number III: Signed Hampden," New York October 15th, 1773. (New York: 1773) Retrieved from the Library of Congress, https://www.loc.gov/item/rbpe.1050090b/.

Various other issues of the newsletter railed against the misadventures the East India Company had in Asia, and made note of the distinctly close relationship between the company and the British government. It seems that for most of the colonists dumping tea into Boston Harbor the Crown and the East India Company appeared to be largely one and the same.

The general mindset of grievance with which most colonists tended to view large British monopolies, seems to have expressed itself in several places as the Founding Fathers were formulating a new government following the Revolutionary War. Thomas Jefferson, consistent with his affinity for the noble independent farmer, seemed to be very devoted to building a protection against monopolies into the new constitution. Jefferson was a fervent advocate of the need for the Constitution to also contain a bill of rights, and among the rights that he proposed he would consistently list a protection against monopolies. Such a protection was included on the list of suggested amendments that Jefferson sent to James Madison, when he was introducing the Bill of Rights into Congress as a series of amendments to the already ratified Constitution. [12] No amendment on monopolies was ever successfully added to the Constitution, but Jefferson remained concerned about control of the new government falling into the hands of a wealthy aristocratic elite, and this emerged as one of his primary disputes with the burgeoning Federalist Party.

James Madison, who was largely responsible for writing the Constitution as well as shepherding the amendments for the Bill of Rights through Congress, also went on to express considerable suspicion toward the corporate institution. Writing in 1820,

[12] Thomas Jefferson, "From Thomas Jefferson to James Madison, 28 August 1789," *Founders Online*, National Archives, http://founders.archives.gov/documents/Jefferson/01-15-02-0354.

Madison decried the “indefinite accumulation of property” by corporations and their “capacity of holding it in perpetuity.” Madison was of the opinion that “the power of all corporations, ought to be limited in this respect,” and that “the growing wealth acquired by them never fails to be a source of abuses.”[13] The time of Madison’s writing is especially interesting because, as we will see later, it is well within the period that the number of corporate charters under the new American system of government had begun to spike, but it was also still before access to corporations had become generally open, and before individual corporations had began to take on a particularly large scale. Thus, it is telling that even at this point in history, Madison was still quite skeptical.

This discussion should serve to demonstrate that there was indeed a prominent strain of anti-corporate and anti-monopoly sentiment that permeated the consciousness of the founding generation of the United States. We have seen that the grievances of the revolutionaries were in many respects just as tied to the favoritism granted to the East India Company as they were to the abuses of the British state. While the strict tariffs imposed by the the Crown were wildly unpopular, the reaction to the Tea Act (which was a primary spark of rebellion) was largely framed as a reaction against special treatment for the East India Company. This injustice seems to have been the straw that broke the camel’s back and prompted the Boston Tea Party. Based on these events, it then seems understandable why some of the founding fathers might still harbor a desire to ensure certain limitations on corporations and monopolies.

[13] James Madison, “Detached Memoranda, ca. 31 January 1820,” *Founders Online*, National Archives, http://founders.archives.gov/documents/Madison/04-01-02-0549.

The new character adopted by corporate entities following the Age of Exploration represents a major shift in the way corporations operate and the way in which they affect the rest of the world. As we have seen, the mercantilist monopolies granted by the Crown to large corporations such as the British East India Company allowed for an expansion of corporate influence across the globe. The sheer wealth and power of the Company held tremendous sway over the British government and in many cases they seemed to operate as almost a singular institution. This represents a bleak vision for the possible consequences of runaway corporate power.

At the same time, it is important to realize that the control that was wielded by the East India Company and other monopolies was not without its limits. Overall these companies were active in only a small section of the overall economy, and there were only a few of these kinds of corporations active at any given time. Additionally, the business endeavors of these companies were not always successful, and there were several large scandals that raised questions about the effectiveness of these companies and the need for their continued existence. Still, the most important check on the power of these corporations was the fact that they were still ostensibly chartered to promote some public interest, and their charter could be revoked by the government at any time. In the case of the East India Company, for instance, their very existence was always predicated on the satisfaction of Parliament.

It seems that the long reaching effects of these early corporate giants may have even had an inhibiting effect on the allowance of new corporate charters in the future. Much of the turmoil that led up to the split of the American colonies from Great Britain seems to have been largely in reaction to a perceived corporate overreach, and there was

wide reaching anti-monopolist sentiment among many of the revolutionaries. We have seen that much of this same dislike of corporations was carried over into many of the Founding Fathers, and that the early American approach to corporations after independence tended to be one of skepticism. The mercantilist period of corporate overreach seems to represent a sort of pattern that should be noticeable with later instances of corporate excess. There is often a period of wild corporate growth, leading to massive power grabs and abuses. Then there is a public reaction against this wild corporate dominance that tends to drive efforts to curtail corporate expansion and insure that there is no undue influence being allowed.

CHAPTER FOUR

The Rise of the American Corporation

The corporation may have been born in Europe, but it grew up in America. Over the course of the 19th century, advancements in technology as a result of the Industrial Revolution and an improved legal framework for incorporation (brought about primarily by the U.S. Constitution) caused a boom in the number of American corporations and began to vastly increase corporate influence on the overall economy. The ratification of the U.S. Constitution lifted many barriers to entry that had previously been restricting companies from becoming incorporated, and once the floodgates were open the surge of corporate influence brought about several other innovations in corporate policy that would serve to continue to expand the importance of corporations to the overall economy.

We have already seen that the circumstances of the American founding were not all that amendable to the notion of an economy based around corporate control. The original conflict with Britain was in many ways sparked by a dissatisfaction with their corporatist policies, and many of the founding fathers were weary of the idea of corporations acquiring too much control. However, it seems that once the American economy got going there was little that could stop it, and corporations were at the center of the action. It would soon become easier than ever to create a corporation, and the privileges and protections that corporations received made it easier than ever to build a successful business. At the same time this rapid expansion also raises questions about the growing powers that corporations might accumulate, and the way corporations began to position

themselves under the protections of the newly passed Fourteenth Amendment points to new concerns on the horizon for how the rights of corporations should be considered.

Innovation in Incorporation

Thus far, we have seen that the history of corporations has involved numerous examples of political leaders who were weary of the potential power that the corporate system might be able to wield. As far back as Ancient Rome, were the formal legal establishment of corporate bodies originate, their creation was heavily limited by the government to prevent their abuse. Throughout the development of this institution its potential strength has only continued to grow, and reasonably the monarchs of Europe also viewed the idea of corporate bodies with a healthy suspicion when they began their resurgence in the Middle Ages. Since that time, even in the case of corporate titans such as the East India Company, corporations have been required to be explicitly chartered by the Crown. A grant of incorporation was the exception, not the rule, and presumably they were only to be allowed if they served some interest of the Crown (and thereby also some interest of the public, to some extent). Contrast this to today, where we see websites that advertise quick legal services that allow even the most average person with the requisite documentation and funding to incorporate their business. This seems more than a bit removed from the vaunted privilege of obtaining a royal charter, and so we have to ask, "What has changed?"

The ability of businesses in America to incorporate prior to independence was drastically limited by a number of legal barriers. The same legal framework that restricted corporate charters in Britain was also in effect in the American colonies until the

beginning of the American Revolution. Like their counterparts in Britain, American businesses required a charter in order to be officially incorporated, and such charters could only be granted by the Crown. (Though some colonial governments did grant corporate charters, these were of dubious legality.) Very few charters were granted by the Crown to American companies, and thus businesses wishing to take advantage of the significant perks offered by a corporate structure (dispersed risk, perpetual succession, etc.) were forced into the legally shaky realm of unincorporated joint-stock companies. However, even this ceased to be an option in 1741 when Parliament expanded the 1720 Bubble Act to also apply to the colonies.[1] This was effectively the nail in the coffin for pre-revolutionary American businesses as it forbade the formation of any kind of joint-stock company without a royal charter.

Understandably, America's separation from Britain and the oppressive laws of Parliament resulted in a major expansion of American incorporation, with numerous businesses being chartered by both the state and national governments. While incorporation did slow down briefly during the time of legal uncertainty that took hold between independence and the ratification of the Constitution, the stability brought about by the new governing framework would soon serve to kick start corporate expansion to unprecedented levels. The Constitution's guaranteed property protections coupled with its unique federal system created a perfect storm for corporate development where people were confident and eager to do business, and states were competing to create the most effective and enticing corporate system to draw in economic growth.[2] The assurances of the new constitutional system and the dawn of the industrial revolution would quickly go

[1] Robert E. Wright, *Corporation Nation* (Philadelphia: University of Pennsylvania, 2014), 22.
[2] *Ibid*., 26.

on to transform the American economy. Farmers, who made up the bulk of the American economy at the time, were able to expand their infrastructure and compete to sell their goods in wider markets. Their increased business in turn allowed for further expansion and diversification into other activities such as milling and eventually manufacturing. The agricultural sector as a whole shifted from subsistence farming to a booming industry.

The effects of the reduction of burdensome regulation and increased legal innovation and stability were of a staggering scale. Between the years of 1783 and 1801, various U.S. states chartered more than 350 business corporations. Meanwhile in Britain, which had arguably a far more advanced economy at the time, the entirety of the 18th century had seen fewer than 20 corporations chartered.[3] Admittedly, most British companies at this time, like many previously mentioned in colonial America, had found legally-grey non-corporate organizational structures that allowed them to exercise many of the same privileges of a corporation, but this was still not an optimal circumstance for business.[4] Early signs indicated that the American corporate experiment was a booming success, and an overall trend towards government restraint in business began to develop both in the United States and in Europe. However, first and foremost, it was the United States that led the charge toward economic freedom, and that decision seems to have paid off in a big way.

In contrast to the old colonial monopolies, the new American corporations were not only chartered with greater frequency, they operated in a much more competitive environment. The exclusivity of royal charters and the natural tendency for companies to engage in rent seeking behaviors fed into huge monopolies among the British colonial

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[3] Oscar Handlin and Mary Handlin, "Origins of the American Business Corporation," in *Enterprise and Secular Change*, ed. Frederic Lane (Illinois: Richard Irwin, 1953) *104*-106.
[4] *Ibid*., 104.

corporations, and in turn led to a business climate that provided no incentive for innovation or advancement. These companies increased their profits solely at the expense of the consumer and not through any actual growth. Corporations in the United States, however, quickly became too abundant to easily claim any kind of monopoly control, and this abundance would only continue to increase as States competed to make the incorporation process as easy as possible in order to attract business to their state. This competition among States eventually led many States to completely do away with the practice of incorporation by charter in favor of general laws of incorporation. The first such law originated in Massachusetts as early as 1799,[5] and by the time the Civil War came to an end nearly all states had opted to adopt general incorporation laws allowing any persons meeting certain conditions to incorporate their business through a bureaucratic mechanism.[6]

The new general laws of incorporation held several distinct advantages over the previously utilized special charter system. One of the primary initial effects of the new general laws was to remove a substantial burden that existed on the state legislatures under the incorporation by special charter system. The endless processing of corporate charters seemed "to constitute nearly the whole mass of legislative enactments," and it was estimated that "nearly one-half of the time of the legislature" was consumed in passing individual special acts of charter for every company that might be petitioning for one.[7] The new general laws served to make incorporation even more efficient and fast, allowing the number of U.S. corporations to continue to climb. The U.S. corporate

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[5] Handlin and Handlin, "American Business Corporation," 106.
[6] Ibid., 16.
[7] L. Ray Gunn, *The Decline of Authority: Public Economic Policy and Political Development in New York State, 1800–1860* (Ithaca: Cornell University, 1988), 112, 224.

growth once again handily out did that of the British system, which did not even allow for general incorporation until the Companies Act of 1844.[8] Additionally, these new laws were more standardized, and were less able to be adjusted to favor or disfavor the company seeking incorporation. Thus, they were able to bring about a new level of fairness and equity in the corporate process, and caused all business people to begin on even terms without favoritism and with less potential for corruption. This shift in policy made incorporation even more accessible and advantageous, and further bolstered the position of incorporation as a central tool in the American economic system.

At the same time that access to the corporate system was expanding, so were the rights and privileges associated with the system. Over the course of the early 19th century several significant legal innovations took hold, on top of those already discussed to this point. In many respects the new developments favoring corporations were growing out of a sort of competition between the states. As state regulation of the economy became more and more relaxed, various state governments began to jockey for increased business activity in their states by participating in a sort of "race to the bottom." While grants of limited liability for corporations had been available in a reduced capacity for certain enterprises, many states began to expand companies' access to it as a sort of corporate incentive. Massachusetts took the novel step in 1830 of expanding the privilege of limited liability to corporations that were not involved in public works, and many other states began to follow suit.[9] Meanwhile, limited liability to would not become generally

[8] Handlin and Handlin, "American Business Corporation," 104.
[9] John Micklethwait and Adrian Wooldrigdge, *The Company: A Short History of a Revolutionary Idea* (New York: Modern Library, 2003) 46.

available in Britain until the Limited Liability Act of 1855, once again showing the clear lead America had developed in the area of corporate law.[10]

As corporations began to be more numerous in the United States, various legal matters relating to their structure and operation began to appear before the U.S. Supreme Court, and thus was born the interesting notion of corporate rights. We have seen that the idea of corporate bodies existing as sort of "artificial persons" seems to go back nearly as far as incorporation itself, but the attribution of legal rights to such persons is a significant development. Starting with the case of *Dartmouth College v. Woodward*,[11] the Court began to recognize that corporations are guaranteed a right to contract. More specifically, that case established that corporate charters are themselves contracts, and thus they can not be capriciously altered and amended by legislatures, as had previously been common practice.[12] Another landmark case, *Society for the Propagation of the Gospel v. Pawlet*,[13] extended the property rights of corporations to be roughly the same as those of "natural persons." This represented one of the first times that "artificial persons" were granted the same status as "natural persons," and it was a major leap forward in how corporations were considered under the law.

There was a stark shift in the distribution of corporate power that occurred in the early 19th century when the American corporate model began to overtake the previously dominant British system. The incredibly exclusive hurdle of obtaining a royal charter was replaced by standardized and fair bureaucratic processes that were open to all, and the monolithic monopolies of old were shortly upended by a stream of freely incorporated

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[10] Handlin and Handlin, "American Business Corporation," 105.
[11] 17 U.S. 518 (1819)
[12] Micklethwait and Wooldrigdge, *The Company*, 45.
[13] 29 U.S. 480 (1830)

small businesses. However, while the influence of the old titans of the mercantilist era waned severely, overall corporate involvement in the economy increased dramatically. Corporate power did not decrease, it simply became more spread out and divested into the hands of many businesses. Industrialization was in full swing, and the strength of urban markets was on the rise. In the time between 1780 and 1880 the percentage of people working in a salaried or waged job in a corporation jumped staggeringly from 20% to 62%.[14] This is a much more subtle kind of influence than having free license to wage war or topple foreign governments, but it is also a much further reaching kind of influence. Compound this spread of industry with the sweeping new corporate privileges that were constantly being devised, and you have a recipe for fast growing corporate power.

Overall, the 19th century served as a key period of development for the American corporate system. The rise of the American corporation was largely responsible for Americas early economic success and eventual dominance, and it was all made possible by legislation that favored a hands off approach. The initial lack of corporate restriction following the Revolutionary War opened the flood gates, and competition for business among states encouraged the discovery of innovative new corporate schemes that continued to boost commercial efficiency. Yes, it would be hard to dispute the benefit that the corporate boom had on the U.S. economy, but at the same time it is important to keep in mind the massive expansion of corporate power that accompanied those benefits. General incorporation vastly reduced the oversight of legislatures on how corporate privileges were being utilized, and Court precedents began to stretch the idea of corporate personhood further than had ever been done before. Corporations now had rights, which

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[14] Gareth Morgan, *Images of Organization* (Beverly Hills: Sage Publications, 1986), 282.

is to say there were certain areas wherein corporations could not be controlled by the government. In some instances, these rights of "artificial persons" were even held to be equivalent to those of "natural persons." This raises the question, could there ever be a conflict between the rights of "artificial persons" and "natural persons"? If so, whose rights would have priority?

A New Corporate Constitution

What does the institution of slavery have to do with American corporate law? More than you might expect. The American practice of slavery is often a defining issue in any discussion of the Civil War. Those who strive to introduce more nuance might insist upon tracing the roots of the conflict back to underlying disagreements on states' rights and other more abstracts notions, but the fact remains that the issue of Southern slavery was front and center in the events both leading up to and immediately following the war. Still, the end of the Civil War was also a major turning point for several other developments in American history, the most notable perhaps being the rise of corporations to economic dominance. Obviously, this particular development is of special interest in this discussion, but interestingly enough, it would seem that we have still not entirely dispensed with the relevance of slavery. It should soon be clear that a slightly strange turn of events actually allowed the Fourteenth Amendment to the U.S. Constitution not only to function as an expansion of legal rights for former slaves and African-Americans, but also as an expansion of the rights of corporations. The question of whether corporations qualify as people with guaranteed constitutional rights has been politically *en vogue* in modern times ever since the *Citizen's United* case in 2010; however, as we will see, this

notion is actually quite old in American law, and has had a significant impact on the growth of the United States' corporate economy.

It would be difficult to overstate the importance of the Fourteenth Amendment in constitutional jurisprudence. In addition to its obviously significant role in granting citizenship to newly freed slaves following the Civil War, it also ushered in a wave of new legal protections that could be claimed by all the people of the United States. The "privileges and immunities" clause of the Fourteenth Amendment is the primary source of the doctrine of incorporation, by which state governments became prevented from abridging any rights guaranteed by the federal constitution, and it once and for all codified the idea that all people should not be denied "equal protection under the law." On its face, it is hard to spot how the granting of these new rights and protections to the people of the United States could be anything but a huge victory for individual liberty, but the key here lies in what is meant by "people." The Fourteenth Amendment makes frequent use of the word "person," and what is meant by person is not nearly as straightforward as you would think, or at least so the Supreme Court would have you believe.

Thus far, our look back into the development of the idea of corporate personhood has revealed a rich history of various institutions of law that have allowed for the notion of "artificial persons" in the form of business corporations and other entities. The practical benefits of this organizational structure are manifold, and it has been fairly straightforward to see, over time, how and why these structures have changed to facilitate improved effectiveness. However, here after the ratification of the Fourteenth Amendment, we are approaching a new paradigm for "artificial persons." The rights of

people established by the United States Constitution and the expansion of those rights by the Fourteenth Amendment granted tremendously broad protections to individuals, while at the same time there was a growing push for courts to consider the rights of "artificial persons" to be equal to those of individuals. From the collision of these two ideas there was an explosion of new privileges and protections for corporations, and the difference of class between artificial and natural persons was virtually abolished. Like many of the major shifts in the way that the United States has considered its laws, this particular change was handed down by the Supreme Court. Given the significance of this question (Are corporations "persons" under the Fourteenth Amendment?), one might expect that its answer would be the result of careful and well reasoned argument that deeply explored the issue at hand and finally settled upon an appropriate determination, but staggeringly, this does not seem to have been the case.

The earliest roots of corporate personhood under the Fourteenth Amendment dates back to a Supreme Court case from 1886, *Santa Clara County v. Southern Pacific Railroad Co*.[15] The facts of the case boiled down to a simple tax dispute between county officials and the railroad. There was much of discussion of fencing along the railroad tracks and what its implications might be for the railroads tax rates, but there is very little in the decision that points towards the principle of corporate personhood. In the written opinion of the Court, there is actually no discussion at all of corporations and Fourteenth Amendment personhood. The only mention of the issue comes in a brief quotation of a statement made by Chief Justice Waite that was attached to the headnote of the cases

[15] 18 U.S. 394 (1886)

record. Purportedly, before reading the main opinion it was announced matter-of-factly by Waite that:

> The Court does not wish to hear argument on the question of whether the provision in the Fourteenth Amendment to the Constitution which forbids a state to deny to any person within its jurisdiction the equal protection of the laws applies to these corporations. We are all of opinion that it does.[16]

And that was it. There was no further elaboration, and that pronouncement carried no bearing on how the main question of the case was actually decided. This declaration is printed in the court reporter's headnotes for the decision, and thus it does not carry any force of law. Despite this, *Santa Clara* was later cited in *Minneapolis & St. Louis Railway Co. v. Beckwith*,[17] and the conclusion that corporations were persons, recognized under the Fourteenth Amendment, was accepted as established precedent. Somehow this one short statement is the genesis of the expansive corporate personhood recognized today in modern American law. Naturally, there should be plenty of good arguments one could make for the need to recognize and protect corporations under the Fourteenth Amendment, but in a truly galling turn of events it appears that the Supreme Court simply pronounced it to be so one day in 1886, with no discussion or explanation, and it was just accepted to be so from then on.

The decision by the Court in *Santa Clara* (such that it was) to grant Fourteenth Amendment protections to "artificial persons" was problematic for several reasons beyond simply the dubious record keeping practices involved. Most of these reasons were actually articulated quite well at the time of the case by Delphin Delmas, the attorney

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[16] *Santa Clara County v. Southern Pacific R. Co.* 118 U.S. 394 (1886)
[17] 129 U.S. 26 (1889)

who was representing Santa Clara County in their suit to collect back taxes owed by the Southern Pacific Railroad. First, while English law (and American law to a slightly lesser extent) had long recognized corporations as having the character of "artificial persons" (mostly for purposes of property ownership and entering into contracts), they were still distinguished from so called "natural persons."[18] Delmas makes note of this distinction in his arguments, as an answer to what he poses as the central question of the case: "Does that amendment place corporations on a footing of equality with individuals?"[19] Delmas argues that the answer must be "no," and presents several statutes that use similar language to the Fourteenth Amendment (i.e. statutes vaguely discussing "persons") that would represent an absolute absurdity if they were applied to corporations, such as laws providing for the ability of people to marry, or laws relating to the creation of wills. Delmas concludes that "the equality between persons spoken of in the Fourteenth Amendment obviously means equality between persons of the same nature or class." He continues that we should consider: "equality between human beings, if the rights of natural persons are involved; equality between corporations of the same class, if the rights of artificial persons are involved."[20]

The clear difference between the rights of people and corporations is further enforced by the fact that corporations, once they are chartered by law, gain many privileges that are not available to individuals that have not entered into a corporation. Delmas chooses to highlight a corporation's ability to petition the state for a grant of eminent domain, as just one example of this. He then presents what amounts to a

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[18] William Blackstone, *Commentaries on the Laws of England*, Vol. 1 (Illinois: Chicago University Press, 1979), 119.
[19] Delphin Delmas, *Speeches and Addresses* (California: A. M. Robertson, 1901), 197.
[20] *Ibid*., 197-198.

contradiction in the railroad's view that corporations and human beings should be legal persons of an equal order. By Delmas' account:

> The corporations…take these discriminating privileges in their corporate capacity, asserting…that the equality between men is not thereby destroyed because the privileges are granted to the corporation and not to the individual; and yet when it comes to discriminating the burden imposed upon the corporation…they claim that the burdens are imposed upon the individuals, and not upon the corporation.[21]

Thus, it would seem that corporations would like to have it both ways, in that they recognize that corporations receive certain privileges that individuals do not, but they refuse to accept that individuals should perhaps receive privileges or rights that corporations do not.

Beyond the obvious practical differences and also the aforementioned legal differences between people and corporations, there still remains the need to discuss what the Fourteenth Amendment actually says and means. As was already mentioned, the Fourteenth Amendment was passed in response to the abuses imposed upon people through slavery. Delmas discusses at length in his argument precisely what the aim of the Fourteenth Amendment was and why it is actually antithetical to the argument that was being put forth by the railroad. According to Delmas "The [the Fourteenth Amendment] is as broad as humanity itself. Wherever man is found within the confines of this Union…he may take shelter under this great law as under a shield against individual oppression in any form, individual injustice in any shape."[22] Delmas has a very lofty view of the Fourteenth Amendment's intention, and sees it as a continuation of the sacred

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[21] *Ibid.*, 204-205.
[22] *Ibid.*, 202.

principles of individual liberty and equality that underlie many of the original documents of the American founding such as the Constitution and the Declaration of Independence. This is precisely why the proposed reinterpretation of the Amendment is so abhorrent in his view. "Its mission was to raise the humble, the down-trodden, and the oppressed to the level of the most exalted upon the broad plane of humanity, …not to make the creature of the State—the bodiless soulless and mystic being called a corporation—the equal of the creature of God."[23]

Finally, while this entire issue, along with the specific points that have been emphasized here, was discussed at length in the initial arguments for *Santa Clara* before the Court, it is important to note once again, that the actual opinion of the Court (which is the only part of the case record that has the force of law) did not discuss, and in fact made no mention of the Fourteenth Amendment question. The case was decided on other grounds, and its precedential value today essentially stems from the misreading of a headnote that carries the legal weight merely of *dicta*. Nearly a century later in 1978, Chief Justice William Rehnquist summed up the case quite well when he wrote (in dissent on a case that overturned state laws against corporations making political contributions on the grounds that the laws violated the corporation's right to free speech) that, "this Court decided at an early date, with neither argument nor discussion, that a business corporation is a 'person' entitled to the protection of the Equal Protection Clause of the Fourteenth Amendment."[24] And that was that.

Now might be a good time to recall that this discussion of the Fourteenth Amendment began by addressing what was ostensibly its primary intended purpose, that

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[23] *Ibid*., 203-204

[24] First National Bank of Boston v. Bellotti 435 U.S. 765 (1978)

is the redress of slavery. Unfortunately for the former slaves, it seems that the Supreme Court during the Reconstruction was not nearly as willing to extend the protections of the Equal Protection Clause to freedmen as it was to corporations. In 1938 Justice Hugo Black observed that:

> Of the cases in this court which the Fourteenth Amendment was applied during its first fifty years after its adoption, less than one half of one percent invoked it in the protection of the Negro race, and more than fifty percent asked that its benefits be extended to corporations.[25]

If the proportions of cases described seem concerning, then the outcome of those cases should be even more so. Most notably there is the 1896 *Plessy v. Ferguson*[26] case in which the Court declined to apply the Fourteenth Amendment to what they deemed to be "social inequality" rather than "political inequality." The Court upheld the conviction of a man of 1/8th black ancestry who was arrested for sitting in a "whites only" train car, and simultaneously established the doctrine of "separate but equal" racial segregation that would not be struck down until 1954. Thus, in what can only be described as a sad irony, it appears that the Court concluded that the language of the Fourteenth Amendment is to be broadly applied in granting "artificial persons" nearly equal standing to "natural persons," but it was only to be narrowly applied to the actual people it was originally written to protect.

Overall the most significant consequence of the Fourteenth Amendment law concerning corporations thus far, is the idea that corporations possess broad constitutional rights. It must be recognized that this a major development in the power that corporate

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[25] *Connecticut General Co. v. Johnson*, 303 U.S. 77 (1938)
[26] 163 U.S. 537 (1896)

organizations possesses. Admittedly, the cases discussed so far have had only fleeting tax implications for the corporations involved, but as times goes on, these precedents will allow new trails to be blazed. What has been suggested so far is that, because of the Equal Protection Clause, "artificial persons" should be given equal protection under the law as "natural persons." Prior to this ruling, the legal consensus would have suggested that the clause should be taken to mean that "artificial persons" should be given equal protection to all other "artificial persons" and that "natural persons" should be given equal protection to other "natural persons," but these cases seem to challenge that.

The early history of the United States comprises a major period of development for the power of corporations, despite the early reticence towards corporations that some of the Americans developed from their experiences with the East India Company. The industrial revolution came right on the heels of the American Revolution and the relaxed restrictions of the new government proved to be a major boon for economic development. During this time the advantages of incorporation spurned on the expansion of the corporate system leading to the granting of new corporate privileges and structures. While corporations around the United States were acquiring limited liability status and taking advantage of new rulings that protected their right to contract and be uniformly taxed, the institution itself was also expanding. Eventually it became commonplace for any person to be able to incorporate a business with special grant of a state charter.

It is also important to highlight the magnitude of the change that has occurred here. Over the period of about 100 years, a corporation in the eyes of American law has gone from being an entity created and strictly controlled by the legislature to being something

that can be created by any one for almost any purpose. Previously the privileges of incorporation were viewed as a sort of public trust, but now these legal "persons" are even being granted rights. The Fourteenth Amendment opens the door for all manner of new protections for corporations under the notion of constitutional rights for artificial persons. This is a tectonic shift. Even though corporations can now be created by anyone, they are still technically being created and granted their legal status by the will of the legislature; these grants are just being much more liberally given. The idea of protected rights for corporations means that in at least some regard the legislature cannot control them. What began as a tool to serve a government interest is made publically available for anyone to take advantage of, and the tool seems to be out of the government's control.

It is not yet entirely clear what this history of corporate development might imply for how we should approach modern corporations. The relevance of 19th century history to modern corporate law is definitely open for discussion; however, anyone who might argue that the protections on private property that are espoused by the U.S. founding documents were intended to fully guard the massive revenues of modern-multinationals from government interference should really consider the way corporate charters were perceived at the time of the framing of the Constitution. For much of the history of this country corporations were regarded as creations of the legislature that could be regulated virtually without limit; however, it appears that through the years they began to acquire a very different character by various changes in law and perception. Given all this, we have to ask, should an organization that has accumulated immense wealth and influence be granted the same constitutional protections as a lone individual?

CHAPTER FIVE

The Advent of Modern Corporate Control

The late 19th century and the early 20th century represent a virtual roller coaster ride for the power of corporations in America. This time period, from 1864 onwards, consists of some of the most essential moments for establishing the role of modern corporations in American society, as well as for determining what limitations they might be subject to. As large-scale industrialization began to take hold in the United States, new organizational structures and management methods became necessary. The wide spread adoption of these innovations in management allowed for further expansion of business. Companies began cooperating with one another in mutually beneficial partnerships. Eventually there would come to be extensive collusion and consolidation in many major industries, often to the substantial disadvantage of the consumer. The general public soon began to demand government intervention to prohibit such corporate excesses, and many workers began organizing amongst themselves to advocate better treatment from their employers. While these efforts to restrain the runaway growth of large corporations had some limited success, the overall influence and control that corporations maintained on the economy seemed not to be substantially effected. In the end, these reactions against the power held by large corporations seemed only to further cement the central role that they had established for themselves in American commerce.

The Consolidation of Corporate Power

It is difficult to overstate the magnitude of the economic shift that occurred in the United States following the Civil War. At that time there seems to have been and ideal set of circumstances to spur a massive expansion of industrial production, and to allow individual firms to exercise more and more control and influence over the market. During the Gilded Age, business in America began to take on and entirely new character, and corporations were at the center of this transformation. The privileges of the corporate institution were growing ever more expansive as states competed with one another to pass the most attractive corporate laws in order to pull in business. At the same time, innovations in organization and management methods were greatly reducing the effort required to maintain large scale manufacturing and distribution networks. This far reaching corporate expansion significantly increased the portion of the labor force involved in corporate work, thus resulting in an even greater level of corporate influence in society.

Railroad companies were the first pioneers of big business in America, and it would seem that many of the unique challenges posed by the railroad business are largely responsible for the innovative organizational systems that their operators adopted. Unlike most previous thoroughfares used for the transportation of goods (such as roads and canals), the entities constructing the railroads and managing their traffic were one in the same. Railroad companies developed a great deal of centralized management over their operations that had formerly been unheard of. This seemed to be necessary based on the safety requirements alone. Given the increased speed and power involved in transport by rail, and the fact that most routes consisted of a single line of track, movements needed to

be controlled from a single headquarters in order to prevent accidents.[1] It did not take long for the railroad to begin to demonstrate their distinct advantages in speed, reliability, and efficiency over other forms of transportation, and their increasingly significant role as the transportation of choice for a wide range of cargos made effective organization all the more important. The business necessity of wide-spread and intricate coordination paved the way for the creation of a new administrative hierarchy, one that required professional managers to oversee various aspects of the railroad's day to day operations. The complexity and scale of the administrative tasks posed by the rapidly expanding business made the task of directing operations a kind of specialized skill. For the first time, high-level company activities were being directed by administrators who did not own any equity in the company, and thus a new occupational category, that of the professional manager, was born.[2] The notion of distributed operation control to mid-level management provided a blueprint for the supervision of enterprise on a massive new scale by way of a far-reaching corporate bureaucracy.

In addition to requiring new approaches to organization and management, the particulars of the railroad business were incredibly effective at encouraging commercial collusion on an immense, and previously unthinkable, scale. The vast number of railroad companies spread across the United States in the late 19th century made it necessary for clients wishing to transport goods over long distances to coordinate their shipments through multiple separately owned railways. The railroad's obsession with achieving the most efficient possible management of traffic thus required a standardization of rail technologies and a novel level of inter-corporate cooperation in order to allow goods to

[1] Alfred Chandler, *The Visible Hand: The Managerial Revolution in American Business* (Massachusetts: Harvard University Press, 1977) 81.
[2] *Ibid*., 87.

seamlessly travel from one railway to the next. Additionally, many railroad companies quickly discovered that price competition with other railways had a profoundly negative impact on their bottom lines. The nature of railroad shipping required that businesses operate on a high-fixed-cost model, and thus maintaining adequate traffic on any given company's rail lines was essential for its profitability. Any piece of equipment that was not being continuously utilized to its full potential was simply losing money.[3] Thus, traffic was the name of the game for the railroads, and competing lines could always gain a substantial advantage by lowering their rates to drive traffic up so long as there was still some margin of profitability above their fixed costs. As one might expect, these circumstances resulted in a race to the bottom for shipping prices, as one railway tried to boost its business by slashing their prices below their competitors, eventually resulting in very low margins that were mutually disadvantageous for all involved. The answer to this problem turned out to be large-scale collusion among railroad companies and the eventual formation of organized cartels that set standardized fares, distributed traffic across multiple lines, and divided up revenues between firms according to pre-arranged ratios.[4] Such collusions would soon come to be outlawed by the Interstate Commerce Act of 1887, however maintaining minimum traffic levels still remained paramount to railroad profitability, and the railroads sought new methods for coordinating business over large networks of track.

The railroad soon discovered new avenues for anti-competitive price fixing. The previous cartel model had some limited success in maintaining traffic levels, but the incentive for rate reductions by individual companies still persisted, and such inter-firm

[3] Alfred Chandler, *Scale and Scope: The Dynamics of Industrial Capitalism* (Massachusetts: Harvard University Press, 1990) 55.
[4] *Ibid.*, 56.

collusion was now illegal. The solution to these challenges seemed to be the consolidation of individual business and expansion of the rail lines controlled by any given company in large scale railroad systems. In 1893 just thirty-three railroad companies controlled 69 percent of the mileage in the United States, and coordinated scheduling for even more. By 1906, stock ownership deals between these companies had allowed only seven separate groups to manage operation for the same proportion of the country's rail mileage.[5] The lessons learned by the railroad industry regarding competition and coordination soon began to take hold in other companies, and the innovations in management and organization pioneered by early train operators allowed enterprises of enormous scales to take hold in new markets. In addition to mimicking the successful methodology used by the railroads, growing businesses also took advantage of the incredibly fast and efficient shipping and communications services that the railroads had now made easily accessible to everyone.

The new ability for massive corporate bureaucracies to manage much larger scale operations led to the development of integrated industrial corporations that endeavored to control as much of the production and distribution process as possible in order to impose greater efficiency. Over the course of only about 30 years between 1870 and 1900, these large scale integrated industrial firms went from being completely unprecedented to being fairly ubiquitous and exerting dominant control over many of the United States' most vital industries.[6] As these businesses began their rapid growth, they too observed the potential benefits that could be gleaned from aiming to minimize competition with other firms. Low competition in industry, as with the railroads, meant there was no need

[5] Chandler, *Visible Hand*, 167, 174.
[6] *Ibid*., 285.

to sacrifice profit margins in potential price wars. Additionally, the consolidation of various competing firms allowed these new conglomerates to reap the benefits in productivity that could be gained by leveraging the new economies of scale in production and distribution. The success of this model led to more and more large scale industries organizing themselves as corporate trusts, wherein the holding and control of assets was separated from their beneficial ownership. Stockholders in various firms were able to turn over their shares to a board of trustees, and would receive trust certificates of equivalent value in return. These certificates paid dividends based on the profits of the various companies within the trust, but they did not grant the holders any say in the trust's operation.[7] The end result was a system of large scale price fixing and inter-firm organization.

Part of what made this climate of collusion and consolidation among American businesses possible was the lack of legal restrictions on the practices and arrangement of large corporations. Regulators tried to keep up with the ever changing landscape of corporate organization, but an interwoven patchwork of state and federal laws made this a difficult endeavor. While corporations were working together to minimize inter-firm price competition, competition among state legislatures to create the most business friendly corporate policies for their states was alive and well. The prospect of attracting large scale business to one state or another was so enticing that many legislatures began to allow unprecedented new privileges to corporations that set up shop in their state. At the turn of the 20th century, New Jersey was the undisputed king of these kinds of maneuvers. By 1901, a New Jersey law specifically allowing for the chartering of holding corporations that could own shares of other companies led nearly two-thirds of American

[7] *Ibid.*, 285.

businesses with a capitalization exceeding $10 million to be incorporated in that state.[8] Thus, not only was it exceedingly difficult for lawmakers to curtail practices of business collusion, in many cases it was extraordinarily beneficial for them to try and do precisely the opposite.

Now by way of trust organization and large scale mergers, massive corporations had once again acquired dominant commercial powers in various sectors of the economy, just like the colonial monopolies of old. Additionally, while these corporations lacked the same war-mongering flare that came to be associated with titans like the East India Company, there was still a considerable penchant for straining the principles of law and basic decency in order to prioritize profit. (Consider Standard Oil's partnership with various German firms even after Hitler's rise to power, and their continued cooperation and sharing of valuable trade secrets with the Nazis even after America had invaded Europe, as just one example.)[9] Still, what made this shift in corporate power particularly impactful is the scope of the effect that it had on the overall economy. Massive new organizations had emerged relatively quickly, and were now controlling unheard of sums of money and labor. Between the years 1780 and 1880 in America, the labor force essentially flipped from being approximately 20% wage or salaried workers and 80% self-employed workers, to being 62% wage or salaried workers and 37% self-employed.[10] Additionally, by the year 1950 those numbers had continued to grow such that 78% of workers were wage or salaried. At the same time as more people were going to work for corporations there was a considerable growth in the number of salaried managers and

[8] John Micklethwait and Adrian Wooldrigdge, *The Company: A Short History of a Revolutionary Idea* (New York: Modern Library, 2003) 68.
[9] Anthony Sampson, *Company Man: The Rise and Fall of Corporate Life* (London: Harper Collins, 1995) 68.
[10] Gareth Morgan, *Images of Organization* (Beverly Hills: Sage Publications, 1986), 282.

administrators in the labor force. In 1880, such managers and administrators accounted for 1.1% of the American labor force (having been a nearly unheard of job category prior to that point), and by the year 1950 that number had nearly tripled to around 3%. So, in addition to controlling vast amounts of capital and industrial production, it should be clear that corporations in the early 20th century had also begun to exert substantial influence over the labor market.

Looking back at the development of the modern American company at the beginning of the late 19th century is should now be clear how these firms were able to rapidly expand the scale and scope of their businesses. New discoveries in management and inter-firm cooperation were pioneered by the early rail roads, largely out of necessity. The implementations of these new administrative systems proved to be a highly efficient and profitable form of organization. The widespread adoption of these techniques by other companies, and the permissive attitudes of state government's wishing to attract business allowed for an unprecedented corporate expansion. New industries emerged and thrived, and eventually large scale integrated companies became the dominate economic power in America and exerted major influence over the production and distribution of commercial goods, as well as over the overall labor force. In the language previously used to analyze the impact of the actions of the East India Company, it would seem that the modern American corporations had achieved an unprecedented amount of reach over the total economy while also retaining a substantial amount of control in their affairs.

Government and Workers Strike Back

The unprecedented concentration of economic power into the hands of a few large corporate entities at the beginning of the 20th century did not escape the notice of the average person living in America at the time. As "Robber Barons" were amassing their fortunes, and trusts were consolidating more and more new companies under their control, there was a growing number of citizens that had become dissatisfied by the corporate takeover of their economy. The pushback against the ever growing influence of large corporations and trusts helped to spark several reform movements (some led by the people and some implemented as preemptive measures by the corporations themselves) that aimed to balance out the power that had been collected by the corporate titans, and to insure that workers were given adequate protections and input in their workplace. The government soon began to take a more proactive role in arbitrating what corporate practices were allowable, and how much market power a corporation should be able to hold. Additionally, the advent of large-scale labor unions provided an avenue for workers to organize and fight to to gain company submission to some of their demands. Despite these developments, it did not take long for corporations to see the writing on the wall and begin to reevaluate their approach. Many corporations began instituting new programs designed specifically to improve the quality of life of their laborers, and the idea of public relations became and important tool for mitigating public backlash. While this age of reform was able to achieve redress for many deficiencies and abuses within the corporate system, overall, corporations came out the other side not much worse for wear. There was less ability for companies to dominate specific markets through collusion and monopoly, but they still retained substantial economic power. Even more

surprisingly, the overall impression that most Americans had of corporations was not significantly tarnished, and their role in American business, and American life in general was allowed to further expand.

One of the most direct efforts to curtail the scale and scope that companies and trusts had achieved was by means of federal anti-trust legislation. The goals of these new laws was to roll back many of the anti-competitive systems that we saw develop in the previous section. Beginning around 1890 there was concerted effort on the part of both populist consumers and smaller disadvantaged businessmen to push regulations that would rein in the runaway monopolies that had been established by the various industrial trusts. Eventually the political pressure was enough to compel Congress to pass the aforementioned Interstate Commerce Act of 1887, and the Sherman Act of 1890.[11] Respectively, these new laws made the practice of organized price collusion through cartels explicitly illegal, and prohibited the practice of consolidating multiple businesses (often in the form of a trust) in an effort to restrain market competition. These new directives were a significant new tool for the government to utilize in an attempt to roll back the vast empires that various trusts had established in certain sectors of industry. The most significant applications of these new laws can be found in the successful push by Theodore Roosevelt in 1906 to break up the Standard Oil trust, and the eventual division of J.P. Morgan's massive banking trust (estimated at a total worth of $22 billion or over $500 billion adjusted for inflation) in 1913.[12]

At the same time, there was reason to believe that, despite public pressure to introduce new anti-trust measures, there was little motivation for government officials to

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[11] Richard Hofstadter, *The Age of Reform: From Bryan to F.D.R.* (New York: Alfred A. Knopf, 1955), 164.
[12] Micklethwait and Wooldridge, *The Company*, 75.

actively pursue action against most trusts. Roosevelt himself, despite his renown as a "trust buster," was very careful to apply these anti-trust regulations in a very conservative and strategic manner.[13] Still, regardless of some early trepidation in the application of these new policies, the push for these anti-trust laws and later the establishment of additional protective agencies, represented a substantial departure from the traditional function of the federal government in the economy. The effort to limit the power of corporate monopolies in the progressive era seems to have led directly to an increased amount of government intervention in the economy that was rather unprecedented considering the United States long history of skepticism towards government expansion. Such a willingness on the part of the public to accept the expanded role of government only seems to be understandable in the context of a widespread fear of the growing authority of private business.[14] Thus, it could be argued that the push to restrain the power of big business served to dramatically increase the power of the government, while simultaneously not having a significant impact on the overall influence of corporate entities.

While there was some tepid success in using the government to rein in corporate collusion through trusts, additional reform efforts were underway targeting other perceived abuses perpetrated by big business. There had been a growing trend of general dissatisfaction with the conditions faced by many laborers in the employ of large corporations, and just as the companies had organized and consolidated themselves to confront challenges posed by certain market forces, the workers had begun to consolidate themselves into unions in order to stand together against the power of the companies.

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[13] Hofstadter, *Age of Reform*, 243-245.
[14] *Ibid*., 232.

Beginning in the late 19th century new organizations aimed at improving workers' rights began to emerge. Early more radical groups such as the National Labor Union and the Knights of Labor took a very hardline approach against what they viewed as an oppressive corporate wage system meant to stifle individual enterprise. These groups sought to use large scale workers strikes to achieve immediate reforms, and often advocated for workers having some kind of control or ownership rights in their companies. The more realistic trade unions were viewed by these organizations as being too narrow in their objectives and thought to have "failed to recognize the rights of man and looked only to the rights of the tradesman."[15] Eventually though, it became clear that the Knights of Labor's hostile approach was unlikely to produce any effective change, and, starting in the late 1880s, the more gradual efforts of the trade unions grew in their appeal. Most significantly, however, the lowered expectations of the trade unions, in pushing for small scale reforms (such as limited working hours), tacitly accepted the legitimacy of the corporate wage-system, and also their rather subservient role within it.[16]

The initial efforts of trade unions to obtain various small scale reforms from their employers were also rebuffed; however, after a period of significant labor strife (often involving outbreaks of violence), and increased political activity and influence by unions, progress eventually began to be made. Still, the success of the workers' rights movement was not the major blow to corporate power that it might seem at first glance. Most of the accommodations made by companies had less to do with the pressure exerted by unions, and more to do with a realization by business managers that improving working

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[15] Samuel Hays, *The Response to Industrialism: 1885-1914* (Chicago: University of Chicago Press, 1995) 86.
[16] Ibid., 87.

conditions and overall worker satisfaction was good for their bottom lines.[17] From this new effort to improve worker morale (and thereby productivity) grew the idea of welfare capitalism, wherein a company was to provide certain additional benefits to their employee's beyond a wage or salary.

Beginning primarily around the start of the 20th century many companies began instituting various programs, ostensibly aimed at benefiting the quality of life of their employees. Workers' children could receive a free education. Many employees were given access to various company stores and complementary company housing. Companies often provided medical care for more dangerous work, and some companies even built recreation facilities (swimming pools, parks, etc.) for their employees to enjoy in their time off.[18] These efforts by corporations to placate their employees were initially quite successful, and there began to be a measured decrease in worker dissatisfaction and striking. Still, it is important to note that these programs did not come about because of any significant new influence exerted by the workers. Corporate management was still very much in control. In this instance the consequences of worker control versus capital control seem to have aligned and resulted in the same outcome, but it is reasonable to assume that this might not always be the case, and that it might even only rarely be the case. However, because certain reforms seemed to have been made under the illusion of worker control, unions seemed to be content in their victory, and many workers began to doubt the need to be involved in labor unions under the new welfare system.[19]

While corporate welfare on first blush seems to be aimed at the benefit of workers, the advantage of the business owners in providing such benefits are readily apparent.

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[17] Stuart Brandes, *American Welfare Capitalism* (Chicago: University of Chicago Press, 1976) 30.
[18] *Ibid.*, 4-5.
[19] *Ibid.*, 136.

And, while these programs in many cases seem to further the interests of the workers, it appears their implementation did very little to address the vast power being wielded by corporations. Arguably, such programs may even serve to further expand corporate power, by causing workers to rely on their employers for essential services. One of the core benefits of these welfare programs that were constantly touted by corporate managers was a significant reduction in employee turn over. Low turnover in most cases is likely an indicator of employee satisfaction (though there is reason to believe that many workers were dissatisfied with welfare programs), but it can just as easily indicate a more permanent reliance by workers upon employers for certain crucial services.[20] By providing these welfare services to their employees, corporations created an even larger role for themselves in managing the lives of their employees and continued to further expand their sphere of influence beyond simply providing wages (which is already a fairly expansive domain of influence on its own).

While we have seen significant efforts undertaken to roll back the perceived overreaches of corporations in the Gilded Age, for the most part there does not seem to have been any substantial decline in the vast power that corporations had accumulated. While legislative efforts were made to curtail the large-scale collusion of business, these regulations took on an almost symbolic nature, given their rather selective enforcement. Additionally, efforts at addressing the excesses of big business seem to have, at the same time, opened the door for the acceptance of big government. The reaction against corporate abuse by laborers seems to have achieved more success. They were certainly effective in obtaining major improvements in working conditions and employee benefits; however, in many respects the success of the workers' rights movement seems to have

[20] Ibid., 135

benefited business just as much as it benefited workers. The implementation of these labor reforms and employee welfare programs seems to have had little impact on the power wielded by large corporations, and in many respects these transformations have simply served to make companies more involved in the lives of their workers. Thus, it seems difficult argue that the initial pushback against growing corporate power achieved any wide-reaching success in curtailing corporate influence.

Clearly the massive commercial growth that occurred in the United States around the beginning of the 20th century created massive shifts in the way that Americans conduct and engage with business. Most of these shifts seem to have been positive, and were responsible for generating massive amounts of new wealth and propelling the United State into the forefront of the new industrial world economy. These economic improvements were largely driven by the growth of corporations of previously unheard of scale and scope. Beginning with the railroad companies, these institutions developed a series of innovations in business management and organization that allowed them to sustain a unique level of growth. The advent of the professional manager allowed for large-scale operations that could be well coordinated at every level. The high-fixed-cost nature of the railroad business also heavily incentivized inter-firm coordination in order for all firms to maintain the necessary traffic levels to remain profitable. The effectiveness of this coordination quickly led to much larger scale collusion and price fixing among railroad companies, and eventually the advent of the trust style holding company allowed formerly separate corporations to be consolidated into single entities. The advantages of these corporate organizational schemes were readily apparent and

began to be used in other businesses such as new highly integrated industrial companies. The end result was not only enormous growth for the American economy, but also an enormous growth in the influence wielded by corporations, with a vast majority of the American laborers being employed by corporations by the mid 20th century.

The rapid expansion of corporate power was certainly concerning to many Americans, and there soon developed several movements aimed at addressing the perceived excesses that had been accumulated by corporate institutions. There was considerable political pressure for the government to step in to curtail the growth of corporate influence, and several new laws were passed for this purpose; however, while there were a few significant applications of these new measures, many officials seemed willing to refrain from applying these new rules in any kind of comprehensive manner. At the same time many workers were fighting for the redress of certain abuses that were being perpetrated upon them by their corporate employers. While these movements seemed to have successfully improved the treatment of workers by their employers, they did very little to reduce that power that corporations had over their employees. In fact, in many respects the dependence that workers developed on new benefit programs instituted by their corporate employers served mainly to increase their reliance on the company.

Overall, the corporate expansion in the Gilded Age and the initial reform efforts that followed it seem, on net, to have greatly increased the power wielded by corporations. The unprecedented scale of new commercial operations has allowed corporations to achieve a level of reach over various economic sectors that was previously unimaginable. The establishment of these corporate giants also represents the final shift of the corporations from being aimed primarily at serving public interests to

have explicitly private interest in mind. State legislatures slowly relinquished their ability control the aims of the corporate institution in order to attract business, and thus the historical corporate trade-off of special privileges in exchange for public benefit devolved into an institutional structure centered first and foremost around the creation of private wealth.

CHAPTER SIX

Conclusion

If there is one thing that should be clear from examining the history of the corporation, it is that the corporate institution is a uniquely powerful one. The legal privileges and the organizational advantages available to businesses that have been allowed to incorporate seem quite well equipped to create an especially potent economic force. Though this institution has a long history and has been utilized to varied effects at various times, it is clear that given the right circumstances it can create a framework through which massively influential organizations can be born. We have seen that the roots of the corporate institution can be traced all the way back to one of the most basic ideas of commerce, two people (or more) going into business together. Once people have recognized the advantages of cooperating for their mutual benefit in some enterprise, any developments from that point are largely just a matter of improvement in organizational efficiency or scale. This is where companies, and eventually corporations, come into play. Such structures represent a valuable tool for the organization of cooperative commerce, especially between increasingly large groups of people. This is also what makes a corporation such a potentially powerful actor, the more people you organize towards some end, and the more efficiently you do it, the more you can accomplish.

This principle is at the root of many of the examples of large scale corporate power that have been discussed. The British East India Company, like other such colonial monopolies, was chartered with the intention of creating an organization that was able to more effectively develop and distribute the massive cache of resources discovered in the

New World. Similarly, the development of management and bureaucracy within the American railroads, and the eventual collusion and consolidation of various railroad firms was also aimed at creating an organizational structure for maximizing efficiency and scale of rail transportation in the late 19th century. When viewed through this lens the corporation is an incredibly useful tool for fostering economic development, technological progress, and prosperity in general. No doubt, both of those industries, and many others like them, were immensely beneficial in bolstering commercial success in their respective societies. Still, the enormous influence that these organizations can wield does raise some concerning question.

While the inherent organizational effectiveness that seems to underlie the corporate structure on its own raises the possibility for abuse, there also seems to be a natural motivation for corporate bodies to expand. Corporations are basically concerned with increasing the efficiency of commercial association, and the expansion of control is a logical way to accomplish this. We have seen that this behavior dates back for almost as long as corporations have existed. The Publican firms of ancient Rome found it far more effective to collude with one and other to determine the distribution of contracts than to attempt to out-bid each other. Nearly 2000 years later that same principle still applies. The railroads found that competing with other lines and lowering their prices to attract adequate traffic was disadvantageous to all involved. Their solution again was collusion and eventually consolidation. Additionally, it was this notion of expansion that prompted the industrial firms of the Gilded age to vertically integrate their production and distribution, with wild success. It seems that growth and expansion is an intrinsic good

within the goals of the corporate system, and given this progression of incentives it seems reasonable to be weary of the potential for overreach on the part of corporate institution.

The potential of corporate institutions amassing disproportionate control, and the intrinsic motivation for them to do so, is precisely why access to corporate privileges has at many times in history been very tightly regulated by the state. This is not to suggest that more state control over corporate business is always an advisable posture. After all, it seems that it was precisely the loosening of American corporate restrictions (acts of general incorporation, new limited-liability laws, etc.) that helped set the stage for the economic boom brought about in the late 19th century by a wide range of corporate involvement in the American economy. Still, it is important to keep in mind, when considering the idea of corporate regulation by the state, that corporate bodies are essentially granted their right to exist at the state’s discretion. We have seen that when the U.S. Constitution was originally ratified most states kept a fairly tight grip on their power to grant corporate charters, and early corporations tended to be largely oriented towards facilitating public works projects (roads, canals, land development, etc.). Eventually, the benefits of wide spread incorporation for commerce became apparent, and the willingness of legislatures to grant charters increased, ultimately resulting in the broad availability for general incorporation. This trend continued once business really took off following the Civil War; however, now, it was no longer the state legislatures that were in the the driver seat. The economic benefits that any particular state might glean from increased corporate activity quickly became such that any legislator worth his salt would want to make the corporate regulation in his state as attractive as possible. This is still not necessarily to say that this pattern of deregulation was harmful. If the state has the power

to enact a restriction, naturally the state should have the power to lift that restriction. Thus, it is perfectly legitimate for a state legislature to roll back corporate regulations to spark business. The problem arises when a legislature is denied the power to reinstate such a restriction, and here is where the notion of corporate rights comes into play.

It does not seem reasonable to assert that corporations should receive no legal protections under the law. Many of the principles in enshrined in the Constitution are aimed at imposing a kind of fairness in the dealings of the government, as well as at the prevention of capricious abuse of authority. It would follow then that these principles should apply to government dealings with corporations as well. Thus, early corporation related Supreme Court cases which recognized the validity and enforceable nature of corporate charters as contracts, as well as granting corporations protection under the clause in Article I, Section 9 prohibiting a "Law impairing the Obligation of Contracts" seem to be perfectly valid restrictions on legislatures. Additionally, prior to the *Santa Clara* ruling it was accepted that corporations should be protected by the Fourteenth-Amendment, only as a separate class, such that "artificial persons" are treated equally to other "artificial persons" and "natural persons" are treated equally to other "natural persons." However, once an "artificial person" is granted equal protection to a "natural person" things begin to break down.

The notion of corporations being brought under the umbrella of the Fourteenth-Amendment and granted the legal protection of constitutional rights seems to be at odds with the historical nature of corporations. "Natural persons" have been recognized since the American founding as being endowed with certain inalienable rights simply by having been born, and thus there are certain actions that the government cannot take

against them. Conversely, corporations are “artificial persons” that can only exist because they are granted the privilege of doing so by a legislature, presumably with the intention of furthering some public good. Since the very existence of an “artificial person” is predicated on the permission of the legislature, it would seem that legislatures should have substantially more authority to place various restrictions upon corporations if they deem such restrictions to further the public good. The protections that corporate bodies have had under the Constitution in the past (outside of those later granted by the court under the Fourteenth Amendment) are not so much grants of rights to corporations, but rather general restrictions on the actions of the government that apply in all cases (i.e. the government is barred from interfering with the obligations of a valid contract regardless of the parties to that contract). Thus, it would seem that until the reinterpretation of the Fourteenth Amendment, there was very little to suggest that corporations should be granted the same special protections from the legislatures that “natural persons” are. Again, this is not to say that it is always (or even often) prudent from an economic policy standpoint for legislatures to impose strict regulations on corporate business. However, it still seems that making such a determination should be left to the discretion of legislatures, and not taken completely off the table by the artificial notion of corporate rights.

In addition to allowing the influence of corporations to reach unprecedented levels, this erosion of state power that was associated with the growth of corporate control and the establishment of corporate rights led to a major backlash that considerably expanded government involvement in the economy. Many voters at the time felt that the only method for checking the massive power being wielded by corporate monopolies and

trusts over the economy was the establishment of equally powerful state institutions capable of overseeing business as a potential counter to possible oversteps by companies. There has long been a tradition of skepticism towards government interference in America, but the worrying growth of private power and authority in the hands of big business seems to have been enough to sway most average Americans from their previous sensibilities to support outspoken "trust busters" such as Roosevelt and Wilson. If one accepts that the growing power of corporations poses a danger to American society, then the bolstering of the state in order to counter that power might seem to be an effective solution. However, we have seen that many of the early anti-trust and labor reform efforts were not entirely successful in bringing corporate influence under control. If that is the case, what is left is a significantly expanded state power in addition to corporate power that has remained unrestrained. The question then arises, what if the still unchecked corporate powers begin to exert substantial influence over the government? Thus, the expansion of the government in order curtail corporations seems to leave open the possibility of corporations gaining control over the expanded power of the state and utilizing it for their own ends.

Given all that has been discussed so far it should be apparent that corporations have changed substantially, just in America, and just over a period of 200 years. The American Revolution and the U.S. Constitution created an environment in America that was very friendly towards business and new enterprise, and this period marked a huge spike in the number of corporations that were chartered. Still, corporations tended to remain relatively small and did not exert much influence over wide areas. Additionally, governance of corporations was considered well within the full purview of legislatures, that it was

thought reasonable in several cases before the Supreme Court to argue that legislators had the power to violate the terms of corporate charters, and rescind valid contracts made with corporations. As business in the United States began to really take off after the Civil War, such attempts by legislatures to strong arm corporations fell by the wayside in favor of measures designed to bring in new corporate business to their respective states. Ultimately, this shift in law and perception became so complete that legislatures came to be seen as completely unrelated to the maintaining of corporations, and new interpretations of the Fourteenth Amendment began to deny legislators the ability to restrict the activities of organizations that they themselves had essentially created in the first place.

Certainly, the major economic advancements sparked by highly integrated industrial corporations should speak to the credit of the corporate institution as a force capable of massively boosting human prosperity and productivity, but it is also clear that there is a vast temptation for overreach and domination the underlies enormous wealth and influence that corporate businesses seek to, and so often do, accumulate. Like so many things, it seems that there may be some mean for corporate power where society could find the the best of both worlds. Is there some system of reasonable regulation that can adequately ensure the fair distribution of corporate power while still allowing society to reap the economic benefits that corporate institutions create? Currently that question seems to have no sure answer. It may well be that granting rights to corporations and guaranteeing the non-interference of government in certain spheres of corporate activity might be beneficial for commercial development, but given the tendency for the incentives of the corporate system to heavily motivate large-scale growth and expansion

of influence, this seems like a poor system for attempting to achieve the kind of public versus corporate balance that was previously described. It would seem that the various federal and state legislatures would be an ideal arbiter of such a balance. Ostensibly, such bodies should already be composed so as to adequately represent both the interests of the public and the interests of business. Thus, the first step in addressing the spread of corporate power may very well lie in a turn back to their historical conception of corporations as legal entities created by legislative consent and more fully subject to legislative intervention and correction.

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