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Corporate Law, Antitrust, and the History of Democratic Control of the Balance of Power

Michelle Meagher

Grown to tremendous proportions, there may be said to have evolved a "corporate system"—as there was once a feudal system—which has attracted to itself a combination of attributes and powers, and has attained a degree of prominence entitling it to be dealt with as a major social institution.[1]

Adolf A. Berle and Gardiner C. Means, The Modern Corporation & Private Property (1932)

1.1 INTRODUCTION

Since their creation, corporations have proven to be vehicles for incredible aggregate wealth creation. Indeed, this was part of the intended design: the resource-strapped state sought a catalyst for public investment and so constituted the legal entity of the company, attaching to this artificial construct the rights and privileges that would allow it to successfully corral private capital.[2] From the creation of the Bank of England to the empire-building of the East India Company, the company form was harnessed as a tool for the expansion of public life.

It was, however, recognised at the outset that in creating a unique set of legal features that would make the company so attractive for private investment – in particular the later ability to own property, via the company, with limited liability – the state was not only creating its own co-investor in public wealth but there was also the possibility that the company would pose a threat to the state itself through its ability

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[1] Adolf A Berle and Gardiner C Means, *The Modern Corporation & Private Property* (Macmillan Company 1932) 3.

[2] WG Roy, *Socializing Capital* (Princeton University Press 1997) 41, 48.

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to channel and multiply the accumulation of private power.[3] The public's salvation, therefore, came with an inherent threat of its undoing.

As such, since its inception, the corporation has been involved in a delicate dance with the state both to route its productive capacity towards socially desirable ends and to control the corporation's power.[4] Today, as technological development and the mobilisation of international financial capital allow the power of the corporation to transcend that of the democratic state in both scale and scope, the tools of the past that were used with varying degrees of vigour to constrain the corporation are increasingly relevant. Corporate law and antitrust were once used to maintain the balance between the power of the corporation and the power of the state. Today, this vital role has been all but forgotten.

We have many regulatory tools that are used to proscribe the bounds of operation of the company, corporate law, and antitrust being two of them. Both disciplines are currently engaged in an active debate as to their core purpose in the modern context. Within antitrust, this has involved revisiting the 'consumer welfare standard' as the accepted litmus test of permitted competitive conduct; within corporate law, it manifests as a collective reflection on the shareholder primacy principle of corporate governance and the stakeholder capitalist model proposed as its alternative. Each debate would benefit from a more nuanced understanding of the origins of antitrust in corporate law (and vice versa) and the historical attempts to constrain the corporation as an entity with the built-in capability of challenging the state's governmental power.

What we see from looking at the history of corporate law and antitrust is that each discipline historically played a complementary role in maintaining the *balance of power* between private, economic concentrations and the demos. The now-separate conversations about corporate responsibility in the corporate governance sphere and about corporate power within competition policy circles have always, in fact, been fundamentally connected and targeted at the same set of risks.

This chapter will start in Section 1.2 by exploring the concept of the *balance of power*, which will then form the framework for our historical exploration of corporate and antitrust law. We will then consider two manifestations of private power that the state must regulate: its own public grants of monopoly power, considered in Section 1.3, and what we will designate as 'constructed monopolies', discussed in Section 1.4. Constructed monopolies differ from publicly granted monopolies in that they are generated within the market, and it is in reaction to the development of such monopoly market positions that modern antitrust law comes into being. It is tempting to consider such monopolies to be 'self-generating' and as such the

[3] JW Hurst, *The Legitimacy of the Business Corporation* (University of Virginia 1970) 43.

[4] For a useful 'potted history' of the corporation, particularly in America, see N Lamoreaux and W Novak, 'Introduction' in Lamoreaux and Novak (eds), *Corporations and American Democracy* (Harvard University Press 2017) 1–33.

mirror-image of the public grant of monopoly. But as we shall see the state is continually involved in co-creating the market and the conditions for monopoly – or competition – and thus 'constructed' is a more accurate framing for the modern monopoly than 'self-generating'.

Whereas modern antitrust forged its path in the regulation of constructed monopolies, corporate law marched into the territory of corporate responsibility, in particular, a responsibility towards investors. Corporate responsibility will be the focus of Section 1.5. Although at face value corporate responsibility seems to operate according to a different logic to the control of corporate and market power – focused instead on investor protections – we shall see that this is, or at least could have been, an aspect of the balance of power. Finally, this chapter will conclude in Section 1.6 by considering the relevance today of the concept of the balance of power to the operation of antitrust and corporate law.

1.2 BALANCE OF POWER

The challenge of maintaining the balance of power between the demos and industry stems from the phenomenon of economies of scale. As Ellis Hawley observes:

> One of the central problems of twentieth-century America has revolved about the difficulty of reconciling a modern industrial order, necessarily based upon a high degree of collective organization, with democratic postulates, competitive ideals, and liberal individualistic traditions inherited from the nineteenth century. This industrial order has created in America a vision of material abundance, a dream of abolishing poverty and achieving economic security for all; and the great majority of Americans have not been willing to destroy it lest that dream be lost. Yet at the same time it has involved, probably necessarily, a concentration of economic power, a development of monopolistic arrangements, and a loss of individual freedom and initiative, all of which run counter to inherited traditions and ideals.[5]

As Hawley describes, the industrial economy is prone to the agglomeration of production capacity, and with that concentration of economic resources comes a threat to individual freedom. Whether the industry is centralised within the state or centralised within private entities, the balance between the autonomy of society and the power of whoever commands the industry must be maintained. The allocation of property rights is thus central to society's response to economies of scale. After identifying the 'corporate system' in the quote with which this chapter began, Berle and Means emphasise that the '*Organization of property has played a constant part in the balance of powers which go to make up the life of any era*'.[6] For Berle and Means, the 'corporate system' not only channels resources towards corporations but the impact of the overall system is so great that '*it may even determine a large part of*

[5] Ellis Hawley, *The New Deal and the Problem of Monopoly* (Princeton University Press 1966) vii.
[6] Berle and Means (n 2) 3.

the behaviour of most men living under it'.[7] The corporation, as a tool for infrastructural and economic development, became the vessel into which increasing returns have been channelled, giving rise to an entity with equivalent powers to the state.

Although economies of scale may be part and parcel of technological development, it is important to note that the dominance of the corporation as an institution was not an inevitable consequence;[8] the corporation is a creature of the state.[9] Alternative modes of an economic organisation include partnerships, associations, municipal corporations, charities, and cooperatives. But it is the corporation that has really thrived, and it has done so with the explicit endorsement of the state. Historically, as we shall see in Section 1.3, the corporation was a positive creation of the state.[10] Today, the corporation exists at the pleasure of the state – anyone can start a corporation for any legal purpose and hardly any effort or bureaucracy is involved in the process. Yet still, the corporation relies on the passive acceptance of the state; the privilege of incorporation could be removed at any time.

The balance of power with which this chapter is concerned refers to the relationship between the power of the corporation and the power of the state. Given the mode of creation of corporate power, the balance of power is inherently reflexive. In a literal sense, the corporation's power does not – cannot – exist independent of the state that creates it,[11] and at the same time, the capacity of the state has become dependent on the economic contributions of corporations as the chosen vehicle for harnessing economies of scale. Being creatures of the state, corporations are tied up in conference with the state, continually negotiating their very existence. This allows the state to push the corporation in directions that benefit society but also gives rise to the opportunity, and leverage, for the corporation to push back.

The balance of power does not start with the desirability or otherwise of increasing returns to scale in economic terms. Concentrated centres of power can be corrosive to public life and are automatically suspect as such. As K. Sabeel Rahman reminds us:

> the biggest moral threats in a democratic society are those practices and arrangements that undermine the capacities and powers of citizens to be active political agents: the concentrated private power of firms that can dominate individuals in the economy; the diffused system of the market that can narrow one's life opportunities and prospects; the spectre of an unresponsive and unaccountable state itself.[12]

[7] Ibid. 3.
[8] Roy (n 3).
[9] Ibid. 12.
[10] Ibid.
[11] Sandeep Vaheesan, 'The Profound Nonsense of Consumer Welfare Antitrust' (2019) 64 Antitrust Bull 479; Roy (n 3) 190.
[12] KS Rahman, *Democracy against Domination* (Oxford University Press 2016) 13.

We can relate this notion of balance of power to Polanyi's concept of the 'double movement'.[13] As Polanyi explores in his seminal book *The Great Transformation*, the market is propelled to continuous expansion as it attempts to pull away from society and render the demos subservient to its logic. But this movement is met by a countermovement of society as society seeks to protect itself from the market's destructive capacity. This manifests as a concerted effort to protect society from the market.[14] Touching on the reflexive nature of the relationship between Berle and Means' 'corporate system' and the state, Polanyi developed the concept of 'embeddedness' which proposes that the market is embedded within society and the state.[15] This embeddedness ensures that the market's attempts to pull away from society will always be met by a corresponding countermovement, tethered as the market is to the society that generates it.

This indeed is just what happened in relation to the corporation. As Naomi Lamoureaux and William Novak describe, as the' *persistent growth in the scale and scope of the largest business corporations frequently challenged extant regulatory rubrics – most famously with the development of interstate trusts and holding companies*' society has proven to be '*surprisingly creative and versatile in generating new legal, administrative, and regulatory tools to bring even the most powerful corporations under a modicum of democratic control*'.[16]

Corporate law and antitrust have both played a role in this democratic countermovement. Corporate law constrains the scope of action of the entity that is the corporation. It thus can act as a check on the power of the corporation on the market and in society, not dissimilar to the remit of antitrust law. Meanwhile, antitrust looks to the external business arrangements of corporations, as well as other business organisations, and determines which configurations of capital are to be permitted the licence to wield collective power and which are to be forced to compete.[17] Antitrust was also once used to govern the corporation at an existential level, as a type of corporate law. Understanding the reactive, contingent, and ever-evolving nature of developments in each of these legal disciplines sheds light on the present-day efforts to respond to corporate domination.

1.3 GRANT OF MONOPOLY

The original model of the corporate 'licence to operate' was the corporate charter. In order to come into existence, a corporation required an affirmative act of the state – a decree of the sovereign or, later, an act of Parliament (in the United Kingdom),

[13] Karl Polanyi, *Great Transformation* (2nd ed Beacon Press 2001) 136.
[14] Fred Block, 'Introduction' in Karl Polanyi, *The Great Transformation* (Farrar & Reinhart 1944) xxii.
[15] Polanyi (n14) 60.
[16] Lamoreaux and Novak (n 5) 4.
[17] Sanjukta Paul, 'Antitrust as Allocator of Coordination Rights' (2020) 67(2) UCLA L Rev 380.

state legislatures, or Congress (in the United States).[18] Some of the first corporate charters were granted in England by a state eager to take advantage of private investment for the completion of public projects. By granting these artificial legal entities protection from liability and by guaranteeing a financial return, the corporate form was utilised as an engine for economic growth.[19]

Corporate charters were a rare privilege. Very few were granted before the turn of the nineteenth century.[20] Before the rise of manufacturing, charters were generally granted to provide transportation infrastructure, water utilities, to create banks and insurance companies.[21] Many of these early corporations, including the East India Company in England[22] and the Bank of New York in the United States,[23] were, as Eric Hilt describes, '*the largest business enterprises that had ever been created …, and were endowed with valuable legal priveleges that were not accessible to other firms*'.[24]

A corporation was a way for private citizens to pool together their resources, and although public benefit was initially a feature of charter grants, private gain was also part of the bargain. The presence of economies of scale and the public interest in seeing the relevant project completed were the justifications of a monopoly grant: it was felt that the underlying enterprise – the construction of a bridge or canal or road – would be unremunerative without some exclusive licence providing a barrier to entry.[25] Not all charters related to industries with substantial economies of scale, but the balance of power was most imperilled in relation to enterprises either with a tendency to grow in size or influence or where the monopoly related to some critical infrastructure or bottleneck in the economy.

Today, we think of monopoly in a narrow sense as the market position that allows a firm to raise price above cost and restrict output. Under the model of corporate chartering though, the grant of a monopoly licence – understood to be an exclusive right to engage in a particular enterprise – was one of several kinds of inducements that could be negotiated as part of a charter grant, all giving some kind of monopolistic privilege. For example, the Society for Establishing Useful Manufactures, which was a textile company chartered in New Jersey in 1791, secured permission to raise funds through a public lottery as well as obtaining exemptions for the company's employees from taxes and military service.[26] There was an inevitable reciprocity that simultaneously reinforced and delimited the role of the state as grantor of the

[18] Roy (n 3) 48–50; Hurst (n 4) 16.
[19] This was also the case in nineteenth century America. Roy (n 3)41.
[20] Hurst (n 4) 15–18; Joseph S Davis, *Essays in the Earlier History of Corporations* (Harvard University Press 1917)
[21] Eric Hilt, 'Early American Corporations and the State' in Lamoreaux and Novak (eds), *Corporations and American Democracy* (Harvard University Press 2017) 40; Roy (n 3) 52.
[22] William Dalrymple, *The Anarchy* (Bloomsbury Publishing 2019).
[23] Hilt (n 22) 41.
[24] Ibid.
[25] Ibid.
[26] Lamoreaux and Novak (n 5) 8.

privileges and the corporation as grantee: charters were granted at the behest of the state but a business would not seek a charter for an enterprise that did not require public support – for this, there was no need to incorporate.

With the grant of monopoly came corresponding power. Such power was not granted without protections. The countermovement to constrain the power of corporations to keep them embedded within society took several forms, which will be explored in this section: (a) restrictions on the ability to grant special privileges; (b) restrictions on the scope of the grant; (c) reservations of the power to revoke the charter; and (d) the introduction of general incorporation.

1.3.1 *Restrictions on the Ability to Grant Special Privileges*

The scope for nepotistic favouritism within the power of the state to grant special privileges has always been keenly felt. In the Tudor Royal Court, privileges – in the form of 'letters patent' – were dispensed liberally as quid pro quo for supporting the sovereign either politically or financially, or even simply given as favours to the sovereign's servants and courtiers.[27] The case of *Darcy v. Allen*,[28] known commonly as the *Case of Monopolies*, demonstrates both the profligacy of the grants and the public intolerance for sovereign power to be so abused. In that case, Queen Elizabeth I had granted an exclusive licence for the production of playing cards to her groom, which the court rendered invalid on the basis that it created a monopoly contrary to common law restraint of trade. In terms of the balance of power, we can understand the perversity of this particular special privilege – the grant of an exclusive licence to produce playing cards is not in fulfilment of some public need and yet it interferes with the right of others to earn their daily bread through an otherwise legally permitted enterprise and does so through the co-option of the state. The focus of the court was on the economic costs of monopoly but also, as Barry Hawk has described, on '*political constitutional objections to royal authority*'.[29]

Eventually, Parliament enacted the Statute of Monopolies in 1624 which prohibited the sovereign from making outright grants of monopoly except as a temporary reward for technological innovation – from which the modern patent is derived. Corporate charters, as opposed to other grants of monopoly privilege, which came with various restrictions attached, did however continue.

In the United States, the distaste for the abuse of public power for private gain found expression in the East India Company tea thrown into Boston harbour in 1773, and this sentiment continued after independence. Several states had antimonopoly provisions in their constitutions,[30] and there was even a proposal to include

[27] Barry E Hawk, 'English Competition Law Before 1900' (2018) 63 Antitrust Bull 42.
[28] *Edward Darcy Esquire v Thomas Allen of London Haberdasher* [1602] 77 ER 1260.
[29] Hawk (n 28).
[30] David Millon, 'The Sherman Act and the Balance of Power' (1988) 61 S Cal L Rev 1219, 1249.

an antimonopoly provision in the US Constitution or Bill of Rights.[31] Although states retained the ability to grant corporate charters, courts were reticent to embellish the grant of a charter with implied privileges. In *Charles River Bridge*,[32] when a new bridge was chartered to be built right next to the already-existing Charles River Bridge, the courts refused to interpret the grant of the earlier corporate charter as an implicit grant of monopoly to collect bridge tolls. Interpretation of corporate privileges was to err on the side of limitation, not expansion.

The US context before and after independence usefully illustrates the dual role of the corporation as a threat to the balance of power but also as a safeguard against the state. At the same time that the American colonists rejected English corporations like the East India Company as vehicles of oppression, they also embraced their own corporate organisations as protection against the British monarch.[33] Many of the early colonies had been formed as chartered companies and they governed themselves according to those charters as a way to ensure due process as between the colonists, with the governance provisions of the corporate charter serving as a model for the governance of public life.[34] Adhering strictly to the terms of the charter also served as a shield against interference by the granting power – the King in England. Individual state constitutions were eventually modelled on these charters.[35]

It also emerged as a legal principle that benefits conveyed by the state should not be capriciously withdrawn. The Contracts Clause in the US Constitution was instituted to protect contracts with the state from arbitrary abuse of state power. In the watershed *Dartmouth College* case,[36] the Supreme Court held that the state of New Hampshire could not unilaterally amend a previously granted charter. In that case, the charter for Dartmouth College had been granted by King George III, before the state of New Hampshire had even been formed. The court found that since the corporate charter constitutes a contract, it could not be unilaterally altered. It could only be changed through mutual consent.

Dartmouth College had the potential to permanently alter the balance of power in favour of corporations, and indeed the decision was hotly contested on these grounds by those who saw it as paving the way for arbitrary *private* power. As one commentator remarked: *'Sure I am that, if the American people acquiesce in the principles laid down in this case, the Supreme Court will have affected what the whole power of the British Empire, after eight years of bloody conflict, failed to achieve*

[31] Ibid.
[32] *Charles River Bridge v Proprietors of the Warren Bridge*, 36 US (11 Pet) 496 (1837).
[33] Nikolas Bowie, 'Why the Constitution Was Written Down' (2019) 71 Stan L Rev 1397; Lamoreaux and Novak (n 5) 7.
[34] Nikolas Bowie, 'Why the Constitution Was Written Down' (2019) 71 Stan L Rev 1397, 1407; Hurst (n 4).
[35] Bowie (n 35) 1477.
[36] *Trustees of Dartmouth College v Woodward*, 17 US (4 Wheat) 518 (1819).

against our fathers'.[37] States responded by enacting legislation that allowed them to insert 'reservation clauses' into corporate charters, maintaining the ability to alter and revoke grants going forward. Nevertheless, the principle of protection against state power, alongside the protections against corporate power built-in to the corporate charters themselves, continued as a theme in the regulation of the corporation.

1.3.2 *Restrictions on the Scope of the Grant*

Beyond limiting the ability of the sovereign or the state to grant monopolies, individual corporate charters tended to contain a whole host of provisions designed to constrain the size of the corporation and the extent of its power.[38] Charters would limit the industries and sectors in which a company could engage. They might contain limits on the amount of capital a corporation could accumulate and limits on the amount of debt. And, they would generally fix the lifespan of the corporation at the outset – sometimes to just a couple of decades or less.[39] Common law also restricted the right of corporations to own stock in other firms.[40] Each of these provisions was intended to circumscribe the corporation and thus limit its ability to expand beyond the granted scope and beyond the balance of power.

1.3.3 *Charter Revocation*

A crisis of the balance of power occurred when corporations outgrew the states that granted them the possibility of existence. The privilege of incorporation, which initially required an act of the state to create, came with not just restrictions in scope but also obligations to perform certain public duties, often including a commitment to complete the public venture for which the company was incorporated. For this reason, the sovereign or the state also retained the right to revoke the charter for either non-use or abuse.[41] This was a meaningful mechanism of public accountability and an existential threat to any company that abused its privilege or reneged on its commitment. But if the corporation no longer relied upon any individual state for its licence, then the balance of power would shift in favour of the corporation.

The procedure by which the corporate charter was initially challenged was known as a *quo warranto* proceeding. A *quo warranto* action is a demand made by the state on some individual or corporation to show 'by what warrant' or right they may exercise a particular franchise or privilege. The burden of proof was on

[37] Henshaw quoted in R L Grossman, F T Adams, and C Levenstein, 'Taking Care of Business: Citizenship and the Charter of Incorporation (1993)' 3 New Solutions a Journal of Environmental and Occupational Health Policy 7–18.

[38] Lamoreaux and Novak (n 5) 12.

[39] Roy (n 3) 54.

[40] Ibid. at 148, 149.

[41] Herbert Hovenkamp, *Enterprise and American Law, 1836–1937* (Harvard University Press 1991) 56–9.

the respondent to show that they had the adequate right to enjoy the privilege in question. The procedure stemmed from an ancient legal writ in use in England since the twelfth or thirteenth century.[42] On Edward I's return to England in 1274, he ordered a general inquiry to be held throughout the land into the reported misconduct of the feudal lords in his absence.[43] The quo warranto writs were issued to challenge the privileges that the lords had taken the liberty of enjoying. The basis for adjudication was merely whether it could be factually established that the privilege had been validly granted by the King or his predecessors. If there was no valid basis for the grant, or no proof of the grant, then an ad hoc court convened for this purpose could order the privilege to be revoked.[44] In later cases against corporations, this would mean that the courts had the power to revoke the corporate charter.

Abuse of the charter usually meant a breach of one of the terms of the charter itself, – for example, the restrictions on scope.[45] But with the rise of the infamous 'trusts' in the second half of the nineteenth century, *quo warranto* proceedings and charter revocation were also used by state attorneys general as what Daniel Crane has described as a '*form of crude antitrust law*'.[46] This was how states, with limited tools available at the time, sought to return the balance of power in face of the epochal challenge of the new conglomerate business organisations.

Towards the end of the nineteenth century, *quo warranto* proceedings were brought frequently to challenge what we would now construe as anticompetitive conduct, first against vertical integration, and then against horizontal combinations.[47] These cases were not primarily about competition though, certainly not about the protection of 'consumer welfare'. They were instead motivated by a desire to protect society from the threat of economic concentrations – or in other words to correct the balance of power. Nevertheless, as a matter of form, state attorneys general often found it easier to rely on the argument that the corporation had strayed *ultra vires* from its charter rather than argue the public policy point of public detriment or economic harm, and they were quite successful as a result of this technical focus on the bounds of the charter – which the courts

[42] Technically the particular procedure in use was the 'information in the nature of quo warranto' which had less onerous requirements. James L. High, A Treatise on Extraordinary Legal Remedies: Embracing Mandamus, Quo Warranto, and Prohibition (1874). I will refer simply to 'quo warranto' for ease of exposition.

[43] Helen M Cam, 'Historical Revisions XXXVIII – The Quo Warranto Proceedings under Edward I' (1926) 11 History 143–148.

[44] Few privileges were in fact revoked. The process was rather used as a form of revenue generation through the collection of fines. See Cam (n 44).

[45] Discussed at Section 1.3.2.

[46] Daniel Crane, 'The Dissociation of Incorporation and Regulation in the Progressive Era and the New Deal', in Lamoreaux and Novak (eds), *Corporations and American Democracy* (Harvard University Press 2017) 112.

[47] Herbert Hovenkamp, 'The Classical Corporation in American Legal Thought', 76 Geo LJ 1593, 1669–72.

were accustomed to adjudicating and which the state had clear power to enforce via the courts.[48]

The question at the heart of these *quo warranto* cases was whether the trusts, comprised of trustees representing multiple individual enterprises, would be permitted the privilege of coordinating their economic assets in an analogous manner to the grant of licence given to all monolithic corporations and whether such a privilege would be read into the individual charter grants of the constituent companies. The trust mechanism was used to circumvent the restrictions in corporate charters that prevented companies from vertically integrating or owning stock in other corporations.[49] The term 'robber baron' which came to be synonymous with the tycoons of the Gilded Age such as John D. Rockefeller and Andrew Carnegie was perfectly apt: the trusts were attempting to assert baronial privileges akin to those of feudal times, and the state, just as Edward I in the thirteenth century sought to challenge the warrant by which those privileges were being asserted.

One of the key features of the second industrial revolution of the 1860s and 1870s, during which time the phenomenon of increasing returns to scale really comes to the fore in America, is the development for the first time of a national market across the United States.[50] Prior to that time, companies would typically seek a charter in the state in which their business was going to be predominantly operating because they would tend to need some state support, such as permission to print bank notes or the power to annex land, in order to operate the business at all – otherwise, there would be no need to incorporate.[51] When the trusts thrust themselves across state lines this co-dependence between corporation and state shifted and states founds themselves wooing these national conglomerates to incorporate in their jurisdiction. Unsurprisingly, *quo warranto* cases suing companies for bold expansion were hardly brought at all.[52]

1.3.4 *General Incorporation*

The original process of granting incorporation through an act of Parliament or Congress was bureaucratically burdensome. It was also open to lobbying and rife with exactly the nepotism that the Statute of Monopolies had attempted to remove from the Royal Courts.[53] The idea of allowing for general incorporation, through laws that would permit anybody to form a company for any legal purpose, was to

[48] Martin Sklar, *The Corporate Reconstruction of American Capitalism, 1890–1916: The Market, the Law, and Politics* (Cambridge University Press 1988) 99; Naomi Lamoreaux and Laura Philips Sawyer, 'Voting Trusts and Antitrust: Rethinking the Role of Shareholder Litigation in Public Regulation, 1880s to 1930s' (2021) *Law Hist Rev*, 39(3), 569–600; Crane (n 47) 113.

[49] Roy (n 3) 176–220.

[50] Roy (n 3) 179.

[51] Lamoreaux and Novak (n 5) 13; Roy (n 3) 145.

[52] Lamoreaux and Sawyer (n 49).

[53] Hilt (n 22) 41.

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democratise the corporate vehicle and remove elitism from incorporation.[54] It was a move to restore the balance of power, but it contained within it a destabilising force that would again act to untether the corporation from society: with anybody able to form a company, the public perception shifted from incorporation as a privilege, granted at the sufferance of the state, to incorporation as a right.[55] The authority of the state to constrain the theoretically democratised corporation was thus compromised.

It was still recognised that the corporation was a vehicle through which private wealth would naturally multiply and thus general incorporation laws alone would not be sufficient to level the playing field across prospective incorporators. Hence, individual general incorporation statutes across the US states initially contained many of the same restrictions as had characterised individual corporate charters.[56]

This defence against corporate expansion was not to last. The pressure on states to accommodate the needs of the burgeoning corporations mounted at the end of the nineteenth century and a few states led the way in relaxing their corporate laws. Their target was the boon of registration fees and tax revenues that came with incorporation.[57] This phenomenon, as it played out across a few key states, has been termed the 'race to the bottom' – as states competed to attract corporations into their jurisdictions.[58] Today, Delaware is the preferred state of incorporation for publicly traded companies, but initially it was New Jersey that was victorious after loosening its law with successive amendments from the 1870s onwards, by which time the legacy restrictions of scope, limited cross-ownership and size of the corporation, had been replaced with a regime amenable to the now-common holding company structure.[59] This transformed the power of the corporation to control economic resources at an increasing scale and represented a fundamental shift in the balance of power.

As will be discussed in Section 1.4, contemporaneous to this relaxation of state incorporation laws, the 'democratic counterreaction' of state and federal antitrust

[54] Crane (n 47) 111; Laura Philips Sawyer, American Fair Trade: *Proprietary Capitalism, Corporatism, and the 'New Competition', 1890–1940* (Cambridge University Press 2018); Gerald Berk, 'Neither Markets nor Administration: Brandeis and the Antitrust Reforms of 1914' (1994) 8 Studies in American Political Development 24, 28; Millon (n 31) 1255; Hovenkamp, 'The Classical Corporation in American Legal Thought' (n 48) 34; Hovenkamp, *Enterprise and American Law* (n 42) 37–8.

[55] Robert Lowe, Vice President of the Board of Trade, who was the mastermind behind the Joint Stock Companies Act of 1856, declared: 'From then to now [incorporation] was a privilege. We hope to make it a right', quoted in John Micklethwait and Adrian Wooldridge, *The Company* (Modern Library 2005) 58. See also Thomas Linzey, 'Awakening the Sleeping Giant: Creating a Quasi-Private Cause of Action for Revoking Corporate Charters in Response to Environmental Violations' (1995) 13 Pace Envtl L Rev 219, 222 (noting that general incorporation elicited a 'shift in public opinion towards routine acceptance of a corporation's right to exist.'); Roy (n 3) 17.

[56] As discussed in Section 1.3.2. Lamoreaux and Novak (n 5) 3.

[57] Crane (n 47) 113–114.

[58] William Cary, 'Federalism and Corporate Law: Reflections upon Delaware' (1974) 83 Yale LJ Number 666.

[59] Lamoreaux and Novak (n 5) 13.

law, in its modern and less 'crude' form, was just taking shape.[60] The net effect was mixed and, as some commentators remarked at the time, somewhat confused: states were weakening corporate law, which had served as a powerful brake on corporate power, just as federal antitrust laws were being strengthened, in part to achieve the same aim.[61]

This context is critical to understanding the evolution of the trusts and the origins of modern corporate and antitrust law. It is clear that the balance of power has not been static; it is in constant, reactive flux. Initially, companies like Standard Oil opted to adopt the trust structure to implement their conglomerate concentrations precisely in order to avoid the corporate law prohibitions against cross-ownership in state incorporation laws.[62] Standard Oil and others rolled-up whole industries and granted what was essentially corporate control to a board of trustees, thus achieving by contract and trust deed what was prohibited by a merger under the terms of the charters.[63] Undeterred, state attorneys general used the *quo warranto* procedure to successfully challenge the trust arrangements as *ultra vires* the charters of the constituent corporations of the trusts.[64] It was by such a procedure that Standard Oil was forced to exit its initial trust.[65] The trusts then used their growing economic might and strategic leverage to lobby for the weakening of corporate law, and the states eventually obliged.[66] This then paved the way for the formation of giant single corporations, which tended still to be referred to as 'trusts', without the need to disguise their intentions behind the trust arrangement.[67] Corporate law thus granted, by default, greater ability to coordinate, and a relief from the necessity of competition (or the risks and instability of cartelisation of the constituent companies), to the expanded, conglomerate corporation – immunising, from antitrust scrutiny, to a certain extent, the underlying economic cooperation within the corporation. State and federal antitrust law was then used to attempt to reign in those newly emboldened corporations, but without the same powers to challenge monopoly power at an existential level or to act against abuse of corporate privilege per se.

1.4 CONSTRUCTED MONOPOLY

With general incorporation and the loosening of incorporation laws, the ability of the state to control the corporation through existential challenge was much diminished. The state was no longer the grantor of monopoly privilege, and yet monopolistic

[60] Lamoreaux and Novak (n 5) 14.
[61] Hovenkamp (n 42) 266.
[62] Roy (n 3) 176–220.
[63] Ibid. at 18
[64] Ibid. at 210; Sklar (n 49) 99.
[65] *State v Standard Oil Co*, 49 Ohio St 137, 184 (1892).
[66] Hovenkamp (n 48) 1669; Roy (n 3) 15–16.
[67] Roy (n 3) 279.

companies were arising anyway, taking advantage of technological advances, the growing national market, and the benefits of the corporate form itself – all of which, in different ways, gave rise to economies of scale.[68] The immediate need was therefore to identify other tools to constrain the increasingly problematic concentrations of power or, in other words, to address the tilting balance of power in favour of monopolies. This is where the joint origins of antitrust and corporate law rupture, spawning a fragmented approach to corporate regulation.[69] Within antitrust, there were two overlapping streams: (a) the use of common law to challenge coercive practices and (b) the passage of the Sherman Act in 1890. We shall consider the separate path of corporate law in Section 1.5.

1.4.1 *Common Law Restraint of Trade and Monopolisation*

The common law notions of 'restraint of trade' and 'monopoly', which had developed under English law and were transported across to the United States with colonisation, were both focused on conduct that sought to prevent others from entering a market and/or attempts to control prices and supply.[70] The concern was with coercion or the limitation of another party's freedom to trade.[71] It was a protection against abuse of imbalance of power but did not prevent or prohibit imbalance itself. Monopolisation, at common law, was effectively a special case of unlawful restraint of trade concerned again with exclusion from the market.

There was one sense in which the common law did act to promote balance of power. Common law restraint of trade applied not to corporations but also to other organisations. Unlike modern statutory antitrust, this common law tradition was permissive of coordination between a wide range of actors which may have served as a countervailing force to balance private corporate power with collective action on the part of workers, farmers, and others.[72] It has also been argued that the tolerance in the common law restraint of trade doctrine for cooperation between business competitors was in part due to the phenomenon of worker unionisation, creating both a model for cooperation among firms and a counterweight to cartels of producers.[73] Although economic power as such was not the primary focus of common law restraint of trade, there was at least this aspect of maintaining the balance and protecting not just competition but a person's right

[68] Hurst (n 4) 74.

[69] Crane (n 47) 110. See also KS Rahman, 'The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept' (2018) 39 Cardozo L Rev 1628–34 (tracing the 'common genealogical roots' of corporate governance, antitrust and the public utility concept as responses to the problem of private power and the need to ensure accountability).

[70] Sklar (n 49) 103; Hawk (n 28).

[71] Hovenkamp (n 42) 274.

[72] Sanjukta Paul, 'Reconsidering Judicial Supremacy in Antitrust' (2020) 31 Yale LJ. See also Sanjukta Paul, 'Antitrust as an Allocator of Coordination Rights' (n 18).

[73] Hawk (n 28) 40.

to earn their daily bread.[74] Cooperation and coordination of economic resources were not unlawful per se under the restraint of trade doctrine.[75]

The common law did not however have experience responding to the nature of the conglomerate corporation that emerged at the turn of the twentieth century. The focus of the law had been relatively small-scale restraints of trade: interferences with the market, non-competes, and questionable business practices. The perspective was somewhat different from today: what we might deem to be anticompetitive conduct was often categorised as the essence of vigorous competition. As one example, in the seminal *Mogul Steamship* case, a cartel of shipowners engaged in trading tea in China responded to a new entrant by declaring that they would refuse cargo from any exporter who used the competitor's vessels and also put on extra sailings to match those of the entrant at below cost.[76] When the case reached the House of Lords, Lord Halsbury articulated the prevailing view that the very essence of competition was to '*compete for a time as to render trade unprofitable to your rival in order that when you have got rid of him you may appropriate the profits of the entire trade to yourself*'.[77]

Other than as observed above, common law restraint of trade did not concern itself in any meaningful way with the relative power of private firms and the state. After an earlier decision in the *Mogul Steamship* case, at the Court of Appeal, The Times newspaper commented that the case '*forces us to realise that we are left with no defence against the monopoly or "trust" except such as the Legislature chooses to give us*'.[78] As we have seen, 'defence against monopoly' was the purview of the statutes on monopoly and incorporation, but the focus there was on public grants of monopoly not on private power.

The remedies at common law for a successful claim of restraint of trade or monopolisation were to render the contract or conduct void. An unlawful restraint of trade was unenforceable. This was a private action. There was no scope for enforcement by the state.[79] Hence the reliance by state attorneys general on the less targeted *quo warranto* proceedings as 'crude antitrust'. State antitrust laws and the federal Sherman Act were enacted to allow for governmental enforcement, but the overlap with corporate law continued: some state antitrust laws contained provisions

[74] Sanjukta Paul, 'Reconsidering Judicial Supremacy in Antitrust' (2020) 31 Yale LJ.

[75] Ibid.

[76] *Mogul Steamship Company, Ltd. V. McGregor, Gow & Company*, 21 Q.B.D. 544 (1889).

[77] Sir Peter Roth QC, 'The Continual Evolution of Competition Law' (Speech at the 36th Blackstone Lecture, Oxford, 9 November 2018) www.catribunal.org.uk/sites/default/files/2018-12/The%20Continual%20Evolution%20of%20Competition%20Law.pdf accessed on 9 September 2021.

[78] As quoted in Sir Peter Roth QC, 'The Continual Evolution of Competition Law' (Speech at the 36th Blackstone Lecture, Oxford, 9 November 2018) www.catribunal.org.uk/sites/default/files/2018-12/The%20Continual%20Evolution%20of%20Competition%20Law.pdf accessed on 9 September 2021.

[79] By the late 1800s, at least 21 states had put common law restraint of trade onto a statutory and/or constitutional footing. But these laws were not vigorously enforced. Sklar (n 49) 93.

familiar from incorporation laws, making participation in trusts ultra vires or instituting a remedy of charter forfeiture for breach of the antitrust law.[80] Meanwhile, some interest groups continued to argue that the federal Sherman Act should contain or be complemented by a federal incorporation framework.[81]

1.4.2 *Sherman Act*

The Sherman Act was historic in giving the federal government, not just state governments, the power to address the balance of power. As William Novak explains, the progressive movement at the end of the nineteenth century explicitly identified the risks of concentrated power.[82] There were known risks in terms of political influence and potential corruption of government. But it was also understood that there was a risk to the 'balance of power' itself; not just an economic or political problem but also a constitutional one.

As it played out, the Sherman Act built on the restraint of trade model at common law, and not the more powerful tool of federal chartering which was a live alternative at the time and immediately after the law's passage.[83] Herbert Hovenkamp has noted that by preserving the common law position, with its tolerance for 'reasonable' monopoly power, the potential of the Sherman Act was considerably emasculated.[84] Meanwhile, David Millon argues that the reliance on the supposedly equalising force of competition to maintain the balance of power turned the Sherman Act into '*the dying words of a tradition that aimed to control political power through decentralization of economic power, which in turn was to be achieved through protection of competitive opportunity*'.[85] The theory was that disparate economic interests, dispersed through competition, would not be able to co-opt the state for private political gain. According to Millon,' *The Senate's conservative approach to the concentration crisis failed to appreciate the magnitude and complexity of the problem. The Sherman Act thus had little impact on the rapidly accelerating consolidation of big business*'.[86]

Instead, coordination among labour and small producers, often permitted at common law, became the occupying focus of antitrust enforcers, with the previously central concern with corporate power fading into the background.[87] Today, the

[80] Hovenkamp, *Enterprise and American Law* (n 42) 266; Roy (n 3) 191.
[81] Hutchison, 'Progressive Era Conceptions of the Corporation' (2017) 2017(3) Colum Bus L Rev 1017.
[82] William Novak, 'Law and the Social Control of American Capitalism' (2010) 60 Emory LJ 377, 393–4.
[83] Crane (n 47) 116; Hutchison (n 82) 1022; Sklar (n 49); Melvin Urofsky, 'Proposed Federal Incorporation in the Progressive Era' (1982) 26(2) Am J Legal Hist 160–183.
[84] Hovenkamp, *Enterprise and American Law* (n 42) 247.
[85] Millon (n 31)
[86] Ibid. See also Roy (n 3) 197 ('The limp legislation was as much an admission that the changes [in American industry] were irreversible as it was a futile gesture to restore a competitive world that had never existed.').
[87] Sandeep Vaheesan, 'Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages' (2019) 78 Md L Rev 766.

influence of the Chicago School since the mid-twentieth century on antitrust law can be seen in the inconsistent treatment of cartels – treated as an ultimate evil with no redeeming 'efficiencies' – and mergers, which are often construed as presumptively 'efficient',[88] as well as the preoccupation with specific economic concepts of 'efficiency' and 'consumer welfare' as opposed to the broader concepts of democracy, both economic and political, and the balance of power.

1.5 CORPORATE RESPONSIBILITY

While the aspects of corporate regulation that we today recognise as antitrust forked away from corporate chartering in the direction of restraint of trade and monopoly, corporate law was forged in the model of the reciprocal obligations and commitments embodied by the original charters. Under this model, the balance of power would be maintained not primarily by the state but by empowering corporate stakeholders. This section will explore these mechanisms, in particular: a) shareholder protections and b) shareholder democracy.

1.5.1 *Shareholder Protections*

Alongside the restrictions to the scope of grant of any privilege which served to constrain corporate power,[89] corporate charters contained provisions expressly designed to protect investors. These rules have changed little to the present day: requirements to publish annual financial statements, rules on dividend payments, rules on electing directors – including protections for minority shareholders.[90] Equally, after the passage of the general incorporation laws, most corporate laws contained some mechanisms to protect shareholders: rules prescribing the number of directors – sometimes requiring them to be shareholders and/or citizens of the incorporating state; rules stipulating one share, one vote; limits on the total proportion of votes to be exercised by a single shareholder.[91] Underlying these provisions was the democratic concern that the special privilege of incorporation would be abused to the detriment of weaker shareholders and the public at large, a parallel line of thinking to that which precipitated the Sherman Act. Part of the purpose of these rules in corporate law was to maintain the balance of power.

There was also a direct way in which shareholder protections reinforced antitrust enforcement. As state attorneys general found their ability to bring *quo warranto* proceedings hampered by weakened corporate law, some minority shareholders challenged the anticompetitive use of the trust structure in state court through derivative

[88] Ramsi A. Woodcock, 'Inconsistency in Antitrust'(2013) 68 U Miami L Rev 105.
[89] Discussed in Section 1.3.2.
[90] Hilt (n 22) 51–52.
[91] Lamoreaux and Novak (n 5) 12.

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suits.[92] This would generally involve the minority shareholders of an acquired entity, that was about to be rolled-up into a trust and shut down, bringing a suit to challenge the effective merger. In these cases, the complaining shareholders would launch derivative suits against the majority shareholders, reinforcing their case with allegations of illegal conduct under the antitrust laws, claims to which the state courts were on the whole sympathetic.[93] Shareholder protections thus had a role in challenging the power of the corporate entity.

1.5.2 *Shareholder Democracy*

Although the principle of shareholder primacy is widely accepted today,[94] the legacy of corporate chartering was initially the notion of public responsibility that came with the early charters. This assumption – that corporations were meant to act to the public benefit, continued, at least in the public imagination, into the early twentieth century.[95] Then in 1919, the Michigan Supreme Court decided the landmark case prioritising the primacy of the shareholders within the corporate structure, *Dodge v. Ford*, holding that '*A business corporation is organized and carried on primarily for the profit of the stockholders*'.[96] *Dodge* heralded a new era of corporate governance, equating corporate responsibility not with the public interest but with shareholder interests.

Among corporate legal scholars, it is often thought that Adolf Berle and Gardiner Means' seminal book *The Modern Corporation* cemented the shareholder primacy principle by demonstrating that the separation of ownership and control alienated shareholders from their property and left managers free to pursue their own interests. This then was the justification for giving shareholders primacy in corporate decision-making. But the context of the time lends a different reading. Despite *Dodge*, it was not business practice of the day to only consider the interests of shareholders in corporate governance.[97] The debate on the role of the corporation was between more or less managerial discretion, with the goal of public benefit taken as a given.[98] The animating purpose of *The Modern Corporation* was to explore the troubling phenomenon of rising corporate concentration in the US economy in the Gilded Age of the 1920s, which left a few 'princes of property' – the corporate managers – with unprecedented power over the whole economy and society.

[92] Lamoreaux and Philips Sawyer (n 49).
[93] Ibid.
[94] See for an exception, eg, Lynn Stout, 'The Shareholder Value Myth' (2013) Cornell Law Faculty Publications Paper 771 http://scholarship.law.cornell.edu/facpub/771 accessed on 9 September 2021.
[95] JN Gordon, 'The Rise of Independent Directors in the United States, 1950–2005: Of Shareholder Value and Stock Market Prices (2006) 59 Stan L Rev 1465.
[96] *Dodge v Ford Motor Company*, 204 MI 459, 170 NW 668 (MI 1919).
[97] William Bratton and Michael Wachter, 'Shareholder Primacy's Corporatist Origins' (2008) 34 J Corp L 99, 102.
[98] Ibid. at 99.

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Thus, Berle and Means' prescription of shareholder empowerment was intended as a democratising, counterbalancing force, rendering management, and therefore the corporation, accountable to the shareholding public and thereby society at large.[99] This was not to be an active democratic participation on the part of the masses, but rather a mechanism to collectivise capital interests and recreate reciprocal public responsibility on the part of the corporation. In terms of balance of power, this democratisation would constrain the power of the corporate entity in a more flexible way than a corporate charter – instead of fixing a list of public responsibilities at the outset, the corporation would be liable for meeting evolving shareholder – and therefore public – needs, on an ongoing basis.

What Berle and Means did not give sufficient weight to in their analysis was that it was not shareholders per se that had been alienated by the separation of ownership and control. Rather, particular segments of financial capital were able to push aside the needs of the general stockholding public, and with the development of the holding company, by then permitted under corporate and antitrust law, they were able to do so with even relatively small shareholdings.[100] This situation was made worse by the move towards further shareholder empowerment within corporate law. Certain shareholder classes were able to maintain control of corporate resources and thus effectively recreate the elitist special privileges of the chartering era.[101]

As a matter of theory, corporate law in the latter half of the twentieth century departed from the 'concession theory' of the corporation as a creature of the state. Building on Ronald Coase's *Theory of the Firm*, the 'nexus of contracts' theory framed the corporation as existing not in relation to the state but in relation to those involved in its creation – labour, input suppliers and capital, with the last having primacy within the nexus.[102] In harmony with neoclassical price theory and the transaction cost economics of the Chicago School, the nexus of contracts replaces the balance of power as the organising principle of corporate regulation, just as the Chicago School interpretation of 'consumer welfare' and 'efficiency' have come to displace the concept of 'corporate power' within antitrust. The shareholders' 'contract' is construed as one that guarantees the maximum possible return on investment – and any resulting imbalance of power is therefore irrelevant as all stakeholders must refer to the terms of their contracts at the nexus.

The democratising thrust of Berle and Means' prescriptions are all but forgotten to history, with Milton Friedman's succinct edict in 1970 operating in its place: 'The Social Responsibility of Business is to Increase Its Profits'.[103] Although over the

[99] Ibid. at 121–2, 148–9.
[100] Roy (n 3) 172–74.
[101] Paul (n 73).
[102] Frank H. Easterbrook and Daniel R. Fischel, The Economic Structure of Corporate Law (Harvard University Press 1991).
[103] Milton Friedman, 'A Friedman Doctrine – the Social Responsibility of Business Is to Increase Its Profits' *The New York Times* (New York, 13 September 1970).

decades debates have still raged in legal scholarly circles over whether shareholder primacy is cogent, whether it is feasible, whether it is the law, and whether it exists as a concept, as of 2001, Henry Hansmann and Rainier Kraakman had declared 'The End of History for Corporate Law', with a resounding victory for shareholder primacy.[104] The emphasis in corporate law has narrowed considerably towards a focus on investor protection as such and not as part of the counterbalancing of corporate power within society. The power of the modern corporation of the twenty-first century must be viewed in this context.

1.6 THE BALANCE OF POWER TODAY

Where does the balance of power stand today? The forking paths of antitrust and corporate law away from the charter model and towards restraint of trade and shareholder primacy do not leave the state well-equipped to implement any countermovement against concentrations of economic power. Meanwhile, such concentrations are ascendant yet again, as the contributions to this book show: the evidence, again, of rising industrial concentration almost 100 years after Berle and Means' investigation; the inequality of share ownership, skewed towards the wealthy; the web of corporate ownership, enabled by the holding company structure, concentrating power among a few entities; the incidence of common ownership, particularly through asset managers. The dual concentrating impacts of financialisation and digitalisation, explored in more detail in the contribution from Ioannis Lianos and Andrew P. McLean, *Financialisation of the digital value chains and competition law*, in Chapter 16, leave us with a sense that the technologically and financially constructed monopoly will not bend to the balancing force of competition alone, nor to any imposition of corporate responsibility. Again, economies of scale, to the extent that they are an economic and technological reality, need not be a corporate inevitability – the power that comes with scale must be actively managed. When the economy, and society, is shaped by 'platform power' – the power to control the infrastructure of digital capitalism, the power to self-preference, the power to predict and influence consumer behaviour, the power to instrumentalise the generation and harvesting of personal data – the balance of power is gravely threatened. It may be argued that this is not the remit of antitrust or corporate law. But without antitrust to constrain the exercise of corporate power on the market and corporate law to constrain the power of the corporate entity as a corporation, other efforts by the state to regulate corporate conduct face unenviable hurdles to success.[105] The political,

[104] Henry Hansmann and Rainier Kraakman, 'The End of History for Corporate Law' (2001) 89 Geo LJ 439, 439 ('There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value.')

[105] Luigi Zingales, 'Towards a Political Theory of the Firm' (2017) 31 J Econ Perspect 113–130.

economic, and constitutional power of the corporation must be addressed at a foundational level, and it is the role of antitrust law and corporate law to do so.[106]

We will need to go further than the early, crude attempts at creating and simultaneously constraining the corporation if we are to meet this challenge. In this vein, Elizabeth Warren's Accountable Capitalism Act[107] revives the notion of federal chartering. States continue to have the power to revoke charters – the *quo warranto* procedure was codified into statute in most US states – although the power is little used. The procedure was actually abolished under English law in 1938,[108] but an equivalent power exists under section 124A of the Insolvency Act 1986 which allows the Secretary of State for Business to petition the courts for the winding up of a company 'in the public interest'. Ewan McGaughey has argued for the application of this provision against oil and gas companies in an attempt to combat climate change[109] – perhaps the ultimate example of the consequences of a persistent imbalance of power between the demos and corporations.

Again and again, however, the courts emphasise that winding up a company is a serious step,[110] as compared to the ease with which a company can be formed under a general incorporation framework. Without some longstop beyond which the corporation's existence will no longer be tolerated, the threat to corporate power posed by the state cannot be fully credible. Modern antitrust, hamstrung by the concepts of 'efficiency' and 'consumer welfare', can be no match for corporate domination and does not, as it stands, provide a sufficient counterweight. So too with corporate law that empowers insider groups of shareholders. The balance of power will continue to swing in favour of the corporation unless there is a mechanism for counterbalance. The roles of antitrust law and corporate law in embedding the corporation in society must be re-established.

[106] Michelle Meagher, 'Powerless Antitrust' (2019) 2(1) Competition Policy International Antitrust Chronicle.

[107] Accountable Capitalism Act, 115th Congress (2017–18) S. 3348.

[108] Administration of Justice Act 1938, s 9.

[109] Ewan McGaughey and Mathew Lawrence, *The Green Recovery Act* (Common Wealth 2020) section 21 www.common-wealth.co.uk/interactive-digital-projects/green-recovery-act#1 accessed 9 September 2021.

[110] *Walter Jacobs* at 252, as cited in Keay, 'Public Interest Petitions' (1999) 20 Company Lawyer 296.

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