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# "Special," Vestigial, or Visionary? What Bank Regulation Tells Us about the Corporation - and Vice Versa

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# “Special,” Vestigial, or Visionary? What Bank Regulation Tells Us About the Corporation—and Vice Versa

*Robert C. Hockett & Saule T. Omarova\**

## ABSTRACT

A remarkable yet seldom noted set of parallels exists between modern U.S. bank regulation, on the one hand, and what used to be garden-variety American corporate law, on the other hand. For example, just as bank charters are matters not of right but of conditional privilege even today, so were all corporate charters not long ago. Just as chartered banks are authorized to engage only in limited, enumerated activities even today, so were all corporations restricted not long ago. And just as banks are subject to strict capital regulation even today, so were all corporations not long ago.

In this Symposium Article, we argue that these parallels are not merely curious accidents but a reflection of certain foundational dynamics embedded in, and constitutive of, the corporate form itself. Tracing the history of the incorporated American firm, we argue that the corporation is an inherently hybrid public–private entity—an institutionalized and conditional outsourcing to private parties of certain essentially public powers and functions. In effect, it is a form of public–private “franchise” arrangement in which the public is the franchisor and private parties collectively serve as the franchisees.

We examine the reasons both for the gradual weakening of this original franchise arrangement as a matter of American corporate law and policy, and for its continuing presence as a matter of bank regulation. We suggest that the “special” salience of banks’ role as public franchisees helps to account for the resilience of the original corporate settlement in U.S. bank regulation. Finally, we consider the normative and

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practical implications of reviving the “forgotten” franchise view of the corporation more generally and, in the spirit of intellectual experiment, tentatively outline some possibilities for reintroducing public interest-driven conditions in state grants of corporate privilege.

## CONTENTS

INTRODUCTION .....	454
I. THE “CORPORATE FRANCHISE”: WHAT IT ONCE WAS .....	463
<i>A. The Extraordinary Nature of Corporate Privilege</i> .....	463
<i>B. The Evolution of the Corporate Form in the United States: From “Franchise” to “Free Incorporation”</i> .....	467
<i>C. The Demise of the Franchise View: Some Explanations</i> .....	469
II. THE “BANKING FRANCHISE”: WHAT IT STILL IS .....	474
<i>A. U.S. Bank Regulation: A (Very) Brief Overview</i> .....	474
<i>B. The Source of “Specialness”: Banks as Public Franchisees</i> .....	477
<i>C. Potential Fragility of “Specialness”</i> .....	480
III. IMPLICATIONS OF THE FRANCHISE VIEW: RETHINKING THE PUBLIC–PRIVATE BALANCE .....	483
<i>A. Framing the Inquiry: If We No Longer Permit “Free Banking,” Why Permit “Free Incorporating”?</i> .....	483
<i>B. Revisiting the Corporate Franchise: Some Tentative Possibilities</i> .....	487
<i>C. Potential Challenges and Difficulties</i> .....	495
CONCLUSION .....	500

## INTRODUCTION

Commercial banks are unlike most other American business firms: they are privately owned corporations in a market-capitalist economy, yet they are explicitly backed, intrusively regulated, and, when they nevertheless fail, expeditiously liquidated by the federal government.<sup>1</sup> In these important respects, banks are undeniably “special,” and widely recognized to be so.<sup>2</sup> However, banks also are “special” in a deeper,

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1. See *infra* Part II.A.

2. There is a reason for the quotes surrounding the word “special.” “Banks are special” is a sort of mantra, a familiar and well-worn phrase-of-art, in bank-regulatory circles. A canonical treatment of the idea can be found in E. Gerald Corrigan, *Are Banks Special?*, in FED. RESERVE BANK OF

more far-reaching, and constitutive sense, as the most salient living embodiment of a particular understanding of the business corporation. They amount to a vestige of what might be called the original American corporate settlement that established the boundary between private and public interests in the management of large-scale productive enterprise.<sup>3</sup>

Several surprisingly extensive parallels exist between modern U.S. bank regulation, on the one hand, and what used to be garden-variety American corporation law until the late nineteenth and early twentieth century, on the other hand.<sup>4</sup> Just as bank charters are matters not of right but of conditional privilege even today, for example, so were corporate charters more generally not long ago.<sup>5</sup> Moreover, as chartered banks enjoy only limited, enumerated powers beyond which they may not stray even today, so were corporations more generally restricted not long ago.<sup>6</sup> And just as banks are subject to strict capital regulation even today, so were all corporations not long ago.<sup>7</sup>

These remarkable yet seldom remarked parallels raise intriguing and important questions. Are these parallels merely curious accidents or is there a more systematic explanation that accounts for them? If the latter is true, then why did the originally shared characteristics ultimately fall by the wayside for general corporations but not for incorporated banks? And what further positive and normative implications might be drawn from the answers to these questions? Might bank regulation bear lessons concerning the nature and proper regulation of the modern corporation—or vice versa?

In this Symposium Article, we address these potentially far-reaching questions. Our answers are necessarily tentative and incomplete at this point, as the issues involved are not only objectively com-

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MINNEAPOLIS ANNUAL REPORT (1983) [hereinafter Corrigan, *Are Banks Special?*], available at <https://www.minneapolisfed.org/publications/annual-reports/are-banks-special>; see also E. Gerald Corrigan, *Are Banks Special? A Revisitation*, THE REGION, Mar. 2000, available at <https://www.minneapolisfed.org/publications/the-region/are-banks-special>. In this Article, we intentionally play on this insider mantra by recasting banks' much-discussed “specialness” in an unaccustomed light.

3. It is not our argument that U.S. bank regulation is the sole remaining vestige of the original American corporate settlement. Other subspecies of corporation—e.g., insurance companies and certain public utilities—might also be characterized, at least in some aspects, as “special” remnants of the old regime. In this Article, however, we focus on U.S. commercial banks and bank regulation as the most striking, salient, and coherent case of this apparent anachronism. See *infra* Part II.

4. In this Article, we use the term “corporation law” to underscore the Article’s focus on the creation and legally recognized formative attributes of a corporate entity, rather than internal governance mechanisms and other matters that comprise the bulk of modern American corporate law.

5. See *infra* Parts I–II.

6. See *infra* Parts I–II.

7. See *infra* Parts I–II.

plex but also tend to come with considerable theoretical and ideological “baggage.” Our aim is not to resolve any long-standing internal debates among corporate law scholars, economists, or historians.<sup>8</sup> We do offer, however, what we believe to be a suggestive thought experiment—an effort to synthesize, in an illuminating manner, a multitude of ideas found in multiple literatures into a single, coherent, “big picture” view.

We view the divergent paths taken by American legal and regulatory treatment of banks and non-bank corporations as a valuable natural experiment in defining and redefining the boundary between public and private in our economy and polity.<sup>9</sup> We turn to history to support a specific interpretation of certain trends in the evolution of the American corporate form and our understanding of what that form was, and still is, meant to achieve—in each case, from the perspective of public policy and the public interest. And, in each case, we use modern bank regulation both as a framing device and as a source of illuminating comparison between past and present.

At the most fundamental level, this comparison highlights the essential role of the state in creating the corporation through the conferral of all the constitutive corporate privileges. The most salient of these privileges are the interlocking and mutually reinforcing attributes of corporate “personality” separate from constituent personalities, perpetual existence, and asset segregation—the latter of which includes, but is not

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8. Corporate law and its attendant scholarship present a particularly complicated intellectual terrain in this respect. Over many decades, scholars and practitioners of corporate law have spilled—and continue to spill—a great deal of proverbial ink, if not actual blood, battling over what the corporation is, whose interests it serves or should serve, and what legal and political rights it has or should have. There is also a substantial body of scholarship tracing the history and discussing the relative merits of various alternative answers to these questions. In the wake of recent controversial Supreme Court decisions involving corporations’ First Amendment rights, these issues have once again come to figure into intense debates even among constitutional scholars. Reviewing all of the multiple strands in this massive literature is a daunting and potentially counterproductive task. We accordingly cite to relevant works of individual scholars as appropriate at various points in this Article. For a brief sampling of particularly illuminating recent work by corporate law scholars, see, for example, Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387 (2003); Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673 (2015); Henry Hansmann & Mariana Pargendler, *The Evolution of Shareholder Voting Rights: Separation of Ownership and Consumption*, 123 YALE L.J. 948 (2014); Henry Hansmann et al., *Law and the Rise of the Firm*, 119 HARV. L. REV. 1333 (2006); Lynn A. Stout, *The Corporation as Time Machine: Intergenerational Equity, Intergenerational Efficiency, and the Corporate Form*, 38 SEATTLE U. L. REV. 685 (2015).

9. For a short but insightful exposition of the origins and implications of the distinction between “public” and “private” in American law, see Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982).

exhausted by, limited shareholder liability.<sup>10</sup> These corporate privileges originally were, both in truth and in explicit statutory and juridical characterization, extraordinary—i.e., not “freely” available as a matter of right.<sup>11</sup> They were public benefits conditionally conferred upon private actors, when such conferral served some public purpose.<sup>12</sup> These purposes ceased to be operative when firms acted *ultra vires*, or outside their state-delimited authority,<sup>13</sup> thereby forfeiting corporate privileges by violating the conditions on which they were granted.<sup>14</sup> In this sense, the nominally privately owned corporation was originally conceived and instituted as an inherently public instrumentality.<sup>15</sup> In other words, from the very beginning, the business corporation amounted to a hybrid institution, representing the conditional outsourcing to private actors of essentially public powers and functions.<sup>16</sup> The public, as represented by the

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10. We discuss these attributes more fully below. See *infra* Part I. For a thorough overview of these corporate attributes and their significance, see, for example, REINIER KRAAKMAN ET AL., *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* 5–16 (2d ed. 2009). For a succinct overview of the key characteristics of corporate entities in the context of prevailing alternative theories of the corporation, see Lynn Stout, *Corporate Entities: Their Ownership, Control, and Purpose*, in *THE OXFORD HANDBOOK OF LAW AND ECONOMICS* (Francesco Parisi ed., forthcoming 2015). Briefly, limited liability and asset segregation are related as species to genus. Limited liability protects shareholder assets against corporate creditors in the event of corporate insolvency. At the same time, insolvency provisions of the corporate law regime protect corporate assets from shareholders’ and other constituents’ creditors. Some distinguished scholars suggest that the protection of corporate assets from constituents’ creditors might be more “essential” to corporate and other bodies of enterprise-organizational law than are other incidents of corporate privilege, including limited liability. See Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 *YALE L.J.* 387 (2000). As for the “interlocking” character of all of these attributes, asset segregation buttresses separate personality, which in turn buttresses perpetual existence by enabling the firm to persist through time longer than the lifetime of any particular generation of constituents.

11. See *infra* Part I.A.

12. See *infra* Part I.A.

13. As a general matter, the *ultra vires* doctrine prohibits corporations from taking actions exceeding their legally enumerated powers, on pain of forfeiting the corporate privileges. See Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 *GEO. L.J.* 1593, 1662 (1988). For a brief and accessible explanation of the *ultra vires* doctrine, see WILLIAM A. KLEIN, JOHN C. COFFEE, JR. & FRANK PARTNOY, *BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES* 155–56 (11th ed. 2010).

14. See, e.g., JOSEPH K. ANGELL & SAMUEL AMES, *A TREATISE ON THE LAW OF PRIVATE CORPORATIONS* AGGREGATE 469–79 (1832); Hovenkamp, *supra* note 13, at 1663–64.

15. See, e.g., Lyman Johnson, *Pluralism in Corporate Form: Corporate Law and Benefits Corps.*, 25 *REGENT U. L. REV.* 269, 277 (2013) (arguing that in early nineteenth-century America, “there appears to have been a special correlating of corporateness with public-oriented service of a sort that did not exist with business activity more generally”).

16. We deliberately focus on the public–private balance within the corporate form, which we consider to be the “abidingly crucial issue in corporate legal theory.” See David Millon, *Theories of the Corporation*, 1990 *DUKE L.J.* 201, 202 (1990). Explicitly or implicitly, this distinction remains the key dimension in ongoing academic debates “about the nature of corporate activity and the ap-

sovereign chartering authority, was in this respect acting as a *franchisor*, while those who founded incorporated firms were, in effect, its *franchisees*.<sup>17</sup> This underlying perception of a corporate charter gave rise to such terms of art as “the corporate franchise.”<sup>18</sup>

We view this dynamic between state and firm not merely as an interesting historical curiosity but as a defining feature built into the foundation of the corporate form itself. No matter how much the face of the American corporation has changed since the late nineteenth century, at its core, the corporation remains a hybrid public–private entity—a franchisee freely pursuing private profits behind a shield of publicly-granted legal privileges, which, in turn, must be justified on public policy grounds.<sup>19</sup>

This conception of the modern corporation as a public–private franchise stands in marked contrast to currently fashionable economic and legal theories that portray corporations as purely private economic actors—as products simply of private ordering—whose only purpose is the pursuit of private gain for their shareholders.<sup>20</sup> The contrast is even starker when it comes to normative implications. The “private contract”

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appropriate goals of corporate law.” *Id.* at 201. See also William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 *CARDOZO L. REV.* 261 (1992) (describing the basic public–private distinction as the dichotomy between the “property conception” and the “social entity conception” of the corporation’s nature and purposes).

17. Depending on the legal and historical context, the term “franchise” may refer to any of a large number of distinct phenomena. For purposes of our argument, we use the term not in any of these specific technical senses but in a more general sense, to refer to an arrangement whereby the state, as agent of the public, explicitly confers certain legal rights and privileges upon private enterprises, with the expectation that these private enterprises will produce certain public benefits.

18. See, e.g., RONALD E. SEAVOY, *THE ORIGINS OF THE AMERICAN BUSINESS CORPORATION, 1784–1855: BROADENING THE CONCEPT OF PUBLIC SERVICE DURING INDUSTRIALIZATION passim* (1982); see also *infra* Parts I–II.

19. In a fascinating recent study of the modern corporation as a fundamentally political institution, political scientist David Ciepley argues that the corporation is properly understood as a “franchise government” that transcends the traditional liberal dichotomy between public and private. See David A. Ciepley, *Beyond Public and Private: Toward a Political Theory of the Corporation*, 107 *AM. POL. SCI. REV.* 139, 140 (2013). We find Ciepley’s arguments both persuasive and fundamentally aligned with our own. See *supra* note 17.

20. Perhaps the most emblematic expression of this view is Milton Friedman’s famous assertion that corporate managers’ only “social responsibility” is “to make as much money as possible” for the corporation’s shareholders. Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, *N.Y. TIMES MAG.*, Sept. 13, 1970, at 33. The currently fashionable rendition of this perspective is the “nexus of contracts” model of the corporation. For the classic exposition, see Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 *J. FIN. ECON.* 305 (1976). Although there are many variants of this general approach, the fundamental factor common to them all is their unequivocal assertion of the primacy of the private in defining the genesis, nature, and purpose of the corporation. We shall accordingly refer to this view as a “private contract” conception of the corporation.

conception of the corporation generally views public regulation of corporate activities as a presumptively illegitimate outside interference with the corporate form, except where particular firms impose externalities upon others.<sup>21</sup> By contrast, this Article’s “franchise” view of the corporate form explicitly recognizes the public’s fundamental and ineluctable role in defining certain fundamental parameters of corporate activity as conditions for the public granting of extraordinary corporate privileges, and its right to enforce such conditions through close regulation.<sup>22</sup> The corporation, in this view, is a hybrid entity that represents a mutualistic arrangement—an institutionalized “bargain” or “settlement”—between the citizenry as a whole, on the one hand, and smaller groups of profit-seeking citizens, on the other hand.<sup>23</sup>

This view of the corporation used to be common. Since the late nineteenth and, especially, the early twentieth century, however, the original conception of the private corporation as a vessel of particularized public interest has gradually faded from public consciousness.<sup>24</sup> We argue that this phenomenon is best understood in light of the genesis of the American corporation as a state-created tool of outsourcing infrastructure and industrial development, which was necessary under conditions of capital scarcity and still-incipient political government during the early

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21. See, e.g., Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 183 (1985); Hovenkamp, *supra* note 13, at 1601.

22. In this sense, we build upon what sometimes is called the old “concession” theory of the corporation, which highlighted the fact that corporations derive their defining powers and privileges from, and thus are ultimately constituted by, the state. The concession conception of the corporation receded with the proliferation of highly permissive general incorporation laws in the late nineteenth century, as discussed below. See *infra* Part I. Despite being routinely and seemingly ritually dismissed as “obsolete” and “statist,” the concession view of the corporation offers a critical insight into the inherently public-private character of the corporate form, a character not expunged simply by interpreting a firm as a “nexus of contracts.” Separate personality, perpetual existence, and asset segregation—particularly where tort liabilities are concerned—cannot be contracted for, but have to be conferred by the state. See Hansmann & Kraakman, *supra* note 10. For more on the original concession theory of the corporation, see Horwitz, *supra* note 21, at 181–82; William W. Bratton, Jr., *The “Nexus of Contracts” Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 433–35 (1989). See generally *infra* Part I.

23. Erik Orts identifies three major legal theories of business enterprise: (1) the concession theory that, in his view, represents a “top-down perspective of the political state”; (2) the participant theory that represents a clear “bottom-up perspective of individual people who aggregate together within a firm”; and (3) an institutional theory that “sees firms as socially established entities that are both authorized and recognized by governments and organized and managed by individual participants.” ERIK W. ORTS, *BUSINESS PERSONS: A LEGAL THEORY OF THE FIRM* 12–14 (2013). Our view of the corporation as a public-private hybrid can be characterized as a variant of Orts’ intermediate “institutional” position.

24. See sources cited *supra* notes 21–22; see also *infra* Part I.



national era in the United States.<sup>25</sup> As the financing needs of large-scale national development and industrialization grew, accelerating accumulation of private capital became an increasingly important public policy priority.<sup>26</sup> To the extent that special corporate privileges—separate personality, perpetual existence, and asset segregation (including limited liability)—spared skittish private capital the risk of excessive loss, attachment, or premature liquidation in the event of projects gone awry, making incorporation widely and easily available served the paramount objective of industrial development.<sup>27</sup> The proliferation of what we call “ultra-general” state incorporation laws in the second half of the nineteenth century was, in effect, a policy of promoting industrialization under conditions of scarce public and private capital.<sup>28</sup>

At the macro-level, the principal public benefits of this policy were twofold: unlocking new channels of large-scale capital accumulation and democratizing access to economic opportunity.<sup>29</sup> Its long-term price, however, was a significant retreat of the state, and hence of the public, as the sovereign franchisor of the “hybrid” corporate form. Once corporate privileges became “freely” available without any commitment on the part of the private enterprise—either explicit or implied—to deliver public benefits, the optics of the corporation changed dramatically. Under the new regime of “free incorporation,” both the role of the state as the franchisor and the inherent public-private hybridity of the corporation became increasingly invisible. Today, the result is a nearly complete triumph of neoliberal, antistatist, antiregulatory ideas in corporate law, theory, and policy.

Such has not been the case in the regulation, and associated history, of banks. While corporations were being “freed” from state-imposed

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25. See *infra* Part I. We use the term “infrastructure” to refer to something broader than merely the familiar forms encountered in contemporary textbooks on public finance. In addition to communications, transport, water, and schools, for example, our conception includes such goods as social safety nets, libraries, and even efforts affirmatively to change a new nation’s comparative advantage in national and global markets—e.g., from primarily agricultural to commercial and industrial. For additional discussion of this more capacious understanding of infrastructure and our reasons for favoring it, see Robert C. Hockett & Saule T. Omarova, *Public Actors in Private Markets: Toward a Developmental Finance State*, 93 WASH. U. L. REV. (forthcoming 2015).

26. See *infra* Part I.C.

27. See *infra* Part I.C.

28. We are, of course, aware of the multiple alternative explanations and additional political and administrative factors that shaped the historical shift from special chartering to general incorporation statutes of the type that prevail today. For a more extensive discussion of these factors, see *infra* Part I.C. For more on the meaning of “general” and “ultra-general” in connection with incorporation laws, see *infra* note 41 and accompanying text, as well as Part I generally.

29. For more on the role of the democratization rationale, see *infra* note 93 and accompanying text.

controls and conditions, U.S. banks remained subject to the original settlement and, to a great extent, remain subject to it even today.<sup>30</sup> For example, access to bank charters is still subject to strict public control and explicit conditions on banks’ business activities, and violations of these conditions can still lead to charter revocation.<sup>31</sup> Most familiar explanations for why banks are “special” tend to focus on their unique access to explicit public subsidies, including federal deposit insurance and central bank liquidity back-up.<sup>32</sup> While pointing to the most visible and politically salient forms of public support for banks, these explanations paint an incomplete picture. As history shows, banks were subject to a restrictive regime of “special chartering” long before the emergence of a fully-functional Federal Reserve System or the creation of the federal deposit insurance scheme during the New Deal era. Unlike most other businesses, banking was excluded from the nationwide move toward “free incorporating” in the later part of the nineteenth century.<sup>33</sup> Thus, there must be deeper, more pervasive reasons for the special treatment of banking corporations.

This remarkable resilience of the original corporate settlement in banking is fully consistent with—and, in fact, lends significant support to—the franchise conception of the corporation. The reasons for continuity in bank regulation are fundamentally rooted in the more visibly hybrid, public–private nature of the banking business, making a bank’s “specialness” as a corporate entity more a matter of degree than of principle.<sup>34</sup> Unlike other corporations, banks manifestly function as specially privileged *franchisees* dispensing a unique public resource—the full faith and credit of the United States, as administered by its central bank, the Federal Reserve System.<sup>35</sup> Because legislators, regulators, and even the general public remain at least intuitively aware of banks’ essentially pub-

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30. See *infra* Part II.A.

31. See *infra* Part II.A. In discussing the vestigial character of contemporary U.S. bank regulation in this Article, we do not express an opinion as to its practical efficacy or success as a matter of financial stability. As the most recent financial crisis demonstrated, regulatory controls do not guarantee that private profit-seeking in the financial services industry can never cause significant public harm.

32. See, e.g., INT’L MONETARY FUND, GLOBAL FINANCIAL STABILITY REPORT: MOVING FROM LIQUIDITY- TO GROWTH-DRIVEN MARKETS 101–32 (2014), available at <http://www.imf.org/External/Pubs/FT/GFSR/2014/01/pdf/text.pdf>.

33. See *infra* note 97 and accompanying text.

34. See *infra* Part II.B.

35. See *infra* Part II.B. We develop a broader interpretive framework that both illuminates and substantiates this assertion in a separate project. See Robert C. Hockett & Saule T. Omarova, *The Finance Franchise* (2015) (unpublished manuscript) (on file with authors).

lic function, the old corporate settlement continues visibly to exist in their case.

Moreover, this settlement's continuing existence at the very heart of the modern American capitalist system defies claims that public control over business corporations generally—that is, the original incorporation regime—is obsolete, invariably inefficient, or inherently incompatible with that system.<sup>36</sup> Banks may be different from “regular” corporations today, but they are very much alive and well: in fact, the U.S. banking industry currently commands an unprecedented amount of wealth, and large banks' balance sheets dwarf those of most non-bank firms.<sup>37</sup> So, if this particular incarnation of the original franchise model of the corporation is able to grow and generate profits, why is the model so easily—indeed, almost automatically—presumed dead? Such a presumption is neither fair nor accurate.

In fact, under today's conditions of capital abundance and mature systems of national government, it might well be desirable to reestablish some updated rendition of the original corporate settlement that explicitly reflects a mutually beneficial public-private bargain. In this Article, we begin outlining some of the possibilities for reintroducing a few fairly modest but explicit conditions on currently unconditionally granted corporate privileges.<sup>38</sup> We remain fully aware of potential challenges and difficulties associated with this effort.<sup>39</sup> Not only does it raise a wide range of complex practical issues of design and implementation, but it also cuts against some of the core assumptions underlying contemporary corporate law doctrine. Our present goal, however, is not to develop a

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36. See, e.g., Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423 (1993).

37. For example, JPMorgan Chase Bank, N.A., reported almost \$2 trillion in total assets as of June 30, 2015. See *JPMorgan Chase Bank: Consolidated Reports of Condition and Income for a Bank with Domestic and Foreign Offices – FFIEC 031*, FED. FIN. INST. EXAMINATION COUNCIL, <https://cdr.ffiec.gov/Public/ViewFacsimileDirect.aspx?ds=call&idType=fdiccrt&id=628&date=06302015> (last updated Sept. 18, 2015). For comparison, Exxon Mobil's total assets, at the end of 2014, were slightly below \$350 billion. See *XOM Company Financials*, NASDAQ, <http://www.nasdaq.com/symbol/xom/financials?query=balance-sheet> (last visited Sept. 29, 2015). Of course, the fact that U.S. banks have such huge balance sheets does not mean they are inherently superior to, less risk-prone, or better managed than non-bank corporations. On the contrary, big banks' size may be viewed as both a symptom and a cause of certain systemic vulnerabilities and dysfunctions in the financial services sector. Modern banking and its regulation present many challenges and are far from being problem-free, or perfectly “well” in any substantive sense. In the context of the present discussion, our aim is simply to point out that the resilience of the old corporate settlement in banking did not preclude the growth of large-scale, profitable, privately owned banking firms.

38. See *infra* Part III.

39. For fuller discussion of some of these challenges, see *infra* Part III.C.

grand new theory or a legislative blueprint, but rather to broaden our collective imagination in search of a better balance between public and private interests, both in our economy and in our polity.

To this end, the Article proceeds as follows. Part I briefly examines the genesis, original function, and subsequent evolution of the corporate form in the United States. Part II analyzes modern U.S. bank regulation as a vestigial case of the original view of the corporation as a public-private franchise. Part III discusses the broader normative implications of reviving the franchise view and tentatively outlines our take on how that view could potentially be reinvigorated and reapplied in practice—and what principal challenges are likely to arise on that path.

## I. THE “CORPORATE FRANCHISE”: WHAT IT ONCE WAS

### A. *The Extraordinary Nature of Corporate Privilege*

The idea that one might charter a separate, asset-owning, and perpetually existing corporation, and that owners of that corporation might avoid personal liabilities—all for no nobler purpose than simply “to make money” for oneself—has been part of the American business landscape for so long now that hardly anyone pauses to wonder whether things were always so.<sup>40</sup> Yet, the answer here is quite clear: things were *not* always so. Indeed, the advent of the cross-categorical general incorporation law, pursuant to which incorporation and attendant liability limitations could be had for any purpose whatsoever, dates back only to the end of the nineteenth century.<sup>41</sup> Prior to that, corporate privileges

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40. This common assumption finds ideal expression in a well-known provision of Delaware law stating that a firm may be incorporated “to conduct or promote any lawful business or purposes.” DEL. CODE ANN. tit. 8, § 101(b) (2013).

41. See SEAVOY, *supra* note 18, at 6–7, 191–254; see also Ronald E. Seavoy, *The Public Service Origins of the American Business Corporation*, 52 BUS. HIST. REV. 30 (1978). Seavoy’s focus is principally upon developments in the State of New York, which he (reasonably, in our view) takes to be emblematic of developments across the United States. For studies that reach similar results to those of Seavoy in other U.S. jurisdictions see, for example, JOHN WILLIAM CADMAN, *THE CORPORATION IN NEW JERSEY: BUSINESS AND POLITICS, 1791–1875* (1949); EDWARD MERRICK DODD, *AMERICAN BUSINESS CORPORATIONS UNTIL 1860, WITH SPECIAL REFERENCE TO MASSACHUSETTS* (1954). For similar takes on the development of the corporate form in the U.K., see, for example, RONALD RALPH FORMOY, *THE HISTORICAL FOUNDATIONS OF MODERN COMPANY LAW* (1923); BISHOP CARLETON HUNT, *THE DEVELOPMENT OF THE BUSINESS CORPORATION IN ENGLAND, 1800–1867* (1936).

A brief word on terminology is in order. The term “general” in “general corporation law” refers to the absence of any need for a separate legislative act to charter a particular firm. In other words, it implies that the legislature that has passed the law in question has delegated the individual firm-chartering decision to an administrative officer such as a secretary of state. The first such laws were not “general” in the sense of making incorporation available for any purpose whatever. The first general incorporation laws, indeed, were passed in connection with firms devoted to specific

were available only for projects with manifestly public purposes, and often only on condition that legislatures (or their appointed administrative agents) could verify that the incorporators actually pursued the promised projects.<sup>42</sup>

It is not difficult to appreciate why, in those earlier times, corporate privileges would have been the exception and not the rule. Nor is it difficult to discern the bases on which such exceptions would have first come to be made. The separate and perpetual existence of a business firm, understood as something over and apart from its owners or principal constituents, would have marked a significant departure from the earlier law of partnership, pursuant to which firms ceased to exist the moment that even one constituent left the firm or violated its constitutive documents.<sup>43</sup> By the same token, the first steps toward legal segregation of constituent assets from firm assets was formally recognized to be an innovation, via the development of what courts forthrightly called a new property form—the so-called tenancy in partnership.<sup>44</sup>

As for that form of asset segregation now known as limited shareholder liability, such a privilege is per se exceptional in any legal system that values and vindicates responsibility and accountability—i.e., liability. The entirety of the law of civil obligation—in particular, contract and tort law—is predicated on liability.<sup>45</sup> Contract law enables one citizen to hold another citizen responsible for his or her promises, provided that these were bargained for or have induced reasonable reliance on the part of another.<sup>46</sup> Tort law enables one citizen to hold another citizen responsible for the harms he or she directly or indirectly causes to others by acting intentionally, recklessly, or negligently.<sup>47</sup> In both cases, accountability—hence potential liability—is of the very essence of the body of law in question. It is what the law is *for*.<sup>48</sup>

These facts of our law hold true even when defendants have acted in concert with others, including by financing others' harmful or prohib-

purposes such as the construction of turnpikes, wharves, and canals. See *infra* notes 64–76 and accompanying text.

42. See, e.g., sources cited *supra* note 8; see also ERNST FREUND, *THE LEGAL NATURE OF CORPORATIONS* (Batoche Books 2000) (1897); JOSEPH STANCLIFFE DAVIS, *ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS* (1917).

43. For an overview of the potential causes of dissolution, see, canonically, UNIF. PARTNERSHIP ACT § 31 (1914).

44. See *id.* §§ 24–28 for a historical overview of the property rights of a partner.

45. See, e.g., JAMES GORDLEY, *FOUNDATIONS OF PRIVATE LAW: PROPERTY, TORT, CONTRACT, UNJUST ENRICHMENT* 7–32 (2006).

46. See, e.g., *id.* at 289–388.

47. See, e.g., *id.* at 159–263.

48. See, e.g., *id.* at 7–32.

ited actions. One does not escape potential liability for burning a home or a business, for example, merely by doing so as part of a mob, or by knowingly supplying the funds that mob members employ to buy torches or accelerants.<sup>49</sup> Indeed, liability in such cases is “joint and several” where the law of civil obligation is concerned, and falls under the sweepingly broad category of “conspiracy” where the criminal law is concerned.<sup>50</sup> Yet this link between act and consequence is precisely what corporate shareholders’ limited liability severs.<sup>51</sup> It limits one’s possible losses, under appropriate circumstances, to no more than the equity capital one put into an enterprise, irrespective of what harms one remotely or proximately facilitates in financing that enterprise.<sup>52</sup>

Why would so extraordinary a set of privileges—separate and perpetual firm existence, asset segregation in general, and limited liability in particular—ever have been conceived, let alone granted?<sup>53</sup> While a full answer to this question is bound to be multilayered and multifaceted, the

49. See, e.g., *id.* at 159–263.

50. “Joint and several” liability falls upon any number of those responsible for a particular injury, such that a successful plaintiff can sue any one or more of those responsible for her harm. Successfully sued parties then have to sue other responsible parties for contribution or indemnification. See *Joint and Several Liability*, WEX LEGAL DICTIONARY & ENCYCLOPEDIA, [https://www.law.cornell.edu/wex/joint\\_and\\_several\\_liability](https://www.law.cornell.edu/wex/joint_and_several_liability) (last visited Sept. 29, 2015). “Conspiracy,” a.k.a. “Pinkerton” liability, is a rough counterpart in criminal law, pursuant to which those who intentionally assist in the planning or execution of a crime, or predicate offense, can be found criminally liable even in circumstances where they do not commit the predicate offense themselves. See *Pinkerton Liability*, WEX LEGAL DICTIONARY & ENCYCLOPEDIA, [https://www.law.cornell.edu/wex/pinkerton\\_liability](https://www.law.cornell.edu/wex/pinkerton_liability) (last visited Sept. 29, 2015).

51. As David Ciepley argues, “a corporate economy is, literally, an institutionalization of individual economic irresponsibility.” Ciepley, *supra* note 19, at 147.

52. See, e.g., ADOLF BERLE & GARDINER MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932); Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879 (1991). For more on the cost-externalizing effects of corporate limited liability see, for example, Phillip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573 (1986); George W. Dent, Jr., *Limited Liability in Environmental Law*, 26 WAKE FOREST L. REV. 151 (1991); Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89 (1985); Joseph A. Grundfest, *The Limited Future of Unlimited Liability: A Capital Markets Perspective*, 102 YALE L.J. 387 (1992); David W. Leebron, *Limited Liability, Tort Victims, and Creditors*, 91 COLUM. L. REV. 1565 (1991).

53. Scholars of corporate law might note here that a general consensus exists in their field as to the reasons for granting limited liability, the key reason being the need to avoid discouraging wealthy individuals from making risky investments. For a brief exposition of that consensus see, for example, William J. Carney, *Limited Liability*, in 3 ENCYCLOPEDIA OF LAW AND ECONOMICS 659, 670–71 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000). Rather than contesting this well-established shareholder-centric view, we aim to supplement it by widening our lens beyond the interests of individual investors and examining the broader public rationale for conferring limited liability. Why should it be thought publicly beneficial to encourage privately accumulated wealth to flow voluntarily toward risky investments? Expanding the explanatory focus in this way offers potentially important new insights and suggests new policy possibilities. See *infra* Part III.

core explanation appears to be rooted in the needs of the nation's economic development at the time.<sup>54</sup> Under circumstances in which capital is scarce and yet must be mobilized for lengthy periods of time for large public infrastructural and industrial projects, and in which government lacks the capacity to mobilize and deploy the necessary capital itself, affording special privileges to private suppliers of capital and their associations can naturally look attractive.<sup>55</sup> It is one obvious means of publicly encouraging the private capitalization of projects that bear public significance when the public itself is not optimally capable of so doing and when private options are significantly limited.<sup>56</sup> In this sense, the corporation can be viewed as a means of outsourcing to private parties the task of critical public investment.<sup>57</sup> So long as the firm does, in fact, invest in public projects, the grant of canonical corporate privileges would appear warranted. Where the firm strays from the purposes originally warranting corporate privilege, however, the purpose of the firm will in effect have been abandoned. Under such circumstances, one might expect that the firm will be deemed to have acted *ultra vires*, its shareholders' corporate privileges accordingly having been abused and in consequence forfeited.<sup>58</sup>

This seems to be largely how things actually worked in late eighteenth- and then nineteenth-century America.<sup>59</sup> Deployable wealth had not yet accumulated in abundance during the colonial and early national periods, nor did significant state or federal capacity exist to accumulate and deploy capital.<sup>60</sup> This was particularly true with respect to the federal

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54. See, e.g., Lyman Johnson, *Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood*, 35 SEATTLE U. L. REV. 1135, 1153–54 (2012) (arguing that a for-profit corporation was viewed as an ideal legal and business vehicle for promoting industrial growth in nineteenth-century America).

55. For the case of New York see, for example, SEAVOY, *supra* note 18, at 3–7 and *passim*. For New Jersey, see CADMAN, *supra* note 41, at 3–83. For Massachusetts, see DODD, *supra* note 41, at 44–46, 158–63, 226–65, 349–54. See also JOHN LAURITZ LARSON, *INTERNAL IMPROVEMENT: NATIONAL PUBLIC WORKS AND THE PROMISE OF POPULAR GOVERNMENT IN THE EARLY UNITED STATES* (2001).

56. See sources cited *supra* note 55.

57. See, e.g., Oscar Handlin & Mary F. Handlin, *Origins of the American Business Corporation*, 5 J. ECON. HIST. 1, 22 (1945) (“At its origin in Massachusetts the corporation was conceived as an agency of government, endowed with public attributes, exclusive privileges, and political power, and designed to serve a social function for the state. Turnpikes, not trade, banks, not land speculation, were its province because the community, not the enterprising capitalists, marked out its sphere of activity.”).

58. See sources cited *supra* notes 13–14.

59. See sources cited *supra* note 41.

60. See sources cited *supra* note 41; see also LARSON, *supra* note 55; Robert E. Wright, *Rise of the Corporation Nation*, in *FOUNDING CHOICES: AMERICAN ECONOMIC POLICY IN THE 1790S* 217 (Douglas A. Irwin & Richard Sylla eds., 2011), which is informative, if a bit triumphalist.

government once President Andrew Jackson vetoed legislation that would have renewed the charter of the nation’s de facto infrastructure bank, the Second Bank of the United States.<sup>61</sup> As a result, individual states resorted to offering corporate status to firms organized with infrastructure projects in view.<sup>62</sup> The full story can be helpfully divided into several distinct, if unavoidably stylized, historical phases.<sup>63</sup>

*B. The Evolution of the Corporate Form in the United States: From “Franchise” to “Free Incorporation”*

The first phase in the evolution of the American corporation, commencing during the late colonial era and continuing into the early national period, saw colonial, then state, legislatures individually chartering specific corporate organizations for a quite limited number of specific purposes. These first incorporated organizations were primarily municipalities, educational and charitable (a.k.a. “benevolent”) institutions, and certain partnerships that provided commercially salient public infrastructure like wharves.<sup>64</sup> The second phase saw the widespread enactment of “general” incorporation statutes—i.e., statutes delegating the chartering function from legislatures to administrative functionaries—for institutions of the same general type: municipalities, religious congregations, educational institutions and libraries, medical societies, and the like.<sup>65</sup> The key benefit of incorporation for these nonbusiness entities was an explicit recognition of their legal right collectively to own property, such as land, in the name of the entity itself, and to assert their collective property and contractual rights in court.<sup>66</sup>

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61. For New York, see SEAVOY, *supra* note 18, at xi-xii, 105, and *passim*. For New Jersey, see CADMAN, *supra* note 41, at ix-xiv, 3-83. For the United States generally, see DODD, *supra* note 41, at 3-9, 11-65, 123-88. For Massachusetts, see DODD, *supra* note 41, at 195-441. For more on the significance of a central bank for purposes of public mobilization of capital for infrastructure and other public projects in early America, see, for example, Hockett & Omarova, *supra* note 25.

62. See sources cited *supra* note 41.

63. Phases here largely track the “stages” proposed in SEAVOY, *supra* note 18, at 5-7. Seavoy himself notes that the boundaries between these stages are not altogether hard-and-fast, particularly given the different rates at which differing states entered into and passed through them. See *id.* at 7 (“In this whole development, there were many overlappings, so that these categories are not consecutive for any once class of corporation in any one state.”).

64. For New York, see, for example, SEAVOY, *supra* note 18, at 3-4, 9-38. For New Jersey, see CADMAN, *supra* note 41, at 3-83. For the United States generally and Massachusetts particularly, see DODD, *supra* note 41, at 44-45, 158-63, 226-65, 349-54.

65. For New York, see, for example, SEAVOY, *supra* note 18, at 9-38. For New Jersey, see CADMAN, *supra* note 41, at 3-83. For the United States generally and Massachusetts particularly, see DODD, *supra* note 41, at 265-66, 354-61.

66. See sources cited *supra* notes 64-65.



The third phase saw the widespread enactment of "general" *regulatory* statutes.<sup>67</sup> These laws were "general" and "regulatory" in the sense that they enumerated in single-fell-swoops all of the powers and limitations attending specific named types of corporations, while still requiring that legislatures authorize individual charters on a firm-by-firm basis.<sup>68</sup> The kinds of firm to which these statutes applied were almost uniformly devoted to the construction of so-called internal improvements, such as commercially salient public infrastructures, and were suggestively labeled "franchise corporations."<sup>69</sup> Partly for this reason, and partly because these "franchise corporations" typically enjoyed toll-collecting and eminent domain powers, in addition to limited liability and other corporate privileges,<sup>70</sup> legislatures granted them charters only after public hearings at which the public need and desirability of any such firm could be thoroughly vetted.<sup>71</sup>

The fourth phase in the development of the American corporate form brought "general" incorporation statutes of the kind first developed for "benevolent" organizations to "franchise corporations" as well, at least where they did not compete in spheres of activity already occupied by sole proprietorships and partnerships.<sup>72</sup> Legislatures, in other words, began delegating charter decisions to administrative functionaries as they had previously done in the case of religious and charitable corporations.<sup>73</sup> At the same time, the class of "public service" functions recognized by such statutes gradually broadened to include more overtly profitable undertakings. This was the case where clear public benefits continued to accompany the private benefits, which were sought by constituents of such firms.<sup>74</sup> Examples included telegraph, railroad, gas, and then elec-

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67. For New York, see, for example, SEAVOY, *supra* note 18, at 5, 39–52. For New Jersey, see CADMAN, *supra* note 41, at 3–83. For the United States in general and Massachusetts in particular, see DODD, *supra* note 41, at 265–66, 354–61.

68. See sources cited *supra* note 67.

69. See sources cited *supra* note 67; LARSON, *supra* note 55.

70. See sources cited *supra* note 67; LARSON, *supra* note 55. The delegation of the state's eminent domain powers to private corporations set up to build much-needed roads and canals was a particularly vivid manifestation of these corporations' role as public instrumentalities.

71. Scholars and practitioners of banking law will immediately recognize a striking similarity here to the substantive and procedural form that bank-chartering decisions continue to take today. For a discussion of bank chartering, see *infra* Part II.A.

72. For New York, see, for example, SEAVOY, *supra* note 18, at 6, 53–236. For New Jersey, see CADMAN, *supra* note 41, at 3–201. For the United States generally and Massachusetts particularly, see DODD, *supra* note 41, at 265–66, 354–61.

73. For the meaning of "general" in the present connection, see *supra* note 41.

74. For New York, see, for example, SEAVOY, *supra* note 18, at 5, 39–52. For New Jersey, see CADMAN, *supra* note 41, at 3–201. For Massachusetts in particular and New England more generally, see DODD, *supra* note 41, at 364–437.

tric lighting firms, as well as banks, insurance companies, and mutual loan firms.<sup>75</sup> However, as the web of proposed legislatively recognizable “public services” grew, political controversy predictably began to attend the process of drafting and enacting general incorporation statutes.<sup>76</sup>

These controversies were ultimately resolved at the end of the nineteenth century by the proliferation of what might be called “*ultra-general*” incorporation statutes, which permitted incorporation for more or less any lawful purpose.<sup>77</sup> By the early twentieth century, these statutes effectively rendered the corporate form freely, easily, and unconditionally available to all who sought its benefits. This principle of “free incorporation” defines the fifth phase of American corporate law development, amidst which we live to this day.<sup>78</sup>

### C. *The Demise of the Franchise View: Some Explanations*

This brief overview of American corporate evolution reveals a crucial dynamic that tends to be overlooked in contemporary discussions of the corporation. The critical—and now almost universally ignored—point is that in all phases before the fifth phase, strict conditions attached to the granting of limited liability and other corporate privileges.<sup>79</sup> Firms had to state their particular public purposes in their charters and then hew to those purposes in pursuit of their activities.<sup>80</sup> Legislatures, and later public administrators, had to charter every firm separately, and acted—partly through public hearings, partly through reporting requirements—to ensure that particular incorporated firms were publicly necessary and

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75. See sources cited *supra* note 74.

76. See sources cited *supra* note 74.

77. For the case of New York, see SEAVOY, *supra* note 18, at 6–7, 177–230, 266–74. For New Jersey, see CADMAN, *supra* note 41, at 3–201. For Massachusetts in particular and New England more generally, see DODD, *supra* note 41, at 364–437.

78. It is possible to argue, however, that the relatively recent proliferation of limited liability *partnership* variants—such as the limited liability company (LLC) and limited liability partnership (LLP), both of which allow for limited liability without exacting the public-benefiting quid pro quo of “double taxation”—properly marks the beginning of the sixth phase in this historical process. During the 1980s, firms of professionals such as doctors, lawyers, accountants, and others, citing a putative “liability crisis,” began lobbying state legislatures to recognize new business-organizational forms that combined the pass-through taxation advantages of the general partnership business form with the limited liability advantages of the corporate form. The limited partnership form, available long before 1980, did not quite fit the bill because it required passivity on the part of the limited partner in return for limited liability status—a condition incompatible with active participation in running the firm on the part of practicing doctors, lawyers, etc. Ultimately, these lobbying efforts paid off as states began introducing new “hybrid” species of business form, including the LLC and LLP forms. For more on the history of these developments see, for example, WILLIAM T. ALLEN ET AL., COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATIONS 121–35 (4th ed. 2012).

79. See *supra* notes 64–76 and accompanying text.

80. See *supra* notes 64–76 and accompanying text.

abided by the terms of their charters.<sup>81</sup> Firms also had to maintain capital buffers to minimize the chance that any creditors would be harmed by the moral hazard dangers occasioned by limited shareholder liability.<sup>82</sup> Violations of these conditions were considered abuses of the corporate form, or deeds *ultra vires* (i.e., outside of the firms' legitimate powers), and accordingly brought forfeiture of the limited liability shield and other corporate privileges enjoyed by the firm and its shareholders.<sup>83</sup>

All of these characteristics of the corporation law regime until the late nineteenth century combined to make plain why many corporations were considered, and typically called, "franchises" throughout this period.<sup>84</sup> Most corporations, even when not municipal but privately owned, were treated essentially as public franchisees. They were creatures of the public, created and empowered to act, in significant measure, on behalf of the public.<sup>85</sup> In effect, they were privately financed, and privately profiting, public agents.<sup>86</sup> What, then, changed in the later-nineteenth century? How did the franchise character of the corporation, and with it the conditionality of corporate privileges, come to dissipate and eventually disappear?<sup>87</sup>

The answer appears to be in part innocent, and in part sordid. The innocent element of the explanation lies in the interplay among three key sets of factors: economic, political, and administrative. The needs of industrialization under conditions of capital scarcity provided the fundamental economic impetus for deep change in the incorporation regime in the later part of the nineteenth century.<sup>88</sup> This was a time when large, capital-intensive industries began growing and proliferating throughout

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81. See *supra* notes 64–76 and accompanying text. As one scholar described it, each special charter was essentially "a private bill creating the particular corporation," which "outlined the corporation's terms and conditions, such as authorized capital and permitted activities, applicable to that individual corporation, and in certain circumstances granted special privileges such as monopoly and eminent domain rights." Susan Pace Hamill, *From Special Privilege to General Utility: A Continuation of Willard Hurst's Study of Corporations*, 49 AM. U. L. REV. 81, 85 (1999).

82. See ALLEN ET AL., *supra* note 78, at 141. In general, moral hazard arises because shareholders, whose potential losses (but not gains) are capped, are incentivized to push the corporation they control to take excess risks in hopes of excess returns.

83. See sources cited *supra* notes 13–14.

84. See, e.g., DODD, *supra* note 41, at 349–59, 435; LARSON, *supra* note 55; SEAVOY, *supra* note 18, *passim*.

85. See, e.g., JOHNSON, *supra* note 54, at 1144–45.

86. See Handlin & Handlin, *supra* note 57, at 22–23.

87. Or, as Seavoy might put it, what accounts for "the transfer of the public service function from benevolent corporations (primarily religious congregations and academies) to internal improvement corporations (turnpikes and bridges) to business corporations that exploited an anonymous market (manufactories)"? See SEAVOY, *supra* note 18, at 7.

88. See JOHNSON, *supra* note 54.

the country, and their growth generated demand for new financing channels.<sup>89</sup> Making long-term equity investing easier and less risky was a readily available means of satisfying this demand and encouraging the accumulation of capital on a more massive scale. Crucially, the corporate form made it possible to segregate and lock in productive assets necessary to undertake large-scale, specialized projects with lifespans longer than those of single generations of investors.<sup>90</sup>

Accelerating industrial growth also put new pressures on the still underdeveloped administrative capacities of individual states. In the second half of the nineteenth century, it became increasingly difficult for legislatures to incorporate every firm separately, rather than in a plenary fashion through the operation of general incorporation laws.<sup>91</sup> It also became more difficult to parse out and specify with particular precision what benefits yielded by industrialization were “public” in character and which were “merely private.”<sup>92</sup> It accordingly grew more difficult to decide precisely which corporate acts were *ultra vires* and which were not, which increasingly problematized the viability of the *ultra vires* doctrine itself. In light of these challenges and the resulting administrative overload, simplifying the process of incorporation and lightening the burden of regulatory oversight were rational responses on the part of overwhelmed state governments.

Finally, there appears to have been an understandable ideological element—a clamoring for the democratization of corporate privilege—at work in the move toward what this Article labels “ultra-general” incorporation statutes. Aspiring entrepreneurs and would-be investors, who plausibly viewed some grants of corporate privilege as cases of cronyism among government and economic elites, began demanding equal access to corporate privileges, and democratic legislatures increasingly responded to these demands.<sup>93</sup> In this respect, the move toward ultra-general in-

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89. For the case of New York see, for example, SEAVOY, *supra* note 18, at 6–7, 177–230, 255–74. For New Jersey, see CADMAN, *supra* note 41, at 111–201. For Massachusetts in particular and New England more generally, see DODD, *supra* note 41, at 364–437.

90. See, e.g., Stout, *supra* note 8, at 687–88.

91. See sources cited *supra* note 89.

92. See sources cited *supra* note 89.

93. See sources cited *supra* note 89; see also Howard Bodenhorn, *Bank Chartering and Political Corruption in Antebellum New York: Free Banking as Reform*, in CORRUPTION AND REFORM: LESSONS FROM AMERICA’S ECONOMIC HISTORY 231 (Edward L. Glaeser & Claudia Goldin eds., 2006); Eric Hilt, *Corporation Law and the Shift Toward Open Access in the Antebellum United States* (Nat’l Bureau of Econ. Research, Working Paper No. w21195, 2015); Eric Hilt, *History of American Corporate Governance: Law, Institutions, and Politics* (Nat’l Bureau of Econ. Research, Working Paper No. 20356, 2014); Eric Hilt & Jacqueline Valentine, *Democratic Dividends: Stock-*

corporation can be viewed as a move away from elitism and oligopoly toward greater economic democracy and competition.<sup>94</sup>

Predictably, alongside all of these good faith reasons for loosening corporate requirements were less noble ones. Corporate privilege in general, and unconditional limited liability in particular, constituted a grand invitation to externalize costs upon others, and those actuated by such temptations found nobler-sounding rationalizations of their demands for corporate status ready at hand in the previously described developments.<sup>95</sup> It is difficult to quantify precisely how prevalent responsibility-ducking motives were among even those clamoring for “free incorporation” on plausible political and economic grounds. However, the literature suggests that, by the late nineteenth century, the “market for incorporation” had become rife with “stock-watering,” creditor-swindling, and other scams.<sup>96</sup>

Ironically, advocates of so-called free-banking and other minimally regulated forms of financial service (such as insurance and nonbank lending) appear to have played a lead role in gradually persuading legislatures to drop the conditions once generally imposed upon corporate status.<sup>97</sup> These advocates, primarily entrepreneurs looking for additional sources of credit to finance rapid business expansion, sought and eventually procured general incorporation statutes for banks and other lending institutions—institutions expressly founded for purposes of profit-making but easily characterized as public utilities under conditions of

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holding, *Wealth and Politics in New York, 1791–1826* (Nat'l Bureau of Econ. Research, Working Paper No. 17147, 2011).

94. See sources cited *supra* note 93. We emphasize that our claim here is not that the original corporate settlement was perfectly effective in curbing private abuses and serving the public interest in every instance. Any such claim would be naïve, at best. Our goal is merely to bring into focus the fundamental conceptual and normative shift in the prevailing understanding of the corporation, which took place in the later part of the nineteenth century.

95. See, e.g., Hansmann & Kraakman, *supra* note 52.

96. See, e.g., ALLEN ET AL., *supra* note 78, at 161.

97. “Free banking” refers to a specific period in U.S. history (1836–1863) during which there was no federal bank regulation and no central bank, state bank charters were “freely” available without special legislative grants, and individual banks were free to issue their own paper currencies. The free banking era was notoriously turbulent, with highly unstable and unreliable currency values and high rates of bank failure. RICHARD SCOTT CARNELL ET AL., *THE LAW OF FINANCIAL INSTITUTIONS* 9 (2013). For more on free banking and its history see, for example, Howard Bodenhorn, *Entry, Rivalry and Free Banking in Antebellum America*, 72 *REV. ECON. & STAT.* 682 (1990); Andrew Economopoulos & Heather O’Neill, *Bank Entry During the Antebellum Period*, 27 *J. MONEY, CREDIT & BANKING* 1071 (1995); Kenneth Ng, *Free Banking Laws and Barriers to Entry in Banking, 1838–1860*, 48 *J. ECON. HIST.* 877 (1988). For the role played by free banking advocacy in pushing the proliferation of general corporate laws, see, for example, SEAVOY, *supra* note 18, at 53–176.

capital scarcity.<sup>98</sup> Their successes paved the way for procurement of general incorporation statutes by other for-profit institutions including non-financial businesses. As discussed below, success along these lines is ironic in light of the fact that modern banks have become classic vestigial cases of the older, more restrictive corporate-regulatory environment.<sup>99</sup>

In any event, over time, the status and understanding of the corporation radically changed from what they originally had been. Corporate charters became easier to obtain, the ultra vires doctrine declined, dissipated, and ultimately disappeared,<sup>100</sup> and even capital regulation was replaced, first with liability insurance requirements and later by virtually no requirements at all.<sup>101</sup> Today, all that remains of the *ancien régime* are the doctrines of equitable subordination,<sup>102</sup> fraudulent conveyance,<sup>103</sup> and corporate veil-piercing.<sup>104</sup> These legal doctrines are designed to police against particularly vulgar forms of abuse of the corporate form that effectively defraud voluntary creditors, but little more.<sup>105</sup>

While the evisceration of strict purpose-focused conditionality and the associated doctrine of ultra vires may be historically justified, and even practically inevitable in light of the factors described above, it

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98. See sources cited *supra* note 97.

99. See *infra* Part II.

100. See Horwitz, *supra* note 21, at 186–87 (“By 1930, the ultra vires doctrine was, if not dead, substantially eroded in practice, reflecting the triumphant view that corporate organization was a normal and natural form of business activity.”); see also Hovenkamp, *supra* note 13, at 1663–64. For a discussion of the limited continuing relevance of the ultra vires doctrine, 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 (2001).

101. See, e.g., sources cited *supra* notes 77 and especially 78.

102. Equitable subordination is a doctrine in the law of debtor–creditor relations pursuant to which a creditor who is also an owner of, or controlling shareholder in, a firm will be subordinated, under appropriate circumstances, to other creditors in insolvency, on the theory that she is at least partly responsible for the firm’s insolvency and is attempting to “jump the queue” in recharacterizing her equity stake in the firm as a credit stake. See, e.g., ALLEN ET AL., *supra* note 78, at 155–61.

103. Fraudulent conveyance is a doctrine in bankruptcy law pursuant to which disbursements to certain creditors prior to insolvency can be reversed, under appropriate circumstances, on the theory that they amount to “queue-jumping” on the part of the favored creditors. *Id.*

104. “Veil-piercing” is the colloquial term for a court showing disregard for shareholders’ limited liability under conditions in which the privilege appears to have been abused to the detriment of third parties who have transacted, voluntarily or involuntarily, with the corporation. “Abuse” can take many forms, including gross undercapitalization, comingling of corporate and personal assets, failure to observe certain corporate formalities, and other factors. Veil-piercing is most often done in the context of closely-held corporations, where disregard of corporate formalities tends to be more easily exposed. The canonical empirical study of American veil-piercing cases, highlighting the factors that appear to have weighed most heavily in court decisions to pierce, is Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036 (1991). A recent update, as well as partial correction of Thompson’s original study, is Peter B. Oh, *Veil-Piercing*, 89 TEX. L. REV. 81 (2010).

105. See, e.g., ALLEN ET AL., *supra* note 78, at 161.

should not automatically be viewed as an immutable “end-of-history” state of corporate law and policy.<sup>106</sup> Fundamental changes in the economic, political, and ideological conditions that originally justified the rise of the “free incorporation” regime may necessitate an open-minded reassessment of that regime’s continuing efficacy and legitimacy.<sup>107</sup> Moreover, even as a descriptive matter, the triumph of the current regime is not as universal, and its boundaries are not as absolutely drawn, as is often assumed. The special case of the bank charter—that last vestige of the old corporate order—provides an intriguing opportunity to test some of these assumptions.

## II. THE “BANKING FRANCHISE”: WHAT IT STILL IS

### A. U.S. Bank Regulation: A (Very) Brief Overview

As noted above, the U.S. system of bank regulation in important respects replicates what used to be a system of corporation law more generally. First of all, in contrast to general incorporation, access to bank charters remains subject to exacting and case-by-case public control. The government controls entry into the banking industry by granting limited numbers of bank charters, which are required of anyone wishing to conduct banking business.<sup>108</sup> In this sense, the government confers limited oligopoly status upon commercial banks.

Bank charters are granted on an entity-by-entity basis, with each prospective bank’s organizing group submitting its own application and undergoing an individualized regulatory review.<sup>109</sup> Pursuant to the reviewing process, bank organizers are required to submit detailed personal

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106. In fact, there is significant evidence that the old regime took a long time to disappear, with various forms of “special chartering” and not-strictly-limited shareholder liability continuing to linger in the early decades of the twentieth century. *See, e.g.*, Hamill, *supra* note 81 (offering an empirical study of the continuing practice of “special chartering” by the states as a feature of the early twentieth-century corporate landscape). Notably, American bank shareholders remained subject to a so-called double liability regime until the major regulatory overhaul of 1933. Under this regime, shareholders were responsible for an insolvent bank’s debts beyond their individual investments, in an amount up to the par value of their stock. *See* Jonathan R. Macey & Geoffrey P. Miller, *Double Liability of Bank Shareholders: History and Implications*, 27 WAKE FOREST L. REV. 31, 35–39 (1992).

107. We consider these issues in greater detail below. *See infra* Part III.

108. *See, e.g.*, 12 U.S.C. § 27 (2012). This is the statutory ground for federally-granted, or national, bank charters. Under the so-called dual-banking system maintained in the United States, individual states charter banking institutions as well, each through its own statutory and administrative regime. For more on dual banking, see CARNELL ET AL., *supra* note 97, at 11–12.

109. *See generally* 12 C.F.R. § 5.20 (2014); OFFICE OF THE COMPTROLLER OF THE CURRENCY, CHARTERS: COMPTROLLER’S LICENSING MANUAL (2009), available at <http://www.occ.gov/publications/publications-by-type/licensing-manuals/charters.pdf>.

information that establishes not only their professional competence but also their integrity and trustworthiness.<sup>110</sup> Bank organizers are required to submit detailed financial information, business plans, and performance projections in order to convince chartering authorities of their ability to provide banking services in a safe and sound manner.<sup>111</sup> Chartering authorities specifically require proof that proposed banks will have sufficient initial capital.<sup>112</sup> Characteristically, another important element of the chartering process is the determination of whether a newly proposed bank will help meet its community’s banking needs—a direct reference to the public interest that the bank is expected to serve.<sup>113</sup>

It is also worth noting that the grant and continuing efficacy of a bank charter are explicitly conditioned on a bank’s ongoing compliance with multiple limitations on its investments and activities. The charter, in other words, remains conditional for as long as it remains in effect, and banks can lose their charters by violating their conditions and effectively acting *ultra vires*. Strikingly similar to general corporation law of the past, U.S. banks are legally permitted to conduct only certain forms of business activities traditionally associated with banking, all of which are affirmatively enumerated in relevant banking statutes.<sup>114</sup> Nearly all non-financial, and even many financial activities and investments, are beyond banks’ legally granted powers.<sup>115</sup> Further, unlike other modern-day corporations, banks are subject to strict regulatory requirements to maintain, at all times, certain minimal levels of equity capital on their balance sheets.<sup>116</sup> The penalties for violating capital requirements are quite harsh: violations can quickly lead to a bank being fined or liquidated, its officers’ being fined or imprisoned, or any combination thereof.<sup>117</sup>

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110. 12 C.F.R. § 5.20(g) (2014).

111. *Id.* § 5.20(g)(3), h(1)–(2).

112. *Id.* § 5.20(g)(3)(ii).

113. *Id.* § 5.20(h)(5).

114. *See, e.g.*, 12 U.S.C. § 24 (2012); *see also* *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970). While it is true that the Office of the Comptroller of the Currency (“OCC”) has at times been quite liberal in its interpretations of the scope of banking powers—see, for example, Saule T. Omarova, *The Quiet Metamorphosis: How Derivatives Changed the “Business of Banking,”* 63 U. MIAMI L. REV. 1041 (2009)—this does not alter the fact that the bank-regulatory regime statutorily presupposes that banks are entities with limited enumerated powers.

115. For a discussion of the general prohibition on U.S. banking organizations’ commercial activities, see Saule T. Omarova, *The Merchants of Wall Street: Banking, Commerce, and Commodities*, 98 MINN. L. REV. 265, 273–92 (2013).

116. Bank capital regulation is a rich and complex subject whose full treatment is beyond the scope of this Article. For more on the U.S. bank capital adequacy regulation, see CARNELL ET AL., *supra* note 97, at 216–39.

117. *See, for example*, 12 U.S.C. § 1818 (2012), to which all banks wishing to receive deposit insurance—irrespective of national or state chartering—are subject. A system of federal capital-



State and federal regulatory and supervisory agencies closely monitor each individual bank's compliance with the applicable rules and regulations. Banks are required to submit detailed information on nearly every aspect of their operations and financial condition to the regulators.<sup>118</sup> Supervisory agencies routinely conduct on-site bank examinations for the purpose of assessing each bank's compliance with the legal and regulatory requirements and conditions attached to their charters.<sup>119</sup> Banks that violate those requirements and conditions run the risk of having their charters revoked.<sup>120</sup>

All of this is quite familiar to anyone with even a basic understanding of how banks, or financial institutions more generally, operate and are overseen in this country.<sup>121</sup> What generally goes unnoticed, however, is how closely contemporary U.S. bank regulation resembles a vestigial form of what once was generic corporation regulation. This is not only intriguing but deeply ironic, given that political pressures in the nineteenth century from advocates of free banking appear to have played a critical role in initially pushing legislatures toward broadening the corporate franchise.<sup>122</sup>

Why, then, does modern U.S. bank regulation retain the basic characteristics of what once was just corporate law simpliciter? Why are banks so clearly "special" as corporate entities?<sup>123</sup>

based requirements and restrictions is known as "prompt corrective action." See 12 U.S.C. § 1831o (2012); see also CARNELL ET AL., *supra* note 97, at 240.

118. For a list of reporting forms applicable to banking institutions, see *Reporting Forms – FFIEC 102: Market Risk Regulatory Report for Institutions Subject to the Market Risk Capital Rule*, FED. FIN. INST. EXAMINATION COUNCIL, <https://www.ffiec.gov/forms102.htm> (last updated July 7, 2015).

119. For example, the OCC, the primary chartering and supervising authority for federally-chartered U.S. banks, currently employs over 2,000 bank examiners. For more on the OCC's bank supervision, see *Examinations*, OFFICE COMPTROLLER CURRENCY, <http://www.occ.treas.gov/topics/examinations/index-examinations.html> (last visited Oct. 17, 2015).

120. See, e.g., 12 U.S.C. § 93 (2012) (containing provisions governing termination of the rights and privileges of a national bank that commits certain violations of the National Bank Act).

121. It is worth noting that many, but not all, features of U.S. bank regulation apply, in some form or to some extent, to various other types of regulated financial intermediaries, such as insurance companies or securities firms.

122. See *supra* note 97 and accompanying text. For a discussion of the failures of free banking and the rise of central banks, see generally CHARLES GOODHART, *THE EVOLUTION OF CENTRAL BANKS* (1988).

123. Again, the question we pose here differs from the more familiar formulations asking whether or not banks are "special" as a type of *financial intermediary* performing certain unique functions (e.g., providing transactional accounts, operating payments systems, serving as key providers of credit and channels of transmission of monetary policy). See Corrigan, *Are Banks Special?*, *supra* note 2. Access to explicit public subsidy in the form of federal deposit insurance and the central bank's liquidity support are also frequently used to explain why banks are "special"—i.e., specially regulated—financial services providers. Our focus in this Article, however, is on what we see

*B. The Source of “Specialness”: Banks as Public Franchisees*

We suspect that banks continue to be treated as all corporations once were because in their case, the essential public–private franchise nature of the entity remains more starkly—if nevertheless seldom articulately—apparent than it does in the case of other firms.

Discovery of the public–private franchise nature of banks was hard in coming during the course of the “free banking” era from mid- to late nineteenth-century America.<sup>124</sup> It emerged as the main lesson of painful events: multiple currency over-issuances by privately owned banking institutions, followed by system-wide panics and crashes, and the ultimate failure of privately-formed clearing houses as means of pooling and self-regulatory lowering the risks of such crashes.<sup>125</sup> Indeed, it was not until the nation once again established a central bank, the Federal Reserve System, in 1913, then tested its mettle in 1929 and immediately after, that we finally came to fully understand the requisite regulatory consequences of taking the “public utility” view of banks as seriously in respect of banks’ *responsibilities* as we did, at the behest of the “free bankers,” in respect of their *rights*.<sup>126</sup> Today, nearly a century later, re-discovering and reaffirming this painfully derived historical understanding of banks’ public–private franchise nature should once again be at the top of our policy agenda.

In calling for such rediscovery, we use the term “franchise” generally to refer to an arrangement whereby extraordinary privileges are publicly conferred upon private enterprises only insofar as those enterprises perform certain essential public functions.<sup>127</sup> The ways in which banks meet this particular understanding of “franchise” are familiar. The nature of banks as *de facto* public utilities in allocating credit and providing a payments system is commonly noted and recognized as warranting special regulation, if not, according to some, nationalization.<sup>128</sup> However,

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as a conceptually deeper explanation for the unique nature of modern banks as *corporations*. This conceptual shift also has potentially significant implications for revisiting the “specialness” of banks as financial intermediaries. We pursue this line of reasoning in a separate project.

124. See *supra* note 97.

125. See generally sources cited *supra* note 97.

126. For an in-depth scholarly analysis of the history, functions, and internal governance of the Federal Reserve System, see generally PETER CONTI-BROWN, *THE POWER AND INDEPENDENCE OF THE FEDERAL RESERVE* (forthcoming 2016).

127. See *supra* note 17.

128. See, e.g., Gar Alperovitz, Op-Ed., *Wall Street Is Too Big to Regulate*, N.Y. TIMES, July 23, 2012, at A21, [http://www.nytimes.com/2012/07/23/opinion/banks-that-are-too-big-to-regulate-should-be-nationalized.html?\\_r=0](http://www.nytimes.com/2012/07/23/opinion/banks-that-are-too-big-to-regulate-should-be-nationalized.html?_r=0); Rick Newman, *Why Bank Nationalization Is So Scary*, U.S. NEWS & WORLD REPORT (Feb. 22, 2009, 2:27 PM), <http://money.usnews.com/money/blogs/>

banks should also be understood as franchises in a much more particular, indeed nearly literal, sense. This is perhaps best explained by reference to what any private banking institution linked to and backed up by a nation's central bank actually dispenses—namely, the full faith and credit of whatever nation has chartered the bank.<sup>129</sup> In other words, it is not merely credit that banks in modern economies dispense—it is ultimately *public* credit. This distinction is crucial for understanding the nature of modern banking and bank regulation.

Explaining the mechanics of a typical bank lending transaction will help in elucidating this distinction. In the United States, when a bank receives an application from a creditworthy entrepreneur to borrow, the bank opens or credits an account in the name of the borrower, then books the transaction as both (1) an asset and a matching liability of its own, and (2) an asset and a matching liability of the borrower.<sup>130</sup> The transaction books as an asset of the bank because the bank is now owed on the loan. It books as a liability of the bank because the bank must now honor all drafts drawn on account by the borrower up to the loan amount. At the same time, the transaction books as an asset of the borrower because the borrower now owns, and is able to draw payments upon, a new (or newly credited) account. It books as a liability of the borrower because the borrower must repay the bank in accordance with the terms of the loan agreement.<sup>131</sup>

As a matter of accounting, this transaction does not violate any particular Newtonian law-like principle of, say, the “conservation of assets relative to liabilities.” There continues to be a direct one-to-one corre-

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flowchart/2009/02/22/why-bank-nationalization-is-so-scary (“Former Federal Reserve Chairman Alan Greenspan has advocated nationalizing select banks. Famed prognosticator Nouriel Roubini says it’s the only way to go, since the whole sector is effectively insolvent. Sen. Chris Dodd, chairman of the Senate Banking Committee, roiled the markets recently by saying nationalization may be necessary for awhile.”); see also Corrigan, *Are Banks Special?*, *supra* note 2.

129. The discussion in the next several paragraphs draws partly upon Hockett & Omarova, *supra* note 35.

130. For an accessible, while not excessively over-simplified, account of the mechanics of bank lending, see Michael McLeay et al., *Money in the Modern Economy*, 54 BANK OF ENGLAND Q. BULL. 4 (2014), available at <http://www.bankofengland.co.uk/publications/Documents/quarterlybulletin/2014/qb14q101.pdf>; see also Bank of England UK, *Money Creation in the Modern Economy*, YOUTUBE (March 12, 2014), <https://www.youtube.com/watch?v=CvRAqR2pAgw> (a helpful video series the Bank of England has produced to complement the McLeay article). An abbreviated and likewise accessible description of how bank lending works (although somewhat overstating the reserve and capital requirements to which the bank likely is subject in the United States) is John Carney, *Basics of Banking: Loans Create a Lot More than Deposits*, CNBC (Feb. 26, 2013, 5:57 PM), <http://www.cnbc.com/id/100497710>. See also John Carney, *What Really Constrains Bank Lending*, CNBC (Apr. 5, 2012, 5:08 PM), <http://www.cnbc.com/id/46970418>.

131. See sources cited *supra* note 130.

spondence between assets and liabilities, which by accounting convention are always mutually canceling.<sup>132</sup> Nevertheless, as a result of this simple lending transaction, there is now more money at work in the economy, as routinely tracked by that measure of money known as “bank-,” “credit-,” or “broad-money.”<sup>133</sup> Now, when the borrower draws on the bank account to pay third parties for their goods and services, those funds end up being deposited by the recipients in their own bank accounts, resulting in new rounds of corresponding asset-liability increases in the banking system.<sup>134</sup> In this sense, the original loan transaction does effectively violate (at least, until the loan is discharged and extinguished) whatever the monetary counterpart to the Newtonian principle of “conservation of energy” might be called. By making that original loan, the bank has indeed (temporarily) created a form of “bank-money” seemingly out of thin air.<sup>135</sup>

As if to underscore the last point, the central bank or monetary authority will have to *accommodate* this act of money-creation undertaken by the privately owned lending bank.<sup>136</sup> This is an inevitable result of the fact that, in most modern economies, the central bank or monetary authority maintains an overnight, interbank lending rate target and/or administers a payments infrastructure on which privately drawn checks clear at par.<sup>137</sup> If the central bank refuses accommodation, then (a) the lending bank will have to borrow from other banks to meet its reserve requirements,<sup>138</sup> placing upward pressure on the interbank rate, (b) some checks drawn on the lending bank will fail to clear at the central bank, or (c) both.<sup>139</sup>

132. See sources cited *supra* note 130.

133. See sources cited *supra* note 130; see also ANN-MARIE MEULENDYKE, U.S. MONETARY POLICY AND FINANCIAL MARKETS 8–16 (1998).

134. For an accessible and short explanation of how bank loans create deposits, see PETER L. BERNSTEIN, A PRIMER ON MONEY, BANKING, AND GOLD 49–65 (John Wiley & Sons, 2008) (1965).

135. *Id.*

136. See *infra* note 139 and text accompanying notes 139–140.

137. For a general overview of how the Federal Reserve System maintains interbank lending rates and administers the U.S. payments system, see, for example, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, THE FEDERAL RESERVE SYSTEM: PURPOSES & FUNCTIONS (9th ed. 2005), available at [http://www.federalreserve.gov/pf/pdf/pf\\_complete.pdf](http://www.federalreserve.gov/pf/pdf/pf_complete.pdf).

138. In the United States, depository institutions are required to maintain a specified fraction of their liabilities in reserve, either in cash or as reserve account balances at the relevant Federal Reserve Bank. See *id.* at 41–42.

139. For more on these mechanics and what drives them, see, for example, Jaromir Benes & Michael Kumhof, *The Chicago Plan Revisited* (Int’l Monetary Fund, Working Paper No. 12/202, 2012); Ulrich Bindseil, *The Operational Target of Monetary Policy and the Rise and Fall of Reserve Position Doctrine* (European Cent. Bank, Working Paper No. 372, 2004); and Piti Disyatat, *Monetary Policy Implementation: Misconceptions and Their Consequences* (Bank for Int’l Settlements, Working Paper No. 269, 2008).

The central bank will then accommodate the private bank's loan by crediting that bank's reserve account, thereby enabling checks drawn on the new account by the original borrower from the bank to clear.<sup>140</sup> In effect, the central bank will be publicly monetizing the promissory note signed by the individual borrower in favor of the lending bank, placing the full faith and credit of the nation behind the credit of the individual. The entire process is part of the well-known structural arrangement between the central bank, privately owned banks, and the banks' borrowers.<sup>141</sup>

This briefly outlined and simplified set of mechanics of an ordinary bank loan transaction reveals something very important yet underappreciated about our banking system. It shows that privately owned banks effectively dispense an indefinitely extensible *public resource*, a resource on which they are licensed, moreover, to charge private oligopoly rents. In essence, the banks are privileged, privately run outlets for something that is ultimately publicly produced and more or less freely extended to them—something that the banks, in turn, dispense for a profit. In the United States, that precious something is the monetized full faith and credit of the United States. By allowing banks to earn rents on this resource, we are effectively privatizing seigniorage.<sup>142</sup>

It is unsurprising, of course, that the average member of the public—of that very “we” that collectively produces the ultimate resource in question—is blissfully unaware of the dynamics described above. It is quite possible that even the typical member of Congress may not fully understand this process or be able to articulate its implications. Nevertheless, most policymakers must be at least intuitively aware of the special nature of the banks as dispensers of a public resource—hence of their role as franchisees. It is likely for this reason that so many vestiges of the old corporation law regime remain in place where banks are concerned. The original “corporate franchise” is alive and well in their case.

### *C. Potential Fragility of “Specialness”*

In recent decades, however, there have been trends that sometimes appear to portend a fate for banking law not unlike that of corporation

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140. See sources cited *supra* note 139.

141. See sources cited *supra* note 139.

142. Seigniorage is the premium enjoyed by an issuer of money in virtue of his, her, or its capacity to spend the very money that he, she, or it is issuing. For example, if a dollar—which is a Federal Reserve Note—costs .01 dollars to print, the Fed enjoys .99 dollars worth of seigniorage on every paper dollar it spends. In turn, where the Fed issues dollars simply through keystrokes the seigniorage it enjoys is greater yet.

law. Two related phenomena stand out in this respect. The first is the steady loosening of various conditions traditionally attached to bank charters and the gradual delegation of certain regulatory tasks to banks’ internal management.<sup>143</sup> Since the 1980s, the U.S. banking industry has successfully pushed for a series of legislative and regulatory expansions of bank-permissible structural affiliations, investments, and other activities.<sup>144</sup> Perhaps the most dramatic and far-reaching example of such regulatory expansion is found in the area of banks’ derivatives trading.<sup>145</sup> Another well-known example in this respect is the weakening, and even downright disappearance, of the legal limits on bank affiliations with nonbank firms within holding company structures.<sup>146</sup>

The second phenomenon that threatens banks’ “special” treatment is a tendency among some legal scholars to treat banking practices that culminated in the latest global financial crisis as largely reducible to garden-variety corporate governance matters, as if banks were not “special” after all.<sup>147</sup> Undoubtedly, improving internal governance and correcting

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143. This is, of course, a complex phenomenon whose full discussion far exceeds the scope of this project. For a thoughtful book-length analysis of these general dynamics, see ERIK F. GERDING, *LAW, BUBBLES, AND FINANCIAL REGULATION* (2013).

144. For a thorough examination of these and related developments, see Arthur E. Wilmarth, Jr., *The Transformation of the U.S. Financial Services Industry, 1975–2000: Competition, Consolidation, and Increased Risks*, 2002 U. ILL. L. REV. 215 (2002).

145. For an in-depth examination of the process through which federal bank regulators allowed banks to engage in an increasingly wide range of derivatives activities, see Omarova, *supra* note 114.

146. In the United States, the key event enabling the explosive growth in such affiliations in recent years was the passage of the Gramm-Leach-Bliley Act of 1999, which repealed the Depression-era prohibition on affiliation between commercial banks and securities firms. See Gramm-Leach-Bliley Financial Services Modernization Act, Pub. L. No. 106-102, 113 Stat. 1338 (codified in scattered sections of 12 U.S.C. and 15 U.S.C. (2012)). For more on the impact of this legislation on the growth of large, diversified, bank-centered financial conglomerates, see Omarova, *supra* note 115; Saule T. Omarova, *From Gramm-Leach-Bliley to Dodd-Frank: The Unfulfilled Promise of Section 23A of the Federal Reserve Act*, 89 N.C. L. REV. 1683 (2011).

147. See, e.g., Brian R. Cheffins, *The Corporate Governance Movement, Banks and the Financial Crisis* (European Corp. Governance Inst., Working Paper No. 232/2014, 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2365738&rec=1&srcabs=2491088&alg=1&pos=2](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2365738&rec=1&srcabs=2491088&alg=1&pos=2); David H. Erkens et al., *Corporate Governance in the 2007–2008 Financial Crisis: Evidence from Financial Institutions Worldwide*, 18 J. CORP. FIN. 1 (2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1397685](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1397685); Grant Kirkpatrick, *Corporate Governance Lessons from the Financial Crisis*, 2009 FIN. MKT. TRENDS 1 (2009), available at <http://www.oecd.org/finance/financial-markets/42229620.pdf>; Marcia Millen Cornett et al., *The Financial Crisis, Internal Corporate Governance, and the Performance of Publicly-Traded U.S. Bank Holding Companies* (January 2010), available at <https://www2.bc.edu/~tehrani/Hassan%20published%20paper/Crisis%2001-19-10.pdf>. For a thought-provoking discussion and critique of academics’ and policymakers’ recent “obsession” with corporate governance, see Mariana Pargendler, *The Corporate Governance Obsession* (Stanford L. and Econ., Working Paper No. 470, 2015), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2491088&rec=1&srcabs=](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2491088&rec=1&srcabs=)

various misalignments in banks' internal incentive structures are important and necessary steps toward potentially reducing the overall risks that activities of individual banks pose to the financial system. However, even if individual banks are able to get these things right—and that is a big “if”—changes in their internal governance would not eliminate the need for an additional layer of externally-imposed safeguards aimed at protecting the interests of the broader public as the key bank stakeholder.<sup>148</sup> To the extent that the dominant doctrines of corporate law and governance tend to focus on firms' shareholders, managers, and creditors—typically, easily identifiable private parties with relatively well-defined interests in the firm—these doctrines are generally ill-equipped to address the full complexities of governing inherently hybrid public-private entities such as banks.<sup>149</sup> In many important respects, banks may be exactly like all modern corporations, but in many other respects, they are not.

Ironically, both of these phenomena might contain unintended seeds of deeper wisdom. It might be true that banks are, in fact, not “special” after all; this does not necessarily, however, lead to the conclusion that banks should be treated the same way that general corporations are currently treated by law and legal scholarship. To the contrary, the real lesson might be that all corporations should be treated as they once were, and as banks continue to be. In other words, it might be time for the law to rediscover the franchise-like nature of *any* corporation enjoying publicly-granted privileges, such as separate personality, perpetual existence, asset segregation (including limited shareholder liability), or formally recognized oligopoly status—and accordingly reimpose conditions upon these extraordinary privileges. Scholars, for their part, may have to recognize that faith in the power of corporate governance to avert corpo-

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2571739&alg=1&pos=3.

148. Not surprisingly, in the wake of the recent global financial crisis, there has been a growing recognition and acknowledgment of the fact that the government—and the public it represents—is the ultimate residual stakeholder in privately owned and publicly-backed banks. See Anna Gelpern, *Common Capital: A Thought Experiment in Cross-Border Resolution*, 49 TEX. INT'L L.J. 355 (2014); Hockett & Omarova, *supra* note 25.

149. Some of the limitations of traditional corporate law and corporate governance doctrines became clear in the aftermath of the government bailout of certain large firms during the financial crisis of 2008–2009. For insightful analyses of the doctrinal difficulties that corporate law faces in dealing with a sovereign shareholder, see, for example, Steven M. Davidoff, *Uncomfortable Embrace: Federal Corporate Ownership in the Midst of the Financial Crisis*, 95 MINN. L. REV. 1733 (2011); Steven Davidoff Solomon & David Zaring, *After the Deal: Fannie, Freddie, and the Financial Crisis Aftermath*, 95 B.U. L. REV. 371 (2015); Marcel Kahan & Edward B. Rock, *When the Government Is the Controlling Shareholder*, 89 TEX. L. REV. 1293 (2011); J.W. Verrett, *Treasury Inc.: How the Bailout Reshapes Corporate Theory and Practice*, 27 YALE J. ON REG. 283 (2010).

rate-wrought social ills involves a significant element of wishful thinking, not only for purposes of bank regulation but for purposes of corporation law as well.

This, of course, would be a radical shift in current understandings of the nature of the modern corporation. However, thinking through the potential policy implications of such a shift presents an opportunity for potentially illuminating intellectual experimentation.

### III. IMPLICATIONS OF THE FRANCHISE VIEW: RETHINKING THE PUBLIC-PRIVATE BALANCE

#### *A. Framing the Inquiry: If We No Longer Permit "Free Banking," Why Permit "Free Incorporating"?*

Reminding ourselves of the original public franchise character of the corporation, and of the continuing public franchise character of banking institutions, invites a number of broader reflections on the social functions and significance of existing forms of enterprise organization. Such reflections, in turn, invite tentative new policy considerations. As suggested above, those that are most intriguing play on the continuing vitality of the regulatory commonplace that "banks are special."<sup>150</sup> Inasmuch as the histories of the corporate form and of banking regulation suggest that the latter in its current guise is much like the former in its original guise—and for much the same reasons—banks' "specialness" becomes more a matter of degree than a categorical distinction. From this perspective, it is tempting to engage in a thought experiment and ask whether the stark distinction between the two regulatory regimes in their present forms ought not itself to be blurred at the margins.

We see two principal ways to frame this inquiry. First, if the dispensing of *corporate* privileges is not regulated or conditioned as it once was, should *banking* corporations continue to be regulated as they are? Or second, to flip that question, if banks continue to be regulated as all corporations once were, notwithstanding free banking advocates' lead role in changing the corporation law regime late in the nineteenth century, might it be worth reexamining the latter regime with a view to retrieving some of the lost forms of regulation?<sup>151</sup>

The first question—whether it makes sense to bring bank regulation into closer conformity with the broader corporation law regime—was repeatedly raised by the advocates of banking and broader financial de-

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150. See *supra* note 2 for a reminder of the significance of this regulatory phrase of art.

151. On the historical role played by the free banking movement in pushing the unconditional corporate privilege agenda, see *supra* note 97 and accompanying text.



regulation that started in the 1980s and did not come to a halt until the financial crisis broke out in autumn 2008.<sup>152</sup> For obvious reasons, few are openly posing that question now in the postcrisis period. As painful memories of the 2008–2009 financial crisis fade away, this tiresome debate might well resurface, perhaps cleverly repackaged in updated terminology. Hopefully, that day is still some ways off.

For present purposes, it is the second question—whether it might make sense to re-introduce some form of publicly imposed conditions on, and control over, all private business entities availing themselves of publicly granted corporate privileges—that presents more intriguing policy and intellectual possibilities and deserves closer consideration.

The full force of the question becomes especially clear in light of the fact that most justifications of the continuing existence of corporate privilege today sound ultimately in the imperative of capitalization. This causal link between corporate privilege and capital mobilization is a fundamental assumption underlying the dominant narrative of corporate law and policy. Relentless and unquestioning assertion of this assumed link in every orthodox account made its argumentative, interpretive logic invisible behind the veil of supposedly descriptive “objectivity.” Because modern productive activity is so much more capital-intensive than it was in the early nineteenth century, the argument runs, firms require even heavier participation on the part of scattered investors than they once did.<sup>153</sup> Only in this way can scarce capital be mobilized to finance productive activity in a more or less laissez-faire economy.<sup>154</sup> In order for this to happen, the argument continues, those who help finance firms must not be made to worry that they will lose their personal assets in the event that firms go bankrupt and leave creditors holding empty bags, nor may we allow some contributors to firms to worry that creditors of other contributors might be able to tap firm resources in the event of default by the latter.<sup>155</sup> Furthermore, this line of thought continues, optimal capitalization of firms in primary capital markets requires “deep,” liquid secondary markets lest investors feel trapped by or locked in to their investments.<sup>156</sup> But the development of such markets, in turn, requires that

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152. See, e.g., MATTHEW SHERMAN, CTR. FOR ECON. AND POLICY RESEARCH, A SHORT HISTORY OF FINANCIAL DEREGULATION IN THE UNITED STATES (2009), available at <http://www.cepr.net/documents/publications/dereg-timeline-2009-07.pdf>.

153. For a condensed general statement of the typical argument, phrased in the traditional shareholder-centric language, see, for example, Carney, *supra* note 53, at 669–71.

154. See *id.*

155. See *id.*; see also Hansmann & Kraakman, *supra* note 10.

156. Carney, *supra* note 53, at 669–71; Hansmann & Kraakman, *supra* note 10; see also ALLEN ET AL., *supra* note 78, at 145; KRAAKMAN ET AL., *supra* note 10, at 1–5.

the value of firm shares not vary too closely with the personal wealth or credit exposures of its investor-owners, as it would were firm and investor assets not legally segregated.<sup>157</sup>

This line of argument is entirely intelligible under conditions of capital scarcity that prevailed in the nineteenth century. It is remarkably out of synch, however, with contemporary monetary and financial conditions. One key lesson of the last three decades of financial sector volatility is that credit aggregates and other forms of finance capital are anything but scarce.<sup>158</sup> Moreover, given the role played by any central bank or equivalent monetary authority that administers a sovereign and elastic currency, finance capital cannot be *truly* “scarce.”<sup>159</sup> To the contrary, one of the greatest financial policy challenges we have faced in recent decades is the problem of overabundance and undermodulation—along with the usual dangers of misallocation—of capital in the global financial system.<sup>160</sup> Today’s large, globally-active institutional investors seem to be constantly “searching for yield,” thereby underwriting destabilizing demand for complex financial instruments structured to generate high returns, while hiding the true extent of underlying risk.<sup>161</sup> This suggests that constitutive characteristics of the corporation law regime aimed at attracting share-purchasers—however well-advised they might have looked in the nineteenth century when capital was indeed scarce and

157. See sources cited *supra* note 156.

158. See, e.g., Daniel Alpert, Robert Hockett & Nouriel Roubini, *The Way Forward* (New Am. Found., Policy Paper, Oct. 11, 2011), available at [http://newamerica.net/publications/policy/the\\_way\\_forward](http://newamerica.net/publications/policy/the_way_forward); Ben S. Bernanke, Governor, Fed. Reserve Bd., Remarks at the Sandridge Lecture, Virginia Association of Economists: The Global Saving Glut and the U.S. Current Account Deficit (Mar. 10, 2005), available at <http://www.federalreserve.gov/boarddocs/speeches/2005/200503102/>; see also Hockett & Omarova, *supra* note 35.

159. See Hockett & Omarova, *supra* note 35. The truth and significance of this observation has in recent years been reemphasized by proponents of “Modern Money Theory,” or “MMT.” See, e.g., L. RANDALL WRAY, *MODERN MONEY THEORY: A PRIMER ON MACROECONOMICS FOR SOVEREIGN MONETARY SYSTEMS* (1st ed. 2012).

160. See sources cited *supra* note 158. See also Hockett & Omarova, *supra* note 25.

161. See Hockett & Omarova, *supra* note 25. This capital glut and investors’ “search for yield” fueled the junk-bond craze of the 1980s, interest in loan participations during the 1990s, and the mortgage-backed securities (MBS) bubble of the early- to mid-2000s. During that last episode, high-risk MBSs and related products were structured specifically to get the highest credit ratings indicating their supposedly “riskless” status, while paying interest at rates higher than U.S. government bonds. For in-depth analyses of the effects of the growing investor demand for U.S. government debt, see Arvind Krishnamurthy & Annette Vissing-Jorgensen, *The Aggregate Demand for Treasury Debt*, 120 J. POL. ECON. 233 (2012); Zoltan Pozsar, *Institutional Cash Pools and the Triffin Dilemma of U.S. Banking System* (Int’l Monetary Fund, Working Paper No. 11/190, 2011), available at <http://www.imf.org/external/pubs/ft/wp/2011/wp11190.pdf>; Ben S. Bernanke et al., *International Capital Flows and the Returns to Safe Assets in the United States, 2003–2007* (Federal Reserve System, Int’l Fin. Discussion Papers No. 1014, 2011), available at <http://www.federalreserve.gov/pubs/ifdp/2011/1014/ifdp1014.pdf>.

there was no central bank or monetary authority authorized to issue a currency untethered to specie—are superfluous, if not dangerous, under present conditions.<sup>162</sup>

This observation finds empirical support not only in recent experiences with credit-fueled asset price bubbles, including that in the lead-up to the 2008–2009 financial crisis,<sup>163</sup> but also, less directly, in the increasingly heated debate over certain dysfunctional dynamics in the practice of contemporary corporate finance. For example, it is not uncommon at present to hear complaints that firms increasingly finance operational expansion, insofar as they operationally expand at all, primarily through redeployment of retained earnings rather than new capital infusions, and that such new capital infusions are deployed simply to bring short-term gains to favored shareholders.<sup>164</sup> It is also common to hear complaints that companies are hoarding their earnings, instead of reinvesting them and thus boosting sluggish postcrisis consumer demand.<sup>165</sup> Finally, some critics attack corporate managers for using retained earnings to repurchase shares from current holders with the intent to artificially—and ephemerally—drive up share prices so as to boost managerial compensation calculated by reference to share price.<sup>166</sup> This criticism suggests that some incorporated firms—even nonfinancial firms—are effectively inflating mini-bubbles in their own equity securities simply in order to enrich management, thereby undermining the long-term viability of firms and the productive, employment-boosting activities they are meant to engage in.<sup>167</sup>

It is not the aim of this Article to adjudicate these claims or the scholarly and policy debates they have occasioned. The key point here is that all of these commonly heard complaints derive from conditions of

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162. These characteristics of the corporation law regime may now be dangerous to the extent that they create incentives that tend to enable or exacerbate the inflation of periodic financial asset price bubbles. See sources cited *supra* note 158.

163. See sources cited *supra* notes 158 and 161; see also Robert Hockett, Debt, Deflation, and Debacle (May 21, 2013) (unpublished manuscript), available at [http://papers.ssm.com/sol3/papers.cfm?abstract\\_id=2268230](http://papers.ssm.com/sol3/papers.cfm?abstract_id=2268230).

164. See, e.g., William Lazonick, *The Financialization of the U.S. Corporation: What Has Been Lost, and How It Can be Regained*, 36 SEATTLE U. L. REV. 857 (2013); J. W. Mason, *Disgorge the Cash: The Disconnect Between Corporate Borrowing and Investment*, ROOSEVELT INST. (Feb. 2, 2015), [http://rooseveltinstitute.org/sites/all/files/Mason\\_Disgorge\\_the\\_Cash.pdf](http://rooseveltinstitute.org/sites/all/files/Mason_Disgorge_the_Cash.pdf). A provocative book-length treatment of these matters is LORRAINE TALBOT, *PROGRESSIVE CORPORATE GOVERNANCE FOR THE TWENTY-FIRST CENTURY* (2013).

165. See, e.g., Lazonick, *supra* note 164.

166. See sources cited *supra* note 164; see also William Lazonick, *Profits without Prosperity: Stock Buy-Backs Manipulate the Market and Leave Most Americans Worse Off*, HARV. BUS. REV., Sept. 2014, at 3–11.

167. See sources cited *supra* notes 164–166.

capital overabundance, and that the salience of these arguments is fundamentally incompatible with the concept of capital scarcity or any associated need to lure investments from skittish would-be shareholders. These debates point to problems that emerge only when the quantum of finance capital looking for yield significantly exceeds the capacity of corporate managers to find productive deployments for it. In this context, all of the familiar arguments for continued unconditional corporate privilege sounding in a putative need to attract shareholders, however apt they might once have been, sound strikingly anachronistic.

If the principal public-policy reasons for unconditional grants of corporate privilege—viz. the need to attract scarce, risk-averse private capital to finance industrial development—are no longer as operative as they might have been in the nineteenth century, why does the law remain so unquestioningly wedded to the historical product of that era? What might be done to reintroduce some form of conditionality to the incorporation of business entities?<sup>168</sup>

### *B. Revisiting the Corporate Franchise: Some Tentative Possibilities*

Like any query raising the possibility of upsetting a well-established regime backed by powerful entrenched interests, thinking through what it would be to reintroduce conditions on incorporation is a complex deliberative exercise. At present, it may not be possible to offer definitive answers to the many questions, both technical and political, such an exercise may raise. Nevertheless, it is still possible to start sketching out at least some of the principal options, using U.S. bank regulation as a valuable source of guidance and a vestigial franchise model of incorporation.

The first issue to be addressed is the question of which conditions the public, as franchisor, might wish to impose upon incorporated private business entities. This is, of course, the most important question: what is it the public wants private corporations to do, or refrain from doing, in return for the extraordinary privileges of legally recognized corporate personality, perpetual existence, asset segregation, limited shareholder

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168. One could also ask whether it makes sense to consider abolishing limited liability and certain other corporate privileges altogether. Proposals to replace limited liability with some form of proportionate liability were at the center of a lively debate among corporate law scholars back in the 1980s–1990s. For a representative sample of academic writings on this issue, see *supra* note 52. We do not intend to replay the arguments advanced in this debate, partly because it seems unlikely to be particularly fruitful at this point and partly because we find the issue of reintroducing conditionality far more intellectually intriguing.

liability, and the like?<sup>169</sup> Although the specific requirements imposed upon firms as conditions of incorporation would directly and inevitably shape the scope and operation of a newly restored ultra vires doctrine, the substance of any such conditions is not simply a legal matter—it is a fundamentally political one.<sup>170</sup> Any new requirements will have to reflect deliberate normative judgments as to what types of micro-economic choices and strategies are of sufficient potential significance, from a macro-economic and overall public policy perspective, to warrant explicit intervention.

Ideally, the normative judgments in question should be derived through a process of democratic deliberation, which helps both to legitimize substantive policy choices and to smooth implementation. In practice, of course, reaching any such consensus in the political (or administrative) arena is invariably fraught with conflict, as numerous competing interest groups push forward their own agendas and their own definitions of the relevant “public interest.”<sup>171</sup> In the absence of a clearly articulated collective vision of corporate public responsibilities—or even a public commitment to articulate such a vision—it would be simply too difficult to formulate any complete set of specific, detailed conditions on corporate privilege.

But one has to start somewhere. For practical reasons, it may be best to start small, building from there in a bottom-up fashion. For instance, one might begin by taking a clue from the bank chartering process and require each business entity that seeks incorporation to provide the following to chartering authorities: (1) a more specific description of the business activities it plans to conduct (a statement of “*business purpose*”); and (2) a separate description of how exactly its business activi-

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169. For a reminder of the extraordinary nature of these now commonly taken for granted corporate attributes, see *supra* Part I.A.

170. It is worth noting here that Adolf Berle famously argued that corporate managers are best understood as having a duty to act in the public interest; as such, objectively cognizable public interest is articulated in the political arena. See BERLE & MEANS, *supra* note 52, at 312–13. For an in-depth analysis of Berle’s approach to the role of corporate managers as agents of the public, see William W. Bratton & Michael L. Wachter, *Tracking Berle’s Footsteps: The Trail of The Modern Corporation’s Last Chapter*, 33 SEATTLE U. L. REV. 849 (2010).

171. The concept of public interest is, of course, inherently complex and its meaning is often highly contestable. Given the heightened economic stakes involved, the struggle to define the cognizable public interest is bound to be especially bitter in the context of business or financial regulation. See, e.g., Mike Feintuck, *Regulatory Rationales Beyond the Economic: In Search of the Public Interest*, in THE OXFORD HANDBOOK OF REGULATION 39, 45–46 (Robert Baldwin et al. eds., 2010). Nevertheless, the complexity of this exercise does not lessen the need for, and importance of, undertaking it.

ties would benefit the national, regional, or local economy or community (a statement of “public purpose”).<sup>172</sup>

At this point, it is easy to imagine the familiar reaction of dismissive eye-rolling: “Oh well, everyone knows that asking modern corporations to define their business purposes would be inefficient and impractical!”<sup>173</sup> But this is not necessarily the case. Indeed, our suggestion would require firms’ incorporators, and then managers, to make public commitments to a particular conception of what their companies hope to accomplish, and why the presence of their firms would be good both for those who purchase stakes in them and for the rest of us. Yet, this is actually a good thing. In practice, such boundary-defining exercises are indispensable to the survival and success of any firm as a business concern. Business organizers must be able to “sell” the idea of a new firm as a prospective maker of goods or provider of services to the firm’s target investors before the latter are ready to part with their money.<sup>174</sup> Having a clear understanding of what a prospective company will do, and where it will stand in relation to other entities in the market, is also a prerequisite for successfully managing its affairs as a going concern. As a substantive matter, therefore, publicly declaring this vision in a new firm’s corporate documents should not create any problematic new constraints on the firm’s ability to thrive and generate profits.<sup>175</sup>

The requisite statements of business purpose and public purpose need not be equally elaborate in all cases, so as to avoid unfairly inhibiting the incorporation of small, local firms that might find it more difficult to show any likely large-scale national economic impact. In fact, the criteria for satisfying both the “business purpose” and “public purpose”

172. In effect, the requirement to state the corporation’s “public purpose” would replicate that pursuant to which seekers of new banking charters inform chartering authorities of how their proposed banks will serve the convenience and needs of the community. See *supra* note 113 and accompanying text.

173. For a basic rendition of this assumption see, for example, KLEIN, COFFEE & PARTNOY, *supra* note 13, at 155.

174. In fact, under U.S. securities laws and regulations, publicly traded corporations are explicitly required to describe their business activities in mandatory public filings.

175. It is reasonable to expect that it would be easier for smaller firms to state their business purpose, while diversified corporate conglomerates might find it more challenging to define their core business pursuits in a sufficiently concrete but not overly restrictive manner. As a technical matter, however, arriving at such definition is made significantly easier by the existence of the North American Industry Classifications System (NAICS). NAICS is “the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy.” *North American Industry Classification System*, U. S. CENSUS BUREAU, <http://www.census.gov/eos/www/naics> (last revised Aug. 4, 2015). Choosing the relevant NAICS categories can serve as a helpful basis for preparing the corporation’s “business purpose” statement.

requirements should be sufficiently capacious and adjustable to reflect not only the size and potential economic footprint of an individual corporation but also the relevant industry dynamics and other potentially significant factors.

The “public purpose” requirement raises particularly complex issues in this respect. We do not advocate top-down government imposition of some sort of strict mandate with respect to what business a private corporation must pursue. Given modern market complexities, “public purpose” must be understood as a nonformalistic, capacious, and flexible concept. This is critical for conceptualizing the corporation as a public-private hybrid rather than a purely public instrumentality. At the same time, however, it is important to ensure that clever corporate lawyers do not subvert the new incorporation regime by simply devising a lexicon of blandly noncommittal terms for describing the public benefit individual corporations plan to deliver. For example, vague claims that the corporation’s contribution to the national economy and the public’s well-being consists of “increased competition” or “job creation,” without further detail or substantiation, should not be acceptable as bona fide statements of public purpose. In other words, while these requirements certainly should not create overly strict hurdles, there has to be a showing of some more or less specific positive externality in exchange for the receipt of corporate privileges.

One example of such positive externality, whose presence or absence could be given particularly great weight in reviewing corporate charter applications, is the impact of incorporating a specific business entity on sustainable domestic employment levels. It is hardly an exaggeration to view the massive outsourcing of manufacturing and other jobs abroad in recent decades as one of the most pressing economic policy problems the United States is facing today. As long as U.S. corporations are viewed as purely private actors, single-mindedly pursuing private profits wherever they may be had, it will be nearly impossible to halt this trend in time to avoid potentially irreversible long-term damage to the nation’s manufacturing capacity, broader economy, and sociopolitical cohesion. Conditioning charters on private firms’ commitment to maintain some minimum level of domestic production and employment offers a direct regulatory mechanism for counteracting firms’ incentives to maximize short-term private gains at the expense of long-term public interest.<sup>176</sup>

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176. There are presumably various ways of operationalizing this mechanism. For example, the official chartering criteria might include a requirement that every U.S. corporation at all times maintain something like a “predominantly domestic employer” status, which would be tied to a specified

Furthermore, it might be desirable to treat a corporation's mandatory statements of business and public purposes as incorporated by reference in its charter. This would have several important consequences from the viewpoint of corporate governance. For example, a significant change in the corporation's business model would then require filing an amendment with the chartering authority as well as, perhaps, obtaining shareholder approval.<sup>177</sup> Some might view this as a good way to curb the excessive power of corporate managers, while others might criticize any such arrangement as an undue interference with managerial freedom. From our perspective, what really matters here is the introduction of a procedural point of potential review of proposed corporate actions by the chartering authority as the acting public franchisor. To strengthen this effect, it might be desirable to add two specific features to this "amendment of corporate purpose" regime. First, the law could require that all corporate filings of amended business or public purpose be accompanied by documentation explaining the nature of the proposed change, the primary reasons for it, and the steps the corporation took or plans to take to alleviate any potentially significant negative impact of the contemplated change on the economy or community.<sup>178</sup> Second, the law could mandate

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threshold of the firm's operations being conducted in the United States (or, in some cases, by U.S. citizens paying U.S. taxes). To accommodate certain potentially legitimate contingencies, the new regime might provide exceptions to this requirement. For instance, certain firms may be allowed to shut down or outsource to other countries a greater proportion of its U.S. operations and yet keep their corporate status and privileges intact if they take sufficiently effective steps to alleviate the negative impact of their actions. Such steps might include, for example, a commitment to find comparable new employment or job retraining for its former workers or a pledge of a certain percentage of the corporation's pretax revenues to a public fund set up for such purposes. These are, of course, merely tentative suggestions on how such a regime may be designed. The devil is, as always, in the details. For our purposes, the key is to show that once we overcome certain unquestioned assumptions concerning the legitimate boundaries of public intervention in corporate affairs, we may be able to see a variety of potential solutions to what currently appear as intractable socioeconomic problems.

177. 15 U.S.C. § 80a-13 (2012) (Act provision dealing with "changes in investment policy"). It is worth noting that similar requirements currently apply to federally-regulated investment companies. See Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 to 80a-64 (2012).

178. This requirement is likely to have significant implications for corporate governance, especially in terms of encouraging meaningful participation of corporations' employees and other external stakeholders in corporate decision-making. Thus, in order to convince the regulators that a particular change in the firm's basic business strategy would not cause serious public harm, the firm's managers would be well-advised to consult with the constituencies likely to be directly affected by such change. In this sense, the introduction of even a modest form of conditionality in the chartering process, suggested in this Article, would potentially create an important opening for the emergence of meaningful workplace democracy and a more generally inclusive form of corporate governance.



that no such amendment becomes effective until the chartering authority approves it.<sup>179</sup>

Under this regime, a corporation acting in contravention of its own stated purposes would be deemed to have violated the explicit provisions of its corporate charter and hence the conditions of its incorporation. Then, much as in the banking world, the range of potential penalties for such violations could include mandatory termination of the corporate charter.<sup>180</sup> Furthermore, and again like banks, corporations could also face a direct threat of having their charters revoked if they commit certain violations of legal or administrative rules and thus fail to maintain their regulatory “good standing” status.<sup>181</sup> Explicitly conditioning the continuation of corporate status and attendant corporate privileges on the firm’s legal and regulatory compliance record, in effect, would reframe the notion of corporate purpose in negative terms: it would state what the public franchisor affirmatively does *not* want corporations to do, in view of potential public harms posed by such actions.<sup>182</sup> At the same time, this approach has the advantage of being essentially incremental. All corporations must comply with laws and regulations applicable to their activities and are subject to various, potentially significant, civil, criminal, and administrative penalties for failing to do so.<sup>183</sup> And, even under the cur-

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179. To ease the inevitable logistical pressures, it might make sense to specify situations in which a particular application for amending a statement of corporate purpose would be deemed approved, if the chartering authority did not take any action on such application within a specified period.

180. For a discussion of bank chartering and regulation, see *supra* Part II.A.

181. See *supra* Part II.A. For a discussion of the possibility of using corporate charter revocation as a means of punishing and deterring corporate criminal behavior, see, for example, Mary Kreiner Ramirez, *The Science Fiction of Corporate Criminal Liability: Containing the Machine Through the Corporate Death Penalty*, 47 ARIZ. L. REV. 933 (2005); Kyle Noonan, *The Case for a Federal Corporate Charter Revocation Penalty*, 80 GEO. WASH. L. REV. 602 (2012). By contrast, our primary concern here is broader than criminal deterrence, as we focus on more fundamental state–corporation, or public–private, dynamics. We accordingly view charter revocation as a potential regulatory tool for achieving a broader range of public policy goals than criminal punishment and deterrence alone.

182. It is important to note here that not all legal and regulatory violations should carry with them a threat of charter revocation. It would be reasonable and practical to limit this ultimate penalty to sufficiently serious violations of those laws and regulations that are of particular public significance in the context of each individual corporation’s business. In some situations, however, the trigger for charter termination could be a series of less serious offenses or a persistent pattern of regulatory compliance problems.

183. In fact, all fifty states have quo warranto statutes that empower state officials, such as attorneys general, to seek revocation of corporate charters for certain violations of law and abuse of corporate powers. Not surprisingly in light of current assumptions that corporations are “private” entities, these statutes are virtually never enforced in practice. In this sense, they are reminiscent of the ultra vires doctrine itself. See, e.g., Mitchell F. Crusto, *Green Business: Should We Revoke Cor-*

rent regime, firms that get into serious legal trouble often do not survive as independent business entities, either because they are forced into bankruptcy or because they are acquired by another firm.<sup>184</sup> Writing this result into the corporate charter does not seem quite so radical in this context.

Of course, that raises a question whether the existing system should be tinkered with at all. What real difference would the explicit acknowledgment of the conditional nature of access to the corporate form make? It could potentially make a tremendous difference, in at least two ways.

The first, more immediately visible consequence of introducing conditionality into the corporate regime is that it would force corporate managers and shareholders to develop and publicly articulate a coherent understanding of their firms’ business goals, activities, and potential social functions. It is no coincidence that, after the latest financial crisis, bank regulators came to appreciate, in full, the importance of this type of contemplative exercise as a matter of good internal governance and risk management, especially at large firms.<sup>185</sup> The fact that each corporation’s purposes are prospectively defined and periodically reconsidered may also make the process of corporate governance inherently more transparent, while at the same time opening new channels for holding corporate managers accountable for their decisions.

The second, less immediately visible but potentially more momentous, consequence of our proposed revisions to the existing regime of incorporation is that they would embody a paradigmatic shift in the way corporations are viewed. It is difficult to overestimate the significance of this attitudinal shift. Reintroducing and operationalizing the notion of “corporate franchise” would completely reverse the key presumption underlying the current regime of corporate law and governance: the pre-

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*porate Charters for Environmental Violations?*, 63 LA. L. REV. 175, 186–91 (2003); Noonan, *supra* note 181, at 610.

184. Enron’s infamous failure in 2001 is a vivid example of how fast and painful this fate can be. See, e.g., Richard A. Opiel Jr. & Andrew Ross Sorkin, *Enron’s Collapse: The Overview; Enron Collapses as Suitor Cancels Plans for Merger*, N.Y. TIMES (Nov. 29, 2001), <http://www.nytimes.com/2001/11/29/business/enron-s-collapse-the-overview-enron-collapses-as-suitor-cancels-plans-for-merger.html>.

185. One of the critical postcrisis reforms in U.S. financial sector regulation was the new requirement for large, systemically-significant financial firms to prepare and file with the regulators so-called living wills, or plans for orderly liquidation of their businesses in the event of major distress. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 165(d), 124 Stat. 1376, 1423 (2010). While the practical efficacy of individual banking organizations’ “living wills” in the event of their failure remains subject to considerable doubt, their value as the mandatory exercise in institutional “soul-searching” and “housecleaning” is widely acknowledged.

sumption that incorporation is an essentially prepolitical, extra-legal, and nearly natural right of private individuals with which the state cannot legitimately interfere except in certain rare cases. By contrast, our proposed regime is fundamentally premised on the view of the corporation as a hybrid public-private entity to which the state, as the agent of the public, grants a set of extraordinary privileges, but only in exchange for promises to deliver certain public benefits. Even though the proposed conditions on corporate charters tentatively outlined above are relatively modest and largely leave the task of formulating specific corporate purposes to firms themselves, their adoption would critically alter the broader context in which private and public actors interact, and would potentially reshape the outcomes of such interaction.<sup>186</sup>

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186. It is worth noting that our proposal's overall game-changing potential significantly exceeds that of so-called benefit corporations, which have recently emerged as a preferred form of business organization for companies seeking to combine shareholder profit seeking with the pursuit of certain social or environmental goals. The concept of a benefit corporation was first put forth by a nonprofit organization known as B Lab in 2008. By early 2015, a total of thirty states had adopted some form of B Lab's proposed model legislation providing for a benefit corporation charter. See J. Haskell Murray, *Corporate Forms of Social Enterprise: Comparing the State Statutes* (Jan. 15, 2015), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1988556](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1988556). Several companies—e.g., Etsy, Patagonia, Ben & Jerry's—have decided to reincorporate as benefit corporations.

Benefit corporations must have a stated corporate purpose of creating a general public benefit, which is broadly defined as a “material positive impact on the society or environment” and must be assessed against a third-party standard (i.e., certified). See *Model Benefit Corporation Legislation*, B LAB §§ 102, 201 (June 24, 2014), available at [http://benefitcorp.net/sites/default/files/documents/Model\\_Benefit\\_Corp\\_Legislation.pdf](http://benefitcorp.net/sites/default/files/documents/Model_Benefit_Corp_Legislation.pdf). Among other things, benefit corporations are required to publish “annual benefit reports” detailing their actions intended to produce material public benefits and to appoint an independent “benefit director” specifically charged with monitoring the company's compliance with its stated public benefit purpose. *Id.* §§ 302, 401. The charter explicitly authorizes the corporation's directors to consider the interests of a broad set of stakeholders in making business decisions. *Id.* § 301(a). Finally, the model legislation contemplates a new mechanism of “benefit enforcement proceedings” allowing any individual to sue the company or its directors for failing to pursue or create public benefits specified in its charter. *Id.* § 305(a). For detailed analyses of the nature and role of benefit corporations see, for example, Johnson, *supra* note 15; Dana Brakman Reiser, *Theorizing Forms for Social Enterprise*, 62 EMORY L.J. 681, 689–92 (2013); Mark J. Loewenstein, *Benefit Corporations: A Challenge in Corporate Governance*, 68 BUS. LAW. 1007 (2013); J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1 (2012).

The emergence and increasing acceptance of benefit corporations is a product of growing societal recognition of the need to reintegrate the public interest into the activities and regulation of private corporations. To a great extent, states' willingness to adopt benefit corporation statutes reflects this ongoing shift in public consciousness. In this sense, benefit corporations provide a potentially powerful counterargument to the likely criticism that this Article's proposal is entirely unrealistic or unacceptably radical. Today's benefit corporations seek to revive the early American view of business corporations as public-service entities. See Johnson, *supra* note 15, at 272. The very fact of such a return to early practices proves that the current ones are not the only possible “reality.”

At the same time, however, the existence of benefit corporations does not remove the need for a more fundamental reform of the general incorporation regime, along the lines envisioned in this Article. In contrast to the existing benefit corporation model, the approach outlined in this Article

*C. Potential Challenges and Difficulties*

Major attitudinal shifts, however, are not easy to accomplish. This may be especially true in the area of corporate law and practice, where entrenched economic interests, well-established legal concepts, and theoretical “truths” seem to constitute a formidable unified worldview. Our thought experiment would be incomplete without a brief word on the principal challenges and difficulties likely to arise on the path to any proposed alteration to that worldview.

Generally, the very idea of asking private corporations to commit to any public purpose is likely to provoke hostile reactions from many corporate law experts, strongly conditioned to associate “free incorporation” with economic efficiency, progress, and freedom. These critics will likely claim that our arguments are not only wrong but also dangerous, and that bringing back the old era of “special chartering” will destroy the country’s capital markets and economic growth, drive job-creating businesses abroad, and unleash government corruption.

Threats of such doomsday scenarios, however, would be misdirected. For one thing, such threats sound in the very “capital scarcity” myths that we debunked above. For another thing, this Article does not advocate bringing back the old era of “special charters.” The proposal outlined here is deliberately modest; it is envisioned as an initial step toward a greater recognition of the public interest in the activities of private corporations that enjoy publicly-granted privileges.<sup>187</sup> Typical doomsday criticisms of such recognition seem for the most part to be mere products of unexamined assumptions about the nature and behavior of presumably privately-constituted corporations and markets. These assumptions also prevent open-minded intellectual experimentation that can generate potential solutions to difficult real-life problems.

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would make the declaration of corporations’ public purposes both general and mandatory. By doing so, our proposal potentially overcomes some of the key weaknesses of the benefit corporation model, which is frequently criticized for being a potentially ineffective “branding” exercise. See Dana Brakman Reiser, *Benefit Corporations—A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591 (2011). Restoring the notion of public purpose to the very foundation of the corporate form removes the element of voluntariness and thus provides a stronger basis for institutionalizing corporate social responsibility.

187. The need for such recognition is evident in the growing popular frustration with the seemingly uncontrolled growth and concentration of corporate power, not only as an economic but also as a political matter. See, e.g., MATT TAIBBI, *THE DIVIDE: AMERICAN INJUSTICE IN THE AGE OF THE WEALTH GAP* 141–96 (2014); George Monbiot, *Taming Corporate Power: The Key Political Issue of Our Age*, THE GUARDIAN (Dec. 8, 2014), <http://www.theguardian.com/commentisfree/2014/dec/08/taming-corporate-power-key-political-issue-alternative>.

As a practical matter, the proposal advanced in this Article in the spirit of such intellectual experimentation is likely to face three main implementation challenges.

First, any attempt to reintroduce explicit corporate conditionality is bound to raise significant political problems and generate serious political opposition. Demanding private corporations to make an enforceable legal commitment to deliver certain public benefits could require rewiring the entire system of corporate chartering and oversight as it currently stands, just as the current regime rewired the earlier, conditional incorporation regime. In the United States, both of these functions are performed primarily within the jurisdiction of individual states.<sup>188</sup> Therefore, any significant reform of the current incorporation regime would require either legislative amendments to each state's existing corporate laws or the federalization of corporate law.

This, of course, is a rather daunting prospect, given the vagaries of state politics in general and the well-known dynamics of the "race to the bottom" approach on the part of individual states seeking to increase their attractiveness to firms as a preferred place of incorporation.<sup>189</sup> As Delaware remains the recognized leader in state competition for corporate charters, the willingness—or, conversely, unwillingness—of Delaware lawmakers and jurists to accept the new paradigm of corporate purpose would likely have a considerable impact on other states' choices.<sup>190</sup> At present, it is difficult to see what factors could possibly move Delaware, or any other state, to restrict the availability of currently "free incorporation" against the likely opposition from various powerful domestic constituencies with vested interests. Accordingly, federalizing corporate chartering and corporate law may offer the only viable alternative to

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188. In the United States, private corporations are chartered by states, and the general rights and obligations of the corporate entity and its stakeholders are governed by state laws. Many state-chartered corporations are also subject to significant federal regulation with respect to their specific activities, such as workplace safety, environmental protections, taxation, and many others. Large, publicly traded corporations are explicitly subject to oversight by the Securities and Exchange Commission. Nevertheless, for the purposes of the present discussion, the existence of this specialized federal regulatory overlay is not directly relevant. For a discussion of the history of federal intervention in corporate law, see Lucian A. Bebchuk & Assaf Hamdani, *Federal Corporate Law: Lessons from History*, 106 COLUM. L. REV. 1793 (2006).

189. For more on the dynamics of state charter competition see, for example, 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); Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435 (1992).

190. See Bebchuk, *supra* note 189, at 1443 ("Delaware's dominance of the state charter competition has resulted in the widespread diffusion of its law.").

dealing with the fifty states’ messy politics.<sup>191</sup> As a practical matter, however, this is an equally politically-fraught proposition, given both traditional attachment to “federalism” and the deeply dysfunctional nature of Congressional politics in recent years.<sup>192</sup>

In addition to political challenges, a shift back toward the franchise view of the corporation is likely to raise potentially serious issues of administrative and regulatory capacity. Imposing conditionality on corporate charters would immediately place a great deal of new responsibilities on chartering authorities.<sup>193</sup> The government agencies overseeing incorporation would have to develop new procedures for processing charter applications and reviewing the newly mandated statements of business and public purpose. As discussed above, such review would inevitably require government officials to make potentially complex technical and normative judgments.<sup>194</sup> Chartering agencies would also have to establish adequate procedural and substantive criteria for continuous monitoring and enforcement of corporations’ compliance with the conditions of their charters.

In order to be able to fulfill these tasks, chartering agencies would likely need substantial increases in their budgets and human resources. They would have to hire knowledgeable people and spend funds to maintain and improve both institutional expertise and institutional integrity. Decades of ideologically-driven “government-bashing”—explicitly, in political debates, and implicitly, in academic discourse dominated by neoliberal orthodoxy—make this task particularly difficult. It is an open secret that government spending, especially for purposes of regulating economic activities, is a notoriously controversial political issue. At least as importantly, pursuing a career in government is generally viewed as an inferior choice for the country’s brightest and most talented people.<sup>195</sup> To the extent that the process of acquiring and maintaining corporate

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191. For a general discussion of federalization of corporate law, see, for example, Bebchuk & Hamdani, *supra* note 188.

192. It is worth remembering, however, that political winds are notoriously fickle, and political will to take certain action can materialize quite suddenly in response to particular triggering events or broader social or attitudinal change. In that sense, the fact that something appears politically unfeasible today does not preclude it happening in the future.

193. Although we refer to government agencies in the plural, the factors discussed below would be equally applicable to a federal incorporation regime administered by a single federal agency.

194. See discussion *supra* Part III.B.

195. See, e.g., John Thornhill, *FT Lunch with Mariana Mazzucato: “You Always Need the State to Roar,”* FIN. TIMES WEEKEND SUPPLEMENT, Aug. 15, 2015, at 3 (citing economist Mariana Mazzucato noting the fact that civil servants are often “depressed” as a result of being routinely, and unfairly, criticized as “enemies of enterprise”).

charters becomes more time-consuming and resource-intensive for corporations, their managers and shareholders will inevitably (and vocally) accuse the relevant agencies of inefficient interference with “job creation,” “productivity,” and other forms of progress.<sup>196</sup> These are typical claims in support of powerful, private groups’ lobbying efforts against increases in regulatory agencies’ budgets, and it would be naïve not to expect the same to happen with respect to the proposed changes in the general incorporation regime.

These are all significant issues that would have to be carefully considered before any specific scheme of conditional incorporation is put in place. We do not pretend to have a clear solution to every potential problem of administrative efficiency and capacity. Yet, it is worth remembering that these are not entirely novel or unique problems. Many federal regulatory agencies, including financial regulators, confront the very same challenges on a daily basis as they deal with technically complex, politically and economically high-stakes issues—often within very strict budgetary constraints. In this sense, the increased administrative complexity of the incorporation regime should be properly viewed not as a proverbial “nail in the coffin” of the proposed vision but rather as part of a broader task of improving the design and functioning of the modern regulatory state.<sup>197</sup>

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196. As discussed above, the perceived inability of state legislatures and administrators to cope with the burden of entity-by-entity chartering was one of the factors driving the adoption of ultra-general incorporation statutes in late nineteenth-century America. *See supra* Part I.C. At the time, of course, nobody could predict the rise of the modern regulatory state capable of performing highly complex administrative functions. Yet, even today, those who oppose regulatory interventions in connection with various economic activities routinely base their arguments on an assumption—effectively powerful because it is unquestioned—that government involvement, almost by definition, undermines some generalized notion of “efficiency” and is thus inimical to economic growth. For an in-depth discussion of why this is an inaccurate and socially harmful assumption, see Hockett & Omarova, *supra* note 25.

197. It is worth noting here that, in modern regulatory practice, there exists a rich body of potentially useful tools for helping government agencies to manage a large universe of regulated entities or activities. These regulatory tools can be creatively adapted to the task at hand. Thus, it might be necessary to implement a new regime of conditional incorporation in stages, and do so with varying intensity and speed, targeting initially only firms in certain industries of heightened public-policy significance (e.g., telecommunications, transportation, energy, construction, etc.) or above a certain size. In addition, both substantive and procedural criteria for incorporation may have to be scaled accordingly so as to direct the regulatory energy to areas of the greatest public concern. It might even be desirable to exempt certain types of small, privately held corporations from some of the most burdensome requirements. All of these general techniques are frequently, and in large part successfully, used in today’s financial sector regulation. Their availability should not be discounted as a potential counterargument to generalized claims of administrative infeasibility of reforming the general incorporation regime.

Finally, in considering the return from the present “free incorporation” paradigm to an updated rendition of the original “corporate franchise” paradigm, it is vital to explore the potential impact of this shift on the structure and operation of financial markets more broadly. For example, if public-purpose conditions are actually imposed on corporate privilege, would there be a mass exodus from equity investments to debt investments? If so, would *that* be problematic? How would such a shift in prevailing patterns of corporate finance affect overall economic growth? In this connection, it is also important to understand how this new corporation law regime would interact with other regulatory regimes that govern the activities of various corporate entities. For example, how does the encouragement of equity investment via corporate privilege compare to the encouragement of debt investment via tax write-offs under the current Internal Revenue Code? If the former were to be removed, would it be best to also remove the latter, so as to avoid excessively stacking the deck in favor of debt investment?<sup>198</sup>

These questions are especially difficult in view of the fact that today’s financial markets are highly institutionalized and globalized. Indeed, as noted above, these issues are most likely to figure prominently in the vast array of potential “doomsday” scenarios the most adamant critics are likely to paint in response to the proposal outlined in this Article. Modern capital is highly mobile, and cross-border financial arbitrage often shapes the implementation of any state’s policies in unexpected ways. Against this backdrop, the role of retail mutual funds and 401(k) pension plans as massive institutional investors in debt and equity of both U.S. and foreign corporations gives even seemingly discrete issues of corporate law particular salience as a major socioeconomic policy matter.

Answering all of these questions—and numerous others—would require a great deal of further research and empirical evidence. This Symposium Article did not seek to address these questions comprehensively or completely. The goal of this Article was to start a conversation about the possibility of reclaiming the public’s right to demand its fair share of the benefits stemming from the corporate privileges that the public confers in the first place. The necessary first step in this direction is to redefine the terms of the debate and to reverse certain fundamental presumptions underlying the current status quo. The failure to take this

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198. A related set of questions arise with respect to whether the proposed change in the regime of incorporation would result in businesses abandoning corporate form in favor of some unincorporated form of business organization, and how that entity arbitrage would affect industrial organization and structure.



step will ensure the continuation of a regime that has largely fulfilled its historical role and is increasingly incapable of meeting the challenges of the nation's economic and political development in the twenty-first century.

#### CONCLUSION

This Symposium Article began by posing a series of questions about the reasons for, and lessons that can be learned from, certain remarkable similarities between the modern U.S. regulation of commercial banks, on the one hand, and what we called the original corporate settlement that governed all American corporations until the end of the nineteenth century, on the other hand. In a spirit of open-minded intellectual exercise, we put forward and elaborated the hypothesis that these similarities reflect a deep, constitutive structure of the business corporation as a hybrid public-private entity, best understood as a franchise arrangement between the state and the corporation's private stakeholders.

This franchise view of the corporation has potentially significant normative implications. It challenges the presently dominant and fundamentally antiregulatory assumption that the corporation is simply a mode of conducting purely private economic activities by private actors pursuing purely private profits. By contrast, viewing every corporation—even the nonbank corporation—as an entity chartered by the public, with an explicit expectation that particularized public benefits will be received in exchange for the extraordinary privileges embedded in the corporate form, significantly expands our policy horizons.

In this exploratory Article, we also started to map out some of the possibilities for restoring this basic public-private balance in the area of corporate law and policy. As a thought experiment, the Article undoubtedly raises many difficult questions and complex issues, all of which will require a great deal of further research and deliberation before our ideas are ready to be translated into practical recommendations. We look forward to it all.