

The Historical Race Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880-1910

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I. INTRODUCTION

In July 1902, readers of *The American Lawyer*, a self-styled “News-Journal of the American Bar” would have seen a large advertisement for an organization called the “Delaware Corporation Company.”¹ It offered “Corporations organized under Delaware Law. Perpetual Charters. Low rate of taxation. Original books may be kept outside the State. Copy of the Law, Blank Forms and full information forwarded upon request.”² A few pages later in that same publication, a similar ad promoted “Maine Corporations,” which, it said, “have broader powers, greater immunity to stockholders and are taxed less than those of New Jersey, New York, Delaware or West Virginia.”³ Appearing in the October issue were two additional advertisements for incorporation in South Dakota. One reported that the state’s “laws are liberal. Least trouble and expense and more privileges than any other state.”⁴ The other ad simply announced “This beats New Jersey.”⁵

New Jersey was definitely the state to beat. The so-called “Mother of Trusts” was the beneficiary of the first great merger boom in American business history,⁶ as combinations of industrial firms created such industry-dominant companies as Consolidated Tobacco, Standard Oil and U.S. Steel, all incorporated in New Jersey.⁷ The financial benefit to the state was substantial. By 1896 New Jersey was, according to its Governor, “practically out of debt” and had no statewide taxes.⁸ By 1905, it had begun to remit to localities a portion of the school tax assessments.⁹ It was not surprising that

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1. 10 AM. LAW. 289 (July 1902).

2. *Id.* at 306.

3. *Id.* at 318.

4. *Id.* at 465.

5. *Id.*

6. See generally NAOMI R. LAMOREAUX, *THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS, 1895-1904*, at 187 (1985) (exploring the causes of turn-of-the-century consolidations and concluding they “were by no means an inevitable component of the rise of the modern industry, even though so many important firms had their origins in these mergers”); RALPH L. NELSON, *MERGER MOVEMENTS IN AMERICAN INDUSTRY 1895-1956* (1959) (examining trends in merger activity between 1895-1956); Alfred D. Chandler, Jr., *The Beginnings of “Big Business” in American Industry*, 33 BUS. HIST. REV. 1, 10-14 (1959) (charting the growth of industries through horizontal integration at the end of the 19th century).

7. JOHN MOODY, *THE TRUTH ABOUT THE TRUSTS* 453-69 (1904). These were three of the seven “greater industrial trusts” categorized by John Moody in 1904. All of them, as well as half of the 298 companies Moody identified as “lesser industrial trusts” were New Jersey corporations. *Id.*; see also Christopher Grandy, *New Jersey Corporate Chartermongering, 1875-1929*, 49 J. ECON. HIST. 677, 678-89 (1989) (discussing New Jersey’s innovation in its “long search for revenue”).

8. Grandy, *supra* note 7, at 683.

9. *Id.*

other states sought to both emulate and compete with New Jersey by offering even more “liberal” state corporation laws or by charging lower incorporation fees and franchise taxes. In the long run, of course, it was Delaware that emerged the victor in this historical race, but that victory was not generally recognized until long after New Jersey, in 1913, effectively took itself out of the running by passing the reform statutes known as the “seven sisters.”¹⁰

The subject of regulatory competition among states for corporate charters has attracted immense theoretical interest in recent years. Broadly speaking, this work can be divided among those who view Delaware’s current dominance as the result of a “race to the bottom,” frequently coupling that analysis with a call for greater federal regulation of corporations;¹¹ those who argue that the beneficial effects of state competition create instead a “race to the top;”¹² and various intermediate positions.¹³ In recent years,

10. Delaware’s replacement of New Jersey as the leading state for incorporations was not very apparent to observers in the years immediately after 1913. Most New Jersey corporations were not affected by the “seven sisters” laws and did not change their state of incorporation as a result of them. Harold W. Stoke, *Economic Influence Upon the Corporation Laws of New Jersey*, 38 J. POL. ECON. 551, 579 (1930). DuPont and General Motors were the major exceptions. Both reincorporated in Delaware in 1916. *Id.* A 1930 article commented that “[t]here is little to indicate that the state [New Jersey] or the corporations suffered particularly from the provisions of the ‘Seven Sisters’ acts.” *Id.* As late as 1957, the increasing tendency of corporations to incorporate in Delaware was sufficiently newsworthy to rate a story in the New York Times. Robert E. Bedingfield, *They Want to Get Away From It All*, N.Y. TIMES, Apr. 21, 1957, § 3, at 1.

11. William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663 (1974) (Cary is generally viewed as the progenitor of this line of argument, although in fact his critique had many antecedents). *See infra* notes 221-225 and accompanying text. Other recent articles which criticize, in various respects, the state competition for charters include RALPH NADER, MARK GREEN, & J. SELIGMAN, CONSTITUTIONALIZING THE CORPORATION: THE CASE FOR THE FEDERAL CHARTERING OF GIANT CORPORATIONS (1976); Oren Bar-Gill et al., *The Market for Corporate Law*, 162 J. INSTITUTIONAL & THEORETICAL ECON. 134 (2006), available at http://papers.ssrn.com/abstract_id=275452 (model showing that the market for corporate law will not perform well where rules provide for managerial private benefits); Lucian A. Bebchuk & Allen Ferrell, *Federalism and Corporate Law: The Race to Protect Managers from Takeovers*, 99 COLUM. L. REV. 1168 (1999) (state competition overprotects managers against takeovers); Lucian A. Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435 (1992) (state competition produces undesirable results in areas where managerial and shareholder interests diverge); John C. Coffee, Jr., *The Future of Corporate Federalism: State Competition and the New Trend Toward De Facto Federal Minimum Standards*, 8 CARDOZO L. REV. 759 (1987) (arguing for federal minimum standards, including a federal right of shareholders to change state of incorporation); Edward S. Herman, *The Limits of the Market as a Discipline in Corporate Governance*, 9 DEL. J. CORP. L. 530 (1984) (state laws historically have benefited managers, not shareholders).

12. The seminal piece on this side of the debate is Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977). Other recent works include FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 1-40 (1991); Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395 (1983); Daniel R. Fischel, *The “Race to the Bottom” Revisited: Reflections on Recent Developments in Delaware’s Corporation Law*, 76 NW. U. L. REV. 913 (1982); Ralph K. Winter, *The “Race for the Top” Revisited: A Comment on Eisenberg*, 89 COLUM. L. REV. 1526 (1989). Roberta Romano offers a more nuanced and empirical perspective on the charter race, but ultimately concludes that reincorporation in Delaware does not harm shareholders and generally favors state regulatory competition. ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW (1993) [hereinafter ROMANO, GENIUS]; Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359 (1998); Roberta Romano, *The State Competition Debate in Corporate Law*, 8 CARDOZO L. REV. 709 (1987); Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225 (1985) [hereinafter Romano, *Law as a Product*].

empirical research¹⁴ has added significantly to the sophistication and complexity of the debate, if not as significantly to its resolution.¹⁵

Given this interest, it is somewhat surprising that more attention has not been paid to the historical origins of state regulatory competition in its earliest period, roughly 1880 to 1910. That is when we can most directly observe actual competition among states for the business of granting corporate charters: in advertisements like those in the 1902 *American Lawyer*; in public statements by state officials and other interested parties; and in books and pamphlets, of varying degrees of partiality, written for members of the bar and the financial community. The story, as told by Professor Cary, is familiar to most corporate lawyers:

In 1896 New Jersey adopted what is regarded as the first of the modern liberal corporation statutes [T]his act is commonly credited with attracting the incorporation of the New Jersey trusts, such as the old Standard Oil Company

Shortly afterwards, Delaware, seeking new sources of revenue, copied very largely from the New Jersey act to establish its own statute. Then, in 1913, at the insistence of Governor Woodrow Wilson, New Jersey drastically tightened its law relating to corporations and trusts with a series of provisions known as the seven sisters. Since Delaware did not amend its statute, it took the lead at that time and has never lost it. . . .¹⁶

This history, repeated by generations of law professors to their Corporations classes, is mostly wrong. New Jersey's dominance of the market for corporate charters did not begin with the 1896 revisions to its corporate code. Fifteen years before that, New Jersey was already a leading state for the incorporation of firms doing business outside a single state. In 1881 and 1882, the number of firms incorporated in New Jersey exceeded those incorporated in Pennsylvania, the second largest industrial state in the union, or any other state for which we have statistics.¹⁷ New Jersey's lead was reinforced and extended in

13. Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908 (1998) (To maintain its competitive advantage, Delaware law fosters "excessive indeterminacy."); Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469 (1987) (Delaware corporate law is shaped not just by desire to maximize tax revenues, but by various interest groups, primarily corporate lawyers).

14. Lucian A. Bebchuk & Alma Cohen, *Firms' Decisions Where to Incorporate*, 46 J.L. & ECON. 383 (2003); Robert Daines, *The Incorporation Choices of IPO Firms*, 77 N.Y.U. L. REV. 1559 (2002); Robert Daines, *Does Delaware Law Improve Firm Value?*, 62 J. FIN. ECON. 525 (2001); Guhan Subramanian, *The Disappearing Delaware Effect*, 20 J.L. ECON. & ORG. 32 (2004); Guhan Subramanian, *The Influence of Antitakeover Statutes on Incorporation Choice: Evidence on the "Race" Debate and Antitakeover Overreaching*, 150 U. PA. L. REV. 1795 (2002).

15. Michal Barzuz, *Price Considerations in the Market for Corporate Law*, 26 CARDOZO L. REV. 127, 130 (2004) ("Puzzlingly, evidence exists to support all sides in the debate.").

16. Cary, *supra* note 11, at 664 (citations omitted).

17. See *infra* APPENDIX I. The data summarized in APPENDIX I is from GEORGE HEBERTON EVANS, *BUSINESS INCORPORATIONS IN THE UNITED STATES: 1800-1943*, at 98-143 (1948), who in turn derived it from reports of various state officials. The states chosen were those for which there is good data on incorporation for the entire period covered by this Article, and are also significant in the history of charter competition. Two of the states, New Jersey and Maine, were active in the market for corporate charters. See generally *infra* pp. 331-53, 361-63. Two others, Pennsylvania and Massachusetts, were large industrial states whose incorporations

the 1888-1889 period, when it passed a number of statutes that gave New Jersey corporations the express right to hold and purchase shares in other corporations. Well before 1896, early trusts like Standard Oil, National Cordage, United States Rubber, American Cotton Oil, and American Sugar Refining, all chose to incorporate there.¹⁸

Moreover, while Delaware did indeed enter into competition with New Jersey by passing its own, virtually identical, statute in 1899, it was far from the only state to do so. New York, Maine, West Virginia and quite a few other states all revised their corporate statutes around 1900 in an effort to capture more incorporation business from New Jersey. Accordingly, New Jersey's dominant position began to decline well before 1913. In 1901, the first year for which we have New York statistics, the total incorporations under New York law exceeded those of New Jersey.¹⁹ Perhaps even more significantly, while the annual total incorporations in New York quadrupled from 1901 to 1910, and those of Delaware almost tripled, the annual total incorporations in New Jersey dropped slightly between 1900 and 1910.²⁰

This Article provides an historical account of the first thirty years of state charter competition, 1880 to 1910. It tells the story of the rise of New Jersey as the "Mother of Trusts," its dominance during the first great merger wave, and the beginnings of the erosion of that dominance. This period was perhaps the most important, innovative, and controversial in American economic history, when many of the fundamental and familiar aspects of the modern American economy first developed. Industrial corporations achieved national and multinational scope. Federal antitrust enforcement began and gave rise to vigorous debates, even as mergers created dominant firms in many industries. A major expansion of the securities markets took place, which cemented New York's position as the financial center of the country. Finally, state competition for corporate charters and a recognized leading state for incorporation of large nationwide businesses both developed for the first time.

All of these developments were controversial. They were noted, analyzed, and debated within legal and financial circles, by politicians, and in the popular press. All

reflected almost entirely domestic businesses. (On the disadvantages of Pennsylvania and Massachusetts as chartering states, see Testimony of Francis Lynde Stetson before the United States Industrial Commission, *infra* note 32, at 971, 975.) Connecticut was a state of roughly equal size to New Jersey, which was not active in the charter market. See *infra* note 287. For comparison purposes, I have also included in APPENDIX I census statistics concerning the capital invested in manufacturing in each of those states for 1880, 1890, and 1900. *Id.* These figures are compiled from historical United States census data available online at the Goestat Center of the University of Virginia Library, <http://fisher.lib.virginia.edu/collections/stats/histcensus/>.

18. APPENDIX II summarizes additional data from EVANS, *supra* note 17, at 127-43, with incorporations broken down by the par value of the authorized capital stock. *Infra* APPENDIX II. "Large" incorporations were those with \$1 million or more authorized capital. "Medium" were \$10,000 to \$1 million, and "small" were under \$10,000. Beginning in 1890 and continuing through 1907, New Jersey almost invariably had more incorporations of large companies than Pennsylvania, Ohio, or any other state for which we have comparable statistics. *Id.* The depression year of 1894 is the sole exception. *Id.* Of the large industrial trusts, United States Leather Company was incorporated in New Jersey in 1893, National Cordage Company in 1887, American Sugar in 1891, and United States Rubber in 1892. ARTHUR S. DEWING, CORPORATE PROMOTIONS AND REORGANIZATIONS 19, 117 (1914); MOODY, *supra* note 7. For the somewhat more complex history of Standard Oil of New Jersey, see *infra* note 175.

19. See *infra* APPENDIX III. This data is also derived from EVANS, *supra* note 17, at 101-32, and compares total incorporations in four important chartering states.

20. See *infra* APPENDIX III.

influenced the race for corporate charters and its winners and losers. On the fundamental question of whether the charter competition in this period is best characterized as a race to the top, a race to the bottom, or something else entirely, the answer of this Article is: all of the above. For “race to the bottom” proponents, there is the undeniable fact that New Jersey’s law was initially designed to permit the market-dominating combinations, commonly known as “trusts,” to avoid restrictions on their anticompetitive activities by federal and state governments. These laws also provided somewhat weaker disclosure requirements and greater protection of managers and shareholders from liability than were found in many other states. Advocates of the “race to the top,” however, can note that the basic contours of the law that emerged in New Jersey in the 1890s is essentially the same as the Delaware law that governs most publicly traded corporations today. Many of the changes that New Jersey instituted at that time—such as the abolition of limitations on the size, duration, and power of corporations to hold and sell stock in other companies, limitations on potential shareholder liability to creditors for issuing undervalued shares, and development of enabling statutes giving incorporators greater freedom to create and structure corporate powers—were criticized at the time as removing important protections for the public.²¹ Most corporate law theorists today, however, would view them as reasonable, efficiency-promoting rules. “Race to the top” proponents will also enjoy the edifying failure of West Virginia, South Dakota, and the District of Columbia as charter jurisdictions, all of whom sought to appeal to the “low-end” of the charter market with a combination of very low fees and promoter-protective laws.²²

However, the history of this period provides most support to those contemporary scholars who stress the importance of interest groups, reputation, and path dependency in the competition for corporate charters. New Jersey’s dominance was built slowly, not by the passage of a particular law, but by the incremental development of a relational understanding between New Jersey politicians and the lawyers, promoters, financiers, and businessmen who first created and profited enormously from the development of large industrial corporations during this period. These interest groups developed a stake in fostering and maintaining New Jersey’s dominance, because of their own familiarity with and self-perceived influence over New Jersey law as well as the prevailing opinion that New Jersey provided the most favorable legal climate for large industrial corporations. Even though, by 1900, the flexibility and broad corporate powers available under New Jersey law were equally available in other states at significantly lower cost, and it was clear by at least 1904 that New Jersey incorporation provided no immunity from prosecution under federal antitrust laws, New Jersey remained the most popular choice for incorporation of large businesses until 1913.²³ Moreover, when its relational contract with big business was shattered irrevocably in 1913, those financiers and lawyers took their business not to the most inexpensive, nor the most innovative of the other chartering states, but to Delaware, the state which offered them law, policy, and economic circumstances most similar to pre-1913 New Jersey.²⁴

State competition for charters during this period involved two distinct, but

21. *See infra* Part IV.B.

22. *See infra* Part V.B.

23. *See infra* Part V.

24. *See id.*

interrelated developments. Corporate law was becoming more liberal, removing restrictions on corporate size, duration, and activities, and moving toward the familiar enabling model of legislation. The impetus for this was largely competition for corporate charters, and New Jersey was in the forefront of this movement. But corporate law was also being narrowed during this period, primarily through the expansion and more vigorous enforcement of federal antitrust law. New Jersey had an impact here too, but it was a negative one. By removing legal restrictions on corporate activity and fostering the development of market-dominant entities, New Jersey helped create the perceived need for a greater federal role in antitrust. Accordingly, state competition for charters can be viewed simultaneously as a success, insofar as it led to a more efficient and coherent model of corporate law, and a failure in that it enabled corporate exploitation of negative externalities that required federal intervention.

Moreover, the market for corporate law was segmented, and state competition operated differentially on different types of consumers. At the very high end were the biggest industrial combinations, the major banks like J.P. Morgan who promoted them and underwrote their securities and their associated lawyers. These were a small, centralized group of highly sophisticated market participants based in New York, who had a strong interest in minimizing antitrust problems, and wanted maximum flexibility in structuring (and frequently restructuring) large corporate entities. Since they generally had representatives on the board and various other means of obtaining private information and influence, these sophisticated market professionals were less concerned with ensuring full disclosure for all shareholders or the strongest forms of investor protection, although they needed some level of both to enable them to market shares to the broader investing public. New Jersey gave them pretty much everything they wanted, and they stayed strongly loyal to New Jersey, (even though Delaware was offering essentially the same product at half the price) until 1913.²⁵

Right below them were smaller but still substantial “trusts,” consolidated businesses organized and financed by smaller promoters or by groups of manufacturers themselves. They had much the same goals and concerns as the top Wall Street financiers, but were somewhat more price conscious and less concerned with long-term reputation effects. States like New York and Delaware could and did make inroads with this group well before 1913.²⁶

In the middle were mid-level companies, mostly unincorporated family businesses, who increasingly sought in this period to operate in the corporate form. Advertisements, such as those described in the first paragraph of this Article, were primarily directed to the lawyers for such companies. These lawyers and their clients had little concern about antitrust liability, a greater desire for certainty than flexibility in structuring corporations, and substantial sensitivity to differing levels of incorporation fees and franchise taxes. It was among this group that the competition for charters was most fierce and contested.²⁷ States competed not only, or even primarily, by changes in substantive corporate law, but by facilitating the incorporation process through trust companies, legal treatises with forms that were not so subtly partial to incorporation in a particular state, and price

25. *See infra* pp. 368-71.

26. *Id.*

27. *See infra* APPENDIX II.

competition over taxes and fees. While New Jersey, the first state with corporation trust businesses and helpful treatises, did fairly well in this competition, it did not dominate it to the same degree it did the market for major corporations. As more states removed the most restrictive provisions from their corporation laws and equalized the costs of doing business for domestic and foreign corporations, incorporation in their home state became the preferred alternative for many of these companies.

Finally, at the bottom were the shady promoters and outright fraudsters. Their interests were in minimal disclosure, minimal liability for promoters, and minimal costs of organization, which, after 1900, states like South Dakota and West Virginia sought to provide. While such states achieved some success, and some revenue, it was necessarily fleeting and unstable for reasons the “race to the top” theorists have well explained.²⁸ Once a state became associated with shady practices or the so-called “cheap” incorporations, the value of its charters rapidly diminished.

These considerations help explain the precise characteristics of the market for corporate charters in this period. New Jersey’s dominance was neither caused nor maintained by unique provisions in its corporate law, but rather because it was perceived by a substantial number of influential lawyers, financiers, and corporate managers as providing the best combination of a liberal statute, a state government receptive and responsive to the concerns of the financial community, clear and determinate incorporation fees and taxes, well-connected agencies providing incorporation services to out-of-state lawyers, and geographical proximity to New York. Once that reputation was established, powerful network and reputational effects enabled it to maintain much of that lead, even after its product—New Jersey corporate law—ceased to be particularly distinctive and was overpriced relative to the competition. Indeed, it is not too great an exaggeration to say that there has only been one dominant state corporate law throughout American history: New Jersey law. It is just that, after 1913, Delaware was perceived by corporate lawyers and promoters as a more reliable custodian of their conception of New Jersey law than New Jersey itself.

This Article provides a roughly chronological account of the historical race for incorporations among the states and related contemporary developments in antitrust policy, industrial development, and the securities business. It is written from a perspective informed by current theoretical debates over state regulatory competition, and supported by the data in the accompanying Appendices, which provide quantitative information on relative incorporations in various states, information never before analyzed in an historical account of charter competition. While there are obvious differences between charter competition at the turn of the twentieth century and today,²⁹

28. *See supra* note 12.

29. RON CHERNOW, *THE HOUSE OF MORGAN* 152 (1990); *see also* MARK J. ROE, *STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE* 30 (1994) (discussing popular concern over J.P. Morgan’s influence in early 20th century America). Obviously the form regulatory competition took in this period does not necessarily describe the current nature of state competition for charters. Federal regulatory policies, concepts of the appropriate forms of corporate power and financial structure, transaction and information costs all differed significantly in the pre-1910 period from those of the present. Perhaps the most important difference was that the separation of ownership and control that Berle and Means were to analyze so cogently in 1932 had not yet become pervasive among large industrial corporations. *Id.* Rather, this was a transitional period, before the Clayton or Glass-Steagall Acts, when bankers like J.P. Morgan and his partners held 72 directorships in 112 corporations, exercising substantial control over many of them.

a study of this historical context can move us beyond irresolvable theoretical debates and toward a more fruitful analysis of the circumstances under which different theories of regulatory competition are likely to be true.

II. THE ORIGINS OF STATE COMPETITION FOR CORPORATE CHARTERS: 1875-1888

In the period from 1875 to 1888, well before state competition for charters was perceived to have even begun, two developments in New Jersey were to have profound effects on that competition. The first was the abolition of special charters by New Jersey in its 1875 Constitution. This development was part of a trend in many states from special to general chartering of corporations, and was a necessary condition for the subsequent development of state charter competition. The second was the beginning of New Jersey's status as a preferred state for incorporation of out-of-state businesses through a series of small, probably uncoordinated legislative acts that took place shortly thereafter and set New Jersey on the path to its later dominance.

A. State Competition in the Era of Special Charters

There was state competition for corporate charters well before the 1880s. In the special charter era, however, that competition took the form of states competing to offer particular corporations the most favorable possible charter terms, including terms that discouraged or disadvantaged competitors. The first great national corporations, the railroads, understood this system and exploited it fully.³⁰ Influential railroad corporations were not only able to obtain favorable tax treatment in their charters, but even protection from competition itself.³¹ Business success often hinged on a company's abilities to obtain appropriate charter amendments and financial aid from the legislature.³² Particularly favored corporations were even granted charters that conferred the then-

30. Most railroad corporations were established by special charter. Even those organized under general incorporation statutes, like New York's, needed the support and cooperation of state and local governments to operate profitably. *See, e.g.*, New York's General Railroad Act of 1850, 1850 N.Y. Laws 211.

31. In 1830, New Jersey not only granted the proposed Camden & Amboy railroad an exemption from all real property taxes, but provided that no competing line would be chartered within three miles of its line for nine years. *See* Stoke, *supra* note 10, at 551, 554-56. One of the last companies to obtain tax breaks through special charters was General Electric, whose 1892 New York special charter (prompted by fears the company might otherwise incorporate in New Jersey) set the maximum rate at which it could be taxed at less than half the rate charged to electrical companies chartered under New York's general incorporation law. *A Shrewd Corporation*, N.Y. TIMES, May 3, 1892, at 2.

32. States were often called upon to provide additional financial relief to insolvent or cash-strapped companies whose roads had been only partially completed or not yet built. In the late 19th century, railway corporations tended to be severely overcapitalized with much of the money raised never finding its way to the actual construction of railroads. This was due, in part, to promoter over-optimism, to the frequent economic panics and downturns in the business cycle, and to the small, non-integrated operations of many railways companies, as well as pervasive corruption and the influence of unscrupulous promoters who profited greatly from a volatile railway bond market, which presented lucrative trading opportunities for knowledgeable insiders. *See generally* HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION 87-88 (1955). Of 282 railroad charters granted between 1830 and 1871, only 55 appear to have resulted in actual attempts to construct railroads. Stoke, *supra* note 10, at 558 n.28. For an argument that overcapitalization was necessary to finance the construction of the railways, see 1 REPORT OF THE INDUSTRIAL COMMISSION 1149-50 (1900) [hereinafter INDUSTRIAL COMMISSION REPORT] (testimony of John Dos Passos).

unusual power to own stock in other corporations.³³ Such special privileges were usually justified as favoring local businesses against their out-of-state competitors,³⁴ but were undoubtedly also influenced by the bribery and corruption for which post-Civil War state and local governments were justly famous.³⁵ Such competition could not result in a leading state for incorporations. Since many of the competitive advantages being sought were effectively zero sum, the best state for one company was unlikely to be the best for all the others.

B. General Incorporation Statutes and the Origins of New Jersey's Dominance

Yet the involvement of state legislatures in favoring particular local corporations did not negate their interest in attracting more businesses to the state, particularly manufacturing firms, which provided jobs but tended to be small and did not injure more powerful existing interests, like railroads. The desire to attract such businesses was a major impetus for passage of the early general incorporation statutes.³⁶ Fear of losing

33. William Randall Compton, *Early History of Stock Ownership by Corporations*, 9 GEO. WASH. L. REV. 125 (1940); Floyd A. Wright & Victor D. Baughman, *Past and Present Trends in Corporation Law: Is Florida in Step?*, 2 MIAMI L.Q. 69, 87 (1947). The Baltimore and Ohio Railroad Company received such a power from Maryland in the early 1830s. JAMES C. BONBRIGHT & GARDINER C. MEANS, *THE HOLDING COMPANY: ITS PUBLIC SIGNIFICANCE AND ITS REGULATION* 58 (1932). Its subsequent acquisition of two-thirds of the stock of the Washington Branch Road probably made it the first parent company in the United States. *Id.* Other corporations granted similar powers were the Pennsylvania Railroad Company, the Chicago & North Western Railway Company, and the Western Union Telegraph Company. *Id.* at 58-59. Between 1868 and 1872, the Pennsylvania legislature issued over 40 special charters giving the favored companies power to “hold and own securities of any form, either as collateral or otherwise, and to dispose of same at pleasure.” *Id.* at 59. The “public scandal” caused by this legislative generosity is said to have resulted in the passage of a constitutional amendment depriving the Pennsylvania General Assembly of the power to grant special charters. *Id.* at 60-61. It should be pointed out, however, that by 1874 a significant number of other states had amended their constitutions to prohibit special charters as well. See Henry N. Butler, *Nineteenth-Century Jurisdictional Competition in the Granting of Corporate Privileges*, 14 J. LEG. STUD. 129 (1985). Another corporate privilege that was valuable and rare but available to favored companies was the right to issue stock for property rather than cash, a particularly useful right for mining corporations. *Id.* at 147. As we shall see, both these powers were to become important features of the more liberal general incorporation laws of the “chartering” period.

34. For example, we are told that sentiment in New Jersey “immediately turned against foreign corporations” when the Camden & Amboy came under the control of the Pennsylvania Railroad in 1871. Stoke, *supra* note 10, at 564 (quotation omitted).

35. See C. F. Adams, Jr., *A Chapter of Erie*, in CHARLES F. ADAMS, JR. & HENRY ADAMS, *CHAPTERS OF ERIE: AND OTHER ESSAYS* (Augustus M. Kelley Publishers 1967) (1871); Lincoln Steffens, *New Jersey: A Traitor State, Part I*, 24 MCCLURE'S 649, 650-52 (1905); Stoke, *supra* note 10, at 562-63; see also Butler, *supra* note 33.

36. The first general incorporation law was passed by New York in 1811. *Slee v. Bloom*, 19 Johns. 456 (N.Y. Sup. Ct. 1821). It was limited to certain specific forms of manufacturing, principally textiles and metalworking. 1811 N.Y. Laws 111; see Ronald E. Seavoy, *Laws to Encourage Manufacturing: New York Policy and the 1811 General Incorporation Statute*, 46 BUS. HIST. REV. 85, 90 (1972). Encouraging such industries was not politically controversial, since they did not substantially compete with existing enterprises and did not exercise eminent domain powers. *Id.* at 88-90. Moreover, the law was limited to small companies (maximum capitalization of \$100,000) of limited duration (20 years). This limitation does not seem to have been much of an impediment, however, since most manufacturing companies organized under special charters during the same period were capitalized at similar or lower amounts and for similar durations. See W. C. Kessler, *A Statistical Study of the New York General Incorporation Act of 1811*, 48 J. POL. ECON. 877, 880-81 (1940). Other states followed with general incorporation statutes of various sorts, as well as incremental

such businesses to more protective states was also a major factor in the extension and strengthening of laws providing corporations with limited liability,³⁷ and probably also played a role in the ultimate demise of the special chartering system.³⁸

The competition to attract more corporations by expanding powers under general incorporation laws had the potential to become a true race for corporate charters. In both the passage and use of general incorporation statutes, there were states that were in the forefront of innovation and others that lagged behind.³⁹ In the decade from 1880 to 1889, there was not yet any public recognition that New Jersey, or any other state, had become a particularly popular state in which to incorporate, although there is evidence of a different perception among knowledgeable business professionals.⁴⁰

By the early 1880s, something significant was happening in New Jersey. Although Cary famously attributes New Jersey's dominance to the extensive revision and liberalization of its laws that took place in 1896, and other recent scholarship views New Jersey corporate law prior to 1890 as "focused on firms operating within the state,"⁴¹ a comparison of incorporations in the 1880s between New Jersey and other states tells a very different story. As early as 1881, New Jersey was receiving a disproportionate number of incorporations. In that year, an extraordinary 449 corporations were chartered in New Jersey, substantially more than in states with much bigger economies, such as Massachusetts and Pennsylvania.⁴² From 1880 to 1890, incorporations in New Jersey greatly exceeded those in comparably sized states like Connecticut and rivaled those of Pennsylvania, the second largest industrial state in the Union. Yet the absolute numbers remained quite small, particularly for large incorporations, and it is unclear how many of these corporations were industrial firms. This much earlier perception of New Jersey as a particularly corporation-friendly state is consistent with some contemporary statements of New Jersey lawyers and politicians.⁴³ They asserted that New Jersey's special status

expansion of permissible corporate size, duration, privileges, and limitations on liability. *Id.* By 1850, New York even passed a general incorporation law for railroads (although it maintained the special charter system as a parallel form of incorporation). *Id.* Other states followed. *Clearwater v. Meredith et al.*, 68 U.S. (1 Wall.) 25 (1863); *Shields v. Ohio*, 95 U.S. 319 (1877) (Ohio statute authorizing railroads to consolidate with foreign railroad corporations); *Polhemus v. Fitchburg R.R. Co.*, 26 N.E. 31 (N.Y. 1890).

37. *See Manufacturing Corporations*, 2 AM. JURIST 92, 104-05 (1829) (arguing that Massachusetts statutes, which provided greater liability for shareholders of manufacturing corporations than that of other states, will "drive property, industry and talent from the place of their birth to seek refuge under milder laws"); *see also* Shaw Livermore, *Unlimited Liability in Early American Corporations*, 43 J. POL. ECON. 674, 677 (1935) ("It was the familiar cry of 'business will leave the state' which as much as any other argument finally vanquished the public defenders [of unlimited liability.]").

38. *See generally* Butler, *supra* note 33 (arguing that interstate competitive pressures led to enactment of general incorporation laws).

39. Although, by 1875, 19 states had abolished special charters by constitutional amendment, they remained an accepted incorporation procedure in the remaining 18. *See* Butler, *supra* note 33, at 152-53.

40. *See infra* APPENDIX I.

41. CHRISTOPHER GRANDY, *NEW JERSEY AND THE FISCAL ORIGINS OF MODERN AMERICAN CORPORATION LAW* 43 (1993).

42. *See infra* APPENDIX I.

43. James B. Dill, primary drafter of the 1896 revisions, testified before the United States Industrial Commission that the corporation law of New Jersey had "practically not changed" since 1846, with no sudden or radical changes. INDUSTRIAL COMMISSION REPORT, *supra* note 32, at 1081; *see also* Edward Q. Keasbey, *New Jersey and the Great Corporations*, 13 HARV. L. REV. 198, 211 (1900) ("The element of stability is an important characteristic of the laws governing corporations in New Jersey."). This was undoubtedly an

began, not in 1896, or even 1888, but far earlier, at least since 1875, when New Jersey passed a constitutional amendment abolishing special charters and expanding the provisions of its general incorporation law.⁴⁴

By the 1880s, New Jersey had already offered some significant advantages to companies operating on a multi-state or national basis. In 1875, when New Jersey amended its constitution to abolish special charters, it also expanded its general incorporation law in ways that recognized that citizens of other states might wish to form New Jersey corporations. It permitted corporations, in their by-laws, to provide that directors meetings and corporate books could be held out of state. Stock and transfer books, shareholders meetings, and a registered agent all had to remain in New Jersey.⁴⁵ New Jersey was also among the more liberal states in endorsing the “good faith” rule: valuations of property received in payment for stock, if made in “good faith” and in the absence of actual fraud, were dispositive in subsequent suits by creditors.⁴⁶

The 1875 revisions to New Jersey’s General Corporation Law were also liberal with regard to the purposes for which corporations could be formed, permitting them for “any lawful business or purpose whatever.”⁴⁷ Such language certainly did not make New Jersey unique, yet it helped establish New Jersey’s reputation as a liberal state for incorporations.

Prior to 1883, there were no fees or taxes associated with incorporation in New Jersey. In 1883 and 1884, New Jersey first instituted incorporation fees and franchise taxes for corporations organized under its general incorporation law,⁴⁸ which likely

exaggeration, intended perhaps to deter the Commission from focusing on more recent changes to New Jersey law that facilitated the creation of trusts. The grain of truth in it, however, was that since at least 1869, New Jersey had followed a consistent and uniform policy of permitting and later encouraging incorporation by corporations intending to do part or most of their business in other states.

44. Doing business outside the state first became possible in 1865, when New Jersey amended its general incorporation law to provide that any corporation organized under that act “may carry on a part of its business out of this state.” 1865 N.J. Laws 54. That act did require, however, “that a majority of the persons associated together in the organization of such company shall be citizens and residents of this State.” *Id.* It provided that such corporations could own property outside the state as well. *Id.* at 356.

45. See 1875 N.J. Rev. Stat., Corporations, Sec. 50, 186; see also Keasbey, *supra* note 43, at 205-06. Although this statute contemplated that stock transfer books would be kept in a registered office maintained in New Jersey, it appears that New Jersey authorities did not strongly enforce this requirement until the creation of the Corporation Trust Company of New Jersey in 1892 gave them a greater pecuniary incentive to do so. See *infra* pp. 354-67. Other significant changes in the 1875 law were the repeal of a prior provision requiring publication of a statement of a company’s paid-in capital, existing debts and assets, substituting instead the familiar right of access by shareholders to the books of the company, and a provision, not unique to New Jersey, that stock could be issued for property. *Id.*

46. The New Jersey case in which that rule was first announced, *Wetherbee v. Baker*, 35 N.J. Eq. 501 (1882), was a case in which such actual fraud was established. Yet its announcement of the good faith principle, (relying on New York, Pennsylvania, and English precedents) “plainly indicated that in an appropriate case the court would adhere to that view.” Leonard M. Wallstein, *The Issue of Corporate Stock for Property Purchased—A New Phrase*, 15 YALE L.J. 111, 117 (1906).

47. See 1875 N.J. Laws 127; Keasbey, *supra* note 43, at 205. The first state permitting corporations to be formed for any lawful purpose was Connecticut in 1837. 1837 Conn. Pub. Acts Sec. 2, 49.

48. Keasbey, *supra* note 43, at 207; 1877 N.J. Rev. Stat. Corps., Sec. 105, at 196. The incorporation fee instituted in 1883 was based on the total number of authorized shares. 1883 N.J. Laws 252. The franchise tax was based on the number of shares outstanding. 1884 N.J. Laws 235. The practice of setting the tax rate as a fixed percentage of the stated capital of the corporation had its origins in New Jersey’s prior experience with the railroads. Stoke, *supra* note 10, at 567 (citation omitted).

explains the surge of New Jersey incorporations in 1881 and 1882.⁴⁹ Even after such charges were instituted, moreover, they were lower and far more easily determined than those charged by New York. New Jersey's final advantage was its unique geographical location just across a river from the two largest cities in America. It was surely not a coincidence that the growth of New Jersey as a preferred state of incorporation paralleled the rise of New York City as the financial center of the nation.⁵⁰

The disproportionate number of incorporations in New Jersey in the 1880s does not appear to reflect a deliberate strategy to derive revenue from out-of-state business incorporations, but simply a recognition and accommodation of the fact that many New Jersey businesses also conducted substantial activities in neighboring states. New Jersey did not even assess fees or taxes on such corporations in the early part of the decade, and New Jersey's total receipts from charter and franchise taxes remained quite small throughout the 1880s.⁵¹ Yet as Appendices I and II show, New Jersey was already becoming known, at least among a certain group of business people and promoters, as a state that was particularly receptive and friendly to businesses that operated in more than one state. As the trend toward national industrial organization accelerated in the 1890s, it was going to get a lot friendlier.

III. INCORPORATION OF THE TRUSTS: NEW JERSEY'S CONTROVERSIAL 1889 STATUTE

In the last decade of the nineteenth century, New Jersey rose to acknowledged preeminence in the competition for corporate charters. The most visible and important part of that rise was New Jersey's dominance of the market for incorporation of the large industrial combinations known as the "trusts."⁵² The standard view among economic

49. See *infra* APPENDIX I. Although railroad related revenues provided over 90% of the state's budget prior to the Civil War, GRANDY, *supra* note 41, at 23, their special tax status created shortfalls in the post-war period. *Id.* at 30-32. The search for additional revenue led to the 1883-1884 imposition of incorporation fees and franchise taxes on New Jersey corporations. It was seen as correcting an "unfortunate" failing in the 1875 general incorporation law, which, by not charging any such fees, deprived the state of monies it would otherwise have received under special charters. Corporations objected strenuously to the idea of paying for corporate rights which they had previously obtained free of charge. *Id.* at 38-39 (quoting N.J. Comptroller, 1883 Annual Report 19-20, 1884 Annual Report 22).

50. To many New Yorkers, then as now, New Jersey was an easy commute. Holding a shareholders meeting once a year in Jersey City or Hoboken would not have seemed like much of a hardship. By 1875, New Jersey was also well established as a place where New Yorkers and Philadelphians could go to escape the legal restrictions of their own states. Lincoln Steffens, in his scathing denunciation of the state, begins by pointing out that New Jersey was where Alexander Hamilton went to fight his fatal duel with Aaron Burr. Steffens, *supra* note 35, at 650. Perhaps more to the point is Charles Francis Adams' account of how Daniel Drew, facing criminal charges in New York, immediately moved to Jersey City, visiting his family in New York only on Sundays, when the warrants against him could not be executed. Adams, *supra* note 35, at 30.

51. GRANDY, *supra* note 41, at 49 fig.3.4. Of course, the absence of substantial state revenue during this period does not mean that individual state politicians did not derive significant personal pecuniary benefits from doing favors for foreign businesses seeking New Jersey incorporation.

52. There are serious ambiguities surrounding the use of the term "trust" both at the end of the 19th century and today. In its narrowest sense, it applied only to the voting trust arrangements, like Standard Oil and the Whiskey Trust, by which groups in certain industries were able to reduce price competition and dominate markets in the 1880s. In a slightly broader sense, it also referred to the consolidated corporations formed to carry on the business of the trusts after they came under legal attack in the late 1880s. New Jersey dominated the market for such charters. In the broadest sense, the term "trust" was used to refer to any large industrial

historians today is that New Jersey achieved this preeminent status by being the first state, in 1888-1889, to explicitly permit corporations to purchase and hold stock in other corporations, thereby legalizing the holding company and facilitating the transformation of controversial industrial trusts into ordinary business corporations.⁵³

This Section focuses on New Jersey's relationship to the large industrial trusts and their lawyers. It challenges the prevailing historical view that New Jersey's success in the charter market derived almost exclusively from its grant of the right to form holding companies. In fact, corporate power to own stock was neither necessary nor sufficient to obtain the incorporation business of the trusts, and the prevailing view vastly oversimplifies the complex relationship between New Jersey and the trusts. Other states had already legalized corporate stock ownership to a considerable degree, and such stock ownership was not the preferred method used to transform voting trusts into corporations. Furthermore, as we have seen, New Jersey had already become a popular state for large incorporations in the early 1880s.

Rather, New Jersey's 1888-1889 statutory attempts to legalize stockholding by New Jersey corporations were significant primarily for the implicit legitimation they offered to the trusts of that period, whose shadowy legal status was under attack precisely because they controlled the stock of many legally separate entities. Although the new corporate "trusts" would choose, by and large, not to organize as holding companies, they organized under New Jersey law anyway, based on an implicit understanding, evidenced by the statutory activity, that New Jersey legislators would do what they could to encourage and facilitate the new movement toward the rise of big business in the United States.

There is little doubt that New Jersey corporate law in this period was shaped primarily by the needs of the trusts and their lawyers. The demand for liberal corporate charters came first, and most powerfully, from the industrial trusts, whose quasi-legal form of organization was being successfully attacked by state attorney generals in *quo warranto* proceedings. The lawyers for those trusts recognized that their clients would be on far firmer legal ground if they reorganized as "ordinary" corporations.⁵⁴ It was this same small group of lawyers who sought to make the New Jersey statute more favorable for their clients. Indeed, members of this group effectively wrote the new New Jersey statutes.

On the whole, these lawyers and their clients did not seek drastic changes or vastly expanded powers under New Jersey laws. Most of the rights and powers granted by the New Jersey statutes in the 1890s were already available in New York and some other states, and had been available to favored companies through special charters. What the

corporation formed by the combination of two or more constituent businesses. During this period, New Jersey also dominated the market for charters of "trusts" in this broadest sense.

53. *E.g.*, VINCENT P. CAROSSO, INVESTMENT BANKING IN AMERICA: A HISTORY 43 (1970); ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 319-20 (1977); THORELLI, *supra* note 32, at 84.

54. The legal work necessary to effect such transformations was exceedingly complex, particularly when the securities of the trusts—the trust certificates—were publicly traded, as many of them were. Only a handful of New York lawyers had the expertise and resources to structure such deals. Such lawyers could also make full use of the increased flexibility and enabling structure of New Jersey law as it developed during this decade. *See infra* Part IV.B.

trusts sought and obtained from New Jersey law was clarity, flexibility in structuring transactions, and reasonable assurance of a continuing commitment to their economic well-being.

A. Events Leading to Enactment of the 1889 Statute

New Jersey's role as the "Mother of Corporations"⁵⁵ and, to some, the "Traitor State," emerged during the first great merger movement in American business history. That movement began in 1889-1890 with the incorporation of the major industrial trusts, mostly in New Jersey.⁵⁶ The state's reputation was based on the widespread and generally accurate perception that large industrial combinations strongly favored New Jersey as a state of incorporation, and the equally widespread belief, which would ultimately prove false, that New Jersey corporations were substantially protected from federal and state antitrust liability.

The wave of industrial consolidations that took place in the United States between 1890 and 1904 was unique.⁵⁷ By many measures, it was the most intense period of merger activity in American history.⁵⁸ Unlike later merger movements, which generally involved only two companies, the prototypical merger of this period was an industrial consolidation involving dozens of firms. Such mergers transformed industries in a very short time, creating many of the giant modern corporations that have dominated American business ever since.⁵⁹

Economic historians have continued to debate the underlying causes, results, and normative implications of this intense period of merger activity.⁶⁰ There is substantially less disagreement, however, over the motivations of the organizers of those early

55. Adolf A. Berle, Jr., *Historical Inheritance of American Corporations*, in SOCIAL MEANING OF LEGAL CONCEPTS 198 (Edmond N. Cahn ed., 1950).

56. The trend was temporarily halted by the Panic of 1893, but picked up with even greater force and intensity from 1898 to 1904. See generally LAMOREAUX, *supra* note 6, at 1-5. One study estimates that New Jersey had 50% of all corporate consolidations between 1895 and 1904. NELSON, *supra* note 6, at 67. Four states—New Jersey, New York, Delaware and Pennsylvania—had 70.7% of such activity. *Id.*

57. LAMOREAUX, *supra* note 6, at 1.

58. NELSON, *supra* note 6, at 34-35 (stating that the average number of firms disappearing annually due to merger activity from 1895 to 1905 was 301).

59. Some of the corporations formed during this period through merger were National Biscuit (now Nabisco), International Harvester, American Tobacco, DuPont, and U.S. Steel. See NELSON, *supra* note 6, at 161-62.

60. One school, associated with Alfred Chandler and Oliver Williamson, emphasizes the efficiency gains achieved by many of the new industrial combinations, brought about by economies of scale, vertical integration, and managerial innovation. CHANDLER, *supra* note 53; Chandler, *supra* note 6; Oliver E. Williamson, *The Modern Corporation: Origins, Evolution, Attributes*, 19 J. ECON. LIT. 1537 (1981). Another school, drawing on the tradition that goes back to the muckrakers of the Progressive Era, but supported by some recent economic analysis as well, focuses on horizontal combination, suppression of competition and ability to raise prices. See LAMOREAUX, *supra* note 6, at 87; George Bittlingmayer, *Decreasing Average Cost and Competition: A New Look at the Addyston Pipe Case*, 25 J.L. & ECON. 201 (1982). Another strain of the Progressive tradition, represented by Justice Brandeis' dissent in *Liggett Co. v. Lee*, 288 U.S. 517, 541 (1933), focuses more on the detrimental social and political effects of the growth of giant corporations. Lawrence Mitchell's recent historical work seeks to revive this critical perspective. See LAWRENCE E. MITCHELL, *Prologue to SQUEEZING TRUTH FROM POWER: THE RISE OF AMERICAN CORPORATE CAPITALISM* 6-7 (forthcoming) (George Washington Univ. Law Sch., Working Paper No. 194, 2006), available at <http://ssrn.com/abstract=887362>.

mergers. They sought to dominate markets and prevent ruinous price competition.⁶¹

By the late 1880s, the trusts were in serious trouble. There was strong and growing public sentiment against them,⁶² which would lead not only to passage of the Sherman Act (whose scope and effect would remain uncertain for many years),⁶³ but the more serious and immediate threat of state proceedings, initiated by state Attorneys General, seeking either to dissolve the trusts directly or cause forfeiture of the charters of their participating corporations. Most of the state suits were very successful in obtaining such relief.⁶⁴

The theory of these prosecutions was that a corporation organized under state law forfeited its charter by participating in the trust arrangement, which both exceeded the powers granted to corporations under state law and, by fostering monopoly, caused public harm and were against public policy. Although both arguments were made and in many instances accepted, state courts tended to be more comfortable with and rely more heavily on the *ultra vires* theory. It appeared quite obvious to these judges that a corporation which transferred effective control from its actual board and shareholders to those controlling the trust had exceeded its corporate powers.⁶⁵

61. The first merger wave grew directly out of the incorporation of the controversial industrial cartels known as trusts, which were themselves the product of a long-term decline in the price of most industrial commodities as a result of increased output and changes in the money supply in the late 1870s and 1880s. CHANDLER, *supra* note 53, at 316; *see also* Timothy Dwight, *The Legality of "Trusts,"* 3 POL. SCI. Q. 592, 626 (1888) (arguing that it was not an act injurious to trade or commerce to prevent a "glut" in a commodity by controlling production). Trade associations formed for the purpose of controlling price and production among competitors morphed into semi-secret voting trusts in an attempt to achieve tighter control of the competitive actions of their members. Although many of the details concerning the administration of these trusts was kept secret, THORELLI, *supra* note 32, at 77, the general facts about their existence were public knowledge and the trust certificates of some were publicly traded. *See* Thomas R. Navin & Marian V. Sears, *The Rise of a Market for Industrial Securities 1887-1902*, 29 BUS. HIST. REV. 105, 119-20 (1955).

62. *See* THORELLI, *supra* note 32, at 108-63.

63. *Id.* at 164-232.

64. In 1889, the Attorney General of Louisiana obtained a permanent injunction preventing the Cotton Oil Trust from carrying on business in Louisiana. *Id.* at 79 (in the order reproduced in APPENDIX VI). In 1888, New York brought a suit against one of the constituent corporations of the Sugar Trust, which resulted in an 1890 Court of Appeals decision affirming the forfeiture of the corporation's charter. *People v. N. River Sugar Ref. Co.*, 24 N.E. 834 (N.Y. 1890); *aff'g* 7 N.Y.S. 406 (N.Y. Gen. Term 1889); *aff'g* 3 N.Y.S. 401 (N.Y. Cir. Ct. 1889). In 1889, California brought a similar lawsuit against a California corporation that was a member of the Sugar Trust, which also resulted in forfeiture of that corporation's charter. *Havemeyer v. Superior Court*, 24 P. 121 (Cal. 1890); THORELLI, *supra* note 32, at 81. A Nebraska proceeding brought against a Nebraska corporate member of the Whiskey Trust resulted in dissolution of that corporation's franchise. *State v. Neb. Distilling Co.*, 46 N.W. 155 (Neb. 1890). Finally, in 1890, a similar suit was brought by the Attorney General of Ohio against the Standard Oil Company of Ohio for its participation in the Standard Oil Trust. The Attorney General apparently conceived the idea for the *quo warranto* proceeding after examining a copy of the Standard Ohio trust deed, which was reprinted in an appendix of a treatise by William W. Cook on trusts. RON CHERNOW, *TITAN: THE LIFE OF JOHN D. ROCKEFELLER, SR.* 331 (1998). While this case did not result in forfeiture of Standard Ohio's charter (due to an Ohio statute of limitations on such forfeiture claims), Standard Ohio was enjoined from participation in the Trust. *State ex rel. Att'y Gen. v. Standard Oil Co.*, 30 N.E. 279 (Ohio 1892).

65. For example, the Sugar Trust was deemed by the New York Court of Appeals to create "a partnership of twenty separate corporations," and such partnerships of corporations were a clear violation of New York law. *N. River Sugar*, 24 N.Y. at 840; *see also Standard Oil*, 30 N.E. at 290 ("[W]hether the agreement should be regarded as amounting to a partnership between the several companies, limited partnerships and individuals, who are parties to it, it is clear that its observance must subject the defendant to a control inconsistent with its character as a corporation.").

This reliance on state corporate law to invalidate the trusts raised the question whether states could also legalize them by expressly permitting the formal consolidation of competing firms, either by asset purchases or stock ownership. The right of corporations to purchase assets or merge with other companies was already fairly well established in many states. Indeed, the very decision of the New York Court of Appeals that invalidated the Sugar Trust noted there would be a “very great” difference between corporations legally formed pursuant to the New York merger statute and the “inherent illegality of the trust combination.”⁶⁶

For some, of course, the growing difficulties of the trusts presented a market opportunity, notably those law firms that were first beginning to specialize in the developing field of corporate law.⁶⁷ This was particularly true of the significant number of trusts whose securities were publicly traded.⁶⁸ Firms such as Sullivan & Cromwell and Simpson, Thatcher & Barnum, with expertise honed advising on railway bond deals and reorganizations, were more than happy to provide similar advice to the new industrial trusts. Accordingly, while the big Wall Street bankers were reluctant to get involved with securities issued by institutions of such uncertain status as the trusts,⁶⁹ the trusts were counseled by the most prominent and influential New York lawyers.

It was at this moment of crisis for the trusts and opportunity for their lawyers that New Jersey began adopting legislation that greatly increased corporate powers, particularly with respect to acquisitions of control of other corporations. These legislative changes are generally seen as the cause of New Jersey’s emergence as the leading state for incorporation of large industrial companies. There has been speculation that this legislation was passed in response to specific requests by trust interests.⁷⁰

66. *N. River Sugar*, 24 N.E. at 840.

67. Because they operated in a legal gray area, the trusts were in constant need of sophisticated legal counsel. The trust device itself was the invention of a corporate lawyer, S.C.T. Dodd, counsel to Standard Oil Company of New Jersey, who created it to get around the prohibition against stock ownership by corporations under most state laws. CHERNOW, *supra* note 64, at 226. On the role of corporate lawyers in this period, see Berle, *supra* note 55, at 200.

68. Public trading of trust certificates was useful as a way for members of the trust to cash out their interest in the enterprise, particularly when the trust had been overcapitalized (as many were). Navin & Sears, *supra* note 61, at 109-16. A substantial market quickly developed in the certificates of certain trusts, centered in New York, and the volume of trading in those trust securities rapidly exceeded the volume of trading on all industrials on the Boston exchange, which had been the leader. *Id.* at 115.

69. Particularly before 1893, the large investment banking firms dealt primarily in railroad securities. They were reluctant to get involved with the industrial trusts. Navin & Sears, *supra* note 61, at 126; CHERNOW, *supra* note 29, at 84 (“The House of Morgan generally didn’t sponsor new companies.”).

70. “It may be true—but remains to be proved—that New Jersey amended her law in 1889, influenced by the Sugar Trust suit in New York and with a deliberate view to provide a haven for trusts willing to reorganize into holding companies. Equally plausible is the theory that she happened to take another logical step in the direction of ‘liberalizing’ her laws at a particularly fateful time.” THORELLI, *supra* note 32, at 84. Steffens states that the 1889 statute was passed to overrule an 1888 New Jersey court decision that a “corporation had no implied power to purchase and hold the shares of another [corporation].” Lincoln Steffens, *New Jersey: A Traitor State, Part II*, 25 MCCLURE’S 41, 47 (1905). I have been unable to find any such decision by a New Jersey court in the 1880s, and suspect Steffens is confusing the 1889 statute with the 1893 statute, which was preceded by a New Jersey decision that trust lawyers apparently found troubling. See *infra* note 93. A ruling that corporations had no power to purchase or hold stock in other corporations absent an express grant of such authority, certainly would have been the prevailing legal opinion at that time. See *Peabody v. Chi. Gas Trust*, 22 N.E. 798, 799-806 (Ill. 1889) (citing authorities prohibiting corporations from owning stock).

In fact, there is credible evidence that trust promoters and their lawyers not only benefited greatly from the 1889 changes in New Jersey law, but actively drafted them.⁷¹ A biography of William Nelson Cromwell, written by his partner, states that two other Cromwell partners who lived in New Jersey, “were among those active in the drafting of this amendment.”⁷² The first trust, and probably the first corporation to organize under that law, the American Cotton Oil Company (formerly the Cotton Oil Trust) was a Cromwell client.⁷³ A second Cromwell client, the North American Company, was an Oregon corporation that chose to reincorporate in New Jersey in 1890 under a new name and to take advantage of the expanded powers to own stock in unrelated corporations that had been given to New Jersey corporations.⁷⁴

B. The 1889 Statute and its Impact on Trust Incorporations

New Jersey passed its first statute expressly giving corporations a right to purchase and hold stock in other corporations in 1888. In fact, it passed two such statutes that year, but neither was clear or general enough to satisfy the trust interests.⁷⁵ New Jersey tried again the following year, 1889, passing a law that granted broad, unambiguous powers to:

purchase mines, manufactories or other property necessary for their business, or the stock of any company or companies owning, mining, manufacturing or producing materials, or other propert[ies] necessary for their business, and issue stock to the amount of the value thereof in payment therefor, and the stock so issued shall be taken and declared full-paid stock and not liable to any further call⁷⁶

It is this statute, probably drafted by New York trust lawyers,⁷⁷ which is generally

71. ARTHUR H. DEAN, WILLIAM NELSON CROMWELL 1854-1948, at 100 (1957). According to Dean, the lawyers involved were William J. Curtis, Hector Tyndale, and Richard V. Lindabury. Curtis and Tyndale were members of Sullivan & Cromwell. Lindabury became a very prominent New Jersey lawyer, and represented U.S. Steel in the Government’s antitrust case. A less laudatory account of the Sullivan & Cromwell firm attributes the 1889 statute to Curtis, who “operated behind the scenes” and a “fast-talking promoter,” James B. Dill. See NANCY LISAGOR & FRANK LIPIUS, A LAW UNTO ITSELF: THE UNTOLD STORY OF THE LAW FIRM OF SULLIVAN & CROMWELL 27 (1988) (explaining how Curtis and Dill “convinced the governor that a new corporate law would strengthen the New Jersey Budget”). Steffens, however, states that Dill’s involvement did not begin until at least 1890. Steffens, *supra* note 70, at 42.

72. DEAN, *supra* note 71.

73. See LISAGOR & LIPIUS, *supra* note 71.

74. *News About Railroads*, N.Y. TIMES, June 17, 1890, at 5. The *Times* story reports that the newly reorganized New Jersey corporation, controlled by the railroad magnate Henry Villard, intended to move beyond railroad finance. “It is expected that the company will have the closest affiliation as a shareholder and otherwise with the Edison General Electric Company and the Thomson Houston Electric Company.” *Id.*

75. The first, 1888 N.J. Laws 445-46, was limited to companies organized “for the purposes of the improvement and sale of land, or the building, operation and maintenance of hotels and the carrying on the business of an innkeeper, or of the transportation of goods, merchandise or passengers upon land or water” and further limited their right to purchase or hold stock to other such companies also “carrying on business, in whole or in part, in the same county.” The other statute, rather bizarrely, conferred such power only on companies that were already “authorized by law to own or hold shares of stock and bonds of corporations of other states.” 1888 N.J. Laws 385. This is presumably the statute Keasbey describes as of “uncertain meaning.” See Keasbey, *supra* note 43, at 207 (explaining that one 1888 provision was of “doubtful meaning and the other was limited to certain companies”).

76. 1889 N.J. Laws 414.

77. See *supra* notes 71-74 and accompanying text.

seen as the primary, if not sole, cause of New Jersey's subsequent dominance of the market for corporate charters.⁷⁸ Yet the claim that the rights conferred by this statute were alone responsible for New Jersey's subsequent success is doubtful. New Jersey was not the first state to permit corporate stock ownership. The Maryland Court of Appeals had held in 1881, without any express statute, that a Maryland corporation had the power to purchase controlling shares in another Maryland corporation and operate the two companies jointly.⁷⁹ Since 1866, New York had a statute that permitted mining, manufacturing, and transporting companies to effectively own shares in many companies with which they did business.⁸⁰ Accordingly, the right to hold shares was not sufficient in itself to give New Jersey a competitive advantage in the race for corporate charters.

Moreover, in the early 1890s, the main legal device for transforming voting trusts into corporations was a sale of the assets of each constituent corporation to the newly formed consolidated corporation. Even Illinois, whose supreme court had specifically held that its corporations could not own stock in other corporations,⁸¹ allowed two former trusts to reorganize in that state as corporations in the early 1890s by issuing stock for assets.⁸²

The same 1889 New Jersey statute that authorized corporate stockholding was at least equally concerned with asset purchases. It not only made explicit the right of New Jersey corporations to purchase assets of competing businesses, but authorized payment in corporate stock, and sought to insulate the company and its shareholders from subsequent attacks on such transactions claiming that the stock had been issued for insufficient consideration.

This portion of the statute was more concerned with clarifying and generalizing from existing law than doing anything truly innovative. The rule that good faith determinations by the directors of the value of property received in exchange for stock were dispositive had been part of New Jersey case law since 1882.⁸³ Similar holdings by appellate courts construing their respective general corporation statutes could be found in

78. See authorities cited *supra* note 53.

79. *Booth v. Robinson*, 55 Md. 419 (1880). Maryland's rule, which followed English practice, was unusual. Some states prohibited corporate stock holding by statute. *E.g.*, MASS. GEN. LAWS ch. 53, § 17 (1872) (prohibiting railroads from owning stock in other railroad corporations); 1874 Pa. Laws 79. But in most states, it was the courts who refused to imply, from the grant of a charter itself, the right to hold such stock, even in companies engaged in the same or related businesses. *BONBRIGHT & MEANS*, *supra* note 33, at 55-56. *New Orleans, Fla., & Havana Steamship Co. v. Ocean Dry Dock Co.*, 28 La. Ann. 173 (1876).

80. 1866 N.Y. Laws 1897. The statute permitted such companies to "hold stock in the capital of any corporation engaged in the business of mining, manufacturing or transporting such materials as are requisite in the prosecution of the business of such corporation so long as they shall furnish or transport such materials for the use of such corporation, and for two years thereafter and no longer; and to hold stock in the capital of any corporation which shall use or manufacture materials mined or produced by such corporation." *Id.* In 1890, New York enacted a new law, which gave its corporations the power to invest in stock in other corporations. 1890 N.Y. Laws 1073. In 1892, New York expanded the law again to permit any corporation to "purchase, acquire, hold or dispose" of the stocks or bonds of other corporations. 1892 N.Y. Laws 1843. A good discussion of the development of New York law on this issue may be found in *De La Vergne Refrigerating Mach. Co. v. German Sav. Inst.*, 175 U.S. 40 (1899).

81. *Peabody v. Chi. Gas Trust Co.*, 22 N.E. 798 (Ill. 1889).

82. See *infra* note 89.

83. *Wetherbee v. Baker*, 35 N.J. Eq. 501, (N.J. 1882).

New York, Michigan, Maryland, Pennsylvania, and Indiana.⁸⁴ In short, the part of the 1889 New Jersey statute most likely to be used to incorporate existing trusts was largely a codification of existing New Jersey case law, law that was not even unique to New Jersey.⁸⁵

Why then, did New Jersey succeed so spectacularly? Because the trust lawyers who sought passage of the 1889 statute did not seek groundbreaking innovation. They sought protection, reassurance, and a clear, flexible, legal vehicle for consolidating business entities. The problem those lawyers faced in 1889 was how to maintain the business advantages of the old-style trust while protecting them as much as possible from legal attack. The main virtues of the 1889 New Jersey statute were its clarity and flexibility (as well as the reassuring fact that it was drafted by them and passed at their behest). The power to purchase assets for stock and the presumption in favor of management's valuation of those assets were established principles of New Jersey law. By setting them forth in a statute, New Jersey clearly defined and reaffirmed them, and decreased the likelihood of backsliding by the New Jersey courts.⁸⁶ The power to purchase and own stock, while not a feature of prior New Jersey case law, was also a clarification and expansion of the power as granted in the 1888 statutes. The fact that the power to purchase stock in other corporations was rarely used in the 1889-1893 period does not mean that it was unimportant or unappreciated. A careful corporate lawyer would understandably advise making an asset purchase, rather than a stock purchase, when both could accomplish the same goal. Asset purchases were more generally recognized as within corporate powers and were less likely to be challenged, particularly when the businesses being acquired were incorporated in other, more restrictive states.⁸⁷ Of the eight trusts that Chandler identifies as "formed to operate in the national market" during the 1880s,⁸⁸ only one, the Cotton Oil Trust, converted to the corporate form in the early 1890s by organizing a holding company. Most of the others consolidated through asset

84. *Coffin v. Ramsdell*, 110 Ind. 417 (1887); *Brant v. Ehlen*, 59 Md. 1 (1882); *Young v. Iron Co.*, 31 N.W. 814 (Mich. 1887); *Schenk v. Andrews*, 57 N.Y. 133 (1874); *Carr v. Le Fevre*, 27 Pa. 413 (1856).

85. Even the express grant of power in the 1889 statute to purchase corporate shares simply clarified and broadened rights New Jersey had granted the previous year, and similar rights had existed for many years under New York law. See *supra* notes 75-80 and accompanying text.

86. With this statute, a "good faith" certification by the board of the value of property transferred for stock became a corporate formality. In describing the formation of the American Malting Company in 1897 by another prominent New York law firm, Simpson, Thacher & Barnum (the attorney provided both the President and Treasurer of the new corporation), Dewing describes a resolution by the newly formed board that the "value to this Company of the properties . . . [being offered for stock] is such as to justify and render desirable the purchase thereof." DEWING, *supra* note 18, at 275-76. He comments that "[c]onsidering, however, that none of the Directors were conversant in the least with the worth of the malting plants, and that the President of the Board was an irresponsible clerk of the attorney, their resolution can be regarded as expressing little more than the formal compliance with a much abused statutory provision." *Id.*

87. Louis Boisot, *The Legality of Trust Combinations*, 39 AM. L. REG. 751, 760 (1901) (claiming that asset acquisition was the merger form "least open to legal objection"). *Merz Capsule v. United States Capsule*, 67 F. 414 (W.D. Mich 1895), is exactly the kind of case that would have given trust lawyers nightmares. There, the Michigan federal court held that a sale by a Michigan corporation of all its assets in exchange for stock in a New Jersey corporation was invalid under Michigan law, because Michigan corporations could not purchase or hold stock.

88. CHANDLER, *supra* note 53, at 320.

sales.⁸⁹

The value of the 1889 statute, therefore, was not just to trusts that sought to reorganize as holding companies. It gave added flexibility to any firm or promoter engaged in negotiating the complex mergers and consolidations that were becoming increasingly popular in the 1890s. It enabled cash-strapped promoters to purchase assets for stock with a reasonable assurance the stock price would not be second guessed in subsequent shareholder litigation. In cases where asset sales were difficult, due to holdouts among the shareholders of the constituent firms, promoters could plausibly threaten to buy control through the purchase of stock from the largest shareholders, and, in the appropriate case, might actually do so.

Once the power to form holding companies was clearly established under New Jersey law, creative lawyers and business people did of course begin to use it more frequently, even though it was not the preferred vehicle for most consolidations. The Chicago Junction Railways cases of 1891 and 1892 provide good examples of such innovative uses.⁹⁰ Chicago Junction Railways and Union Stockyards Company, (the “Junction Company”) was a New Jersey corporation, formed in 1890, to “purchase, hold” and “do any and all acts and things necessary to increase the value of the shares of” the Union Stockyards and Transit Company (“Transit Company”) an Illinois corporation that owned a large portion of the Chicago stockyards and associated railway tracks.⁹¹ Junction Company, in modern parlance, was a single company holding company, allegedly organized to provide rebates to favored customers of the Transit Company, rebates that would have constituted illegal discrimination under Illinois law if issued directly by the Transit Company.⁹² The New Jersey courts upheld the actions of the Junction Company against various *ultra vires* and other challenges made in these lawsuits without, surprisingly, ever mentioning the 1888 or 1889 statutes. Nonetheless, there is an implication in later New Jersey case law⁹³ that these cases were seen as casting sufficient

89. BONBRIGHT & MEANS, *supra* note 33, at 68-69. In the early nineties “little use was made of the holding company.” *Id.* Of ten “monopoly-seeking consolidations,” *id.*, including most of those listed by Chandler, only one, the Cotton Oil Company, organized as a holding company. The rest organized as “fusions, bringing the property of the constituent companies under the direct ownership of a single corporation . . .” *Id.* Two of those fusions, the Whisky and Linseed Oil trusts, which were based in Chicago, chose to incorporate under Illinois rather than New Jersey law, despite that state’s express rejection of the corporate right to own stock. This suggests that regional affiliations still played a powerful role in the market for corporate charters. Although holding companies had become more popular by the end of the decade, even during the peak years of the merger boom, 1900 to 1903, “the holding company vied with fusion as the most important form of consolidation.” *Id.* at 70. Standard Oil was a unique case. After the injunction against Standard of Ohio in 1892, the former trustees exchanged their trust certificates for majority stock in the twenty constituent companies of the trust. Although prior to this time the base of Standard Oil’s operations was in Ohio, and its trustees met in New York, the reorganized company sought to make use of New Jersey’s favorable law and business climate by giving Standard Oil (New Jersey) a “unique status” as a purchaser of large blocks of stock of some of the other Standard companies. Accordingly, from 1892 to 1899, it functioned as “both an operating and holding company.” In 1899, Standard Oil of New Jersey was reorganized as a full fledged holding company for the group. CHERNOW, *supra* note 64, at 332-34, 430.

90. *Willoughby v. Union Stockyard & Transit Co.*, 25 A. 277 (N.J. 1892); *Ellerman v. Chi. Junction Rys.*, 23 A. 287 (N.J. 1891).

91. *Ellerman*, 25 A. at 287, 294.

92. *Willoughby*, 25 A. at 280.

93. *Dittman v. Distilling Co. of Am.*, 54 A. 570, 571-72 (N.J. 1903). Both *Ellerman* and *Willoughby* can be read to leave open the possibility that the alleged *ultra vires* acts of holding companies, while not subject to

doubt on the power to form a holding company in New Jersey that another statute was passed in 1893, providing an even clearer and more general corporate right to purchase, hold, and vote stock in other New Jersey or foreign corporations.⁹⁴

Yet the vast majority of companies incorporated under New Jersey law at this time did not intend to become holding companies, nor to diversify or consolidate through stock purchases. They came to New Jersey not for the specific new powers granted under its law, but for general protection and reassurance at a time when industrial firms were expanding rapidly for both cost reduction and anti-competitive purposes, and were under increasing legal and political attack. At a time when the governments of New York, Ohio, California, and others were actively prosecuting trusts, New Jersey passed a statute restating, clarifying and expanding its already well-known solicitude towards large corporations seeking to operate on an interstate or national basis. The trusts and their lawyers had every reason to expect that solicitude would continue, because they knew it provided important financial benefits to the state, and perhaps even more importantly, because they had already experienced great success in getting New Jersey to amend its laws in ways beneficial to them and their clients. That process would continue through the 1890s as New Jersey corporate law was repeatedly amended to expand corporate powers and otherwise advance the interests of the trusts and the individuals who promoted, managed, advised, and owned shares in them.⁹⁵

When did New Jersey become the leading state for incorporation of large business enterprises? As we have seen, there are three conflicting accounts. Cary famously dated New Jersey's dominance to the 1896 revision of its corporate code.⁹⁶ In the view of most economic historians, the 1889 statute was the critical event. Finally, the position of many of New Jersey's defenders at the time was that New Jersey's leading role derived from the stability and consistency of its corporate policy since at least 1875.⁹⁷

The raw data for all types of incorporations in Appendices I and II provide some support for each of these points of view. Both the absolute number of incorporations in New Jersey and the number relative to large industrial states like Pennsylvania increased substantially after 1890, reflecting both the merger boom and the impact of the 1889 statute.⁹⁸ There is another increase in both absolute and relative incorporations beginning

challenge in private suits by shareholders, might be challenged in a *quo warranto* proceeding. *Ellerman*, 23 A. at 295-96; *Willoughby*, 25 A. at 284. The barest hint of the possibility of a *quo warranto* by the New Jersey Attorney General would have struck fear in the heart of any 1892 trust lawyer.

94. 1893 N.J. Laws 301.

95. See *infra* Part IV.B.

96. Professor Cary seems to have been following the account of New Jersey's dominance first provided by Lincoln Steffens in his famous 1905 article. Steffens described how New Jersey adopted a conscious plan in the early 1890s to create a corporation law that would "make[] the trust lawful." Steffens, *supra* note 70, at 41-47. The plan was said to be the invention of James B. Dill, the corporate lawyer who was the acknowledged drafter of the 1896 revision of the New Jersey corporate law. *Id.*

97. INDUSTRIAL COMMISSION REPORT, *supra* note 32, at 1081 (testimony of James B. Dill) ("[T]he laws of the State of New Jersey have practically not changed since 1846, excepting in the addition of the restrictive provisions of which I have spoken; and, therefore, a man in going to New Jersey feels that he is going into a State that has had a definite policy for many years.").

98. By 1891, New Jersey had over twice as many incorporations as Pennsylvania, and its dominance was even greater in the categories of medium and large incorporations. See *infra* APPENDIX II. The percentage of New Jersey incorporations relative to other states also increased significantly both in 1890 and again in 1891. See *infra* APPENDICES I & II.

in 1897-1898, reaching its peak in 1899, the height of the merger boom. This peak may also reflect some added impact of the 1896 corporate law revisions. The data for large incorporations in APPENDIX II tell a similar story, with New Jersey's advantage over other states even more pronounced.

Yet these statistics also make it clear that the events of 1889 and 1896 did not create New Jersey's dominant position, but strengthened and extended an already existing lead. The critical variable was not the actual content of New Jersey law, but its reputation as a state exceedingly responsive to the needs and concerns of large industrial enterprises. The most important effect of the 1889 statute, as we have seen, was to confirm and enhance that reputation.⁹⁹ Accordingly, New Jersey could and did benefit disproportionately from the increased demand for incorporations from large business enterprises that took place during the great merger boom. While the statistics for New Jersey incorporations in the 1890s clearly reflect the boom and bust cycle of the decade, the 1893 panic, and the economic slowdown that followed, it is also worth noting that there is an underlying trend of increased incorporation throughout the decade, particularly among smaller corporations.¹⁰⁰ The next Section will look more closely at how that was accomplished.

IV. THE BUSINESS OF SELLING INCORPORATIONS: 1890-1899

While New Jersey's role in the creation of large industrial combinations is relatively well known, very little has been written about its facilitation of an equally important and longer lived economic development that was occurring at the same time—the transition of a substantial proportion of industrial and commercial activity from unincorporated form to corporations.

Incorporation was a fairly rare occurrence prior to 1890.¹⁰¹ Although general incorporation laws and expansion of limited liability had caused some increase in corporations during the latter half of the nineteenth century, most industrial enterprises remained small, local and unincorporated.¹⁰² Between 1880 and 1910, however, there was a substantial increase in the number of companies annually seeking incorporation, not only in New Jersey, but in every state.¹⁰³

99. See *supra* Parts III.A, III.B.

100. For example, in 1890, New Jersey had 74 large incorporations and 406 small ones. See *infra* APPENDIX II. In the 1894 economic downturn, large incorporations were down to 42, but small ones still increased to 480. See *infra* APPENDIX II. APPENDIX V, which lists annual New Jersey incorporations based on the total amount of authorized capital stock, provides another perspective on New Jersey's success as a chartering state. Also based on data compiled by EVANS, *supra* note 17, it is basically consistent with APPENDIX II and shows the strong effects of the business cycle, particularly on large incorporations. See *infra* APPENDIX V. Since incorporation fees were based on the amount of authorized stock, APPENDIX V also provides a good indication of the relative importance of large and smaller incorporations to New Jersey state revenue. Clearly larger companies were the more important but also more volatile source. In times of economic downturn, APPENDIX V shows that smaller companies could provide 40-50% of the revenue from incorporations. See *infra* APPENDIX V.

101. For example, according to census data, investment in manufacturing in Pennsylvania more than doubled between 1880 and 1890, to almost \$1 billion dollars, yet there were only slightly more than 4000 incorporations in Pennsylvania during the entire decade, and most of those were not manufacturing businesses. See *infra* APPENDIX I.

102. CAROSSO, *supra* note 53, at 42.

103. There were numerous reasons for this trend. The advantages of corporate status were becoming better

That growth can clearly be seen in APPENDIX I. In every state for which we have statistics there is a substantial increase in the annual number of incorporations between 1880 and 1910, irrespective of the spikes and troughs of the business cycle.¹⁰⁴ The vast majority of these incorporations were not trusts or large industrial combinations, but smaller firms that were presumably seeking the benefits of corporate status on the most advantageous terms.¹⁰⁵ If we look for evidence of a disproportionate number of firms incorporating in New Jersey relative to other states, we see that the effect is weakest for small incorporations, which are most likely to be local businesses, but is at least as strong for medium as for large incorporations. That is, New Jersey at this time was as good at attracting out-of-state firms capitalized at \$100,000 to \$1,000,000 as it was firms capitalized at over \$1,000,000.¹⁰⁶ This Section considers how New Jersey accomplished that feat.

The marketing plan New Jersey developed is one that a smart business school graduate might propose today: extensive advertising, good customer support, and real, but incremental, product improvement. Indeed, this marketing plan was largely accomplished by a business, the Corporation Trust Company of New Jersey, which commenced operation in 1892, and its first President, James B. Dill.¹⁰⁷ Corporation Trust sold incorporation under New Jersey law to thousands of businesses and their lawyers.¹⁰⁸ It advertised in magazines as well as through pamphlets and speeches to target audiences.¹⁰⁹ It provided potential customers with support and lowered the transaction costs of incorporation by providing easy to use forms, practical treatises, and actual incorporation services.¹¹⁰ Incremental product improvement came primarily from the revisions of New Jersey corporate law in 1896, which, by reconceptualizing corporate law as composed of enabling rather than mandatory rules, managed to meet the needs of both sophisticated trust lawyers and others with far less experience in corporate law.

known. Restrictions on limited liability, which were common in the period before 1860, were being removed. *See, e.g.*, JAMES WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970*, at 27 (1970). Corporate laws in many states were revised in ways that increased the benefits and lowered the costs of incorporation. Consumers and other market participants became more familiar with companies doing business in the corporate form, and corporation trust companies increased awareness and reduced the transaction costs involved in incorporation. The possibility that a small or medium sized industrial business might become part of a major consolidation (on usually generous buyout terms) provided yet another incentive to incorporate.

104. For example, if we compare total annual incorporations for the years 1881 through 1886 with those for 1900 through 1905, two periods of boom followed by bust, we see the following rates of increase for the individual states: New Jersey: 642%, Pennsylvania: 413%, Maine: 354%, Massachusetts: 407%, and Connecticut: 165%. *See infra* APPENDIX I.

105. APPENDIX II shows that the number of small and medium incorporations in New Jersey substantially exceeded the number of large incorporations every year from 1880 to 1910. It should also be noted, however, that in all but a few of those years, large incorporations accounted for the majority of the income New Jersey derived from the incorporation business. *See infra* APPENDIX V, which is also derived from data in EVANS, *supra* note 17, at 126-35.

106. For example, in 1909 and 1910, New Jersey had fewer large incorporations than Pennsylvania and fewer small incorporations than Pennsylvania, Ohio, or Texas, yet still led the market for medium incorporations. *See infra* APPENDIX II.

107. *See supra* note 96.

108. *Id.*

109. *See infra* note 120.

110. *Id.*

A. Organization of the Corporation Trust Company of New Jersey

Some time in the early 1890s, New Jersey officials began to realize that their state's popularity for incorporations could be more than just a way for New Jersey politicians to curry favor with powerful business interests.¹¹¹ It could actually be a significant source of revenue for the state and themselves.¹¹² According to contemporary accounts, the person who made them aware of that possibility was James B. Dill.¹¹³

Dill, like many prominent business figures of that period, was a combination hustler and visionary. By the 1890s, Dill was a well known corporate lawyer, whose firm, Dill, Chandler & Seymour, represented many of the well known trusts.¹¹⁴ Dill lived in New Jersey, practiced in New York, and was a member of the bars of both states. Like other corporate lawyers, he was adept at utilizing New Jersey law to the advantage of his trust clients. His genius was in recognizing that if the process of New Jersey incorporation could be made easier, cheaper and more certain, it would attract large numbers of smaller but still significant business enterprises, many of which were not yet organized in the corporate form.¹¹⁵

The Corporation Trust Company of New Jersey was formed in 1892.¹¹⁶ The company made no effort to hide its political connections, but trumpeted them.¹¹⁷ Its directors included Leon Abbett, who was then Democratic Governor of the State, the New Jersey Secretary of State, the Clerk of the New Jersey Chancery Court and the United States Attorney for New Jersey, the sole Republican.¹¹⁸ James B. Dill was both a director and officer, and his firm was counsel to the company.¹¹⁹

The close relationship between the company and influential New Jersey politicians was, of course, a large part of what Corporation Trust was selling. It expected to "guarantee" the "regularity and legality of the issues of stocks, bonds and mortgages of New Jersey corporations," and held itself out as having not merely expertise, but prescience concerning future developments in New Jersey law.¹²⁰ Yet it is also worth noting that in a time and a state with notorious political corruption, the New Jersey politicians' personal interest in the success of the Corporation Trust Company of New Jersey represents an advance of sorts, in that it aligned their personal incentives with that

111. See *supra* note 51.

112. See Stoke *supra* note 10.

113. *Id.* at 571; Steffens, *supra* note 70, at 43-45.

114. James B. Dill, 10 BANKING L.J. 375 (1898) ("It is said, upon excellent authority, the Mr. Dill is counsel for more banks, trust companies and corporations than any individual lawyer of the New York bar.").

115. Stoke and Steffens both emphasize that advertising New Jersey's advantages to smaller firms in other states was an integral part of Dill's scheme. Steffens, *supra* note 70, at 43; Stoke, *supra* note 10, at 571.

116. See *infra* note 118.

117. *Id.*

118. Steffens, *supra* note 70, at 44; *Will Look After Corporations*, N.Y. TIMES, Dec. 24, 1892, at 8. It is reasonable to assume that the directors were also substantial stockholders. Steffens states that Governor Abbett took stock in the company, but at least he paid for it "which was more than can be said of some of the others." Steffens, *supra* note 70, at 44 (internal quotations omitted). The Controller of Equitable Life also had a seat on the board, indicating that Equitable was also a major shareholder.

119. *Id.*

120. *Will Look After Corporations*, *supra* note 118. The article quotes a statement from the new company which predicted, "[t]here is likely to be some legislation in New Jersey the coming [w]inter more strictly enforcing the rule that corporations must maintain continuously an office in the State," and suggested that companies will "find it to their advantage to rent offices in the building of our company." *Id.*

of the State of New Jersey in maximizing revenues from incorporations in the State.¹²¹ It also provides support to those theorists who have argued that it is private interest groups, and only incidentally maximization of state revenues, that drives regulatory competition.¹²² Corporation Trust Company of New Jersey in 1892 can be viewed as a contractual method of aligning those two sets of interests.¹²³

Even more importantly, Corporation Trust was able to provide services both to the giant trusts and to smaller businesses. New York promoters were well aware of the New Jersey law requiring shareholders meetings to be held in the state, as well as the need to have an office and registered agent there.¹²⁴ Prior to 1892, these requirements had been complied with on a sporadic and ad hoc basis, if at all.¹²⁵ Corporation Trust offered such corporations a simple, easy, and legal way to obey the law.

The company also offered to provide dummy incorporators who would conduct the initial incorporation meeting, and even a single genuine New Jersey director, as required under New Jersey law.¹²⁶ Yet the primary role of Corporation Trust and its primary value to the state was in reducing the costs of incorporation and increasing awareness of New Jersey law, particularly among out-of-state lawyers.¹²⁷ By making it easier for out-of-state businesses and their lawyers to comply with the provisions of the New Jersey statute, Corporation Trust increased New Jersey's share of this important market

121. Even Lincoln Steffens conceded that, while this was graft, it was honest graft "organized not to rob, but to help the state." Steffens, *supra* note 70, at 44-45. On the distinction between honest and dishonest graft, see WILLIAM L. RIORDAN, PLUNKITT OF TAMMANY HALL: A SERIES OF VERY PLAIN TALKS ON VERY PRACTICAL POLITICS 3-8 (1963).

122. See Macey & Miller, *supra* note 13 (suggesting that Delaware law reflects a political equilibrium among the state's various interest groups).

123. The alignment was relatively short lived, however. In February 1901 there was a consolidation of trust companies of various states under the control of North American Trust Company. The Corporation Trust Company of New Jersey, the Corporation Trust Company of New York, the Corporation Trust Company of Maine, the Corporation Organization and Trust Company of Chicago, and the New Jersey Registration Company of Boston (discussed *infra* at note 129) all came under common control. It is unclear whether any Delaware registration companies were included in the consolidation, which intended to provide incorporation services on a nationwide basis. See *Big Combination of Trust Companies*, N.Y. TIMES, Feb. 24, 1901, at 23 (describing North American Trust Company's takeover of several unnamed institutions, in addition to those publicly announced). Although this move undoubtedly reduced the trust companies' contribution to state charter competition, there were other interest groups, notably lawyers, who were unable to obtain such diversification, and therefore still retained a strong interest in promoting the incorporation business of a particular state.

124. According to Steffens, many of the New York promoters held shareholders' meetings at Taylor's Hotel in Jersey City, a short ferry ride from downtown New York (and a "vice resort" at night). Although Corporation Trust offered offices for such meetings near the hotel, the New York financiers were slow to change their habits, until, as predicted, New Jersey got stricter in enforcing its in-state office and agency requirements. Steffens, *supra* note 70, at 45.

125. *Id.*

126. Stoke, *supra* note 10, at 573. This created some problems for Corporation Trust when companies it organized turned out to be vehicles for fraud. When it incorporated an illegal banking business called Franklin Syndicate as a New Jersey manufacturing company, Corporation Trust found it necessary to deny having any substantive involvement with the business. *Desert Miller's Company*, N.Y. TIMES, Nov. 24, 1899, at 8; see also *Clarke v. Mercantile Trust Co.*, 110 A.D. 901, 903 (N.Y. App. Div. 1905) (suit against officers and employees of Corporation Trust, alleging that they were "dummy, fictitious and fraudulent incorporators, stockholders, directors and officers of the defendant shipbuilding company").

127. See *infra* Part IV.B.

segment.¹²⁸

By 1900, Corporation Trust Company of New Jersey was styling itself “The Lawyers’ Company.”¹²⁹ The close relationship between the New Jersey government and the Corporation Trust Company made it possible for them to jointly promote awareness of New Jersey corporate law among lawyers nationally. The company printed copies of significant New Jersey corporate law decisions for free distribution to interested parties.¹³⁰ The New Jersey Secretary of State’s Office, in turn, would frequently refer questions of corporate law to Corporation Trust and similar companies.¹³¹ In this way Corporation Trust became an important resource both by providing the latest information to sophisticated corporate lawyers and help and assurance to less knowledgeable out-of-state lawyers who were exploring the possibility of New Jersey incorporation for their clients.

B. The 1896 Revision of New Jersey Corporate Law

All the advertising and promotion in the world will not help, of course, if the product itself becomes outmoded or undesirable. Since the people selling New Jersey corporate law in the 1890s were essentially the same people charged with making, revising, and updating that law, they had every incentive to introduce changes that would maximize the law’s attractiveness to its target audience. The ubiquitous James B. Dill was a member of the committee charged with revising New Jersey corporation laws and that group was active throughout the decade.¹³² New Jersey corporate law was amended repeatedly in the 1890s, with substantial changes in 1893, 1896, 1897 and 1898. The most famous and comprehensive changes were those embodied in the 1896 Act, which essentially recodified New Jersey corporate law. It was largely the work of James B. Dill.¹³³ The innovations of the 1896 Act were not primarily in granting new or expanded

128. When it was founded, Corporation Trust representatives stated that they expected its most profitable business would not be the provision of agency services, but guaranteeing the validity under New Jersey law of the stocks of these corporations. The idea was not an implausible one in 1892. While shareholders in a company that had not been properly incorporated were, in theory, protected by the de facto incorporation rule and the lack of standing of private parties to challenge defective incorporations, those doctrines were vague and their limits unclear. *See, e.g., Elizabethtown Gas Light Co. v. Green*, 18 A. 844 (N.J. Ch. 1889) (finding standing insufficient and complaint deficient in a gas company suit), *aff’d*, 24 A. 560 (N.J. 1892). Yet this business did not seem to develop as the company envisaged, and within a few years what it was describing as its “guarantees” of the regularity of corporate stock sales were simply the ordinary functions of a transfer agent. *See Big Combination of the Trust Companies*, *supra* note 123, at 23 (discussing largest consolidation of banking and trust companies to date).

129. *Advertisement*, 8 AM. LAW. 1 (Feb. 1900). In the front of the Harvard Library copy of James B. Dill’s 1898 Treatise on New Jersey Corporation Law is a small insert distributed by the New Jersey Registration Company which states that it is “representing the Corporation Trust Company of New Jersey.” *Id.* The insert shows that a company with capital of \$125,000 or less can be incorporated in New Jersey for a price of \$107 based on costs consistent with New Jersey fees as of 1898-1900. It also states that the company can supply members of the bar “gratis” with “all Forms, Blank Charters, Waivers, By-laws, Proxies, Etc.” *Id.* What is perhaps most interesting is that the main office of the “New Jersey Registration Company” was in Boston.

130. *See, e.g., Recent Decision: The Legality of Pooling Agreements*, 9 AM. LAW. 121 (1901) (discussing *Chapman v. Bates*, 46 A. 591 (N.J. Ch. 1900)).

131. HENRY R. SEAGER & CHARLES A. GULICK, JR., TRUST AND CORPORATION PROBLEMS 42 (1929).

132. INDUSTRIAL COMMISSION REP. (Testimony of James B. Dill), *supra* note 32, at 1077.

133. SEAGER & GULICK, *supra* note 131, at 42-43.

powers to New Jersey corporations. Rather, Dill's achievement was to present a clear, simple, and unified conception of corporate law as a body of enabling rules that provided a wide scope for private contracting among individuals. It turned New Jersey corporate law into a marketable brand.

The direction in which Dill moved New Jersey corporate law shows that he was well aware of the dual nature of his target audience. On the one hand were large, financially sophisticated trust promoters and their equally sophisticated lawyers. On the other were business people seeking to operate in the corporate form for the first time and their far less knowledgeable lawyers. The interests of these two groups were not usually antagonistic, but they were different. The trusts wanted maximum freedom and flexibility to structure transactions, particularly asset and stock acquisitions, in whatever ways were necessary to achieve the financial results sought. They also wanted as much protection as New Jersey law could give them from legal and political attack in other states. Smaller businesses wanted the advantages of the corporate form as simply, cheaply and reliably as possible. Both groups wanted as much protection from personal liability as the law could afford.¹³⁴

In 1893, two statutes directly responsive to the concerns of the trusts were passed within a week of each other. One broadened and clarified the right of New Jersey corporations to acquire, hold, and sell securities of other companies.¹³⁵ The second gave promoters increased flexibility in structuring combinations between two or more New Jersey companies.¹³⁶ In 1894, New Jersey passed a reciprocity statute imposing on foreign firms doing business in New Jersey the same taxes and obligations their state applied to New Jersey corporations.¹³⁷

These were all incremental changes, likely passed in response to the concerns of trusts and their lawyers.¹³⁸ The 1896 revisions, however, were something quite different, a major reconceptualization of corporate law. Although incremental in its expansion of corporate powers, it brought much greater clarity and simplicity to that law, while also laying the groundwork for a new conception of corporate law based on a model of private

134. Dill's 1898 Treatise on New Jersey corporate law contains the assurance that:

The law of the State of New Jersey is singularly free from pitfalls and ambiguities leading to personal liability of stockholders, officers and directors. Under the laws of New Jersey stockholders and officers obtain in the fullest sense limited liability.

JAMES B. DILL, *THE STATUTORY AND CASE LAW APPLICABLE TO PRIVATE COMPANIES UNDER THE GENERAL CORPORATION ACT OF NEW JERSEY* xix (1898).

135. 1893 N.J. Laws 301. This law may have been passed to assuage concern by trust lawyers about language in some recent New Jersey cases. *Supra* note 93.

136. 1893 N.J. Laws 121. This statute was very similar to one that New York had passed the previous year. 1892 N.Y. Laws 2045. It provided that the merger agreement could contain "all other provisions" that the directors deemed necessary to perfect the merger, as well as express provisions for the issuance of common or preferred stock or debt.

137. 1894 N.J. Laws 446.

138. There is some question whether these liberalizations actually brought about changes in corporate practice or merely ratified and legalized practices that had already occurred. For example, Dewing discusses a merger of two New Jersey companies, both in the leather business, one of which was incorporated under the old 1875 New Jersey law and the other under the 1893 law, which "permitted the corporation to do anything outside the state of New Jersey that it saw fit to do," including operating railroads. Yet Dewing notes that the older corporation also operated railroads "even though nothing to that effect was mentioned in the original charter." DEWING, *supra* note 18, at 46.

contracting.

At a time when corporations in most states were subject to numerous complex classifications and different bodies of regulations,¹³⁹ the 1896 New Jersey statute applied to all corporations engaged in “any lawful business or purpose whatsoever,” except for financial, railroad, or other companies with the right to take and condemn land.¹⁴⁰ It is also significant that at a time when restrictions on anti-competitive and unfair labor practices were still viewed as an appropriate part of many states’ laws regulating corporations, the 1896 Act makes no mention of any such restrictions.¹⁴¹ The Act simplifies corporate law by narrowing its focus largely to matters of formation, governance and finance. The arrangement of sections in the revised Act is straightforward and logical, and not very different from the content and order of subjects found in most contemporary corporate statutes.¹⁴² There were a few expansions of corporate power, most notably a provision for perpetual corporate existence.¹⁴³ More often, the 1896 revisions strengthened, clarified, or generalized preexisting corporate powers under New Jersey law.¹⁴⁴

The 1896 revisions represent the beginnings of a new conception of corporate law. Throughout most of the nineteenth century, the powers granted by the corporate form were viewed as special privileges. When those privileges first became widely available through general incorporation laws, the powers conferred were carefully balanced by statutory limits on the size and duration of large capital aggregations. Creditors were protected by statutory limits on dividends and the rules of limited liability were hedged with various exceptions.¹⁴⁵ Although these restrictions had increasingly been whittled away, in the 1896 revisions we see the development of an entirely different conception of the corporation. It is no longer concerned with the power and potential abuse of large

139. In New York, for example, business corporations were subject to three separate statutes, and corporations generally were classified into sixteen different categories. 1892 N.Y. Laws 1801 (General Corporation Law); 1892 N.Y. Laws 1824-41 (Stock Corporation Law); 1892 N.Y. Laws 2042-50 (Business Corporation Law).

140. 1896 N.J. Laws 279-80. The statute did permit formation of New Jersey corporations who would own or operate railroads wholly in other states, a provision frequently cited by those who viewed New Jersey as a traitor state.

141. New York’s Stock Corporation Law, in contrast, contained an express prohibition on any combination “with any other corporation or person for the creation of a monopoly or the unlawful restraint of trade.” 1892 N.Y. Laws 1828. Many other states were also passing antitrust laws at this time.

142. The Act begins with general provisions regarding the powers of corporations organized under the statute and then proceeds to rules on formation, alteration and dissolution of corporations, stockholders’ meetings, dividends, winding up and insolvency, lawsuits against officers, and directors and foreign corporations. This arrangement of topics is essentially the same one followed by the current Delaware statutes.

143. 1896 N.J. Laws 280. New York provided perpetual existence for certain types of corporations, but limited business corporations to 50 years. 1892 N.Y. Laws 1804-05; 1892 N.Y. Laws 2042-43.

144. For example, New Jersey law already provided that stock issued in exchange for property was fully paid and “not liable to any further call.” 1889 N.J. Laws 414. The 1896 act added the sentence, “In the absence of actual fraud in the transaction, the judgment of the directors as to value of the property purchased shall be conclusive,” 1896 N.J. Laws 293-94, thereby inserting prior judicial interpretations of that statute into the language of statute itself, and giving shareholders a little greater assurance. Similarly, the rights of corporations to engage in any lawful business, to merge and consolidate, to vote stock held in other companies and many other rights, which most corporate lawyers had already believed existed under New Jersey law, were now stated clearly and explicitly in a single statute. *Id.* at 279, 294-95, 309-13.

145. See generally HURST, *supra* note 103, at 31-38.

capital aggregations, but views the corporation simply as a contractual arrangement among individuals, one which can be made for any lawful purpose, and which may be governed by any rules to which the parties agree. It implicitly excludes the state from interfering in the formation or control of this relationship. At the same time, however, the corporate relationship itself is narrowly defined to exclude the interests of employees, creditors, and consumers.

Accordingly, the 1896 Act, in addition to providing that corporations could be formed for “any lawful business or purpose whatever,”¹⁴⁶ also gave incorporators power to put in the charter “any provision for the regulation of the business and the conduct of the affairs of the corporation,”¹⁴⁷ power to create various kinds of stock with differing powers and voting preferences,¹⁴⁸ and power to amend the charter or dissolve the company, each by board approval and a two-thirds shareholder vote.¹⁴⁹

The 1896 Act did not remove all mandatory provisions from New Jersey corporate law, particularly those that could be viewed as protective of creditors or shareholders. In some areas, New Jersey tried to walk a fine line between liberality and irresponsibility, reflecting an awareness of the growing controversy about its role as protector of trusts,¹⁵⁰ as well as a recognition that too great an abrogation of such protections might scare off potential investors. Accordingly, while granting great discretion to directors in valuing property received in exchange for stock, New Jersey did not permit issuance of stock in exchange for services.¹⁵¹ It also required at least \$1000 of capital to be paid in before commencement of business. While shareholders had far less rights to information than were available under New York law, they did at least retain the rights to inspect the shareholder list if they were willing to come to New Jersey.¹⁵²

Yet, all in all, the 1896 Act moved New Jersey further in the direction of an enabling statute than any corporate law that had yet been enacted. Two years later, New Jersey took another big step down that road by amending the statute to give incorporators power to add any provision “*creating, defining, limiting and regulating the powers of the corporation.*”¹⁵³ The power of incorporators to create and define the powers of their own

146. 1896 N.J. Laws 279-80. New York law similarly provided that “[t]hree or more people may become a corporation for the purpose of carrying on any lawful business.” 1892 N.Y. Laws 2042-43.

147. 1896 N.J. Laws 280. New York had a similar provision. 1892 N.Y. Laws 2042-43.

148. 1896 N.J. Laws 283. New York law provided for common and preferred stock, but only the preferred could have different classes, and conversion from preferred to common required a two-thirds vote of the directors and could not increase the total amount of capital stock. 1892 N.Y. Laws 1837.

149. 1896 N.J. Laws 385-86, 287-88. New York had a similar provision for amending the charter, but required a three-fifths shareholders vote. 1892 N.Y. Laws 1833. There was no express provision for voluntary dissolution of a corporation.

150. In 1897, New Jersey went a bit over that line by passing a statute that sought to insulate officers, directors, and shareholders of New Jersey corporations from any “statutory personal liability” for corporate obligations based on the laws of any other state. 1897 N.J. Laws 125. The law was supposedly designed to protect officers of the sugar trust who were under investigation in New York. It was enacted just 18 hours after it was introduced. *Stoke*, *supra* note 10, at 576-77. The law was declared unconstitutional both by federal and New Jersey courts shortly after its enactment. *W. Nat’l Bank of N.Y. v. Reckless*, 96 F. 70, 79 (C.C.D.N.J. 1899) (citing opinion of the New Jersey chief justice in *Western National Bank v. Skillman* (N.J. Sept. 28, 1898) (unpublished opinion), a related case previously decided in New Jersey state court).

151. 1896 N.J. Laws 293.

152. *Id.* at 208, 288.

153. *Id.* at 408 (emphasis added). Such powers, of course, had to be “not inconsistent” with New Jersey

corporations added tremendously to the flexibility and attraction of New Jersey law.¹⁵⁴

In 1898, James B. Dill also published his treatise on New Jersey corporate law, complete with “suggestions and forms.”¹⁵⁵ It is an excellent treatise, clear and comprehensive, and written for a national audience by someone with exhaustive knowledge of his subject. While it also represents an attempt to sell New Jersey incorporations, the sales pitch is relatively soft and subtle.¹⁵⁶ Dill begins with an announcement of New Jersey’s steadfast commitment, since 1875, “by the enactment of laws first wise and then liberal to attract incorporated capital to the State, and by like legislation to protect capital thus invested against attacks from within and from without.”¹⁵⁷ He goes on to praise the 1896 revisions for recognizing the “commercial need” of private companies¹⁵⁸ for simplicity of organization, dissolution without need for judicial proceedings, and “freedom from undue publicity in the management of the private affairs of the corporation.”¹⁵⁹

Dill was well aware of the unique enabling aspects of New Jersey law and the departure they represented from prior practice. He stated that “[w]ithin certain clearly defined limits parties may by their certificate of incorporation obtain what is practically equivalent to a special act of the Legislature”¹⁶⁰ and that the charter was now “the foundation of the corporate structure.”¹⁶¹ Here Dill was advocating the new conception of corporate law on both egalitarian and libertarian grounds. Under New Jersey law, the benefits of the corporate form previously available to the well-connected few were now potentially available to all, and created, defined, or limited in accordance with the wishes of the individuals involved. It was a conception of corporate law designed to appeal to businesses both large and not so large, and it came just in time for the greatest merger boom in American history.

law. *Id.*

154. Yet it had rather different impacts on sophisticated and unsophisticated consumers of corporate law. For the trusts and their lawyers, it offered the opportunity to design customized corporate structures of whatever size or complexity was required, and reduced the need to go back to the New Jersey legislature each year or so for more legislation. For the less sophisticated lawyer of smaller businesses, the enabling approach was attractive insofar as it offered greater clarity and simplification. The idea that the corporation would have exactly the powers stated in its charter made sense to lawyers used to drafting contracts. Yet a law that said corporations could have any powers you wanted them to have might have seemed a little too free and indeterminate, causing lawyers to seek guidance as to what to include in the charter and other corporate documents. Of course, Corporation Trust and other such businesses were happy to provide such guidance.

155. DILL, *supra* note 134.

156. Dill’s annotations to the New Jersey General Corporation Act were distributed without charge by the office of the New Jersey Secretary of State. *The Act Concerning Corporations*, 10 VA. L. REG. 164 (1904).

157. DILL, *supra* note 134, at xvii.

158. Dill emphasizes in his title and throughout his treatise that the New Jersey law applies only to private companies, as distinguished from public corporations, and assumes that the distinction is one that is unambiguous and familiar to his readers. *Id.*

159. *Id.*

160. *Id.* at xix. It is worth remembering, as Dill and his readers undoubtedly did, that the powers granted to corporations by special charters usually vastly exceeded those available under general incorporation statutes.

161. *Id.* While Dill generally presents corporate law as simple and easily understood by the non-specialist, when discussing the new broadened powers obtainable through the certificate, he notes that “the skill of counsel for corporations in drawing charters” may be called for. DILL, *supra* note 134, at 21.

V. MERGER MANIA AND THE CHALLENGE TO NEW JERSEY: 1899-1910

The turn of the twentieth century saw the apotheosis of New Jersey's efforts to dominate the market for corporate charters. The second wave of the great merger boom spread through the financial markets with far greater intensity than the first, and most of the largest of the newly created firms were New Jersey corporations.¹⁶² The windfall that New Jersey (and its politicians and lawyers) were reaping through its corporate laws, however, did not go unnoticed.¹⁶³ Quite a few states amended their laws expressly to compete with or at least avoid losing domestic businesses to New Jersey, creating an intense and intentional state competition for corporate charters.¹⁶⁴

The methods states used to challenge New Jersey's dominance were innovative and varied. Delaware sought to offer essentially the same product, the New Jersey statute, at a lower price in taxes and incorporation fees.¹⁶⁵ West Virginia enacted laws that were substantially more liberal and promoter-friendly than New Jersey.¹⁶⁶ New York, always an innovator in corporate law, revised its laws and rationalized its tax structure to some degree and, due to the size and importance of its economy, quickly became New Jersey's most powerful competitor.¹⁶⁷ Other states were touted primarily for their low taxes and incorporation fees.¹⁶⁸

The standard view is that none of this competition had much effect, that New Jersey, with its established reputation and first mover advantage, remained the dominant state for incorporations of large business entities until it threw away that advantage with the passage of the 1913 "seven sisters" laws.¹⁶⁹ Again, this tells less than half the story. The fact is that New Jersey's role as the leading state for incorporations weakened considerably in the period 1899 to 1910, the victim primarily of price competition.¹⁷⁰ The more price-sensitive promoters increasingly saw Delaware and New York as cheaper and perfectly respectable alternatives to New Jersey incorporation for many businesses.¹⁷¹ Other states found ways to encourage their domestic businesses to incorporate in their home states.¹⁷² The result was that New Jersey's percentage of the incorporation business dropped substantially well before 1913, and it was no longer viewed as a uniquely favorable state for incorporation of large enterprises.¹⁷³

It is true, however, that for major investment bankers like J.P. Morgan, who were just beginning to underwrite industrial securities, and for the elite group of corporate lawyers they employed, New Jersey law remained the gold standard, the most dependable state for incorporation of large consolidated enterprises.¹⁷⁴ Yet this preference came to be

162. *See infra* Parts V.B, V.C.

163. *Id.*

164. *See infra* Part V.B.

165. *See infra* Part V.B.1.

166. *See infra* Part V.B.4.

167. *See infra* Part V.B.3; *see also* APPENDIX III.

168. *See infra* Part V.B.

169. *See, e.g.,* Cary, *supra* note 11, at 664 ("New Jersey drastically tightened its law relating to corporations and trusts with a series of provisions known as the seven sisters.").

170. *See infra* APPENDIX III.

171. *See infra* Parts V.B.1; V.B.3.

172. *See infra* Parts V.B.1-5.

173. *See infra* APPENDIX I.

174. *See infra* APPENDIX II.

increasingly based on nothing but New Jersey's reputation, familiarity and past history, and even the Morgan interests on occasion contemplated other states for incorporation.¹⁷⁵ Accordingly, New Jersey's dominant position began to erode even before 1913.

A. Causes of the Great Merger Boom

The great wave of industrial consolidations that swept through American business at the turn of the twentieth century transformed the national economy. It also provided substantial financial benefits to New Jersey,¹⁷⁶ where most of those consolidated businesses were incorporated.¹⁷⁷ There is general agreement among historians that the merger wave was the result of a confluence of three basic factors, although the relative importance of each continues to be debated: (1) the desire to suppress "ruinous" competition and maintain or increase price levels;¹⁷⁸ (2) the desire to achieve greater efficiencies through exploitation of national communications and transportation networks, administrative centralization, vertical integration, scale economies, and advertising;¹⁷⁹ and (3) the development of an active market in the securities of industrial corporations.¹⁸⁰ The combined effect of these three developments helps explain why

175. For example, Francis Lynde Stetson, a legal advisor to Morgan, explained to the United States Industrial Commission why he advised Morgan to incorporate the Federal Steel Company in New Jersey in 1898. Stetson said he would have advised incorporation in New York if the principal property of the corporation had been in that state, but since it proposed to acquire properties primarily in states "inhospitable to the development of large business enterprises," he chose New Jersey because its laws presented "the most favorable conditions." INDUSTRIAL COMMISSION REPORT, *supra* note 32, at 970-71. Stetson testified that the laws of West Virginia were also considered very favorable, except that West Virginia at that time still set a limit on the amount of authorized capital. *Id.* at 971. We can see here both Stetson's presumption in favor of New Jersey, and his willingness to contemplate incorporation in other "hospitable" states like New York and West Virginia.

176. GRANDY, *supra* note 41, at 45-47.

177. The statistics for 1899 in Appendices I and II illustrate both the magnitude of the movement and its concentration in New Jersey. In that year, 2,186 companies were incorporated in New Jersey, almost twice the already high number of businesses incorporated there in each of the three prior years. *See infra* APPENDIX I. Moreover, as APPENDIX II shows, many of these were very large businesses. Three hundred fifty-four had authorized capital stock of \$1,000,000 or greater, almost quadruple the average number of large incorporations for the previous two years. Fifty of them had authorized capital of \$20 million or more. Before that year, only 25 companies that large had been chartered in the entire history of New Jersey. EVANS, *supra* note 17, at 49, tbl. 17.

178. Naomi Lamoreaux has shown that consolidations occurred disproportionately in new or rapidly growing industries with capital intensive production processes and high fixed costs. Competing firms in such industries had strong incentives to run at full capacity to capture additional market share, even when faced with falling prices. The result was a sequence of "expansion, depression, and consolidation." LAMOREAUX, *supra* note 6, at 98. Some of the industries Lamoreaux cites are "newsprint, tin plate, wire nails, bicycles, window glass, [and] copper." *Id.* at 107.

179. The foremost proponent of this view is Alfred Chandler. CHANDLER, *supra* note 53, at 334-36. He views technological changes like the development of national transportation and communications networks, and new techniques for mass production and distribution of manufactured goods, as the primary explanation for the success of industrial consolidations. *Id.*

180. *See* NELSON, *supra* note 6, at 89-100. Until the 1890s, most of the shares traded on the securities exchanges were the stocks and bonds of railroads and financial institutions. Even in the first wave of the merger boom in the early 1890s, shares of trusts or industrial combinations were considered so questionable and speculative that most of the major investment banking houses did not underwrite them. In fact, most of the early issues of industrial preferred stock were not underwritten at all, but merely sold by brokerage firms for commission on behalf of the stockholders who obtained shares in the merger or consolidation. Navin & Sears,

New Jersey's reputation for reliability and relatively conservative approach to legal innovation remained so important to the trusts and their advisors.

While monopolies and agreements in restraint of trade were ostensibly outlawed by the Sherman Act in 1890, throughout this period, it was uncertain whether monopoly power achieved by consolidation within a single corporate entity permitted under state law was exempt from federal antitrust challenge. The Supreme Court's decision in *United States v. E.C. Knight* seemed to support that view.¹⁸¹ The majority opinion's strong distinction between manufacturing and commerce had constitutional overtones, suggesting that the power to regulate "monopol[ies] in manufacture" was within the "exclusive" police power of the states.¹⁸² Yet if states had such exclusive constitutional power, they could presumably only legitimately exercise it over companies that were genuinely and properly subject to that state's law. Accordingly, New Jersey, which required organizational and shareholder meetings to be held in that state, was seen as a safer place to incorporate potentially monopolistic enterprises than Delaware or West Virginia, which were condemned by many as authorizing creation of "tramp corporations" with no true home.¹⁸³

Many economic historians have argued that antitrust considerations were of secondary importance in understanding the great merger boom, pointing instead to the massive growth and capital investments, made to exploit technological innovation, scale efficiencies, administrative centralization, and vertical integration.¹⁸⁴ This Chandlerian view implies a very strong interest by large corporations in the stability and reliability of

supra note 61, at 122. One significant exception were the Belmonts, American representatives of the Rothschilds, who helped underwrite the 1890 issuance of preferred stock in connection with the incorporation of the National Cordage trust. *Id.* at 125. Lawrence Mitchell views the desire of promoters to obtain quick profits in the burgeoning market for industrial securities as the primary causal factor in the merger boom. *See* MITCHELL, *supra* note 60, Chapter I, at 9-10.

181. 156 U.S. 1, 11-13 (1895). *Knight* was the first case decided by the Supreme Court under the Sherman Act. It upheld the purchase by a New Jersey corporation of shares of four Pennsylvania companies that operated sugar refineries in Philadelphia. *Id.* at 16-18. The majority held that a "monopoly in manufacture" as opposed to a monopoly in interstate commerce, was not within the scope of federal power under the Sherman Act. *Id.*

182. *Id.* at 11. Although it did not expressly say that monopolies formed by corporate combinations were exempt from federal antitrust regulation, it did say that the Sherman Act did not limit the rights of state created corporations in the "control[] or disposition of property." *Id.* at 16. There is an interesting debate among legal historians as to whether the *Knight* case should be viewed as a reflection of the Court's laissez-faire attitude toward regulation of big business or as an attempt to preserve the traditional power of the states to regulate corporate power and restraints on trade through common and statutory law. *Compare* Edward S. Corwin, *The Anti-Trust Acts and the Constitution*, 18 VA. L. REV. 355 (1932) (arguing the Court's decision showed its bias to laissez-faire economics), *and* DUMAS MALONE & BASIL RAUCH, *THE NEW NATION: 1865-1917*, at 110-11 (1960) (arguing the Court's interpretation of the Constitution favored big business), *with* Charles W. McCurdy, *The Knight Sugar Decision of 1895 and the Modernization of American Corporation Law, 1869-1903*, 53 BUS. HIST. REV. 304 (1979) (arguing the Court's decision in *Knight* was an effort to preserve state powers); *see also* HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW, 1836-1937*, at 261-62 (1991).

183. Two years later, the New Jersey courts decided *Stockton v. Am. Tobacco Co.*, 36 A. 971 (N.J. Ch. 1897), *aff'd*, 42 A. 1117 (N.J. 1898). It was an action to enjoin the American Tobacco Company, a New Jersey corporation, from restraining competition by fixing the price at which jobbers could sell its cigarettes and preventing those jobbers from selling competing products. *Id.* at 971-74. The Vice-Chancellor, in dismissing the action, held that the corporation had the same power to deal with its manufactured goods as an individual manufacturer. *Id.* at 975-76.

184. CHANDLER, *supra* note 53, at 315-39 and accompanying authorities.

the state corporate legal regime.¹⁸⁵ Given the massive long term investments that were being made in administration, plant and equipment, and distribution networks by the newly consolidated entities, any legal changes that altered or restricted their permissible size, organization, or mode of operation could have disastrous financial consequences. Such changes were not at all inconceivable circa 1900, when New Jersey was under enormous attack from many quarters for its “traitorous” facilitation of big business development, and there were increasing calls for federal chartering of corporations.¹⁸⁶ Again, this helps explain the loyalty of the largest promoters to New Jersey, which had successfully resisted such criticisms in the past and was considered more politically reliable than the mercurial New York, or the relatively unknown legal and legislative regime of Delaware.¹⁸⁷

The third major factor in the development of the merger boom was Wall Street. Industrial securities were increasingly seen as legitimate and potentially highly-profitable investments.¹⁸⁸ Major Wall Street bankers, like J.P. Morgan, became involved in organizing and underwriting some of the largest deals.¹⁸⁹ Yet the majority of the consolidations were still organized by independent promoters like John R. Dos Passos, formerly a lawyer for the sugar trust.¹⁹⁰ Others were negotiated by the manufacturers themselves, advised only by legal counsel.¹⁹¹ Among this group, there was greater need for cash to finance the deals and greater price sensitivity, and therefore greater receptivity to incorporation in lower-cost states like Delaware.¹⁹² Still, the need and desire to raise capital in financial markets meant that promoters had to give serious consideration to the views of investors concerning the reputation of firms incorporated under different state laws, avoiding those with particularly unfavorable reputations.

Financial opportunity brought with it speculative excess. Many of the highly touted mergers and consolidations failed, often just a few years after their initial promotion.¹⁹³

185. *Id.*

186. See GRANDY, *supra* note 41, at 55-74; Steffens, *supra* note 35.

187. It also explains why New Jersey completely and immediately lost this support when, in 1913, it passed the Seven Sisters laws which, among other things, prohibited formation of new holding companies under New Jersey law. Although the law did not affect existing companies, and was repealed a few years later, New Jersey’s reputation in the business community for consistency and reliability was lost forever. It also explains why many in the business community supported the federalization of corporation law, not merely because they saw it as inevitable, but because of the consistency and reliability it would bring. Of course, they hoped for a federal law along the lines of the New Jersey statute.

188. Industrial securities had weathered the Panic of 1893 at least as well as more established railroad stocks. Navin & Sears, *supra* note 61, at 128. This was particularly true of the largest trusts which had incorporated in the 1890-1893 period. The apparently favorable legal climate for monopolies of manufactures created by the *Knight* case undoubtedly also enhanced the attractiveness of industrial securities.

189. In 1898, when a syndicate led by J.P. Morgan & Co. organized the Federal Steel Company, a New Jersey company with \$100 million in authorized capital, it confirmed for many observers the financial opportunities available through industrial mergers. Morgan went on to organize United States Steel in 1901.

190. See CAROSSO, *supra* note 53, at 43; Navin & Sears, *supra* note 61, at 129.

191. Navin & Sears, *supra* note 61, at 129-30.

192. *Id.* at 131 (at the peak of the merger boom, “increasing amount[s] of cash [were] required to effect a merger.”). Another contributing factor was the election of William McKinley as President in 1900. McKinley was perceived by the business community as “a Republican president who approved of consolidation and didn’t interpose bothersome antitrust obstacles.” CHERNOW, *supra* note 29, at 82.

193. See generally DEWING, *supra* note 18 (explaining that this was most frequently the result of overcapitalization brought about by many factors: unrealistic demands by owners of constituent businesses;

In addition to the honest failures, there were the dishonest ones—companies with little or no economic substance, designed to be sold to unsophisticated investors during periods of intense speculative activity.¹⁹⁴ Then, as now, it was frequently hard to tell the difference between companies with poor business plans and outright frauds.

The fact that the merger boom took place in an atmosphere of speculative frenzy also had important implications for the market for charters. With no federal securities laws in place, the degree to which stock could be watered and business reverses kept secret were solely matters of state law. They therefore became matters for state competition as well. The promoters, industrialists, financiers, and lawyers who made the incorporation decision had a natural inclination to favor laws that were rather lenient on these matters. Yet that inclination was tempered by the recognition that some degree of investor assurance and information was needed to effectively market securities to the public. Moreover, the larger, sounder, more conservative financial players sought to distinguish themselves from those who dealt with more speculative issues, in part by making fuller disclosures to investors.¹⁹⁵ Those selling more risky shares, in contrast, had an incentive to look as much as possible like the Morgan bank.

The result was that the consumers in the market for corporate charters became increasingly segmented. There were the giant consolidations, organized by Morgan or one of the other major investment houses.¹⁹⁶ Here reputational concerns were paramount and New Jersey the almost invariable choice. Other large mergers, the majority in fact, were organized by smaller promoters like Dos Passos.¹⁹⁷ They were a little less concerned with reputation and more sensitive to price. The largest number of consumers of corporate charters were smaller industrial firms that chose to organize in the corporate form.¹⁹⁸ As more states liberalized and removed restrictions on their domestic corporations, the financial incentives for these businesses to incorporate in their home state became stronger. Finally, there were the con artists and hucksters who saw in the merger mania an unparalleled opportunity to make a fast buck. They valued states with low fees and very lax regulations, but also needed to avoid easy methods for distinguishing them from more legitimate deals. This segmentation created potential opportunities for other states to enter the race for corporate charters, challenge New Jersey, and pursue various strategies to attract different segments of the market. That is precisely what they did.

B. State Competition During the Great Merger Boom

Between 1899 and 1902, Delaware, Maine, New York, West Virginia, Massachusetts, and Connecticut all made major revisions in their corporate laws. Some of the states that enacted such legislation, like Delaware and Maine, sought to actively

overly optimistic earnings projections; and expectations of monopoly control which failed to materialize).

194. *See infra* Parts V.B.4 & V.B.5.

195. JEAN STROUSE, MORGAN, AMERICAN FINANCIER 398 (1999) (stating that Morgan underwritings took the “unusual step” of issuing quarterly reports). The New York Stock Exchange, an institution not subject to substantial competitive pressures at this time, appears to have been the major source of shareholder disclosure requirements during this period. *See also* SEAGER & GULICK, *supra* note 131, at 42-43.

196. *See infra* Part V.C.

197. *Id.*

198. *See infra* APPENDIX II.

compete with New Jersey in the charter market.¹⁹⁹ Others, like Massachusetts, had the more modest ambition of deterring local businesses from incorporating out of state.²⁰⁰ All had considerable success. The number of incorporations in all these states rose considerably between 1899 and 1910, while incorporations in New Jersey stayed essentially flat.²⁰¹

I. Delaware

Prior to 1899, Delaware had one of the most restrictive incorporation statutes in the country. Charters could only be granted by judicial order, and there were limitations on the duration, amount of capital, and purposes for which a corporation could be formed.²⁰² Not surprisingly, and perhaps intentionally, most businesses sought to incorporate instead under special charters, which were still available from the Delaware legislature.²⁰³ As in many other states, however, the special charter procedure was subject to egregious abuse.²⁰⁴ In 1897, Delaware's Constitution was amended to abolish special charters and authorize the passage of a new general incorporation law. Such a bill was introduced in the Delaware legislature in 1898. It contained fairly restrictive provisions for the time, such as a requirement of 50% paid in capital to commence business, double liability of stockholders to creditors, and limitations on anti-competitive rail mergers.²⁰⁵ The bill failed to pass, largely due to objections from the Pennsylvania Railroad.²⁰⁶

In the interval before the next legislative session, however, an "unofficial committee" formed itself, consisting of "a financial editor of a New York paper, a New York lawyer, and two Dover lawyers."²⁰⁷ Their plan was to form a corporation, much like Corporation Trust of New Jersey, that would "engage in the business of incorporating companies and representing them as resident agents."²⁰⁸ First, of course, they had to get Delaware to pass a liberal, New Jersey-style statute, but this was apparently not much of a problem. The 1899 Act passed the Delaware House unanimously, and the Senate concurred.²⁰⁹

The statute that passed was basically the 1896 New Jersey statute, with a few improvements from a promoter's standpoint. Unlike New Jersey, the 1897 Delaware

199. See *infra* Parts V.B.1, V.B.2.

200. See *The Massachusetts Business Corporation Law of 1903*, 17 HARV. L. REV. 215 (1903) (book review); *The Massachusetts Corporation Law*, N.Y. TIMES, Sept. 22, 1903; *infra* note 236.

201. See *infra* APPENDICES I, III.

202. RUSSELL CARPENTER LARCOM, *THE DELAWARE CORPORATION* 3-7 (1937); S. Samuel Arsht, *A History of Delaware Corporation Law*, 1 DEL. J. CORP. L. 1, 4-7 (1976).

203. In 1897, the last year of the dual system, only 10 corporations were chartered under the general act, and 115 were chartered or renewed through the legislature. Arsht, *supra* note 202, at 5.

204. Special charters were allegedly granted by the Delaware legislature to companies that "would never have been given at the hands of the Court under a proper general incorporation law." LARCOM, *supra* note 202, at 5 (quoting Martin Burriss in the *Journal of the Constitutional Convention of 1897*, IX, 5571). On corruption generally in the granting of special charters, see Butler, *supra* note 33.

205. LARCOM, *supra* note 202, at 8.

206. *Id.* The Pennsylvania Railroad apparently had a subsidiary that was a Delaware corporation.

207. *Id.*

208. *Id.* at 9.

209. *Id.* at 9 & n.27. As with New Jersey, New York corporate lawyers appear to have had a direct impact on legislation in other states.

Constitution permitted corporations to issue stock for “labor,” as well as money, personal property, real estate, or leases.²¹⁰ New Jersey required shareholders meetings to be held in the state.²¹¹ Delaware did not.²¹² New Jersey required original stock and transfer books to be kept in the state.²¹³ Delaware required only duplicates, which did not have to be shown very often.²¹⁴ But the biggest difference was price. Delaware’s incorporation fees were only three-fourths the cost of New Jersey’s.²¹⁵ Its annual franchise tax rates were half of New Jersey’s.²¹⁶

Delaware also adopted New Jersey’s sales strategy. Corporation trust companies quickly began selling the advantages of Delaware incorporation, and, as in New Jersey, worked in close cooperation with state government officials.²¹⁷ Moreover, in 1899, the same year in which the new Delaware law was passed, J. Ernest Smith, a Wilmington lawyer, published a full volume treatise on that law, complete with annotations and corporate forms. The work was clearly indebted to James Dill’s treatise on New Jersey law, published the prior year, and was issued with Dill’s cooperation and permission to quote extensively from Dill’s treatise.²¹⁸

210. DEL. CONST. art. IX, § 3 (1897). As with many other formal features of state corporate law, it remains unclear how significant these nominal differences were in practice. Despite the ostensible New Jersey prohibition on issuing stock for services, we are told that the syndicate that underwrote the U.S. Steel consolidation received \$57.5 million in stock “for its services.” CHERNOW, *supra* note 29, at 85.

211. See *supra* note 45 and accompanying text.

212. 21 Del. Laws 451 (1899).

213. See *supra* note 45 and accompanying text.

214. 21 Del. Laws 450 (1899). In his 1899 treatise, Ernest Smith helpfully points out that it was common to insert in the certificate of incorporation a limitation on the times, places, and conditions under which corporate books could be inspected by shareholders in order to avoid “litigations by stockholders having but a small interest in the company” and to “prevent rival concerns from prying into the private accounts.” J. ERNEST SMITH, *THE LAW OF PRIVATE COMPANIES ORGANIZED UNDER THE GENERAL CORPORATION LAWS OF DELAWARE* 36 (1899). In a speech to University of Pennsylvania students, the President of the Delaware Charter Guarantee and Trust Company was careful to point out that no corporate books, but only a “duplicate stock ledger” had to be maintained in Delaware. Josiah Marvel, Esq., President of Delaware Charter Guarantee & Trust Co. of Wilmington, Delaware, Address Before the Students of the Dept. of Fin. and Econ. of the Univ. of Pa. 14 (May 14, 1902). In short, it seems that Delaware charter companies were telling the truth when they asserted that “[t]he examination of the books by intermeddlers is much more difficult under the Delaware law than under the laws of any other State.” *Little Delaware Makes a Bid for the Organization of Trusts*, 33 AM. L. REV. 418, 423 (1899) (quoting from a circular of the Corporation Trust Company of Delaware).

215. Delaware’s incorporation fees, like New Jersey’s, were based on the number and par value of the authorized shares, but incorporation in Delaware cost only 15 cents per thousand shares, while New Jersey charged 20 cents. 1896 N.J. Laws 315; 1899 Del. Laws 498. New Jersey’s annual franchise tax, based on the number of shares issued and outstanding, was 1/10 of 1%. 1884 N.J. Laws 235. Delaware’s, computed on the same basis, was 1/20 of 1%. 1899 Del. Laws 305; LARCOM, *supra* note 202, at 19.

216. Compare 1884 N.J. Laws 235 with 1899 Del. Laws 305.

217. See *The Abuse of the Corporation Charter*, 69 ALB. L.J. 188 (1907) (question to the Delaware Secretary of State referred to Delaware Corporation Company).

218. Because such cooperation seems inconsistent with state competition, it is worth speculating on why the foremost exponent of New Jersey incorporations might have been inclined to help a fledgling competitor. First, Dill may have had a personal pecuniary interest in one or more of the corporation trust companies that were being started in Delaware. Dill had substantial experience in the operation of such companies, and there was no reason why his participation in such businesses should be limited to New Jersey. Second, even if Dill had no interest in the success of Delaware, some of his clients certainly did. New York trust lawyers were active in securing passage of the new Delaware law, and it stands to reason that trust interests would encourage the creation of a second New Jersey, both because they were aware of political pressures in New Jersey to reform

Although Delaware had radically changed its corporate law policy between 1897 and 1899, its proponents sought to assure potential customers that its corporate law, like that of New Jersey, had been the “result of a conservative, steady and progressive growth,” and that therefore “will not be subject to any radical changes.”²¹⁹ One concrete piece of evidence they could cite in support of this position was a 1900 decision of the Delaware Chancery Court to apply the decisions of the New Jersey courts in construing disputed provisions of the new Delaware statute, “regardless of what would otherwise be the judgment of this court.”²²⁰ In short, Delaware’s proponents sought to present their law as a better, cheaper version of New Jersey.

Delaware’s initial entry into the competition for charters was greeted with derision in many quarters.²²¹ In the financial community, however, Delaware was taken far more seriously. It attracted a reasonable amount of incorporation business even in its early years,²²² and, by the end of the decade, was perceived as an acceptable lower-cost alternative to New Jersey.²²³ In 1899, the annual number of incorporations in Delaware were only nineteen percent of those in New Jersey.²²⁴ By 1910, the percentage had risen to almost seventy percent.²²⁵

2. *Maine*

Maine was one of the earliest states to charter substantial numbers of out-of-state firms.²²⁶ In 1890, however, the Supreme Court of Maine held that shareholders could be personally liable if a company issued stock for property worth less than the par value of the stock received.²²⁷ According to one influential treatise writer of the time, that

its law, and because competition among chartering states could only be beneficial to the consumers of such charters. Finally, Dill apparently saw himself, at least at times, not as a narrow partisan of New Jersey interests, but as the exponent of a new conception of corporate law as flexible, private enabling legislation. As such, he was undoubtedly pleased to find lawyers and legislators in other states who shared this vision.

219. Marvel, *supra* note 214.

220. *Wilmington City Ry. v. Peoples Ry.*, 47 A. 245, 253 (Del. Ch. 1900).

221. In 1899, the *American Law Review* published no less than three pieces, all ridiculing the inhabitants of “little Delaware,” their “cupidity excited by the spectacle of their northern neighbor, New Jersey, becoming rich and bloated through the granting of franchises to trusts which are to do business everywhere except in New Jersey.” *Little Delaware*, *supra* note 214, at 418; *Delaware Missionary Enterprise*, 33 AM. L. REV. 794 (1899); *Book Review of Smith’s Delaware Corporation Law*, 33 AM. L. REV. 945, 945 (1899) (suggesting that “a State that will put such a piece of legislation on its statute books ought to be disincorporated and reduced to territorial condition”).

222. It had 421 incorporations in 1899, which, while well below New Jersey’s total (2186), exceeded Massachusetts and Connecticut and compared favorably with Pennsylvania (687) and an established chartering state like Maine (697). See *infra* APPENDIX I. Even more significantly, according to Larcom, Delaware also had four “trusts” incorporate there in 1899, the third highest for any state that year, although well below New Jersey’s massive total of 61. LARCOM, *supra* note 202, at 13. Larcom’s statistics were based on data originally compiled by John Moody. See MOODY, *supra* note 7. Larcom defined “trusts” as companies with authorized capital of \$1,000,000 or more formed by combination of two or more enterprises. LARCOM, *supra* note 202, at 12.

223. See *infra* APPENDIX III.

224. See *id.*

225. See *id.*

226. Indeed, in the mid-1880s, incorporations in Maine were comparable to those in New Jersey, even slightly exceeding them in 1884. See *infra* APPENDIX I.

227. *Libbey v. Tobey*, 19 A. 905 (Me. 1890). In exchange for a silver mine they had purchased at a

decision made Maine too “dangerous” a place in which to incorporate.²²⁸ Later accounts cite that decision as the reason for Maine’s decline as a chartering state.²²⁹ The statistics, however, do not fully bear this out. They show that Maine restored its reputation substantially during the great merger wave.²³⁰

In 1901, Maine passed a new statute that legislatively overruled the 1890 decision and substituted language virtually identical to the New Jersey statute.²³¹ Maine also changed its tax provisions in 1899 to impose franchise taxes on the same basis as New Jersey but at a substantially lower rate for most corporations.²³² These changes were apparently instituted as a result of pressure from the Maine bar. In 1901 and 1902, Maine lawyers issued a number of books and pamphlets touting the state’s benefits to corporations and comparing it favorably with New Jersey, New York, and Delaware.²³³

Maine did reasonably well during the great merger boom, but was in the second rank of chartering states.²³⁴ The reason for its relative failure remains unclear. The 1890 decision may have left lingering doubts about the reliability of its judiciary, but an even more significant factor was probably geographical. Maine, like New Jersey but unlike Delaware, required shareholders meetings to be held in state.²³⁵ This would not have

valuation of \$6,666, the shareholders received stock with a par value of \$240,000. *Id.* This was held to be a violation of the Maine statute, which required a “bona fide and fair evaluation” of property received in exchange for stock. *Id.*

228. LARCOM, *supra* note 202, at 14.

229. *Id.*

230. See *infra* APPENDICES III, IV. APPENDIX IV is compiled from contemporary data first published in the New York Times during January 1901, 1902, and 1904. These were lists of companies organized the previous year with \$500,000 or more in authorized capital, their names, capital stock and states of incorporation. *The Larger Incorporations During 1901*, N.Y. TIMES, Jan. 5, 1902, at AFR 46; *New Incorporations of the Year*, N.Y. TIMES, Jan. 4, 1903, at AFR 39; *New Incorporations Effected During 1904 and their Capital Stock*, N.Y. TIMES, Jan. 8, 1905, at 18. APPENDIX IV aggregates that data for the 9 states with the largest number of incorporations during those years. See *infra* APPENDIX IV. The original source of this data is unclear, but it likely comes from one or more of the corporation trust companies. Although it is not fully consistent with the data compiled in the other Appendices from more official sources, it provides information about incorporation activity during the merger boom that is not available from any other source.

231. The new statute had language identical to New Jersey’s 1896 law dealing with valuations of property issued for stock except that Maine also permitted stock to be issued “for services rendered.” 1901 Me. Laws 243. See also DYER, *infra* note 233, at 117. This could be viewed as a legislative overruling of the 1890 case, since under the new Maine statute, as in New Jersey, the director’s valuation of property received for stock was conclusive “in the absence of actual fraud.” 1901 Me. Laws 243.

232. HERBERT M. HEATH, COMPARATIVE ADVANTAGES OF THE CORPORATION LAWS OF ALL THE STATES AND TERRITORIES 58-61 (1902).

233. *Id.* at 170; ISAAC DYER, THE STATUTES OF MAINE RELATING TO BUSINESS CORPORATIONS (5th ed. 1901). Maine’s advocates argued that its favorable policy to corporations was as reliable as New Jersey’s, citing Maine’s “unchanging political control” and “a corporation code carefully planned by the bar for forty years.” HEATH, *supra* note 232, at 64.

234. Between 1899 and 1902, its annual rate of incorporation increased by 74%. LARCOM, *supra* note 202, at 13, 175. (Delaware’s increased by 107%, but from a lower base.) Larcom’s data shows that between 1899 and 1903 there were 7 “trusts” incorporated in Maine. *Id.* This was more than West Virginia (5), Illinois (4), or Ohio (5), but less than Delaware (13), New York (24), or New Jersey (158). *Id.* It was third, however, in the number of new industrial companies listed on the New York Stock Exchange between 1900 and 1904, with 5, topped only by New York and New Jersey. *Id.* APPENDIX IV shows Maine in a second tier of popularity during the merger boom, well behind New Jersey, New York and Delaware. See *infra* APPENDIX IV.

235. See *supra* notes 45, 212 and accompanying text.

been a great burden for residents of Boston, and indeed many of the Maine incorporations were Massachusetts-based businesses who viewed their home state as particularly inhospitable to large corporations.²³⁶ As the center of finance moved to New York, however, promoters saw no need to make an annual trip to so distant a state.²³⁷

3. New York

New York had always been a somewhat schizophrenic state with respect to corporations and their charters. It was one of the first states to permit broad general purpose clauses and to give corporations the right to own stock.²³⁸ Yet New York had also prosecuted the Sugar Trust, and its laws contained numerous provisions troubling to promoters, including direct liability of shareholders for unpaid compensation to corporate employees, comparatively stringent financial reporting requirements,²³⁹ and directors' personal liability for overissue of debt or improperly issued dividends.²⁴⁰ New York was viewed as a potential chartering state,²⁴¹ but one that lacked New Jersey's political reliability.²⁴² Perhaps the biggest drawbacks to New York incorporation, however, were its higher taxes and incorporation fees coupled with greater uncertainty about their precise amount.²⁴³

236. APPENDIX II shows that after legislative changes made Massachusetts a more attractive state for charters in 1903, Maine incorporations declined substantially. *See infra* APPENDIX II.

237. Grandy argues that "proximity to the capital markets may explain why New Jersey and Delaware enjoyed advantages over states such as Maine, West Virginia, and Maryland." GRANDY, *supra* note 41, at 79. While the significance of the relative proximity of Maryland and Delaware to New York is debatable, the important variable Grandy leaves out is whether the state law actually required anyone to visit the state.

238. *See supra* note 80.

239. New York law required stock corporations to file a report every January setting forth the amount of their authorized and issued capital stock, as well as the amount of their debts and assets. 1892 N.Y. Laws 1832-33. Not only was this far more information than was required of corporations in Delaware, New Jersey or Maine, but failure to file the annual report in a timely fashion made each director of the corporation "personally liable for all the debts of the corporation then existing." *Id.*

240. 1892 N.Y. Laws 1831-33.

241. As Francis Stetson acknowledged in his testimony before the Industrial Commission, New York was not considered inhospitable to the trusts. Stetson advised International Paper Company to incorporate there because its principal property was in that state. INDUSTRIAL COMMISSION REPORT, *supra* note 32, at 971.

242. New York was considered less reliable, in part, because of its greater need for revenue. HORACE WILGUS, A STUDY OF THE UNITED STATES STEEL CORPORATION IN ITS INDUSTRIAL AND LEGAL ASPECTS 68 (1901). Steffens states that James B. Dill first offered his plan to increase incorporations to the political "bosses" of New York. According to Steffens, they rejected it because making the law more clear, fixed, and certain would deprive political office-holders of "all this good old graft." Steffens, *supra* note 70, at 41-42. It is hard to know whether this is an accurate account of Dill's activities, but it does graphically illustrate the political difficulties corporate lawyers had in dealing with New York's political culture of the time. *See also* GRANDY, *supra* note 41, at 76 (noting that New York state officials "found expressions of strong antitrust and pro-labor positions politically necessary").

243. Throughout the 1890s, New Jersey was charging an incorporation fee of \$0.20 per thousand shares of authorized stock. *See supra* note 215. In 1899, as we have seen, Delaware lowered their price to \$0.15 per thousand shares. *Id.* New York, however, was charging 1/8 of 1%, or \$1.25 per thousand shares. Frank White, *Advantages of Incorporation Under the Laws of the State of New York*, N.Y. TIMES, June 2, 1901, at SM13. Moreover, while New Jersey had a fixed annual franchise tax rate of 1/10 of 1% of the outstanding capital stock for most companies, New York's annual franchise taxes were computed based on the amount of capital the corporation was deemed to have employed within the state, which required an annual appraisal of the company's financial condition. *Id.*

In 1901, the New York legislature amended its corporate laws to make the state more attractive to new corporations. The requirement for filing an annual report was repealed, as well as limitations on the amount of corporate debt that could be incurred.²⁴⁴ Incorporation fees were substantially reduced, making it cheaper for corporations that intended to do all or a substantial part of their business in New York to incorporate there. New York had hit upon the basic legal strategy for preventing domestic businesses from incorporating out of state. It charged competitive incorporation fees, equalized taxes on in-state operations of domestic and foreign corporations, and removed restrictions, like personal liability of directors, which were particularly unattractive to promoters.²⁴⁵ This strategy removed incentives for primarily single-state businesses to incorporate outside their home state and created the familiar choice that most companies face today between incorporating in their home state and incorporating in Delaware.²⁴⁶

Unfortunately, very little data is available on New York incorporations prior to 1901.²⁴⁷ The post-1901 data, however, shows that New York was, by far, the most popular state for total incorporations, with its lead increasing through the decade.²⁴⁸ It is likely many of these were purely domestic New York businesses.²⁴⁹ Yet New York was also considered a major chartering state and got a significant share of what might be considered the “lower end” of the trust business.²⁵⁰ By the end of the great merger wave, New York, like Delaware, had made significant inroads in New Jersey’s business.

4. West Virginia

West Virginia was one of the earliest chartering states, its popularity largely based

244. Annual reports now had to be filed only if a shareholder or creditor made a written request for it, and failure did not result in personal directors’ liability, but only a corporate fine of \$50 a day. See White, *supra* note 243.

245. *Id.*

246. See Lucian A. Bebchuk & Alma Cohen, *Firms’ Decisions Where to Incorporate*, 46 J.L. & ECON. 383, 386 (2003) (“States . . . enjoy a significant home-state advantage in competing for the firms located in them.”).

247. A New York Times story, based on information from the Secretary of State’s office, reported 1,226 New York incorporations in 1894 and 1,423 in 1895, exceeding New Jersey’s totals for each of those years. It stated that 27 of the 1895 incorporations had capital stock of \$1 million or more. New Jersey had 48. *Boom In New Companies*, N.Y. TIMES, Jan. 2, 1896, at 11. Larcom’s compilation of Moody’s data show 12 “trusts” incorporated in New York between 1888 and 1900, but this was still good enough for third place behind New Jersey (111) and Pennsylvania (22). Similarly, between 1890 and 1900, 32 new industrial companies listed on the New York Stock Exchange were incorporated in New Jersey, 5 in Pennsylvania, and 4 in New York. LARCOM, *supra* note 202, at 13, 175.

248. In 1901, the first year we have data from the New York Department of State on total incorporations, New York already led the country with 2,670, 13.5% more than New Jersey. Between 1901 and 1905, moreover, annual incorporations in New Jersey fell and those in New York increased significantly, so that by 1905, New York had three times the annual number of incorporations as New Jersey. See *infra* APPENDIX III.

249. Interestingly, although there is a substantial increase in incorporations in New York between 1901 and 1905 and a decline in New Jersey, there does not seem to be a disproportionate decline in small or medium incorporations in New Jersey, which one might expect if smaller New York based companies had previously been incorporating in New Jersey. Rather, the decline in New Jersey seems proportionate across all size categories and seems more related to a general decrease in merger activity after a peak in 1900 plus competitive pressures from other states.

250. The New York Times data in APPENDIX IV shows New York third in 1901, with 143 incorporations, behind New Jersey and Delaware. See *infra* APPENDIX IV. By 1902 and 1904, however, it has incorporation numbers comparable to New Jersey, although the average size of the companies incorporated was smaller. *Id.*

on its low taxes and incorporation fees, and the fact that it did not require any reports or any meetings to be held in the state.²⁵¹ Up until 1901, however, it retained some provisions that had come to seem old-fashioned, thus limiting its desirability as a chartering state.²⁵² Moreover, its taxes were set at a fixed amount, regardless of the size of the corporation being formed, which meant that West Virginia derived comparatively little revenue from its incorporation laws.²⁵³

In 1901, West Virginia amended its corporate law, and made no bones about the reason for it. The new law was entitled “[a]n act to provide additional revenue for the state” and substantially increased the incorporation fees and annual taxes for larger incorporations.²⁵⁴ Unlike New Jersey and Delaware, the annual franchise tax was payable on authorized, rather than issued, capital stock.²⁵⁵ West Virginia also removed most of the remaining restrictions on corporate size, duration, and activities, and gave majority shareholders powers that required supermajority or unanimous shareholder approval in other states, like dissolving the corporation or amending the charter to increase or decrease the authorized capital stock.²⁵⁶ Although majority control on these issues has now become a standard part of most corporate codes, at the time it was condemned as well beyond the bounds of acceptable corporate legislation.²⁵⁷

The policy of West Virginia, in short, was to offer the loosest, most liberal law of any state in the union. It was anticipated that such a law would attract a certain number of crooks and swindlers, and the West Virginia bar seemed to take a somewhat nonjudgmental attitude toward that possibility.²⁵⁸ The new policy was a resounding failure. During the great merger boom, West Virginia did quite poorly for a state actively seeking incorporations. It already had a reputation for attracting fakers and swindlers, which the 1901 amendments did nothing to alleviate, and that also made it anathema for any legitimate business that sought to establish a reputation for probity or maintain an active market for its stock. Of course, that also made it a less attractive state for fakers and swindlers.²⁵⁹

251. Although there are few available statistics on West Virginia incorporations in the 1880s and 1890s, it appears to have been popular for incorporation of speculative ventures like mining corporations. See Thomas Conyngton, *The Amended Corporation Laws of West Virginia*, 63 ALB. L.J. 189 (1901) (stating that incorporations in West Virginia were “multitudinous” although “[t]heir reputation was not always such as to inspire confidence in Wall Street”); see also INDUSTRIAL COMMISSION REPORT, *supra* note 32, at 1110 (testimony of Charles N. King, officer of New Jersey Corporation Agency) (“[C]orporations organized in West Virginia have considerable difficulty in placing their stocks and bonds.”).

252. It still limited authorized capital to \$5,000,000 and imposed personal liability on directors for authorizing dividends that impaired capital stock.

253. *West Virginia Corporations*, 27 AM. L. REV. 105, 109 (1893).

254. 1901 W. Va. Laws 93, 110-11.

255. *Id.*

256. *Id.* at 104. In New Jersey, for example, these actions required an affirmative vote of two-thirds of the outstanding shares of each class. See *supra* note 148.

257. Conyngton opined, “It is doubtful if any more thoroughly vicious corporation laws were ever enacted.” Conyngton, *supra* note 251, at 190.

258. As one anonymous commentator stated: “If West Virginia essays to throw its benevolent arms of protection around the operators of a fake enterprise in the Klondike, and lend its fair name to give dignity and standing to a distant swindle, isn’t that worth 50 dollars?” *We’re in the Business*, 8 W. VA. B. 99, 110 (1901).

259. See *infra* APPENDIX IV. As Conyngton predicted in critiquing the 1901 West Virginia statute, “No conservative, solid enterprise will hereafter go to West Virginia for incorporation. Even the optimistic evolver of schemes and the impecunious promoter will pass her by and betake them to far-off South Dakota, where

5. South Dakota

For a short period of time during the great merger boom, South Dakota became very popular for incorporation of enterprises with large amounts of authorized capital stock.²⁶⁰ The reason was simple. Incorporation fees were fixed and extremely low, between \$10 and \$40, and there was no annual franchise tax.²⁶¹

South Dakota was not a chartering state in the sense of New Jersey or Delaware, which sought incorporations as a matter of state policy. Its corporate statute was undeveloped and not particularly liberal, with no express power to issue preferred stock, to own shares in other corporations and no power to issue debt in excess of capital stock subscribed.²⁶² Moreover, with its tax structure, it obviously could not expect to make much money as a preferred state of incorporation.

Rather, the popularity of South Dakota seems to have resulted from the efforts of some private South Dakota lawyers who sought to cash in on the merger boom by touting South Dakota as a potential incorporation state and offering their own services as counsel and resident agents.²⁶³ The plan appears to have been extremely successful for a short period of time, attracting large numbers of incorporations with substantial capitalizations.²⁶⁴ South Dakota's popularity was short-lived, however. It quickly acquired a reputation as home of wildcat mining stocks and other shady schemes.²⁶⁵

A similar series of events occurred in the District of Columbia. Some enterprising and not particularly scrupulous D.C. lawyers managed to create a short lived boom in District of Columbia incorporations.²⁶⁶ In 1905, President Roosevelt sent Congress a

incorporation may be had at bargain-counter rates, and with an easy informality beyond anything heretofore attempted." Conyngton, *supra* note 251, at 191.

260. See *infra* APPENDIX IV.

261. See JOHN S. PARKER, WHERE AND HOW: A HANDBOOK OF INCORPORATION 62, 68 (2d ed. 1906).

262. See *id.* at 64-65.

263. See *supra* notes 4, 5 and accompanying text (citing South Dakota advertisements).

264. See *id.* According to *New York Times* data, in 1902, South Dakota was the third most popular state for incorporation of firms with authorized capital over \$500,000 (187), and second most popular measured by the amount of authorized capital. *Id.* Further indirect evidence of South Dakota's popularity is a muckraking article in the *Albany Law Journal* which states that in 1901, 1,013 companies were incorporated in South Dakota. *Abuse of the Corporation Charter*, 69 ALBANY L.J. 188, 190 (1907). If true, this would make South Dakota the third most popular state for total incorporations in 1901, after New Jersey and New York. In 1902, there were seven companies incorporated in South Dakota with authorized capital of \$20 million or more. See *The Larger Incorporations During 1901*, N.Y. TIMES, Jan. 5, 1902, at AFR 46; *New Incorporations of the Year*, N.Y. TIMES, Jan. 4, 1903, at AFR 39; *New Incorporations Effected During 1904 and their Capital Stock*, N.Y. TIMES, Jan. 8, 1905, at 18. One company, Consolidated Copper Co. of Virginia, had \$100 million of authorized capital. *Id.* This was larger than all but two of the companies formed in New Jersey that year, Rock Island (\$150 million) and International Harvester (\$120 million). EVANS, *supra* note 17, at 48. Unlike the latter two companies, however, Consolidated Copper Co. of Virginia seems never to have been heard of again.

265. By 1904, no large companies were being incorporated there. See *infra* APPENDIX IV.

266. Like South Dakota, the D.C. statute was somewhat obscure and not particularly liberal. See, e.g., *Dancy v. Clark*, 24 App. D.C. 487, 502 (1905) (D.C. charters may not combine more than one class of business in the purpose clause), but provided for very low corporate taxes and fees. Moreover, D.C. charters were often mistakenly believed by investors to have been issued by the federal government. *Incorporation Law of the District of Columbia*, 39 AM. L. REV. 282, 282 (1905). In January 1904, a Congressional committee was informed that 922 charters had been issued in the prior two years, with aggregate capital of over \$1.5 billion, but that the District had received only \$1,091 in fees. *A New Corporation Mill*, N.Y. TIMES, Jan. 27, 1904, at 12.

message noting the increased use of the D.C. corporation law by “unscrupulous persons to perpetuate fraud” and called for a suspension of the right to incorporate in D.C. and the possible annulment of existing charters.²⁶⁷

C. Charter Competition at the End of the Great Merger Boom

By 1903, the great merger boom had ended.²⁶⁸ Although some of the industrial consolidations had been great successes, a distressing number had failed, often quickly and spectacularly.²⁶⁹ Economic historians continue to debate whether the overall effects of the merger boom were harmful or beneficial.²⁷⁰

Although the merger boom, like most such bursts of market enthusiasm, carried the seeds of its own demise, it took another big blow in 1904 when the Supreme Court decided the *Northern Securities* case.²⁷¹ The Court held that Northern Securities, a New Jersey corporation that had purchased controlling shares in two formerly competing railroads thereby violated the Sherman Act.²⁷² The rationale for this holding was unclear, as was its effect on the legality of other holding companies organized under state law. Legal and academic circles continued to debate the matter as the era of trust creation waned.²⁷³ Yet the broader trend toward incorporations did not stop. Most states saw a

267. *President Would Aid Uniform Divorce Laws*, N.Y. TIMES, Jan. 31, 1905, at 3 (quotation omitted). There is no indication that any such suspension or annulment occurred, but amendments to the statute in February 1905 seem to have reduced the District’s popularity as a charter jurisdiction.

268. See APPENDICES I, III, & V; see also CHANDLER *supra* note 53, at 332.

269. For example, the United States Shipbuilding Company, organized in 1902 in New Jersey with issued shares in excess of \$70 million, was in receivership and reorganization by 1903. DEWING, *supra* note 18, at 487-88, 488 n.3. Even J.P. Morgan followed his triumphant formation of United States Steel with the unsuccessful International Mercantile Marine Company. See generally Thomas A. Navin & Marian V. Sears, *A Study in Merger: Formation of the International Mercantile Marine Company*, 28 BUS. HIST. REV. 291 (1954) (detailing the failure of the merger that created the International Mercantile Marine Company).

270. See, e.g., Shaw Livermore, *The Success of Industrial Mergers*, 50 Q.J. ECON. 68 (1935); CHANDLER, *supra* note 53, at 315-44. LAMOREAUX, *supra* note 6, at 139-58.

271. *Northern Securities Co. v. United States*, 193 U.S. 197 (1904).

272. Justice Harlan, writing for the majority, was “not at all impress[ed]” by defendants’ argument that because holding companies were legal under New Jersey law, they could not be prosecuted under the Sherman Act. *Id.* at 332. Rather, he held that shareholders could conspire illegally under the Sherman Act through the instrumentality of a legally formed corporation: “[w]e cannot agree that Congress may strike down combinations among manufacturers and dealers in iron pipe, tiles, grates and mantels that restrain commerce among the States in such articles, but may not strike down combinations among stockholders of competing railroad carriers.” *Id.* at 342.

273. Four Justices dissented in *Northern Securities*, including Oliver Wendell Holmes. They argued that only the states had the power to regulate ownership of shares by state created entities, and that the majority’s ruling was “absolutely destructive of the Tenth Amendment.” *Id.* at 369. The academic bar was divided. Langdell, writing before the Supreme Court decision, confidently asserted that the status of Northern Securities as a single legal person incorporated under the law of New Jersey protected it from any claim of combination or conspiracy. Christopher C. Langdell, *The Northern Securities Case and the Sherman Anti-Trust Act*, 16 HARV. L. REV. 539, 547 (1903). The English legal scholar Frederick Pollack was slightly more equivocal, noting that the formation of Northern Securities might be a violation if the transfer of railway shares to it was not a true sale, but “merely colorable.” Frederick Pollock, *The Merger Case and Restraint of Trade*, 17 HARV. L. REV. 151, 154 (1904). Victor Morawetz supported the Supreme Court’s decision, arguing that while the legal organization of Northern Securities Corporation did not violate the Sherman Act, its “subsequent acquisition of a controlling interest in the stocks of the two railroad companies” might well do so. Victor Morawetz, *The Anti-Trust Case and the Merger Case*, 17 HARV. L. REV. 533, 534 (1904).

steady increase in annual incorporations throughout this decade, a trend that is particularly strong in major industrial states like Pennsylvania, New York, and Ohio, and in states that recently liberalized their statutes like Connecticut and Massachusetts.²⁷⁴ One does see a dip in incorporations in major chartering states like New Jersey and Maine between 1904 and 1908, but, even here there is not much of an overall decline as the continued growth of companies doing business in the corporate form counteracted the end of the merger boom.²⁷⁵

How successful were Delaware, New York, and the other states in challenging New Jersey during the great merger boom and the period immediately following it? Again, the answer varies for different market segments. Both New York and Delaware, in different ways, sought to compete with New Jersey largely on price, and the different market segments showed different sensitivities to those price differentials. Overall, New York and Delaware made substantial inroads on New Jersey's domination of trust incorporations, but New Jersey's reputation, familiarity to corporate lawyers, and perceived moderation enabled it to compete successfully for the largest, most lucrative incorporations, even though it was, in effect, charging promoters a premium for a New Jersey charter.²⁷⁶

Throughout the great merger boom, the largest and most respectable trust promoters, like J.P. Morgan, remained extremely loyal to New Jersey. All the major Morgan consolidations were incorporated in that state, and this undoubtedly reflected the preference of Morgan and his lawyers.²⁷⁷ While it may seem surprising in light of later events, it was reasonable during this period for conservative business people to view New Jersey as the safest state in which to incorporate large business enterprises. That safety consisted of three components: its political reliability, its judicial predictability, and the relative moderation of its corporate statute. New Jersey lawyers and policymakers insisted in their public statements that the corporation laws of New Jersey had been "practically uniform" for the prior 50 years.²⁷⁸ Moreover, the trust interests were undoubtedly aware of the intense political and public criticism that New Jersey had incurred as a result of its being the "traitor state."²⁷⁹ The fact that it had not retreated in the face of such pressure, but continued to move in the direction of greater liberality, may

274. See *infra* APPENDICES I, II.

275. See *infra* APPENDICES I, III.

276. New Jersey clearly worried about and felt the effects of this increased competition. In a speech given in Chicago in 1901 by James Dill, he criticized the new legislation in New York, Connecticut, and many other states as designed "to encourage and increase State revenue rather than toward soundness and integrity . . ." *Trusts, Their Use and Their Abuse*, N.Y. TIMES, Nov. 10, 1901, at 3. He also called for greater public disclosure of corporate finances, which he said the "better corporations are voluntarily practicing," and argued for statutes mandating such disclosure. *Id.* Among other things, Dill is clearly trying to reinforce the image of New Jersey as a responsible, conservative, yet business-friendly state.

277. In the 1902 merger that created International Harvester, the competing interests agreed to have Morgan choose the state of incorporation. CHERNOW, *supra* note 29, at 109. Like every other Morgan deal, it was organized under New Jersey law. See also WILGUS, *supra* note 242, at 72 ("[T]he whole organization of the United States Steel Corporation was left in the hands of, and determined by, Mr. Morgan and his advisers.").

278. WILGUS, *supra* note 242, at 69. Taken literally, of course, the claim was nonsense. New Jersey law changed dramatically just between 1880 and 1900. Yet there is some truth to the claim that the underlying policy of New Jersey, its receptivity to out-of-state business interests, and continuing efforts to craft a law that would be helpful and protective to them had been basically consistent throughout this period.

279. *E.g.*, Steffens, *supra* notes 35, 70.

have evoked some admiration and enhanced the state's reputation for political reliability.²⁸⁰

With respect to the courts, the long history of New Jersey's policy of encouraging incorporation of out-of-state businesses was even more comforting. There were no decisions in New Jersey that sought to impose personal liability on directors or promoters or that could have otherwise been seen as dangerous. Quite the contrary, New Jersey judges were politically savvy enough to know the importance of the incorporation business to their state and to do nothing that would upset the trust lawyers' settled view of New Jersey law.²⁸¹

Delaware was seen as a riskier but cheaper alternative to New Jersey.²⁸² New Jersey's proponents suggested that the somewhat greater liberality of Delaware and West Virginia made it more dangerous to incorporate there. Unlike New Jersey, which required registered offices and shareholders meetings in state, Delaware or West Virginia companies might have their charters invalidated in federal litigation as "tramp corporations" with no true connection to the state.²⁸³

Path dependency and New Jersey's first-mover advantage also had an impact. The corporate lawyers that advised the trusts were more familiar with New Jersey, its officials, and its law. It was the law under which they had drafted charters and by-laws for most of the prior decade, and the law they felt they knew most thoroughly, particularly since many of them had a hand in writing it.²⁸⁴ Moreover, as with other luxury items, the somewhat higher cost of a New Jersey incorporation may have

280. In his 1901 study of the formation of the United States Steel Company, Professor Horace Wilgus of Michigan Law School set forth a series of reasons why U.S. Steel was incorporated in New Jersey, information he presumably obtained by talking with that company's lawyers and his general familiarity with their views. They show a high level of comfort and familiarity with New Jersey. Wilgus reports: "There has been no hostile policy, either among the people or in the decisions of the courts [of New Jersey], and the provisions of the laws are easy to comply with (or easy to evade under friendly official inaction.)" WILGUS, *supra* note 242, at 69. On Progressive attempts to limit or repeal New Jersey's corporation laws in this period, see RANSOM E. NOBLE, JR., *NEW JERSEY PROGRESSIVISM BEFORE WILSON* 4-6, 118-20 (1946).

281. See *supra* Part III.B. For example, in *State ex rel. O'Hara v. National Biscuit Co.*, 54 A. 241 (N.J. 1903), a shareholder sought to inspect the company's books to determine if shares were owned by a person against whom the plaintiff had a pre-existing legal claim. While the New Jersey statute seemed to provide an unqualified right to "every shareholder" to examine the books and records during usual business hours, the New Jersey Supreme Court qualified that right not only to his "interests as a stockholder," but further suggested that the right could only be exercised to "prevent frauds in the elections of incorporated companies." *Id.* On the other hand, when the New Jersey legislators passed laws that seemed to go beyond New Jersey's preferred stance of respectable liberality, such as the so-called promoters liability act of 1903, which reduced the statute of limitations on promoters' secret bonuses, it was subject to criticism from the Attorney General and repealed in 1907. See NOBLE, JR., *supra* note 280, at 119.

282. Wilgus notes that it would have been about one third cheaper for U.S. Steel to incorporate in Delaware, but their law was "new, and its meaning [was] not yet settled by the courts." WILGUS, *supra* note 242, at 69.

283. See INDUSTRIAL COMMISSION REPORT, *supra* note 32, at 1077-78. (James Dill opined that the legality of such "tramps" might be successfully challenged in the United States Supreme Court.)

284. For example, Francis L. Stetson, as general counsel of U.S. Steel, wrote a charter that gave its board broad powers like the right to increase the number of directors by amending the by-laws, prevent stockholders from inspecting corporate books and records, and permit the corporation to purchase its own shares. Although Stetson believed these provisions were valid under New Jersey law, he had no definitive authority on which to rely. WILGUS, *supra* note 242, at 73, 134-37. In theory, Delaware law provided the same rights, but Stetson obviously thought it prudent to stay with New Jersey.

increased its perceived value.

For other promoters, however, the balance of considerations was different. Most of the trusts, even after 1900, were organized by smaller promoters who had neither Morgan's reputation nor financial resources. They often needed to pay the owners of the constituent companies in cash rather than stock in the newly created enterprise,²⁸⁵ thus making them more price sensitive than Morgan, and more receptive to lower priced alternatives to New Jersey. Accordingly, both Delaware and New York, while not supplanting New Jersey, became established as viable alternatives for incorporation of large businesses.²⁸⁶

For smaller, more localized businesses, state charter competition presented a choice between their home or primary state of operation and one of the chartering states. States like New York, Massachusetts, and Connecticut, concerned by the loss of "their" corporations, sought to compete by eliminating the most restrictive aspects of their own laws and equalizing the charges imposed on domestic corporations and foreign companies doing business in the state.²⁸⁷ The result was to make it more attractive for a larger number of companies to incorporate in their home state and created further incentives for more states to adopt liberal incorporation statutes.

The promotional literature of the various corporation trust companies, as well as the legal guides to incorporation that came out at this time, were largely addressed to this market and their lawyers. They provided explanations of the advantages of doing business in the corporate form, as well as the mechanics of organizing a corporation, and the relative advantages of incorporation in the various states. For this market, the major reason to incorporate in one of the chartering states was to avoid restrictions on domestic corporations. One such work explains that "[i]t is often possible for foreign corporations to do business in certain states on better terms than domestic corporations."²⁸⁸ Another notes that "[a]s a rule a corporation should be organized in that state in which its principal operations are to be carried on, and this rule should not be departed from unless to gain some distinct advantage."²⁸⁹

We can see the effects of this increased home state competition in the incorporation statistics for the first decade of the twentieth century.²⁹⁰ While the total number of incorporations continued to rise, the relative share of that business captured by the chartering states started to drop, particularly after the end of the merger boom in 1904.²⁹¹ Instead, the major growth was in states like New York, Massachusetts, and Ohio, larger industrial states that had learned how to compete effectively for the incorporation of

285. See Navin & Sears, *supra* note 61, at 131-32.

286. *Id.* See *infra* APPENDICES III, IV. For example, the former Sugar Trust reincorporated under New Jersey law as the American Sugar Refining Company, but a smaller group of refiners, outside the Sugar Trust, incorporated in 1899 under Delaware law as the Colonial Sugar Refining Company, with an authorized capital of \$100 million. *\$100,000,000 Sugar Company*, N.Y. TIMES, Dec. 13, 1899, at 1.

287. See *supra* Parts V.B.2, V.B.3. See also *The New Connecticut Corporation Law*, 9 AM. LAW. 517 (1901).

288. PARKER, *supra* note 261, at 3. Parker lists the potential advantages of out-of-state charters as freedom from "restrictions on domestic corporations" lower taxes, and the availability of federal jurisdiction in the event of litigation. *Id.* at 4.

289. THOMAS CONYNGTON, A MANUAL OF CORPORATE ORGANIZATION 36 (1908).

290. See *infra* APPENDICES I, III.

291. *Id.*

domestic businesses.²⁹²

The short lived popularity of states like West Virginia and South Dakota that sought to appeal to the low end of the charter market is also confirmed by statements in some of the handbooks. They advise that the reputation of the state of incorporation is important, particularly with respect to corporations seeking outside capital from investors. One such treatise warns that “[t]he mere fact that a corporation is organized in Arizona, South Dakota, or the District of Columbia is sufficient to put experienced investors on their guard and renders the sale of corporate securities difficult.”²⁹³

VI. CONCLUSIONS AND IMPLICATIONS

One period of state charter competition, even the most important period in the development of the modern American economy, cannot by itself prove or refute any of the plentiful theories concerning the nature, benefits, and dangers of such competition. It can serve to remind us, however, that all such theories are necessarily limited, both in the claims they make regarding the benefits and dangers of state charter competition, and in the circumstances under which the theories hold true. The historical period examined in this Article provides case studies of success and failure in the market for corporate charters that illustrate these points.

The state charter competition debate has historically involved three separate, if partially overlapping, questions concerning who benefits and who is injured by such competition: (1) Does state charter competition facilitate the imposition of externalities by corporate entities? (2) Does state charter competition facilitate managerial overreaching at the expense of shareholders? (3) Does state charter competition promote optimization of the value of firms? The historical period examined here provides clear evidence of charter competition facilitating the imposition of externalities on non-shareholder groups and more equivocal data on the latter two questions.

The initial concerns over state charter competition, from Lincoln Steffens to Justice Brandeis, focused on the role of charter competition in facilitating the growth of large corporate entities and the negative externalities they imposed. Brandeis’ dissent in *Liggett Co. v. Lee*,²⁹⁴ generally considered the first expression of the “race to the bottom” thesis,²⁹⁵ attributed the uncontrolled growth of large corporate entities primarily to state charter competition. The evils Brandeis saw created by that growth were encroachment on individual liberties, subjection of labor to capital, monopoly, and evils similar to mortmain.²⁹⁶ Note that Brandeis saw the problem of state charter competition not in terms of damage or benefit to shareholders, but as promoting the imposition by corporations of negative externalities on consumers, workers, and society generally. In

292. This can be seen clearly in APPENDIX I, where the percentage of New Jersey incorporations as a percentage of all incorporations in the five states listed drops from around 50% in 1900 and 1901 to a little over 30% for most of the remainder of the decade. Note also that annual incorporations in New Jersey do not increase from 1900 to 1910, while the number of incorporations in Pennsylvania, Massachusetts, Connecticut, and other non-chartering states increase substantially. See *infra* APPENDIX I.

293. CONYGTON, *supra* note 289, at 40.

294. 288 U.S. 517, 541-42 (1933).

295. In that case, Brandeis himself first coined the “race” metaphor. *Id.* at 559 (“The race was not one of diligence but of laxity.”).

296. *Id.* at 548-90.

Liggett, Brandeis illustrated his point with references to the same historical period that has been the subject of this Article.²⁹⁷

As this Article has shown, Brandeis was right. There can be little doubt that charter competition during this period severely impeded states' ability to regulate monopoly and other negative externalities by limiting the size and powers of corporations. The internal affairs doctrine made restrictions on the size or stock-ownership powers of foreign corporations impossible for states to enforce. Even state law restrictions that were theoretically enforceable equally against domestic and foreign corporations, like restrictions on unfair labor or anticompetitive practices, were, as a practical matter, made more difficult by the growth of corporate size and power.

Proponents of state charter competition might well reply that these problems can and have been corrected by federal law, and we now know that these issues are best dealt with not through corporate law but through antitrust, labor law, and other specified legal frameworks. Yet our modern understanding of corporate and antitrust law as separate fields requiring different methods of regulation at different levels of government is itself a product of precisely the history described in this Article. It was the trust lawyers' success in using New Jersey incorporation to defeat state antitrust challenges that led to both more vigorous federal antitrust enforcement and a redefinition of corporate law, seen most clearly in the 1896 New Jersey statute, as enabling law limited to the relationship between shareholders, promoters, and managers. Increased federal antitrust regulation may be seen as a partial vindication of the "race to the bottom" proponents' call for a federal corporate law.²⁹⁸

This history also provides some support for the view, recently set forth by Mark Roe, that federal law, rather than that of competing states, has played the major role in constraining and shaping the policies of the dominant corporate law jurisdiction.²⁹⁹ In the history recounted by Brandeis and others, the failure of corporate law to restrain monopolistic practices was a problem later solved by federal antitrust law. But this simple causal statement is, as we have seen, historically inaccurate. New Jersey corporate law and federal antitrust law developed concurrently and with reference to each other. New Jersey legislation, beginning in 1888, dramatically undercut existing state-law constraints on corporate power, increasing the perceived need for effective antitrust enforcement at the federal level. Yet the Sherman Act, the contours of which remained unclear for quite some time, also led New Jersey to define and focus its corporate law narrowly, so as to avoid a direct clash with potential federal antitrust policies. New Jersey at this time reflected, among other things, a recognition that the private enabling concept of corporate law was the least risky way for large corporate interests to possibly realize anticompetitive objectives without posing a direct challenge to national industrial policy. On this view, the *Knight*, *Northern Securities*, and *Standard Oil* cases represent an important federal component to the development of state corporate law, since they

297. *Id.* at 561-65.

298. The problem remains alive today, particularly at the international level, where the uninformative slogan of "anti-globalization" can be more fruitfully understood as a call for international efforts to prevent attempts by corporations to impose negative externalities such as slavery, child labor, and unfair or environmentally destructive practices in countries where corruption or misgovernment makes it difficult to prevent such activities at the national level.

299. Mark J. Roe, *Delaware's Politics*, 118 HARV. L. REV. 2491 (2005).

progressively defined the limits on the powers states could confer on corporate entities.

By the time William Cary revisited the issue of state charter competition in 1974, his focus, and that of most later corporate law theorists, was on the manager-shareholder relationship.³⁰⁰ Cary argued that Delaware law facilitated transactions which were injurious either to shareholders generally or to non-controlling shareholders. He criticized the broad scope of the business judgment rule as applied in Delaware fiduciary duty cases, and cited examples concerning control transactions, proxy disclosure, accrued dividends, and freezeout mergers. Ralph Winter's article, pointing out the potentially constraining effects of capital market competition on activity destructive to shareholder value, was a direct response to Cary.³⁰¹

Some of the events described in this Article, particularly the fate of West Virginia and South Dakota as chartering states, confirm the broad outlines of Winter's argument. The failure of West Virginia's 1901 strategy is particularly telling, in that the state consciously sought to charge managers and promoters a premium (in the form of higher taxes) for a statute designed to facilitate transactions, like freezeout mergers, which could enrich them at the expense of the shareholders. This history illustrates Winter's basic point that potential capital market effects can constrain state law sanctioned efforts to diminish shareholder value. What is ironic is that many of the features of the West Virginia statute that were condemned at the time, like the lack of in state shareholders meetings or majority votes to freeze out minorities, are now unexceptional parts of Delaware law.

This "race to the top" story must also be contrasted with the effect during this period of state competition on issues of shareholder disclosure, where the conclusion is far more equivocal. Successful chartering states like New Jersey and Delaware provided more limited disclosure of books and records to shareholders than many other states, like pre-1901 New York, which was forced to reduce its own disclosure requirements to compete. The chartering states also highlighted their lack of transparency as a selling point of their law. In mitigation, it should be noted that some New Jersey corporations, particularly the large Morgan interests and other companies that sought to participate in capital markets, provided substantially more disclosure than the minimum New Jersey required.³⁰² Also, at a time when the right to inspect books could be viewed as absolute and not subject to a "proper purpose" standard, the prospect of a competitor buying a few shares of stock and gaining access to the books would have been a source of concern for many businesses. Nonetheless, state charter competition during this period clearly reduced the information available to shareholders generally.³⁰³

The contrast between West Virginia's failure and New Jersey's success in enacting laws helpful to promoters and disadvantageous to shareholders illustrates the importance of context and circumstances. West Virginia's 1901 statute was a sharp break from past practice, which clearly diminished shareholder's rights while providing them with no compensating benefits. New Jersey's 1896 changes were more subtle, requiring careful

300. Cary, *supra* note 11.

301. Winter, *State Law*, *supra* note 12.

302. *See supra* note 195.

303. This can also be seen in the contemporary calls for greater statutory requirements of publicity from such friends of large corporations as James Dill and John Dos Passos. *See supra* note 276; *see also* MITCHELL, *supra* note 60, Chapter III at 18.

drafting of the articles of incorporation, and offering benefits to shareholders, as well as diminished access to information. Most importantly, New Jersey, as the dominant player in the charter market, could provide such subtle benefits to managers at the expense of shareholders without worrying that it would diminish the investment value of New Jersey corporations generally. West Virginia, as a marginal player, sought to differentiate its product more dramatically, but succeeded only in attracting businesses that gave West Virginia corporations a bad reputation generally.

Finally, as the debate on charter competition has continued in recent decades, the claim of its proponents has subtly changed from the negative assertion that charter competition overall did not diminish shareholder value to the stronger claim that state competition actually serves to maximize both shareholder value and the value of the firm. Roberta Romano has called state competition the “genius” of American corporate law,³⁰⁴ and called for its extension to federal securities law, while Lucian Bebchuk and others seek to refute this claim by noting the potentially detrimental effect that state takeover statutes, the most prominent recent product of state competition, can have on firm value.³⁰⁵

The early history of state competition is even more equivocal on this issue, as historians continue to debate whether the great merger wave—which, as we have seen, was facilitated by, and largely consisted of, consolidations permitted under the new, more liberal state laws—was ultimately helpful or harmful to the firms involved. It created both a large number of efficient, highly profitable, and ultimately market-dominant firms, as well as a large number of spectacular failures. It is also worth noting the somewhat ill-defined nature of the assertion that state charter competition maximizes firm value—maximized relative to what? Critics of the claim point out that modern corporate law authorizes many practices, like excessive executive pay, takeover defenses, and ineffective board oversight that appear detrimental to shareholder value, implicitly comparing existing corporate law to an imagined best of all corporate law worlds. Proponents of state competition generally make a different, but still significant claim, that state corporate law, while not perfect, creates continued incentives for states to discard inefficient rules and adopt new ones that increase firm value, thereby producing better results than those that could be expected from a single federal regulator.

Viewed this way, the claims of state charter competition advocates and opponents are not really in disagreement as to their evaluation of historical developments. Both might well agree that state charter competition in the United States has led to a reasonably efficient and effective regulatory environment for business that could still stand some improvement. The real disagreement is about what interests are and should be shaping American corporate law. While primarily a normative question, it is informed by perceptions and disagreements about the actual entities and interests that affect the development of corporate law. Our historical account of state charter competition tends to support three general conclusions on this subject:

- (1) The impetus for changes in state corporate law comes primarily from in-state actors seeking private benefits, not maximization of tax revenues.

304. ROMANO, GENIUS, *supra* note 12.

305. Bebchuk & Ferrell, *supra* note 11.

(2) Geographical considerations play some, but not the dispositive role in determining state corporate law policies.

(3) Network and reputational effects play at least as important a role in determining a state's success in the competition for corporate charters as the actual content of its laws.

The view that charter competition simply is a race among states to maximize revenues from taxes and incorporation fees ignores the important role of individuals on the supply side who seek and receive substantial private benefits if their state succeeds in such competition. We have seen that these private benefits were critical in producing the first important steps in state charter competition.³⁰⁶ The move from special to general incorporation laws³⁰⁷ more closely aligned the private interests of legislators with those of the state by making it more risky and less profitable for legislators to sell special charters to individual corporations. We have also seen how legislators in New Jersey and elsewhere sought instead to increase their private benefits through corporation trust companies, which rewarded them for generating laws which were perceived as beneficial to domestic corporations generally. It is clear that it was the availability of these private benefits to New Jersey politicians, lawyers, and other interest groups that provided the main impetus for continued competition not only in New Jersey, but also in Delaware, Maine, and even South Dakota. Our history also suggests that a state's ability to increase revenue by raising its fees is severely constrained by potential or actual price competition from other states,³⁰⁸ which also tends to increase the relative importance of private benefits to in-state interest groups.

On the demand side, we have seen that the result of this search for private benefits means that the market for corporate law will frequently be a segmented one, and the state that emerges as dominant will be the one whose law reflects the interests of the largest and most profitable segment of that market. This was the story of both New Jersey and Delaware, where Wall Street lawyers and promoters representing the trusts were not only instrumental in passage of both the New Jersey and Delaware statutes, but were also its main beneficiaries. Yet it also seems clear that states can choose to focus their attention on something other than the very top of the market, by seeking to attract a segment where they have more of a competitive advantage, as New York and Massachusetts did with smaller domestic businesses.

Roberta Romano has famously argued that geography is important in that small states like Delaware are better able to credibly commit to a consistent corporate law policy attractive to large enterprises, since the income to be expected from such a policy will be a larger portion of total state revenue.³⁰⁹ The history of charter competition is broadly consistent with that argument. Not only did New Jersey ultimately lose out to a smaller state, Delaware, but it did so when its industrial development was reducing the

306. This supports a central thesis of Macey & Miller, *supra* note 13.

307. This was usually achieved by constitutional rather than legislative action. See Butler, *supra* note 33 (discussing the rationale and the method that incorporation laws evolved to general from special).

308. Even during the height of New Jersey's dominance as chartering state from 1898 to 1904, its revenues from charters and franchise taxes did not exceed \$3 or 4 million. GRANDY, *supra* note 41, at 49, 79. Moreover, it was constrained by competition from Delaware and others from raising its fees. *Id.* at 79.

309. Romano, *Law as a Product*, *supra* note 12, at 235.

importance of franchise taxes and fees as a portion of total state revenues.³¹⁰ We have also seen that the trust lawyers were wary of New York, despite its innovative and generally hospitable law, in part because of New York's uncertain politics. Yet Romano's thesis cannot explain why Delaware, rather than other small states like Maine or West Virginia, was the ultimate winner. For that, we have to consider other geographical factors (especially proximity to major financial markets) and, even more, the importance of reputational and network effects.³¹¹

While the actual content of the a state's corporate law was an important feature of charter competition during this period, its reputation and perceived commitment to the future content of its laws was even more important. After 1900, New Jersey no longer had a competitive advantage over other chartering states, either with respect to price or the actual content of its laws, but was still able to compete quite effectively for new incorporations primarily on its reputation for reliability and responsiveness to the concerns of big business, modified importantly by its reputation for being careful and conservative in adopting new promoter-friendly innovations. Many have argued that similar reputational factors, still tempered by a conservative approach to change, remain the driving force in Delaware's dominance.

In considering reputation, however, we should consider the effects on charter competition of political backlash and public outrage. In recent years, theorists have begun to recognize the important role of public outrage on corporate behavior.³¹² It is clear that such outrage played a significant role in many events during this controversial period of corporate law. The public reaction to New Jersey's emerging dominance as the mother of trusts, as well as the related threat of pervasive federal regulation, clearly exercised some constraining effect on the legal changes sought by business interests and those enacted by the New Jersey legislature. It also contributed to the unpopularity of states like West Virginia and South Dakota. Public outrage was also instrumental in the most dramatic event in the history of charter competition: New Jersey's short-lived, but devastating decision to pass the "seven sisters" laws. More frequently, however, public outrage does not result in dramatic reform, but functions as a background condition that constrains corporate actors and chartering states from permitting conduct deemed likely to provoke strong public disapproval. In the historical period, we see it in New Jersey's maintenance of weak but not negligible limits on watered stock and "tramp corporations." Today, we can see it in Delaware's efforts to maintain weak but not negligible constraints on executive pay.³¹³

310. GRANDY, *supra* note 41, at 80.

311. West Virginia, as we have seen, chose a statute that was viewed as legally risky and likely to provoke political and investor backlash. Maine was perhaps too conservative in not eliminating its requirement of in-state shareholder meetings.

312. *See, e.g.*, LUCIAN BEBCHUK & JESSE FRIED, *PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION* (2004) (arguing that public outrage is the major control on excessive executive pay).

313. *See In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006) (deferring largely to the competence of the board of directors, the court found that the board was not grossly negligent in approving a generous pay structure for the president).

APPENDIX I

Total Incorporations in New Jersey, Maine, Connecticut, Massachusetts, and Pennsylvania: 1880 to 1910

<u>Year</u>	<u>New Jersey</u>	<u>Penn.</u>	<u>Conn.</u>	<u>Mass.</u>	<u>Maine</u>
1880	106,226	474,511	120,480	303,806	48,988
1890	250,806	991,243	227,004	630,032	80,420
1900	502,824	1,551,549	314,697	823,264	122,919

Total Annual Incorporations

<u>Year</u>	<u>New Jersey</u>	<u>Penn.</u>	<u>Maine</u>	<u>Mass</u>	<u>Conn.</u>	<u>% N.J.</u>
1880	168	215	241	145	--	21.8
1881	449	252	231	149	85	38.5
1882	351	288	228	132	83	32.4
1883	295	344	222	132	98	27.0
1884	232	399	234	143	77	21.4
1885	254	441	208	111	90	23.0
1886	386	482	252	146	103	28.2
1887	472	467	292	153	128	31.2
1888	567	477	308	195	110	34.2
1889	685	717	370	233	110	32.4
1890	897	667	476	199	118	38.1
1891	1155	572	436	203	163	45.7
1892	1212	760	519	245	173	41.7
1893	970	604	456	227	137	40.5
1894	890	578	405	228	141	39.7
1895	964	573	457	251	139	40.4
1896	859	530	432	235	131	39.3
1897	1118	540	490	259	137	43.9
1898	1104	484	452	232	165	45.3
1899	2186	687	697	256	179	54.6
1900	1995	854	631	239	198	50.9
1901	2353	1171	862	254	236	48.3
1902	2255	1530	1215	258	239	41.0
1903	2035	1608	1178	535	276	36.1
1904	1635	1345	853	1067	313	31.4
1905	1872	1469	993	1272	322	31.6
1906	2086	1528	1042	1314	437	32.6
1907	1840	1611	1027	1213	343	30.5
1908	1643	1114	850	1276	329	31.5
1909	2091	1517	920	1343	390	33.4
1910	1909	1523	722	1283	369	32.9

APPENDIX II

Large, Medium and Small Incorporations in New Jersey, Pennsylvania, Ohio, and Texas: 1880 – 1910

Year	New Jersey			Penn.			Ohio			Texas		
	(L)	(M)	(S)	(L)	(M)	(S)	(L)	(M)	(S)	(L)	(M)	(S)
1880	35	65	68	--	--	--	30	102	259	6	17	62
1881	124	199	126	--	--	--	56	206	246	5	47	106
1882	78	170	103	--	--	--	63	217	318	14	59	114
1883	34	139	122	--	--	--	61	194	357	8	95	159
1884	22	103	107	--	--	--	37	137	303	6	75	172
1885	8	116	130	--	--	--	24	140	351	10	76	135
1886	21	159	206	--	--	--	47	161	418	0	34	123
1887	53	223	196	--	--	--	57	206	569	4	59	221
1888	56	268	243	52	137	288	51	175	435	8	72	184
1889	47	328	310	100	179	438	37	197	491	6	84	241
1890	74	417	406	62	165	440	46	182	540	8	115	293
1891	93	522	540	37	154	381	43	188	603	12	83	242
1892	82	593	537	76	165	519	26	171	657	4	80	220
1893	65	428	477	53	103	448	26	127	560	5	53	263
1894	42	368	480	79	95	404	9	153	673	0	55	208
1895	48	430	486	49	96	428	21	159	692	4	56	302
1896	49	351	459	38	87	405	13	102	648	2	35	288
1897	88	445	585	41	84	415	8	110	596	1	28	313
1898	90	518	496	28	47	409	11	105	585	1	33	281
1899	354	1076	756	35	121	531	19	144	842	2	34	351
1900	233	1040	722	23	130	701	14	163	925	1	65	428
1901	284	1261	808	37	161	973	25	237	1206	60	444	730
1902	270	1239	746	36	195	1299	22	239	1198	17	172	684
1903	192	1084	759	56	265	1287	17	240	1400	9	108	737
1904	94	791	750	58	131	1156	16	328	1742	8	112	732
1905	114	911	847	51	140	1278	28	340	1970	7	97	894
1906	111	994	981	87	180	1261	24	348	2025	8	135	1312
1907	63	823	954	100	172	1339	13	333	1960	5	154	1547
1908	58	701	884	44	97	973	11	215	1920	0	45	800
1909	63	885	1143	68	141	1308	11	255	2415	3	101	1263
1910	67	758	1084	97	147	1279	15	232	2028	2	118	1112

APPENDIX III

**Competition Among Major Chartering States
Annual Incorporations: 1899-1910**

<u>Year</u>	<u>New Jersey</u>	<u>Delaware</u>	<u>New York</u>	<u>Maine</u>
1899	2186	421	N/A	697
1900	1995	552	N/A	631
1901	2353	734	2670	862
1902	2255	872	3577	1215
1903	2035	746	3887	1178
1904	1635	493	4420	853
1905	1872	550	5609	993
1906	2086	587	6347	1042
1907	1840	671	6599	1027
1908	1643	872	7185	850
1909	2091	1318	8328	920
1910	1909	1325	7998	722

APPENDIX IV

**New York Times Data on Incorporations Over \$500,000 in 1901, 1902, and 1904
Annual Incorporations**

<u>Year</u>	<u>N.J.</u>	<u>Del.</u>	<u>N.Y.</u>	<u>Me.</u>	<u>W.Va.</u>	<u>S.D.</u>	<u>Pa.</u>	<u>Ohio</u>	<u>Tex.</u>
1901	505	176	143	4	14	3	7	14	14
1902	247	145	210	17	6	187	5	4	8
1904	134	33	116	41	2	0	18	9	3

Authorized Capital (In Millions)

<u>Year</u>	<u>N.J.</u>	<u>Del.</u>	<u>N.Y.</u>	<u>Me.</u>	<u>W.Va.</u>	<u>S.D.</u>	<u>Pa.</u>	<u>Ohio</u>	<u>Tex.</u>
1901	2947	236	264	34	61	115	9	29	78
1902	1309	271	410	79	14	756	36	7	29
1904	331	48	140	107	8	0	24	21	9

APPENDIX V

New Jersey Incorporations by Authorized Capital Stock (In Millions)

<u>Year</u>	<u>All Incorporations</u>	<u>Large Incorporations</u>	<u>% Large</u>
1880	146.1	127.8	87
1881	417	349.6	84
1882	433.8	381.2	88
1883	132.7	95.1	72
1884	56.6	32	57
1885	36.9	8	22
1886	84.7	43.9	52
1887	145.9	96.9	66
1888	170.4	100.2	59
1889	172.8	89.8	52
1890	400.6	293.6	73
1891	407.5	284.1	70
1892	390	243.8	63
1893	328.9	225.5	67
1894	179.3	91.9	51
1895	179.7	80.4	45
1896	195	117.7	60
1897	420.3	319.5	76
1898	810.1	698.7	86
1899	3261.9	3005.9	92
1900	1329.8	1093.9	82
1901	1779.8	1488.8	84
1902	1517.6	1239.7	82
1903	1000	760.2	76
1904	641.6	478.8	75
1905	769.1	584.1	76
1906	596.1	387.5	65
1907	304.4	188.3	62
1908	480.2	334.6	70
1909	644.6	467.1	72
1910	310.1	158.8	51