

# **General Laws and the Mid-Nineteenth-Century Transformation of American Political Economy: Massachusetts, New York, Indiana, and Beyond**

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**Abstract:** Before the middle of the nineteenth century most laws enacted in the United States were special in the sense that they granted favors to specific individuals, groups, or localities. This fundamentally inegalitarian system provided political elites with important tools to reward supporters, and as a result, they were only willing to abandon it voluntarily under very special circumstances. In the early 1840s, however, a major fiscal crisis forced a number of states to default on their bonded debt, unleashing a political earthquake that swept this system away. Starting with Indiana in 1851, states revised their constitutions to ban the most common types of special legislation and, at the same time, mandate that all laws be general in their application. These provisions dramatically changed the way government and the economy worked and interacted, giving rise to the modern regulatory state, interest-group politics, and a more dynamic form of capitalism.

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The General Assembly shall not pass local or special laws, in any of the following numerated cases, that is to say: Regulating the jurisdiction and duties of justices of the peace and of constables; For the punishment of crimes and misdemeanors; Regulating the practice in courts of justice; Providing for changing the venue in civil and criminal cases; Granting divorces; Changing the names of persons; For laying out, opening and working on, highways, and for the election or appointment of supervisors; Vacating roads, town plats, streets, alleys and public squares, Summoning and empaneling grand and petit juries, and providing for their compensation; Regulating county and township business; Regulating the election of county and township officers, and their compensation; For the assessment and collection of taxes for State, county, township or road purposes; Providing for supporting common schools, and for the preservation of school funds; In relation to fees or salaries; In relation to interest on money; Providing for opening and conducting elections of State, county or township officers, and designating the places of voting; providing for the sale of real estate belonging to minors, or other persons laboring under legal disabilities, by executors, administrators, guardians or trustees.

—Indiana Constitution of 1851, Article IV, Section 22

In all the cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the State.

—Indiana Constitution of 1851, Article IV, Section 23

Corporations ... shall not be created by special act, but may be formed under general laws.

—Indiana Constitution of 1851, Article XI, Section 13

In 1851 Indiana rewrote its constitution in response to a major crisis in its public finances. The state had borrowed massive amounts of money during the late 1830s to fund a system of canals, railroads, and roads, but in 1841, unable to pay the interest on its bonded debt, it defaulted. The new constitution aimed to prevent similar catastrophes in the future by prohibiting the legislature from contracting “any debt ... on behalf of the State,” except under a

few emergency circumstances.<sup>1</sup> But the revisions did more than restrict legislative borrowing. Delegates to the constitutional convention viewed the state's default as a symptom of more serious problems with the way their government worked, and they took the opportunity to make far-reaching reforms. The most important were the provisions quoted above forbidding the legislature to grant special charters of incorporation or to enact private or local bills in a long list of enumerated circumstances.<sup>2</sup> Henceforth, laws had to be impersonal and treat everyone (or at least broad categories of everyone) the same. This change, we will show, dramatically altered the functioning of government, the workings of the economy, and the way government and the economy interacted. Moreover, it was not restricted to Indiana. Almost all other states embraced similar constitutional revisions over the next several decades (Figure 1).

To understand the importance of this change, one must appreciate that the vast majority of the laws enacted by legislatures in the early nineteenth century were special bills that benefited specific individuals, groups, or localities.<sup>3</sup> In the year before Indiana's new constitution was ratified, for example, the assembly enacted 550 bills (Table 1). Of these, only 59 (11 percent) were either general laws or laws needed to run the state government. Fully 278 (51 percent) were enacted on behalf of particular local governments, allowing them to charge extra taxes, make additional expenditures, set salaries, fees, duties, and meeting times for local

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<sup>1</sup> Indiana, Constitution of 1851, Article X, Section 5. Unless otherwise noted, all citations to state constitutions are to the NBER/Maryland State Constitutions Project, <http://www.stateconstitutions.umd.edu/index.aspx>.

<sup>2</sup> Although contemporaries sometimes attached different meanings to the words special, private, and local, they also used these words interchangeably to refer to legislation that benefited specific individuals, groups, or communities. Except where necessary for clarity or historical fidelity, we will use the word special to refer to all legislation of this type.

<sup>3</sup> Robert M. Ireland estimated that 70-90 percent of all bills passed by state legislatures during this period were special. "The Problem of Local, Private, and Special Legislation in the Nineteenth-Century United States," *American Journal of Legal History* 46 (July 2004): 271-299. Our own counts are similar.

administrative bodies and courts, and take a variety of non-routine actions. Another 213 (39 percent), benefited specific individuals. Some of these special bills involved personal matters such as divorces, name changes, and the administration of decedents' estates, but the vast majority (about three-quarters) involved grants of economically valuable privileges such as corporate charters.

Because some individuals and groups were better positioned than others to obtain such legislative favors, this system of special legislation was fundamentally inegalitarian. Indeed, it was precisely because it was inegalitarian that it persisted. The competitive democratic politics of the early nineteenth century meant that governing elites had to build coalitions of supporters to secure and maintain power. To this end, they doled out privileges to members of their faction and deliberately excluded people who belonged to other groups. Those who were out of power complained bitterly about "corruption," but regardless of their party or faction, they behaved in the same way when they came to power, favoring their supporters and freezing out the opposition. To do otherwise was to risk losing control of the government, as well as of important economic organizations.

Despite the inherent resilience of the system, from early on there were a few scattered incidents that pointed to a different way of organizing the relationship between government and the economy. As we show in the next section of the paper, first in Massachusetts and later in New York conflicts over the corrupt use of bank charters for political ends led elites to recognize that they might be better off if they took political control of banking off the table and opened up access to bank charters to everyone who met a basic set of criteria. This solution did not spread, however, until the economic crisis of the early 1840s, when Indiana, seven other states, and one territory defaulted on their bonded debt, and several other states teetered on the brink of default.

The crisis set off a massive political earthquake that led citizens in most of the affected states to revise their constitutions and reshape their governments in fundamental ways. In the third section of the paper we document this transformation, focusing on Indiana because it was the first state to impose a comprehensive ban on the special laws that made political control of the economy possible. Most of the other states that revised their constitutions in the aftermath of the financial crisis went only part of the way and prohibited special charters of incorporation, but within a few decades almost all of them took the additional step of mandating that all laws be general. When other states subsequently rewrote their constitutions or entered the union and drafted new ones, they typically followed Indiana's example, so that by the end of the century nearly all states prohibited special bills under most circumstances, not just for corporations (Figure 1).<sup>4</sup> Although the federal government never adopted any of these provisions, the revisions that states made to their constitutions changed the norms for how governments should operate, and eventually (in 1946) Congress took steps to curb the enactment of special bills.<sup>5</sup>

Historians have paid little attention to this important transformation.<sup>6</sup> In particular, scholars who study American state formation have been preoccupied to the exclusion of virtually

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<sup>4</sup> These general-law mandates persist with only minor changes to the present day, with the important exception that many states repealed their uniform tax rules in the twentieth century to allow them to offer tax breaks to attract business ventures. See John Wallis, "A History of the Property Tax in America," in *Property Taxation and Local Government Finance: Essays in Honor of C. Lowell Harriss*, ed. Wallace E. Oates (Cambridge, MA: Lincoln Institute of Land Policy, 2001): 123-147 at 139.

<sup>5</sup> The key legislation was the Administrative Procedures and Legislative Reorganization Acts of 1946. See Maggie McKinley (now Blackhawk), "Petitioning and the Making of the Administrative State," *Yale Law Journal* 127 (Apr. 2018): 1538-1637; and Matthew Mantel, "Private Bills and Private Law," *Law Library Journal* 99 (Winter 2007): 87-100. To the present day, however, Congress can (and does) enact laws that apply to specific individuals or organizations. Mantel (p. 93) reminds us that in the Abscam sting operation of the late 1970s FBI agents who purported to be Arab sheiks offered bribes to congress people to secure special immigration bills.

<sup>6</sup> A notable exception is Farah Peterson, who argues that the vacuum created by

everything else with the question of whether the United States had a strong or weak state. Much recent literature has been directed toward overturning the conventional view that the governmental activities that mattered most for early economic development—creating a financial system, building the transportation network, chartering corporations—were disproportionately the work of the states.<sup>7</sup> Thus Paul Paskoff and Richard John have emphasized the role the federal government played in building a national transportation and communications infrastructure.<sup>8</sup> Peter Rousseau and Richard Sylla have claimed that the policies Alexander Hamilton put in place as the nation’s first treasury secretary laid the foundation for subsequent financial development by the states and thus for economic growth.<sup>9</sup> Max Edling has traced the origins of the U.S. fiscal-military state to the founding era, Richard White has documented that

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legislatures’ preoccupation with special bills gave eminent jurists like James Kent the opportunity to shape public law. See “Interpretation as Statecraft: Chancellor Kent and the Collaborative Era of American Statutory Interpretation,” *Maryland Law Review* 77 (issue 3, 2018): 712-773. Even historians who have studied state constitutions have missed the import of the shift to general laws or have not seen beyond the imposition of general incorporation. A good example is Siddali Silvana, *Frontier Democracy: Constitutional Conventions in the Old Northwest* (New York: Cambridge University Press, 2016). She treats the move to general laws only in passing on pp. 361-363.

<sup>7</sup> For the conventional view, see George Rogers Taylor, *The Transportation Revolution, 1815-1860* (New York: Rinehart, 1951), and classic state studies such as Oscar Handlin and Mary Flug Handlin, *Commonwealth: A Study of the Role of Government in the American Economy* (Rev. edn.; Cambridge: Harvard University Press, 1969); and Louis Hartz, *Economic Policy and Democratic Thought: Pennsylvania, 1776-1860* (Cambridge, Mass.: Harvard University Press, 1948). For the critique, see Richard John, “Governmental Institutions as Agents of Change: Rethinking American Political Development in the Early Republic, 1787-1835,” *Studies in American Political Development* 11 (Fall 1997): 347-380.

<sup>8</sup> Paul F. Paskoff, *Troubled Waters: Steamboat Disasters, River Improvements, and American Public Policy, 1821-1860* (Baton Rouge: Louisiana State University Press, 2007); Richard R. John, *Spreading the News: The American Postal System from Franklin to Morse* (Cambridge, MA: Harvard University Press, 1995).

<sup>9</sup> Peter L. Rousseau and Richard Sylla, “Emerging Financial Markets and Early U.S. Growth,” *Explorations in Economic History* 42 (Jan. 2005): 1-26; Richard Sylla, “Financial Foundations: Public Credit, the National Bank, and Securities Markets,” in *Founding Choices: American Economic Policy in the 1790s*, eds. Douglas A. Irwin and Sylla (Chicago: University of Chicago Press, 2011): 59-88.

state's importance for westward expansion and the destruction of native populations, and Lindsay Schakenbach Regele has tracked its role in the development of manufacturing.<sup>10</sup> Brian Balogh has argued that the federal government did not govern less during the nineteenth century, it just governed "less visibly."<sup>11</sup>

As William Novak has pointed out, underpinning much of this literature (and also the more general effort to "bring the state back in" to the study of American history) is a Weberian concept of the state as a distinct, centralized, rationalized, bureaucratic entity with the power to make, administer, and enforce the law.<sup>12</sup> Such a perspective, Novak counters, does a poor job of describing governance in democratic societies like the United States, and he offers instead a view that owes more to John Dewey and the American pragmatic philosophers than to Max Weber. Novak insists that there was never a sharp boundary between state and society in the U.S.—that from the founding to the present state power has been horizontal rather than hierarchal, "separated and divided rather than integrated," with many overlapping jurisdictions and a tendency to delegate authority downward. This system might look peculiar from a European perspective, but, Novak argues, it facilitated an "extraordinary penetration of the state through

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<sup>10</sup> Max M. Edling, *Hercules in the Cradle: War, Money, and the American State, 1783-1867* (Chicago: University of Chicago Press, 2015); Richard White, *"It's Your Misfortune and None of My Own": A History of the American West* (Norman: University of Ohio Press, 1991), esp. Part II; Lindsay Schakenbach Regele, *Manufacturing Advantage: War, the State, and the Origins of American Industry, 1776-1848* (Baltimore: Johns Hopkins University Press, 2019).

<sup>11</sup> Brian Balogh, *A Government out of Sight: The Mystery of National Authority in Nineteenth Century America* (New York: Cambridge University Press, 2009).

<sup>12</sup> William J. Novak, "The Myth of the 'Weak' American State," *American Historical Review* 113 (June 2008): 752-772; and Novak, "The Concept of the State in American History," in *Boundaries of the State in US History*, eds. James T. Sparrow, Novak, and Stephen W. Sawyer (Chicago: University of Chicago Press, 2015): 325-349.

civil society,” a penetration that was often strongly regulatory in its impetus yet sustained by an unusual degree of popular legitimacy.<sup>13</sup>

Compelling as this perspective is, what it is missing is a sense of chronological development, of change over time—in a word, history. Gary Gerstle made this point in an important critique, and he has tried to remedy the lack in his own work.<sup>14</sup> Starting in the same place as Novak—that is, with the recognition that the police power (“the open-ended power of government to regulate in the interest of public health, safety, and welfare”) has since the founding been “formally in the hands of states rather than the national government”—he has put forward an alternative model of an “improvisational” state in which federal political leaders gradually, in response to specific historical exigencies over the course of the late nineteenth and early twentieth centuries, found innovative ways for the federal government to step into important policy arenas and exercise what were in effect the states’ police powers.

Like the more general literature on American state formation, however, this focus on the growth of federal power misses the profound transformation that occurred in the middle of the nineteenth century in the way the states’ police powers could be used—a shift that also changed the way these powers could be deployed by the federal government. In the final section of our paper, we sketch out the revolution that the shift from special to general laws wrought in the horizontal, state-society relationship that Novak has so usefully highlighted. The opening up of access to what had been previously been restricted economic privileges, we argue, generated a new kind of capitalism—much more broadly participatory and so competitive and dynamic that

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<sup>13</sup> Novak, “Myth of the ‘Weak’ American State,” 766-767.

<sup>14</sup> Gary Gerstle, “A State Both Strong and Weak,” *American Historical Review* 115 (June 2010): 779-785; and Gerstle, *Liberty and Coercion: The Paradox of American Government from the Founding to the Present* (Princeton, NJ: Princeton University Press, 2015).

an earlier generation of historians misinterpreted the change as the triumph of laissez faire.<sup>15</sup> However, it was anything but. The political earthquake set in motion by the state defaults gave form to the resentments that had built up among Americans from the middling strata of society, particularly white male voters who felt themselves disadvantaged by the system of legislative favoritism. Thus the general incorporation statutes enacted in the wake of these constitutional reforms contained numerous regulatory provisions that aimed to level the playing field, ranging from ceilings on capital to restrictive corporate governance rules to increased shareholder liabilities.<sup>16</sup> Admittedly, these regulation-filled laws did not prevent private concentrations of economic power from amassing, but states would respond by enacting antitrust laws that had more legal bite than the federal government's Sherman Act (1890) would have for decades after its enactment.<sup>17</sup> States also began to create new regulatory commissions to curb the power of

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<sup>15</sup> James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (Madison: University of Wisconsin Press, 1956); Hurst, *The Legitimacy of the Business Corporation in the Law of the United States, 1780-1970* (Charlottesville: University of Press of Virginia, 1970); Hartz, *Economic Policy and Democratic Thought*; Handlin and Handlin, *Commonwealth*; Ronald E. Seavoy, "Laissez-Faire: Business Policy, Corporations, and Capital Investment in the Early National Period," in *Encyclopedia of American Political History*, ed. Jack P. Greene (New York: Charles Scribner's Sons, 1984), Vol. 2, 728-737. See also John Lauritz Larson, *Internal Improvement: National Public Works and the Promise of Popular Government in the Early United States* (Chapel Hill: University of North Carolina Press, 2001).

<sup>16</sup> Naomi R. Lamoreaux, "Corporate Governance and the Expansion of the Democratic Franchise: Beyond Cross-Country Regressions," *Scandinavian Economic History Review* 64 (issue 2, 2016): 103-21; and Lamoreaux, "Revisiting American Exceptionalism: Democracy and the Regulation of Corporate Governance: The Case of Nineteenth-Century Pennsylvania in Comparative Context," in *Enterprising America: Businesses, Banks, and Credit Markets in Historical Perspective*, ed. William J. Collins and Robert A. Margo (Chicago: University of Chicago Press, 2015), 25-71 .

<sup>17</sup> Naomi R. Lamoreaux and Laura Phillips Sawyer, "Voting Trusts and Antitrust: Rethinking the Role of State Corporation Law in Competition Policy," HBS Working Paper 19-109 (2018).

railroads, the private businesses whose economic power was most worrisome for middling Americans.<sup>18</sup>

The shift to general laws also brought into being modern interest-group politics. Before the change, the wealthy and powerful mainly lobbied for privileges that benefited them individually. Afterwards, they discovered they had a common interest in influencing the content of the new general laws and began to organize for their collective benefit. Our story, therefore, is not a simple one of darkness into light. Corruption did not go away but rather changed form and perhaps, in some ways, even intensified.<sup>19</sup> And yet, the shift to general laws simultaneously encouraged and empowered the formation of new kinds of voluntary associations to counter the power of economic elites, giving rise to the myriad of organizations that Elisabeth Clemens has called the “people’s lobby.”<sup>20</sup> Hence the story is not a simple one of darkness to darkness either.

Our understanding of this transformation owes much to the theoretical framework developed by Douglass North, John Wallis, and Barry Weingast for their study *Violence and*

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<sup>18</sup> For an overview, see William R. Childs, *The Texas Railroad Commission: Understanding Regulation in America to the Mid-Twentieth Century* (College Station: Texas A&M University Press, 2005), Ch. 1.

<sup>19</sup> See, for example, Richard L. McCormick, “The Discovery That Business Corrupts Politics: A Reappraisal of the Origins of Progressivism,” *American Historical Review* 86 (Apr. 1981): 247-274. John Joseph Wallis has labeled the change as a shift from systematic corruption to venal corruption—that is, from the corrupt manipulation of the economy for the purpose of political control to corrupt rent seeking by economic actors. See “The Concept of Systematic Corruption in American History,” in *Corruption and Reform: Lessons from America’s Economic History*, ed. Edward L. Glaeser and Claudia Goldin (Chicago: University of Chicago Press, 2006), 23-62.

<sup>20</sup> Elisabeth S. Clemens, *The People’s Lobby: Organizational Innovation and the Rise of Interest Group Politics in the United States, 1890-1925* (Chicago: University of Chicago Press, 1997). On the importance of the shift to general laws for empowering voluntary associations, see Ruth H. Bloch and Naomi R. Lamoreaux, “Voluntary Associations, Corporate Rights, and the State: Legal Constraints on the Development of American Civil Society, 1750-1900,” in *Organizations, Civil Society, and the Roots of Development*, eds. Lamoreaux and John Joseph Wallis (Chicago: University of Chicago Press, 2017), 231-290.

*Social Orders*.<sup>21</sup> As North, Wallis, and Weingast show, in most places in the world, both today and throughout human history, ruling elites have manipulated access to economically valuable privileges in order to maintain power. By the modern era, many of these societies were capitalist by any of the definitions that historians of capitalism have offered.<sup>22</sup> Yet only a very small number of them ever made the transition that is the focus of this paper—that is, to a system where access to economically valuable privileges is open, if not to everyone, to a broad enough segment of the population to sustain vibrant economic and political competition. The few countries that went through this transformation shared broadly similar characteristics before and after the change, but the actual processes of transformation varied considerably from case to case. Hence an important aim of our larger project is to situate the U.S. experience in global context at the same time as we use what was particular (exceptional) about it to contribute to the literature on American political and economic development.<sup>23</sup>

### **Banking and the First Steps toward General Laws in Massachusetts and New York**

The most visible example of how American political elites put economic privileges to strategic use after the Revolution comes from the banking sector. Bank charters played an

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<sup>21</sup> Douglass C. North, John Joseph Wallis, and Barry R. Weingast, *Violence and Social Orders: A Conceptual Framework for Interpreting Recorded Human History* (New York: Cambridge University Press, 2009).

<sup>22</sup> For alternative definitions, see Joyce Appleby, *The Relentless Revolution: A History of Capitalism* (New York: Norton, 2010), 25 (“a cultural system rooted in economic practices that rotate around the imperative of private investors to turn a profit”); Jonathan Levy, “Capital as Process and the History of Capitalism,” *Business History Review* 91 (Autumn 2017): 483-510 at 483 (“a pecuniary process of forward-looking valuation, associated with investment”); and Caitlin Rosenthal, “Capitalism where Labor was Capital: Slavery, Power, and Price in Antebellum America,” unpublished paper (“(1) the commodification of labor, as it results from, (2) the accumulation of capital”).

<sup>23</sup> See our introduction to *Organizations, Civil Society, and the Roots of Development*, as well as the essays collected in that volume.

important role in coalition building during this period for the simple reason that the privileges they conferred were extraordinarily valuable. There had been no formally organized, legally recognized banks in the colonies, and the small number of bank charters that the new state and national governments began to grant in the aftermath of the Revolution were highly sought after. Not only did they create entities that could amass lendable funds by issuing currency and selling shares of capital—an important ability in the credit-scarce environment of the Early Republic—but the favored few who controlled them had both preferred access to credit and the power to determine who else would obtain loans.<sup>24</sup>

Alexander Hamilton, perhaps more than anyone else, understood the political value of a bank. His efforts in Washington’s first administration to use the Bank of the United States, in combination with the assumption of state debts, to build an elite coalition in support of the national government and its Federalist leadership are well known.<sup>25</sup> Even earlier, however, he and Federalist political allies had organized the Bank of New York, and they managed to block all attempts to found competing banks in the state until 1799, when Democratic-Republican Aaron Burr cleverly exploited a loophole in the charter of a water company to start the Manhattan Bank.<sup>26</sup> Burr’s allies credited the new bank with the destruction of the Federalists’ “empire,” boasting that it had “emancipated hundreds who were held in bondage by the old

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<sup>24</sup> Naomi R. Lamoreaux, *Insider Lending: Banks, Personal Connections, and Economic Development in Industrial New England* (New York: Cambridge University Press, 1994), Ch. 1.

<sup>25</sup> Bray Hammond, *Banks and Politics in America: From the Revolution to the Civil War* (Princeton, NJ: Princeton University Press, 1957), Ch. 5; and David Jack Cowen, *The Origins and Economic Impact of the First Bank of the United States, 1791-1797* (New York: Garland Publishing, 2000), Ch. 1.

<sup>26</sup> Eric Hilt, “Early American Corporations and the State,” in *Corporations and American Democracy*, eds. Naomi R. Lamoreaux and William J. Novak (Cambridge, MA: Harvard University Press, 2017), 37-73 at 61-62. See also Brian Phillips Murphy, “‘A Very Convenient Instrument’: The Manhattan Company, Aaron Burr, and the Election of 1800,” *William and Mary Quarterly* 65 (April 2008): 233-266.

institutions.”<sup>27</sup> However exaggerated that claim, there is no question that the Democratic-Republicans deliberately used the Manhattan Bank for political ends, offering supporters loans in reward for their loyalty. As Brian Murphy has shown, moreover, the Federalists responded in kind by denying credit to Democratic-Republicans. Previously, Federalist merchants had enjoyed privileged access to credit at the Bank of New York, as well as the New York branch of the Bank of the United States, but until 1799 both banks had discounted commercial paper presented by other traders. Now they refused to accept notes from Democratic-Republican merchants, underscoring the latter’s need for their own financial institutions.<sup>28</sup> When the Democratic-Republicans gained control of the New York legislature in 1803, therefore, they played tit-for-tat, founding a bank for their supporters and refusing to grant a charter to a new Federalist bank. When the latter went into operation anyway as a joint-stock partnership, they passed a restraining act prohibiting it and any similar association from operating as a bank without a charter and giving it a year to wind up its affairs. Although a Federalist resurgence subsequently enabled the bank to secure a charter, the restraining act remained in effect, facilitating future efforts by those in power to control access to banking.<sup>29</sup>

In Massachusetts a similar dynamic shaped the early banking system. The first bank in the state, the Massachusetts Bank, was chartered in Boston in 1784 as a monopoly that would not only serve the interests of the government but also the dominant Federalist elite. The bank was too small to meet the credit needs of all the Federalists that had to be kept in the coalition,

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<sup>27</sup> Murphy, “A Very Convenient Instrument,” 233.

<sup>28</sup> Murphy, “A Very Convenient Instrument.”

<sup>29</sup> Murphy, “A Very Convenient Instrument”; Howard Bodenhorn, “Opening Access: Banks and Politics in New York from the Revolution to the Civil War,” unpublished working paper (2017); Hilt, “Early American Corporations and the State”; Brian Phillips Murphy, *Building the Empire State: Political Economy in the Early Republic* (Philadelphia: University of Pennsylvania Press, 2015), Chs. 1 and 3.

however, so to maintain their loyalty the legislature chartered a second bank in Boston and a small number of additional banks in other locations.<sup>30</sup> Members of rival political groups clamored for banks of their own, especially after the legislature passed a restraining act in 1799 that prohibited banks from operating without charters, but they were repeatedly turned down. Salem, for example, had two banks, both run by Federalists. A number of that city's prominent Democratic-Republican leaders, including George Crowninshield, who would become Madison's Secretary of the Navy, and Joseph Story, the future U.S. Supreme Court Justice, sought to start a bank, but their petitions were of no avail.<sup>31</sup>

As support for the Federalists declined in the early nineteenth century, the growing competitiveness of state politics roiled the financial sector in both Massachusetts and New York. Democratic-Republicans in Massachusetts won control of both houses of the legislature as well as the governorship in 1811. Moving immediately to capitalize on their victory, they founded two new banks. One was in Salem, a reward to their long-suffering supporters there.<sup>32</sup> The other, in Boston, was a massive new institution with a capitalization of \$3,000,000, three times as large as the largest bank previously chartered in the commonwealth. Called the State Bank, it was ostensibly a public institution: at least one third of its capital was supplied by the government; it would return a portion of its profits to taxpayers in the form of dividends on the state's ownership share; and it would pay an annual tax to the state amounting to 0.5 percent of

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<sup>30</sup> Qian Lu, *From Partisan Banking to Open Access: The Emergence of Free Banking in Early Nineteenth Century Massachusetts* (Basingstoke, UK: Palgrave Macmillan, 2017), ##.

<sup>31</sup> Albert W. Dennis, *The Merchants National Bank of Salem, Massachusetts* (Salem: Salem Press, 1908), 7-12; Lu, *From Partisan Banking to Open Access*, 22-23; and Qian Lu and John Joseph Wallis, "Banks, Politics, and Political Parties: From Partisan Banking to Open Access in Early Massachusetts," in *Organizations, Civil Society, and the Roots of Development*, eds. Lamoreaux and Wallis, 109-45.

<sup>32</sup> Dennis, *The Merchants National Bank of Salem*, 57.

its paid-in capital. The fact that eleven of the State Bank's twelve directors were Democratic-Republicans, however, suggested that the bank would also operate in the interests of that party.<sup>33</sup>

Not content simply to found their own banks, the victors also sought to inflict harm on the Federalists. All but one of the existing banks' charters were set to expire in 1812, and Democratic-Republican legislators vowed to block their renewal. They were not able to make good on this threat because the Federalists retook the lower house and governorship in 1812. Instead, the need to share power forced both parties to compromise. The act that created the State Bank had mandated that its terms, including the tax on capital, would apply to all banks chartered by the state in the future. With the Democratic-Republicans still in control of the Senate, this condition held. The Federalists got their banks rechartered but only on condition that they would be subject to the same "rules, restrictions, limitations, taxes and provisions, and entitled to the same rights, privileges and immunities" as the State Bank.<sup>34</sup>

In this context of increased electoral competitiveness, the close brush with nonrenewal seems to have prompted politicians of both parties to rethink their coalition-building strategies and agree at least tacitly to take banking off the political table. Although few new banks were chartered during the turbulent war and depression years that followed, when economic

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<sup>33</sup> Lu and Wallis, "Banks, Politics, and Political Parties"; and Lu, *From Partisan Banking to Open Access*, Ch. 2. The Democratic Republicans took a variety of other steps to entrench themselves in power, including famously redrawing the state's senatorial districts (giving rise to the term "Gerrymandering" after the governor who signed the bill into law). See Elmer Cummings Griffith, *The Rise and Development of the Gerrymander* (Chicago: Scott, Foresman and Co., 1907), 19-20.

<sup>34</sup> See, for example, Massachusetts General Court, "An act to incorporate the President, Directors and Company of the Boston Bank," approved June 23, 1812. The tax provision in the State Bank's charter was made general at the same time in "An Act imposing a Tax on the Banks within this Commonwealth," approved June 23, 1812. Unless otherwise noted, all state statutes referenced in this paper can be found in the Session Laws collected on [www.heinonline.org](http://www.heinonline.org). See also Lu and Wallis, "Banks, Politics, and Political Parties"; and Lu, *From Partisan Banking to Open Access*, 31-32.

conditions improved during the early 1820s and the demand for bank charters increased, the legislature responded by granting most of them. As a result, by the height of the 1830s boom there were nearly 130 banks in the state, and Massachusetts' citizens were better served by banking institutions—that is, there was more bank capital and more currency per capita in the state—than anywhere else in the United States except Rhode Island, which adopted a similarly liberal chartering policy.<sup>35</sup> All the new banks paid the 0.5 percent tax on their capital, and the state's soaring tax revenues undoubtedly helped reinforce the new arrangement. In 1830, the first year for which data is available, the tax on bank capital accounted for fully 61 percent of the state's revenue. Indeed, thanks to the bank tax, Massachusetts did not have to impose *any* property or poll taxes on its citizens in half the years between 1826 and 1855.<sup>36</sup>

What mattered most in the long run, however, was the commitment that all bank charters would henceforth be the same. This agreement was formalized in 1829 when the legislature passed a new statute specifying the rules under which all banks would operate. The crucial clause mandated that if “any new or greater privileges shall be granted to any other bank . . . , each and every Bank in operation at the time shall be entitled to the same.”<sup>37</sup> This regulatory act was not a general incorporation law for banking, but it had a similar effect. From this point onward,

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<sup>35</sup> The Massachusetts legislature enacted a general incorporation law for banks in 1851, but almost no banks organized under it because charters were already so widely available. Lamoreaux, *Insider Lending*, Ch. 3.

<sup>36</sup> Lu and Wallis, “Banks, Politics, and Political Parties”; Richard Sylla, John B. Legler, and John Joseph Wallis, “Banks and State Public Finance in the New Republic: The United States, 1790-1860,” *Journal of Economic History* 47 (June 1987): 391-403; John Joseph Wallis, Richard E. Sylla, and John B. Legler, “The Interaction of Taxation and Regulation in Nineteenth-Century U.S. Banking,” in *The Regulated Economy: A Historical Approach to Political Economy*, eds. Claudia Goldin and Gary D. Libecap (Chicago: University of Chicago Press, 1994), 121-144.

<sup>37</sup> Massachusetts General Court, “An Act to regulate Banks and Banking,” approved Feb. 28, 1829.

whenever the Massachusetts legislature considered chartering a new bank or changing the charter of an existing bank, every bank in the commonwealth was potentially affected. No longer would there be special deals for any individuals or groups forming banks.

Increased political competition played out somewhat differently in New York. As in Massachusetts, on the eve of the War of 1812 power shifted from the Federalists to the Democratic-Republicans, who took advantage of the opportunity to charter additional banks for their supporters. Unlike in Massachusetts, however, the Federalists never regained control of the state government. Instead, during the so-called Era of Good Feeling that followed the collapse of the first party system, Martin Van Buren's Democratic-Republican faction used its power over bank charters and other sources of patronage to build a formidable political machine, dubbed the Albany Regency by its opponents. During the economic boom of the 1830s, the New York legislature received an average of about 70 bank petitions a year, but under the machine's tight control only about ten percent of that number received charters. The high rejection rate increased the value of bank charters for supporters, but it also fueled discontent. When the Panic of 1837 brought down the banking system, the Albany Regency collapsed as well.<sup>38</sup> The opposition—now called the Whig Party—took advantage of its rise to power to pass an innovative “free banking” law in 1838 that made bank charters freely (that is, routinely) available to all applicants who satisfied the provisions of the law.<sup>39</sup> In this way, the Whigs met

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<sup>38</sup> Howard Bodenhorn (“Opening Access”) has “followed the money” to show precisely how the Regency used the award to charters to enrich its minions. See also Bodenhorn, “Bank Chartering and Political Corruption in Antebellum New York: Free Banking as Reform,” in *Corruption and Reform*, ed. Glaeser and Goldin, 231-257; Hilt, “Early American Corporations and the State”; and Ronald Seavoy, *The Origins of the American Business Corporation, 1784-1855* (Westport, Conn.: Greenwood Press, 1982), Ch. 4.

<sup>39</sup> New York Legislature, “AN ACT to authorize the business of banking,” passed April 18, 1838.

the pent-up demand for charters and insured that the Regency would never again be able to control access to banks for political ends. To counter worries that open access would undermine the soundness of the banking system, the legislature added an important regulation to the act that required banks fully to back their currency issues by investing in specific categories of government (mainly New York) bonds.<sup>40</sup> The result was a dramatic expansion in the number of banks and an improved market for the state's debt.<sup>41</sup>

New York's demonstration of the benefits that could be reaped by opening access to banking was not in itself enough to induce other states to adopt the innovation. Elites in most places were able to weather the turbulence of the 1837 crisis and maintain control of the banking system for their own ends. They were not willing voluntarily to relinquish such a valuable tool of political dominance, and, as we will show in the next section, it was not until the political earthquake that followed the state defaults of the early 1840s that they were forced to accept the change. However, states that were slow to adopt free banking paid a penalty in terms of financial development. The cost can be seen most clearly by comparing the growth of bank capital per capita in New York and Pennsylvania, two similar Middle-Atlantic states with major ports on the coast, significant industrial sectors, and large prosperous farming regions. In 1837 the amount of bank capital per capita was roughly similar in the two states, \$16.43 and \$14.86 respectively. The next year New York opened a significant lead with the enactment of its free banking law, while Pennsylvania retained its old system of special charters. By the time Pennsylvania finally made the move to free banking in 1860, the amount of bank capital per

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<sup>40</sup> In 1837 Michigan had adopted a free banking act without this backing provision to disastrous results. Hilt, "Early American Corporations and the State," 68.

<sup>41</sup> Bodenhorn, "Bank Chartering and Political Corruption," 240-244; Seavoy, *Origins of the American Business Corporation*, Ch. 6.

capita in the state had fallen to \$8.80, whereas New York's had grown to \$28.72. Massachusetts, which had effectively opened access to banking by the 1820s, was even further ahead, with \$54.00 of bank capital per capita in 1860.<sup>42</sup>

Free banking was not in itself a solution to the problem of financial instability, but it is important to emphasize that the history of prudential regulation begins, not ends, with the achievement of open access. How could states exercise any regulatory control over banks when the people who controlled them were privileged recipients of legislative favors? It was only when entry into the financial sector was reasonably free of political manipulation—when the rules to which each bank was subject were uniform and not dependent on the privileges embedded in its charter—that policy makers could begin to grapple with the problems that periodically produce crises in fractional reserve banking systems.<sup>43</sup> Thus Massachusetts could respond to the Panic of 1837 by creating a Board of Bank Commissioners with the authority to examine the accounts of all the banks chartered in the state.<sup>44</sup> New York's free banking act required banks to file regular twice-yearly reports with the state comptroller, who also held the securities they used to back their currency and had the power to sell them off if needed to reimburse noteholders. As the New York model spread, the comptroller (sometimes called the auditor) acquired more regulatory authority.<sup>45</sup> Thus Ohio's 1851 law required a board consisting of the Auditor, the Treasurer, and the Secretary of State to appoint a "suitable person" to conduct

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<sup>42</sup> Bodenhorn, "Bank Chartering and Political Corruption," 239, Table 7.1; Howard Bodenhorn, *A History of Banking in Antebellum America: Financial Markets and Economic Development in an Era of Nation-Building* (New York: Cambridge University Press, 2000), Ch. 2.

<sup>43</sup> Hilt makes this point in "Early American Corporations and the State."

<sup>44</sup> Massachusetts General Court, "An Act providing for the appointment of Bank Commissioners," approved Feb. 23, 1838.

<sup>45</sup> New York Legislature, "AN ACT to authorize the business of banking," passed April 18, 1838.

an examination of all the states' bank every year.<sup>46</sup> Under the National Banking Acts, which were modeled on Ohio's law, the U.S. Comptroller of Currency employed professional examiners to conduct thorough annual and, for important banks, semi-annual inspections.<sup>47</sup>

### **The Political Earthquake of Fiscal Crisis**

During the early 1840s eight states (Arkansas, Illinois, Indiana, Louisiana, Maryland, Michigan, Mississippi, and Pennsylvania) and the territory of Florida defaulted on their bonded debt, and several other states, including Alabama, New York, Massachusetts, and Ohio, only narrowly avoided a similar fate. The states' fiscal problems stemmed from the huge debt obligations they had incurred to finance transportation systems and also, in the case of the Southern states, mortgage banks to support plantation agriculture.<sup>48</sup> The political upheaval that followed this catastrophe led most of these states to make fundamental changes in the way their governments worked by eliminating their legislatures' ability to use special laws to control the award of economic privileges. Free banking and general incorporation laws spread in its wake.

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<sup>46</sup> Ohio General Assembly, "AN ACT to authorize Free Banking," approved Mar. 21, 1851.

<sup>47</sup> Of course, bank regulation could itself be a source of financial instability. The National Banking Acts' inflexible currency and pyramiding of reserves in New York City have been blamed for the many banking crises of the late nineteenth and early twentieth century. See Eugene Nelson White, *The Regulation and Reform of the Banking System, 1900-1929* (Princeton, NJ: Princeton University Press, 1983).

<sup>48</sup> John Joseph Wallis, "Constitutions, Corporations, and Corruption: American States and Constitutional Change, 1842-1852," *Journal of Economic History* 65 (Mar. 2005): 211-256; Howard Bodenhorn, *State Banking in Early America: A New Economic History* (New York: Oxford University Press, 2003), Ch. 9; Larry Schweikart, *Banking in the American South from the Age of Jackson to Reconstruction* (Baton Rouge: Louisiana State University Press, 1987); Sharon Murphy, "Free Banking in Louisiana," unpublished working paper (2017); Ted R. Worley, "The Control of the Real Estate Bank of the State of Arkansas, 1836-1855," *Mississippi Valley Historical Review* 37 (Dec. 1950): 403-426.

On the surface the transportation projects at the root of the defaults might seem to have little in common with the bank and other corporate charters that legislatures were doling out in the early nineteenth century. After all, they were large (mostly) public works projects that promised to spread their gains widely and benefit everyone from small landowning farmers to wealthy big-city merchants. But the projects were products of the same political system as legislative favoritism in the award of charters. At the most obvious level they were pushed by an intertwined set of political and economic elites who stood to benefit from their success. The Erie Canal, for example, was a device for resuscitating DeWitt Clinton's political career and solidifying support for his New York Democratic-Republican faction, as well as for land companies seeking to unload their holdings profitably.<sup>49</sup> But the more significant connection was the way the projects were put together—the political deals that accounted both for their massiveness and for the precarious way in which they were financed.

The basic problem that elites had to face in putting together the support they needed to build transportation systems was geography. How could a legislature that operated on the principle of majority rule fund a project that benefited a minority of districts but potentially imposed higher taxes on everyone? There were three common ways to secure the assent of reluctant voters. The first was logrolling—that is, packaging projects for different locations together so that people in each place got something they wanted. The second was structuring the financing of these projects to reassure residents that they would not have to pay for improvements that only benefited others. For example, if a transportation improvement raised

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<sup>49</sup> Nathan Miller, *The Enterprise of a Free People: Aspects of Economic Development in New York State during the Canal Period, 1792-1838* (Ithaca, NY: Cornell University Press, 1962), Ch. 3-4. Murphy detailed the political and economic interests behind the canal, but he was misled by the promoters' rhetoric to see the public-works character of the canal as marking a significant breakpoint in New York politics. *Building the Empire State*, Ch. 5.

land values in its vicinity, an ad valorem tax on land could shift the costs of the project to those whose land values went up. Legislative approval for the Erie Canal was secured using this type of “benefit taxation,” but tolls on canal traffic raised so much money for the state that the taxes never had to be imposed. Other states thought their experience with canal projects would be similar and so often did not levy enough taxes to cover building costs. Accordingly, a third way to finance infrastructure projects was through “taxless finance.” Especially early on the most common method of taxless finance was to confer a special privilege on a group of private individuals—a monopoly on a bridge location, for example—that the group could only exploit if it provided the public service. Another method, which became increasingly popular after the Erie’s success, was to borrow more money initially than the project required, pay the interest on the bonds in the early years out of borrowed funds, and then, when the project began generating income, pay the interest and retire the debt out of the revenue stream.<sup>50</sup>

The federal government was never able to solve the problem of geography, in part, as has often been noted, because of Southern concerns about threats to the institution of slavery, but also because the tools it had at its disposal to overcome different geographic interests were limited.<sup>51</sup> Congress could engage in log rolling, but its reliance on tariffs as a source of revenues all but eliminated the possibility of benefit taxation and made taxless finance much less credible. States did not face the same constraints. Because their main source of revenue was the property tax, they were able to shift the tax burden to those who would benefit most from the projects—either by levying benefit taxes from the start or by reserving them for the eventuality that taxless finance failed. It was relatively easy, moreover, for political leaders to deploy the system of

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<sup>50</sup> Wallis, “Constitutions, Corporations, and Corruption.”

<sup>51</sup> See Carter Goodrich, *Government Promotion of American Canals and Railroads* (New York: Columbia University, 1960); Larson, *Internal Improvement*, Ch. 2.

special legislation that they were already so adept at manipulating to blend big public works projects with smaller grants of privileges to local groups. By such means, the amount of canal mileage in the U.S. increased from 100 to 3326 between 1816 and 1840, and there was also a tremendous growth in road and bridge construction and the beginnings of a railroad network. About \$80 million of the approximately \$130 million that the states spent on transportation infrastructure in this period came from taxless finance, and \$50 million from benefit finance.<sup>52</sup>

Indiana, for example, was a big state geographically, and much of its rich agricultural land was far from existing waterways. There had long been interest in a canal that would bisect the northern half of the state and make commercial production feasible throughout that region, but political leaders faced the usual problem that residents in other regions of the state were unwilling to support transportation projects from which they did not expect to benefit. Farmers along the Ohio River were particularly opposed; they already had good access to transportation and did not want to pay taxes to improve the commercial prospects of farmers in the north.<sup>53</sup> Political leaders solved this problem in the three standard ways. First, they revised the tax system by shifting from a per-acre to an ad valorem tax and by assessing the tax on all kinds of property—not just land. This revision insured that those who would benefit most from the transportation system in terms of higher land values or better trading opportunities would pay the most for the improvements. Moreover, because the tax base would grow, farmers with valuable

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<sup>52</sup> Southern states' plantation banks piled up another approximately \$50 million of taxless finance. Wallis, "Constitutions, Corporations, and Corruption," 227. See also Taylor, *Transportation Revolution*, Ch. 3.

<sup>53</sup> John Joseph Wallis, "The Property Tax as a Coordinating Device: Financing Indiana's Mammoth Internal Improvement System, 1835-1842," *Explorations in Economic History* 40 (Jul. 2003): 223-250. For overviews of this period of Indiana history, see Donald F. Carmony, *Indiana, 1816-1850: The Pioneer Era* (Indianapolis, IN: Indiana Historical Bureau & Historical Society, 1998); and Logan Esarey, *History of Indiana: From Its Exploration to 1850* (Indianapolis, IN: W. K. Stewart, 1915).

land along the Ohio River could credibly be promised that their taxes would not increase.<sup>54</sup> These measures were not in themselves enough to secure approval of the canal project, because areas that needed transportation improvements were not willing to support the bill unless their projects were also included. Promoters, therefore, had to increase the project's scale until the expected improvements benefited most of the districts in the state.<sup>55</sup> The resulting plan was popularly known as the Mammoth Internal Improvement Bill, and it deserved that name because it funded a state-wide system of canals, railroads, and turnpikes (see Figure 2) with a total projected cost of more than \$10 million. The bill was shepherded through the legislature by the Whigs, who controlled both houses, as well as the governorship, but it attracted substantial Democratic support, and passed in January 1836 by overwhelming majorities. Its success was the result of a deliberate but transparent manipulation of local economic interests to build a broad coalition in support of the project.<sup>56</sup>

The bill created a new Board of Internal Improvement and authorized it to borrow up to \$10 million in 5 per cent bonds, secured by the good faith and credit of the state. At the time, Indiana's annual revenues amounted to about \$60,000—a full order of magnitude smaller than the \$500,000 per year that would be needed just to service the debt. The plan was not quite as reckless as these numbers make it seem, however. Indiana officials had good reason to expect

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<sup>54</sup> Wallis, "Property Tax as a Coordinating Device."

<sup>55</sup> In the legislative session the year before the bill passed, promoters of the project seem to have been calculating voting margins narrowly and seeking only enough votes for passage. For example, they first opposed an amendment to bill to appropriate \$220,000 for the Vincennes and New-Albany road but switched a few days later to support it because, it seems, they needed the votes of legislators from that region. See "Remarks of Mr. Smith of Ripley, on the amendment ... to the internal improvement bill," *Indiana Democrat*, Jan. 30, 1835. The next year they seem to have thrown caution to the wind.

<sup>56</sup> "AN ACT to provide for a general system of Internal Improvements," approved Jan. 27, 1836; Wallis, "The Property Tax as a Coordinating Device"; Esarey, *History of Indiana*, Ch. 16; Carmony, *Indiana*, Ch. 4.

that tax revenues would more than double by the early 1840s, even if the transportation projects did not generate any additional revenues for the state. The enabling act that Congress had passed in 1816 in preparation for Indiana's statehood required it to forbear taxing any land sold within the state by the federal government until five years after the date of sale. In 1834, slightly more than 4.5 million acres of land were subject to state taxes. In 1835 and 1836 the federal government sold an equivalent amount of additional acreage within the state, so Indiana officials could reasonably forecast that tax revenues would at least double by the early 1840s. In fact, the amount of land that Indiana could tax increased to more than 10 million acres by 1841 and to more than 14.5 million in 1843. Moreover, Indiana officials expected, as a result of the new ad valorem tax system, that revenues would increase as land values appreciated in the areas with improved access to markets. Between 1835 and 1837, the average value of an acre of farm land in Indiana increased from \$5.41 to \$9.87, and the rise in the value of town lots was even steeper. Most of the increase occurred in counties projected to benefit from the transportation projects. Land values in counties where there were no planned transportation improvements rose on average by \$2.74 an acre during the boom years of 1835 to 1837, compared to \$4.55 per acre in counties where improvements were anticipated and \$8.29 in counties where the proposed transportation routes would intersect (mainly counties with larger towns).<sup>57</sup>

These expectations depended, of course, on everything continuing to go well—on the economy prospering, on the transportation projects being completed, on settlers migrating to localities with improved access to markets, on land values rising. But all did not continue to go well. To the contrary, a major financial crisis in 1839 brought everything to an abrupt halt. The proximate cause of the state's troubles was the default of the Morris Canal and Banking

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<sup>57</sup> Wallis, "Property Tax as a Coordinating Device."

Company, which Indiana (along with several other states) had used as an intermediary to sell bonds. Indiana officials had given the Morris Company millions of dollars in bonds on credit to market on its behalf (the exact amount is uncertain) in exchange for a promise to pay the state \$500,000 every six months until the debt was paid off. State officials found the deal attractive because they needed an agent to market the bonds internationally, and they did not need all the funds from the sale of bonds at once. They seem to have been somewhat naïve or corrupt, however, because it later became apparent that the state was liable for interest on the full amount of the bonds, even though it had only been paid for a portion of them. Even worse, in the summer of 1839 the bank informed the state that it would no longer make the semiannual payments of \$500,000 as promised. Because the state had relied on these transfers to finance construction, work on the transportation system came to a halt in the fall of 1839. With construction at a standstill, property values, which had risen speculatively on the expectation of improved access to markets, plummeted, as did tax revenues—from about \$300,000 in 1840 to about \$170,000 in 1841. Unable to pay the interest on the bonds it had issued, the state was forced to default.<sup>58</sup>

The collapse of the internal improvement scheme threw the state into political turmoil. The Whigs had dominated Indiana's government during the 1830s, and the Democrats now successfully blamed them for the state's problems, even though most Democratic legislators had voted for the internal improvements bill.<sup>59</sup> The crisis gave the Democrats control of the lower house in 1841 and 1842 and then both houses of the legislature and the governorship in 1843.

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<sup>58</sup> John Joseph Wallis, "What Caused the Crisis of 1839?" NBER Historical Working Paper 133 (Apr. 2001); Esarey, *History of Indiana*, Ch. 16.

<sup>59</sup> "Address of the Democratic Members of the Legislature," *Indiana Democrat*, Feb. 18, 1841.

National controversies associated with the Mexican War, the annexation of Texas, and westward expansion of slavery helped the Whigs regain some ground in the mid-1840s, and the Democrats were unable to maintain their dominance. With no party in clear control of the legislature, proposals to get the state's finances back on track languished, though in 1847 the assembly finally managed to ratify a compromise worked out with representatives of a large group of bondholders. By then, Democrats were making increasingly insistent calls for a constitutional convention. Once they regained control of the legislature in 1848, their efforts succeeded, and Democrats won a two-thirds supermajority in the election for delegates that occurred in 1850.<sup>60</sup>

One outcome of the convention was a constitutional ban on further borrowing by the state, except "to repel invasion, suppress insurrection, or, if hostilities be threatened, provide for public defense."<sup>61</sup> Given the state's fiscal troubles, one might think such a measure would have been the central goal of many of the delegates. However, even a quick glance at the convention's proceedings suggests that the representatives had a more systematic understanding of what had gone wrong and a broader sense of what they wanted to accomplish. From the beginning, the prohibition on borrowing ranked relatively low on the lists of reforms proposed by the delegates. The first list submitted, for example, had it only fifth, after proposals mandating "that corporations shall be created under a general law" (2), "that special legislation shall be prohibited" (3), and "that the Legislature shall be prohibited from granting divorces" (4).<sup>62</sup> Other resolutions submitted at the start of the convention had a similar ordering of priorities, and among the standing committees set up to draft the new constitutions there were, in

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<sup>60</sup> Carmony, *Indiana*, Ch. 6.

<sup>61</sup> Indiana Constitution of 1851, Article X, Sections 1 and 5.

<sup>62</sup> Indiana, *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution* (Indianapolis: A. H. Brown), Vol. 1, 40.

addition to those assigned to review each branch of government, committees “On Special and Local Legislation, and Uniformity of Laws,” “On Currency and Banking,” “On Corporations other than Banking,” as well as on “On State Debt and Public Works,” and “On Finance and Taxation.”<sup>63</sup>

In the immediate fallout from the state’s default, Democrats had accused Whig officials of corruption, pointing especially to details of the arrangement with the Morris Bank.<sup>64</sup> But the catastrophe could not be explained away so easily. Political leaders had systematically manipulated the economic interests of voters to build a broad coalition in support of the project, and they had succeeded in generating tremendous enthusiasm for the Mammoth enterprise. As one delegate to the convention reminded the others, news of the bill’s passage had been greeted with celebrations and fireworks displays across the state. In Indianapolis “there was a general rejoicing; every pane of glass in the city was illuminated; and the population turned out on the streets as upon a great holiday.”<sup>65</sup> Everything about the manipulation had been transparent, above board, and legal, but that was no protection against catastrophe. Indeed, the defaults were highly visible evidence of the ease with which democratic institutions could be perverted to produce bad outcomes. Railing about corruption would not prevent such debacles in the future. Nor would simply preventing the state from borrowing. The logrolling that produced the Mammoth bill had thrived in an environment where special bills predominated. By the time the

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<sup>63</sup> Indiana, *Report of the Debates*, Vol. 1, 43, 52, 58.

<sup>64</sup> See for examples, “Madison Railroad,” *Indiana Democrat*, Jan. 9, 1841; letter from “A Taxpayer,” *Indiana Democrat*, Jan. 13, 1841; and “Milton Stapp, Esq.,” *Indiana Democrat*, Jan. 22, 1841. For accounts that rely on these kinds of accusations to explain the debacle, see Esarey, *History of Indiana*, Vol. 1, Ch. 16; and Paul Fatout, *Indiana Canals* (West Lafayette, IN: Purdue University Studies, 1972).

<sup>65</sup> Indiana, *Report of the Debates*, Vol. 1, 675. Three people died in fireworks accidents.

delegates gathered in October of 1850 to revise the constitution, there was already consensus that the political environment had to be changed.

When the constitutional convention was first seriously proposed in 1846, banning special bills was among the list of desired revisions already being discussed at public meetings around the state.<sup>66</sup> Democratic Governor James Whitcomb focused on the issue in his December 1845 message to the legislature, and he continued to push for it in subsequent remarks, declaring in an 1848 address that banning special legislation was such a pressing issue that “[i]f calling a Convention to amend the Constitution were productive of no other result, than furnishing an effectual remedy for this growing evil, it would be abundantly justified.”<sup>67</sup> Governor Paris C. Dunning echoed these remarks the next year when, announcing the results of the referendum approving a constitutional convention, he called attention to the “growing evil” of special legislation that “has attracted much attention amongst the masses of people, and to which much well founded opposition exists in the public mind.”<sup>68</sup> By 1850 the groundswell against special legislation led even the state’s Whigs to agree that it was “a fruitful source of evil” and that “some general provision ought to be adopted [at the constitutional convention] having reference to incorporations, county business, and other subjects of legislation, heretofore unnecessarily multiplied.”<sup>69</sup>

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<sup>66</sup> Charles Kettleborough, *Constitution Making in Indiana: A Source Book of Constitutional Documents with Historical Introduction and Critical Notes* (Indianapolis: Indiana Historical Commission, 1916), Vol. 1, lxiv-lxv, 167-169.

<sup>67</sup> Message of Governor James Whitcomb, in Kettleborough, *Constitution Making in Indiana*, Vol. 1, 185-189. See also his 1845 and 1846 addresses, reprinted respectively in *Indiana, Documents of the General Assembly* (Indianapolis: J. P. Chapman, 1846), Pt 1, 87-96; and the *Wabash Courier*, Dec. 12, 1846.

<sup>68</sup> Message of Governor Paris C. Dunning, in Kettleborough, *Constitution Making in Indiana*, Vol. 1, 194-196.

<sup>69</sup> “Whig Resolutions,” *Wabash Courier*, Feb. 16, 1850.

Speeches on the floor of the convention linked the state's fiscal debacle to the evil. Thus one delegate asserted that the proposed constitutional revisions would bring an end to "this special and local legislation that has ... heaped upon us burdens of taxation for no good purpose."<sup>70</sup> Another argued that the influence that "corporations and combinations of wealthy men" exerted on the legislature "to secure special privileges and partial legislation" made it necessary to "have it explicitly declared in our organic law" that the legislature had no unilateral power to contract a state debt.<sup>71</sup> As yet another declared, "The evil of vicious legislation under which we are now suffering has arisen from local legislation." It was important "to break up this system of legislation, and with it the log-rolling by which it was ever sustained" so that "combinations of local interests, which have heretofore been made, cannot ... be entered into with any degree of success."<sup>72</sup> One delegate explained that the volume of special legislation, in combination with log-rolling, meant that "bills have often been passed through the General Assembly without being once read, without their true character being understood." In this way, he continued, powers "have been given to corporations which ought not to be intrusted to any man or set of men." The new constitution would "prevent such evils, by providing that corporations shall exist only under general laws, which must be enacted deliberately, with the consent of not less than a majority of all the members to the House ..."<sup>73</sup>

The proposal to ban all special legislation had widespread support at the convention. Almost no one spoke against it, and it passed overwhelmingly on the third reading by a vote of 116 to 13.<sup>74</sup> The only real debate was over whether the constitution should simply state that "the

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<sup>70</sup> Indiana, *Report of the Debates*, Vol. 2, 1032.

<sup>71</sup> Indiana, *Report of the Debates*, Vol. 1, 683.

<sup>72</sup> Indiana, *Report of the Debates*, Vol. 2, 1041.

<sup>73</sup> Indiana, *Report of the Debates*, Vol. 1, 369.

<sup>74</sup> Carmony, *Indiana, 1816-1850*, 416-417.

General Assembly shall not pass local or special laws” or whether it should enumerate the kinds of special laws that would be prohibited.<sup>75</sup> In the end the constitution did both, listing nearly a score of specific types of special legislation that would be banned but also mandating that “in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the state.”<sup>76</sup> Once the constitution was ratified, moreover, there was no going back. The Democrats dominated the legislature during the next couple of sessions, and they got to work revising existing statutes and enacting new general laws where needed. When the new Republican Party took control of the lower house in 1855, its leaders tried to amend the constitution in several ways, including restoring some ability to enact local legislation. But their efforts failed, even in the House.<sup>77</sup>

The sequence of events in the other states which defaulted was similar to that in Indiana. Regardless of party affiliation, politicians everywhere had sought during the 1820s and 1830s to respond to their supporters’ desire for transportation projects. Yet they were also concerned that the economic benefits resulting from these projects could be manipulated by their opponents for partisan advantage. As a consequence, the positions they took on particular projects depended on whether they were in power and how well entrenched—just as did their position on banks. Whichever party happened to be in power pushed hard for the projects their constituents most wanted, but to increase their margin of support they often added other projects to their proposals. The amount that had to be borrowed correspondingly increased.

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<sup>75</sup> See Indiana, *Report of the Debates*, Vol. 2, 1768-1769.

<sup>76</sup> Indiana Constitution of 1851, Article IV, Sections 22 and 23, and Article XI, Section 13.

<sup>77</sup> Kettleborough, *Constitution Making in Indiana*, Vol. 2, 8-12.

When the crisis struck, the political upheaval that ensued took a similar form regardless of the party in power. All the defaulting states that had not just written constitutions in the 1830s revised their constitutions in the 1840s and 1850s. As might be expected, all the new constitutions included debt provisions to prevent similar financial troubles in the future.<sup>78</sup> More significantly, all curbed the power of state legislatures with the aim of changing the way government worked. Initially none went as far as Indiana and mandated that all laws be general and uniform throughout the state. Instead they focused on the core problem of the award of economically valuable privileges and prohibited their legislatures from chartering corporations except under general laws (see Table 2). Three other states with high debt levels revised their constitutions during this period, and they also made similar changes. Even states that did not amend their constitutions in this way (even those largely free of financial crisis) responded to the general political upheaval by enacting general incorporation laws. In 1840 only four states had general incorporation laws for manufacturing companies in force; by 1860 all but five out of thirty-four had enacted them.<sup>79</sup> The spread of general incorporation laws for banks was similar though somewhat slower, in part because some states responded to the crises of 1837 and 1839 by banning banks entirely. The number of states with free-banking laws increased from two in 1840 to four in 1850 to eighteen in 1860.<sup>80</sup> In the absence of constitutional bans on special charters, however, the legislatures in these states could, and did, continue to dispense economic

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<sup>78</sup> These measures dramatically reduced levels of state borrowing. Wallis, “Constitutions, Corporations, and Corruption,” 217.

<sup>79</sup> Eric Hilt, “Corporation Law and the Shift toward Open Access in the Antebellum United States,” in *Organizations, Civil Society, and the Roots of Development*, ed. Lamoreaux and Wallis, 147-177, especially 159.

<sup>80</sup> Hilt, “Early American Corporations and the State,” 69; Sharon Ann Murphy, *Other People’s Money: How Banking Worked in the Early American Republic* (Baltimore: Johns Hopkins Press, 2017), Map 4.1.

privileges to their supporters, and so almost all revised their constitutions over the next couple of decades to ban special charters. And when they did, they almost always banned other kinds of special bills as well (see Figure 1).

As in the case of banking, the delays imposed costs on a states' economies by lowering their dynamism. So long as businesses could obtain a better deal from the legislature by securing a special charter, they avoided taking out charters under general laws. Some idea of the effect that continuation of the special charter system could entail can be obtained by comparing the number of incorporations in Ohio, which banned special charters in 1851, with those in New Jersey and Pennsylvania, which enacted general incorporation laws in the 1840s but did not ban special charters for two more decades. In the ten years following the Civil War, Ohio chartered 2.2 times as many corporations under its general law as New Jersey did under both its general and special laws. After New Jersey banned special charters in 1875, the gap began to close. During the 1880s (that is, before New Jersey's liberal revision of its general incorporation law), the ratio of new corporations in Ohio relative to New Jersey fell to 1.5, at the same time as the numbers of corporations founded in both states rose dramatically. Although there are gaps in the data for Pennsylvania, the story there seems to have been much the same, with the number of corporations converging on the number in Ohio only after the imposition of the ban on special charters in 1874.<sup>81</sup>

Most states did not wait long to mandate general incorporation. The constitutional revisions that Indiana and other states enacted in the aftermath of the defaults changed the norms for how new governments should be set up. As Table 2 indicates, five of the six states that

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<sup>81</sup> George Heberton Evans, Jr., *Business Incorporations in the United States, 1800-1943* (New York: National Bureau of Economic Research, 1948), 12, and Appendix 3.

entered the union between the defaults and the Civil War (all but Texas) included in their constitutions bans on special corporate charters, and three of them went so far as to require all laws be general. The case of Kansas is especially interesting because it shows how pervasive the new ideas were. Settlers in this war-ravaged territory wrote four different constitutions between 1855 and 1859. Three of the constitutions, Topeka (1855), Leavenworth (1859), and Wyandote (1859, the one accepted by Congress) proposed that Kansas be admitted as a free state. All three included almost identical bans on special charters of incorporation and a requirement that laws be general. For example, the Wyandote provision on special charters read: “The Legislature shall pass no special act conferring corporate powers. Corporations may be created under general laws; but all such laws may be amended or repealed.” Even the pro-slavery Lecompton constitution leaned in the same direction, though it was somewhat weaker (or perhaps just badly drafted): “Corporations may be formed under a general law, but the Legislature may by special act create bodies politic for municipal purposes, where the objects of the corporations cannot be attained under it. All general laws or special acts enacted under the provisions of this section, may be altered, amended, or repealed by the Legislature at any time.”<sup>82</sup>

After the Civil War, the constitutional reforms pioneered by Indiana continued to spread. As Figure 1 shows, almost all the states that entered the union in the late nineteenth or early

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<sup>82</sup> Article 5, Sec. 24 of the Lecompton constitution moved toward general laws by declaring, “The Legislature shall have no power to grant divorces, to change the names of individuals, or direct the sales of estates belonging to infants or other persons laboring under legal disabilities, by special legislation, but by general laws shall confer such powers on the courts of justice.” The rule in the other three constitutions was broader. For example, Article 2, Sec. 17 of the Wyandote constitution declared, “All laws of a general nature shall have a uniform operation throughout the State; and in all cases where a general law can be made applicable, no special law shall be enacted.” The four constitutions can be found on the website of the Kansas Historical Society, <https://www.kshs.org/kansapedia/kansas-constitutions/16532>, accessed Aug. 18, 2019.

twentieth centuries incorporated both the ban on special charters and the mandate that all laws be general into their constitutions, as did most of the southern states when they rewrote their constitutions after the Civil War. Only a few states never adopted these reforms. Almost all of the holdouts were in New England, where legislatures had effectively opened access to banking and the corporate form by statute during the preceding decades and the award of economically valuable privileges to favorites was no longer an important source of political controversy. Instead what roiled the region was the balance of power between cities and their rural hinterlands, an issue that became especially salient with influx of Irish immigrants after the potato famine. Massachusetts' 1853 constitution was voted down (by a 52 to 48 margin) because it would have reduced the representation of Boston and other coastal cities in the legislature.<sup>83</sup>

At the federal level, as already noted, there were no similar constitutional reforms, and Congress would not make a serious effort to curb the enactment of special bills until the mid-twentieth century. There was nothing preordained about this outcome—no inevitable reason why the transition to general laws in the U.S. should be the achievement of the states and not the national government. However, because of the way the federal system was set up from the beginning—and this was more a matter of the power to tax than the police power—Congress could not solve the problem of geographic competition that prevented it from borrowing money for infrastructural projects. Governments that do not borrow do not experience fiscal crises, and it was the imperative to prevent any recurrence of default that drove states to reform their

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<sup>83</sup> Thomas H. O'Connor, "Irish Votes and Yankee Cotton: The Constitution of 1853," *Proceedings of the Massachusetts Historical Society* 95 (1983): 88-99; Eli A. Glasser, "Government and the Constitution (1820-1917)," in *Commonwealth History of Massachusetts*, ed. Albert Bushnell Hart (New York: States History Co., 1930), Vol. IV, 1-34 at 18-22. The vote is reported in Massachusetts, *Journal of the Constitutional Convention* (Boston: White & Potter, 1853), 518-541.

governments in the first place. Although the obvious way to prevent future defaults was to impose controls on legislative borrowing, contemporaries understood that the crisis had deeper causes. The special bills that were the legislators' bread and butter had distorted collective decision making. The reforms aimed to eradicate the problem at its root.

### **A New Political Economy**

After the ratification of the new constitution in 1851, the Indiana legislature got to work and produced a set of revised statutes with general laws covering topics that previously had been subjects of special legislation. Once this task was completed, the legislature had much less business to conduct, and as mandated by the new constitution, it switched from annual to biennial sessions. Even though it met less frequently, the number of pages required to publish its acts shrank. The records of the regular *biennial* sessions of 1853, 1857, 1859, and 1861 averaged 220 pages, whereas those of the *annual* sessions of 1846, 1847, 1848, and 1849 had been more than three times as large, averaging 769 pages each. More importantly, as the number of bills dropped, their composition changed, with general laws now accounting for half to two thirds of the total, private bills almost completely disappearing, and bills that applied to specific local governments plummeting in number and proportion (Table 1).

The new general laws enacted after 1851 moved many tasks that previously had occupied the legislature to other parts of the government. Some activities, such as granting divorces or changing people's names, became the exclusive responsibility of the courts.<sup>84</sup> Others, such as decisions about whether livestock would be allowed to run at large or whether to establish a

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<sup>84</sup> Indiana General Assembly, "AN ACT regulating the granting of Divorces, nullification of Marriages ..." approved May 13, 1852; and "AN ACT authorizing Circuit Courts to change the names of persons and corporations," approved Jan. 21, 1852.

public ferry over a river, went to local administrative bodies.<sup>85</sup> Still others, for all practical purposes, went to nobody. To form a manufacturing corporation, for example, three or more persons simply had to “make, sign, and acknowledge” before “some officer capable to take the acknowledgement of deeds” a certificate that stated such basic information as the company’s name, its business object, the amount of its capital, and the names of its initial officers.<sup>86</sup> No governmental official had to do more than check that the certificate included all the necessary information and that the requisite filing fees had been paid. Entry was now completely non-discretionary and open.

Entry was similarly open in the other states that mandated general incorporation. George Heberton Evans’s count of the number of new corporations formed in the various U.S. states shows a tremendous surge following the spread of bans on special charters in the last third of the nineteenth century. Moreover, most of the new corporations were relatively small. Wherever the data allowed, Evans divided his counts into three categories: small corporations (less than \$100,000 in authorized capital), medium-sized (\$100,000 to \$1,000,000), and large (more than \$1,000,000). As the number of corporations grew during this period, so did the proportion that were small—in Maryland from about 10 percent to more than three quarters of the total, in Ohio from 40-50 percent to over 80 percent, in Texas from about 50 percent to 90 percent. The only state for which data is available that displays a different trend is New Jersey, which liberalized its general laws in 1888 to facilitate mergers and legalize holding companies and thus attract

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<sup>85</sup> Indiana General Assembly, “AN ACT to provide for the regulation of the running at large of all kinds of animals ...” approved May 31, 1852; and “AN ACT to establish and regulate Ferries,” approved June 17, 1852.

<sup>86</sup> Indiana General Assembly, “AN ACT for the incorporation of Manufacturing and Mining Companies ...” approved May 20, 1852.

large corporations from other states. But even in New Jersey about half of the new corporations chartered in the 1890s were small.<sup>87</sup>

The relative increase in the number of small corporations was to some extent at least a matter of design. The constitutional reforms enacted in the wake of the fiscal crisis of the early 1840s had been shaped by small-scale producers' resentment against the privileges that legislators had conferred on political favorites, and the general incorporation statutes that followed consequently aimed to level the playing field and keep it as flat as possible. A survey of the laws passed in seven major states (California, Illinois, Massachusetts, New Jersey, New York, Ohio, and Pennsylvania) reveals that all but one had ceilings on corporate borrowing and limits on the duration of charters. All mandated particular governance structures, and all imposed additional liabilities on shareholders under specific circumstances, usually to ensure that workers got paid in the event of financial difficulties. (In California shareholders were unlimitedly liable for their proportion of *all* corporate debts, a rule that persisted deep into the twentieth century.) Most of the states also took steps to prevent the wealthy and powerful from disproportionately benefiting from the ready availability of the corporate form by placing ceilings on the amount of capital a corporation could raise and/or by limiting the power of the wealthiest shareholders within the enterprise.<sup>88</sup>

These provisions were only truly binding in states with constitutional provisions that banned special charters. Otherwise business people with favored access to the legislature could

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<sup>87</sup> Evans, *Business Incorporations in the United States*, Appendix 3.

<sup>88</sup> Ron Harris and Naomi R. Lamoreaux, "Opening the Black Box of the Common-Law Legal Regime: Contrasts in the Development of Corporate Law in Britain and the United States in the Late Nineteenth and Early Twentieth Centuries," *Business History* 61 (issue 7, 2019): 1199-1221. See also the online appendix of U.S. state general incorporation statutes associated with that paper.

evade the constraints by securing special charters. Five years after the enactment of Pennsylvania's 1849 general incorporation law for manufacturing less than a dozen companies had actually incorporated under it, while in 1855 alone the legislature passed 196 special bills chartering or amending the charters of for-profit business corporations. Many of these bills were sought by enterprises whose businesses were not yet covered by the general laws, but others were moves to escape the restrictive features of the laws. For example, in the iron industry companies obtained special charters in order to buy stock in other companies (purchases that were otherwise prohibited), engage in lines of business not permitted by their charters (such as building a railroad or a telegraph), borrow money in greater amounts than allowed by the general statute, escape limits imposed on real estate holdings, and institute non-standard voting rules for elections for directors.<sup>89</sup>

Even after constitutional bans on special charters closed these escape hatches, general incorporation laws retained their regulatory character. Among the seven states we surveyed, limits on capital and duration tended to become more liberal over time or to disappear entirely, but the same was not true of the ceilings on borrowing or the mandatory governance rules. Indeed, there was a pronounced trend to bolster the relative power of small shareholders by

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<sup>89</sup> See, for examples, "AN ACT To enable the Sharon Iron Company, of Mercer county, to subscribe to the Stock of the Pittsburg and Erie Railroad Company," 5 April 1855; "AN ACT to incorporate the Hopewell Coal and Iron Company," 7 May 1855; "AN ACT To incorporate the Saucona Iron Company, in the county of Northampton," 8 April 1857; "AN ACT To incorporate the Sullivan Coal and Iron Company," 2 March 1868; "AN ACT To incorporate the Emaus Iron Company," 11 March 1870; "AN ACT Relative to the Bloomsburg Iron Company," 12 March 1870; "A Further Supplement To an act, entitled 'An Act to incorporate the Emaus Iron Company ...'" 2 April 1872. See also Hartz, *Economic Policy and Democratic Thought*, 39-41; and Lamoreaux, "Revisiting American Exceptionalism," 40. The evidence in these acts counters Susan Pace Hamill's claim that special charters were little different in their salient features than charters obtained under general laws. See "From Special Privilege to General Utility: A Continuation of Willard Hurst's Study of Corporations," *American University Law Review* 49 (Oct. 1999), 81-180.

mandating cumulative voting in elections for corporate directors. In Pennsylvania and Illinois this requirement was even written into the state constitution.<sup>90</sup> After New Jersey's 1888 revisions sparked a competition to charter corporations, some companies moved their corporate domiciles to states with lighter regulations, but the extent of the resulting "race to the bottom" has been greatly over-emphasized in the literature. Although many states eventually followed New Jersey's lead and facilitated corporate mergers, in other respects their statutes remained highly regulatory. Illinois even wrote antitrust restrictions into the New-Jersey type merger provisions it adopted in 1919.<sup>91</sup>

The dynamic, competitive capitalism that open entry produced, in combination with the lack of government oversight of the incorporation process, has led some scholars to see the late nineteenth century as a period of *laissez faire*. This is a misunderstanding. The regulations embedded in general incorporation statutes were meant to be self-enforcing in the sense that officers, directors, and controlling shareholders who did not follow the rules risked being sued by minority shareholders, creditors, or other stakeholders. Already in the middle decades of the nineteenth century, however, states were beginning to build administrative capacity in areas where the public welfare required more active vigilance. We have already mentioned the growing oversight of banking operations in the aftermath of New York's free banking law. During the late nineteenth century at least two dozen states set up railroad commissions to

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<sup>90</sup> Under cumulative voting, if the board included five directors, shareholders would have a choice of casting one vote for each of five different candidates, five votes for one candidate, or anything in between.

<sup>91</sup> It is beyond the scope of this paper to document the limited impact of corporate chartermongering on the regulatory features of state general incorporation laws, but see Harris and Lamoreaux, "Opening the Black Box" and the associated online appendix; and Lamoreaux and Phillips Sawyer, "Voting Trusts."

enforce the regulations they had embodied in general legislation.<sup>92</sup> Moreover, as manufacturing corporations began to join forces to exert monopoly power over their industries, most states enacted new general laws known as antitrust statutes to prohibit combinations in restraint of trade. Vigorously enforced by many the state attorneys general they empowered, these statutes could never have been effective under a regime of special laws, where politically well-connected businesses could secure legislative authorization to combine.<sup>93</sup>

In response to these initiatives businesses organized collectively to influence both the content of the legislation and the decisions of the regulators. This development for the most was something new. Before the shift to general laws businesses had mainly sought individual favors from legislatures, and there had been little need for them to unite for lobbying purposes, except to push Congress for favorable tariff legislation.<sup>94</sup> Opponents of business now also organized to influence legislators and regulators, forming a range of new associations from farmers' cooperatives to labor organizations to more elite civic and anti-monopoly leagues. This too was for the most part a new development, though it had its antecedents in the anti-slavery and other reform associations of the antebellum period.<sup>95</sup>

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<sup>92</sup> That is the number of state railroad commissions from which annual reports are available on the Hathi Trust Digital Library.

<sup>93</sup> James May, "Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918," *University of Pennsylvania Law Review* 135 (Mar. 1987), 495-593; May, "Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918," *Ohio State Law Journal* 50 (issue 2, 1989), 257-395; and Lamoreaux and Phillips Sawyer, "Voting Trusts and Antitrust."

<sup>94</sup> See, for example, Douglas A. Irwin, *Clashing Over Commerce: A History of Trade Policy* (Chicago: University of Chicago Press, 2017).

<sup>95</sup> The literature is vast, but see Clemens, *People's Lobby*; and Richard R. John, "Robber Barons Redux: Antimonopoly Reconsidered," *Enterprise & Society* 13 (Mar. 2012): 1-38.

If one focuses just on the history of the United States, it is easy to allow the (very real) concerns of these oppositional groups with the rise of big business and growing economic inequality to obscure the (also very real) transformation wrought by the shift to general laws. As the rapid growth in the number of small corporations suggests, open access to banking and the corporate form changed the nature of American capitalism, facilitating entry and intensifying the competitiveness of the economy. As North, Wallis, and Weingast have shown in *Violence and Social Orders*, most capitalist countries never went through a similar transformation, and their economies remain the object of political manipulation. Mexico is good example of that more common trajectory. The government of Porfirio Díaz (1884-1911) tightly controlled the number of banks in each state, and the resulting constraints on the availability of finance, as well as other government-imposed barriers to entry, meant that most large-scale industries were dominated by one or two privileged firms, and that even competitively structured sectors like textiles were much more highly concentrated than in the U.S. The Porfiriato's tight political control of the economy also meant the progressive degradation of Mexico's budding democracy into a dictatorship that finally collapsed in violence in 1911. After the Revolution, however, nothing much changed, except the coalition that doled out economic privileges for political ends. This is how capitalism operates in most places in the world, even today.<sup>96</sup>

A very small number of countries have succeeded in escaping this fate by moving to a system of impersonal, general laws. The United States is one. There was nothing inevitable about this development. It was not foreordained by the Constitution; nor was it an

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<sup>96</sup> Stephen Haber, Armando Razo, and Noel Maurer, *The Politics of Property Rights: Political Instability, Credible Commitments and Economic Growth in Mexico, 1876-1929* (New York: Cambridge University Press, 2003); Charles W. Calomiris and Stephen H. Haber, *Fragile by Design: The Political Origins of Banking Crises and Scarce Credit* (Princeton, NJ: Princeton University Press, 2014), Ch. 10; North, Wallis, and Weingast, *Violence and Social Orders*.

accomplishment of the federal government, weak or strong. The states' greater ability to put legislative coalitions together for the benefit of particular interests led them to take on enormous burden of debt to build transportation systems and other infrastructure projects. When these endeavors collapsed in fiscal catastrophe, they set in motion a political earthquake that, in the particular context of the 1840s, swept away the old system of special legislation that had underpinned elite political control of the economy. Again, this was not a simple shift from darkness into light. The new regime had its own wellsprings of corruption, inequality, and crisis. But it is easy to be swept up in the critique of those ills and forget that the relevant counterfactual alternative was Mexico.

Table 1. Types of Laws Enacted by the Indiana Legislature, Select Years, 1830-1885

Year	Total Number of Laws	General Laws	General Laws as Percent of Total	Special Laws for Government	Special Laws for State Government as Percent of Total	Local Laws for Local Governments	Local Laws for Local Governments as Percent of Total	Private Laws	Private Laws as Percent of Total
Panel A: Legislative sessions held before the 1851 Constitution									
1830	118	2	0.02	8	0.07	83	0.70	25	0.21
1835	247	28	0.11	8	0.03	132	0.53	79	0.32
1840	307	39	0.13	31	0.10	156	0.51	81	0.26
1845	496	49	0.10	28	0.06	248	0.50	171	0.34
1850	550	43	0.08	16	0.03	278	0.51	213	0.39
Panel B: Legislative sessions held after the 1851 Constitution									
1855	114	74	0.65	23	0.20	12	0.11	5	0.04
1861	154	86	0.56	34	0.22	21	0.14	13	0.08
1865	156	97	0.62	28	0.18	26	0.17	5	0.03
1871	35	14	0.40	7	0.20	12	0.34	2	0.06
1875	158	104	0.66	22	0.14	28	0.18	4	0.03
1881	157	91	0.58	29	0.18	26	0.17	11	0.07
1885	159	85	0.53	32	0.20	36	0.23	6	0.04

*Notes:* We divide special laws into three categories: “special laws for state government” pertained to the different parts of the state government, for example appropriations for the state attorney general or the supreme court; “local laws for local governments” regulated specific local governments, for example by allowing specific taxes or setting salaries for particular officials; and “private laws” were bills enacted to benefit specific individuals or groups, for example by allowing them to change their names or form corporations. The counts before 1855 include both the volumes for “General Laws” and the volumes for “Local Laws.” After 1851,

there was only one volume per legislative session. The counts for 1861, 1865, 1875, 1881, and 1885 include both the regular session and special sessions held during those years. There was no special session in 1855 or 1871.

*Source:* Indiana Session Laws, Heinonline, <https://heinonline.org/HOL/Index?index=ssl/ssin&collection=ssl>.

Table 2. Revisions to State Constitutions, 1840-1860

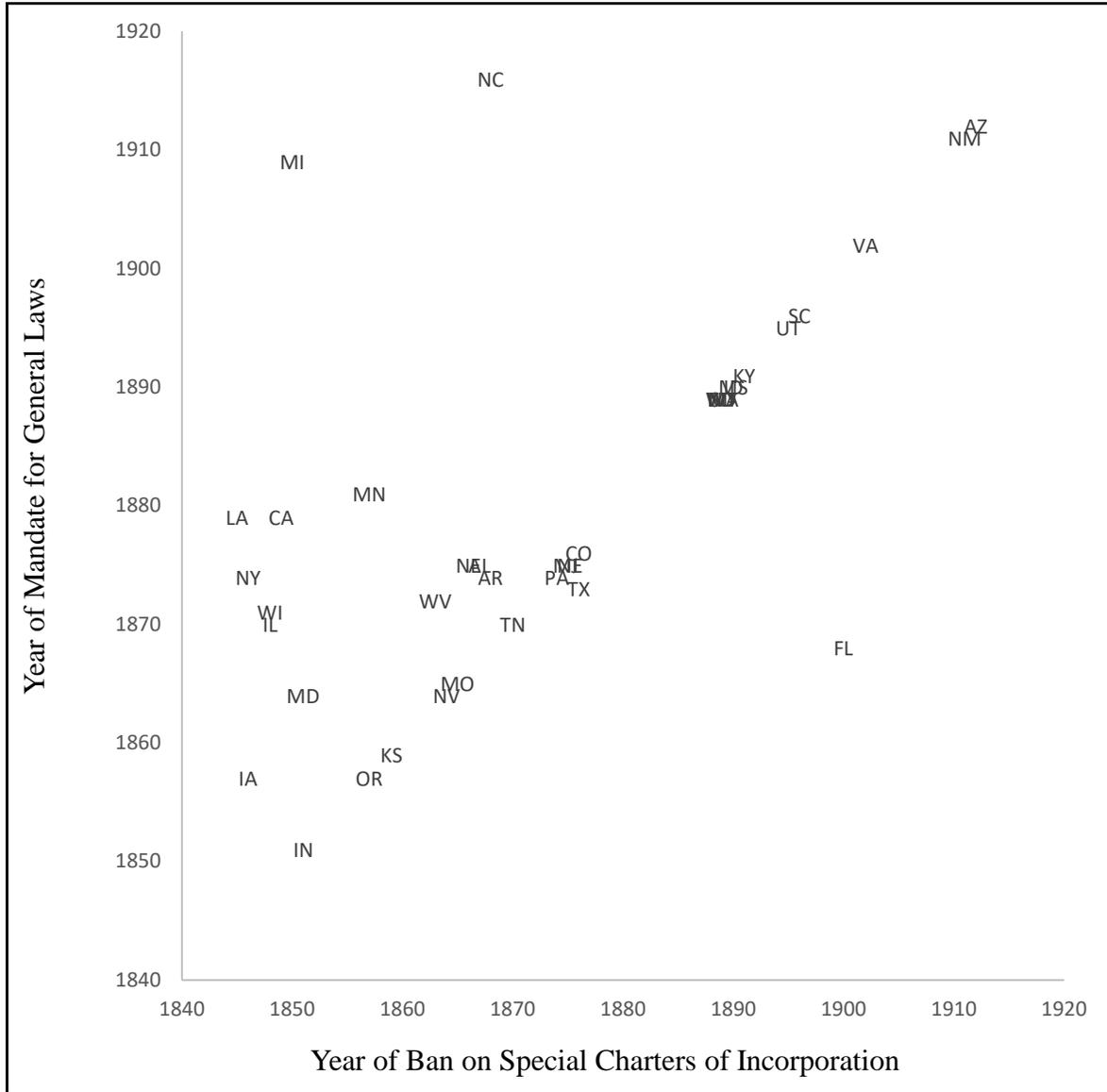
	Adopted a New Constitution?	Banned Special Corporate Charters?	Mandated General Laws?
<i>States that Defaulted</i>			
Arkansas	N	--	--
Florida	N	--	--
Illinois (1848)	Y	Y	N
Indiana (1851)	Y	Y	Y
Louisiana (1845 and 1852)	Y	Y <sup>a</sup>	N
Maryland (1851)	Y	Y	N
Michigan (1850)	Y	Y	N
Mississippi	N	--	--
Pennsylvania	N	--	--
<i>Other States with High Debts</i>			
Alabama	N	--	--
Massachusetts	N	--	--
New York (1846)	Y	Y	N
Ohio (1851)	Y	Y	N
South Carolina	N	--	--
Wisconsin (1848)	Y	Y	N
<i>States with Low or No Debts</i>			
Connecticut	N	--	--
Delaware	N	--	--
Georgia	N	--	--
Kentucky (1850)	Y	N	N
Maine	N	--	--
Missouri	N	--	--
New Hampshire	N	--	--
New Jersey (1844)	Y	N	N
North Carolina	N	--	--
Rhode Island (1843)	Y	N	N
Tennessee	N	--	--
Vermont	N	--	--
Virginia (1851)	Y	N	N
<i>New States</i>			
California (1849)	Y	Y	N
Iowa (1846 and 1857)	Y	Y	Y <sup>b</sup>
Kansas (1859)	Y	Y	Y
Minnesota (1857)	Y	Y	N
Oregon (1857)	Y	Y	Y
Texas (1845)	Y	N	N

<sup>a</sup>Louisiana banned special corporate charters in 1845 but omitted that provision when it rewrote its constitution again in 1852, only adding it back in 1879 when it adopted a general law mandate.

<sup>b</sup>Iowa did not mandate general laws in its 1846 constitution but added the provision when it rewrote its constitution in 1857.

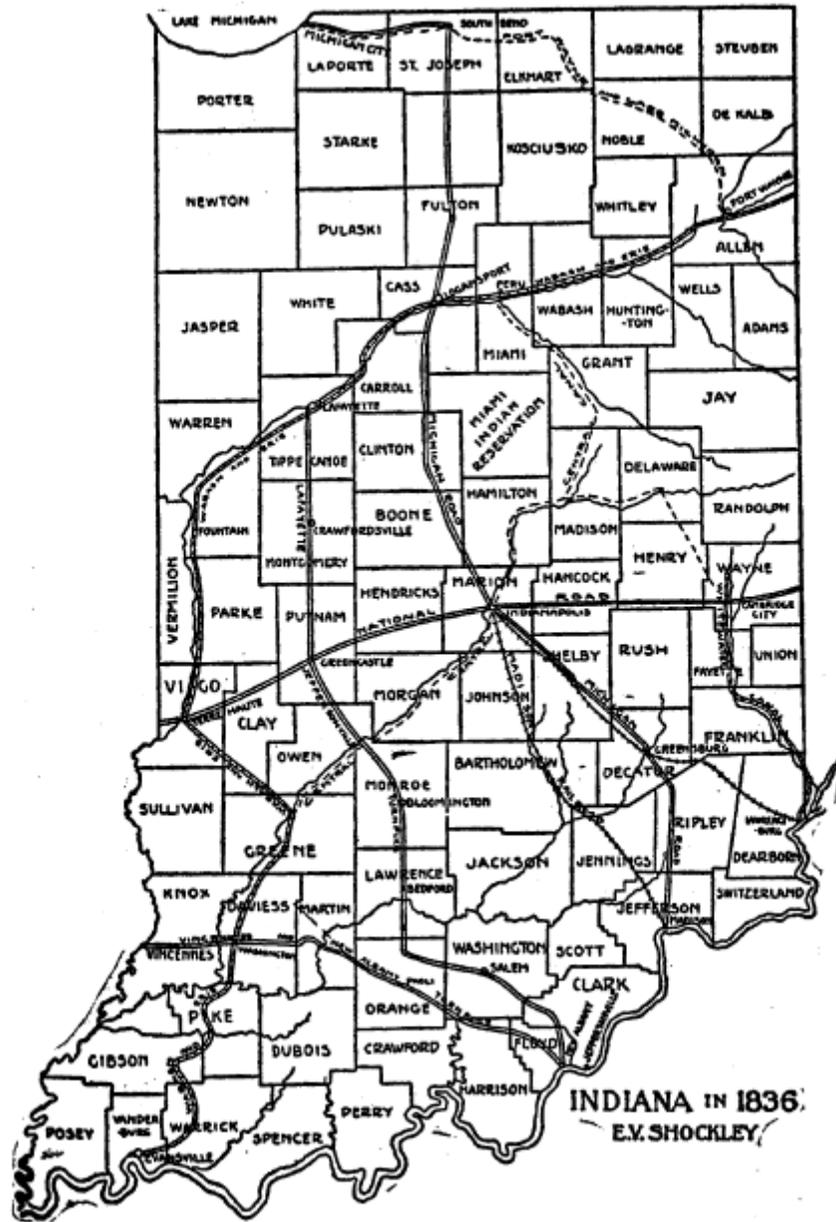
*Notes and Sources:* The defaulting states that did not rewrite their constitutions in this period all had just written new constitutions in the 1830s. Three additional states wrote revised constitutions in the 1840s or 1850s that were rejected by the voters: Delaware (1853), Massachusetts (1853), and Missouri (1845). Only the Massachusetts draft prohibited special corporate charters. States were considered to have high debts if their obligations exceeded \$5 per capita. See Wallis, "Constitutions, Corporations, and Corruption," 217. Constitutional provisions are from the NBER/Maryland State Constitutions Project. For a list of state constitutional conventions from the period, see John J. Dinan, *The American Constitutional Tradition* (Lawrence: University Press of Kansas, 2006), 8-9.

Figure 1. Comparison of Dates of Constitutional Mandates for General Incorporation and General Laws, by States



*Notes and Sources:* Delaware, Ohio, Oklahoma, and Vermont banned special corporate charters (in 1897, 1851, 1907, and 1913 respectively) but did not enact mandates for general laws. Connecticut, Georgia, Massachusetts, New Hampshire, and Rhode Island did not enact either provision. For the text of the provisions see the NBER/Maryland State Constitutions Project.

Figure 2. The Mammoth System of Internal Improvements



Source: Reproduced from Esarey, *History of Indiana*, Vol. 1, 355.