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# Corporate Purpose and the Separation of Powers

*Benjamin T. Seymour*

## ABSTRACT

*Despite its intense focus on inter-jurisdictional competition, corporate law scholarship has thus far overlooked the influence of inter-branch competition on business organizations. This Article shows how inter-branch struggles for control over corporations catalyzed the advent of modern corporate law and helped propel Delaware to its dominant position in the market for corporate charters.*

*For centuries, the legislature, judiciary, and executive vied for the decisive role in dictating the means and ends of corporations. Through the nineteenth century, competition among the branches produced a dysfunctional and volatile relationship between government and private enterprise, with each branch successively assuming a leading role in corporate oversight, only to falter under the weight of its unique structural limitations. The resulting instability ultimately proved so intolerable as to prompt the creation of an entirely new paradigm of liberalized corporate codes at the dawn of the twentieth century. Delaware's innovation of and rigorous adherence to corporate law's newfound separation of powers gave it a crucial, yet previously unappreciated, edge in the competition for corporate charters. Moreover, modern corporate law's system of checks and balances curbed longstanding abuses and ushered in an equilibrium among the branches that has served as a foundation for economic growth in the United States since.*

*Beyond illuminating a novel factor in Delaware's ascendancy, corporate law's separation of powers poses unappreciated problems and provides preliminary solutions for the ongoing debate over corporate purpose. A growing chorus of progressive academics and policymakers has called on the government to impose and enforce corporations' social obligations. This Article offers new grounds for skepticism towards these proposed reforms because they would jeopardize corporate law's hard-fought equilibrium among the branches by reviving the unilateralism and dysfunction that once plagued the United States' corporate law regime. Accordingly, this Article contends that vesting the government with a proactive role in imposing and enforcing corporate purpose, whether at*

*the state or federal level, is ill advised. Yet this Article also provides reform-minded progressives with a concrete framework for structuring an expanded power to enforce corporate purpose with minimal risk to corporate law's separation of powers.*

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## I. INTRODUCTION

Corporate law is often characterized as a branch of private law,<sup>1</sup> yet this description belies the fact that much of the most significant corporate law scholarship from the past fifty years has interrogated how political dynamics shape business organizations.<sup>2</sup> The most prominent of these debates concerns inter-jurisdictional competition for corporate charters.<sup>3</sup> While many commentators have examined relationships among the

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1. See KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES* 33 (2006) (describing the private law conception of corporate law).

2. See, e.g., Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 *STAN. L. REV.* 923, 924 (1984) (examining “the important link between corporate law and political theory, that political ideals constrain or influence the form of business organizations”).

3. For two seminal and opposing perspectives on inter-jurisdictional competition for corporate charters, see William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 *YALE L.J.* 663 (1974); Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 *J. LEGAL STUD.* 251 (1977).

states<sup>4</sup>—especially Delaware’s dominance in attracting charters<sup>5</sup>—another strand of scholarship has explored the federal government’s influence on state corporate law.<sup>6</sup>

Despite its intense focus on inter-*jurisdictional* competition, corporate law scholarship has thus far overlooked the influence of inter-*branch* competition on business organizations. A firsthand account from a prominent member of Delaware’s corporate bar suggests that the state’s practitioners and judges recognize the importance of the separation of powers when shaping corporate law.<sup>7</sup> But previous scholarly discussion of the separation of powers in corporate law has amounted to little more than a handful of analogies.<sup>8</sup>

This Article shows how inter-branch struggles for control over corporations catalyzed the advent of modern corporate law and helped propel Delaware to its dominant position in the market for corporate charters. For centuries the legislature, judiciary, and executive branches

4. See, e.g., Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1437 (1992); Daniel R. Fischel, *The “Race to the Bottom” Revisited: Reflections on Recent Developments in Delaware’s Corporation Law*, 76 NW. U. L. REV. 913 (1982); Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679 (2002); Jonathan R. Macey, *Smith v. Van Gorkom: Insights About C.E.O.s, Corporate Law Rules, and the Jurisdictional Competition for Corporate Charters*, 96 NW. U. L. REV. 607 (2002); Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L., ECON. & ORG. 225 (1985).

5. See Stephen M. Bainbridge, *Can Delaware Be Dethroned? Evaluating Delaware’s Dominance of Corporate Law*, in *CAN DELAWARE BE DETHRONED?* 1, 1 (Stephen M. Bainbridge et al. eds., 2018) (“Delaware’s dominance of corporate law arises in the first instance from its dominant position in the market for corporate charters. According to the Delaware Division of Corporations, as of April 2016, more than half of all public corporations were incorporated in Delaware, including 64 percent of Fortune 500 companies.”); Lucian Arye Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 YALE L.J. 553, 555 (2002) (“Delaware’s dominant position is far stronger . . . than has been previously recognized.”).

6. See, e.g., Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 VAND. L. REV. 1573 (2005); Mark J. Roe, *Delaware’s Competition*, 117 HARV. L. REV. 588 (2003).

7. Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749, 1757 (2006) (recounting how Delaware judges and the drafters of its corporate code rarely communicate because they “[r]ecogniz[e] the importance of the separation of coequal branches of government”).

8. See Cary Coglianese, *Legitimacy and Corporate Governance*, 32 DEL. J. CORP. L. 159, 162 (2007) (analogizing the relationship among CEOs, boards of directors, and shareholders to a “separation of powers”); see also Christopher M. Bruner, *The Enduring Ambivalence of Corporate Law*, 59 ALA. L. REV. 1385, 1431 n.238 (2008) (same, but remarking “such comparisons ought not be pushed too far—principally due to the radically differing postures and legitimacy of these institutions in articulating the social good and orienting their conduct toward it”); Timothy K. Kuhner, *The Separation of Business and State*, 95 CALIF. L. REV. 2353, 2370–73 (2007) (discussing the separation of powers as a model for curbing corporate political expenditures).

vied for the decisive role in dictating the means and ends of corporations.<sup>9</sup> Through the nineteenth century, competition among the branches produced a dysfunctional and volatile relationship between government and private enterprise, with each branch successively assuming a leading role in corporate oversight, only to falter under the weight of its unique structural limitations.<sup>10</sup> The resulting instability ultimately proved so intolerable as to prompt the creation of an entirely new paradigm of liberalized corporate codes by the dawn of the twentieth century.<sup>11</sup> Delaware's innovation of and rigorous adherence to corporate law's newfound separation of powers gave it a crucial, yet previously unappreciated, edge in the competition for corporate charters.<sup>12</sup> Moreover, modern corporate law's system of checks and balances curbed longstanding abuses and ushered in an equilibrium among the branches<sup>13</sup> that has served as a foundation for economic growth in the United States ever since.<sup>14</sup>

Beyond illuminating a novel factor in Delaware's ascendancy, corporate law's separation of powers poses unappreciated problems and provides preliminary solutions for the ongoing debate over corporate purpose. The proper ends of corporations, whether purely to promote shareholder value or instead enhance stakeholder welfare, transformed from a perennial subject of academic theory<sup>15</sup> into a major policy issue in

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9. *See infra* Section II.A.

10. *See infra* Sections II.B–II.D.

11. *See infra* Section III.A.

12. *See infra* notes 234–238, 247–266 and accompanying text.

13. *See infra* Part III.

14. *Cf.* William W. Bratton & Joseph A. McCahery, *The Equilibrium Content of Corporate Federalism*, 41 WAKE FOREST L. REV. 619, 620 (2006) (“[E]quilibrium prevails in the charter market, following from Delaware’s successful pursuit of an evolutionarily stable strategy to maximize rents from the sale of charters. The strategy, first followed by New Jersey, caused a radical change in corporate law in the late nineteenth century. Since then, stability has ruled.”).

15. For an influential exchange on corporate purpose, see E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932); A.A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932).

recent years.<sup>16</sup> Business executives<sup>17</sup> and politicians<sup>18</sup> alike have seized on corporate purpose as a rallying cry for reform. Yet the first-order matter of what ends corporations should serve is inevitably accompanied by the second-order question of how to actualize that purpose in practice.<sup>19</sup> A growing chorus of progressive academics and policymakers has called on the government to actively impose and enforce corporations' broader social purposes.<sup>20</sup>

This Article's separation of powers framework offers new grounds for skepticism towards these proposed reforms, because they would jeopardize corporate law's hard-fought equilibrium among the branches by reviving the unilateralism and dysfunction that once plagued the United States' corporate law regime.<sup>21</sup> Accordingly, this Article contends that vesting the government with a proactive role in imposing and enforcing corporate purpose, whether at the state or federal level, is a risk not worth taking.<sup>22</sup> Yet reform-minded progressives are not bound by the separation of powers flaws of prior proposals. Thus, for those committed to greater public intervention in corporate affairs, this Article articulates a concrete statutory structure that revives the government's corporate enforcement powers with minimal risk to corporate law's interbranch equilibrium.<sup>23</sup>

The remainder of this Article proceeds as follows: Part II surveys how the legislative, judicial, and executive branches of the United States

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16. See Jill E. Fisch & Steven Davidoff Solomon, *Should Corporations Have a Purpose?*, 99 TEX. L. REV. 1309 (2021).

17. See, e.g., *Business Roundtable Redefines the Purpose of a Corporation to Promote "An Economy That Serves All Americans"*, BUS. ROUNDTABLE (Aug. 19, 2019) [hereinafter, *Business Roundtable Redefines Purpose*], <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans> (rescinding the Business Roundtable's prior commitment to shareholder primacy and replacing it with a commitment to also serve stakeholder and societal interests); see also Omar Rodríguez-Vilá & Sundar Bharadwaj, *Competing on Social Purpose*, HARV. BUS. REV., Sept.–Oct. 2017, <https://hbr.org/2017/09/competing-on-social-purpose> (discussing firms' successful social purpose strategies).

18. See, e.g., Elizabeth Warren, Opinion, *Companies Shouldn't Be Accountable Only to Shareholders*, WALL ST. J. (Aug. 14, 2018, 7:01 PM), <https://www.wsj.com/articles/companies-shouldnt-be-accountable-only-to-shareholders-1534287687>; Michael Peregrine & Charles Elson, *Biden in the Boardroom*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 6, 2020), <https://corpgov.law.harvard.edu/2020/12/06/biden-in-the-boardroom/>.

19. The enforcement of corporate purpose has become a focus in recent scholarship. See Lucian A. Bebchuk, Kobi Kastiel & Roberto Tallarita, *For Whom Corporate Leaders Bargain*, 93 S. CAL. L. REV. (forthcoming 2021) (challenging the extent to which managers pursue the interests of stakeholder constituencies, even when empowered to do so).

20. See *infra* Section IV.A.

21. See *infra* Section IV.B.

22. See *infra* notes 328–329 and accompanying text.

23. See *infra* notes 331–342 and accompanying text.

successively arrogated primary control over corporate oversight during the nineteenth century, resulting in dysfunction and instability. Part III explains the revolution in corporate law that followed, as the advent of modern corporate codes in New Jersey and Delaware led to a new equilibrium of checks among the branches. Part IV explores the separation of powers implications of the ongoing debate over corporate purpose, arguing that current proposals for government enforcement of corporate purpose would reproduce the pathologies of the pre-modern approach to corporate law. To avoid repeating these failures, Part IV cautions against reviving the government's role in enforcing corporate purpose, but provides reformers committed to government intervention with a concrete proposal for how to enhance public oversight of corporations yet safeguard checks and balances. A brief conclusion contextualizes the contemporary debate over corporate purpose in the longer arc of history and celebrates the tradition of questioning the proper role of private enterprise in democratic society.

## II. INTER-BRANCH STRUGGLES FOR CORPORATE OVERSIGHT

Until the dawn of the twentieth century, corporations occupied a precarious position in U.S. law, reflecting a deep-seated suspicion toward their power.<sup>24</sup> Government interventions, designed to curb the perceived threat of corporate excess, imposed stringent restrictions on the corporate form prior to the advent of modern corporate codes.<sup>25</sup> While distrust of corporations was widespread,<sup>26</sup> the proper role of each branch in restraining the United States' burgeoning business organizations remained an open question throughout the nineteenth century. This uncertainty resulted in a protracted struggle, with each branch successively arrogating a dominant role in defining the terms upon which corporations could exist and operate, only to reveal how that branch's unique structural limitations prevented effective oversight.<sup>27</sup>

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24. See Bruner, *supra* note 8, at 1385–86.

25. See *infra* notes 99–102 and accompanying text.

26. See JAMES WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780–1970*, at 5 (1970) (discussing the “diffuse distrust of the corporate form”).

27. See *infra* Sections II.B–II.D.

*A. An Inheritance of Inter-Branch Competition*

The instability that defined the United States' early relationship with corporations reflected the conflicting precedents of English law. Since the development of the first corporate bodies in England—the overwhelming majority of which were municipal, ecclesiastical, and charitable<sup>28</sup>—the various arms of the state vied to assert power over the corporate form.<sup>29</sup>

By far the foremost force in early corporate law,<sup>30</sup> the Crown wielded its authority over charters as an instrument of inter-branch control. The King claimed ultimate authority to create corporations by granting charters.<sup>31</sup> Those who operated corporations without valid charters were vulnerable to royal enforcement actions through the writ of *quo warranto*.<sup>32</sup> The writ, whose name means “by what authority?,”<sup>33</sup> punished defendants unable to prove they acted within the bounds of a royal charter by dissolving their entity and assessing fines.<sup>34</sup> Although kings harnessed the writ of *quo warranto* to consolidate power as early as the twelfth century,<sup>35</sup> the most famous *quo warranto* suit of English history occurred between 1671 and 1673, when King Charles II revoked the City of London's charter<sup>36</sup> and governed the city by royal commission for the following five years.<sup>37</sup> The Attorney General justified the Crown's revocation power by arguing that otherwise corporate bodies would amount to “independent commonwealths,” undermining royal

28. See W.S. Holdsworth, *English Corporation Law in the 16th and 17th Centuries*, 31 YALE L.J. 382, 382 (1922) (“The largest part of the law still centered round the boroughs and various ecclesiastical corporations sole or aggregate. But hospitals and colleges had begun to increase . . .”).

29. See *id.*

30. See JOSEPH STANCLIFFE DAVIS, *Corporations in the American Colonies*, in *ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS* 1, 6 (1917).

31. See David B. Guenther, *Of Bodies Politic and Pecuniary: A Brief History of Corporate Purpose*, 9 MICH. BUS. & ENTREPRENEURIAL L. REV. 1, 9 (2019).

32. See Comment, *Quo Warranto and Private Corporations*, 37 YALE L.J. 237, 237–38 (1927).

33. See Richard B. Allen, *Mandamus, Quo Warranto, Prohibition, and Ne Exeat*, 1960 U. ILL. L.F. 102, 106 (1960).

34. See Comment, *supra* note 32, at 239 (“[T]he defendant if guilty was ousted and fined . . .”).

35. See Helen M. Cam, Book Note, 77 HARV. L. REV. 985, 985 (1964) (reviewing DONALD W. SUTHERLAND, *QUO WARRANTO PROCEEDINGS IN THE REIGN OF KING EDWARD I, 1278–94* (1963)); see also Edward Jenks, *The Prerogative Writs in English Law*, 32 YALE L.J. 523, 527–28 (1923) (discussing the use of *quo warranto* as a “royal weapon” in the thirteenth century).

36. See Holdsworth, *supra* note 28, at 403; Catherine Patterson, *Quo Warranto and Borough Corporations in Early Stuart England: Royal Prerogative and Local Privileges in the Central Courts*, 120 ENG. HIST. REV. 879, 879–80 (2005).

37. See Howard A. Nenner, Book Review, 15 AM. J. LEGAL HIST. 352, 353 (1971) (reviewing JENNIFER LEVIN, *THE CHARTER CONTROVERSY IN THE CITY OF LONDON, 1660–1688, AND ITS CONSEQUENCES* (1969)).

sovereignty.<sup>38</sup> But scholars have uncovered less principled motivations behind the London case, observing that it was part of the King's broader strategy to pressure municipalities and thereby control the House of Commons.<sup>39</sup>

Courts also inserted themselves in corporate affairs, imposing significant limits on royal control. The judiciary insisted that the King could neither alter the terms of a royal charter once granted, as this would amount to changing the law,<sup>40</sup> nor dissolve a corporation without a judicial decree.<sup>41</sup> Additionally, judges challenged the exclusivity of the Crown's chartering power by recognizing the validity of corporations created by operation of the common law.<sup>42</sup>

Yet Parliament provided the more powerful check on royal authority over corporations. Parliament intermittently chartered corporations of its own,<sup>43</sup> though courts defended this practice as so longstanding as to carry the implied assent of the Crown.<sup>44</sup> But rather than granting individual charters, Parliament more often regulated corporations through general acts, prescribing certain features for all future charters and setting limits on privileges the King could confer.<sup>45</sup>

Parliamentary control over corporations reached its apogee in 1720 with the passage of the Bubble Act.<sup>46</sup> Enacted during the South Sea Bubble, a stock market crash precipitated by the failure of a colonial corporation,<sup>47</sup> the Bubble Act imposed harsh penalties on any corporation that operated without a royal or parliamentary charter.<sup>48</sup> With the Bubble

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38. Holdsworth, *supra* note 28, at 383 (quoting (1682, K.B.) 8 S.T. 1039); see Nenner, *supra* note 37, at 354.

39. See Nenner, *supra* note 37, at 354 ("The numerous dissolutions which followed in the wake of the London case were part of a royal policy to control the composition of parliament. The borough corporations returned a majority of the members of the House of Commons, and only if these boroughs could be regulated did the Stuarts think that they might be assured of the composition they desired.").

40. See Holdsworth, *supra* note 28, at 385.

41. See *id.*; see also Nenner, *supra* note 37, at 353 (discussing the role of the King's Bench in the London *quo warranto* case).

42. See Guenther, *supra* note 31, at 9.

43. Holdsworth, *supra* note 28, at 384; see WILLIAM A. KLEIN & JOHN C. COFFEE, JR., BUSINESS ORGANIZATIONS AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES 113 (3d ed., 1988).

44. See DAVIS, *supra* note 30, at 6.

45. See *id.*; see also Holdsworth, *supra* note 28, at 385–86 (noting most corporate charters were pursuant to royal authority).

46. See Henry N. Butler, *General Incorporation in Nineteenth Century England: Interaction of Common Law and Legislative Processes*, 6 INT'L REV. L. & ECON. 169, 172–73 (1986).

47. KLEIN & COFFEE, *supra* note 43, at 113.

48. *Id.*; Guenther, *supra* note 31, at 11; see also Paul G. Mahoney, *Contract or Concession? An Essay on the History of Corporate Law*, 34 GA. L. REV. 873, 887 (2000) ("Thus, for the first time, English law formally embraced the proposition that a business organization with separate legal

Act, Parliament eclipsed the Crown as the most powerful branch in corporate law by restricting the universe of valid charters and dictating the terms of royal and parliamentary charters alike.<sup>49</sup>

Distance from England compounded inter-branch conflict over the creation and oversight of corporations in the American colonies. Although Parliament extended the Bubble Act to the colonies in 1741,<sup>50</sup> the earliest colonial corporations received charters directly from the Crown.<sup>51</sup> But as the colonies grew increasingly independent, they began granting charters themselves, claiming to act as delegees of the Crown.<sup>52</sup> Power struggles soon followed, as royal governors and colonial assemblies alike asserted that they were the proper delegees of the royal chartering power.<sup>53</sup> The resulting parallel system of chartering occasionally collapsed into confrontation, as when Governor John Seymour of Maryland granted Annapolis a municipal charter in 1708.<sup>54</sup> In response, Maryland's assembly passed a resolution denying the governor's authority to grant charters.<sup>55</sup> Governor Seymour retaliated by dissolving the assembly.<sup>56</sup> When Governor Seymour reconvened the assembly, the delegates affirmed Annapolis's charter yet insisted on retaining a role in the creation of corporations by modifying the charter's terms.<sup>57</sup>

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personality and transferrable shares could not be a creature of contract but must be a concession from the state.”).

49. See Margaret Patterson & David Reiffen, *The Effect of the Bubble Act on the Market for Joint Stock Shares*, 50 J. ECON. HIST. 163, 166 (1990); see also Holdsworth, *supra* note 28, at 384 (discussing Parliament's plenary power over corporate charters).

50. See P.M. Vasudev, *Corporate Law and Its Efficiency: A Review of History*, 50 AM. J. LEGAL HIST. 237, 241 (2010).

51. See DAVIS, *supra* note 30, at 7 (“The earliest colonial corporations . . . possessed charters granted directly by the crown, which were issued in the same form, by the same process, and under the same conditions as charters for corporations to operate in the British Isles.”); Guenther, *supra* note 31, at 15.

52. DAVIS, *supra* note 30, at 7 (“[A]s soon as the colonial governments had attained a slight degree of development the great majority of American corporations were erected by grants from colonial proprietors, governors, or assemblies, and not by letters patent issuing from the English crown or by act of Parliament.”).

53. See *id.* at 9, 11–12.

54. See *id.* at 13.

55. See *id.* at 14.

56. See *id.*; C. Ashley Ellefson, *Governor John Seymour and the Charters of Annapolis*, MD. ST. ARCHIVES 21 (2008),

<https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000749/pdf/am749.pdf> (“Disgusted with the delegates over their challenge to his issuing the charter as well as over their other offensive proceedings, Seymour had had enough. On Tuesday morning he called them into the council chamber again and dissolved the assembly after a session of only nine days.”).

57. See Ellefson, *supra* note 56, at 27 (describing the amended provisions and concluding “[t]he delegates conceded Seymour's right to issue the charter, and Seymour conceded the delegates' right to amend and confirm it”).

By the eve of the American Revolution, the question of each branch's role in overseeing corporations remained in a state of flux,<sup>58</sup> as the legislature, judiciary, and executive could each invoke English precedents as entitling them to the decisive role in regulating corporate affairs. With independence, a growing desire for access to corporations<sup>59</sup> exacerbated competition among the branches of the nascent United States. The remainder of this Part explores this century-long struggle, explaining how the successive domineering of each branch produced dysfunction and instability.

### *B. Legislative Overbearance in the Early Republic*

In the decades following the American Revolution, legislatures assumed a dominant role in corporate oversight.<sup>60</sup> But the promise of democratic accountability in corporate affairs proved short-lived. By 1820, revolutionary hopes had given way to constitutional concerns of aggrandizement<sup>61</sup> and the disappointing realities of legislative rent-seeking,<sup>62</sup> partisanship,<sup>63</sup> and impotence.<sup>64</sup>

Once independent from Britain, newly sovereign state legislatures wielded the unquestioned power to charter and regulate corporations.<sup>65</sup> Legislatures' ascendancy in corporate matters reflected a broader trend of the decade following the Revolution:

In the heady flush of Revolutionary republicanism, Americans flirted with the idea that governmental structure should be simple, allowing the unmediated will of the people to be transmuted into public policy. . . . Accordingly, though they to some extent separated the executive and

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58. Cf. DAVIS, *supra* note 30, at 7.

59. See Guenther, *supra* note 31, at 28 ("American state legislatures in the late eighteenth and early nineteenth century proceeded to charter more business corporations than the world had ever known.").

60. See *infra* notes 65–69 and accompanying text.

61. See *infra* notes 84–87 and accompanying text.

62. See *infra* notes 88–91 and accompanying text.

63. See *infra* notes 92–96 and accompanying text.

64. See *infra* notes 107–114 and accompanying text.

65. See Jason Kaufman, *Corporate Law and the Sovereignty of States*, 73 AM. SOC. REV. 402, 415 (2008); Gregory A. Mark, *The Court and the Corporation: Jurisprudence, Localism, and Federalism*, 1997 SUP. CT. REV. 403, 409 ("The sovereign power to create corporations thus devolved from England to the former colonies, not in their confederated form, but to each of the former colonies specifically, and within the structures of the new state governments, to the legislatures. This devolution was so uncontroversial that one strains to find anyone who even bothers to comment that it had happened.").

judicial powers from the legislature, early state constitutions provided few institutional checks on legislative power.<sup>66</sup>

While New Jersey's Governor attempted to charter a corporation in 1778, the colonial practice of gubernatorial chartering soon disappeared from the United States entirely.<sup>67</sup> No longer burdened with the implied consent of the executive,<sup>68</sup> legislatures enjoyed plenary authority over corporations in the first decades of the Early Republic.<sup>69</sup>

The Founders grappled with the necessity of corporate chartering, since corporations developed America's economic infrastructure<sup>70</sup> and attracted much-needed capital to the indebted nation.<sup>71</sup> Under the prevailing "mercantilist" theory of the corporation, the state created corporations and permitted their operation solely for these public ends.<sup>72</sup> A prominent manifestation of the mercantilist view was James Madison's proposal at the Constitutional Convention to authorize Congress "to grant charters of incorporation in cases where the Public good may require them, and the authority of a single State may be incompetent."<sup>73</sup> Madison argued that the provision would encourage commerce among the states.<sup>74</sup> James Wilson, in a view that ultimately carried the day,<sup>75</sup> objected to the proposal as unnecessary, reasoning that the chartering power was implicit in the Commerce Clause.<sup>76</sup> With other delegates expressing fears that the power would prove too divisive, given states' differing approaches to

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66. Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 *YALE L.J.* 1672, 1703 (2012).

67. *Cf.* LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 170 n.30 (1973).

68. *See* DAVIS, *supra* note 30, at 7.

69. *See* FRIEDMAN, *supra* note 67, at 166; Mark, *supra* note 65, at 411.

70. *See* Guenther, *supra* note 31, at 5 (describing the use of corporations for the "development of local transportation, finance, and other much-needed economic infrastructure . . . at a time when local governments lacked the resources to build such infrastructure").

71. *See* Susan P. Hamill, *From Special Privilege to General Utility: A Continuation of Willard Hurst's Study of Corporations*, 49 *AM. U. L. REV.* 81, 93 (1999).

72. Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 *GEO. L.J.* 1593, 1603 (1988).

73. JONATHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 440 (1876).

74. *Id.* at 544 ("[Madison's] primary object was, however, to secure an easy communication between the states, which the free intercourse now to be opened, seemed to call for. The political obstacles being removed, a removal of the natural ones, as far as possible, ought to follow.").

75. *See* *McCulloch v. Maryland*, 17 U.S. 316 (1819).

76. ELLIOT, *supra* note 73, at 455; *see* Elizabeth Pollman, *Constitutionalizing Corporate Law*, 69 *VAND. L. REV.* 639, 646 (2016).

incorporation,<sup>77</sup> the proposal failed on an eight-to-three vote.<sup>78</sup> Nevertheless, by the ratification of the Constitution, the notion that chartering was an essential tool for economic development had taken root among the United States' political elite.<sup>79</sup>

Despite the developmental expediency of corporations, the Founders disagreed over whether chartering would become an instrument of legislative aggrandizement. By the late 1780s, constitutional reform at the federal and state levels sought to replace legislative supremacy with a more definite separation of powers secured by checks and balances.<sup>80</sup> Ratification of the Constitution only bred deeper divisions, however, as the question of legislative authority in corporate affairs crystallized into the most contentious constitutional debate of the Early Republic: whether Congress could charter the First Bank of the United States.<sup>81</sup> Although much of the controversy focused on the Necessary and Proper Clause<sup>82</sup> and the importance of federalism,<sup>83</sup> the Bank's opponents also claimed that granting this power to Congress would eviscerate the separation of powers.<sup>84</sup> Thomas Jefferson described the charter as an "invasion[] of the legislature,"<sup>85</sup> warning that allowing it:

would reduce the whole [Constitution] to a single phrase, that of instituting a Congress with power to do whatever would be for the good of the U.S. and as they would be the sole judges of the good or evil, it would be also a power to do whatever evil they pleased.<sup>86</sup>

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77. ELLIOT, *supra* note 73, at 455; see Mark, *supra* note 65, at 411; see also Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 WM. & MARY Q. 51, 52 (1993) (observing that the delegates feared including the power would jeopardize ratification).

78. ELLIOT, *supra* note 73, at 456; see Mark, *supra* note 65, at 411.

79. See JAMIL S. ZAINALDIN, *LAW IN ANTEBELLUM SOCIETY: LEGAL CHANGE AND ECONOMIC EXPANSION* 43 (1983).

80. See Chapman & McConnell, *supra* note 66, at 1705; see also THE FEDERALIST NO. 51 (Alexander Hamilton or James Madison) ("[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.").

81. See ERIC LOMAZOFF, *RECONSTRUCTING THE NATIONAL BANK CONTROVERSY: POLITICS AND LAW IN THE EARLY AMERICAN REPUBLIC* 9 (2018); Pollman, *supra* note 76, at 646.

82. See, e.g., Alexander Hamilton, *Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank* (Feb. 23, 1791), <https://founders.archives.gov/documents/Hamilton/01-08-02-0060-0003>; Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183, 188 (2003).

83. See Hamilton, *supra* note 82 (discussing the Tenth Amendment).

84. See Keith Werhan, *Checking Congress and Balancing Federalism: A Lesson from Separation-of-Powers Jurisprudence*, 57 WASH. & LEE L. REV. 1213, 1224 (2000).

85. Thomas Jefferson, *Opinion on the Constitutionality of the Bill for Establishing a National Bank* (Feb. 15, 1791), <https://founders.archives.gov/documents/Jefferson/01-19-02-0051>.

86. *Id.*

Jefferson's resistance to the Bank supplied skeptics around the country with a new vocabulary for challenging legislatures' plenary power over corporations.<sup>87</sup>

As the Founders clashed over the long-term effects of legislative predominance in corporate affairs, state legislatures began to exhibit their inability to effectively oversee corporations in practice. Rent-seeking was endemic.<sup>88</sup> Legislatures restricted the supply of charters to enhance their value, granting only a small fraction of charter applications.<sup>89</sup> Outright bribery pervaded the chartering process,<sup>90</sup> and legislators frequently reserved a portion of stock in newly chartered enterprises for themselves.<sup>91</sup>

Partisanship similarly undermined the effectiveness of legislative oversight.<sup>92</sup> By only granting charters to party allies, majority factions cemented their political control.<sup>93</sup> Factionalism was particularly acute in New York, a center of early corporate law,<sup>94</sup> where Federalist legislators leveraged their chartering power to create a network of loyal investors.<sup>95</sup> When the Democratic Republicans later won control of the New York

87. For an analysis of Jefferson's impact on Jacksonian opposition to legislative authority over corporations, see ARTHUR M. SCHLESINGER, JR., *THE AGE OF JACKSON* 307–09 (1945).

88. See Eric Hilt, *Early American Corporations and the State*, in *CORPORATIONS AND AMERICAN DEMOCRACY* 37, 41 (Naomi R. Lamoreaux & William J. Novak eds., 2017).

89. See *id.*; Nicholas Walter, *Antitrust and Corporate Law: Revisiting the Market for Corporate Control*, 15 U. PA. J. BUS. L. 755, 766 (2013) (describing the scarcity of corporate charters in the early nineteenth century); Naomi R. Lamoreaux & John Joseph Wallis, *Economic Crisis, General Laws, and the Mid-Nineteenth-Century Transformation of American Political Economy* 3 (Nat'l Bur. of Econ. Rsch., Working Paper No. 27400, 2020), <https://www.nber.org/papers/w27400>.

90. See Jonathan R. Macey, *Crony Capitalism: Right Here, Right Now*, 37 HARV. J.L. & PUB. POL'Y 5, 7–8 (2014) (describing the Early Republic's chartering process as "a kind of fertilizer for cronyism, because people got these charters by paying bribes"); Nathan B. Oman, *A Pragmatic Defense of Contract Law*, 98 GEO. L.J. 77, 89 (2009) ("[I]ncorporation by special charter resulted not only in the monopolization of sectors of the economy but also in the corruption of legislatures through bribery or other schemes designed to protect this artificial privilege.").

91. See Eric Hilt & Jacqueline Valentine, *Democratic Dividends: Stockholding, Wealth, and Politics in New York, 1791–1826*, 72 J. ECON. HIST. 332, 342 (2012); Howard Bodenhorn, *Opening Access: Banks and Politics in New York from the Revolution to the Civil War* 4 (Nat'l Bur. of Econ. Rsch., Working Paper No. 23560, 2017).

92. See Hilt, *supra* note 88, at 47. Ofer Eldar and Gabriel Rauterberg have recently argued that partisanship remains a fundamental problem for corporate law. See Ofer Eldar & Gabriel Rauterberg, *Is Corporate Law Nonpartisan?* (2020) (manuscript on file with author). By contrast, this Article contends that partisanship is just one among many structural barriers to effective legislative control of corporations that makes modern corporate law's separation of powers so valuable.

93. See Lamoreaux & Wallis, *supra* note 89, at 3.

94. See Hovenkamp, *supra* note 72, at 1654 (describing New York as "the state with the greatest influence on antebellum American corporate law").

95. See Hilt, *supra* note 88, at 44; Brian Phillips Murphy, "A Very Convenient Instrument": *The Manhattan Company, Aaron Burr, and the Election of 1800*, 65 WM. & MARY Q. 233, 237 (2008).

legislature, they repaid the Federalists in kind by only chartering corporations owned by their own partisans.<sup>96</sup>

The extensive lobbying required to secure corporate charters not only restricted their availability to elites<sup>97</sup> but also resulted in widely divergent terms upon which corporations could operate.<sup>98</sup> Reducing legal restraints was invaluable due to the onerous conditions that legislatures typically imposed in corporate charters, including limits on how much capital the corporation could raise; lifespan provisions, after which the corporation needed to seek renewal of its charter; territorial restrictions on where the corporation could operate; and prohibitions on corporate ownership of stock in other entities or other categories of property.<sup>99</sup> In keeping with the mercantilist view that charters were only granted in the public interest<sup>100</sup> and that the state was an indelible participant in any corporate venture,<sup>101</sup> charters further stipulated exclusive corporate purposes.<sup>102</sup>

Incorporators' lobbying for more favorable terms also illuminates a structural impediment to legislative intervention in the affairs of individual corporations. To change the legal status of a single corporation—whether through an initial charter or subsequent amendment—legislatures inevitably passed special legislation, solely applicable to a specified group, rather than general legislation.<sup>103</sup> Although common in the

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96. See Bodenhorn, *supra* note 91, at 398; Hilt, *supra* note 88, at 47; Lamoreaux & Wallis, *supra* note 89, at 3.

97. See Robert M. Ireland, *The Problem of Local, Private, and Special Legislation in the Nineteenth-Century United States*, 46 AM. J. LEGAL HIST. 271, 281 (2004) (“The process of legislative chartering also meant that often incorporation was granted only to those who possessed influence with the legislature.”); Maier, *supra* note 77, at 72.

98. See Henry N. Butler, *Nineteenth-Century Jurisdictional Competition in the Granting of Corporate Privileges*, 14 J. LEGAL STUD. 129, 143 (1985); Ireland, *supra* note 97, at 281; Carl E. Gershenson, *The Social and Political Origins of the American Business Corporation, 1787-1861*, at 28 (Mar. 2018) (unpublished Ph.D. dissertation, Harvard University), <https://dash.harvard.edu/bitstream/handle/1/40050039/GERSHENSON-DISSERTATION-2018.pdf> (“[T]he special charter system incentivized incorporators to focus their lobbying efforts on improving the terms of their own charter and preventing rivals from obtaining charters.”).

99. See Vasudev, *supra* note 50, at 246–47 tbl.2 (offering a taxonomy of common restrictions in nineteenth-century corporate charters).

100. See KLEIN & COFFEE, *supra* note 43, at 113; Guenther, *supra* note 31, at 30.

101. See KLEIN & COFFEE, *supra* note 43, at 113–14; Hovenkamp, *supra* note 72, at 1595 (“The very act of incorporation presumed state involvement.”).

102. See HURST, *supra* note 26, at 45 (“[L]egislation early required that corporate articles define a limiting purpose or field of operations for the corporate enterprise. Limitation of purpose commonly applied to corporations for trade and industry, as well as to those embarking on business of a public utility character.”); Henry Hansmann & Mariana Pargendler, *The Evolution of Shareholder Voting Rights: Separation of Ownership and Consumption*, 123 YALE L.J. 948, 987 (2014) (“Nineteenth-century business corporations typically listed in their charters a relatively narrow and specific set of corporate purposes.”).

103. Ireland, *supra* note 97, at 271, 281.

nineteenth century,<sup>104</sup> special legislation raises hackles today because it offends the principle that like cases should be treated alike.<sup>105</sup> In a word, legislative oversight of corporations in the Early Republic, which depended on favoritism and access, was unfair.<sup>106</sup>

Finally, legislatures proved impotent in ensuring the enforcement of the rigid restrictions they imposed on corporations.<sup>107</sup> Legislatures could not effectively monitor and enforce charter restrictions on their own.<sup>108</sup> The executive branch of the Early Republic likewise lacked an adequate bureaucracy to enforce limitations on corporations.<sup>109</sup> Without standardized charter terms, prosecutors had to scrutinize individual charters to determine whether a given corporate act warranted a *quo warranto* suit.<sup>110</sup> Additionally, governors and state attorneys general frequently declined to enforce charter restrictions,<sup>111</sup> both in protest of legislative favoritism<sup>112</sup> and in fear of powerful investors.<sup>113</sup> As a result, many of the peculiar terms that legislatures imposed on corporations had limited practical effect.<sup>114</sup>

By 1820, legislatures' dominant role in corporate oversight amounted to a failed experiment, beset by constitutional concerns and legislative dysfunction. Yet legislatures' loss proved the judiciary's gain. Discontent with legislatures prompted judicial seizures of authority over corporate affairs, in the name of protecting investors from arbitrary treatment during the mid-nineteenth century.

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104. *See id.* at 271 (“Until the mid- to late-nineteenth century, state legislatures mostly enacted local, private, and special legislation, and very little general legislation.”).

105. Anthony Schutz, *State Constitutional Restrictions on Special Legislation as Structural Restraints*, 40 J. LEGIS. 39, 60 (2014) (“The next bill that came before the legislature on the same subject with the same facts had no assurance of similar treatment.”); Evan C. Zoldan, *Legislative Design and the Controllable Costs of Special Legislation*, 78 MD. L. REV. 415, 437 (2019). In Hayekian terms, the individualized treatment of special legislation is anathema to the rule of law. *See* F.A. HAYEK, *THE ROAD TO SERFDOM* 75–85 (2001).

106. *Cf.* LON L. FULLER, *THE MORALITY OF LAW* 47 (1964) (arguing special legislation is unfair).

107. *See* Hilt, *supra* note 88, at 52.

108. *See* HURST, *supra* note 26, at 40.

109. *See id.* (“[T]he regulatory goals set by legislatures could be achieved only through steady, strong, capable executive or administrative effort. In the nineteenth-century situation it was almost inevitable that we would not provide the necessary executive or administrative apparatus. From the American Revolution we inherited a stubborn distrust of committing power to the executive.”).

110. *See* LOUIS HARTZ, *ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776-1860*, at 262 (1948) (describing the “welter of variety and inconsistency” among special charters “which not even the finest administrative system could have enforced”); Hilt, *supra* note 88, at 52.

111. Ireland, *supra* note 97, at 293.

112. Maier, *supra* note 77, at 74.

113. *See* Hilt, *supra* note 88, at 53.

114. *See* HURST, *supra* note 26, at 40; Maier, *supra* note 77, at 80.

*C. Judicial Usurpations in the Mid-Nineteenth Century*

As the Early Republic gave way to the mid-nineteenth century, courts responded to the deficiencies of legislative dominance in corporate oversight by constitutionalizing investors' rights under corporate charters.<sup>115</sup> Through a series of increasingly strained applications of the Contracts Clause, the judiciary wrested control from the legislature.<sup>116</sup> Yet courts quickly proved just as incapable of unilateral corporate oversight as legislatures had. Constrained by the ex-post nature of adjudication<sup>117</sup> and limited in their fact-finding abilities,<sup>118</sup> judges ossified restrictions on corporations and frustrated popular attempts at innovation.<sup>119</sup>

The judiciary took its first steps towards arrogation under the benign guise of checking legislative infringement on the judicial function.<sup>120</sup> Legislatures of the early nineteenth century regularly intervened in the operations of existing corporations by amending their corporate charters.<sup>121</sup> But jurists and incorporators protested that charter amendments violated the separation of powers by depriving individuals of their property without judicial process.<sup>122</sup>

In 1819, the Supreme Court entered the fray, imposing the first major check on legislatures' authority over corporations in the landmark decision of *Trustees of Dartmouth College v. Woodward*.<sup>123</sup> New Hampshire's legislature had passed a special statute altering the terms of Dartmouth College's charter.<sup>124</sup> These amendments provided that the state of New Hampshire would appoint a majority of Dartmouth's board, effectively transforming the college into a public institution.<sup>125</sup> On Dartmouth's

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115. See *infra* notes 129–131 and accompanying text.

116. See *infra* notes 148–152 and accompanying text.

117. See Linda Meyer, "Nothing We Say Matters": Teague and New Rules, 61 U. CHI. L. REV. 423, 423 (1990) ("Ordinarily, a court reaches the merits of the question brought before it and applies its resolution to the parties, even though their dispute arose in the past. In other words, judicial decisions are usually retroactive").

118. See Note, *Judicial Review of Congressional Factfinding*, 122 HARV. L. REV. 767, 768 (2008) ("From the institutional competence perspective, the legislature's superior capacity to collect evidence—stemming from its committee system, larger staffs, and research arms—gives it a comparative advantage over the judiciary in the generalized factfinding that informs legislation.").

119. See *infra* note 140 and accompanying text.

120. See Chapman & McConnell, *supra* note 66, at 1762.

121. See *supra* note 103 and accompanying text.

122. See Chapman & McConnell, *supra* note 66, at 1756 (citing *Trs. of Univ. of N.C. v. Foy*, 5 N.C. 58, 85 (1805)).

123. 17 U.S. 518 (1819).

124. *Id.* at 539.

125. *Id.* at 539–44 (setting forth the special statute); see Simon Rosenzweig, Comment, *Corporations: Quo Warranto*, 13 CORNELL L. REV. 92, 96 (1927).

behalf, Daniel Webster contended, “By these acts, the legislature assumes to exercise a judicial power[;] it declares a forfeiture, and resumes franchises, once granted, without trial or hearing.”<sup>126</sup>

While the Marshall Court proved receptive to Webster’s arguments,<sup>127</sup> the Justices’ arsenal for interfering in state affairs was conspicuously limited. The most natural provision to capture Webster’s separation of powers concerns, the Due Process Clause, did not apply against the states.<sup>128</sup> Instead, Chief Justice Marshall invoked the Contracts Clause,<sup>129</sup> reasoning that, because Dartmouth’s charter constituted a contract with the state,<sup>130</sup> New Hampshire’s attempt to amend the terms of Dartmouth’s charter amounted to unconstitutional impairment of a contract.<sup>131</sup> Yet Marshall also reinforced the state’s role in restricting the corporate form, writing that as “a mere creature of law” a corporation “possesses only those properties which the charter of its creation confers” on the entity.<sup>132</sup>

*Dartmouth College* marked a turning point in corporate law’s separation of powers. Interposing the Constitution between legislatures and investors, the Marshall Court not only tolled the death knell of direct legislative oversight of corporations, but also insisted on the judiciary’s right to dictate the contours of the corporate form.<sup>133</sup> Yet *Dartmouth College*’s quixotic vision of judges as the heroic protectors of investors’ rights belied the judiciary’s limited institutional capacity for corporate oversight, due to the retroactive nature of adjudication<sup>134</sup> and judges’ lack of business expertise.<sup>135</sup>

Indeed, *Dartmouth College* threatened to ossify American corporate law by preventing legislatures from lifting restrictions in previously

126. 17 U.S. at 579.

127. See Chapman & McConnell, *supra* note 66, at 1766.

128. See *id.*

129. U.S. CONST. art. I, § 10, cl. 1 (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts”).

130. 17 U.S. at 643–44 (Marshall, C.J.). Although Dartmouth received its charter from the Crown, Chief Justice Marshall recognized that New Hampshire’s legislature was the successor to the Crown for purposes of the contract. *Id.*; see Mark, *supra* note 65, at 409.

131. 17 U.S. at 655; Rosenzweig, *supra* note 125, at 96.

132. 17 U.S. at 636.

133. See Mark, *supra* note 65, at 425 (“[*Dartmouth College*] says that it is the Court that gets to define what corporations are . . .”).

134. See Note, *supra* note 118 and accompanying text.

135. See Frank H. Easterbrook, *The Constitution of Business*, 11 GEO. MASON U. L. REV. 53, 72 (1988) (remarking that judges’ lack of economic expertise is a perennial problem in commercial disputes).

granted charters.<sup>136</sup> Justice Story sought to avoid this problem in his concurrence, remarking that because corporate charters were contracts, legislatures could simply insert clauses in future charters reserving the right to amend their terms.<sup>137</sup> Over the following decades, reservation clauses proliferated in charters across the country.<sup>138</sup> Reservation clauses remain the law in forty-nine states today.<sup>139</sup> Despite these and other popular reforms meant to limit judicial intervention, courts continued to arrogate authority over corporate affairs in the decades after *Dartmouth College*.<sup>140</sup>

Jacksonian backlash to legislatures' cronyism spawned the development of general incorporation statutes, which allowed incorporation without a special charter.<sup>141</sup> While these statutes led to a dramatic increase in the number of corporations,<sup>142</sup> they did little to stem the tide of legislative rent-seeking, since legislatures continued to grant special charters with more favorable terms than were available by general incorporation.<sup>143</sup> Special charters thus remained valuable because general incorporation statutes imposed many of the charter restrictions common in the Early Republic.<sup>144</sup>

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136. See KLEIN & COFFEE, *supra* note 43, at 112 (“The [*Dartmouth College*] decision evoked much contemporary protest, because to many it seemed to imply that once a corporate charter was granted, the corporation was beyond legislative control.”).

137. See *Dartmouth Coll.*, 17 U.S. at 675 (Story, J., concurring).

138. See KLEIN & COFFEE, *supra* note 43, at 112; Pollman, *supra* note 76, at 648. Delaware was the first state to adopt a general reservation clause in 1831. See Hovenkamp, *supra* note 72, at 1617.

139. See Ian S. Speir, Constitutional and Statutory Reservation Clauses and Constitutional Requirements of General Laws with Respect to Corporations: The Fifty States and the District of Columbia (Apr. 2011) (unpublished manuscript), <https://ssrn.com/abstract=1820868>. The lone exception is Utah. See *id.* at 1.

140. See Nelson F. Taylor, *Evolution of Corporate Combination Law: Policy Issues and Constitutional Questions*, 76 N.C. L. REV. 687, 721–22 (1998) (describing legislative responses to *Dartmouth College* and its progeny).

141. See Hamill, *supra* note 71, at 101; Hovenkamp, *supra* note 72, at 1634.

142. See Hovenkamp, *supra* note 72, at 1635.

143. See Ireland, *supra* note 97, at 281 (“Although a number of states enacted general laws of incorporation by the mid-nineteenth century, often these laws were not mandatory, and the influential usually avoided them and continued to secure special acts of incorporation that granted them powers and privileges not available through the general incorporation statute.”); Maier, *supra* note 77, at 76; Joel Seligman, *A Brief History of Delaware’s General Corporation Law of 1899*, 1 DEL. J. CORP. L. 249, 249–50 (1976).

144. See Butler, *supra* note 98, at 143; Pollman, *supra* note 76, at 649; Seligman, *supra* note 143, at 258; Vasudev, *supra* note 50, at 256; Theodore H. Davis, Jr., Note, *Corporate Privileges for the Public Benefit: The Progressive Federal Incorporation Movement and the Modern Regulatory State*, 77 VA. L. REV. 603, 615 (1991) (“[T]he new laws retained a number of provisions from the previous three decades. As a general rule, the new corporate laws stipulated matters of corporate purpose, powers of directors and officers, amendment of articles, share structure, capital requirements and sources of dividends.”).

As popular reforms sought to incrementally liberalize corporate law,<sup>145</sup> *Dartmouth College*'s threat of ossification began to cast a longer shadow. States experimented with reservation clauses to preserve the legislature's ability to lift restrictions on existing corporations or impose new oversight mechanisms.<sup>146</sup> New Jersey stipulated in its general incorporation statute that all subsequent charters would include an implicit reservation clause;<sup>147</sup> however, in an extension of its Contracts Clause jurisprudence, the Supreme Court struck down this statutory provision, concluding the session of the legislature that passed the general statute could not bind future sessions that wished to contract for irrevocable charters.<sup>148</sup> Thus, to avoid ossification, states had to amend their constitutions to include reservation clauses.<sup>149</sup> New Jersey and many other states did so.<sup>150</sup>

Even after states amended their constitutions to accommodate the judiciary's skepticism towards reservation clauses, courts continued to frustrate legislative innovation. Applying *Dartmouth College*, courts held that legislatures could not lift restrictions in corporate charters if doing so enabled charter amendments that altered private relations among shareholders.<sup>151</sup> Accordingly, when corporations availed themselves of newly permissible charter provisions, any shareholder could enjoy the change by filing suit.<sup>152</sup>

State courts ultimately loosened this constitutional stricture in a manner that assisted Delaware's ascendancy in the market for corporate charters three decades later. New Jersey treated newly permissible charter

145. See Charles Y. Yablon, *The Historical Race: Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880-1910*, 32 J. CORP. L. 323, 332-33 n.36 (2007) (describing the "incremental expansion of permissible corporate size, duration, privileges, and limitations on liability" during the mid-nineteenth century).

146. See Horace Stern, *The Limitations of the Power of a State Under a Reserved Right to Amend or Repeal Charters of Incorporation*, 53 U. PA. L. REV. 145, 158 (1905).

147. See *Morris & E.R. Co. v. Comm'r of R.R. Tax'n*, 38 N.J.L. 472, 480 (N.J. 1875).

148. *New Jersey v. Yard*, 95 U.S. 104, 111 (1877).

149. See *id.*

150. See, e.g., *Hancock v. Singer Mfg. Co.*, 41 A. 846, 848 (N.J. 1898) (discussing this constitutional amendment).

151. See Taylor, *supra* note 140, at 722.

152. See *Zabriskie v. Hackensack & N.Y.R. Co.*, 18 N.J. Eq. 178, 183-84 (N.J. Ch. 1867) ("[O]ne partner or corporator, however small his interest, can prevent it . . . This rule is founded on principle, the great principle of protecting every man and his property by contracts entered into, a guiding principle in all right legislation, and incorporated into the constitution of the United States, and of almost every state in the Union. And the rule is not changed because the new business or enterprise proposed is allowed by law, or has been made lawful since the association was formed."); Taylor, *supra* note 140, at 730-32.

amendments as an exercise of eminent domain,<sup>153</sup> such that dissenting shareholders enjoyed a constitutional right to appraisal and just compensation,<sup>154</sup> rather than an injunction. By contrast, Delaware courts interpreted the state constitution's reservation clause broadly to permit corporations to opt into newly permissible charter provisions without issue.<sup>155</sup> Delaware was therefore able to update its corporate code without requiring corporations that availed themselves of newly permissible charter provisions to incur the higher transaction costs mandated in states like New Jersey.<sup>156</sup>

The judiciary likewise arrogated a dominant role in interpreting and implementing charter restrictions, especially those specifying corporate purpose,<sup>157</sup> through a strict *ultra vires* doctrine.<sup>158</sup> This doctrine enabled shareholders to void or enjoin<sup>159</sup> acts that were beyond the enumerated powers of a corporation's charter.<sup>160</sup> Although the doctrine's rationale was investor protection,<sup>161</sup> this rule reduced firm value by enabling strategic invocation of *ultra vires* to avoid unfavorable contracts, thereby introducing hold-up costs between corporations and their suppliers.<sup>162</sup>

Through quixotic interventions designed to protect investors, judges deployed the Constitution to usurp power over corporate enterprise during

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153. See Taylor, *supra* note 140, at 734.

154. See Black v. Delaware & R. Canal Co., 24 N.J. Eq. 455, 473 (N.J. 1873); Taylor, *supra* note 140, at 732.

155. See Davis v. Louisville Gas & Electric Co., 142 A. 654 (Del. Ch. 1928); Taylor, *supra* note 140, at 922 n.970.

156. For an analysis of corporate codes as transaction cost reduction devices, see Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1596 (2005).

157. See Holdsworth, *supra* note 28, at 398 (describing courts' development of "a large body of complex rules" to implement charter restrictions in the mid-nineteenth century).

158. See DAVID SKEEL, *ICARUS IN THE BOARDROOM: THE FUNDAMENTAL FLAWS IN CORPORATE AMERICA AND WHERE THEY CAME FROM* 52 (2005) ("In addition to the capital requirements imposed by many states, courts enforced a long-standing judicial rule known as the *ultra vires* doctrine. Under the *ultra vires* doctrine, corporations were prohibited from conducting any business that was not specifically authorized in their corporate charter.").

159. See Michael A. Schaeftler, *Ultra Vires—Ultra Useless: The Myth of State Interest in Ultra Vires Acts of Business Corporations*, 9 J. CORP. L. 81, 81–82 (1983).

160. See Hansmann & Pargendler, *supra* note 102, at 987; Leo E. Strine, Jr. & Nicholas Walter, *Originalist or Original: The Difficulties of Reconciling Citizens United with Corporate Law History*, 91 NOTRE DAME L. REV. 877, 899 (2016).

161. See SKEEL, *supra* note 158, at 52; Charles E. Carpenter, *Should the Doctrine of Ultra Vires Be Discarded?*, 33 YALE L.J. 49, 65 (1923); Hansmann & Pargendler, *supra* note 102, at 988; Saul Levmore, *Irreversibility and the Law: The Size of Firms and Other Organizations*, 18 J. CORP. L. 333, 339 (1993); Schaeftler, *supra* note 159, at 81.

162. See Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (with Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279, 1310–11 (2001).

the mid-nineteenth century. But these increasingly complex and implausible extensions of the Contracts Clause stymied innovation and ossified the onerous restrictions of the Early Republic. Judicial arrogation, much like legislatures' prior overbearance, achieved little more than dysfunction and discontent.

#### *D. Executive Domination at the Turn of the Century*

By the last three decades of the nineteenth century, the failure of the legislative and judicial branches to effectively oversee corporations created a power vacuum that the executive branch eagerly filled.<sup>163</sup> Reviving the blunt instrument of *quo warranto*, attorneys general around the nation wielded unchecked power to dissolve the era's largest corporations,<sup>164</sup> creating the uncertainty and instability that ultimately catalyzed the advent of modern corporate law.<sup>165</sup>

The United States underwent an unprecedented economic consolidation following the Civil War.<sup>166</sup> Firms' vertical and horizontal expansion<sup>167</sup> reduced prices<sup>168</sup> and spurred growth.<sup>169</sup> But legislatures—paralyzed by rent-seeking and judicial ossification<sup>170</sup>—proved unable to keep pace with this spurt of commercial activity. Still operating under restrictions dating back to the Early Republic, the vast enterprises of the Gilded Age were in near-constant violation of their charters.<sup>171</sup> Corporate purpose provisions proscribed vertical expansion into new lines of business.<sup>172</sup> Prohibitions on corporations holding stock in other firms outlawed parent-subsidiary structures.<sup>173</sup> To circumvent this restriction,

163. See *infra* notes 177–181 and accompanying text.

164. See *infra* notes 180–182 and accompanying text.

165. See *infra* notes 193–197 and accompanying text.

166. See Daniel A. Crane, *Antitrust Antifederalism*, 96 CALIF. L. REV. 1, 13–14 (2008) (discussing “postbellum economic expansion”); Christopher Grandy, *New Jersey Corporate Chartermongering, 1875–1929*, 49 J. ECON. HIST. 677, 678 (1989); Naomi R. Lamoreaux, *The Problem of Bigness: From Standard Oil to Google*, 33 J. ECON. PERSP. 94, 96 (2019).

167. See, e.g., Elizabeth Granitz & Benjamin Klein, *Monopolization by “Raising Rivals’ Costs”*: *The Standard Oil Case*, 39 J.L. & ECON. 1, 45 (1996) (discussing Standard Oil’s vertical and horizontal expansion).

168. See Lamoreaux, *supra* note 166, at 96.

169. See Alexander J. Field, *U.S. Economic Growth in the Gilded Age*, 31 J. MACROECON. 173, 177 (2009).

170. See *supra* Sections I.B–I.C.

171. See HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW, 1836-1937*, at 63 (1991).

172. See Herbert Hovenkamp, *Antitrust Policy, Federalism, and the Theory of the Firm: An Historical Perspective*, 59 ANTITRUST L.J. 75, 81 (1990).

173. See Paul Nolette, *Litigating the “Public Interest” in the Gilded Age: Common Law Business Regulation by Nineteenth-Century State Attorneys General*, 44 POLITY 373, 387 (2012).

the nation's largest businesses formed trusts,<sup>174</sup> to which the common owners of multiple corporations would assign their shares so the trustee could coordinate the corporations' activities.<sup>175</sup> The trusts of the Gilded Age used their newfound ability to act in concert to engage in price fixing and other anti-competitive activities later forbidden under antitrust laws.<sup>176</sup>

Large corporations' runaway violations of their obsolete charter provisions devolved unfettered control over these entities from the legislature and judiciary to the executive branch.<sup>177</sup> Amidst a populist backlash against the new industrial combinations,<sup>178</sup> elected state attorneys general seized the opportunity<sup>179</sup> and fulfilled their constituents' demands by reviving the writ of *quo warranto*.<sup>180</sup> Insisting the trusts' constituent corporations had abused their charters, attorneys general across the country filed *quo warranto* suits against leading firms in a variety of industries.<sup>181</sup>

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174. See F.J. Stimson, *Trusts*, 1 HARV. L. REV. 132, 134–136 (1887).

175. See Hovenkamp, *supra* note 172; Stimson, *supra* note 174, at 140; Benjamin Woodring, *Quo Warranto: The Structure and Strength of a Common Law Antitrust Remedy*, 96 U. DET. MERCY L. REV. 187, 198 (2019).

176. See Lamoreaux, *supra* note 166; James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880–1918*, 135 U. PA. L. REV. 495, 510 (1987) (discussing “corporate concentration, collusion, and predation” in the Gilded Age).

177. See Nolette, *supra* note 173.

178. See Camden Hutchison, *Corporate Law Federalism in Historical Context: Comparing Canada and the United States*, 64 MCGILL L.J. 109, 122 (2018); Charles W. McCurdy, *The Knight Sugar Decision of 1895 and the Modernization of American Corporation Law, 1869–1903*, 53 BUS. HIST. REV. 304, 321 (1979) (“The emergence of new, threatening aggregations of private power such as the oil, sugar, and whiskey trusts, to mention only three, unleashed a thunderous outcry in the press . . . .”); Nolette, *supra* note 173, at 396.

179. See Nolette, *supra* note 173, at 394 (“[N]early all SAGs (and indeed all SAGs bringing the suits against the trusts . . .) were elected independently from the governors and state legislatures . . . .”); Werner Troesken, *Antitrust Regulation Before the Sherman Act: The Break-up of the Chicago Gas Trust Company*, 32 EXPLS. ECON. HIST. 109, 119 (1995).

180. See Wayne D. Collins, *Trusts and the Origins of Antitrust Legislation*, 81 FORDHAM L. REV. 2279, 2322 (2013) (“Several states responded to public demands for actions against the trusts by initiating quo warranto proceedings to revoke the charters of domestic corporations participating as trust members.”); Crane, *supra* note 166, at 14; McCurdy, *supra* note 178; John C. Brinkerhoff, Jr., *Ropes of Sand: State Antitrust Statutes Bound by Their Original Scope*, 34 YALE J. ON REG. 353, 371 (2017).

181. *E.g.*, *State ex rel. Crow v. Firemen’s Fund Ins. Co.*, 52 S.W. 595 (Mo. 1899); *State ex rel. Att’y Gen. v. Standard Oil Co.*, 30 N.E. 279 (Ohio 1892); *People v. N. River Sugar Ref. Co.*, 24 N.E. 834 (N.Y. 1890); *State v. Neb. Distilling Co.*, 46 N.W. 155, 161 (Neb. 1890); *People ex rel. Peabody v. Chic. Gas Tr. Co.*, 22 N.E. 798, 806 (Ill. 1889); see Hutchison, *supra* note 178, at 124; Troesken, *supra* note 179, at 110; Laura Phillips Sawyer, *US Antitrust Law and Policy in Historical Perspective* (Harv. Bus. Sch., Working Paper No. 19-110, 2019), <https://hbswk.hbs.edu/item/us-antitrust-law-and-policy-in-historical-perspective>.

One of the most prominent *quo warranto* suits of the Gilded Age was the New York Attorney General's enforcement action against a constituent corporation of the Sugar Trust in 1890.<sup>182</sup> With seventy percent of the nation's market share, the Sugar Trust was a frequent target of the press.<sup>183</sup> Yet, as was typical in the *quo warranto* proceedings of the era,<sup>184</sup> the prosecution's theory rested solely on the Trust's violation of corporate law restrictions, rather than any competitive analysis.<sup>185</sup> New York's Court of Appeals embraced the Attorney General's facile approach, reasoning that by delegating decision-making authority to the Trust, the defendant corporation had unlawfully "accept[ed] from the State the gift of corporate life only to disregard the conditions upon which it was given."<sup>186</sup>

In the Sugar Trust case<sup>187</sup> and every other major *quo warranto* suit,<sup>188</sup> the judiciary acquiesced in executive domination by granting the harsh remedy sought—dissolution of the defendant corporation. Upon "corporate death,"<sup>189</sup> the entity's assets went into receivership and the state wound down the firm's affairs.<sup>190</sup> Judicial dissolutions left closed factories and terminated employees in their wake, as investors balked at the political

182. See Hovenkamp, *supra* note 172, at 80; Daniel E. Rauch, *Sherman's Missing "Supplement": Prosecutorial Capacity, Agency Incentives, and the False Dawn of Antitrust Federalism*, 68 CLEV. ST. L. REV. 172, 178 (2020); Woodring, *supra* note 175.

183. See Woodring, *supra* note 175, at 199; *see also, e.g., The Sugar Trust*, N.Y. TIMES, Jan. 15, 1892, at 4, <https://timesmachine.nytimes.com/timesmachine/1892/01/15/104090654.html?pageNumber=4> (criticizing the Sugar Trust's acquisition of independent refineries).

184. See Woodring, *supra* note 175 at 198 ("[R]ather than fret over the precise nature of a trust and its ultimate legality, the state could more simply argue that a given domestic corporation did not have the authority to give over control of its franchise . . . without delving into the hornet's nest of the evils of monopoly.").

185. See Hovenkamp, *supra* note 172, at 80; May, *supra* note 176, at 512; Sawyer, *supra* note 181, at 5.

186. *N. River Sugar Ref. Co.*, 24 N.E. at 840; *see also id.* at 841 ("Having reached that result, it becomes needless to advance into the wider discussion over monopolies and competition and restraint of trade and the problems of political economy.").

187. *See id.* ("[I]t appears to us to have been established, that the defendant corporation has violated its charter, and failed in the performance of its corporate duties, and that in respects so material and important as to justify a judgment of dissolution.").

188. See Nolette, *supra* note 173, at 388 ("Despite the severe nature of this remedy, SAGs successfully initiated the dissolution of the targeted corporation in nearly all of their early *quo warranto* litigation."); *see also, e.g.,* Karen Clay & Werner Troesken, *Strategic Behavior in Whiskey Distilling, 1887–1895*, 62 J. ECON. HIST. 999, 1014 (2002) (Whisky Trust *quo warranto* in Illinois); Troesken, *supra* note 179, at 119 (Chicago Gas Trust *quo warranto* in Illinois); Woodring, *supra* note 175, at 203 (Whisky Trust *quo warranto* in Nebraska).

189. *N. River Sugar Ref. Co.*, 24 N.E. at 834.

190. *See, e.g.,* State v. Neb. Distilling Co., 46 N.W. 155, 161 (Neb. 1890); Woodring, *supra* note 175, at 188 ("Quo warranto, as applied to corporate franchises, threatened to strip a company of its charter or certificate, and to place its assets with a receiver, winding up its business.").

risk of resuming former firms' operations.<sup>191</sup> Capital markets reeled at the insecurity of corporate assets, with event studies of the most significant *quo warranto* decisions of the era demonstrating a twenty-nine to thirty-seven percent cumulative decline in the market value of the nation's largest firms, regardless of their involvement in any litigation.<sup>192</sup>

Unconstrained by the legislature and judiciary, the executive branch's opportunism ruptured the delicate trust between states and corporations.<sup>193</sup> As relational contracts between the state and corporation,<sup>194</sup> charters open investors up to the threat of government exploitation.<sup>195</sup> To encourage incorporation, states must credibly commit themselves to long-term cooperation rather than short-term defection.<sup>196</sup> Any semblance of such commitment dissipated in the late nineteenth century as the unchecked executive, through entrepreneurial state attorneys general, dissolved unpopular corporations for political gain.<sup>197</sup>

By the late nineteenth century, judicial ossification and legislative inaction resulted in an executive branch with unfettered power over corporations.<sup>198</sup> Ambitious state attorneys general wielded that power opportunistically, appealing to populist constituencies by dissolving large corporations for their non-compliance with obsolete restrictions.<sup>199</sup> An ensuing breakdown of trust between states and investors wreaked havoc

191. See McCurdy, *supra* note 178, at 339 (“[A]ttorneys general still could not be certain that new investors would be willing to keep local factories in operation as separate and independent concerns. The consequences of successful *quo warranto* actions were therefore disastrous . . . . Employees might be thrown out of work, local entrepreneurs might leave the industry, and local governments might lose a significant source of tax revenues.”).

192. Werner Troesken, *Did the Trusts Want a Federal Antitrust Law? An Event Study of State Antitrust Enforcement and Passage of the Sherman Act*, in PUBLIC CHOICE INTERPRETATIONS OF AMERICAN ECONOMIC HISTORY 77, 97 (J.C. Heckelman ed., 2000).

193. See Christopher Grandy, *Can Government Be Trusted to Keep Its Part of a Social Contract?: New Jersey and the Railroads, 1825–1888*, 5 J.L. ECON. & ORG. 249, 266 (1989).

194. See Roberta Romano, *The States as a Laboratory: Legal Innovation and State Competition for Corporate Charters*, 23 YALE J. ON REG. 209, 212 (2006) (“[A] corporate charter is a relational contract—it binds the state and firm in a multi-period relationship in which performance under the contract is not simultaneous . . . .”).

195. See Grandy, *supra* note 193, at 250 (“When the state enters a contract, public choice issues arise that frustrate incentive compatibility. Economic and political changes may lead to state opportunism, while the powers of government as enforcer of contracts place the private party at a disadvantage.”).

196. See Romano, *supra* note 194, at 235; Roberta Romano, *The State Competition Debate in Corporate Law*, 8 CARDOZO L. REV. 709, 720–21 (1987).

197. See Nolette, *supra* note 173, at 375 (discussing the “entrepreneurial” character of state attorneys general in the late nineteenth century); see also Collins, *supra* note 180, at 2327 (observing *quo warranto* actions typically followed corporations’ closures of plants and other unpopular actions).

198. See *supra* notes 177–181 and accompanying text.

199. See *supra* notes 187–188 and accompanying text.

on the United States' capital markets and jeopardized corporations' very existence.<sup>200</sup> The disequilibrium evident in the shifting centers of gravity among the branches of government since the Early Republic had culminated in crisis under the unchecked power of the executive. Yet out of this instability, modern corporate law was born.

### III. MODERN CORPORATE LAW'S EQUILIBRIUM

Successive domineering by each of the branches produced a costly disequilibrium in nineteenth-century corporate law—one that ended in an unfettered executive dissolving of some of the largest corporations in the United States.<sup>201</sup> But this unstable relationship between government and enterprise catalyzed a new approach to corporate law's separation of powers at the dawn of the twentieth century. Modern corporate law guarded against inter-branch arrogation and ushered in an era of stability in American business.

This Part examines the arrival and structure of modern corporate law's equilibrium by exploring its two most important checks on the previously unbridled power of the executive branch: first, enabling corporate codes divested the executive of its ability to revoke charters of businesses too large to comply with the strictures of pre-modern corporate law;<sup>202</sup> and second, the judiciary transformed from a barrier to legislative change into a protector of the new codes' commitment to flexibility and guardian against executive overbearance.<sup>203</sup>

#### *A. Legislative Checks: Modern Corporate Codes*

The *quo warranto* actions of the late nineteenth century produced an uproar among investors, who began to demand less restrictive corporate laws that would accommodate consolidated enterprises and shield firms from arbitrary treatment.<sup>204</sup> New Jersey heeded the call, convening a commission of business practitioners led by the corporate attorney James Dill to draft a new corporate code responsive to the dynamism of

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200. See *supra* notes 192–197 and accompanying text.

201. See *supra* Section II.D.

202. See *infra* Section III.A.

203. See *infra* Section III.B.

204. See HOVENKAMP, *supra* note 171, at 63–64; Hutchison, *supra* note 178, at 124; Yablon, *supra* note 145, at 336 (“The demand for liberal corporate charters came first, and most powerfully, from the industrial trusts, whose quasi-legal form of organization was being successfully attacked by state attorney generals in *quo warranto* proceedings.”).

contemporary commerce.<sup>205</sup> The enactment of Dill's statute in 1896 marked a revolution in corporate law, as New Jersey became the first state to adopt a modern corporate code.<sup>206</sup>

New Jersey's 1896 corporate code jettisoned the onerous restrictions that had constrained the corporate form since the Early Republic. The code allowed the state's corporations to incorporate for any lawful purpose,<sup>207</sup> own stock in other companies,<sup>208</sup> and operate and hold annual meetings outside the state.<sup>209</sup> Dill's code eliminated limits on duration,<sup>210</sup> replacing a prior fifty-year limit on corporate life,<sup>211</sup> and capitalization.<sup>212</sup> Finally, the statute was enabling in structure, allowing incorporators to define the corporation's powers and create internal governance structures, rather than reserving that authority to the state.<sup>213</sup>

Eager to avoid stringent restrictions enforced by the threat of dissolution, firms reincorporated in New Jersey en masse.<sup>214</sup> Critics denounced New Jersey as a "Traitor State"<sup>215</sup> and "Mother of Trusts,"<sup>216</sup> that coddled anticompetitive businesses.<sup>217</sup> Indeed, many of the corporations recently dissolved in *quo warranto* actions, including those

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205. See Grandy, *supra* note 166, at 680–681; Harold W. Stoke, *Economic Influences upon the Corporation Laws of New Jersey*, 38 J. POL. ECON. 551, 572 (1930).

206. See Cary, *supra* note 3, at 664; Grandy, *supra* note 166, at 680; Hamill, *supra* note 71, at 116; Yablon, *supra* note 145, at 339.

207. See HOVENKAMP, *supra* note 171, at 64; SKEEL, *supra* note 158, at 63; Stoke, *supra* note 205, at 572; Eldar & Rauterberg, *supra* note 92, at 24.

208. See SKEEL, *supra* note 158, at 63; Hamill, *supra* note 71, at 116; Hovenkamp, *supra* note 172, at 84; Grandy, *supra* note 166, at 681; Yablon, *supra* note 145, at 336.

209. See SKEEL, *supra* note 158, at 63.

210. See Collins, *supra* note 180, at 2329.

211. See Seligman, *supra* note 143, at 265.

212. See Collins, *supra* note 180, at 2329.

213. See Grandy, *supra* note 166, at 681, 685; Edward Q. Keasbey, *New Jersey and the Great Corporations*, 13 HARV. L. REV. 198, 210 (1899) (discussing the New Jersey corporate code's commitment to the freedom of contract); Eldar & Rauterberg, *supra* note 92, at 24 ("New Jersey adopted an enabling corporation law in 1896 that granted businesses wide freedom of design, including allowing corporations to be formed for any purpose and providing managers and shareholders great freedom in structuring their own transactions.").

214. See Hutchison, *supra* note 178, at 127 ("Between 1896 and 1901, New Jersey incorporations increased nearly 200% . . . . By 1904, all seven of financial analyst John Moody's 'greater industrial trusts'—the largest corporations in the country—were incorporated in New Jersey, as were 162 of 311 'lesser' (but still significant) trusts."); Grandy, *supra* note 166.

215. Lincoln Steffans, *New Jersey: A Traitor State*, 24 MCCLURE'S MAG., Apr. 1905 at 649, 649.

216. Seligman, *supra* note 143, at 270.

217. See SKEEL, *supra* note 158, at 63; Keasbey, *supra* note 213; Yablon, *supra* note 145, at 352-53; Eldar & Rauterberg, *supra* note 92, at 24.

of the Sugar Trust,<sup>218</sup> reemerged as New Jersey corporations.<sup>219</sup> But New Jersey reaped the rewards of increased franchise fees,<sup>220</sup> which produced so much revenue that New Jersey eliminated its property tax in 1902.<sup>221</sup>

Although several states emulated New Jersey, none matched its success in attracting charters in the first decade of the twentieth century.<sup>222</sup> Beyond New Jersey's first-mover advantage, the state maintained a sterling reputation among corporate lawyers, particularly for its expert and business-friendly judiciary.<sup>223</sup> Nevertheless, this nascent inter-state competition for charters led to the proliferation of modern corporate codes throughout the country.<sup>224</sup>

Modern corporate codes provided a crucial check on executive power by depriving prosecutors of their ability to bring *quo warranto* actions for violations of obsolete and invasive restrictions on the corporate form.<sup>225</sup> Yet the prospect of increased franchise fees and lower taxes was so politically attractive that New Jersey's Governor Leon Abbett supported the state's remarkable restructuring of corporate law's separation of powers.<sup>226</sup> Inspired by calls for reform after the dissolutions of the late nineteenth century, New Jersey's modern corporate code established a legislative limit on executive authority over corporations, fostering a balance between the two branches that had eluded the United States since the Founding.

218. See Troesken, *supra* note 192, at 85.

219. See Rauch, *supra* note 182.

220. See Collins, *supra* note 180, at 2331 fig.3 (documenting New Jersey's growth in tax revenue from franchise fees); Hutchison, *supra* note 178, at 127 (noting franchise fees provided "more than 60% of the state's total tax revenue"); Davis, *supra* note 144, at 618.

221. See Grandy, *supra* note 166, at 683 ("By 1902 New Jersey had eliminated its bonded debt and had abolished its state property tax.").

222. See SKEEL, *supra* note 158, at 64; Hutchison, *supra* note 178, at 128 ("A number of states, including Delaware, Maine, South Dakota, and West Virginia, attempted to compete with New Jersey by passing similar corporation acts and/or charging lower corporate franchise taxes."); McCurdy, *supra* note 178, at 340 ("One state after another, anxious for some of New Jersey's lucrative franchise-tax income, decided to switch rather than fight.").

223. See Hutchison, *supra* note 178, at 128; Keasbey, *supra* note 213, at 211-12; Eldar & Rauterberg, *supra* note 92, at 26.

224. See Seligman, *supra* note 143, at 269 ("By 1912, New Jersey had reshaped the corporate law of virtually every state in its own image: Forty-two states, by then, permitted the organization of corporations for 'any lawful purpose.' Forty-three states had abolished capital stock limitations. Twenty-four states issued perpetual charters and in most of the rest, charter renewal had become pro forma.").

225. Cf. SKEEL, *supra* note 158, at 63 ("New Jersey permitted corporations to define their business broadly, which diminished the significance of the ultra vires doctrine (once you're permitted to define your corporation as 'doing any lawful business,' nothing the corporation might do will be out of bounds).").

226. See Grandy, *supra* note 166, at 681; Stoke, *supra* note 205, at 571.

But New Jersey's commitment to restraining the executive ultimately proved short-lived. By 1913, Governor Woodrow Wilson's successful presidential campaign made him a progressive icon in his home state.<sup>227</sup> Wilson, like the entrepreneurial state attorneys general before him, understood that executive action against unpopular corporations would galvanize the electorate.<sup>228</sup> Thus, to bolster his party's popularity in New Jersey, one of Wilson's final acts as governor was to push a series of corporate law reforms through the legislature.<sup>229</sup> Known as the Seven Sisters,<sup>230</sup> these reforms threatened a return to the executive domination of the late nineteenth century by limiting corporations' ability to hold stock in other firms<sup>231</sup> and punishing violations with charter revocation.<sup>232</sup> The specter of an unchecked executive, capable of dissolving consolidated enterprises for political gain, eviscerated the credibility of New Jersey's commitment to long-term cooperation.<sup>233</sup>

Delaware, boasting a uniquely stable separation of powers in corporate affairs, overtook New Jersey in the decade following the Seven Sisters' enactment and became the dominant jurisdiction in corporate charters.<sup>234</sup> Prior to 1899, Delaware had one of the most restrictive corporate law regimes in the United States, with severe limitations on duration, capital, and purpose.<sup>235</sup> Delaware began to liberalize its approach to corporations in 1897, when it amended its constitution to prevent legislative domineering by prohibiting incorporation by special charter and requiring super-majorities to pass any corporate statute.<sup>236</sup> Delaware then checked the power of its executive branch by adopting a modern corporate code in

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227. See SKEEL, *supra* note 158, at 65.

228. See Grandy, *supra* note 166, at 687, 689; Eldar & Rauterberg, *supra* note 92, at 25.

229. See Grandy, *supra* note 166, at 689.

230. See Cary, *supra* note 3, at 664; Seligman, *supra* note 143, at 270.

231. See Grandy, *supra* note 166, at 689; Stoke, *supra* note 205, at 578.

232. See Joseph F. Mahoney, *Backsliding Convert: Woodrow Wilson and the "Seven Sisters,"* 18 AM. Q. 71, 73 (1966) ("The first of the Seven Sisters . . . provided for the punishment of the corporation by loss of its charter and fine, and of corporation officers by fine and/or imprisonment.").

233. See Hutchison, *supra* note 178, at 128; Grandy, *supra* note 166, at 689 ("New Jersey had reneged on the implicit contract with the corporations."); Seligman, *supra* note 143, at 270.

234. See SKEEL, *supra* note 158, at 65; Cary, *supra* note 3, at 663–64; Pollman, *supra* note 76, at 650; Christopher J. Grandy, *The Economics of Multiple Governments: New Jersey Corporate Chartermongering, 1875–1929*, at 265 (May 15, 1987) (Ph.D. dissertation, University of California at Berkeley) (on file with the Yale Law School library).

235. See Yablon, *supra* note 145, at 359 (describing Delaware's "limitations on the duration, amount of capital, and purposes for which a corporation could be formed.>").

236. See Eldar & Rauterberg, *supra* note 92, at 27.

1899 that mimicked New Jersey's<sup>237</sup> so closely that Delaware courts treated New Jersey precedents as binding when interpreting the statute.<sup>238</sup>

Additionally, Delaware's response to judicial interventions in the mid-nineteenth century allowed Delaware to update its corporate code without triggering appraisal rights for dissenting shareholders, as in New Jersey.<sup>239</sup> These reduced transaction costs provided a long-term advantage, as Delaware updated its corporate code hundreds of times in the following years to keep pace with the evolving needs of business.<sup>240</sup> Indeed, Delaware's frequent and often unanimous updates to its corporate code, based on the advice of practitioners,<sup>241</sup> remain a key contributor to Delaware's success today.

By 1920, Delaware was the unquestioned epicenter of American corporate law.<sup>242</sup> The state's division of powers among the legislative and executive branches succeeded where New Jersey had failed, replacing the uncertainty of the late nineteenth century with a stable equilibrium.

### *B. Judicial Checks: Defusing the Dissolution Power*

Delaware's judiciary similarly established itself as a check on political opportunism in corporate affairs. Scholars have repeatedly emphasized the contribution of Delaware's expert<sup>243</sup> and non-partisan judiciary<sup>244</sup> to the state's dominance in corporate charters.<sup>245</sup> Yet commentators have thus far

237. See Cary, *supra* note 3, at 664; Yablon, *supra* note 145, at 359–60; Eldar & Rauterberg, *supra* note 92, at 27.

238. *Wilmington City Ry. Co. v. Peoples Ry. Co.*, 47 A. 245, 253 (Del. Ch. 1900); see Butler, *supra* note 98, at 162 (“[T]he court reasoned that the legislature, in adopting the language of the New Jersey statute, had intended that the courts of Delaware adopt the New Jersey courts’ construction of the statute.”); Yablon, *supra* note 145, at 361.

239. See *supra* notes 153–156 and accompanying text.

240. See Seligman, *supra* note 143, at 270; Curtis Alva, *Delaware and the Market for Corporate Charters: History and Agency*, 15 DEL. J. CORP. L. 885, 896 (1990) (“Delaware adopted its first modern general corporation law in 1899. The statute has been amended hundreds of times since then.”). New Jersey likewise amended its corporate code repeatedly in the 1890s. See Yablon, *supra* note 145, at 344.

241. See Alva, *supra* note 240, at 899–900; Hamermesh, *supra* note 7, at 1755; Eldar & Rauterberg, *supra* note 92, at 30.

242. See Hamill, *supra* note 71, at 118–19.

243. See, e.g., Alva, *supra* note 240, at 903; Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1078 (2000); Romano, *supra* note 194, at 213.

244. See Eldar & Rauterberg, *supra* note 92, at 3.

245. See, e.g., Bernard S. Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 NW. U. L. REV. 542, 590–91 (1990); Fisch, *supra* note 243, at 1081; Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908, 1923 (1998); Romano, *supra* note 4, at 280.

overlooked how Delaware's courts check the executive's power over corporations, both in legal practice and as a credible commitment to investors.<sup>246</sup>

Delaware's judiciary is unusually insulated from the opportunistic politics of the executive branch. The constitutional amendments of 1897 reduced gubernatorial control over judges by imposing partisan balance requirements on the courts.<sup>247</sup> This appointments process stands in sharp contrast to other states, where popularly elected judges are more vulnerable to political pressures.<sup>248</sup>

In place of the legislative-judicial conflicts of the mid-nineteenth century, Delaware's legislature deliberately vested the courts with significant policy-making authority over corporate law.<sup>249</sup> The legislature's adoption of an enabling code ensured private lawsuits eclipsed executive enforcement as the primary means of policing corporate affairs.<sup>250</sup> Through their adjudication of private disputes and elaboration of evolving fiduciary law doctrines, Delaware's courts assumed a leading role in crafting the state's approach to corporate law and fulfilling the legislature's enabling mandate.<sup>251</sup>

The judiciary's check on executive power is most evident in Delaware's modern approach to *quo warranto*. Once a fountainhead of executive control,<sup>252</sup> *quo warranto* suits became increasingly untenable as the liberalization of corporate purpose led the majority of firms to adopt a stated purpose of pursuing any lawful business,<sup>253</sup> reducing the acts

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246. See *supra* note 196 and accompanying text.

247. See Hamermesh, *supra* note 7, at 1760; Eldar & Rauterberg, *supra* note 92, at 28.

248. See Hamermesh, *supra* note 7, at 1760; Eldar & Rauterberg, *supra* note 92, at 28; cf. John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 969 (2002) ("Separating the judiciary from the other branches of government means little if judges are then subjected directly to the very same pressures that caused us to mistrust executive and legislative influence in the first place.").

249. See Fisch, *supra* note 243, at 1080–81.

250. See Lucian A. Bebchuk & Assaf Hamdani, *Federal Corporate Law: Lessons from History*, 106 COLUM. L. REV. 1793, 1821–22 (2006); Lyman P.Q. Johnson, *The Delaware Judiciary and the Meaning of Corporate Life and Corporate Law*, 68 TEX. L. REV. 865, 887 (1990); Kahan & Rock, *supra* note 6, at 1606.

251. See Fisch, *supra* note 243, at 1080–81; Hamermesh, *supra* note 7, at 1760.

252. See *supra* Section II.D.

253. See Michael A. Schaeftler, *The Purpose Clause in the Certificate of Incorporation: A Clause in Search of a Purpose*, 58 ST. JOHN'S L. REV. 476, 482–83 (1984) (setting forth an empirical study "demonstrat[ing] conclusively that the overwhelming majority of corporations in most states, particularly medium and large-sized corporations, has adopted broad, boilerplate purpose clauses or, where available, an 'any lawful purpose' clause"); David G. Yosifon, *The Law of Corporate Purpose*, 10 BERKELEY BUS. L.J. 181, 185 (2013) ("In fact, most business corporations use this 'any lawful act'

prosecutors could challenge as *ultra vires*.<sup>254</sup> Accordingly, Delaware's Attorney General almost entirely ceased filing *quo warranto* actions.<sup>255</sup>

Although the Delaware Attorney General maintains the authority to seek the dissolution of any corporation that abuses its charter,<sup>256</sup> the few cases in which the Attorney General has invoked this power only underscore the judiciary's limitations on executive intervention. Since the enactment of Delaware's modern corporate code, the sole targets of *quo warranto* actions have been non-profit corporations with limited purposes.<sup>257</sup> Still, Delaware courts have not acquiesced in an executive request to dissolve a corporation through a *quo warranto* proceeding since 1928.<sup>258</sup> In the decades since, the judiciary has declined to find any abuse of charter so egregious as to warrant dissolution.

The judiciary's reluctance to grant dissolution in *quo warranto* suits received its greatest test during the civil rights movement of the 1950s, when the attorneys general of multiple states commenced *quo warranto* proceedings against segregationist non-profits.<sup>259</sup> The most famous of these modern *quo warranto* cases arose in Illinois, where the state's Supreme Court ordered the dissolution of a non-profit corporation due to its distribution of racist literature throughout Chicago.<sup>260</sup> Delaware's Attorney General followed suit in 1954, filing a *quo warranto* action against the National Association for Advancement of White People, a white supremacist non-profit dedicated to segregating the state's

language in the purpose section of their articles of incorporation."); Fisch & Solomon, *supra* note 16, at 1328–29.

254. See SKEEL, *supra* note 158, at 63; Fisch & Solomon, *supra* note 16, at 1315 ("This led states to shift from special charters to general charters that allowed corporations to define their purpose as engaging in any lawful purpose or business activity. This legislative transition enabled corporations to define their purpose as engaging in any action permitted by law. As a result, the *ultra vires* doctrine fell into disrepair. The consequence was that corporate purpose became undefined and effectively meaningless, a matter we take up in the next subsection.").

255. See Schaeftler, *supra* note 159, at 90–91 (offering an empirical study of *quo warranto* actions). States that liberalized their corporate law to emulate New Jersey and Delaware's success in attracting charters similarly experienced a precipitous drop in *quo warranto* suits. *See id.*

256. DEL. CODE ANN. tit. 8, § 284 (2020); *see also* DEL. CONST. art. IX, § 1 ("The General Assembly shall, by general law, provide for the revocation or forfeiture of the charters of all corporations for the abuse, misuse, or non-user of their corporate powers, privileges or franchises. Any proceeding for such revocation or forfeiture, shall be taken by the Attorney-General, as may be provided by law.").

257. See Allen, *supra* note 33, at 107; Hansmann & Pargendler, *supra* note 102, at 990–91.

258. See *Southerland v. Decimo Club*, 142 A. 786, 792 (Del. Ch. 1928) (dissolving a non-profit corporation that operated for profit).

259. See Allen, *supra* note 33, at 107.

260. *People v. White Circle League of Am.*, 97 N.E.2d 811, 817 (Ill. 1951).

schools.<sup>261</sup> Despite this abhorrent defendant, which the court found had repeatedly urged its members to violate state law,<sup>262</sup> the judiciary concluded the corporation had not sufficiently abused its charter to warrant dissolution.<sup>263</sup> This high point of judicial skepticism toward executive action demonstrated that even in the most heinous cases, Delaware judges would not acquiesce in corporate dissolution at the executive's behest.

Delaware's courts similarly countered executive power by awarding limited remedies in successful *quo warranto* cases. While charter revocation was once granted freely, Delaware courts began treating dissolution as a remedy of last resort after the advent of the state's modern corporate code.<sup>264</sup> For example, shortly after *Young*, the Attorney General filed a *quo warranto* action against the Fifth Ward Republican Club, whose name and purported non-profit purpose belied its operation as a for-profit tavern in circumvention of Delaware's blue laws.<sup>265</sup> Although conceding the defendant had abused its charter, the court refused to dissolve the corporation and instead merely enjoined its illicit activities.<sup>266</sup>

Delaware's separation of powers in corporate affairs—rooted in both its corporate code and case law—fueled the state's rise to its dominant position in American corporate law. These structural protections assuaged investors' fears of the executive opportunism that defined the late nineteenth century. The enabling nature of Delaware corporate law also obviated the threat of legislative favoritism, while the cooperative relationship between the legislature and judiciary eschewed ossification by judicial usurpation. Thus, by the early twentieth century, Delaware achieved what had previously eluded the United States: a stable equilibrium among the branches over questions of corporate law. Although uncelebrated by commentators, Delaware's distinctive separation of powers marks a crowning achievement of corporate law and provided a foundation for economic growth to this day.<sup>267</sup>

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261. *Young v. Nat'l Ass'n for Advancement of White People*, 109 A.2d 29, 30 (Del. Ch. 1954).

262. *Id.* at 32 (“[I]t is clear that the defendant urged the use of boycott and participated actively in an effort to bring about violation of the laws of Delaware . . .”).

263. *Id.*

264. See 4 JAMES D. COX & THOMAS LEE HAZEN, *TREATISE ON THE LAW OF CORPORATIONS* § 26:5 (3d ed., 2020).

265. See *Craven v. Fifth Ward Republican Club, Inc.*, 146 A.2d 400, 401 (Del. Ch. 1958).

266. *Id.* at 402.

267. Cf. Kira Fuchs & Florian Herold, *The Costs and Benefits of a Separation of Powers—An Incomplete Contracts Approach*, 13 AM. L. & ECON. REV. 131, 154 (2011) (discussing the economic benefits of the separation of powers generally).

## IV. THE PERILS OF ENFORCING CORPORATE PURPOSE

Corporate purpose, though a canonical subject of scholarly debate,<sup>268</sup> has recently reemerged as the most contentious issue in corporate law.<sup>269</sup> This resurgence is largely attributable to a renewed interest in the social obligations of corporations among business executives.<sup>270</sup> A prominent indicator of corporate America's willingness to reexamine purpose arose in 2019, when the Business Roundtable rescinded its prior statement that shareholder wealth maximization is the sole end of corporations and replaced it with a broader commitment to also serving stakeholder and societal interests.<sup>271</sup>

The terms of the debate over corporate purpose are well established. Proponents of the traditional concession view contend that because the government grants enterprises the privilege of the corporate form, corporations owe substantial duties to the public.<sup>272</sup> At the other pole, adherents of the nexus of contracts view consider corporations to be essentially private enterprises that exist to serve the interests of shareholders.<sup>273</sup>

Yet the first-order matter of the corporation's purpose is inevitably accompanied by the second-order question of how corporate purpose should be enforced. While commentators tend to emphasize the former to the exclusion of the latter,<sup>274</sup> proposals to have the government actively enforce corporations' social obligations have quietly catalyzed a far-reaching reconsideration of the relationship between corporations and the state.<sup>275</sup>

This Part examines proposals to revive government enforcement of corporate purpose and argues that proponents of these reforms have

268. See George A. Mocsary, *Freedom of Corporate Purpose*, 2016 BYU L. REV. 1319, 1320 (“Every few decades, there erupt political and academic debates over the proper nature and purpose of the corporation.”). For two seminal contributions to this debate, see Dodd, *supra* note 15; Berle, *supra* note 15.

269. See Fisch & Solomon, *supra* note 16, at 1309.

270. See *id.*

271. *Business Roundtable Redefines Purpose*, *supra* note 17; see William S. Laufer & Matthew Caulfield, *Wall Street and Progressivism*, 37 YALE J. ON REG. BULL. 36, 47 (2019).

272. See Greenfield, *supra* note 162, at 1304; Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 186 (1985); Schaeftler, *supra* note 159, at 87.

273. See Greenfield, *supra* note 162, at 1291; Horwitz, *supra* note 272.

274. See Fisch & Solomon, *supra* note 16, at 1337, 1344–46 (observing that this is a problem).

275. See *infra* Section III.A; see also Edward B. Rock, *For Whom Is the Corporation Managed in 2020? The Debate over Corporate Purpose*, 76 BUS. LAW. 363, 363 (noting this “political” dimension of the debate over corporate purpose).

overlooked the separation of powers ramifications of greater state intervention. Empowering the executive or legislative branches to directly intervene in corporate affairs would destabilize modern corporate law's equilibrium and invite a return to the inter-branch contestation of the nineteenth century. Without careful checks on each branch's power over corporations, history shows that the aggrandizement of a single branch—particularly the executive—can easily result, at severe economic cost.<sup>276</sup> To preserve the equilibrium of modern corporate law, this Part cautions against adopting any proposal for active government enforcement of corporate purpose;<sup>277</sup> however, for progressive reformers committed to such government intervention, this Part offers concrete suggestions for how to structure a renewed role for the state with minimal separation of powers concerns.

### A. Current Proposals

A growing chorus of academics, journalists, and policymakers has called for the government once again to impose social purposes on corporations, enforced by threat of charter revocation.<sup>278</sup> Yet nostalgia for the pre-modern approach to corporate oversight is hardly new. By 1936, Roscoe Pound already advocated a return to the pre-modern regime of aggressive *quo warranto* prosecutions to curb corporate excess.<sup>279</sup> But through a steady stream of scholarship and advocacy, this once-obscure proposal has seized the popular imagination and crept closer to a political reality.<sup>280</sup>

Since the 1970s,<sup>281</sup> environmental law scholars have argued that because regulatory approaches to pollution have proven ineffective,<sup>282</sup> the

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276. See *supra* Part II.

277. See Rock, *supra* note 275, at 394 (“[T]inkering with the law of corporate purpose threatens to disrupt the coherence of the corporate form, a form that has been one of the great wealth-generating innovations of the last 150 years.”).

278. See *infra* notes 281–293 and accompanying text.

279. Roscoe Pound, *Visitation Jurisdiction over Corporations in Equity*, 49 HARV. L. REV. 369, 376, 395 (1936).

280. Cf. *The Overton Window*, MACKINAC CTR. PUB. POL’Y (2019), <https://www.mackinac.org/OvertonWindow> (explaining how “the Overton Window can both shift and expand, either increasing or shrinking the number of ideas politicians can support without unduly risking their electoral support”).

281. See Richard J. Maddigan, *Quo Warranto to Enforce a Corporate Duty Not to Pollute the Environment*, 1 ECOLOGY L.Q. 653, 653 (1971).

282. See Thomas Linzey, *Killing Goliath: Defending Our Sovereignty and Environmental Sustainability Through Corporate Charter Revocation in Pennsylvania and Delaware*, 6 DICK. J. ENV’T L. & POL’Y 31, 35 (1997) (“The regulatory agencies and the regulations themselves have failed to control corporate harms.”).

executive branch should impose a social duty not to pollute on corporations by revoking the charters of non-compliant firms.<sup>283</sup> Many of these commentators favorably cited nineteenth-century approaches to corporate law as precedent for their proposals.<sup>284</sup> Academic interest in the preservationist possibilities of *quo warranto* eventually transformed into activist strategy.<sup>285</sup> For example, in 2011, several climate organizations mounted a campaign to convince Delaware Attorney General Beau Biden to revoke the charter of Massey Energy, a mining corporation with a long record of environmental violations.<sup>286</sup> Attorney General Biden, undoubtedly aware of the doctrinal hurdles to *quo warranto* actions in Delaware, declined to file suit.<sup>287</sup> Yet the perception of charter revocation as an expedient tool of corporate oversight soon spread beyond the limits of environmental law.

Following the accounting scandals of the early 2000s,<sup>288</sup> academics began to call on the executive branch to revoke the charters of corporations

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283. See John Christopher Anderson, *Respecting Human Rights: Multinational Corporations Strike Out*, 2 U. PA. J. LAB. & EMP. L. 463, 501–02 (1999); Mitchell F. Crusto, *Green Business: Should We Revoke Corporate Charters for Environmental Violations?*, 63 LA. L. REV. 175, 190 (2003); Thomas Linzey, *Awakening A Sleeping Giant: Creating A Quasi-Private Cause of Action for Revoking Corporate Charters in Response to Environmental Violations*, 13 PACE ENV'T. L. REV. 219, 278 (1995); Linzey, *supra* note 282, at 61; Maddigan, *supra* note 281, at 654; Ryan C. Drake, Note, *Corporate Responsibility and State False Claims Acts: Evaluating the Use of Qui Tam Proceedings to Revoke the Charters of Corporate Polluters*, 12 LEWIS & CLARK L. REV. 267, 268–69 (2008); Mark Willis, *Striking at the Heart of Corporate Polluters: Resurrecting Quo Warranto Proceedings to Revoke Corporate Charters*, VT. J. ENV'T L. (2006), <https://web.archive.org/web/20201129105138/http://vjel.vermontlaw.edu/writing-competition/2006-essays/striking-at-the-heart-of-corporate-polluters-resurrecting-quo-warranto-proceedings-to-revoke-corporate-charters/>.

284. See Anderson, *supra* note 283, at 501; Maddigan, *supra* note 281, at 658–59 (“The writ of quo warranto is thus a time-tested and efficient means of enforcing the corporate duty to the public.”); Linzey, *supra* note 283, at 221; Willis, *supra* note 283.

285. See, e.g., Nancy Rivera Brooks, *Group Wants Union Oil’s Charter Revoked*, L.A. TIMES (Sep. 11, 1998, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1998-sep-11-fi-21521-story.html>; Charlie Cray, *Chartering a New Course: Revoking Corporations’ Right to Exist*, 23 MULTINAT’L MONITOR, Oct.–Nov. 2002, <https://multinationalmonitor.org/mm2002/02oct-nov/oct-nov02corp1.html> (describing the National Lawyer’s Guild’s efforts to revive *quo warranto* as a method of corporate oversight).

286. See APPALACHIAN VOICES, DELAWARE SHOULD REVOKE THE CORPORATE CHARTER OF THE MASSEY ENERGY COMPANY (2011), <https://appvoices.org/resources/Massey-Charter-Revocation-FAQ-060811.pdf>; see also JEFFREY D. CLEMENTS & BILL MOYERS, CORPORATIONS ARE NOT PEOPLE: RECLAIMING DEMOCRACY FROM BIG MONEY AND GLOBAL CORPORATIONS 139–40 (2014) (describing this campaign).

287. See CLEMENTS & MOYERS, *supra* note 286, at 145.

288. For an overview of the accounting scandals of the early 2000s and the ensuing backlash, see Kathleen F. Brickley, *From Enron to Worldcom and Beyond: Life and Crime After Sarbanes-Oxley*, 81 WASH. U. L.Q. 357 (2003).

that engaged in any kind of serious misconduct.<sup>289</sup> Kent Greenfield, in an influential article in the *Virginia Law Review*, exhorted state attorneys general to resume *quo warranto* actions to punish corporate crime.<sup>290</sup> Other commentators proposed similar enforcement tactics at the federal level, inviting the U.S. Department of Justice to inflict the “corporate death penalty” of charter revocation on deviant firms.<sup>291</sup> Even popular media outlets concurred that a return to the nineteenth-century practice of charter revocation was overdue.<sup>292</sup>

By far the most prominent proposal to revive the government’s role in enforcing corporations’ social purposes through the threat of charter revocation was Senator Elizabeth Warren’s Accountable Capitalism Act (ACA).<sup>293</sup> While Senator Warren’s bill was not enacted into law, the ACA nevertheless represents an authoritative expression of progressive corporate law that will almost certainly influence future reforms from the left.<sup>294</sup> Under the ACA, large corporations would be required to acquire federal charters from the newly created Office of United States Corporations within the Department of Commerce.<sup>295</sup> The Director of the Office would be removable at will by the President.<sup>296</sup> Upon application

289. See, e.g., Mary Kreiner Ramirez, *The Science Fiction of Corporate Criminal Liability: Containing the Machine Through the Corporate Death Penalty*, 47 ARIZ. L. REV. 933, 951 (2005).

290. See Greenfield, *supra* note 162, at 1359–60 (“[O]ne can imagine a situation in which the practice of illegality is so engrained in the culture and fabric of a corporation that dissolution is the only way to ensure that it will not continue.”).

291. See MARY KREINER RAMIREZ & STEVEN A. RAMIREZ, *THE CASE FOR THE CORPORATE DEATH PENALTY* 224 (2017); Assaf Hamdani & Alon Klement, *Corporate Crime and Deterrence*, 61 STAN. L. REV. 271, 278 (2008); John F. Hulpke, *If All Else Fails, a Corporate Death Penalty?*, 26 J. MGMT. INQ. 433, 434 (2017); Ramirez, *supra* note 289, at 974 (proposing a three-strikes approach); Drew Isler Grossman, Note, *Would a Corporate “Death Penalty” Be Cruel and Unusual Punishment?*, 25 CORNELL J.L. & PUB. POL’Y 697, 711 (2016); Kyle Noonan, Note, *The Case for a Federal Corporate Charter Revocation Penalty*, 80 GEO. WASH. L. REV. 602, 606 (2012).

292. See, e.g., David Dayen, *Give Wells Fargo the Corporate Death Penalty*, NEW REPUBLIC (Aug. 1, 2017), <https://newrepublic.com/article/144144/give-wells-fargo-corporate-death-penalty>; Ron Fein, Opinion, *Equifax Deserves the Corporate Death Penalty*, WIRED (Oct. 20, 2017, 8:00 AM), <https://www.wired.com/story/equifax-deserves-the-corporate-death-penalty/>; Thom Hartman, *It’s Time to Bring Back the Corporate Death Penalty*, SALON (Jan. 10, 2019, 11:30 AM), [https://www.salon.com/2019/01/10/its-time-to-bring-back-the-corporate-death-penalty\\_partner/](https://www.salon.com/2019/01/10/its-time-to-bring-back-the-corporate-death-penalty_partner/); Stephen Reader, *What Merits the Corporate Death Penalty*, WNYC (May 27, 2011), <https://www.wnyc.org/story/137299-what-merits-corporate-death-penalty/>.

293. Accountable Capitalism Act, S. 3348, 115th Cong. (2018); see Laufer & Caulfield, *supra* note 271.

294. See Stephen F. Diamond, *The Myth of Corporate Governance*, CLS BLUE SKY BLOG (Jan. 13, 2021), <https://clsbluesky.law.columbia.edu/2021/01/13/the-myth-of-corporate-governance/> (“[The ACA] may, in light of the commitment of the Biden administration to restoring fairness in the economy, stand a chance of passage.”).

295. S. 3348, § 3(a).

296. *Id.* § 3(b)(2).

by the attorney general of any state,<sup>297</sup> the Office would inquire into whether a federally chartered corporation had acted beyond its social purpose.<sup>298</sup> If so, the Director, with approval from the Secretary of Commerce, would revoke the corporation's charter.<sup>299</sup> This penalty would be stayed for a year,<sup>300</sup> so the corporation could seek judicial review<sup>301</sup> and relief from Congress.<sup>302</sup>

Scholars—including Professors Robert Hockett and Saule Omarova of Cornell Law School—embraced Senator Warren's proposal,<sup>303</sup> celebrating its similarities to nineteenth-century approaches to corporate purpose and charter revocation.<sup>304</sup> Senator Warren herself contended the ACA was consistent with the prevailing view for “much of U.S. history” that “American corporations exist only because the American people grant them charters.”<sup>305</sup> Policy professionals at think tanks like the Roosevelt Institute likewise lauded the ACA's call to renew government enforcement of corporate purpose.<sup>306</sup>

From the pages of legal scholarship to the floor of the Senate, proposals to restore the government's role in enforcing corporations' social obligations by revoking the charters of non-compliant firms became a fixture of the contemporary debate over corporate purpose. Often explicitly, these reforms mimic the interventionist approach to corporate

297. *Id.* § 9(a).

298. *Id.* § 9(c).

299. *Id.*; see Carew S. Bartley, *The Accountable Capitalism Act in Context and Its Implications for Legal Ethics*, 33 GEO. J. LEGAL ETHICS 373, 391 (2020); Denise Kuprionis, *Will Warren's Accountable Capitalism Act Help? The Answer Is No*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 10, 2018), <https://corpgov.law.harvard.edu/2018/09/10/will-warrens-accountable-capitalism-act-help-the-answer-is-no/>.

300. S. 3348, § 9(d).

301. *Id.* § 9(c).

302. Letter from Robert Hockett et al. to Sen. Elizabeth Warren 5 (Aug. 15, 2018), <https://www.warren.senate.gov/imo/media/doc/Federal%20Corporate%20Charter%20Letter%20of%20Support.pdf> (“The company's charter would then be revoked a year later—giving the company time before its charter is revoked to make the case to Congress that it should retain its conditional charter in the same or in modified form.”).

303. See *id.* at 1; Robert Hockett, *Accounting for Incorporation: Part 2*, L. & POL. ECON. PROJECT (Sept. 26, 2018), <https://lpeproject.org/blog/accounting-for-incorporation-part-2/>.

304. See Letter from Robert Hockett et al., *supra* note 302, at 1–2.

305. Warren, *supra* note 18; see Abdurrahman Kayiklik, *How Elizabeth Warren Is Reviving the Concession Theory of the Corporation*, CLS BLUE SKY BLOG (Nov. 1, 2019), <https://clsbluesky.law.columbia.edu/2019/11/01/how-elizabeth-warren-is-reviving-the-concession-theory-of-the-corporation/>.

306. See Leonore Palladino & Kristina Karlsson, *Towards 'Accountable Capitalism': Remaking Corporate Law Through Stakeholder Governance*, ROOSEVELT INST. 6–7 (Oct. 2018), <https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI-Towards-%E2%80%98Accountable-Capitalism%E2%80%99-brief-201810.pdf>.

oversight that prevailed in the nineteenth century. But as the next Section argues, the dysfunctional separation-of-powers dynamics of that period underscore the perils of a reflexive return to the pre-modern regime.

### *B. Reasons for Doubt*

Every proposal to have the government once again impose social purposes on corporations raises the fundamental separation of powers question of *which* branch will wield this authority. The successive failures of each branch's dominance in corporate affairs<sup>307</sup> illustrate why arrogation by any single branch would threaten the stability of modern corporate law.<sup>308</sup> Previous proposals to revive the government's role in imposing social purposes on corporations have simply ignored this separation of powers problem and instead celebrated the crude cudgel of executive enforcement. Because political opportunism remains a threat today just as it was in the Gilded Age, the United States should not resurrect unchecked executive power over corporations yet expect a different result.<sup>309</sup>

Proposals to use state *quo warranto* proceedings to revoke corporate charters<sup>310</sup> strike at the heart of modern corporate law's separation of powers. Delaware's doctrinal skepticism towards allegations of charter abuse constitutes a key bonding device, whereby the state credibly commits to refrain from exploiting investors.<sup>311</sup> Relaxing this judicial check on executive arrogation would raise the specter of arbitrary treatment for prosecutors' political gain.<sup>312</sup> Even a marginally heightened risk of mistreatment at the hands of a future attorney general would reduce the value of Delaware corporations generally;<sup>313</sup> however, history suggests that the risk of a political shock leading an entrepreneurial attorney general to pursue *quo warranto* enforcement actions to galvanize a populist electorate is less remote than commentators apparently believe.<sup>314</sup>

Executive domination at the federal level is equally perilous. Although appointed by the President rather than directly elected, U.S. Attorneys still face political pressures to bolster the popularity of the governing

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307. See *supra* Sections II.B-II.D.

308. See Rock, *supra* note 275, at 391 (discussing the benefits of stability in corporate law).

309. See *supra* Section II.D.

310. See, e.g., Greenfield, *supra* note 162, at 1359–60.

311. See *supra* Section III.B.

312. See *supra* notes 187–188 and accompanying text.

313. See *supra* note 192 and accompanying text.

314. See *supra* note 197 and accompanying text.

administration.<sup>315</sup> Because anti-corporate populism remains a potent force in federal politics,<sup>316</sup> the executive branch's electoral incentives reward highly publicized enforcement actions against large, unpopular corporations.<sup>317</sup> Moreover, political concerns are likely top of mind for the senior Department of Justice officials who increasingly intervene in major corporate enforcement actions.<sup>318</sup> Vesting federal prosecutors with the power to pursue *quo warranto* actions would therefore result in a heightened risk of political opportunism, much like at the state level.

Senator Warren's ACA carries executive domination to its logical extreme by allowing the Department of Commerce to revoke corporate charters unilaterally. Reducing pre-revocation protections to the mere agreement of two political appointees<sup>319</sup>—both of whom are terminable at will by the President and therefore subject to presidential control<sup>320</sup>—would encourage executive opportunism. This threat of arbitrary charter revocation at the hands of an unchecked executive would undermine the credibility of the United States' commitment to abstain from the exploitation of locked-in investors, reducing the vitality of America's capital markets.<sup>321</sup>

The ACA's ex-post checks from coordinate branches are similarly inadequate. Judicial review of the Department of Commerce's decision to

315. See Sanford C. Gordon & Gregory A. Huber, *The Political Economy of Prosecution*, 5 ANN. REV. L. & SOC. SCI. 135, 136 (2009) (“At the federal level, United States Attorneys are political appointees who often possess strong partisan loyalties.”); see also Michael W. Dolan, *Political Influence on the Department of Justice: Are the Pressures Only External?*, 9 J.L. & POL. 309, 309 (1993) (“[T]he Department of Justice[’s] decisions can be affected by Department officials doing what they believe will be politically popular or politically rewarded.”).

316. See Stephen M. Bainbridge, *Corporate Purpose in a Populist Era*, 98 NEB. L. REV. 543, 562 (2020); Kahan & Rock, *supra* note 6, at 1588–89; Mark J. Roe, *Delaware's Politics*, 118 HARV. L. REV. 2491, 2504 (2005) (explaining that “populist public opinion” tends to “flood through Washington”).

317. See Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2126 (2016).

318. See Nick Schwellenbach, *How Corporate Lawbreakers Get a Leg up at the Justice Department*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 12, 2019), <https://corpgov.law.harvard.edu/2019/11/12/how-corporate-lawbreakers-get-a-leg-up-at-the-justice-department/> (describing interventions by top Justice Department officials in recent corporate prosecutions). Political influence in federal prosecutions is hardly new. See Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 659 (1994) (“Thomas Jefferson was not the first President to assert control over prosecutors. Presidential superintendence of federal prosecution was asserted from the very beginning.”).

319. Accountable Capitalism Act, S. 3348, 115th Cong. § 9(c) (2018).

320. Cf. THE FEDERALIST NO. 79 (Alexander Hamilton), [https://avalon.law.yale.edu/18th\\_century/fed79.asp](https://avalon.law.yale.edu/18th_century/fed79.asp) (“A power over a man's subsistence amounts to a power over his will.”).

321. See *supra* notes 192–196 and accompanying text.

revoke a charter would be nominally available under the Administrative Procedure Act;<sup>322</sup> however, the ACA's scant guidance on when revocation is warranted<sup>323</sup> would foreclose meaningful judicial review.<sup>324</sup> Thus, for corporations with suspended charters, lobbying Congress would be the only viable option.<sup>325</sup> Unlike in most states, special legislation is permissible at the federal level.<sup>326</sup> But inviting large corporations to exact special privileges from Congress would result in the rent-seeking, partisanship, and unfairness that sullied the era of special chartering.<sup>327</sup> Additionally, congressional rechartering of corporations dissolved by the executive would spur unstable inter-branch competition.

Previous proposals to restore the government's role in imposing corporations' social obligations through the threat of charter revocation have unquestioningly embraced executive power. But whether at the state or federal level, an unchecked executive would shatter modern corporate law's separation of powers equilibrium and prompt a return to the dysfunctional unilateralism of the nineteenth century. In the debate between defenders of Delaware's current approach and progressive reformers, both sides should heed these concerns because, as the next Section shows, either camp can pursue their agenda without incurring unnecessary inter-branch instability.

### *C. A Better Way*

The best and simplest way to preserve the separation of powers equilibrium that has fostered stability and growth in the United States'

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322. S. 3348, § 9(c)(3)(A) ("A decision by the Director to grant a revocation petition under this subsection shall be subject to judicial review under section 706 of title 5, United States Code").

323. The ACA merely offers non-dispositive factors. *See id.* § 9(c)(2) ("[T]he Director shall consider whether the United States corporation... has engaged in repeated, egregious, and illegal misconduct that has caused significant harm to... the customers, employees, shareholders, or business partners of the United States corporation... or... the communities in which the United States corporation operates..." (emphasis added)).

324. *See Webster v. Doe*, 486 U.S. 592, 599–600 (1988) ("[E]ven when Congress has not affirmatively precluded judicial oversight, 'review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" (quoting *Heckler v. Chaney*, 470 U.S. 821 (1985))); Linzey, *supra* note 283, at 263 (discussing the probable non-reviewability of decisions to revoke charters in the public interest); cf. Richard A. Epstein, *Elizabeth Warren, Corporate Bully*, HOOVER INST. (Oct. 14, 2019), <https://www.hoover.org/research/elizabeth-warren-corporate-bully> ("[T]he federal government would have the power to revoke a charter for some undefined class of illegal activities.").

325. *See supra* note 322 and accompanying text.

326. *See Schutz*, *supra* note 105, at 41 ("There is no restriction on special legislation found in the federal constitution.").

327. *See supra* Section II.B.

corporate sector for over a century is to do just that.<sup>328</sup> Leaving in place the checks and balances of Delaware corporate law would ensure efforts to curb corporate excess do not devolve into arrogation by a single branch. Regulatory interventions outside corporate law, though too plodding for some critics,<sup>329</sup> offer a means of confining undesirable behavior without effecting seismic shifts in the corporate form.

But the fact that prior proposals to restore the government's role in enforcing corporations' social purposes would eviscerate the salutary separation of powers in corporate law does not mean this outcome is inevitable. Instead, for reformers committed to expanding the government's authority in corporate affairs, this Section elucidates how to do so in a manner that poses the least threat to corporate law's inter-branch equilibrium. Drawing on the most successful features of Delaware law, the structure outlined in this Section synthesizes the lessons from the United States' history of single-branch overbearance at the hands of the legislature and judiciary as well as the executive. As recent proposals have primarily called for intervention at the federal level,<sup>330</sup> this Section envisions federal reforms, though an analogous regime could be implemented *mutatis mutandis* at the state level.

Given the realities of gridlock and partisanship,<sup>331</sup> any proposal that requires Congress to emulate the Delaware legislature's unanimity or reliance on expert practitioners is bound to fail. Thus, rather than vesting Congress with a dominant role in establishing precise rules governing corporate purpose, reformers should have Congress enact a broad framework for such rules but charge an independent agency with promulgating specific regulations. A newly created, multi-member Corporate Affairs Commission, with partisan balance requirements, would more closely approximate the unanimity and reliance on expertise<sup>332</sup> that has proven crucial to the success of Delaware's corporate code.<sup>333</sup> Members of the Commission should enjoy for-cause firing protections to

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328. See Rock, *supra* note 275, at 391.

329. See *supra* note 282 and accompanying text.

330. See *supra* note 291 and accompanying text.

331. See Gillian E. Metzger, *Agencies, Polarization, and the States*, 115 COLUM. L. REV. 1739, 1748 (2015) ("Perhaps the most immediate effect of polarization, combined with divided government and supermajority requirements, is congressional gridlock. Congress becomes unable to direct agencies through enactment of substantive legislation.").

332. Cf. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 531 (2010) (Breyer, J., dissenting) ("[T]his Court has recognized the constitutional legitimacy of a justification that rests agency independence upon the need for technical expertise.").

333. See *supra* notes 240–241 and accompanying text.

insulate them from the political pressures to engage in opportunism that would pervade an executive agency like the Department of Commerce.<sup>334</sup>

To facilitate judicial review, the Commission's organic statute should specify concrete policy objectives that the Commission's regulations must fulfill. While the contours of these policy objectives will differ depending on the reformer's vision of corporate purpose, this Article submits that the statute should require the Commission to promulgate only enabling rules, rather than mandatory ones. The statute should then provide that these rules must be based on the best available evidence of which approach to corporate purpose would minimize transaction costs by providing a majoritarian default<sup>335</sup> corporate purpose provision. But even reformers intent on a more restrictive statutory framework should require the Commission to follow notice-and-comment procedures when promulgating its regulations, to allow input from experts and stakeholders alike. With ex-ante rules from the Commission tempered by judicial review, corporations could more easily discern and comply with government expectations of the purposes that undergird their charters.<sup>336</sup> Requiring the Commission to adopt general legislative rules would also avoid the dysfunctions of special legislation.<sup>337</sup>

The Commission's enforcement authority should likewise be subject to procedural protections and inter-branch checks. Rather than empowering entrepreneurial state attorneys general to trigger mandatory inquiries by filing complaints against corporations,<sup>338</sup> Congress should instruct the Commission to exercise independent discretion as to whether enforcement is warranted based on the Commission's expertise. To guard against judicial usurpation, Congress should specify that the Commission's decision not to pursue enforcement in a particular case is non-reviewable.<sup>339</sup> If the Commission concludes a corporation's violation of binding regulations justifies enforcement, Congress should require the

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334. See *supra* notes 319–321 and accompanying text.

335. Cf. Ian Ayres & Robert Gertner, *Majoritarian vs. Minoritarian Defaults*, 51 STAN. L. REV. 1591, 1611 (1999) (“Contractual gaps should be filled with the hypothetical term that most contractors would have wanted. This majoritarian standard has great appeal and, other things being equal, we wholeheartedly support it.”).

336. See *Nat'l Petroleum Refiners Ass'n v. F.T.C.*, 482 F.2d 672, 683 (D.C. Cir. 1973) (“[T]he availability of notice before promulgation and wide public participation in rule-making avoids the problem of singling out a single defendant among a group of competitors for initial imposition of a new and inevitably costly legal obligation.”).

337. See *supra* notes 88–106 and accompanying text.

338. See *Accountable Capitalism Act*, S. 3348, 115th Cong. § 9(a) (2018).

339. Cf. *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (“[A]n agency's decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2).”).

Commission to seek relief directly in court, rather than adjudicate the dispute in a manner that could trigger *Chevron* deference.<sup>340</sup> A traditional judicial proceeding would preserve the separation of powers arrangement that provided a crucial check on executive power in Delaware corporate law.<sup>341</sup> Finally, the Commission's organic statute should codify doctrinal safeguards in enforcement actions by specifying that charter revocation is always a last resort to be eschewed when a less restrictive injunction could prevent the corporation from exceeding its purpose.<sup>342</sup>

In sum, reformers should hesitate before advocating for any proposal that would jeopardize corporate law's separation of powers equilibrium. Although maintaining the prevailing balance achieved in Delaware law is the safest way to protect modern corporate law's hard-won achievement, those who insist on a greater role for the government in policing corporate purpose should follow the strictures advocated in this Section to avoid rekindling the inter-branch competition and arrogation that afflicted American corporate law for more than a century.

## V. CONCLUSION

This Article has analyzed a previously overlooked dimension of U.S. corporate law—competition among the coordinate branches of government for greater authority in corporate affairs. Grappling with the conflicting precedents of English law, the United States swung between successive periods in which a single branch assumed the dominant role in corporate oversight. The resulting instability and dysfunction hindered the development of the corporate form and culminated in the dissolution of the nation's largest firms at the hands of entrepreneurial prosecutors. But the advent of modern corporate law at the turn of the century ushered in an era of prosperity with legislative and judicial checks to assure investors that their assets would not be opportunistically seized for the electoral gain of political actors. This separation of powers revolution fostered an equilibrium among the branches that has continued to this day.

But amid the raging debate over corporate purpose, a growing chorus of academics, journalists, and politicians have advocated for greater government involvement in imposing and enforcing corporations' social obligations. Ignoring the inter-branch dynamics of corporate law, these

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340. For example, the Commission might otherwise proceed by formal adjudication to receive *Chevron* deference. *See* *United States v. Mead Corp.*, 533 U.S. 218, 219 (2001).

341. *See supra* Section III.B.

342. *See supra* note 291 and accompanying text.

proposals call for a return to the executive domination that exploited investors and roiled capital markets in the late nineteenth century. This Article argues that corporate law's equilibrium should not be so carelessly cast off. The safest way to preserve the current balance among the branches is to maintain the hard-won system of checks and balances of Delaware law. But even reformers intent on reviving government enforcement of corporate purpose should proceed carefully, adopting the structure of checks and balances articulated in this Article to minimize the risk of aggrandizement and instability.

Inter-branch stability is indispensable in U.S. corporate law precisely because the proper role of private enterprise in a democratic society remains an open question. Leaving room for an evolving conception of corporate purpose prevents naïve efforts to cut off this discourse, and with it the shifting perspectives that have enriched America's intellectual tradition.<sup>343</sup> Perhaps a new consensus will render modern corporate law's separation of powers obsolete, as many commentators already believe to be the case.<sup>344</sup> Yet this Article asks that reformers pause to consider the costly failures of single branches' prior attempts to declare victory over the corporate form and move on. Corporate law's checks and balances keep a single voice from winning out, enabling the debate over corporations' ends to flourish into the future.

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343. See Lyman Johnson, *Unsettledness in Delaware Corporate Law: Business Judgment Rule, Corporate Purpose*, 38 DEL. J. CORP. L. 405, 438 (2013) (“[L]aw today, by being agnostic, rightly refrains in a free society from prematurely (if ever) foreclosing ongoing, and sometimes shifting, social and normative debates about the proper goal(s) of corporate activity.”); Mocsary, *supra* note 268.

344. See *supra* Section IV.A.