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The Birth of the American Business Corporation: Of Banks, Corporate Governance, and Social Responsibility

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The Birth of the American Business Corporation: Of Banks, Corporate Governance, and Social Responsibility

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INTRODUCTION

Much happened in late eighteenth-century American legal history: an era that produced the Constitution, Declaration of Independence, and Bill of Rights. Yet we may still underestimate the legal creativity of this era. The same people who drafted the Constitution also designed our other great form of collective governance: the business corporation. The two great corporate issues of today—the problems of internal corporate governance and the fear of corporate power—originated in one brief decade: 1781-91. These issues were not embryonic: they emerged full-grown, and were at the center of debate. Eighteenth-century corporate governance was a complex and purposive response to the separation of ownership and control, as fully sophisticated as the Constitution. The eighteenth century attack on the democratic legitimacy of private economic power was as sophisticated as anything seen since, and remains cogent today.

When I began this work, I did not suspect that I would be dealing with corporate governance. I thought that fear of concentrated corporate power would be a peripheral concern. My initial goal was very limited: to discover why Alexander Hamilton inserted a clause into the charter of the First Bank of the United States that limited the Bank's power to engage in commercial transactions. I did not realize until later that I had seized on a golden thread. Banks were the major business corporations of the time, and the forces that separated banking from commerce were the forces that created early American corporate law. These forces remain regnant today: the separation of ownership and control, and fear of corporate power.

The events of the late eighteenth century also contain a possible answer to a difficult problem: why the corporation? The late eighteenth century may have needed business organizations that could agglomerate large amounts of

capital from unrelated individuals. However, the corporation was not the only eighteenth-century legal means to this end, and the business corporation was virtually untested in colonial America. Did the business corporation have any advantages over its competitors, such as the joint-stock company or limited partnership? The obvious answer—limited liability—was probably not decisive, and may not even have been all that useful. England—a far more advanced commercial country than the United States—did not commonly employ limited liability (or the corporate form) until the middle of the nineteenth century.

I argue that the eighteenth-century business community preferred corporate governance in business affairs for the same reason it preferred Constitutional governance in political affairs: members needed to limit their creature's own power. The late eighteenth-century corporate charter provided unique protection against expropriation by majority stockholders, protection that other forms of organization could not supply. The eighteenth-century business community needed a charter from the State that could not be modified except by a costly and unpredictable political process. Such a charter would provide credible commitments against improper behavior by majority shareholders. As an added bonus, charter restrictions provided political cover. At critical times and in critical ways, the restrictions on these charters protected the incorporators from a polity that was deeply skeptical about the business corporation. Although the governance need for a corporate charter diminished in the early nineteenth century, Americans had become accustomed to the corporate form, which proved supple enough to meet subsequent business needs.

I organize my discussion with two stories: one of corporate governance and one of corporate politics. I tell these stories in two different ways. Corporate governance, like the business corporation itself, is instrumental, and calls for a functional exposition. Part I discusses the structure, function, and governance of one kind of corporation—the eighteenth-century mercantile bank. The first mercantile bank was the Bank of North America (“BNA”), chartered in 1781. The BNA and its daughter banks carefully accommodated corporate governance concerns, in both their corporation law and their internal

operations. Indeed, the very corporate existence of these banks seems best explained by governance.

My story of corporate politics is not instrumental. Part II therefore tells this story chronologically. I use three bank wars to organize this story. The greatest of these wars was the first: the charter loss and subsequent rechartering of the BNA in 1785-1787. A smaller war was fought in the 1791 creation of the Bank of the United States ("BUS"). However, Alexander Hamilton had learned the political lessons of the BNA, and preempted as many objections as he could.¹ A third war was fought in 1792, with the charter revisions of the Massachusetts Bank. Fear of business corporations played an important part in all these wars, but was only well articulated in the first.

These two stories overlap and reinforce each other. The governance problems of the early banks created political problems. Hamilton's famous *Report on a National Bank*² was a masterly political document in part because it was an excellent treatise on corporate governance. Although I separate these two stories for expositional convenience, early corporate governance and early corporate politics were very closely entwined.

I. CORPORATIONS AND GOVERNANCE

Before discussing the history of eighteenth-century banking corporations and their governance, I begin with a brief discussion of the prehistory of banks.

A. *The Prehistory of Chartered Banks*

The history of American banking existed before the American Revolution. However, Colonial business corporations were at best vestigial, and Colonial banks were not business corporations. Most large-scale transactions were conducted on the books of English export houses, and the colonies developed no great merchant banks. Colonial merchants also conducted financial operations, albeit

1. See *infra* text accompanying notes 310-25.

2. Alexander Hamilton, Report on a National Bank, in LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES at 15, 21 (M. St. Clair Clarke & D.A. Hall eds., Augustus M. Kelley, 1967) (1832) [hereinafter HISTORY OF THE BUS].

seldom on the scale of English merchant houses. These merchant houses—organized as partnerships or proprietorships—were *not* standalone banks, as we would understand the term today.³ They accepted deposits, extended commercial credit, and themselves were active in trade.⁴ Most colonial banking was an extension of mercantile activities, and not a very significant extension, at that. But there was one exception.

Although the need for trade credit may have been satisfied by English and domestic merchant banks, the need for currency was not. The colonies were specie-poor, and remained so for many years after independence. An adjunct to specie was sorely needed.⁵ The adjunct currency was often supplied by colonial loan offices, which were the only formal domestic stand-alone banking institutions of this period.⁶ These government agencies, frequently organized as public corporations, issued paper currency backed by land mortgages.⁷ They helped inculcate the colonists with a love of paper money, and also played an important role in the political debates of the late eighteenth and early nineteenth century. Some colonies, such as Pennsylvania and Maryland, managed to keep their paper currency at par with specie.⁸ Other colonies, such as Rhode Island, chose an expansive monetary policy, and issued depreciating scrip.⁹ Loan offices were restricted by the federal Constitution (which forbade direct emission of State currency¹⁰), and did not leave significant institutional descendants.

But the Colonial era did not produce a specialized mercantile bank, whether chartered or unchartered.¹¹

3. See 2 JOSEPH STANCLIFFE DAVIS, *ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS* 3-5, 34 (Russell & Russell 1965) (1917).

4. ROBERT A. EAST, *BUSINESS ENTERPRISE IN THE AMERICAN REVOLUTIONARY ERA* 20-26 (1938).

5. George David Rappaport, *The Sources and Early Development of the Hostility to Banks in Early American Thought* 42 (1970) (unpublished Ph.D. dissertation, New York University).

6. *Id.* at 40-42.

7. See BRAY HAMMOND, *BANKS AND POLITICS IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR* 10 (1957); Rappaport, *supra* note 5, at 40. See generally Theodore Thayer, *The Land-Bank System in the American Colonies*, 13 *J. ECON. HIST.* 145 (1953).

8. See Thayer, *supra* note 7, at 151-52.

9. See *id.* at 151.

10. U.S. CONST. art. I, § 10, cl. 1.

11. See EAST, *supra* note 4, at 25.

Perhaps there was a good reason for the nonexistence of a Colonial mercantile bank. The tradition of the individual capitalist was strong, although individual capitalists were not extraordinarily wealthy. English houses provided the large-scale finance needed, and Colonial governors granted few business corporate charters.¹² Benjamin Franklin thought in 1764 that the balance of trade would prevent an American mercantile bank from keeping its specie,¹³ a fear voiced by the opponents of banks in the middle 1780s. But it is risky to assert that mercantile banking would have been impossible under colonial conditions. The Revolution certainly triggered the first bank charter grant.¹⁴ But the same commercial forces underlying the Revolution might have created an American mercantile bank in any case. Robert Morris, founder of the BNA, hinted that a Colonial bank had been in the offing:

However, though the old [colonial] government had no idea of a bank, the commercial men of the province had; and I, as a merchant, laid the foundation of one; and established a credit in Europe for the purpose. From the execution of this design, I was prevented only by the revolution.¹⁵

Whatever the reason for the dearth of colonial banks, it was not a lack of models in the Old World. There was plenty of British banking theory developed before the American Revolution,¹⁶ and Adam Smith's *Wealth of Nations* contained banking theory and a description of banking

12. *See id.* at 25-26; *see also* 2 DAVIS, *supra* note 3, at 5-6 (discussing reasons for general scarcity of business corporations). As of the Revolution, there were three water works corporations in Rhode Island, a docks corporation each in Massachusetts and Connecticut, and an insurance corporation in Pennsylvania. *Id.* at 4, 22.

13. Benjamin Franklin, Remarks and Facts Relative to the American Paper Money (1764), in 2 AM. MUSEUM 17, 22 (1787).

14. *See infra* text accompanying notes 30-31.

15. DEBATES AND PROCEEDINGS OF THE GENERAL ASSEMBLY OF PENNSYLVANIA, ON THE MEMORIAL PRAYING A REPEAL OR SUSPENSION OF THE LAW ANNULING THE CHARTER OF THE BANK 37 (Matthew Carey ed., Philadelphia, Seddon & Pritchard 1786) [hereinafter BNA DEBATES AND PROCEEDINGS]; *see also* GEORGE STARNES, SIXTY YEARS OF BRANCH BANKING IN VIRGINIA 11 (1931) (discussing evidence of planned "James River Bank" in Virginia); WILLIAM GOUGE, THE CURSE OF PAPER-MONEY AND BANKING 200 (Greenwood Press 1968) (1833) (mentioning "traces of a Bank in Virginia").

16. *See generally* LLOYD W. MINTS, A HISTORY OF BANKING THEORY IN GREAT BRITAIN AND THE UNITED STATES 13-41 (1945).

practices that would influence the early Republic.¹⁷ More significantly, English, Scottish, and Continental models—especially the Bank of England—were known to the Colonists, and figured into the early post-Revolutionary bank debates.¹⁸ However, Americans may have had more theoretical than operational knowledge of banking, and the earliest United States mercantile banks might have had to piece operations out by themselves.¹⁹ Furthermore, these models, although useful, were copied selectively. American banking charters developed in distinctly American ways, for distinctly American reasons. **The idea that United States institutions were slavish copies of English ones²⁰ is just plain wrong. Bank of England charter language was indeed copied verbatim, but copied with a sharp eye to American context.²¹ There is a lot of mindless copying in United States banking law—but the templates are those of earlier American charters, not foreign ones.**

B. *The Classical Mercantile Bank*

The classical United States mercantile bank of the late eighteenth century was exemplified by the Bank of North America (“BNA”). The BNA, which started operating in 1782, was the model for all banks of the 1780s and most banks of the early 1790s.²² The BNA had tremendous intellectual and operational influence on the early banks. A

17. See, e.g., HISTORY OF THE BUS, *supra* note 2, at 39 (James Madison); BNA DEBATES AND PROCEEDINGS, *supra* note 15, at 106 (Thomas FitzSimons); see also 7 THE PAPERS OF ALEXANDER HAMILTON 236-56 (Harold C. Syrett & Jacob E. Cooke eds., Colum. Univ. Press 1963) [hereinafter HAMILTON PAPERS] (essay on Hamilton’s influences as reflected in his *Report on a National Bank*).

18. See, e.g., 1 FRITZ REDLICH, THE MOLDING OF AMERICAN BANKING 5-7 (Johnson Reprint Corp. 1968) (1947).

19. See Letter from John Wilson, BNA Accountant, to Joseph Pemberton (Apr. 1, 1782), in George David Rappaport, *The First Description of the Bank of North America*, 33 WM. & MARY Q. 661, 665-67 (1976); Letter from Thomas Willing, BNA President, to William Phillips et al. (Jan. 1784), in N.S.B. GRAS, THE MASSACHUSETTS FIRST NATIONAL BANK OF BOSTON 1784-1934, at 209-10 (1937). There were some operational banking texts at the time. See, e.g., 1 MALACHY POSTLETHWAYTE, THE UNIVERSAL DICTIONARY OF TRADE AND COMMERCE 193-201 (Augustus M. Kelley 1971) (4th ed. 1774).

20. See, e.g., Stephen K. Halpert, *The Separation of Banking and Commerce Reconsidered*, 13 J. CORP. L. 481, 491 (1988).

21. See *infra* notes 270-89 and accompanying text.

22. See 1 REDLICH, *supra* note 18, at 33-36, 42; HAMMOND, *supra* note 7, at 65-66.

small, but telling, example: the Massachusetts Bank (founded in 1784) had the same six staff positions as the BNA—cashier, teller, sub-teller, accountant, runner, and porter.²³

The classical mercantile bank exemplified by the BNA did not last long. Its business practices only persisted for two or three decades, when domestic manufacturing displaced foreign trade as the cutting edge of the American economy. But some of that early germ plasm has survived over two hundred years of subsequent evolutionary pressure. There are two reasons for this. First, the late eighteenth century was an extraordinarily creative period in American life, which has left many contemporary traces. Think of the Constitution, an eighteenth-century document governing a twenty-first-century polity, with only a few amendments. As with the Constitution, eighteenth-century banking forms persist: partly functional, partly traditional, and partly constitutive.

There is a second reason for this persistence of old forms. Not only was the late eighteenth century an extremely creative time, but the subsequent legal milieu has been extremely conservative. Until effective bank supervision and regulation were invented with the New York Safety Fund System²⁴ and developed through the National Bank Act²⁵ in the mid-19th century, banking was almost exclusively regulated by charter. These charters tended to incorporate provisions from earlier charters, frequently without much thought as to their original purpose.²⁶ Legal restrictions that were not too dysfunctional tended to ossify. With the passage of time, many of the charter restrictions remained, sometimes for good, sometimes for ill, and sometimes for no purpose. After the invention of bank regulation and supervision, evolutionary pressure on the charter—low enough already—shrank even more. A charter need not be amended by a legislature when a regulator can interpret the problems away.

23. GRAS, *supra* note 19, at 27. The Massachusetts Bank did not actually fill the sub-teller position. *Id.*

24. See HAMMOND, *supra* note 7, at 559; J.T.W. HUBBARD, FOR EACH, THE STRENGTH OF ALL: A HISTORY OF BANKING IN THE STATE OF NEW YORK 73-77 (1995); ROSS M. ROBERTSON, THE COMPTROLLER AND BANK SUPERVISION 25-26 (1995).

25. ROBERTSON, *supra* note 24, at 70-75.

26. See *infra* notes 27-28 and accompanying text.

The result can be an astonishing conservatism in legislative language. An example: In 1936, Bray Hammond noted that the word “association,” applied to national banking corporations, was a relic of a banking debate that had taken place a century ago.²⁷ Sixty-five years later, national banking corporations are still called “associations.”²⁸

Those creative first few years of United States banking law have thus cast their dead hand across generations of United States banking history. Of course, these early legal precedents have affected banking law more than banking practice. But legal commands do more than constrain behavior; legal thought is partially constitutive of general social discourse. The positive commands of banking law translated into normative ideas of what a bank should be.

1. *The Charters.* An examination of these mercantile banks begins with their charters. The earliest charters were extremely unrestrictive. The earliest charter of all—that of the Bank of North America—was the least restrictive of them all.

The Revolution produced the BNA. The BNA, headquartered in Philadelphia, was chartered on the last day of 1781 by the Continental Congress.²⁹ It was chartered to finance the United States in war and provide a stable replacement for the depreciated Continental currency.³⁰ The BNA was granted monopoly powers by several states for the duration of the war.³¹ The Bank successfully obtained several state charters, being uncertain about the chartering authority of the Continental Congress.³² The British surrendered at Yorktown shortly before the bank was chartered, government financing became less significant

27. Bray Hammond, *Free Banks and Corporations: The New York Free Banking Act of 1838*, 44 J. POL. ECON. 184, 209 (1936).

28. *Id.* A more extensive example of persistence? See *infra* Appendix (comparing the modern federal bank charter with the 1838 New York free banking charter). Many tropes of language have survived intact these years. The only significant difference is the modern charter’s detailed treatment of bank securities powers. See 12 U.S.C. § 24 (1994 & Supp. V 1999).

29. See HAMMOND, *supra* note 7, at 50.

30. *Id.* at 49; LAWRENCE LEWIS, JR., HISTORY OF THE BANK OF NORTH AMERICA 31 (Phila., J.B. Lippincott & Co. 1882).

31. HAMMOND, *supra* note 7, at 51.

32. *Id.*

within a year or so, and commercial trade became the *raison d'être* of the bank. The monopoly protection of the BNA disappeared with the Treaty of Paris in 1783.

The 1781 Continental charter for the BNA was almost purely enabling, with almost no restrictions, save that on capitalization.³³ Its powers were virtually undefined, and its lifetime perpetual, with the main limit being a cap of \$10 million in capital.³⁴ Indeed, except for the capitalization limit (which was far higher than the \$400,000 capital actually injected),³⁵ the Continental charter was even *more* permissive than the charter sought by Robert Morris. Morris suggested that the Continental government have the power to examine the bank; this power did not find its way into the Continental charter. The legal power of the Continental Congress to issue the charter was the sole subject of legislative contention.³⁶ There is no evidence of any argumentation over its open-ended terms. The 1782 Pennsylvania charter was a mere copy of the Continental charter, although it was not enacted without a political tussle.³⁷

The pattern of the earliest BNA charter was repeated in several different states, at several different times. Legislators did not seem to care about the terms of many of the early state bank charters. Whatever powers the nascent bankers wanted, they usually got. Few future charters were as loose-textured as the BNA's, but several comparatively unrestricted charters were issued in the next few years: to the Massachusetts Bank (1784),³⁸ the Bank of Maryland (1790),³⁹ and the Providence Bank (1791).⁴⁰ There is no record of any controversy attending the Maryland or Massachusetts bank charters. The Providence Bank charter was even more extreme. It was, in effect, a state ratification of a document drawn up by its shareholders, with some additional terms added by the legislature.⁴¹ This was not

33. LEWIS, *supra* note 30, at 127-32.

34. See HISTORY OF THE BUS, *supra* note 2, at 12-14.

35. LEWIS, *supra* note 30, at 133 (1000 shares of \$400 apiece).

36. See HAMMOND, *supra* note 7, at 51.

37. LEWIS, *supra* note 30, at 44; see also *infra* Part II.A (Pennsylvania chartering).

38. 2 DAVIS, *supra* note 3, at 47.

39. *Id.* at 49.

40. See *id.* at 49-50.

41. Stat. R.I. (Oct. 1791).

uncommon for the earliest charters, banking and nonbanking.⁴²

It is important to note that the earliest charter terms were simply those convenient to the merchants. Even later, charter terms were seldom inimical to the merchants' perceived self-interests. The state had a relatively limited interest in these earliest mercantile banks. They were often perceived as a source of credit to the state, and perhaps secondarily as a source of stable paper currency and as a stable payments system.⁴³ But—with the exception of the earliest years of the BNA and the Bank of the United States—these banks were seen by the states themselves as predominantly a mercantile concern. As a consequence, state interest in the terms of these charters was relatively insignificant, at least at the beginning.⁴⁴ United States banking was a *merchants'* invention, and the charters are best considered as indicia of merchants' banking practices.

Very significantly, the bank founders did not usually want unlimited powers. The founders of these earliest banks had good reasons of their own for charter restrictions. To understand why this was so, a detailed examination of the mercantile banking business is required.

2. *The Merchants' Utility—A Credit Club.* The mercantile bank exemplified by the BNA was best viewed as a public utility for merchants, “a kind of credit union for its merchant-owners.”⁴⁵ “Merchants”—wholesalers active in the import-export business—were expected to control these banks.⁴⁶

A bank is a sort of mercantile institution, or at least has such a close connexion with the whole mercantile interest, that it will more naturally and properly fall under the direction of merchants, than of any other sort of men less acquainted with its nature and principles, and less interested in its success.⁴⁷

42. 2 DAVIS, *supra* note 3, at 316.

43. See RONALD E. SEAVOY, *THE ORIGINS OF THE AMERICAN BUSINESS CORPORATION: 1784-1855*, at 53 (1982).

44. See *id.* at 53-54; *infra* Part I.B.2.

45. HAROLD VAN B. CLEVELAND & THOMAS F. HUERTAS, *CITIBANK 1812-1970*, at 8 (1985).

46. See Hamilton, Report on a National Bank, *supra* note 2, at 15, 21.

47. Pelatiah Webster, *An Essay on Credit: In Which the Doctrine of Banks Is Considered, and Some Remarks Are Made on the Present State of the Bank of*

Bank directors “were merchants advancing their own money, as they felt, to other merchants.”⁴⁸ These mercantile banks permitted merchants to pool their scarce credit and scarcer specie, and augment it with that of foreign shareholders. As Thomas Paine, an unlikely but avid apologist for the BNA, wrote:

It is the convenience which the stockholders, as commercial men, derive from the establishment of the bank, and not the mere interest they receive, that is the inducement to them. It is the ready opportunity of borrowing alternatively of each other that forms the principal object: and as they pay as well as receive a great part of the interest among themselves, it is nearly the same thing, both cases considered at once, whether [the bank's profit] is more or less.⁴⁹

These banks were founded because of the scarcity of credit in America. America may have been an entrepreneurial country, but its rich citizens were simply not very rich, by European standards.⁵⁰ Almost nobody in the post-revolutionary United States had accumulated enough liquid wealth to constitute a *rentier* class; the private family banks of Continental Europe were simply inconceivable in America.⁵¹ The only way to get enough credit was to pool it among the moderately wealthy mercantile entrepreneurs who needed it the most, with the addition of whatever specie outside (mainly foreign) investors were willing to contribute.

This pooled credit was used to facilitate mercantile transactions: import, export, and distribution. Consequently, credit terms were short,⁵² and payment

North-America, in POLITICAL ESSAYS ON THE NATURE AND OPERATION OF MONEY, PUBLIC FINANCES AND OTHER SUBJECTS 427, 439 (Burt Franklin 1969) (1786).

48. HAMMOND, *supra* note 7, at 74. One can carry this idea too far. Even the earliest banks had some non-mercantile customers. The Massachusetts Bank, for example, extended credit to private bankers and brokers, and auctioneers. GRAS, *supra* note 19, at 56-58. Nevertheless, the majority of customers of all the early banks were merchants. *See id.* at 45, 54.

49. 2 THOMAS PAINE, *Dissertations on Government; the Affairs of the Bank; and Paper Money*, in THE WRITINGS OF THOMAS PAINE 132, 170-71 (Moncure Daniel Conway ed., G. P. Putnam's Sons, New York 1894).

50. *See* GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 112-13 (1992).

51. HAMMOND, *supra* note 7, at 68-69.

52. The rechartering debates of 1786 indicate that the credit terms of the BNA were usually forty-five days. *See* BNA DEBATES AND PROCEEDINGS, *supra*

expected to be prompt.⁵³ Endorsers of notes were expected to stand behind their name.⁵⁴ These businesslike practices seemed onerous to debtors accustomed to more forgiving business behavior,⁵⁵ and led to great political controversy in the first decades of banking.⁵⁶ In the course of things, these banks provided a source of circulating currency. But the circulation of this currency was incidental to its main function: permitting the banks' merchant customers to conduct their business. It was the credit behind the currency that the merchants wanted, more than the currency itself.

*A BANK is a large repository for cash, deposited under the direction of proper officers (say, a president and directors) for the purpose of establishing and supporting a great and extensive credit, to be made use of in every case where an established credit will answer in exchange or payment as well as cash, or better than cash, as in many circumstances will manifestly and undoubtably be the case*⁵⁷

Indeed, some supporters of the BNA went so far as to insist that bank notes were not paper currency.⁵⁸ The incorporators of the Massachusetts Bank felt as if they had no responsibility to supply bank note money in the late 1780s and early 1790s.⁵⁹ Nor did the October 1789 petition

note 15, at 80. The BNA's 1782 by-laws permitted sixty days' credit. At the time of its founding in 1784, the Bank of New York only extended thirty days' credit, with no accommodation. HENRY W. DOMETT, *A HISTORY OF THE BANK OF NEW YORK 1784-1884*, at 19 (4th ed., Riverside Press 1922) (1884).

53. Several early bank charters stressed the importance of punctuality. The preamble of chapter 13 of the 1790 Maryland Bank charter read "whereas it is absolutely necessary that debts due to the said bank should be punctually paid, to enable the directors to calculate with certainty and precision on meeting the demands that may be made upon them." Stat. Md. ch. 90 (1790). The 1791 preamble to the Providence Bank charter listed "promoting Punctuality in the Performance of Contracts" as one of the virtues of a bank; the Bank of Richmond had a similar charter clause in 1792. Stat. R.I. (Oct. 1791); Stat. Va. ch. 77 (1792).

54. See EAST, *supra* note 4, at 259-60.

55. DOMETT, *supra* note 52, at 29 (Bank of New York accused of being uncompassionate toward creditors).

56. See *infra* Part II.A.

57. Webster, *supra* note 47, at 433.

58. See *infra* text accompanying notes 66, 81.

59. See OSCAR HANDLIN & MARY FLUG HANDLIN, *COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1774-1861*, at 120-22 (1947).

of the Bank of New York for a charter so much as mention provision of currency as an advantage that the Bank would provide the State, if incorporated.⁶⁰

3. *A Credit Club—Not a Money Club.* The earliest United States banks therefore provided credit, and currency was at best an incidental means to credit. As a goal, currency was a state interest, at least before state currency was proscribed by the Constitution. (Not until Hamilton's Bank of the United States was the idea of banking solidly melded with provision of paper currency.)⁶¹ To be sure, the petition for a charter for the Massachusetts Bank mentioned that the bank would provide a medium of exchange,⁶² although there was no express note-issuing authority in its 1784 charter.⁶³ However, the 1789 petition of the Bank of New York for a charter contained no such provision,⁶⁴ and currency was only weakly alluded to in the elaborate preamble of the Providence Bank charter, which contained an extensive apologia for banking.⁶⁵

In the great BNA bank charter debate of 1786, there was little evidence that either mercantile or agrarian forces considered bank notes to be a real substitute for state-issued paper currency, and much evidence that the two kinds of paper were considered to be two different—even incompatible—things. The agrarian radical William Findley (of whom much shall be said below) even viewed the BNA as "inimical to the emission and credit of paper money."⁶⁶

60. See DOMETT, *supra* note 52, at 32-33.

61. See *infra* Part II.B.1.

62. See GRAS, *supra* note 19, at 23.

63. See 1 DOCUMENTARY HISTORY OF BANKING AND CURRENCY IN THE UNITED STATES 321-24 (Herman E. Krooss ed., 1969) [hereinafter BANKING & CURRENCY].

64. See DOMETT, *supra* note 52, at 32-33.

65. The relevant portion of the Providence Bank charter (written by the incorporators) reads:

Taught by the Experience of *Europe and America*, that well-regulated Banks are highly useful to Society, by promoting Punctuality in the Performance of Contracts, increasing the Medium of Trade, facilitating the Payment of Taxes, preventing the Exportation of Specie, furnishing for it a safe Deposit, and by Discount rendering easy and expeditious the Anticipation of Funds on lawful Interest, advancing at the same Time the Interest of the Proprietors . . .

Stat. R.I. (Oct. 1791).

66. BNA DEBATES AND PROCEEDINGS, *supra* note 15, at 69. *But see* 1 JAMES WILSON, *Considerations, on the Power to Incorporate the Bank of North*

Findley and Thomas Paine were opponents in this debate, but both denied the monetary status of bank paper. New York and Philadelphia merchants, users of bank paper, were quite unenthusiastic about state issues of money in the 1780s.⁶⁷ They preferred their own, more private bank credit instruments. The states may have wanted banks to provide—or at least facilitate—a public paper currency, but the bankers were of another mind.

“Money” was not a homogeneous concept in the 1780s (and remains intellectually contested today).⁶⁸ There were many different kinds and notions of money, which satisfied different needs of the community and had different partisans. Specie, being universally acceptable, was in a class of its own, but any kind of paper could be money (or for the more prudish, a money substitute). State and federal debt securities, although debased, were frequently used as paper currency, a point stressed by Alexander Hamilton in his *Report on Public Credit*.⁶⁹

Different forms of paper currency had different constituencies. Loan office currency, issued by the state, was an extremely democratic form of money—the favorite of agrarians.⁷⁰ Bills of exchange were at the opposite extreme, a form of semi-private semi-currency, potentially negotiable into the stream of commerce, but generally transferred only between merchants. Bank notes, when considered at all, were another alternative, intermediate between loan office currency and bills of exchange, in both safety and exclusivity.⁷¹ As discussed above, both friends and foes of

America, in THE WORKS OF JAMES WILSON 549-55 (James D. Andrews ed., Chicago, Callaghan & Co. 1896).

67. See DOMETT, *supra* note 52, at 29-30; see also BNA DEBATES AND PROCEEDINGS, *supra* note 15, at 80-81 (Robert Morris).

68. For a recent discussion of some tensions in the law of money, see Joseph H. Sommer, *Where Is a Bank Account?*, 57 MD. L. REV. 1, 10-23 (1998). The most significant modern treatment of money probably remains Simmel's. See GEORG SIMMEL, THE PHILOSOPHY OF MONEY (Tom Bottomore & David Frisby trans., Routledge & Kegan Paul 1978) (1907).

69. See 6 HAMILTON PAPERS, *supra* note 17, at 70-72.

70. See *infra* text accompanying notes 186-88, 235.

71. Indeed, one bank supporter viewed checking accounts—similar to a bill of exchange—as a superior form of bank money to bank notes:

The advantage [of bank money] would be still greater, if, instead of bank-bills, the owner would take a *bank credit*, and *draw checks* on the bank whenever he needed his money; this would enable him to pay any sum *exactly*, without the trouble of *making change*; he would be able in any future time to *prove his payments*

banks considered bank notes as a money of the rich. Friends of banks, generally opposed to state currency, viewed specie as the proper currency for the poor, rather than small-denomination bank notes.⁷²

Banks in the 1780s were therefore not uniquely responsible for currency. Indeed, they were usually not considered a particularly significant source of currency in the United States, and the currency they provided was for the rich. Unlike England, paper currency was associated with the state. The debates over ratification of the Constitution are instructive. The convention thought it knew exactly what kind of monetary constitution it was making⁷³ and inserted several interlocking clauses designed to prevent the monetary abuses of the 1770s and 1780s from recurring.⁷⁴ The prohibition of emission of state currency was a hot topic in the ratification debates, especially in the South. The debaters seemed aware of two classes of money: specie and state notes. Neither side seemed to discuss bank paper money at all as a third possible alternative.⁷⁵ In later life, Madison stated that the framers of the Constitution had not contemplated bank

Webster, *supra* note 47, at 434.

72. See MINTS, *supra* note 16, at 148 (discussing small note controversy at dawn of free banking era). The opposition to small notes dates back at least to the practices of the eighteenth-century Bank of England. See *id.* at 21. Smith justified restriction of small notes because otherwise, the notes of uncreditworthy issuers would be accepted in circulation. See ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 343-45 (Edwin Cannan ed., Univ. Chi. Press 1976) (1776).

73. See, e.g., JAMES WILLARD HURST, A LEGAL HISTORY OF MONEY IN THE UNITED STATES, 1774-1970, at 8 (1973).

74. See U.S. CONST. art. I, § 8, cl. 5-6 (permitting Congress to coin money and punish coinage and securities counterfeiters); *id.* art. I, § 10, cl. 1 (prohibiting states from coining money, emitting bills of credit, creating nonspecie legal tender, impairing contracts).

75. See, e.g., James Madison, Notes for Speech Opposing Paper Money (Nov. 1, 1786), in 3 THE FOUNDERS' CONSTITUTION 392-402 (Philip Kurland & Ralph Lerner, eds., 1987); Records of the Federal Convention (1788), in 3 THE FOUNDERS' CONSTITUTION, *supra*, at 393; Luther Martin, Genuine Information (1788), in 3 THE FOUNDERS' CONSTITUTION, *supra*, at 394; THE FEDERALIST NO. 44 (James Madison) (excerpt), reprinted in 3 THE FOUNDERS' CONSTITUTION, *supra*, at 393; Charles Pinckney, South Carolina Ratifying Convention (May 20, 1788), in 3 THE FOUNDERS' CONSTITUTION, *supra*, at 395-96; Debate in North Carolina Ratifying Convention (June 15, 1788), in 3 THE FOUNDERS' CONSTITUTION, *supra*, at 400-02.

emissions,⁷⁶ notwithstanding the three banks operating in 1787. Hurst is probably correct in concluding that the "limited resources and the relative isolation of [the early banks'] operations did not add up to a situation likely to make the constitution makers perceive private bank notes as a significant expression of state law affecting the money supply."⁷⁷ The Framers' neglect of bank money led to a standard Constitutional argument against the authority of the federal government to charter banks, used until around 1830. The argument held that bank notes were not money and, thus, fell outside the Constitutional authority granted Congress to regulate money.⁷⁸

At the time of the drafting of the Constitution, a virtual symposium on money was published in *The American Museum*, a magazine published by Mathew Carey. The best of the essays, by John Witherspoon, favored both bank and loan office money, although was very cautious about the latter.⁷⁹ The rest of the essays barely touched on bank money, concentrating on state paper emissions. One essay, arguing for a land-based loan office, repeated James Steuart's objections to mercantile banking.⁸⁰ Most essays seemed to simply assume that only state paper could be money.⁸¹ Shortly before, Thomas Paine had drawn a sharp

76. Letter from James Madison to Charles J. Ingersoll (Feb. 2, 1831), in 3 THE FOUNDERS' CONSTITUTION, *supra* note 75, at 463.

77. HURST, *supra* note 73, at 11-12; cf. 1 WILLIAM GRAHAM SUMNER, A HISTORY OF BANKING IN ALL THE LEADING NATIONS 144 (New York, J. of Commerce & Commercial Bulletin 1896) (stating that BNA and Bank of Massachusetts bank notes were regarded by the framers of the Constitution "as credit instruments of a different character" than currency).

78. RICHARD H. TIMBERLAKE, THE ORIGINS OF CENTRAL BANKING IN THE UNITED STATES 8, 36 (1978).

79. See JOHN WITHERSPOON, ESSAY ON MONEY (Phila., Young, Stewart & McCulloch 1786), reprinted in 2 AM. MUSEUM 47 (1787).

80. See WILLIAM BARTON, THE TRUE INTEREST OF THE UNITED STATES (Phila., C. Cist 1786), reprinted in 2 AM. MUSEUM 32 (1787). Sir James Steuart was an influential banking theorist of the day. He was opposed to mercantile banking because its assets were no better than the credit—the promises—of merchants. He preferred banking on collateral: either personal or real. In practice, this meant real property. See 2 JAMES STEUART, AN INQUIRY INTO THE PRINCIPLES OF POLITICAL ECONOMY 471-83 (Andrew S. Skinner, ed., 1966). History has not been kind to Steuart's banking theory; banking on real property was highly risky, because property was far more illiquid (and no more reliable) than merchants' promises.

81. One of these essays (in favor of hard money) explicitly mentioned the BNA, without discussing its paper as money at all! See Nestor, *Thoughts on Paper Money*, 2 AM. MUSEUM 42 (1787). Nestor, along with others, may have

distinction between (evil) state paper currency and bank notes, which Paine held not to be paper currency at all.⁸²

Certainly, after 1791, banks were henceforth intimately connected with monetary policy. **But it is important to keep in mind that, in the formative decade of the 1780s, bank notes were generally deemed a form of circulating credit not quite money. In the 1780s banks were not public institutions, and their money not a public good.**

C. *The Merchant's Utility*

1. *A Private Club.* To a large extent, then, the mercantile banks could be considered merchants' utilities, chartered perhaps as public corporations, but operated as private credit clubs. These mercantile banks were suffused with only a limited public spirit. The BNA, for example, refused to become a national bank in 1790, even though invited to do so by Hamilton.⁸³ Robert Morris publicly stated as early as 1786: "I must confess that I do not wish to see government attached to [the BNA]. It is better to keep it for the benefit and promotion of trade and commerce."⁸⁴ In an earlier, more private communication, Robert Morris characterized the BNA as "a mere private Thing in which any Man my be interested who chuses to purchase Stock."⁸⁵

assumed that bank money was a mere specie substitute, rather than a separate form of money. *See, e.g.,* Janet A. Riesman, *Money, Credit, and Federal Political Economy*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 128, 137-42 (Richard Beeman et al. eds., 1987).

82. 2 PAINE, *supra* note 49, at 176-87.

83. LEWIS, *supra* note 30, at 86-90.

84. BNA DEBATES AND PROCEEDINGS, *supra* note 15, at 30.

85. Letter from Robert Morris to John Wendell (May 1, 1782), in 5 *THE PAPERS OF ROBERT MORRIS 1781-84*, at 95 (E. James Ferguson & John Catanzariti eds., 1980) [hereinafter *MORRIS PAPERS*]. John Wendell was a New Hampshire merchant; Morris may have been trying to sell him some BNA stock. Morris went on to say:

The Government have nothing to do with the Bank except meerly to prevent the Directors should they be so inclined from extending their Operations in a manner disproportionate to their Capital thereby endangering their Credit. Any Aid which the Government derive from the Bank is by lodging proper Securities with them and borrowing money for short Periods . . .

Id. at 95-96. Morris, of course, was "government" at the time, being Superintendent of Finance. He may have been conflating his private role as entrepreneur with his public role as Superintendent; the BNA charter did not give the United States visitorial rights. *Compare id.* at 12 (clauses 11 and 13,

This was in May 1782, only a few months after the bank was chartered.⁸⁶ The BNA may have been born a “public” organization, but if it was, it did not stay so for long.

The Massachusetts Bank promptly reneged on most of the promises it made the state to secure its charter in 1784.⁸⁷ About twenty years after the fact, William Findley remembered the First Bank of the United States as the first public bank, stating that none of the state banks present before the Bank of the United States “were instituted to promote the regular, permanent, and successful operation of the finances of the State.”⁸⁸ The public-minded BUS was an anomaly, not a norm.

Historians frequently assert that early business corporations were public enterprises, perhaps closer to contemporary municipal corporations than contemporary business corporations.⁸⁹ This assertion seems correct as a matter of legal doctrine, and—as shall be discussed—bears considerable political truth. But the post-Revolutionary merchants who actually conducted the corporations’ operations did not seem to concur with the lawyers or politicians. **Given the practical weakness of business regulation by charter, it was the merchants’ opinion that counted.** As we shall see, most of the terms of these charters—at least the bank charters—were motivated by forces internal to these banks.

To be sure, the mercantile banks had a public value that went beyond their facilitation of trade.⁹⁰ Bank notes, perhaps limited in their circulation, nevertheless circulated.

the vistorial rights provisions in the proposed charter), with HISTORY OF THE BUS, *supra* note 2, at 12-14 (BNA charter).

86. See Rappaport, *supra* note 5, at 18-21 (discussing Morris’s conception of the BNA); LEWIS, *supra* note 30, at 76-80.

87. See GRAS, *supra* note 19, at 22-23.

88. HISTORY OF THE BUS, *supra* note 2, at 215 (1810 rechartering debate for First BUS). Findley had been an effective opponent of the BNA in 1785, but had become an advocate of the Bank of the United States over the years. He may have been trying to reconcile his two divergent positions, and this may have affected his recollection. It does, however, seem consistent with other information.

89. See, e.g., MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860, at 111-12 (1977); Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 WM. & MARY Q. 51, 53-57 (1993).

90. See BNA DEBATES AND PROCEEDINGS, *supra* note 15, at 28 (Robert Morris) (citing state loans as public benefit of bank); DOMETT, *supra* note 52, at 32 (“one essential object of banks is to afford aid to the government”).

Banks provided fiscal agency and often direct aid to states, through medium-term loans.⁹¹ (But the loyalty of these early banks was to their stockholders first, and they would not extend credit to the state if the banks deemed it inappropriate.)⁹² The public value of these institutions was acknowledged. The Massachusetts Bank, for example, was referred to as "the State Bank," and its notes bore the Commonwealth seal.⁹³ The polity often wanted banks to be far less private than they in fact were.

But little pertinent to business is lost by ignoring the broader public interest inherent in mercantile banks. This observation raises some questions. If the charters were consistent with private mercantile interests, why did the merchants want them, and why did the states grant them? The beneficiaries of the private merchants' club still needed public aid in maintaining their clubs.

2. *That Needed the State.* Charters conferred many advantages, of which the most prominent—and perhaps most overrated—was limited liability. Although the limited liability controversy is complex, one only needs to remember that banks are in the business of credit. Limited liability diminishes credit: a point well understood at that time.⁹⁴ **The Scottish system of unlimited-liability banking was widely known, and the corporate form was not necessary to provide limited liability, if it were desired.** Early Americans knew how to secure limited liability for

91. See Letter from Robert Morris (Jan. 8, 1782), in LEWIS, *supra* note 30, at 39-40 (circular letter sent to the governors of all the states); PELATIAH WEBSTER, *TO THE STOCK-HOLDERS OF THE BANK OF NORTH-AMERICA, ON THE SUBJECT OF THE OLD AND NEW BANKS* 10-11 (Phila. 1791) (arguing that \$50,000 cap on loans from First BUS to states constituted derogation of state sovereignty, hindering their ability to conduct internal improvements).

92. See, e.g., STARNES, *supra* note 15, at 23-24 (Bank of Alexandria refusing credit to Virginia in 1794).

93. HANDLIN & HANDLIN, *supra* note 59, at 107.

94. See generally Oscar Handlin & Mary F. Handlin, *Origins of the American Business Corporation*, 5 J. ECON. HIST. 1, 8-17 (1945). The limited liability status of corporate charters was not clarified until the 1810-1860 period. See JAMES WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970*, at 26-27 (1970); see also Shaw Livermore, *Unlimited Liability in Early American Corporations*, 43 J. POL. ECON. 674 (1935). Banks did not routinely enjoy limited liability until the New Deal, and the wisdom of this policy remains controversial. See generally Jonathan R. Macey & Geoffrey P. Miller, *Double Liability of Bank Shareholders: History and Implications*, 27 WAKE FOREST L. REV. 31 (1992).

passive investors without the corporation, through the limited partnership device.⁹⁵ However, states did not provide for limited partnerships until the 1820s.⁹⁶ **Limited liability on notes was also attainable by a legend on the note,** although this point might have been uncertain in the late eighteenth century.⁹⁷

Limited liability was not the only attraction of the corporate form, and many others have been noted. Two of them were clearly useful, but just as clearly unnecessary. The legal personality granted by the bare fact of incorporation was useful for technical legal reasons, such as suing on a note.⁹⁸ The formal recognition of the state was doubtless useful, for overall legitimacy,⁹⁹ for prestige,¹⁰⁰ and for the aid granted by state anti-counterfeiting laws, which usually accompanied the charters.¹⁰¹ However, these features were clearly not necessary. Unchartered joint-stock banks flourished in Scotland.¹⁰² Even in the United States, many early banks flourished without charters.¹⁰³

The quasi-monopoly status of early chartered banks could also be viewed as a source of state aid, and an important reason for incorporating. Like today's public utilities, the post-Revolutionary corporations were deemed "natural" regional monopolies by many.¹⁰⁴ This view was by

95. Use of the limited partnership device dated back to seventeenth-century France. Although not available in English law, the idea seemed familiar in the United States. JOSEPH K. ANGELL & SAMUEL AMES, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE 24 (Arno Press 1972) (1832).

96. *Id.* at 24 n.1.

97. This point became settled by the early 19th century. *Riggs v. Swann*, 20 F. Cas. 788 (C.D.C. 1827) (No. 11,831), *rev'd on other grounds sub nom. Mandeville v. Riggs*, 27 U.S. (2 Pet.) 482, 484 (1829).

98. HURST, *supra* note 73, at 19; Rappaport, *supra* note 5, at 224-25.

99. See BNA DEBATES AND PROCEEDINGS, *supra* note 15, at 44 (Robert Morris) (suggesting that removal of BNA charter deprived bank of foreign confidence).

100. HAMMOND, *supra* note 7, at 67 n.3.

101. See 2 PAINE, *supra* note 49, at 174.

102. VERA C. SMITH, THE RATIONALE FOR CENTRAL BANKING 25-27 (Liberty Press 1990) (1936). The Scottish experience could not be replicated in England because the Bubble Act restricted English joint-stock companies in the 18th century. See HAMMOND, *supra* note 7, at 4-6.

103. See HAMMOND, *supra* note 7, at 144-45.

104. See 1 REDLICH, *supra* note 18, at 21; HAMMOND, *supra* note 7, at 67-68. Indeed, when the First BUS was founded, both the Banks of New York and Massachusetts had some interest in merging with the national BUS. 2 DAVIS, *supra* note 3, at 54-56. Hamilton was very uneasy about the prospect of competition between the First BUS and the BNA. See Hamilton, Report on a

no means unanimous. The virtues of competition were well known in the late eighteenth century and were viewed by many as applicable to banks.¹⁰⁵ But the natural monopoly view was widely accepted, for some good reasons. **Banks could—and did—stage ruinous raids on each others' resources by presenting large quantities of bills drawn on the other.**¹⁰⁶ Furthermore, there was a fear that an excess of local banks would create an excess of credit.¹⁰⁷ Finally, there was the notion—not yet crystallized into positive law—that a charter was a sacred promise, which would be abrogated if additional charters were granted.¹⁰⁸ As a consequence, banks were lumped in with bridge and turnpike corporations, although explicit monopoly privileges were

National Bank, *supra* note 2, at 21, 26; *see also* HISTORY OF THE BUS, *supra* note 2, at 37 (Jackson) (stating that the BUS “is an infringement of the [BNA] charter”).

105. *See, e.g.*, BNA DEBATES AND PROCEEDINGS, *supra* note 15, at 114 (Robert Whitehill); SAMUEL BLODGET, *ECONOMICA: A STATISTICAL MANUAL FOR THE UNITED STATES OF AMERICA* 161 (Washington, D.C. 1806). *See generally* Anna Jacobson Schwartz, *The Beginning of Competitive Banking in Philadelphia, 1782-1809*, 55 J. POL. ECON. 417 (1947). The restrictions on interlocking directorates that crept in to the charters of the early and middle 1790s were consistent with an emerging pro-competitive policy. Hamilton himself waffled on the monopoly issue. *Compare* Letter from Alexander Hamilton to Gouverneur Morris (Feb. 21, 1784), in 3 HAMILTON PAPERS, *supra* note 17, at 512-14, with Letter from Alexander Hamilton to Gouverneur Morris (Apr. 7, 1784), in 3 HAMILTON PAPERS, *supra* note 17, at 528-29.

106. *See* Schwartz, *supra* note 105, at 418-21; HAMMOND, *supra* note 7, at 84. This seemed to be particularly prevalent in Scotland during the 1760s, and ended only in the early 1770s, when Scottish banks agreed to near-universal note exchange. Charles W. Munn, *The Origins of the Scottish Note Exchange*, 107 THREE BANKS REV. 45, 47 (1975), *reprinted in* 2 FREE BANKING 263 (Lawrence H. White, ed., 1995).

107. *See, e.g.*, Letter from Alexander Hamilton to William Seton, Cashier of the Bank of New York (Jan. 18, 1791), in DOMETT, *supra* note 52, at 42 (“T is impossible but that three great banks in one city must raise such a mass of artificial credit as must endanger everyone of them . . .”); ALFRED B. STREET, *THE COUNCIL OF REVISION OF THE STATE OF NEW YORK* 427 (William Gould, Albany 1859) (inflation caused by excess number of banks was an objection of Justice Spencer to incorporation of the Merchants Bank in 1805).

108. HAMMOND, *supra* note 7, at 67; Hamilton, Report on a National Bank, *supra* note 2, at 15, 26 (“[T]he Government of the United States ought not, in point of candor and equity, to establish any rival or interfering institution, in prejudice to the one already established . . . [in this case,] the Bank of North America.”); HISTORY OF THE BUS, *supra* note 2, at 37 (Robert Jackson). This notion ultimately died with the Jacksonian revolution. *See* Charles River Bridge v. Warren Bridge, 36 U.S. 420, 539 (1837); *see also* STANLEY I. KUTLER, *PRIVILEGE AND CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE* 2-3 (1971).

seldom granted, except in the case of some bridge corporations.¹⁰⁹ The natural monopoly view of banks was clearly not universally appreciated.

But monopoly was not particularly significant. Early charters did not grant a monopoly, and legislative unwillingness to grant additional charters did not seem inherently fatal. Several early banks were quite willing to operate for several years without a charter. The first and best-known example was Hamilton's Bank of New York: opened in 1784, chartered in 1791, and still in business today.¹¹⁰ But there were also other examples during this period, such as the Bank of South Carolina (opened 1792, chartered 1801)¹¹¹ and the Essex Bank (opened 1792, chartered 1799).¹¹² Unincorporated banking, which flourished in the first decade or so of the nineteenth century,¹¹³ was viable until at least the Great Depression, and still persists today. Brown Brothers Harriman is still a bank, and still a partnership.¹¹⁴

Monopoly or other forms of state aid were not only unnecessary; they were dangerous. Monopoly (or the scent of monopoly inherent in the corporate form) bred tremendous political unpopularity.¹¹⁵

This creates a minor mystery. Unincorporated joint-stock banking was comparatively rare in the 1780s and early 1790s, although it succeeded when it was tried. The early bankers definitely wanted charters, even if the charter was a mere ratification of a merchant's compact. But the advantages of charters seemed modest. Limited liability was at best a mixed blessing, and—as we shall see—a charter could be an invitation to a disruptive bank

109. 2 DAVIS, *supra* note 3, at 320.

110. HAMMOND, *supra* note 7, at 144-45.

111. *Id.*

112. *Id.*

113. See, e.g., ALFRED COOKMAN BRYAN, HISTORY OF STATE BANKING IN MARYLAND 22-24 (Johns Hopkins Studies in Hist. & Pol. Sci., Series 17, No. 1, 1899) (Union and Farmers' Banks in Maryland willing to operate without a charter, pending legislative approval). The District of Columbia had a strong early tradition of unincorporated banking from 1804-1811, because the charter of the First Bank of the United States forbade incorporated banking in the District. DAVID M. COLE, THE DEVELOPMENT OF BANKING IN THE DISTRICT OF COLUMBIA 23-30 (1959).

114. See Brown Brothers Harriman website, at <http://www.bbh.com> (last visited Sept. 30, 2001).

115. See *infra* Part II.

war. Legal personality, the aura of the state, and anti-counterfeiting laws were nice, but did not seem essential. Monopoly was almost never explicitly granted, and was political poison, to boot. Maybe there was another advantage to the corporate charter?

3. *To Provide Internal Governance.* The mercantile banks were useful merchant's tools, but dangerous ones, even to the friends of banks. From the beginning, this merchant's tool was feared by the merchants themselves, for special merchants' reasons. As a result, all of the earliest charters, *except* the open-textured BNA charter, contained provisions designed to protect the merchants from their creations. Even the BNA had such protections, in the form of by-laws.

Banks presupposed a large agglomeration of capital. How to ensure that this agglomeration did not turn on the merchant community that capitalized and used it? The separation of ownership and control was *the* big corporate law issue of the 1780s. Early merchants lived in fear that the banking cooperative they capitalized would become the tool of their bank's directors. The bank charters of the 1780s and 1790s were the battleground upon which this corporate war was fought, and the separation of banking and commerce the result.

As a source of credit, the mercantile bank was useful; as a potential competitor, it was dangerous. "The bank, for aught we know, might become a trading company; and, by stopping discounts, at particular times, might take advantage of the private merchants."¹¹⁶ In a contemporary light, such a view might smack of special pleading. But it was considered good public interest reasoning in the late eighteenth century, especially with monopolistic banks. Throughout the eighteenth century and into the early nineteenth century, few charters were issued in businesses that were already densely occupied by individual entrepreneurs, and preservation of entrenched business expectations was considered legitimate public policy.¹¹⁷

Indeed, virtually no United States trading corporation of any kind was established in the eighteenth century,

116. BNA DEBATES AND PROCEEDINGS, *supra* note 15, at 113 (Robert Whitehill).

117. See SEAVOY, *supra* note 43, at 73-75.

despite some early interest by Alexander Hamilton in 1780.¹¹⁸ As Rufus King stated, discouraging a plan for incorporating an Anglo-American trading company:

the Plan would be objected to as well on account of the general unpopularity of monopolies in America as on the score of a defect of *power in Congress* to create an *Exclusive Corporation* for the Purpose of Trade. . . . [O]ur *merchants* are numerous and full of enterprize, and no way has suggested itself by which a limited number of them could without undue preference be selected to compose a company.¹¹⁹

Even Robert Morris—the largest post-Revolutionary merchant—was shocked by the notion of a trading company with exclusive privileges.¹²⁰ It is significant that the most unpopular business corporations were trading companies.¹²¹ The failure of John Law's Mississippi Bubble—a bank-cum-trading company—was a textbook horror story that evoked strong memories long after 1780.¹²² It is easy to see why banks were excluded from commerce from the very beginning.

Unfair competition from the bank was not the only mercantile fear. Unfair treatment by the bank was also very significant. Many merchants—especially the smaller ones—felt unfairly excluded from bank credit.¹²³ This was not an unreasonable fear. Until the concept of competitive banking became legitimized more than a generation later,

118. There were two abortive attempts at establishing Colonial trading companies: the 1682 Free Society of Traders in Pennsylvania (which finally disappeared in 1723), 2 DAVIS, *supra* note 3, at 4, and the stillborn New London Society United for Trade and Commerce (chartered 1732). *Id.* at 87.

119. *Id.* at 288.

120. BNA DEBATES AND PROCEEDINGS, *supra* note 15, at 40 (Robert Morris).

121. See 2 DAVIS, *supra* note 3, at 287-88; see also BNA DEBATES AND PROCEEDINGS, *supra* note 15, at 23 (John Smilie invoking specter of trading companies); HISTORY OF THE BUS, *supra* note 2, at 42 (James Madison invoking specter of East India and South Sea companies).

122. See, e.g., RICHARD HILDRETH, THE HISTORY OF BANKS 20-26 (Augustus M. Kelley 1968) (1837).

123. See, e.g., 2 DAVIS, *supra* note 3, at 68; EAST, *supra* note 4, at 259-60; BRYAN, *supra* note 113, at 36; Rappaport, *supra* note 5, at 47-48. This point was articulated in the petition against the BNA that caused it to lose its charter: "the directors of the bank are enabled to give such preferences in trade, by advances of money to their particular favorites, when most needed, as to destroy that equality which ought to take place in a commercial country." BNA DEBATES AND PROCEEDINGS, *supra* note 15, at 15 (internal quotation marks omitted).

those denied credit could fairly blame the antipathy of a particular bank, rather than their own lack of creditworthiness.¹²⁴ Furthermore, there was not enough credit to go around, and some perfectly creditworthy individuals might not get it.¹²⁵

The flip side of antipathy was favoritism. Not only were merchants obliged to avoid bank enmity; they were well-advised to secure bank friendship. Even **Robert Morris, a key figure in the Bank of North America who denied Bank favoritism, conceded that shareholder's dividends were insufficient incentive to hold stock.**¹²⁶ **The greatest incentive of merchants "to continue stockholders, is to support an institution which affords them accommodation and convenience, by means of discounts."**¹²⁷ Accusations of favoritism were even heard during shareholders' meetings.¹²⁸ The earliest banks had no economic interest in meeting the credit needs of their communities, even if the credit needs were narrowly defined as mercantile needs. **They were merchants' clubs, and their members came first.** Some outsiders would be served, but no more than the controlling merchants thought convenient. Indeed, the Massachusetts Bank shrank in size shortly after it was chartered, because it had too much capital for the business that it wanted to do.¹²⁹

There is little evidence that the earliest mercantile bankers engaged in gross self-dealing, although many later banks, especially those in backwaters, were corruptly run.¹³⁰ But creditworthiness was almost certainly not the only factor that directors considered in extending credit; antipathy and favoritism were significant.

124. See BRYAN, *supra* note 113, at 36.

125. See *id.*

126. BNA DEBATES AND PROCEEDINGS, *supra* note 15, at 44 (Robert Morris).

127. *Id.* at 95.

128. See, e.g., Letter from Jeremiah Wadsworth to Alexander Hamilton (Jan. 9, 1786), in 3 HAMILTON PAPERS, *supra* note 17, at 645-46; EAST, *supra* note 4, at 259-60.

129. See HANDLIN & HANDLIN, *supra* note 59, at 121.

130. 1 REDLICH, *supra* note 18, at 26. Redlich thinks that managerial corruption became more common in the early nineteenth century. See *id.* The first bank failure, caused by self-dealing, was the Farmer's Exchange Bank in 1809. See HAMMOND, *supra* note 7, at 172-78; GOUGE, *supra* note 15, at 6-11. For an extraordinarily funny contemporary description of bank abuses, see JOSEPH G. BALDWIN, THE FLUSH TIMES OF ALABAMA AND MISSISSIPPI: A SERIES OF SKETCHES 63-64 (Sagamore Press 1957) (1853).

Some mercantile fears were less creditable than unfair treatment. Some merchants even feared the bank as a source of credit because convenient mercantile credit would lower commodity prices, and would impair the merchants' own profits in providing credit.¹³¹

Fears of unfair competition could be successfully addressed by charter restrictions on bank powers. Fears of unfair treatment were addressed—less successfully—by governance restrictions on banks. The founders of banks, along with the founders of the United States (the two classes overlapped), were afraid of rule by faction. In the first few years of banking, several governance restrictions were tried—including regressive voting, rotation of directors, and prohibitions on director interlocks.¹³² These governance restrictions were conjoint with the bank powers charter restrictions—all were attempts by the mercantile community to keep their creation docile.

It is here, perhaps, that the utility of the state-granted charter has not been sufficiently recognized. The state charter offered a fixed governance structure, of use to the members of the corporation. A partnership is a mere agreement between private parties, subject to dissolution or novation. The old charters were something more permanent, bearing the same relationship to a partnership as a constitution does to a statute.¹³³ This observation is no anachronism: Hamilton used the very word “constitution” to refer to the corporate charter, and the comparison was a frequent trope of the era.¹³⁴

131. See HAMMOND, *supra* note 7, at 62; BNA DEBATES AND PROCEEDINGS, *supra* note 15, at 96 (Robert Morris); Janet Wilson, *The Bank of North America and Pennsylvania Politics: 1781-1787*, 66 PA. MAG. HIST. & BIOGRAPHY 9 (1942).

132. See *infra* text accompanying notes 154-64 (regressive voting), 165-70 (rotation), *supra* note 105 (interlocks).

133. HURST, *supra* note 73, at 16.

134. See HISTORY OF THE BUS, *supra* note 2, at 27 (Alexander Hamilton); 2 STEWART KYD, A TREATISE ON THE LAW OF CORPORATIONS 113 (Garland Publishing, Inc. 1978) (1793). The trope becomes common in the caselaw of the 1820s. See, e.g., Trustees of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 652 (1819) (“constitution of the corporation”); Bank of United States v. Norton, 10 Ky. (3 A.K. Marsh.) 422, 425 (1821); *In re St. Mary’s Church*, 7 Serg. & Rawl 517, 557 (Pa. 1822); Bank of Vincennes v. Indiana, 1 Blackf. 267, 275, 278 (Ind. 1823).

The founders of the early banks needed to make some credible commitments to their stakeholders.¹³⁵ They had to commit that they would not destroy their stakeholders' livelihood with competing mercantile enterprises. They had to commit that they would not exhibit excessive favoritism to a small clique. The early BNA attempted to provide these protections with by-laws. But in general, the mercantile banks—especially those not clearly identified with a trustworthy controlling party—provided these minority protections with specific charter provisions.

Post-revolutionary merchants chose charter governance of their banks for many of the same reasons that they chose constitutional governance of their nation: constitutions are harder to change than statutes, and are thus less dependent on transient public sentiment.¹³⁶ The charters of yesterday were harder to change than by-laws, and thus were less dependent on a transient majority of shareholders. Legal provisions that must be permanent are constitutionalized, especially if they exist to protect minorities from majorities. Similarly, permanent corporate governance provisions were welded into the early corporate charter, which could not be changed without a legislative act. The legislative process would provide an external forum for the grievances of minority shareholders and other stakeholders of the bank. It would also introduce a measure of wildcard uncertainty, which could discourage any amendment that was not absolutely necessary. A restrictive

135. By "stakeholders," I mean active shareholders and members of the community who relied on the bank to remain a limited-purpose merchants' utility. I do not discuss another class of stakeholders: the passive (usually foreign) investors in the stock of mercantile banks. It is likely that they were protected by a different device. The early banks did not keep their surplus, but rather dividended out all profits that exceeded their capital. This device—an early use of par value stock—can be viewed as a protection against the agency costs of free cash flows. See Michael Jensen, *The Agency Costs of Free Cash Flow: Corporate Finance and Takeovers*, 76 AM. ECON. REV. 323, 323 (1986). The directors—who benefited more from the mercantile bank's credit than the value of its stock—would otherwise be tempted to use the retained surplus to support additional lending to themselves and their friends. This additional lending would likely be riskier on the margin, and hence less profitable to the passive shareholders. It is worth noting that the Massachusetts Bank downsized in the mid-1780s, HANDLIN & HANDLIN, *supra* note 59, at 121, probably because its lending capacity exceeded the community's credit capacity. See *infra* text accompanying note 327. I do not know of any further historical evidence for this explanation, although I have not looked for it.

136. See Maier, *supra* note 89, at 79-80.

charter would therefore provide a measure of stability, and protection for oppressed minorities. These points were articulated, if not in the 1780s, a few decades later. Justice Duncan, of the Pennsylvania Supreme Court, had to consider the validity of a corporate request for a charter amendment:

[T]he application for [charter] amendments must come from the corporation—it must be a corporate act. But this does not prove that the Court is precluded from inquiring into the whole matter . . . for then a corporate body might so modify the charter as to keep themselves in power forever. Besides, there would be no end to these changes, and every year there might be some new bone of contention, and charters, which should be fixed and stable, would vary as caprice or passion would direct, and of these varieties and changes of constitution, as is said of making books, there would be no end. I do not speak of the alteration of mere regulations in the charter, which, experience had proved to be incorrect or impracticable, but a radical change of the body politic.¹³⁷

Of course, Justice Duncan's opinion notes a weakness in the legislative route: the legislature might choose to rubber-stamp any amendment that a corporation sends it. But this did not seem likely in eighteenth-century America: the legislatures seemed quite willing to mediate corporate disputes.¹³⁸ And Justice Duncan showed that the courts were willing to step in when the legislature was not.

Perhaps the charter was not the only possible means toward this end. Supermajorities in by-laws might afford similar protection, especially if the by-laws required supermajorities for their amendment. (The BNA actually tried this, in the form of regressive voting for changes in by-laws, by 1790.¹³⁹) But such by-laws, being subject to substantive judicial scrutiny for fairness,¹⁴⁰ were legally less reliable than charters.

137. *In re St. Mary's Church*, 7 Serg. & Rawle 517, 557 (Pa. 1822). The same problem may exist today, and may call for similar solutions. See Lucian Arye Bebchuk, *Limiting Contractual Freedom in Corporate Law: The Desirable Constraints on Charter Amendments*, 102 HARV. L. REV. 1820, 1848-59 (1989).

138. See, e.g., EAST, *supra* note 4, at 291 (describing Pennsylvania experience); GRAS, *supra* note 19, at 62 (describing Massachusetts experience).

139. See 7 HAMILTON PAPERS, *supra* note 17, at 281 n.139.

140. See ANGELL & AMES, *supra* note 95, at 184-88 ("The legislative power of a corporation is not only restricted by the constitutional and statute law of the state in which it is located, but by the general principles and policy of the

The evolution of these provisions is very obvious in the early bank charters. The first charter—that of the BNA—had no explicit protection of any sort and mercantile protection was entrusted to the by-laws.¹⁴¹ The second charter—the Massachusetts Bank—began to protect its shareholders' livelihoods through charter restrictions on bank activities.¹⁴² The third charter (actually the Bank of New York joint-stock shareholder's compact) added the first governance restriction.¹⁴³ Thereafter, only one of the remaining eighteenth-century charters had neither governance nor power restrictions,¹⁴⁴ and most charters usually had both.

The Massachusetts Bank introduced the first bank powers charter restriction—a very straightforward prohibition in its 1784 charter on employing “any money or monies of the said corporation or body politic, in trade or commerce.”¹⁴⁵ The historian of this bank says that the trade restriction was intended to keep it “from competing with existing mercantile houses.”¹⁴⁶ In the 1786 reincorporation debate of the BNA, its proponents claimed that it had a similar prohibition in its Continental charter, for a similar reason.¹⁴⁷ This claim was not accurate, as the charter imposed no limitations on the bank's power.¹⁴⁸ However, such a limitation existed in the bank's by-laws, almost from the beginning. Section 9 of these by-laws, dated November 4, 1782 read:

common law, as it is accepted there.”). Angell and Ames wrote in 1832, but cited enough old English case law to make their proposition credible for the 1780s.

141. *E.g.*, text accompanying note 149.

142. Stat. Mass. ch. 2 (1784).

143. See DOMETT, *supra* note 52, at 32-35.

144. This was the 1795 charter of the Bank of Rhode Island. The two eighteenth-century Rhode Island bank charters were extraordinarily unrestricted. Unlike the first BNA charter, these charters were quite sophisticated. The earlier Providence Bank was dominated by the Browns and thus may not have needed governance restrictions; the Bank of Rhode Island is less certain. EAST, *supra* note 4, at 300.

145. Stat. Mass. ch. 2 (1784).

146. GRAS, *supra* note 19, at 24.

147. See BNA DEBATES AND PROCEEDINGS, *supra* note 15, at 90 (Robert Morris) (“They are constrained by the charter from engaging in commerce.”); *id.* at 113 (Thomas FitzSimons) (“The corporation is restrained from trading by the charter.”).

148. LEWIS, *supra* note 30, at 130-32.

It is enacted and ordained by the Authority aforesaid; *That* the Corporation shall not carry on any Trade, either domestic or foreign; nor deal in any Article of Commerce, except in Bullion Gold or Silver, public Funds, or in selling Goods mortgaged to it and not redeemed, Lands or the Produce of Land purchased by the Corporation.¹⁴⁹

Although these by-laws did not prevent the BNA from acquiring land through mortgage, the BNA avoided real estate activities as a matter of prudence. (The prudence was well advised; real estate speculation bankrupted Robert Morris.)¹⁵⁰ These by-laws are the earliest limitation of bank powers in United States history. The Bank of New York is another interesting case. From 1784 until 1791, it had no charter, but operated as a joint-stock company under rules written by the shareholders themselves.¹⁵¹ These rules specifically contained a prohibition on dealing in foreign exchange, a mercantile specialty.¹⁵² Similarly, the mercantile founders of the Bank of Hartford inserted a charter restriction on trade in 1792.¹⁵³

Governance restrictions were introduced almost as soon as restrictions on powers. Several of these earliest charters also provided for regressive voting, whose mechanism and purpose was explained by Alexander Hamilton in his *Report on a National Bank*:

A vote for each share renders a combination between a few principal stockholders, to monopolize the power and benefits of the bank, too easy. An equal vote to each stockholder, however great or small his interest in the institution, allows not that degree of weight to large stockholders which it is reasonable they should have, and which, perhaps, their security, and that of the bank, require. A prudent mean is to be preferred.¹⁵⁴

149. 7 MORRIS PAPERS, *supra* note 85, at 808. The by-laws were apparently written by William Bingham. *Id.* at 822 n.58.

150. HAMMOND, *supra* note 7, at 73.

151. DOMETT, *supra* note 52, at 11-15, 19-20.

152. *Id.* at 13.

153. P.H. WOODWARD, ONE HUNDRED YEARS OF THE HARTFORD BANK 1792-1892, at 18-19 (1892). The 1784 application of the Bank of New York for a charter similarly contained a clause: "The Bank never to Engage in Trade." 3 HAMILTON PAPERS, *supra* note 17, at 519.

154. Hamilton, Report on a National Bank, *supra* note 2, at 28; *cf.* BNA DEBATES AND PROCEEDINGS, *supra* note 15, at 109 (John Smilie).

Although this rationale can be read as providing for community control of the merchants,¹⁵⁵ it reads more logically as providing mercantile control of the directors. In theory, regressive voting would ensure that the respectable merchants would collectively dominate the bank, but would keep individual merchants (or factions) from oppressing the rest. (One is reminded of the extremely limited political suffrage of that era.) The rechartering of the Bank of North America in 1787 (discussed below) was dominated by this notion, with regressive voting as community control perhaps a subtheme.

The Maryland and Providence Banks contained regressive voting provisions in their charters;¹⁵⁶ the Bank of New York had such a provision in its original 1784 joint-stock agreement.¹⁵⁷ The 1784 Massachusetts Bank charter did not contain such provisions,¹⁵⁸ although the politicized 1792 revision did.¹⁵⁹ Neither the 1781 BNA charter nor the 1787 recharter contained any regressive voting provision.¹⁶⁰ Interestingly, the 1787 shareholders were far more factionalized than the founding shareholders, and regressive voting had been inserted by by-law in April of 1784.¹⁶¹ The Massachusetts Bank was also controlled by a cohesive faction and had no regressive voting.¹⁶² If controlling shareholders did not fear each other, they would not desire regressive voting: it would only dilute their

155. Hurst believes that Hamilton was afraid of the political power of the BUS, and inserted rotation and regressive voting limitations in order to ensure that the BUS was not captured by a faction set on using it as a political weapon. HURST, *supra* note 73, at 274 n.157. This interpretation, although not at all inconsistent with narrower business fears, seems more characteristic of Hamilton's opponents than Hamilton. Hamilton had retained his dream of a trading corporation as late as 1791. 8 HAMILTON PAPERS, *supra* note 17, at 75.

156. Stat. Md. ch. 9 (1790); Stat. R.I. (Oct. 1791).

157. DOMETT, *supra* note 52, at 12.

158. Stat. Mass. ch. 2 (1784).

159. Stat. Mass. ch. 158 (1792).

160. See HISTORY OF THE BUS, *supra* note 2, at 12-14 (1791 charter).

161. 7 MORRIS PAPERS, *supra* note 85, at 823.

162. EAST, *supra* note 4, at 294-95; GRAS, *supra* note 19, at 54. The founders of the Bank of New York, the First Bank of the United States and the Bank of Maryland did not come from a small, tight-knit mercantile community. EAST, *supra* note 4, at 294-95, 303. On the other hand, the Bank of Providence, which had regressive voting, was also dominated by the Brown family. *Id.* at 300. The change in the BNA by-laws coincided with the opening of the BNA to a larger group of investors, see LEWIS, *supra* note 30, at 52-53, and may have been intended to provide assurance to them.

control. It is interesting to note that almost every other eighteenth-century bank had regressive voting.¹⁶³ The abortive Pennsylvania Bank of 1784, proposed by a faction excluded from the BNA,¹⁶⁴ had regressive voting in its proposed charter.

An allied, if less universal, means for controlling the governance of mercantile banks was rotation of directors. As Alexander Hamilton wrote in his *Report on a National Bank*:

The continual administration of an institution of this kind, by the same persons, will never fail, with or without cause, from their conduct, to excite distrust and discontent. The necessary secrecy of their transactions gives unlimited scope to imagination to infer that something is or may be wrong. And this *inevitable* mystery is a solid reason for inserting in the constitution of a bank the necessity of a change of men. As neither the mass of the parties interested, nor the public in general, can be permitted to be witnesses of the interior management of the directors, it is reasonable that both should have that check upon their conduct, and that security against the prevalency of a partial or pernicious system, which will be produced by the certainty of periodical changes. Such, too, is the delicacy of the credit of a bank, that every thing which can fortify confidence and repel suspicion, without injuring its operations, ought carefully to be sought after in its formation.¹⁶⁵

163. Of the thirty-one eighteenth-century charters surveyed by this author (including the Massachusetts charter of 1784), twenty-five had regressive voting provisions: New York Compact (1784), Coxe Proposal for Pennsylvania Bank (1784), Maryland (1790), Bank of the United States (1791), New York (1791), Providence (1791), Union Bank of Mass. (1792), Hartford Bank (1792), Union Bank of Conn. (1792), New Haven Bank (1792), Bank of Alexandria (1792), Richmond (1792), Albany (1792), Massachusetts (rechartered 1792), Sullivan Proposal for State Bank in Massachusetts (1792), Pennsylvania (1793), Columbia, Md. (1793), Baltimore (1795), Nantucket (1795), Merrimack (1795), Rhode Island (1795), Norwich, Conn. (1796), Albany (rechartered 1797), Essex (1799), Portland (1799). The only charters surveyed that did not contain regressive voting provisions were: Bank of North America (1781, rechartered 1787), Massachusetts Bank (1784), Middletown, Conn. (1795), Delaware (1796), Manhattan (1799).

164. See LEWIS, *supra* note 30, at 51-53.

165. HISTORY OF THE BUS, *supra* note 2, at 27-28; *cf. id.* at 464-65 (William Findley, in 1810 debate on renewing charter of First Bank of the United States, pointing to rotation as "artificial [i.e., intentionally planned] check" assuring integrity of bank governance).

Contrary to Hamilton's assertion that rotation was in banks' interest, not all banks liked it. Rotation thus may have been a genuinely public measure, imposed on bankers rather than sought by them. The principle of rotation had been enshrined in the Articles of Confederation,¹⁶⁶ and its absence in the Constitution was deplored by Anti-Federalists.¹⁶⁷ None of the earliest merchants' compacts contained rotation, and the Bank of New York succeeded in removing rotation from its charter in 1801.¹⁶⁸ On the other hand, the Bank of Albany successfully petitioned to have rotation put into its charter in 1797,¹⁶⁹ and rotation seems to have been inserted in some early bank and insurance by-laws when not specified by charter.¹⁷⁰

The limited-purpose charter is no longer a standard feature of corporate governance. Other devices have replaced it where it is needed. However, merchants—particularly bankers—still conduct cooperative economic activity, and still need to protect themselves from the competition of their cooperatives. Take, for example, the **Depository Trust and Clearing Corporation ("DTCC.")** This organization holds, clears and settles securities, for the benefit of its members.¹⁷¹ It is exclusively owned—and controlled—by its users, including the major banks, securities firms, and exchanges. It does no banking or brokerage: just clearing and settlement. Another example is **S.W.I.F.T. ("Society for Worldwide Interbank Financial Telecommunication.")** This firm, organized as a Belgian cooperative society owned by financial institutions, boasts **Articles of Association** that—although functioning today—evoke the eighteenth century. First, S.W.I.F.T. has a limited main object—**"the study, creation, utilization and**

166. ARTICLES OF CONFEDERATION, art. 5, ¶ 2.

167. An Officer of the Late Continental Army, *Independent Gazetteer* (Nov. 6, 1873), reprinted in 2 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 210, 212 (Merrill Jensen ed., 1976). This essay, allegedly written by William Findley, claimed that lack of rotation was a defect in the Constitution. See *id.* at 216 n.1. In his *Report on a National Bank*, Hamilton carefully distinguished between corporate rotation (beneficial) and political rotation (harmful). Hamilton, *Report on a National Bank*, *supra* note 2, at 27.

168. See ALLAN NEVINS, *HISTORY OF THE BANK OF NEW YORK AND TRUST COMPANY: 1784 TO 1934*, at 37 (1934).

169. 2 DAVIS, *supra* note 3, at 324-25.

170. See *id.* at 324.

171. See Depository Trust and Clearing Corp. website, at <http://www.dtcc.com> (last visited Oct. 16, 2001).

operation of the means necessary for the telecommunication, transmission and routing of private, confidential and proprietary financial messages.”¹⁷² Second, voting stock power is “proportional to the usage of the message transmission services of the Company by each such Member.”¹⁷³ Lastly, a supermajority vote is required for modification of articles, share allocation rules, and a few other enumerated issues. A change in the main object of S.W.I.F.T. cannot be made under any circumstances.¹⁷⁴

II. THE EARLY CHARTER WARS

The earliest bank charters and joint stock compacts show that corporate governance drove many charter provisions. But only the earliest of the charters were granted in a political vacuum. External politics, as well as mercantile needs, influenced the early charters, if not the early merchants’ compacts. What perhaps may be surprising is how readily merchants’ desires meshed with the broader political demands of the community.

Between 1784 and 1792, three wars over bank charters were fought: the BNA, the first Bank of the United States, and the Massachusetts Bank. The first of these wars—the recharter of the BNA—was fought over a mixture of banking and corporateness, and pitted agrarians and outsider merchants against established merchants. The language of this war was economic interest and ideology. The BNA recharter debate, therefore, was at the center of the social and intellectual forces acting on early business corporations. The second great war—the initial chartering of the First BUS—was more about the corporation rather than banks. The parties to this war were roughly the same as those to the BNA war, but the language of combat was political and legal. The BUS debate, therefore, is of less interest to this study than the BNA debate, although its Constitutional implications make it a weighty event in general United States history. The third war—over the rechartering of the Massachusetts Bank—was less

172. S.W.I.F.T. By-Laws, art. 3 (1973) (as amended through June 13, 2001), available at http://www.swift.com/index.cfm?item_id=7229 (on file with Buffalo Law Review).

173. *Id.* at art. 9.

174. *Id.* at art. 29.

important than the first two, but presaged future bank wars. In this war, the opponents were not agrarian and mercantile interests. Rather, they could be characterized as expansionary versus established business interests; the same interests who were to fight in Jackson's Bank War. Expansionary business interests also played a role in the conclusion—and perhaps the beginning—of the BNA war.

In all three wars, the mercantile forces got most of what they wanted. The concessions made to the foes of banks were generally concessions of powers that bankers did not particularly want.

A. *The Bank of North America and the Dawn of Corporophobia*

Just as the BNA was the first bank, the 1785-87 rechartering of the BNA was the first great bank war. The new charter contained most of the standard provisions limiting bank powers: the old charter none. The BNA war presaged the great bank wars of the future, and most of the themes heard later were struck in the beginning. For these reasons, the BNA charter war is the key to understanding the political origins of American corporate law.

1. *Prelude to Combat.* An early skirmish was fought in 1782, when radical agrarian opponents of the BNA sought to restrict the bank's Pennsylvania charter by inserting clauses restricting the bank's life to seven years and prohibiting it from holding real estate.¹⁷⁵ The opponents lost.¹⁷⁶ Another, more significant, battle erupted in early 1784, when the Bank's sole position was challenged with an attempt to organize another bank, the "Bank of Pennsylvania."¹⁷⁷ This attempt involved established Quaker merchants and others, who had been largely excluded from the early bank group.¹⁷⁸ They seemed driven largely by a

175. ROBERT L. BRUNHOUSE, *THE COUNTER-REVOLUTION IN PENNSYLVANIA 1776-1790*, at 111-12 (1971).

176. *Id.*

177. *See id.* at 150-51; Rappaport, *supra* note 5, at 50-51.

178. Rappaport, *supra* note 5, at 50-51; *see also* Schwartz, *supra* note 105, at 417-21; Wilson, *supra* note 131, at 3-4. The fight over the BNA was but a battle in a larger war between radical "Constitutionalists" (including, but not limited to, agrarians) and conservative "Republicans." Most Constitutionalists were enemies of the BNA, and the BNA's fortunes in the Assembly followed those of

feeling that they were being excluded by favoritism from the BNA's discounts, as well as the healthy profits of the BNA in 1783.¹⁷⁹ After a legislative debate, this challenge was defeated by the expedient of offering cut-price BNA shares to the organizers of the new bank, and by inserting a by-law forbidding any shareholder to vote more than 20 shares of stock.¹⁸⁰

The real problems began in early 1785, triggered by a recession beginning in mid-1784. The non-mercantile interests of Pennsylvania had remembered fondly the colonial loan office and its relatively stable paper money, and did not like the new bank. The new bank, thanks to its limited capitalization, close management, short-term asset structure, and favoritism, would lend to fewer people than wanted loans, and probably fewer people than were creditworthy.¹⁸¹ Some of those favored with credit were unused to the mercantile bank's insistence on punctuality in repayment.¹⁸² On the liability side, the BNA did not issue nearly enough currency to go around.¹⁸³ Worse yet, specie drained overseas, paying for a flood of foreign imports, drawn by peace.¹⁸⁴ The BNA—consistently with the mercantilist economic theory still regnant—was blamed for facilitating this specie efflux.¹⁸⁵

When the recession came, the BNA stopped discounts, a prudent business decision, but politically costly. The BNA (and much the same, its directors) remained opposed to the paper currency, which the majority in the state Assembly demanded to ease the economic pain.¹⁸⁶ The BNA's opposition could be fatal to a state paper scheme. If the BNA refused to accept deposits denominated in state paper, it would be very difficult for the state paper to maintain its value, even though the state paper issue was conservative

the Republicans. Brunhouse's monograph places the bank battle in the perspective of the larger war. BRUNHOUSE, *supra* note 175, at 111-12. Rappaport's dissertation is the most detailed account of the bank battle. See Rappaport, *supra* note 5, at 50-68.

179. See BNA DEBATES AND PROCEEDINGS, *supra* note 15, at 14-15 (Robert Lollar).

180. Rappaport, *supra* note 5, at 50-68.

181. See Wilson, *supra* note 131, at 7-8.

182. See *id.*

183. See *id.*

184. See *id.* at 5.

185. See *id.*

186. See *id.* at 6.

in size.¹⁸⁷ After an election won by the radical party, it was time for the BNA's enemies to strike, and they struck hard.¹⁸⁸

On March 21, 1785, the Assembly received a petition from citizens of Chester County to repeal the BNA's charter.

Petitions from a considerable number of the inhabitants of *Chester* county were read, representing that the bank established at *Philadelphia* has fatal effects upon the community; that whilst men are enabled, by means of the bank, to receive near three times the rate of common interest, and at the same time receive their money at very short warning, whenever they have occasion for it, it will be impossible for the husbandman or mechanic to borrow on the former terms of legal interest and distant payments of the principal; that the best security will not enable the person to borrow: that experience clearly demonstrates the mischievous consequences of this institution to the fair trader; that impostors have been enabled to support themselves in a fictitious credit, by means of a temporary punctuality at the bank, until they have drawn in their honest neighbors to trust them with their property, or to pledge their credit as sureties, and have been finally involved in ruin and distress; that they have repeatedly seen the stopping of discounts at the bank operate on the trading part of the community, with a degree of violence scarcely inferior to that of a stagnation of the blood in the human body, hurrying the wretched merchant who hath debts to pay into the hands of griping usurers: that the directors of the bank may give such preference in trade, by advances of money to their particular favorites, as to destroy that equality which ought to prevail in a commercial country; that paper money has often proved beneficial to the state, but the bank forbids it, and the people must acquiesce: therefore, and in order to restore public confidence and private security, they pray that a bill may be brought in, and passed into a law for repealing the law for incorporating the bank.¹⁸⁹

The complaint was a political success. By March 28, a committee had studied the matter and reported that the

187. *See id.*

188. LEWIS, *supra* note 30, at 55-56; Rappaport, *supra* note 5, at 68-74.

189. LEWIS, *supra* note 30, at 56 n.1. This statement, extracted from the March 21, 1785 minutes of the Pennsylvania State Assembly, is also quoted in 2 PAINE, *supra* note 49, at 155-58. Its reverberations extended to at least 1833, when the petition and committee report were also reprinted as the appendix to GOUGE, *supra* note 15, at 197-99.

Bank's operations were inconsistent with public safety.¹⁹⁰ The committee's report added a few new items: the bank facilitated the balance of trade deficit, the BNA was independent of government, and that "the accumulation of enormous wealth in the hands of a society who claim perpetual duration, will necessarily produce a degree of influence and power, which can not be entrusted in the hands of any set of men whatsoever, without endangering the public safety."¹⁹¹

Most of the citizens' accusations were essentially of unfair treatment. They did not allege that the world would have been better off if the BNA had never existed, but rather alleged that the BNA selected its beneficiaries unfairly, and then treated them harshly by not extending accommodation.¹⁹² Several other of these accusations were foolish, such as the one that the BNA facilitated fraud, or the one confounding the BNA's (high) profits with the BNA's (unexceptional) interest rates, or the one accusing the BNA of raising market interest rates because its specie capital would otherwise have been employed in long-term low-interest loans. Another set of accusations concerned harsh treatment of BNA debtors.¹⁹³ The remainder of the accusations concerned the monetary policy of the BNA; accusations of economic merit. In contrast to the citizens, most of the committee's accusations were more overtly political, although their balance of trade accusations was economic.

The bill repealing the BNA's charter received its second reading on April 4, the same day the Assembly approved a loan office.¹⁹⁴ This office was organized as a public corporation, capitalized at 50,000 pounds, and authorized to make loans between 25 and 100 pounds, at 6%, geographically apportioned.¹⁹⁵ Its notes were not legal tender and its capitalization conservative. Although it provided an alternative currency and agricultural credit, this loan office did not ease the antipathy against the Bank of North America. Desperately, the BNA agreed to accept state paper money in a separate account from specie, and

190. LEWIS, *supra* note 30, at 60.

191. GOUGE, *supra* note 15, at 198.

192. LEWIS, *supra* note 30, at 58.

193. *Id.*

194. Wilson, *supra* note 131, at 9-12.

195. Stat. Pa. ch. 205, §§ 10-11 (1785).

hired James Wilson to defend it in front of the Assembly.¹⁹⁶ James Wilson's argument relied largely on the contractual sacredness of the charter, which precluded abrogation by the state that granted it.¹⁹⁷ This was a weak argument in 1785,¹⁹⁸ and it was not enough—the state charter was repealed on September 13, 1785.¹⁹⁹

The repeal was not fatal to the BNA. It got another charter in early 1786, by offering inducements to the tiny state of Delaware.²⁰⁰ (Delaware's history as a center of easy incorporation thus has a long lineage.) This charter, which had the same terms as the Pennsylvania and Continental charters, seemed designed to forestall stockholders, as much as protect the bank's business. A significant minority of stockholders felt insecure enough to want the Bank to liquidate, and the Delaware charter made this path legally more difficult. Indeed, these disaffected shareholders went so far as to obtain a unanimous shareholder's resolution to test the legal status of the bank in court.²⁰¹ If the bank lost such a test, the shareholders would have a right to demand return of their specie stock. The directors, led by Robert Morris, ignored this resolution, and continued to fight for a reissue of the old charter.²⁰² They eventually won, but not before the first great American banking debate, in March of 1786.

Before discussing the 1786 debate, let us return to the 1785 Chester citizens' complaint, which triggered the rechartering controversy.²⁰³ Politically successful as it was, it reads strangely. Although formulated as an economic

196. Wilson, *supra* note 131, at 9-12.

197. *See id.*

198. Pennsylvania had effectively revoked the charter of the College and Academy of Philadelphia in 1779. BRUNHOUSE, *supra* note 175, at 78. Perhaps the BNA experience made Pennsylvania repent its treatment of the old College: the old faculty was restored in 1789, with apologies. *In re St. Mary's Church*, 7 Serg. & Rawle 517, 565 (Pa. 1822). But the school still remains known by its upstart name: the University of Pennsylvania.

199. *See* HAMMOND, *supra* note 7, at 54.

200. LEWIS, *supra* note 30, at 68-69.

201. Letter from Jeremiah Wadsworth to Alexander Hamilton (Jan. 9, 1786), in 3 HAMILTON PAPERS, *supra* note 17, at 645-46.

202. *See* Letter by Alexander Hamilton on Behalf of Bank Shareholders to Jeremiah Wadsworth (Jan. 3, 1786), in 3 HAMILTON PAPERS, *supra* note 17, at 642-44; Letter from John Chaloner to Alexander Hamilton (Apr. 15, 1786), in 3 HAMILTON PAPERS, *supra* note 17, at 660; *see* Rappaport, *supra* note 5, at 149-53.

203. *See supra* text accompanying notes 188-90.

complaint, it made far better political than economic sense. The chief claim, unfair treatment, is more of a political than an economic complaint. **The other claims of economic damage were mostly weak, and generally translated to the BNA's insistence on punctuality.** Even the best of these economic claims—regarding the BNA's monetary policy—was largely political. Monetary policy has always carried strong political overtones in United States history.²⁰⁴ The subsequent committee report underscored the political nature of the complaint.

Why did this complaint have such a powerful impact? Two texts are particularly instructive. One, from the committee report: "the accumulation of enormous wealth in the hands of a society who claim perpetual duration will necessarily produce a degree of influence and power which can not be entrusted in the hands of any set of men whatsoever without endangering the public safety."²⁰⁵ The other, from the Chester citizens' complaint: "that the directors of the bank may give such preference in trade, by advances in money to their particular favorites, as to destroy that equality which ought to prevail in a commercial country."²⁰⁶ These fears were attached to banks, but not exclusively to banks. These were fears of corporations in general, and business corporations in particular. These fears were not limited to the Bank of North America, or to banking corporations, or to the 1780s.

2. *Corporophobia.* The first complaint, about corporations and political corruption, was very clearly expressed about ten years later. The New York Council of Revision, objecting to a March 8, 1795 scheme for incorporating a society of tradesmen and mechanics, wrote:

Because all incorporations imply a privilege given to one order of citizens which others do not enjoy, and are so far destructive of

204. To a large extent, this is the theme of Bray Hammond's book. See HAMMOND, *supra* note 7. But Jackson's Bank War was not the only time that monetary policy has stood as proxy for a congeries of social issues. The silver fight of the 1870s-1890s was another famous example. See RICHARD HOFSTADTER, *FREE SILVER AND THE MIND OF "COIN" HARVEY*, reprinted in *THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* 238 (Alfred E. Knopf ed., 1965).

205. See *supra* text accompanying note 191.

206. See *supra* text accompanying note 192.

that principle of equal liberty which should subsist in every community; and though respect for ancient rights induced the framers of the Constitution to tolerate those that then existed, nothing but the most evident public utility can justify a further extension of them. . . .

. . . [E]ither the mechanics will influence the magistrates, and the extensive powers of the corporation . . . be made at some future day instruments of monopoly and oppression; or, which is more probable, the [government] will obtain a controlling power over the corporation of mechanics, and thus add to the extensive influence which [the government] already enjoy[s] . . . for the Governor and Senators being now elected either by the State at large, or extensive districts in which there will on many occasions be a variety of sentiments, it must be obvious that a comparatively small body of citizens uniting in one general object may, by their weight, make the lightest scale preponderate.

Because the reason assigned in the preamble of this bill may equally operate for the incorporation not only of the mechanics, but of every other order of men in every county, whereby the State, instead of being a community of free citizens pursuing the public interest, may become a community of corporations influenced by partial views, and perhaps in a little time (under the direction of artful men) composing an aristocracy destructive to the Constitution and independence of the State.²⁰⁷

In contemporary terms, the Council of Revisions had made an effective critique of the corporatism inherent in corporations—or in this particular case, trade unions. The fear of concentrated corporate power suborning government is as recent as today's headlines,²⁰⁸ and as old as the BNA.²⁰⁹ The **corporophobes** were not speaking hypothetically. 1786—the same year that the BNA fought for its charter—was the year the House of Commons began impeachment

207. STREET, *supra* note 107, at 261-62.

208. See RALPH NADER, MARK GREEN, & JOEL SELIGMAN, *TAMING THE GIANT CORPORATION* (1976).

209. See JOHN TAYLOR, *AN INQUIRY INTO THE PRINCIPLES AND POLICY OF THE GOVERNMENT OF THE UNITED STATES* 272-76 (Loren Baritz ed., Bobbs-Merrill Co. 1969); BNA DEBATES AND PROCEEDINGS, *supra* note 15, at 60, 65 (William Findley). The Council of Revision's converse fear—that a government would add to its power through entanglement with intermediating institutions—is potent in contemporary Establishment Clause jurisprudence, and is at the core of Milovan Djilas's socialist critique of communism. MILOVAN DJILAS, *THE NEW CLASS: AN ANALYSIS OF THE COMMUNIST SYSTEM* (1957). However, few today would argue mere state recognition of intermediating institutions is tantamount to state entanglement.

proceedings against Warren Hastings for abusing the power of the East India Company.²¹⁰ A few years later, in 1795, the BNA and BUS were accused of forcing Philadelphia merchants to support the Jay treaty by threatening to withhold discounts.²¹¹ Shortly thereafter, the Bank of the Manhattan Company was credited with engineering Jefferson's victory in the 1800 Presidential election.²¹²

But this fear of political corruption through concentrated interest, although well articulated, was less significant than the other fear of the Chester citizens: loss of "that equality which ought to prevail in a commercial country."²¹³ This complaint reads simply enough: the BNA was accused of playing favorites, by favoring specific merchants and by refusing to satisfy the agricultural demand for credit. The BNA's proponents fudged the first charge, but could not deny the second charge.

But the BNA's opponents were not too concerned about selective extension of credit, *per se*. The opponents of the bank were proponents of a loan office that had only 50,000 pounds of credit to extend, and was supposed to extend this credit in tranches of 25 to 100 pounds.²¹⁴ This permitted only between 500 and 2000 debtors statewide. Because credit was allocated by county,²¹⁵ there could be as few as thirteen debtors in, say, Westmoreland County, which was allocated only 1270 pounds.²¹⁶ But the rather detailed charter of the loan office prescribed no procedure whereby this very scarce credit would be allocated!²¹⁷ Fairness was apparently not important if the connection with the state were sufficiently intimate. Inequality, then, was not solely a matter of favoritism in extension of credit, although favoritism was an issue. By "equality," the BNA's opponents

210. See P.J. MARSHALL, *THE IMPEACHMENT OF WARREN HASTINGS* 22, 39-42 (1965).

211. See Letter from Pierce Butler to James Madison (Aug. 21, 1795), in 16 *THE PAPERS OF JAMES MADISON* 53, 54 (J.C.A. Stagg et al. eds., 1990) [hereinafter *MADISON PAPERS*].

212. HAMMOND, *supra* note 7, at 160.

213. LEWIS, *supra* note 30, at 56 n.1.

214. Stat. Pa. ch. 205, §§ 10 (1785).

215. *Id.* § 11.

216. *Id.*

217. See *id.* §§ 1-22.

meant the political equality of citizens at least as much as they meant equal access to credit.²¹⁸

The real problem was the intermediate statal connection of the bank. The opponents of the BNA did not seem averse to private mercantile banking;²¹⁹ the problem was the state charter. Unchartered private banking was not deemed a threat to equality. The state loan office could grant credit to a subset of the creditworthy with neither due process nor obloquy. Inequality became only problematic with the intermediate statal nexus of the BNA. Equality is threatened when the state delegates any of its powers to less than everybody, as when it forms a political body that is subordinate to, but independent of the state: the *imperium in imperio*. (This concern persists today, and is particularly apparent in discussions of the private regulation of the Internet.²²⁰) Such an intermediating

218. BNA DEBATES AND PROCEEDINGS, *supra* note 15, at 65-67, 130 (William Findley); *id.* at 14-15, 77 (Robert Lollar). The more frankly political committee report has it as: even if Bank management were "confined to the hands of Americans, it would be totally destructive of that equality which ought to prevail in a republic." 2 PAINE, *supra* note 49, at 157 n.*. Robert Morris's sarcastic summary of William Findley's argument says it all: "Equality is the darling of our government—and the constitution says government is instituted to preserve equal privileges, &c.—the bank, he says, cannot be common amongst the citizens, and is therefore contrary to the constitution." BNA DEBATES AND PROCEEDINGS, *supra* note 15, at 88.

219. *See, e.g.*, BNA DEBATES AND PROCEEDINGS, *supra* note 15, at 114 (Robert Whitehill), 74 (William Findley). The opponents of the BNA did not view free chartering as an alternative. Indeed, the enemies of corporations were often as opposed to free chartering as they were to limited chartering. *See, e.g.*, HURST, *supra* note 94, at 31-38; BNA DEBATES AND PROCEEDINGS, *supra* note 15, at 114 (Robert Whitehill); TAYLOR, *supra* note 209, at 276; GOUGE, *supra* note 15, at 191. Some of this opposition to free chartering continued during and after the triumph of the free chartering movement, due in large part to fears of independent artisans at being proletarianized by incorporated factories. *See, e.g.*, Note, *Incorporating the Republic: The Corporation in Antebellum Political Culture*, 102 HARV. L. REV. 1883, 1898 (1989). This particular strand of corporophobia did not become particularly relevant to banks until much later, because the nearly universal charter restriction on engaging in commerce assured that banks would not (directly) disrupt established means of production.

220. Much of this discomfort has focused on private regulation of the Internet by Internet architecture: so-called "code." *See* LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999). The Internet Corporation for Assigned Names and Numbers ("ICANN")—organized as a nonprofit organization that determines Internet domain name policy—is another area of concern. *See, e.g.*, A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17 (2000). Both topics raise

institution would seem particularly dangerous, in an era when the predominant intermediating institutions—the church and feudal lords—were identified with the aristocratic old order supplanted by the Revolution.

Hence the concern with unfairness in credit allocation by the bank, but not by individuals or the state. Christopher Stone has argued that the public sector is expected to display virtue; the private sector is merely expected to obey the law.²²¹ The creators of the BNA loan office thought that this virtue was easy: the state was controlled by the people, and hence virtuous. But the people did not control the Bank of North America. As chartered collective economic activity, it was public, but with no guarantees of virtue. Its charter did not sufficiently regulate its activities, and compliance with the commercial law of the day was simply insufficient.

It is not surprising that many opponents of the BNA had a difficult time clearly articulating this grievance, or other equality-linked grievances. The opposition to corporations carried—and still carries—a lot of baggage, and much of it has not been particularly logical.²²² Even Justice Brandeis used darkling language: “There was a sense of some insidious menace inherent in large

the same old question in a new context: is great “private” power inherently public? Whatever one’s normative take on the issue, contemporary American federal constitutional law has a clear answer: No. Paul Schiff Berman, *Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to “Private” Regulation*, 71 U. COLO. L. REV. 1263 (2000); Joseph H. Sommer, *Against Cyberlaw*, 15 BERKELEY TECH. L.J. 1145, 1194-1201 (2000). The great power and intermediate status of corporations was also a significant issue at the turn of the previous century, resolved temporarily by the organicist conception of the corporation. Gregory A. Mark, Comment, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1447 & n.18, 1469-73 (1987).

221. See, e.g., Christopher D. Stone, *Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?*, 130 U. PA. L. REV. 1441, 1494-1506 (1982); Gerald E. Frug, *The City As a Legal Concept*, 93 HARV. L. REV. 1057, 1131 (1980).

222. HURST, *supra* note 73, at 30-38. For examples, see *infra* text accompanying note 235 (discussing agrarian argument that corporate profits were akin to tax); NADER ET AL., *supra* note 208, at 17-32; Gordon S. Wood, *Conspiracy and the Paranoid Style: Causality and Deceit in the Eighteenth Century*, 39 WM. & MARY Q. 401 (1982); text accompanying notes 250-53 (discussing Jefferson’s corporophobia). On the other hand, it is not difficult to find clear corporophobic thought apart from Findley’s. See, e.g., BNA DEBATES AND PROCEEDINGS, *supra* note 15, at 65 (William Findley); STREET, *supra* note 107, at 261-62.

aggregations of capital, particularly when held by corporations."²²³ This sense of menace was seldom carefully articulated by the foes of corporations, and seemed beyond the ken of the friends of corporations, such as Hamilton. "Imagination appears to have been unusually busy concerning it. An incorporation seems to have been regarded as some great independent substantive thing; as a political engine, and of peculiar magnitude and moment; whereas it is truly to be considered as a quality, capacity, or mean to an end."²²⁴

Fortunately, the March 1786 legislative debate on rechartering the BNA (which resulted in a temporary victory for the foes of the BNA) involved a noteworthy foe of corporations—an articulate, precise, and radical thinker, and a political heavyweight, to boot.²²⁵ Although William Findley became a friend of the Bank of the United States in the nineteenth century,²²⁶ his 1786 attack on the business corporation remains unrivalled for its clarity and precision:

Enormous wealth, possessed by individuals, has always had its influence and danger in free states. Thus, even in Rome, where patriotism seems to have pervaded every mind, and all her measures to have been conducted with republican vigour, yet even

223. *Liggett v. Lee*, 288 U.S. 517, 549 (1933) (Brandeis, J., dissenting).

224. HISTORY OF THE BUS, *supra* note 2, at 97; cf. BNA DEBATES AND PROCEEDINGS, *supra* note 15, at 57 (Robert Morris, puzzled by the word "equality"). As Maier has noted, many historians share this puzzlement. Maier, *supra* note 89, at 66 n.43.

225. See, e.g., BNA DEBATES AND PROCEEDINGS, *supra* note 15, at 86 (Robert Morris), 100 (Thomas FitzSimons). Findley's historical importance goes well beyond banking. For example, he invented the congressional committee system. In the BNA debate alone he was credited by Gordon Wood with the first legitimization of interest group politics, an act which Professor Wood considers "maybe the crucial moment" in the history of American politics. WOOD, *supra* note 50, at 256-58. Wood viewed the debate as a struggle between Morris and Findley, with Findley attacking the hypocritical contrast between Morris's disinterested rhetoric and his enormous personal stake in the BNA. Gordon Wood, *Interests and Disinterestedness in the Making of the Constitution*, in BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 69, 93-100 (Beeman et al. eds., Chapel Hill 1987). For a biography of Findley's earlier years, see JOHN CALDWELL, WILLIAM FINDLEY FROM WEST OF THE MOUNTAINS: A POLITICIAN IN PENNSYLVANIA, 1783-1791 (2000).

226. HAMMOND, *supra* note 7, at 119 n.* ("William Findley . . . had been prominent in the attack on the Bank of North America, but twenty-five years later, in Congress, he was equally prominent in defense of the Bank of the United States.").

there, the patricians always had their clients—their dependents—by the assistance of whom they often convulsed the counsels, and distracted the operations of the state, and finally overturned the government itself. But the Romans had no chartered institutions for the sole purposes of gain. They chartered no banks.

Wealth in many hands operates as many checks: for in numberless instances, one wealthy man has a control over another. Every man in the disposal of his own wealth, will act upon his own principles. His virtue, his honour, his sympathy, and generosity, will influence his disposals and designs; and he is in a state of personal responsibility. But when such an unlimited institution is erected with such a capital, for the sole purpose of increasing wealth, it must operate according to its principle; and being in the hands of many, having only one point in view, and being put in trust, the personal responsibility arising from the principles of honour, generosity, &c. can have no place. The special temper of the institution pervades all its operations: and thus, like a snow ball perpetually rolled, it must continually increase its dimensions and influence.

This institution having no principle but that of avarice, which dries and shrivels up all the manly—all the generous feelings of the human soul, will never be varied in its object: and, if continued, will accomplish its end, viz. to engross all the wealth, power and influence of the state.

The human soul is affected by wealth, in almost all its faculties. It is affected by its present interest, by its expectations, and by its fears. And must not, therefore, every thinking man see what advantage this institution has on the human feelings, above that of wealth held by many individuals? If our wealth is less equal than our kind of government seems to require—and if agrarian [i.e., redistributionist] laws are unjust in our present situation, how absurd must it be for government to lend its special aid in so partial a manner, to wealth, to give it that additional force and spring, which it must derive from an almost unlimited charter? Can any gentleman avoid seeing this to be eventually and effectually overturning our government? Democracy must fall before it. Wealth is its foundation, and gain its object and design.²²⁷

Findley's speech rests on two points. First, the fiduciary principle implicit in the corporation is inhuman, and socially destructive.²²⁸ *Homo sapiens* cannot be reduced to

227. BNA DEBATES AND PROCEEDINGS, *supra* note 15, at 65-66.

228. The Jacksonian editor of the Trenton *Emporium and True American* captured the same idea in 1835. "To grasp all, and never voluntarily disgorge,

homo economicus and remain fully human. Society can tolerate businessmen acting as men pursuing wealth, but cannot tolerate depersonalized rational profit-maximizers. The business of America is not business alone. The Revolutionary generation was obsessed with the ties that bind society,²²⁹ and Findley was terrified of powerful bonds less than human, at least if these bonds were not governmental and legal. Abolishing the quasi-feudal relations of rich and poor individuals may have been an object of the American Revolution, but even these relationships were better than the impersonal relationship between an individual and a fiduciary. What could be worse than vassalage to a dead hand? Vassalage to an invisible hand?

Implicit in this is a sort of egalitarianism. Findley wanted a polity of people and personal relations embedded in one state, not a mixed polity of individual people and embodied but impersonal economic interests, organized as statelets. Worst of all would be a polity of organized parastatal economic interests alone, the corporatist polity dreaded a decade later by the New York Council of Revisions:

If the legislature may mortgage, or, in other words, charter away portions of either the privileges or powers of the state—if they may incorporate bodies for the sole purpose of gain, with the power of making bye-laws, and of enjoying the emolument of privilege, profit, influence, or power,—and cannot disannul their own deed, and restore to the citizens their right of equal protection, power, privilege, and influence,—the consequence is, that some foolish and wanton assembly may parcel out the commonwealth into little aristocracies,²³⁰ and so overturn the nature of our government without remedy.

are incident to [the] very nature [of corporations].” Corporate agents were dehumanized by their agency: “with the nobler feelings and sentiments of men, they have, in their capacity as agents, nothing to do.” *Emporium and True American*, July 19, 1835, cited in JOHN W. CADMAN, *THE CORPORATION IN NEW JERSEY: BUSINESS AND POLITICS* 78 (1949).

229. See WOOD, *supra* note 50, at 215-18.

230. BNA DEBATES AND PROCEEDINGS, *supra* note 15, at 65 (William Findley). This metaphor could be inverted. A corporation could be a “minor republic,” just as easily as it could be a “little aristocracy.” WOOD, *supra* note 50, at 337 (quoting Samuel Blodget); Maier, *supra* note 89, at 62. The taxonomy of corporations was blurry in the 1780s, and the delegated powers of municipal corporations which we now consider indubitably “statal” (e.g. taxation) were not

There may be nothing wrong with the pursuit of wealth or a reasonable amount of commerce,²³¹ but it must be a democratic commerce of equal individuals, who—unlike corporations—neither enjoy delegated statal powers, nor can be reduced as fiduciaries to their commercial role.

Second, Findley subscribed to a more straightforward egalitarianism. He insisted that inequality of wealth, although perhaps unavoidable, subverts the political equality of citizens.²³² The effects of inequality are amplified by increasing concentrations of wealth. Both inequality and concentration are caused, in part, by corporations. Some inequality might be unavoidable, but the inequality resulting from corporations can be avoided with little cost. Redistributionist laws may be unjust,²³³ as may interference with the associational rights of merchants, but it is easy to just say no to corporate charters.

Any state-sanctioned device for agglomerating wealth would be open to charges of soullessness and fomenting inequality. But there was one acceptable form of collective economic action—the state itself.²³⁴ All of the BNA opponents were well disposed towards the state loan office—indeed, their opposition to the BNA was largely predicated on the BNA's antipathy to state money. A common agrarian argument for loan offices was that the profit accrued to the state—like a tax—whereas the profit of banks accrued to its shareholders. Shareholders thus had arrogated the power to tax!²³⁵ The logical lacuna of this

readily distinguished from the other powers granted to business corporations. HENDRIK HARTOG, *PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870*, at 86 (1983); HORWITZ, *supra* note 89, at 112.

231. See BNA DEBATES AND PROCEEDINGS, *supra* note 15, at 128 (William Findley); TAYLOR, *supra* note 209, at 282. But maybe too much property is a problem. In a later debate, Findley blamed England's lack of republican virtue on its commerce, and contrasted England with the republican, if uncommercial, Switzerland. Rappaport, *supra* note 5, at 220-21.

232. See also BNA DEBATES AND PROCEEDINGS, *supra* note 15, at 126 (William Findley).

233. BNA DEBATES AND PROCEEDINGS, *supra* note 15, at 122 (William Findley); TAYLOR, *supra* note 209, at 285-86, 288-89 (love of property is justly at root of society).

234. The central economic role of the state is stressed in FRANK BOURGIN, *THE GREAT CHALLENGE: THE MYTH OF LAISSEZ-FAIRE IN THE EARLY REPUBLIC* (1989).

235. BNA DEBATES AND PROCEEDINGS, *supra* note 15, at 24 (John Smilie); TAYLOR, *supra* note 209, at 259-69.

argument is quite instructive. Agrarians did not assert that unincorporated individuals' profits are taxes, nor the profits of partnerships. Nor did they distinguish any relevant differences between corporate and partnership profits, that would make one a tax and the other a legitimate profit. The intermediate statal connection was enough.

But the 1780s business corporation was even more offensive, if that seems possible. The corporate device—if not its function—smacked of medieval times, of feudalism and church. In England, business corporations were fairly insignificant (except for the Bank of England),²³⁶ and corporations had been associated with ecclesiastical organization. The revolutionary ex-colonists had not forgotten this.

After a patient trial of charter privilege and monopoly for three thousand years, almost at the moment they are rejected as poison to civil and religious liberty, we are told that they are wholesome aliment for commerce. . . .

. . . It is not a new experiment, therefore, which we are trying. It is only charter and state instead of church and state.²³⁷

The Revolution created a new polity of individual, equal, rights-bearing citizens. The very idea of a corporation seemed reactionary, standing for the old polity of powerful intermediating organizations consisting this time of lords of stock, rather than lords of land or church. A citizen could no more hope to be equal to a stockholder than

236. Stewart Kyd wrote the first corporation law treatise in 1793. This English treatise barely mentioned business corporations at all, classifying them as a subspecies of civil corporations, which in turn was a member of the genus "lay corporation." The other subspecies of civil corporation contemplated by Kyd was the eleemosynary corporation. Lay corporations, in turn, excluded ecclesiastical corporations. 1 KYD, *supra* note 134, at 28-29. The substantive law of all of these corporations was remarkably similar. Samuel Williston, *History of the Law of Business Corporations Before 1800*, 2 HARV. L. REV. 105, 105-06 (1888).

237. TAYLOR, *supra* note 209, at 281-82; *see also* HISTORY OF THE BUS, *supra* note 2, at 55 ("We have . . . perpetual debt; I hope we shall not make a perpetual corporation. What was it drove our forefathers to this country? Was it not the ecclesiastical corporations, and perpetual monopolies of England and Scotland?") (Rep. James Jackson of Georgia, during the BUS chartering debate of 1791); BNA DEBATES AND PROCEEDINGS, *supra* note 15, at 65, 123 (William Findley, casting a feudalistic tone on corporations), 22 (John Smilie, making a similar argument).

he could hope to be equal to a lord or bishop. This was true regardless of the ready transferability of stock. "[N]one but men of wealth have money to be bankers."²³⁸ And beside, an intermediating institution is more than the sum of its individual shareholders.

The feudalistic air of the corporation was forgotten after the Jacksonian era, although most of the other strands of corporophobia remain intact today, at least for large corporations.²³⁹ But it is worth noting that the late eighteenth-century corporation was a politically obtuse device for agglomerating capital. Given the hieratic aroma of the corporation, it is perhaps surprising that it succeeded in competition with other forms, such as the joint-stock company, business trust or limited partnership. It is even more surprising that it succeeded in republican America well before aristocratic England. The unique advantages of a corporation over other devices—such as its permanent governance relations, quasi-monopoly status and perhaps limited liability—must have been strong to outweigh the political disadvantages of the corporate form. But early America did not have great concentrations of wealth, and perhaps needed these advantages more than England.

But apart from feudalism, Findley still speaks today, and the corporation still remains a live issue. Findley's corporophobia is still with us, although the contemporary animus is not against corporations as such, but against large corporations.²⁴⁰ Justice Brandeis touched on this

238. BNA DEBATES AND PROCEEDINGS, *supra* note 15, at 74 (William Findley).

239. See, e.g., NADER ET AL., *supra* note 208, at 7-9.

240. Contemporary corporophobia contains several strands not contemplated in the Revolutionary era. For example, eighteenth-century corporophobes were not particularly concerned about the relationship between large businesses and their employees. An urban proletariat was not well developed, and the agrarian opponents of corporations were not particularly concerned with the plight of urban workers. Furthermore, the large banks employed very few people. See, e.g., *supra* text accompanying note 23. Although the agrarian language remained, the Jacksonian opposition to corporations had developed a far more proletarian flavor. See HAMMOND, *supra* note 7, at 493 (discussing the anti-bank stance of the urban Equal Rights party, also known as the Loco Focos); *Incorporating the Republic*, *supra* note 219, at 1898-1902. Protection of small business was a special case. This was a concern of both corporophobes and corporophiles in the eighteenth and early nineteenth century, and therefore effectively checked. The chartering policy of the time kept the nascent corporations from competing with established lines of business. See *supra* note 117 and accompanying text.

animus in 1933, when he wrote his famous dissent in *Liggett v. Lee*. Ralph Nader touches on many of the same issues, and adds new specters, including: pollution, discrimination, employee anomie, product safety, and power over taste formation.²⁴¹ But neither of these two lawyers has been Findley's best twentieth-century voice. Nader and Brandeis²⁴² bound themselves by Hamiltonian utilitarian language, which does not lend itself well to corporophobia. Frank Capra's masterpiece, *It's a Wonderful Life*, is an eerily close reflection of Findley's speech. Not only did Capra seem to share Findley's corporophobia; **the subject of this film was banking.**

This film is a tale of two individuals, identified with two institutions: George Bailey, head of the Bailey Bros. Building & Loan, and Henry Potter, identified with a commercial bank. George Bailey himself was a good family man, a man of "virtue, honor, sympathy and generosity," who felt a sense of "personal responsibility" for the depositors and mortgagees of Bedford Falls. Economic relations were personal. To stop a run on his bank, George Bailey spoke to his panicky depositors, unpacking the balance sheet of his bank into a set of helping relations between individuals. The bank run ceased when Bailey had repersonalized the relationships, going so far as to help depositors with his own honeymoon money. When George Bailey gave a mortgage, he was also giving a gift, a gift that gently bound the mortgagee in a chain of community. "Our laws and habits countenance long credits, and afford slow methods for recovering debts."²⁴³

241. NADER ET AL., *supra* note 208, at 17-32. It may be worth noting that Findley's bill of particulars was far more rationally constructed than Nader's. Nader views small corporations far more kindly than large corporations, even though small corporations seem no less likely—per unit capitalization—to pollute, discriminate, or produce unsafe products than large corporations. (Indeed, small corporations are *permitted* to discriminate! 42 U.S.C. § 2000e(b) (1994)). Nader does not appear to place disproportionate emphasis on employee anomie or the power of large corporations over taste formation, both of which may be related to corporate size, rather than mere corporateness.

242. This reference to Brandeis is not to his scholarly opinion in *Liggett v. Lee*; it is to his anti-bank polemic. See LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY* (Stokes 1914).

243. BNA DEBATES AND PROCEEDINGS, *supra* note 15, at 65 (William Findley). The deposits at the Bailey Brothers Building and Loan were not demand deposits, but were rather on sixty-day call. Henry Potter generated the run on Bailey Brothers by offering ready cash for assignment of the deposits, at

But old Mr. Potter had no friends, no family, no background. Mr. Potter was not human; he existed in no social context but fiduciary to his investment portfolio. He had “no principle but that of avarice, which dries and shrivels up all the manly—all the generous feelings of the human soul.”²⁴⁴ Mr. Potter being an inhuman fiduciary, “the personal responsibility arising from the principles of honour, generosity, &c. can have no place.”²⁴⁵ Mr. Potter, in short, was a walking corporation—who owned a bank.

Findley’s nightmare stopped with the displacement of the State by the corporation. He could articulate the corporation’s challenge to the State, but could at best only sense the corporation’s threat to a community of individuals. Capra went the next step, depicting in detail the sort of society that would emerge when the corporation was triumphant over the individual. George Bailey’s angel had the power to create a world without George Baileys, dominated by the impersonal economics of Mr. Potter. It was a world without social glue, of pure market relations. It was a world of individual vice and moral rot, a world of gin mills and broken families, with no responsibility outside of the inhuman fiduciary relationship to the corporation. The individual, presumably without the aid of an independent State (Bedford Falls was renamed “Pottersville”), would decay in the soulless society wrought by the impersonal corporation.

Findley and Capra appear to be part of a continuous tradition. Consider William Leggett, the Jacksonian journalist:

We are no enemy to a free and natural system of credit between man and man, the result of mutual confidence, the exercise of one of the kindest attributes of our nature, without which the frame of society would fall into individual fragments, and be utterly destroyed. But we are an enemy to a monopoly [i.e., bank] credit system Your monopoly credit system fosters the city, but it ruins the country; it builds up lordly mansions for the keen-eyed sons of trade, but it leaves to irremediable dilapidation the cabins of the farmer and mechanic; it encourages luxury and profusion

a 50% discount. In Frank Capra’s world, punctuality seems to be a root of evil. *IT’S A WONDERFUL LIFE* (RKO Pictures 1946).

244. BNA DEBATES AND PROCEEDINGS, *supra* note 15, at 66 (William Findley).

245. *Id.*

among the few, and spreads penury and vice among the many. It is a demoralizing system. It makes the acquisition of sudden wealth the prime object of general effort, and blunts the publick moral sense as to the means of gain.²⁴⁶

There are doubtless considerable differences between 1780s, Jacksonian and contemporary corporophobia. However, the similarities are striking.

Corporophobia was amplified by the monopolistic nature of early banking. It is fair to say that monopolies were almost universally disliked in the 1780s. The problem was in defining what a monopoly was. This term clearly had two senses, a narrow legal sense and a broader political one. The legal sense was clearly stated by Alexander Hamilton: "monopoly implies a *legal impediment* to the carrying on the trade by other than to whom it is granted."²⁴⁷ Such state-granted monopolies were clearly offensive to any meaningful sense of equality.

But—except for the brief period between 1782 and 1783—banks did not enjoy such bald monopoly powers in their charters.²⁴⁸ But there was another sense of monopoly, which did apply to the early banks. As usual, William Findley said it best:

The institution is itself a monopoly—being incorporated a great trading company—and having a right to turn ten millions of dollars into trade, if the president and directors please—or to lay out that amount upon land. So, by taking advantage of a scarcity of money, which they have it so much in their power to occasion, they may become sole lords of the soil. If they may monopolize

246. WILLIAM LEGGETT, *DEMOCRATICK EDITORIALS: ESSAYS IN JACKSONIAN POLITICAL ECONOMY 173* (Lawrence H. White ed., 1984).

247. *HISTORY OF THE BUS*, *supra* note 2, at 101 (Hamilton's opinion to the President on the constitutionality of the First BUS). In a mild historical irony, the meaning of illegal monopoly has been reversed with time. In the 1780s, monopoly implied state action. Contemporary antitrust laws regulate the independent actions of corporations, but absolve most state actions of monopolistic stigma.

248. Formal monopoly power first came to banking in 1799, when the first "restraining act" was adopted. The restraining acts forbade the emission of paper money by anybody but a chartered bank. However, they are not relevant to this discussion, because they were not present before 1799, and not common until around 1814. See *infra* note 338 and accompanying text. The charters of the Banks of the United States did not permit federal charter of another bank, but state competition was presumed. 1 *BANKING & CURRENCY*, *supra* note 63, at 307-14 (First BUS), 460-76 (Second BUS).

trade—if they may monopolize the soil—why not the government too? Doubtless they may.

I do not say whether or no the bank is a monopoly in the strict legal sense of the word. This is not to my purpose. But I say that it is, in its nature and principles, in the common popular sense,²⁴⁹ a monopoly: and being so in its nature, it must be so in its effects.

The 1780s banks were indeed monopolies, in Findley's sense, if not Hamilton's. The fear of "turn[ing] ten millions of dollars into trade" was real even among the merchants—real enough to engender by-laws and subsequently charter restrictions. Formally, the charter was far short of a legal bar on competition. But as a practical bar on effective competition, it was frightening enough.

Findley's clear thought was unusual among his contemporary corporophobes. Indeed, unvarnished corporophobia could seem nearly paranoid. The paranoia may have been further fuelled by the mysterious nature of banking. Not only was banking economically ill understood, but its day-to-day operations were shrouded in secrecy. The secretive collective decisionmaking of early banks was sufficiently conspiratorial to bring out a paranoid streak in their critics.²⁵⁰

Corporophobia could dull the brain of no less than Thomas Jefferson, as evidenced in his 1791 report to President Washington on the Constitutionality of the First Bank of the United States. Most of the other opponents of the measure, including Madison and Edmund Randolph, made perfectly sound legal arguments predicated on the limited scope of implied powers in the Constitution. Not so Jefferson. His report began with the Corporation, not the Constitution:

The bill for establishing a national bank undertakes, among other things,

1. To form the subscribers into a corporation.

249. BNA DEBATES AND PROCEEDINGS, *supra* note 15, at 69 (William Findley); *see also id.* at 125 (William Findley).

250. *See id.* at 73 (William Findley); *see also* GRAS, *supra* note 19, at 14; Hamilton, Report on a National Bank, *supra* note 2 at 27 (also excerpted *supra* text accompanying note 171). Eighteenth-century Americans were very sensitive to conspiracies, real or imagined. *See generally* Wood, *supra* note 222. On the collective decisionmaking by early banks' directors, *see* 1 REDLICH, *supra* note 18, at 17-20, 55-64.

2. To enable them, in their corporate capacities, to receive grants of land; and so far is against the laws of *mortmain*.

3. To make *alien* subscribers capable of holding lands; and so far is against the laws of *alienage*.

4. To transmit these lands, on the death of a proprietor, to a certain line of successors; and so far changes the course of *descents*.

5. To put the lands out of the reach of forfeiture or escheat; and so far is against the laws of *forfeiture and escheat*.

6. To transmit personal chattels to successors, in a certain line; and so far is against the laws of *distribution*.

7. To give them the sole and exclusive right of banking under the national authority; and so far is against the law of *monopoly*.

8. To communicate to them a power to make laws paramount to the laws of the States; for so they must be construed, to protect the institution from the control of the State Legislatures; and so, probably, they will be construed.²⁵¹

Jefferson then dropped his attack on corporations and jumped to a more conventional Constitutional argument from the limited powers of Congress, similar to Randolph's and Madison's. Near the end of his opinion he finally referred back to the preface, stating that it was outside the intent of the Constitution that "Congress should be authorized to break down the most ancient and fundamental laws of the several States, such as those against mortmain, the laws against alienage, the rules of descent, the acts of distribution, the laws of escheat and forfeiture, [and] the laws of monopoly[.]"²⁵² This was a very weak legal move by the standards of its time. The legal issue was Congressional authority; not State prerogative. **The Supremacy Clause clearly contemplated that valid Federal law would trump contrary state law.** Furthermore, the tradition of Parliamentary sovereignty over common law was very strong in the late eighteenth century.²⁵³

251. HISTORY OF THE BUS, *supra* note 2, at 91 (Thomas Jefferson) (footnote omitted); *see also id.* at 86-89 (Attorney General Edmund Randolph's anti-bank opinion on constitutionality); *id.* at 40-44, 82-84 (Madison's legal objections in his House of Representatives speeches).

252. *Id.* at 93 (Thomas Jefferson).

253. THE FEDERALIST NO. 44, at 306 (J. Cooke ed., 1961) (James Madison) (on Supremacy Clause); *see also* H. Jefferson Powell, *The Original*

Jefferson's opinion was not only bad law, it was bad rhetoric. No good advocate (and Jefferson was good enough to have written the Declaration of Independence) would lead off with a fragment of an unconventional argument, switch to a strong argument, and finish up with the rest of the unconventional argument. Jefferson was arguing from his heart, not his head.

3. *Results of Combat.* Although the 1786 debate ended in defeat of the pro-bank faction's proposal to restore the old charter, there were some signs of compromise. Paine, in his pro-bank polemic, agreed with the anti-bank force's objections to the unlimited charter of the bank, had no objection to a restriction in land holding, and approved (albeit without much reasoning) the Bank of England's restriction on trading activities.²⁵⁴ But even the radicals hinted that there might have been room for compromise. Smiley, a key bank opponent, hinted that the problem with the bank may be more in its high capital, unlimited powers, and close control than in its existence, and excoriated the Bank's proponents for demanding restoration of the old charter rather than a compromise.²⁵⁵ Whitehill, another bank enemy, said that one of the problems with the bank was its lack of rotation.²⁵⁶ Smilie also called for regressive voting.²⁵⁷ In later life, William Findley claimed that his objections to the bank were its size and perpetual lifetime, not its existence.²⁵⁸ (This claim is not borne out by his record at the 1786 debates, although Findley did acknowledge the next year that a bank that did not interfere with government might be acceptable.)

Understanding of Original Intent, 98 HARV. L. REV. 885, 916-17 (1985). Jefferson's resort to the Framers' deliberations was also an unusual move by contemporaneous legal conventions, which looked to the language of the statute, rather than the legislative history. *Id.* at 915 n.153.

254. PAINE, *supra* note 49, at 164-65, 185.

255. BNA DEBATES AND PROCEEDINGS, *supra* note 15, at 112 (John Smilie). Robert Lollar also attacked bank governance, as much as its existence. *See id.* at 76 (Robert Lollar).

256. *Id.* at 60-61 (Robert Whitehill).

257. *Id.* at 109 (John Smilie).

258. On Findley's subsequent recollections, see Letter from William Findley to William Plumer (Feb. 27, 1812), in PA. MAG. HIST. & BIO. 440, 444 (1881); HISTORY OF THE BUS, *supra* note 2, at 216, 462-63 (discussing Findley's remarks during the Congressional debate to renew the bank's charter); *see also Proceedings of the General Assembly*, PENNSYLVANIA PACKET, Mar. 20, 1787.

Whether or not these Assembly members were sincere is open to discussion.²⁵⁹ Yet not all opponents of the original BNA charter wanted its death, or were even agrarians. We have just discussed Thomas Paine, but he was by no means alone. Tench Coxe, a Philadelphia merchant who later helped Hamilton launch the BUS, opposed the BNA as it was then constituted, but was a strong supporter of a limited bank. He was particularly concerned with the BNA charter's lack of regressive voting, and much of his argument concerned this one issue. He argued that neither private partnerships nor the Bank of England had voting rules commensurate with wealth. He also argued from the equality concerns of the time: that civil government treated all voters equally, regardless of their wealth, and corporate voting should be similar. Coxe had been active in organizing the abortive Bank of Pennsylvania in 1784, and had penned a charter whose chief distinctions from the BNA charter were regressive voting and state inspection. His dislike of banks run by a small group of large shareholders arose from personal experience. Although a BNA shareholder, he was not one of the major insiders, and perhaps resented the insiders' total control of the bank.²⁶⁰

Coxe also proposed rotation, limited individual shareholdings, and exclusion of foreign shareholders.²⁶¹ His argument for these provisions was largely from the precedent of the Bank of England, and less from personal experience, or independently articulated policy concerns. He also briefly mentioned trade restrictions:

259. For example, at the end of the debate, a bank proponent named John Hannum unsuccessfully sought to amend the resolution on the table to provide for a more restricted charter. This motion lost by about the same margin as the proposal to restore the charter (Yeas-Nays, 30-39 vs. 28-41, respectively). BNA DEBATES AND PROCEEDINGS, *supra* note 15, at 131. At the time, the opponents of the BNA seemed much keener on abolition than reform.

260. Rappaport also notes that bank proponents seemed split into two factions, with Tench Coxe playing a prominent role in the more "moderate" faction. Rappaport seems to view the moderates as possessing pro-bank economic beliefs and anti-bank political beliefs, resulting in a compromise position of support for a limited charter. Rappaport, *supra* note 5, at 211-15. This may be true (Coxe became a pro-business Jeffersonian in the 1790s), but the behavior of Coxe and others is also explicable in terms of micropolitics: as a struggle between insider supporters of Morris's autocratic internal governance of the Bank and outsider proponents of a less centralized internal governance scheme.

261. Coxe Family Papers, Historical Society of Pennsylvania, Ser. 3, Reel 111 (Dec. 6, 1786).

The bank of England was likewise restrained from trading any thing, but bills of exchange or bullion, but the charter from the Assembly of Pennsylvania did not prohibit a trade in any thing whatever.²⁶²

He did not discuss land holdings nor provide any further rationale for trade restrictions; indeed, none may have occurred to him. Apart from his independently reasoned stance on regressive voting, Coxe seemed an uncritical admirer of the Bank of England charter.

Or consider John Chaloner, Alexander Hamilton's business correspondent in Philadelphia. Chaloner was a more restrained admirer of the Bank of England than Coxe, but signed a petition, probably penned by Coxe, seeking to make the rechartered BNA resemble the Bank of England. Writing to Hamilton:

I believe if adopted it [the new charter] will so effectually remove the Jealousy and apprehension of Government as no longer to Cause the Bank to be an object of their Resentment; which was solely occasioned by the influence a few people had among the Stockholders to allways nominate and Elect the directors: and by their Continuing to sit as Directors did in a great measure influence and Comand the Trade of the City²⁶³ and give a bias to all Elections for assembly or other purposes.

The merchants wanted a bank, but were not all happy with Robert Morris' bank. In its struggle for survival, the BNA had shown its full political power, and Morris his full political control over the Bank. This changed the tenor of the 1787 debate considerably. Gone was the Findley's theoretical corporophobia of 1786. In the 1787 rechartering debate, the power of the bank and its dominance by Morris was a major concern of all.

262. *Id.*

263. Letter from John Chaloner to Alexander Hamilton (Dec. 16, 1786), in 3 HAMILTON PAPERS, *supra* note 17, at 699-700; see also JACOB COOKE, TENCH COXE AND THE EARLY REPUBLIC 91 n.29 (1978) (attributing petition to Coxe). As for Chaloner's "bias to all Elections" remark, it should be noted that Morris and two associates stood for election to the Pennsylvania Assembly in 1785, apparently to protect the Bank. Rappaport, *supra* note 5, at 153. Their election, and the motives behind it, was a major theme of the March 1786 debate. BNA DEBATES AND PROCEEDINGS, *supra* note 15, at 31 (Thomas FitzSimons), 71 (William Findley).

See him [Robert Morris] converting a bank, instituted for common benefit, to his own and creatures emolument, and by the aid thereof, controuling the credit of the state, and dictating the measures of government. View the vassalage of our merchants, the thralldom of the city of Philadelphia, and the extinction of that spirit of independency in most of its citizens so essential to freedom.²⁶⁴

As this opponent of the bank saw it, the most prominent person associated with the bank turned it into a private piggybank, destroyed the credit of state paper, and made citizens excessively dependent on the bank. But at least the first and third of these criticisms, unlike those of 1785-86, were compatible with the existence of banks.

A new election to the Assembly returned a pro-bank majority, and a committee of the Assembly proposed that a new charter be issued, although limited in capital, lifetime, and addressing other "reasonable grounds of objection."²⁶⁵ By December 13, 1786, the Assembly had adopted the committee's report, although not without debate.²⁶⁶ The debate was largely a rehash of the earlier debate, with Morris and Findley continuing to play the key roles. (Smilie, the other leader of the anti-bank forces, was not reelected.) Findley theorized less about equality, and concentrated more on the ability of the Bank to suborn the State.²⁶⁷

The result was a compromise, limiting capital and lifetime, but not affecting bank governance or operations. Despite these apparently good terms, Robert Morris and some other bank insiders were uneasy with anything short of restoration of the old charter. There are several possible reasons for this. An amended charter could possibly permit shareholders to depart from the bank. Perhaps Morris genuinely believed in Paine's and Wilson's arguments that charter revocation was tyrannous, or perhaps he was afraid that only an irrevocable charter would ensure that he

264. 2 HERBERT J. STORING, *THE COMPLETE ANTI-FEDERALIST 178-79* (1981) (Letter from the "Centinel" to the People of Pennsylvania, Dec. 29, 1787).

265. FREEMEN'S J. (Philadelphia), Dec. 6, 1786; *Proceedings of the General Assembly*, PENNSYLVANIA PACKET, Dec. 14, 1786.

266. See *Proceedings of the General Assembly*, PENNSYLVANIA PACKET, Dec. 14, 1786.

267. See *Proceedings of the General Assembly*, PENNSYLVANIA PACKET, Dec. 25-27, 1786 (recounting the debates in the General Assembly on Dec. 13, 1786).

remained in control of the Bank.²⁶⁸ However, other major bank figures, such as FitzSimons, were happy with a compromise that permitted the BNA to operate as it had been doing.²⁶⁹

The charter debate in March, 1787 which ratified the December actions was intellectually far thinner than the March, 1786 debate, but perhaps politically richer. Most speeches of opposition to the bank discussed the political muscle it had shown; corporophobia was largely absent. But the 1787 debate featured genuine disagreements among the bank proponents, reflecting the struggle between Morris' insider faction and the outsider merchants who wanted a more accommodating utility. The bill was enacted clause-by-clause.²⁷⁰ The first clause, specifying the life of the charter, was blank in the bill.²⁷¹ **A proposal for a twenty-one year life was defeated forty to twenty-six, but a fourteen year life won, thirty-five to thirty.**²⁷² Even many of the proponents of the bank were afraid of too powerful an institution. Most of the other clauses passed by a similar majority, although Findley managed to defeat a charter clause punishing embezzlement with death.²⁷³ (Robert Morris seconded Findley's motion.) Whitehill, a bitter opponent of the bank, sought to permit shareholders to withdraw their stock; this amendment was defeated.²⁷⁴

More significantly, George Logan sought to restrain shareholders to one vote each.²⁷⁵ This proposal also lost, after the bank proponents explained that the BNA already had a by-law limiting shareholders to twenty votes.²⁷⁶ Logan was no blind enemy of the bank; he had voted to restore the

268. See *Proceedings of the General Assembly*, in PENNSYLVANIA PACKET, Dec. 25, 1786 (Robert Morris addressing Assembly on Dec. 13, 1786).

269. Letter from John Chaloner to Alexander Hamilton, (Dec. 13, 1786) in 3 HAMILTON PAPERS, *supra* note 17, at 698; LEWIS, *supra* note 30, at 73; see also *Proceedings of the General Assembly*, PENNSYLVANIA PACKET, Dec. 25, 1786 (Robert Morris and Thomas FitzSimons addressing Assembly on Dec. 13, 1786).

270. *Proceedings of the General Assembly*, PENNSYLVANIA PACKET, Mar. 20, 1787. See generally Wilson, *supra* note 131, at 26-28 (discussing the overall atmosphere of the debate).

271. *Proceedings of the General Assembly*, PENNSYLVANIA PACKET, Mar. 20, 1787.

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

charter in 1786. But Morris's autocratic rule had changed his mind. The George Logan who voted for incorporated banking in both April and December of 1786 voted against Morris's piggybank in 1787.²⁷⁷ But the bank was finally rechartered, on new terms, by a thirty-five to thirty-one vote.²⁷⁸ The restrictions on land holding and trade were never mentioned in the March 1787 debate, but were mentioned at least once in the December 1786 debate. Findley expressed some fear that the BNA would snap up the land that Pennsylvania was about to sell.²⁸⁰ This was a demagogic move; it had already been made abundantly clear in previous debates and pamphleteering—as well as BNA practice—that the BNA was not interested in land acquisition.²⁸¹

The bank kept its preferred mode of governance, and did not introduce regressive voting or rotation into the charter, although regressive voting was already in the BNA's by-laws.²⁸² **The bank surrendered the right to keep its by-laws secret.** This surrender was not of central significance, although it may have served to crystallize the regressive voting provisions present in the more flexible secret by-laws. The only things that the BNA may have valued that it surrendered were unlimited life and effectively unlimited capital. But even here, it received a reasonable bargain. **The opponents of the bank had argued that the bank charter should last no longer than the state's—seven years.**²⁸³ But the new BNA charter was good

277. *Id.*

278. *Id.*

279. Rappaport, *supra* note 5, at 220.

280. *Proceedings of the General Assembly*, PENNSYLVANIA PACKET, Dec. 25, 1786.

281. *See supra* text accompanying note 149 (BNA by-laws); *supra* text accompanying note 254 (bank-apologist Paine expressing no opposition to land restrictions); HAMMOND, *supra* note 7, at 75-76 (discussing mercantile bank assets).

282. Morris was a strong partisan of the status quo in governance. BNA DEBATES AND PROCEEDINGS, *supra* note 15, at 117 (Robert Morris). However, his ruling faction of the Bank conceded regressive voting for directors through the by-laws in 1784, as part of the movement to open the Bank. Originally, the by-laws themselves were subject to straight per-share voting, but by the end of 1790, they too were subject to regressive voting. *See* 7 HAMILTON PAPERS, *supra* note 17, at 281 n.139 (discussing hand-written note by Morris on Hamilton's draft *Report on the Bank*).

283. BNA DEBATES AND PROCEEDINGS, *supra* note 15, at 65 (William Findley).

for fourteen years. The authorized capital of the new BNA was \$2 million, more than twice the actual BNA capital at the time of the 1786 debate.²⁸⁴

The new prohibitions on bank powers were strongly written, but—being already standard business practice—were cheap for the Bank to provide. The restriction on land-holding power was quite strong, for its time. The bank was forbidden to acquire land, except that necessary for conducting the business of the bank or land acquired through debt foreclosure. In contrast, neither the Maryland nor Providence Bank charters had land prohibitions. The 1784 Massachusetts bank charter limited land holding to 50,000 pounds, but had no restriction on the purposes or means of acquisition. (Most subsequent land restrictions resembled the BNA's, which was copied from the Bank of England's). The restriction on land holding does not appear to be related to the governance of the early banks. Merchants may have been land speculators, but there is no evidence that merchants feared bank competition in this field. For their own safety, mercantile banks avoided landed assets in particular, and illiquid assets in general.

The prohibition on landowning, then, ratified existing business practices. It did not prevent the BNA from becoming a landed institution; it merely restricted the means by which the BNA could acquire land. At most, the BNA charter restriction may have prevented it from becoming a *dealer* in land, but did little to prevent it from *accumulating* land. (The opponents of banks did not miss this distinction.)²⁸⁵ It was BNA operations, not the BNA charter, which kept it out of the real estate business.

It is possible to justify the land-holding restrictions as another governance measure. The prohibition on direct purchase of land could serve as a prohibition on the bank's purchasing land from a favored customer on generous terms. This could be far more detrimental to a bank than insider discounts. Such an explanation, although logically tenable, seems strained. The land-holding restrictions were most likely a sop to the corporophobes, a mortmain law for banks. If United States banking corporations were reminiscent of English religious corporations, the same

284. During the debate, Morris stated that the Bank's capital was \$870,400. *Id.* at 94 (Robert Morris).

285. HISTORY OF THE BUS, *supra* note 2, at 74 (William Branch Giles).

remedial provision could be applied to both. It made little difference whether it remediated anything. For political peace, the bankers were willing to make a partial surrender of a power not particularly desired.

Although the language of the land-holding restrictions of the BNA was copied from the charter of the Bank of England, the provenance of the language was not particularly significant. After all, the earlier charter of the Massachusetts Bank also restricted land holding, albeit in a far simpler (and more effective) fashion. Its resemblance to the Bank of England charter may have been an attempt to please Tench Coxe and his Anglophilic ilk, who had lost on the far more important regressive voting issue.

One other charter limitation was present in the 1787 charter—a restriction on dealing in merchandise, except goods acquired as security, bullion, and produce from the bank's lands. This restriction was slavishly copied from the original 1694 charter of the Bank of England, with a few changes in spelling and punctuation, and a few other changes that reflected structural differences between the British Crown and the republican government of Pennsylvania.²⁸⁶ It may have been adopted uncritically, as another inexpensive sop to critics of the Bank. It is unlikely that bank safety was a consideration. No American source of which I am aware discussed the prohibition on trade as a means of assuring bank safety.

To the extent that it had a purpose, the BNA charter prohibition on merchandise probably had the same purpose as the Bank of England restriction—to protect established merchants from competition from the nascent Bank.²⁸⁷ In

286. The BNA recharter even cribbed the 1694 Bank of England's prohibition of "wager of law." This truly medieval legal device permitted the defendant to take an oath and recruit eleven oath-helpers to solemnly confirm the oath. If this ordeal was properly performed, the defendant immediately won the trial. Although this bizarre practice was not formally abolished in England until 1833, it had become functionally obsolete by 1602 in most cases. See F.W. MAITLAND, *THE FORMS OF ACTION AT COMMON LAW* 14-17 (A.H. Chaytor & W. J. Whittaker eds., 1962).

287. The Bank of England charter language contained an explanatory preface:

And to the intent that their Majesties subjects may not be oppressed by the said corporation by their monopolizing or ingrossing any sort of goods, wares, or merchandizes be it further declared . . . that the said corporation . . . shall not at any time . . . deale or trade . . . in the buying or selling of any goods, wares, or merchandizes whatsoever . . .

the December, 1786 debates over the Bank, one pamphleteer discussed the powers restrictions as ensuring that the Bank would not “injure the private commerce of the country.”²⁸⁸ Findley, of course, had discussed the latent commercial powers of the old bank as a possible source of monopoly.²⁸⁹ As discussed above, exactly the same considerations were present at the chartering of almost all the early merchants’ banks. Similar—albeit very differently worded—protective clauses could be found in two other early charters, those of The Bank of New York and The Massachusetts Bank.

But the remarkable thing about the 1787 charter was how insignificant the charter restrictions on land and commerce were. **The big issues were lifetime, capital, and regressive voting.** The land and commerce restrictions seemed to be surrenders of things not much wanted by bankers. The foes of banks did not get much for these surrenders: some abatement of Findley’s corporophobia, a sop to Coxe’s outsider merchants, and a small dose of the Bank of England’s legitimacy. The lifetime and capital restrictions were far more significant defeats for the BNA;

5 & 6 W. & M., c. 20, § 26 (1694) (Eng.); see also Bernard Shull, *The Separation of Banking and Commerce: Origin, Development, and Implications for Antitrust*, 28 ANTITRUST BULL. 255, 262 (1983). One of the few contemporary English explanations of this charter prohibition reads:

[An incorporated bank’s] business is to keep the cash of traders, or others, to deal in bullion, exchanges, and discounts, and to lend upon securities, but upon none but such as are morally certain, and for short time of payment; or which, upon occasion, may be readily exchanged again for money: on the contrary, that such a bank ought never to purchase or lend money upon lands, as well because of the hazards of titles, as of the tediousness and uncertainty of repayments: least of all should a bank deal in merchandize, because of the risque of adventuring, the dubiousness of profits, and the length of time for returns: it ought, indeed to be always strictly restrained from the buying and selling merchantable commodities, by reason of the great injury which might thereby arise to trade in general, from an uncontrollable monopoly.

POSTLETHWAYTE, *supra* note 19 (under dictionary entry for “Banking”). Even Postlethwayte, perhaps the only commentator who perceived any business risk in bank mercantile activities, seemed far more concerned about disruption of established business relationships and the risks of land banking, devoting almost one and a half folio pages to the subject. *Id.*

288. Thoughts Concerning the Bank, PENNSYLVANIA PACKET, Dec. 20, 1786 (commonly attributed to Tench Coxe).

289. See *supra* note 249 and accompanying text.

the exclusion of regressive voting in the charter a far more significant defeat for the outsiders.

B. *The First Bank of the United States*

The First Bank of the United States—chartered in 1791—was the fourth chartered bank in the United States. In many ways, it was a typical early bank of the time; the idea of a “central bank” had not yet been invented.²⁹⁰ But the First BUS was special in three key ways. First, the BUS was a *national* bank. This meant that it was far bigger than other banks, providing services on a national scale. It was thus more frightening, and politically charged. Second, national politics was different. Consistent with Madison’s *Federalist* No. 10, the national BUS was no work of a small clique. To be sure, regional conflict was pronounced, and noted by the participants.²⁹¹ However, there was little personal or idiosyncratic about the politics of the BUS. Finally, as we shall see below, the BUS was a merchants’ utility in operations only—its ends were public.

Because the BUS was a national bank, large and prestigious, its charter had a strong effect on subsequent ones. The pre-BUS charters were idiosyncratic and experimental. The BUS charter was also experimental, but it was not idiosyncratic for long. It became the template on which future bank charters were constructed. Future charters in the eighteenth and early nineteenth century might differ from the First BUS charter on significant points, but still they tended to generally resemble the First BUS charter.

After the adoption of the BUS charter, resemblances between the BUS charter and subsequent charters can be attributed to conservatism, rather than conscious choice. There was much less charter evolution in the chartering orgy of 1792-1800 than during the preceding decade.

290. See TIMBERLAKE, *supra* note 78, at 4. There is no indication that the First BUS was intended to govern other banks’ currency. In contrast, the drafters of the Second BUS charter were clearly aware that the Bank would stabilize the currency. See, e.g., HISTORY OF THE BUS, *supra* note 2, at 630-34 (John Calhoun’s Feb. 26, 1816 speech to the House of Representatives).

291. See, e.g., HISTORY OF THE BUS, *supra* note 2, at 56 (Robert Jackson).

1. *The First Public Bank.* The First BUS was not only a national bank, it was special in another way. Unlike other banks at the time, it was not founded by and for merchants. Calculated public policy dominated. The First BUS, then, was similar to the 1781 BNA, but not similar to subsequent and contemporary chartered banks—the BNA of 1784,²⁹² the Massachusetts Bank, and the Banks of Maryland, New York, and Providence.

Alexander Hamilton proposed the Bank of the United States to the First Congress in 1791. His report on the BUS neglected its corporate character almost completely, and discussed the bank as an instrumentality for creation of a nonmetallic currency, a source of credit to the federal government, and as fiscal agent for the Federal government.²⁹³ Hamilton's strong emphasis on the Bank's paper money cannot contrast more strongly with the position of the BNA advocates in the 1786 debate. It also reflects an apparent recent conversion on Hamilton's part. In January 1790, Hamilton issued his *Report on Public Credit*. This report barely mentioned a bank and discussed it *only* as a means of stabilizing the value of the debt, making securities a more effective money.²⁹⁴ However, even in 1790, Hamilton knew that mercantile opinions on bank notes were changing. On November 25, 1789, William Bingham had sent Hamilton a letter suggesting an expansion of the BNA, funded largely by government debt, in large part to provide currency through the BNA's bank notes.²⁹⁵ The *Report on a National Bank* dropped all mention of public securities as currency, possibly because securities had become a politicized issue at the time.²⁹⁶

Private ownership was a means to a public purpose. Private ownership was the only way to produce a stable paper currency. The "stamping of paper is an operation so much easier than the laying of taxes," that a government would be tempted to debauch the currency, as did several

292. The BNA may have been born "public," *cf.* Riesman, *supra* note 81, at 35-42 (discussing some of the "public" considerations behind the creation of the BNA), but may have become "private" with almost its first breath, and was certainly "private" by 1784. *See generally supra* Part I.B.

293. Hamilton, Report on a National Bank, *supra* note 2, at 15, 16-18.

294. 7 HAMILTON PAPERS, *supra* note 17, at 70, 108.

295. 5 HAMILTON PAPERS, *supra* note 17, at 551-54.

296. *See generally infra* Section II.B.3 (discussing Hamilton's *Report on a National Bank* and its treatment of the public securities issue).

state governments under the Articles of Confederation.²⁹⁷ Private enterprise, driven by the profit motive and disciplined by fear of loss, was needed to ensure responsibility. A privately owned bank would more easily raise the required funds than a governmental bank; merchants had better credit than the nascent Republic. But a partnership or a joint-stock company would not do. A corporate charter was needed to ensure government control over the goals of the bank.

Finally, Hamilton was aware that the private banks, seeking to optimize their return, would only open up their subscriptions for a limited amount of capital. A small bank would not only encourage accusations of favoritism in discounts, it would not be an efficient means of issuing currency. The BUS's large mandatory capital was, in itself, a public feature.

Hamilton's opponents, unsurprisingly, took the opposite tack. James Madison stuck chiefly to the constitutional issues. But when he discussed the merits of the BUS, he chose to list the advantages of the bank as primarily mercantile, rather than public. Madison's rank ordering of bank advantages was: improved mercantile financing resulting in more business; improved mercantile financing resulting in easier payment of customs duties; short- and medium-term loans to government; diminishing usury; physically preserving metallic currency; and facilitating payments.²⁹⁸ Madison wished to characterize the BUS as one of the "private" mercantile banks of its time: the BNA, the still-unincorporated Bank of New York, and the Massachusetts and Maryland Banks.

2. *The Chartering Debate.* The debate in the House of Representatives was not dominated by banking, or even (*pace* Jefferson) corporophobia, but rather by the bank's Constitutionality. (Senate debate was secret.) The Constitutional issue was genuine. The authority to charter corporations was not explicitly mentioned in the Constitution. This exclusion could not be called inadvertent;

297. Hamilton, Report on a National Bank, *supra* note 2, at 24.

298. See HISTORY OF THE BUS, *supra* note 2, at 39. It is perhaps worth noting that Madison, unlike the Philadelphia agrarians who fought the BNA, was no friend of state emissions of paper. *E.g.*, THE FEDERALIST NO. 44, at 300-01 (James Madison) (J. Cooke ed., 1961).

chartering power had been discussed in the debates over the Constitution.²⁹⁹ (Not discussed was any particular policy on banking, or the monetary policy of banks.³⁰⁰) Because the power to incorporate banks had not been expressly granted to Congress, (and indeed was contested by the ratifying states),³⁰¹ the power had to be implied, if it existed at all.

299. See HAMMOND, *supra* note 7, at 104-05. The framers, prompted by James Madison, had debated whether to include chartering authority as a power of Congress in the Post Road Clause. See Records of the **Federal Convention (Sept. 14, 1788)**, in 3 **THE FOUNDERS' CONSTITUTION**, *supra* note 75, at 19. They decided not to put this question to a vote for two reasons. First, a general grant of chartering authority would be construed as permitting a bank, a result not desired in the commercial cities of Philadelphia and New York. Second, charters were associated with the "mercantile monopolies" of the British Crown. A third reason for not voting on special chartering was also proffered by James Wilson (a defender of the BNA in 1785-86): that the chartering power was already granted to Congress in the Commerce Clause. See *id.* These objections limited the vote to specially chartered canal companies, but this vote was defeated, with only the Post Office and Post Road Clause remaining. See U.S. CONST. art. I, § 8, cl. 7

The question of chartering authority also arose in the Patent and Copyright Clause, *id.* art. I, § 8, cl. 8, but in this context, the Framers were thinking of chartering eleemosynary corporations, as opposed to the public-interest business corporations contemplated in the Post Road Clause debates. Madison's notes read:

- To secure to literary authors their copy rights for a limited time
- To establish an University
- To encourage, by proper premiums and provisions, the advancement of useful knowledge and discoveries
- To establish seminaries for the promotion of literature and the arts and sciences
- To grant charters of incorporation
- To grant patents for useful inventions
- To secure to authors exclusive rights for a certain time
- To establish public institutions, rewards and immunities for the promotion of agriculture, commerce, trades, and manufactures.

3 **THE FOUNDERS' CONSTITUTION**, *supra* note 75, at 40. **The Patent and Copyright Clause has further significance for early banking law. It clearly authorizes a limited subset of federal monopolies.** This might be taken to imply that other monopolies (such as corporate charters) are forbidden by the Constitution. *Expressio unius est exclusio alterius*. This logic was used in Andrew Jackson's 1832 message vetoing the renewal of the charter of the Second Bank of the United States. See also TAYLOR, *supra* note 209, at 263 (discussing the unconstitutionality of monopolies).

300. HAMMOND, *supra* note 7, at 106.

301. Massachusetts, New Hampshire, North Carolina and Rhode Island suggested in their ratifications of the Constitution that it be amended to provide that no federal mercantile charters be granted bearing "exclusive advantages of commerce." New York wanted to ban all monopoly grants. Such amendments were suggested in the First Congress and in 1793, but to no avail.

This Constitutional debate, therefore, concerned the scope of Congress' implied powers. Although very important in its own right, this issue is not particularly significant to this study. The First BUS debate does far less to illuminate early corporate law than the BNA debate.

James Madison, the chief opponent of the Bank in the House, had a complex set of feelings towards the Bank. He was primarily concerned with the Bank's constitutionality. In 1781, he opposed the BNA for constitutional reasons alone; he did not doubt that the public bank was wise on the merits.³⁰² Nor did he seem opposed to banks in the summer of 1787. Quite the contrary. The BNA charter war was barely over when the Federal Constitutional convention began. At the Convention, Madison twice suggested that Congress be empowered "to grant charters of corporations in cases where the public good may require them, and the authority of a single state may be incompetent."³⁰³ It is difficult to think of an interstate business in 1787 that was not a bank, or perhaps a canal company.

These constitutional concerns dominated Madison's posture in the debate. Most of his reservations about banking were remediable. He was most concerned by the subscription procedures of the new Bank, which he viewed as designed to transfer wealth to Northern securities speculators.³⁰⁴ But this was no objection to banking *per se*, and indeed, Hamilton's subscription scheme was modified in a supplementary act passed a week after the bank act itself. Most of the other objections to the Bank in his speech to the House were also remediable (including excessively long lifetime, the Bank's power to lend to the federal

Simeon Baldwin, *American Business Corporations Before 1786*, 8 AM. HIST. REV. 449, 464 (1903).

302. See Letter from James Madison to Edmund Pendleton (Jan. 8, 1782), in 4 MADISON PAPERS, *supra* note 211, at 22-23.

303. Baldwin, *supra* note 301, at 464.

304. Madison's draft of a veto message for the Bank stressed the bank act's unfair subscription procedure and its enrichment of the Northern speculator class, as did numerous of his subsequent writings. See James Madison, Draft Veto of the Bank Bill (Feb. 21, 1791), in 13 MADISON PAPERS, *supra* note 211, at 395; see also Letter from James Madison to Thomas Jefferson (July 10, 1791), in 14 MADISON PAPERS, *supra* note 211, at 43; James Madison, Notes on William Loughton Smith's *Politicks and Views* (Nov. 4, 1792), in 4 MADISON PAPERS, *supra* note 211, at 399-400; James Madison, Political Observations (Apr. 20, 1795), in 15 MADISON PAPERS, *supra* note 211, at 511-12.

government, and its power to branch). However, Madison was enough of an **advocate (or politician)** to resort to some genteel corporophobic rhetoric. He was aware that Old World banks had suborned governments, and was not shy to share this knowledge in the debate.³⁰⁵ He particularly focussed on banks' evil twin: the general trading company. He could not see how a bank charter would not imply general Federal chartering powers, which would imply a Congressional power to "give monopolies in every branch of domestic industry."³⁰⁶ He darkly pointed out that corporations "are a powerful machine, which have always been found competent to effect objects on principles in a great measure independent of the People."³⁰⁷ He also casually mentioned the Bank of England, the East India Company, and the South Sea Company, but left it to the auditor to make the necessary inferences.³⁰⁸ (The interminable trial of Warren Hastings was still in progress.) But this limited corporophobia is perfectly consistent with Madison's position in the Constitutional Convention. Trading companies were not consistent with the public good, but chartered banks could be.

Madison's arguments were typical. Only rarely did raw anti-corporate sentiment flash through in the debate.³⁰⁹ Corporophobia was generally subordinated to constitutional arguments. And fear of state banks was almost impossible to find.

Not all of the anti-BUS agitation was confined to Congress, or to the foes of banking. Although the BNA itself

305. Madison got his information about Old World Banks, specifically the Bank of St. George, from Adam Anderson's book *The Origins of Commerce*. See James Madison, Notes on Banks (Feb. 1, 1791), in 13 MADISON PAPERS, *supra* note 211, at 365-66 nn. 3-4. Anderson, however, was no opponent of banks. See 1 ADAM ANDERSON, AN HISTORICAL AND CHRONOLOGICAL DEDUCTION OF THE ORIGINS OF COMMERCE, 235, 475-77 (London 1764); 2 ANDERSON, *supra*, at 201-02.

306. HISTORY OF THE BUS, *supra* note 2, at 42. Edmund Randolph, who also opined against the bank, shared Madison's assumption that a bank charter power implied a general chartering power. More surprisingly, Alexander Hamilton also shared it. Randolph's assumption was openly expressed in his opinion on the Constitutionality of the Bank, *see id.* at 87, but Hamilton's was not. It appeared in his first draft, but was suppressed in the opinion given to President Washington. See *infra* text accompanying note 315.

307. HISTORY OF THE BUS, *supra* note 2, at 82 (James Madison), 57 (Rep. James Jackson of Georgia).

308. *Id.* at 42 (James Madison).

309. *See id.* at 57 (William Penn Boudinot).

did not seem opposed to the BUS, some factions within the BNA wanted the BNA to do the BUS's job. William Bingham, late in 1789, proposed to Hamilton that the BNA become a national bank with responsibility for currency. After the BUS was chartered, Pelatiah Webster wrote a pamphlet arguing strongly against the BUS. Unsurprisingly, he argued that the BUS charter was issued in derogation of the BNA's. His indiscriminate attack also included the bond funding of the BUS, its untested management, and the tendency of the BUS to centralize all credit in derogation of state sovereignty, and its potential to control states through allocation of credit. Webster was even reduced to arguing that the prohibition of foreign shareholder voting in the BUS charter would enable large American speculators to monopolize the BUS.

Webster's attack could not be anything but strained; Hamilton's proposed BUS charter accommodated all objections usually made by the opponents of banks, except objections to the bank's very existence.³¹⁰ (Hamilton even deflected Webster's attack on the untested management of the BUS by hiring the BNA's president, Thomas Willing, for the new institution!) Hamilton was an animating spirit of the Bank of New York and was certainly aware of the BNA experience. Tench Coxe was his Assistant Secretary, and Hamilton had corresponded with many of the BNA principals during the charter wars. Indeed, as a private attorney, Hamilton had represented some of the outsider shareholders in the BNA's struggle to retain its charter, and thus had some personal familiarity with corporate governance struggles.³¹¹ It is uncertain how much influence Coxe actually had on Hamilton,³¹² but many of the provisions advocated by Coxe for the BNA made their way into the BUS charter.

310. See Letter from William Bingham to Alexander Hamilton (Nov. 25, 1789), in 5 HAMILTON PAPERS, *supra* note 17, at 551-54; WEBSTER, *supra* note 91. Pelatiah Webster's objection to deprivation of foreign voting rights wasn't completely senseless; the foreign shareholders in 1786 were opposed to Robert Morris's policy of preserving the BNA at all costs. However, Webster conveniently ignored the regressive voting that Hamilton inserted into the BUS charter.

311. Rappaport, *supra* note 5, at 149-50.

312. COOKE, *supra* note 263, at 172-73.

3. *The Charter*. The capital of the new bank was fixed at \$10 million, the lifetime fixed at twenty years, and the government contribution at 20% of stock. No other federal charter would be granted to any other bank during the lifetime of the corporation. The Secretary of the Treasury was entitled to weekly Bank statements. Loans to the United States had to be authorized by positive law, and if such a loan exceeding \$100,000 were made without an Act of Congress, the individuals responsible would have to forfeit treble the sum of the loan. (A similar clause held states to \$50,000; Webster found this particularly objectionable.) Notes of the Bank were made legal tender, and a usury limit of 6% was imposed.

Of all the limitations on bank powers, governance was the most on Hamilton's mind, and occupied the greatest amount of space in his brilliant *Report on a National Bank*. (Hamilton's truly innovative work—his extensive creditor protections—required far less justification in the report.) The charter also contained an elaborate regressive voting scheme, similar to that in the Bank of New York compact (also written by Hamilton), as well as the Maryland and Providence Bank charters. These shareholders could include individuals, partnerships or "bodies politic"—i.e., states and business, municipal, and religious corporations. (Most—if not all—of the eighteenth-century charters contained no restrictions on corporate share ownership, and often explicitly permitted it.) Only domestic shareholders could vote, a prohibition reminiscent of the BNA debates, in which foreign ownership figured significantly. There was also a limit on how much stock a single person could own. One-quarter of directors could not be reelected, ensuring rotation. Rotation—although previously demanded in the BNA debate—was an innovation in charter technology. Although regressive voting was a valuable governance provision in open mercantile communities, there was no particular mercantile need for rotation. It is no surprise that the public BUS had the first charter containing a rotation clause. The large and mandatory capitalization of the BUS was also a governance feature, ensuring that the public functions of the bank would not be sacrificed for the higher dividends of a smaller bank.³¹³

313. See *supra* note 135.

The BUS charter also contained the BNA restrictions on land acquisition and commerce. As with the BNA charter, no specific punishment was prescribed for improper land acquisition, but a treble forfeiture was imposed for commercial dealings. The First BUS prohibition on commercial dealings, although structurally similar to that of the BNA or Bank of England, was not a copy of either, and forbade the BUS to deal in any goods except those specified as permissible: "bills of exchange, gold or silver bullion, or . . . goods really and truly pledged for money lent and not redeemed in due time; or of goods which shall be the produce of its lands."³¹⁴ Hamilton defended the land provisions in his *Report* as a bank safety measure but did not argue for the restriction on commercial dealings.

Hamilton's failure to argue for the restriction on commercial dealings is curious. Hamilton tried to justify most of the charter provisions and, unlike Coxe, was not uncritical in his admiration of the Bank of England. Either Hamilton could think of no good argument for restrictions on commercial dealings, or the arguments that occurred to him did not seem politic. Hamilton was quite capable of omitting impolitic arguments; his *Report* did not discuss the constitutionality of the Bank at all. It is possible that Hamilton did not choose to discuss the prohibition on commercial dealings because he had a trading corporation in mind. Hamilton's first draft of his opinion on the constitutionality of the Bank contained a detailed argument that the Constitution permitted trading corporations and, *a fortiori*, permitted a Bank.³¹⁵ This argument was dropped from the final opinion, with scarcely a trace. As discussed above, a trading corporation was little more than a mercantile bank permitted to compete directly with merchants. The standard contemporaneous defense for the prohibition on commercial dealings was thus an attack on trading corporations. If the merchants' utility model is correct, almost any rationale that Hamilton adduced for

314. 1 BANKING & CURRENCY, *supra* note 63, at 313 (First BUS § 9).

315. Alexander Hamilton, Opinion on the Constitutionality of an Act to Establish a Bank (Feb. 23, 1791), in 8 HAMILTON PAPERS, *supra* note 17, at 74-75, 84. This was not Hamilton's only significant deletion. His draft for the *Report* contained penal provisions for embezzlement and counterfeiting; these were stricken by hand. See 7 HAMILTON PAPERS, *supra* note 17, at 297. Did Robert Morris or Tench Coxe remind Hamilton of the circumstances of the 1787 BNA rechartering?

limited commercial dealings could be later turned against his plans for a trading corporation.

If this explanation for Hamilton's silence is correct, it is further evidence that the prohibition on commercial dealings was not seen at the time as a plausible bank safety measure, or else Hamilton would have rationalized it on the basis of safety, as he did with land dealing. Hamilton probably instituted the prohibition on commerce to lull the merchants and as a sop to the corporophobes. He certainly did not seem to believe in it. Hamilton did not seem to care a fig for the protection of merchants or other established means of production. Not only did he retain his dream of a trading corporation; his **Society for Useful Manufactures—an incorporated textile factory in New Jersey**—was bitterly opposed by incumbent manufacturers.³¹⁶

Although these powers restrictions on land and mercantile transactions were already becoming standard, the First BUS had a genuinely innovative bank powers restriction in its charter; a prohibition on dealing in United States securities.³¹⁷ BUS directors construed this provision to forbid state securities dealings, as well.³¹⁸ Hamilton did not defend the restriction on securities dealing in his *Report*. Nor was the restriction contained in the draft of the *Report*, although it was both in the final version of the *Report* and in the proposed charter he transmitted to Congress.

This restriction became quite common in the bank charters granted in 1791-1793, and its genesis requires some explanation. Merchants did not become active in the securities business until the 1780s, when depreciated state and Continental government securities became actively traded on the market. This market was highly speculative, since Continental securities were heavily discounted. However, the securities developed considerable liquidity, and even served as a medium of exchange in the specie- and note-starved country.³¹⁹ The price of securities bottomed

316. Maier, *supra* note 89, at 67.

317. 1 BANKING & CURRENCY, *supra* note 63, at 311 ("The said corporation may sell any part of the public debt whereof its stock shall be composed, but shall not be at liberty to purchase any public debt whatsoever . . .") (First BUS § 7, cl. 10).

318. DOMETT, *supra* note 52, at 39.

319. EAST, *supra* note 4, at 269-84; 2 REDLICH, *supra* note 18, at 304-05; JAMES SULLIVAN, THE PATH TO RICHES: AN INQUIRY INTO THE ORIGIN AND USE OF

around 1786, but soared around 1790, after the new Constitution was in place.³²⁰ The market exploded in size in 1790, with Hamilton's refunding of the debt. The net result of this trade was a wealth transfer from many erstwhile securities holders to a narrow class of speculators, from agricultural South to mercantile North.³²¹ This wealth transfer was quite visible, and certainly did not please the transferors, who notably included the Revolutionary War veterans paid in securities.³²²

Not only did securities become a politically charged issue, the activity was also functionally uncharacteristic of early corporations. Securities speculation did not require collective economic effort; individuals could readily speculate without pooling capital. Thus, securities might not be considered a "bank-like" activity. In 1789, the BNA considered trade in public securities a "kind of [s]peculation" in which it did not engage, although it was careful to state that its charter permitted securities dealings.³²³ This may be because the BNA contemplated or actually had securities holdings. (Within ten years, it had acquired a stock portfolio, possibly a passive one.) In contrast, the Massachusetts Bank was an active securities dealer until its securities powers were limited in 1792.³²⁴

Securities dealing was not only functionally uncharacteristic of corporations, it was the sort of activity in which a bank could use its ability to manipulate prices to swamp mercantile competitors. Securities dealing was thus

MONEY 15-16 (I. Thomas & E.T. Andrews, Boston, 1792). Hamilton suggested that public debt had enough liquidity to serve as a reserve for the First BUS. Alexander Hamilton, Report on a National Bank, *supra* note 2, at 33. He also noted that the incorporation of public debt into First BUS stock (i.e., assets) would raise the value of the public debt, and thus help subscribers to the First BUS. *Id.* The money-like nature of government securities was ballyhooed even in the early nineteenth century. SAMUEL BLODGET, JR., THOUGHTS ON THE INCREASING WEALTH AND NATIONAL ECONOMY OF THE UNITED STATES OF AMERICA 23 (Washington, D.C. 1801).

320. EAST, *supra* note 4, at 272, 274. Beard estimated that Continental paper was selling between one-sixth and one-tenth face value during its nadir. CHARLES BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 34 (1935).

321. WALTER WERNER & STEVEN T. SMITH, WALL STREET 13 (1991); EAST, *supra* note 4, at 280-84.

322. See *infra* text accompanying note 330.

323. Letter from Thomas Willing, BNA President, to Alexander Hamilton (Oct. 1, 1789), in 5 HAMILTON PAPERS, *supra* note 17, at 418.

324. See GRAS, *supra* note 19, at 61-63.

on a par with the mercantile activities which bank founders had so carefully avoided. Securities dealing suffered from all the problems of "commerce," and the additional one of being considered innately odious by a large portion of the population. The odium of securities dealing may have increased further after the market break of 1791-92, which depressed the buoyant securities markets of 1790-91 throughout the rest of the decade.³²⁵

Because Hamilton certainly had no objection to profiteering, and probably did not believe in limited charter powers, it is no wonder he did not try to justify the BUS provision restricting securities dealings. In all likelihood, no justification occurred to him. He was bowing to a political pressure that had not yet peaked. No charter issued before 1791 had any explicit restrictions on securities dealings. The 1791 charters were all restricted, as were most of the 1792 charters. The Providence Bank restriction was particularly noteworthy. The 1791 Providence Bank charter was in form a merchants' compact, ratified by the state. The state added four paragraphs. The second through fourth added paragraphs conferred benefits to the Bank that a merchants' compact alone could not provide (i.e., limited liability, legal process for collecting on debts due to the Bank, and an anti-counterfeiting law). The first added paragraph read:

Be it further Enacted . . . That the Articles aforesaid [i.e., the mercantile compact] are and shall be the Constitution of the said Bank; with this Alteration and Proviso, that no Security given before the passing of this Act shall be received in the said Bank, subject to the Operation of the Laws of the said Bank; and that no Securities given after the granting this Charter [sic], which are not made payable to the said Bank, excepting those commonly called Bills of Exchange, shall be considered in the Operation of the Laws of the said Bank.³²⁶

The eighteenth-century charters passed after 1793 tended not to explicitly restrict securities activities. Once the price of government securities had been stabilized, securities dealing ceased to resemble profiteering at the expense of patriots. Future restrictions on securities activities would have to be inferred from broader

325. WERNER & SMITH, *supra* note 321, at 12-19, 35.

326. Stat. R.I. (Oct. 1791).

restrictions on commercial transactions. Although some post-1793 charters did not restrict commercial activities, the anomalous charter of the Providence Bank—which restricted securities activities without restricting commercial activities—was never again repeated in United States banking law.

C. *The Massachusetts Bank Recharter*

Around the same time as the adoption of the BUS charter, a small bank war was fought in Massachusetts. The Massachusetts Bank was unpopular for several reasons. It may not have been as useful to the local mercantile community as the BNA, having downsized itself the first year after incorporation and having gone through early management difficulties. The downsizing—similar to a contemporary freezeout—created ill-will among those ejected. The recession of 1791-92 drew the same kind of obloquy to the Massachusetts Bank as the 1785-86 recession did to the BNA in Philadelphia.³²⁷

This bank war seemed spearheaded (polemically, at least), by James Sullivan, who himself was Attorney General of Massachusetts (and later became Governor), a Jeffersonian capitalist with plans for a state bank to supplant the Massachusetts Bank.³²⁸ The grievances against the Massachusetts Bank, as articulated by Sullivan, differed significantly from the bill of particulars against the BUS. Sullivan was certainly no ideological agrarian, and was not hostile to the idea of business corporations. However, his pamphlet (printed after the Massachusetts Bank charter revision) seemed aimed at popular prejudices.

Chief among Sullivan's grievances was securities speculation. The First BUS subscription had set off a nationwide stampede of subscribers.³²⁹ The BNA and Massachusetts Bank stock had paid handsome dividends, and traded above par, so it is little wonder that BUS stock was eagerly sought. The supply of par stock at issuance was less than the demand, and the unfair tactics of sophisticated investors gave them a considerable advantage in procuring the coveted stock. Worse yet, the BUS stock

327. HANDLIN & HANDLIN, *supra* note 59, at 114.

328. SULLIVAN, *supra* note 319, at 43-54; GRAS, *supra* note 19, at 61-63.

329. HAMMOND, *supra* note 7, at 123.

subscription succeeded in its goal of stabilizing the price of the Federal debt, and the linkage between the two events was painfully obvious:

The men who had risked their lives in the war, or who had parted with their patrimonies or hard earned estates, to save the public liberty, stood at a distance, and with astonishment beheld the singular and unexpected phenomenon [of the BUS subscription]. The securities which they had received for their services and properties, in the place of gold or silver, and had sold at two shillings and six pence in the twenty shillings, resumed their pristine value in the hands of their new possessors, and greatly enlarged their new and unexpected value by the machinery of the [BUS].³³⁰

So strong was Sullivan's grievance at securities speculation (or so strong was his perception of popular feeling) that his proposed bank, although saying nothing about restricted commercial transactions, restricted securities dealing. Unlike the earlier BNA opponents, Sullivan was very aware that the Massachusetts Bank notes were currency, and blamed the Massachusetts Bank for manipulating the price level through its discounting policy.³³¹ This accusation would recur again and again in United States history. Hamilton's bank had permanently established the connection between banking and money.

The Massachusetts Bank war involved several stages. First the Bank was the subject of a special tax promulgated in September 1791 (which was found to be illegal by the Massachusetts Supreme Judicial Court), and the Bank's charter was restricted in March 1792.³³² The restrictions were relatively mild, imposing reporting requirements, regressive voting (shareholders could vote only ten shares of stock), and a limitation on dealing in merchandise or bank stock.³³³ Sullivan's demand for a state bank was satisfied in part by the chartering of the Union Bank in 1792. This bank was intended to remedy the perceived problems of the Massachusetts Bank. For example it was forced to devote a fifth of its funds to small agricultural loans, secured on land, which were to run at least for one year. Rotation was

330. SULLIVAN, *supra* note 319, at 31-32.

331. *Id.* at 37.

332. 2 DAVIS, *supra* note 3, at 68-69.

333. Stat. Mass. ch. 158 (1792).

inserted in the charter, as well as the regressive voting forced on the Massachusetts Bank.

But the Union Bank charter suffered from one problem. The Union Bank was a business corporation whose mercantile stockholders and directors—being out for profit and mercantile credit—had goals similar to the stockholders and directors of the Massachusetts Bank. The Union Bank beautifully vindicated Hamilton's thesis that a chartered bank would be "under the guidance of *individual interest*, not of *public policy*."³³⁴ The Union Bank ignored its more unpleasant duties, and concentrated on being a mercantile bank.³³⁵ Only certain kinds of charter restrictions were effective in an era in which enforcement of charters was clumsy. The negative charter restrictions of the BUS or BNA were effective, especially when they were consistent with mercantile desires to establish effective corporate governance. Far more problematic were positive directives in aid of a public policy antagonistic to mercantile goals. These could not become effective until the development of the administrative state.

III. POSTLUDE

Many of the earliest American business corporations were banks. Their corporate law accommodated the special governance needs of these merchants' credit clubs. The operations of these banks were presumably expressive of these needs; the charter restrictions of these banks seldom contradicted these needs. These charter restrictions usually resembled those self-imposed restrictions in by-laws or partnership agreements. These restrictions were either governance protections that the merchants themselves desired, or at worst were concessions of powers that the merchants did not really want. Charters gave merchants trustworthy governance devices that helped cope with the separation of ownership from control: governance devices not available from contract alone. Secondary benefits of the charter included: semi-monopolistic franchises, limited liability, anti-counterfeiting and embezzlement protection, simplified legal processes, and legitimacy. Before the BUS, the states' *quid pro quo* for these charters, apart from the

334. Alexander Hamilton, Report on a National Bank, *supra* note 2, at 29.

335. HANDLIN & HANDLIN, *supra* note 59, at 115.

benefits of fostering business, was a possible source of medium-term credit, with an adjunct currency a secondary benefit. After the BUS, provision of currency became more significant, and perhaps central, but the charter provisions were already in place.

Call it coincidence or consummate political skill: the charter restrictions that assured effective 18th-century corporate governance were the same ones demanded by 18th century politics. Both the merchants who ran the banks and the voters who chartered them demanded limited bank powers. This implies that the "separation of banking from commerce" so characteristic of contemporary United States banking law originated as a response to eighteenth-century political and corporate governance needs. This connection is intriguing, and perhaps worth tracing.

After the 1780s and early 1790s, most of the charter provisions separating banking and commerce became an apolitical matter of course, throughout at least two thirds of the nineteenth century. It is difficult to find mention of these restrictions after the 1780s. For example, the debates over the reincorporation of the BUS seemed to traverse every subject *but* bank powers limitations. An 1814 Treasury proposal to reincorporate the BUS only referred to the "general powers, privileges and regulations of the bank, [which] shall be the same as are usual in similar institutions."³³⁶ The language referring to the limitations on commercial activities and landholding was the same for every draft of the Second BUS bills of 1815-1816, in strong contrast to Hamilton's tentative explorations. Lost was any sense on *why* the restrictions were there, and the charter restrictions (except for the regulation of real estate activities³³⁷) became increasingly ossified in time.

However, the banking industry was revolutionized, in two ways relevant to our purposes. First, the demise of monopolistic banking removed most of the governance role of charters. The decline of monopoly started by the end of the eighteenth century, in the major cities, and became

336. HISTORY OF THE BUS, *supra* note 2, at 483.

337. The language of the land powers restrictions kept changing with time, responding to the tensions between business opportunity and bank safety (leavened with fear of mortmain). It was the restriction on commercial activities that was invisible, and relatively invariable.

quite general with the advent of the free banking movement. Consistent with the merchants utility model developed above, the old governance provisions involving rotation and regressive voting disappeared. This model would predict that merchants and manufacturers need not worry about fair allocation of credit and concomitant governance provisions, once monopoly disappeared and they had the option of establishing (or dealing with) a competitor.

Second, the “restraining acts” near-universally adopted around the War of 1812 prohibited individuals or partnerships from issuing notes—the essence of the banking business at the time.³³⁸ (They were a response to the collapse of the banking system at this time.) A charter, therefore, became a necessity for most banking activities, not a mere convenience in governance. This transformed the possibilities for public control of banks. No longer were charter restrictions a fairly accurate expression of mercantile wants, with perhaps a few public features added (and often ignored). Instead, charters could be written restrictively, because a charter was the only route to the lucrative banking business. The restraining acts gave the state the leverage to impose whatever charter restrictions it chose.

Conglomerate corporations were a possible way to work around these charter restrictions on banking activities, as witnessed by the Manhattan Company, a bank-cum-waterworks.³³⁹ But in “general, legislatures were chary of granting, and the companies hesitated to ask, combinations of diverse powers.”³⁴⁰ It is difficult to find a contemporaneous statement of policy supporting single-purpose corporations, but multipurpose corporations had a

338. *Bonsal v. Ohio*, 11 Ohio 72 (1842); DAVIS R. DEWEY, *STATE BANKING BEFORE THE CIVIL WAR* 143-51 (1910); J. VAN FENSTERMAKER, *THE DEVELOPMENT OF AMERICAN COMMERCIAL BANKING: 1782-1837*, at 32-39 (1965); SUMNER, *supra* note 77, at 83-94.

339. The banking and engineering functions were kept quite separate within the corporation. Gregory S. Hunter, *The Development of Bankers: Career Patterns and Corporate Form at the Manhattan Company 1799-1842*, 14 *BUS. & ECON. HISTORY* 59 (1985). Furthermore, the Manhattan Company's engineering activities were pursued with barely enough enthusiasm to protect the charter. *People v. Manhattan Co.*, 9 Wend. 351 (N.Y. 1832); HARTOG, *supra* note 230, at 150.

340. 2 DAVIS, *supra* note 3, at 319; see also HURST, *supra* note 94, at 44-45.

very limited role in the antebellum years.³⁴¹ Such a policy may have been a consequence of corporophobia, or may have reflected the *ad hoc* nature of early corporations, chartered one by one to address discrete social problems or discrete desires of their incorporators. A corporate governance tale is also plausible, at least to the extent that early business corporations were producer cooperatives, like banks. **Cooperatives tend to develop governance problems when they branch into disparate lines of business, losing essential homogeneity of interest.**³⁴² It is certainly true that

341. Before 1810, a few corporations obtained a nonbanking charter as a ruse, and immediately went into banking on a large scale. The most famous such corporation was the Manhattan Company. Another such corporation was the Miami Exporting Company, chartered in 1803 ostensibly to transport farm produce. Legislatures soon got wise to this trick, and subsequently did not charter banks unless they intended to do so. HAMMOND, *supra* note 7, at 170-71.

In the 1810-1837 period, a "development bank" or "improvement bank" movement enjoyed a vogue, conjoining banking with some other activity. This movement used the grant of a highly desirable bank charter to encourage entrepreneurs to enter some less profitable, but socially useful activity. The legislators who conceived of development banks could be as naive as the Massachusetts legislature that imposed unwanted business activities on the Union Bank. These hybrid organizations frequently eliminated (or subordinated) their undesired functions as soon as seemed decent. CADMAN, *supra* note 228, at 68-69 (New Jersey); *see also* HARTOG, *supra* note 230, at 150 (Manhattan Bank). In reaction, New Jersey insisted, as a condition of retaining the bank charter, that the nonbanking activity (generally a public project like a road) be conducted by a specified time. CADMAN, *supra* note 228, at 375. Maryland, a more intelligent practitioner of the policy, usually required its banks to take stock in such corporations, rather than participate in the desired activity directly. Indeed, the only true hybrid bank chartered by Maryland managed to eliminate its unwanted bridge activity before eventually expiring. BRYAN, *supra* note 113, at 44-47, 104. Maryland's policy was also conducted in Connecticut, with the **Quinebaug Bank required in 1832 to subscribe one fifth of its capital to railroad stock.** DEWEY, *supra* note 338, at 49-50. A variant on this policy was granting note-issuing powers to nonbanking corporations, especially railroads. *See id.* at 49-52 (Morris Canal Company of New Jersey; Michigan, Ohio, Texas, Louisiana, Mississippi, Georgia, Carolinas, Tennessee (railroad & others)).

342. *See generally* HENRY HANSMANN, *THE OWNERSHIP OF ENTERPRISE* (1996). Professor Hansmann argues that one of the great advantages of investor-owned firms is that their members all share the same interest: maximum profit. However, firms owned by customers tend to have multiple interests: both maximum profit and maximum services. This tension can be resolved if the firm only offers one service (in which case the profit constraint can collapse into mere operational efficiency), but can become intolerable if different subclasses of owners demand different services. Successful mutuals tend to have a relatively homogeneous product line.

many of the early conglomerate banks had very little interest in their nonbanking activities.

The restrictions on commercial activities remained in these new restricted charters, although their rationale became increasingly anachronistic. As the Supreme Court held in *Union National Bank v. Matthews*:

The object of the [National Bank charter] restrictions was obviously threefold. It was to keep the capital of the banks flowing in the daily channels of commerce; to deter them from embarking in hazardous real-estate speculations; and to prevent the accumulation of large masses of such property in their hands, to be held, as it were, in mortmain.³⁴³

The object of these restrictions may have been obvious to the *Matthews* court, and indeed the prohibition on real estate lending was justifiable. But the reference to “the daily channels of commerce” was an anachronism. It appears to be a reference to the real bills doctrine—which began its long intellectual reign in America around the 1820s.³⁴⁴ This doctrine—an incoherent hybrid of monetary policy and prudential regulation—insisted that a bank’s assets consist of little but short-term commercial paper. This virtually demanded the separation of banking and commerce, because these asset restrictions precluded almost all commercial activity. But curiously, the charters of the day did not further articulate the real bills doctrine (which would have also barred such traditional banking activities as extending or dealing in medium-term corporate credit), but relied on the ancient restrictions.

Apart from a smattering of *ultra vires* cases, the separation of banking and commerce was not a particularly significant political issue until the end of the nineteenth century. With a few interesting exceptions, incorporated commercial banks accepted deposits, extended credit, perhaps issued notes or engaged in securities activities, but left the rest of the economy to others. The charter restrictions became increasingly irrelevant, because the restraining acts began to lose their teeth after the Civil War. They remained legally effective—indeed were federalized by the National Bank Act. However, note issue had become economically secondary, and banking activities

343. *Union Nat'l Bank v. Matthews*, 98 U.S. 621, 626 (1878).

344. MINTS, *supra* note 16.

were more defined by the deposit account and the check. Only a bank could issue notes, but until the Glass-Steagall Act, many firms (and even some licensed individuals) could take a deposit. Near the end of the century, trust companies—with relatively unlimited powers including depository powers—were beginning to assert a presence.³⁴⁵ Private banks could always do what they pleased, subject to the restraining acts, which no longer restrained much of importance.

Bank powers became a live political issue again in the late nineteenth century.³⁴⁶ The motive force was familiar—the intersection of concentrated bank capitalism and concentrated corporate power. By this time, the original rationales were frozen dead, and a new set of rationales had to be applied, notably the real bills doctrine and the general antitrust spirit of the era. Yet another set of rationales are being applied to the contemporary debate. (Ironically, some of the more sophisticated rationales for separating banking and commerce still rely on corporate governance, albeit different ones than those which preoccupied Robert Morris, Tench Coxe, and Alexander Hamilton.) But as discussed above, the corporophobia of 1786 was still alive in 1886, and for that matter, is still alive today.

The meaning of limited bank powers has changed considerably in the last 200 years. What has changed far less is the language of the charters,³⁴⁷ and American discomfort with the power and implications of the business corporation.

345. See generally JAMES G. SMITH, TRUST COMPANIES IN THE UNITED STATES (1928).

346. At this point, an interested reader has many sources to consult. *E.g.*, H.R. REP. NO. 62-1593 (1913) (Pujo Committee Report); GEORGE BENSTON, THE SEPARATION OF COMMERCIAL AND INVESTMENT BANKING: THE GLASS-STEAGALL ACT REVISITED AND RECONSIDERED (1990); BRANDEIS, *supra* note 242; VINCENT CAROSSO, INVESTMENT BANKING IN AMERICA (1970); NADER ET AL. *supra* note 208; WILLIAM NELSON PEACH, THE SECURITY AFFILIATES OF NATIONAL BANKS (1941); MARK ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE (1994); Helen A. Garten, *Subtle Hazards, Financial Risks, and Diversified Banks: An Essay on the Perils of Regulatory Reform*, 49 MD. L. REV. 314 (1990); Halpert, *supra* note 20; Edwin J. Perkins, *The Divorce of Commercial and Investment Banking: A History*, 88 BANKING L.J. 483 (1971); Shull, *supra* note 287.

347. See *infra* Appendix.

Appendix

This Appendix compares the powers restriction in the New York free banking charter of 1838 with that of the modern federal banking charter.

New York Free Banking Act of 1838

18. Such association shall have power to carry on the business of banking, by discounting bills, notes and other evidences of debt; by receiving deposits; by buying and selling the gold and silver bullion, foreign coins and bills of exchange, in the manner specified in their articles of association for the purposes authorized by this act; by loaning money on real and personal security; and by exercising such incidental powers as shall be necessary to carry on such business; to chose one of their number as president of such association, and to appoint a cashier, and such other officers and agents as their business may require, and to remove such president, cashier, officers and agents at pleasure, and appoint others in their place.

...

24. It shall be lawful for such association to purchase, hold and convey real estate for the following purposes:

1. Such as shall be necessary for its immediate accommodation in the convenient transaction of its business; or

2. Such as shall be mortgaged to it in good faith, by way of security for loans made by, or moneys due to, such association; or

3. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings; or

4. Such as it shall purchase at sales under judgments, decrees or mortgages held by such association.³⁴⁸

348. Act of Apr. 18, 1838, An Act to Authorize the Business of Banking, 1838 N.Y. Laws 61st Leg. Sess., §§ 18, 24. The full text of this charter can be found in 2 BANKING & CURRENCY, *supra* note 63, at 1183-91.

Modern Federal Banking Charter

§ 24 *Seventh.* To exercise by its board of directors or duly authorized officer or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security. . . . The business of dealing in securities and stocks by the association shall be limited to . . . [over four pages of single-spaced text pertaining to securities follow].

§ 25a(a) A national bank may not—

(1) deal in lottery tickets . . .

§ 29 A national banking association may purchase, hold, and convey real estate for the following purposes, and for no others:

First. Such as shall be necessary for its accommodation in the transaction of its business.

Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

Fourth. Such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it.

But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years . . . ³⁴⁹

349. 12 U.S.C. §§ 24, 25a(a), 29 (1994 & Supp. V 1999).

