

GANGS OF AMERICA: The Rise of Corporate Power and the Disabling of America, Ted Nace, 2003,2005, <http://www.amazon.com/Gangs-America-Corporate-Disabling-Democracy/dp/1576753190>

CHAPTER SEVEN

Superpowers

*The corporation acquires nine powerful attributes
(1860-1900)*

FOR BETTER OR FOR WORSE, we human beings are stuck with the attributes that nature gave us. That doesn't mean we can't imagine new ones—after all, isn't that what comic books are all about? Consider the following top ten items from a Web site entitled "The Top 47 Super Powers You Wish You Had" (www.keepersoflists.org):

1. X-ray vision
2. Invisibility
3. Telepathy
4. Ability to mute people on command
5. Ability to teleport
6. Power to freeze time
7. Ability to fly
8. Superstrength
9. Ability to change the weather
10. Power to make telemarketers quit calling my house

But corporations aren't like us. Because their powers are determined by laws, not by nature, it is possible to engineer them with all sorts of qualities, including some attributes outside the realm of human possibility. In theory, that programming can go either way: society can make corporations stronger by removing restraints and adding new legal powers, or it can make them weaker by doing the reverse. The key lesson is this: corporations are only as powerful as they are legally designed to be.

As the previous chapters described, the engineers of the American political system deliberately created a framework of laws to keep corporations politically weak. That framework was subsequently undermined by the ingenious maneuvers of Tom Scott and other businessmen, lawyers, and sympathetic legislators. So extensive were the changes in the legal framework that the corporation of 1900 was quite different from the corporation of 1860. This chapter summarizes that transformation. As shorthand, I'll call the corporate institution that existed before the Civil War the *classic corporation*. And I'll call the corporation that emerged by the end of the nineteenth century the *modern corporation*. Table 7.1 compares these two institutional forms.

Table 7.1 Differences Between the Classic Corporation (Before 1860) and the Modern Corporation (After 1900)		
ATTRIBUTE	CLASSIC CORPORATION	MODERN CORPORATION
Birth	Difficult: requires a custom charter issued by a state legislature	Easy: general incorporation charter allows automatic chartering
Life span	Limited terms	No limits
“Shape-shifting”	Corporations not allowed to own stock in other companies; restricted to activities specified in charter	Corporations free to pursue acquisitions and spin-offs
Mobility	Usually restricted to home state	No restrictions
Adaptability	Restricted to activities specified in charter	Allowed to pursue multiple specified lines of business and initiate or acquire new ones at company’s discretion
“Conscience”	Actions constrained by shareholder liability and by threat of charter revocation	Fewer constraints due to limited liability, disuse of charter revocation, and tort reforms
“Will”	Managerial action hampered by legal status of minority shareholders and of corporate agents	Legal revisions enable consolidation of management’s power
Size	Limited by charter restrictions	Asset limits removed; antitrust laws generally not effective
Constitutional rights	Functional only	Steady acquisition of constitutional rights

72 GANGS OF AMERICA

As the table shows, the differences are extensive and highly significant. Indeed, they may be likened to the differences between *Star Wars’* C-3PO, the fussy, awkward, highly specialized droid who possesses excellent manners but little else, and Arnold Schwarzenegger’s *Terminator*, a more robust, more focused, faster, more adaptable being.

Change #1: Creating Corporations Gets Easier

By 1902, anyone in the United States could receive a corporate charter merely by filing some papers with the state. The new system was a dramatic change from the incorporation system that existed prior to the Civil War, when charters required specific legislative approval and many contained special provisions unique to that entity.

This new system of automatic approval for new corporate charters, known as *general incorporation*, had actually first been introduced in the late 1700s as a means to allow churches to receive charters without the need to seek specific approval from the state legislature. The goal was to let churches enjoy the functional benefits provided by corporate ownership of land and property while at the same time avoiding the potential impingement on religious freedom that might have resulted if church charters were subject to the political process.

In 1811, the first general incorporation statute was passed by the state of New York for certain types of business corporations, including manufacturing, textiles, glass, metals, and paint. It allowed companies with capital of up to \$100,000 to be automatically incorporated for a life span of up to twenty years. In 1846, New York offered general incorporation to all companies. (See Table 7.2.) But for decades, charters issued under general incorporation laws continued to contain a variety of restrictive clauses, which explains why corporations in states such as New York began fleeing to New Jersey in the 1890s, even though both had general incorporation standards. Though New York began offering general incorporation much earlier, New Jersey was quicker to drop most restrictive features from its law. Only when truly modern-style general incorporation, with no restrictions, was introduced by New Jersey and then by Delaware, West Virginia, and other states, did it become impossible for states to control corporations in the way they had when a customized charter was required for each new corporation.

SUPERPOWERS O 73

1846	New York	1864	Nevada	1875	Maryland
1846	Iowa	1864	Louisiana	1876	Colorado
1848	Illinois	1865	Missouri	1876	Texas
1848	Wisconsin	1866	Nebraska	1889	Idaho
1849	California	1867	Alabama	1889	North Dakota
1850	Michigan	1868	North Carolina	1889	South Dakota
1851	Ohio	1868	Georgia	1889	Montana
1851	Maryland	1870	Tennessee	1889	Washington
1851	Indiana	1871	Arkansas	1890	Mississippi
1855	Kansas	1872	West Virginia	1895	Utah
1857	Minnesota	1874	Pennsylvania	1897	Delaware
1857	Oregon	1875	New Jersey	1902	Virginia

Source: *Liggett v. Lee (1933)*.

Change #2: Corporations Acquire an Unlimited Life Span

The classic corporation was chartered for a limited term and had to apply periodically to have its charter extended—every six to fifty years, depending on the type of business. After the advent of general incorporation statutes, states gradually began to replace limited terms with perpetual terms; almost half had done so by 1903. Thus, a key difference between the classic corporation and the

modern corporation is that the latter, at least in theory, enjoys an unlimited life span. This does not mean that modern corporations can never go bankrupt, or that one corporation can't absorb another. According to a study by Royal Dutch/Shell Group, the average Fortune 500 company survives about forty to fifty years before it vanishes, sometimes due to bankruptcy but more often because it is swallowed up by a bigger fish. If we consider the acquisition of one company by another to be a continuation of both companies' lives, the estimates of corporate life spans become significantly longer, especially for the largest corporations. Among the top twenty-five corporations on the *Financial Times* Global 500 list for 2002, the median age is 113 years. Only six companies among the top twenty-five are younger than 50 (Microsoft, Wal-Mart, Intel, Vodafone Group, Cisco, and Home Depot).

From a social and legal perspective, perpetual existence creates tremendous difficulties in holding corporations accountable for criminal behavior; in addition, it allows corporations to benefit indefinitely from behavior that once was legal but now is not. For example, despite the destruction of the Nazi and the Japanese fascist regimes, a number of German, Japanese, and even American corporations that benefited from the use of slave labor in the 1930s and 1940s can be found on today's Global 500 list, including IBM (#12), Siemens (#57), Daimler-Chrysler (#81), Deutsche Bank (#100), Ford (#157), BMW (#167), Bayer (#175), BASF (#187), Volkswagen (#211), General Motors (#308), Mitsubishi (#380), and Mitsui (#472). IBM bears a particularly heavy historical burden; evidence uncovered by historian Edwin Black describes how IBM's data processing technology helped the Nazi regime implement its genocidal policies.

With many corporations having roots extending back earlier than the American Civil War, it is not surprising that at least one Canadian and seven American companies on the Global 500 list also benefited from the use of slave labor prior to 1865, including American International Group (#11), JP MorganChase (#44), FleetBoston (#109), Lehman Brothers (#283), Union Pacific (#285), Gannett (#212), and Tribune (#327).

The point here is not that corporations that engaged in murderous practices in the past deserve to be smeared by the broad brush of history. Rather, the point is that the legal attribute of indefinite existence makes the corporation truly a different sort of social actor than you or me. For example, when evidence emerged that Kurt Waldheim, former U.N. secretary-general and then president of Austria, had played a leadership role in military units responsible for World War II atrocities, much of the world responded by ostracizing him, and he did not run for a second presidential term in 1992. In contrast, a corporation such as IBM, whose close involvement with the Nazi regime produced suffering on a vastly larger scale than anything Waldheim could have done, has experienced no lingering reproach other than calls for reparations.

Although perpetual existence allows corporations to outlive their own crimes and atrocities, it also has a very practical benefit in ordinary political and legal affairs. Consider, for example, the antitrust litigation against Microsoft initiated by the United States Justice Department under the administration of Bill Clinton. Such cases usually last at least a decade, often longer, and this gives companies such as Microsoft the chance to roll the dice with a new administration. In Microsoft's case, the Bush administration arrived in time to apply a more lenient philosophy to the case—and the company slipped the noose.

Change #3: Corporations Learn to Shape-Shift

As useful as it is, corporate immortality becomes even more potent when used in combination with the modern corporation's ability to morph dramatically in any number of ways. Corporate governance expert Ralph Estes has termed this morphing ability "indefinite entity," which he describes as "the ability to disguise itself, to run and to hide, or to reorganize into a whole new entity... sell off divisions and subsidiaries, be taken over and absorbed into a different company, or ... rename itself and emerge as, seemingly, a completely different company." Estes cites the example of Drexel Burnham Lambert:

Its image befouled with six felonies plus the legacy of junk bond king Michael Milkin, Drexel used a tax loophole to give itself a whole new identity as the spanking clean New Street Capital Corporation. Drexel, with its felonies, couldn't get a license to run a gambling casino in Puerto Rico it wanted to take over. New Street could—even though it emerged out of Drexel's hide.

Prior to the Civil War the sort of maneuvering described by Estes would have been beyond the capacities of any company. Under the charter system, a classic corporation was not allowed to own stock in another, so both hostile takeovers and spin-offs from one corporation to another were ruled out. Charters tended to be quite specific about the activities that a given corporation was allowed to undertake. In order to go beyond the terms of its charter, a corporation had to return to the state legislature and receive approval for a charter amendment.

By 1900, all those restrictions had vanished. As noted in the previous chapter, the key changes that undermined the antebellum charter system were Tom Scott's innovation of the holding company as a political tool in Pennsylvania in 1871, and the 1889 legislative change in New Jersey that made the holding company an option for any corporation chartered in that state.

By loosening their corporate statutes, New Jersey and the states that mimicked it created a new environment in which, according to historian Lawrence Friedman, "the corporation had torn free of its past—it could be formed almost at will, could do business as it wished, could expand, contract, dissolve."

Change #4: Corporations Gain Mobility

A key feature of the classic corporation was its firm link to the chartering state. That connection was reinforced by a number of factors, including a prohibition on one corporation owning stock in another, and *ultra vires*, a legal doctrine under which any contract outside the activities permitted in a corporation's charter was considered null and void by the courts. Although *ultra vires* lingered in theory into the 1930s, judges had mainly abandoned attempting to enforce it by 1900. Of course, once a corporation could both act beyond the legal definitions of its charter and change its legal location to a venue far removed from the communities where it conducted its operations, the ability of states to hold corporations accountable was greatly diminished. Indeed, the ability of corporations to go "venue shopping" encouraged states to compete with each other to create the most permissive corporate atmosphere. For example, when Connecticut's legislatures held the line with strict corporate rules, including a provision requiring that a majority of the board of directors of any company be Connecticut

residents, the state “drove from her borders not only foreign enterprises but also her own industries.” New Jersey, with a combination of low taxes and loose statutes, became “the favorite state for incorporations.” Another corporate favorite was West Virginia, a “Snug Harbor for roaming and piratical corporations,” the “tramp and bubble companies of the country.”

Change #5: Corporations Become More Adaptable

Charters issued by legislatures prior to the Civil War were quite specific about the activities that a corporation could pursue. Just as states restricted the mobility of corporations, they also made it illegal for a corporation to alter its activities without seeking a change in its charter. After the Civil War, those restrictions were lifted, often a decade or two after the change from special chartering to general incorporation. For example, New York switched fully to general incorporation in 1844, but the statutory change that permitted incorporation “for any lawful purpose” came in 1866. Illinois made the conversion to “any lawful purpose” in 1872, Massachusetts in 1874, Maine in 1876. Other states followed shortly.

The removal of clauses that defined and limited what a company was permitted to do, combined with new rules permitting holding companies, opened the door to the creation of two kinds of corporations that were not permitted under the classic corporation system. One was the conglomerate—a holding company that owns a diversity of companies. The other was the vertically integrated company, which attempts to control the entire life span of a certain product group from production through distribution and retail. Both approaches led to immense, potentially monopolistic corporations.

Change #6: Corporations Shed Their “Conscience” Mechanisms

Science fiction writers who have imagined the introduction of intelligent automatons into society have recognized the need for building at least a rudimentary “conscience” mechanism into robots and androids. Isaac Asimov imagined a solution in which robots were programmed with simple rules, such as, “A robot may not injure a human being, or, through inaction, allow a human being to come to harm.”

Because corporations are complex systems, in which large numbers of people and machines interact with the real world in myriad ways, it is a difficult challenge to program into them a “conscience”—that is, mechanisms to ensure that human beings aren’t trampled. But that does not mean it is impossible, and indeed a major preoccupation of the law is to develop various ways to protect people from being harmed not just by corporations but by institutions in general.

Much of this sort of programming is simply an extension of the legal provisions that protect humans from hurting each other, such as civil and criminal laws. Of course, criminal law never had any teeth in the first place when it came to corporations because of the obvious uselessness of the corporal disincentives that the law has traditionally relied on—flogging, imprisonment, and so forth. Instead, the designers of the classic corporation relied on the limitations contained in corporate charters and on the

ultimate sanction of charter revocation. But by around 1875, general incorporation had largely replaced the system of individually issued charters, and charters ceased to provide a means for controlling corporate behavior.

The end of the charter system also marked the full arrival of the doctrine of limited liability, which ended any legal incentive for corporate shareholders to concern themselves with the behavior of the businesses in which they owned an interest. As described in chapter 5, investors in some British corporations had enjoyed limited liability as early as the 1660s, but limited liability protection as a universal feature did not occur in Britain until 1855. Even then, Parliament required that a company “announce its members’ irresponsibility” by appending the phrase “LLC” (limited liability company) to its official name. In America, limited liability was highly controversial prior to the Civil War. For example, in Maine, the law changed back and forth nine times between 1823 and 1857—between no liability and full liability, depending on whether the Whigs or the Democrats had a majority of the legislature. Between about 1810 and 1860, judges began to develop a doctrine that conferred limited liability on shareholders in the absence of any charter provision to the contrary. Usually, however, charters were not silent. Some required that shareholders be exposed to unlimited liability for debts or legal settlements against a corporation; others required “double liability,” which meant that shareholders’ exposure was limited to twice the amount of their investment.

Of course, the ultimate effect of shielding stockholders from risk is to shift potential losses onto society at large. Such a shift also occurred in areas of civil law such as the law of torts, as summarized by political scientist Arthur S. Miller:

As with constitutional law, so with the private law of contracts, of property, and of torts. Judge-made rules in those fundamental categories had the result of transferring the social costs of private enterprise from the enterprise itself to the workingman or to society at large. Tort law provides apt illustration. Under its doctrines, a person who willfully or negligently harms another’s person or property must answer by paying money damages. The analogue of contract, which is a consensual obligation, a tort is a nonconsensual legal obligation. Who, then, bore the costs, in accidents and in deaths, of the new industrialism? Not the businessman. Not the corporation. The worker himself. (Often those workers were children.) And who bore the costs of pollution and other social costs? Society at large. How did this come about? In tort law judges created doctrines of “contributory negligence,” “assumption of risk,” and the “fellow servant rule,” all of which served to insulate the enterprise from liability. By “freely” taking a job, said the judges, the workers “assumed the risk” of any accident that might occur.

Change #7: Unleashing the Corporate Will

In the context of corporate law, legal scholar Paul Vinogradoff has defined will as “the faculty of taking resolves in the midst of conflicting motives; a governing brain and nerves, in the shape of institutions and agents; a capacity for the promotion and the defense of interests by holding property, performing acts in law, and exercising rights of action in courts.”

One of the least noted differences between the legal framework of the classic corporation and that of the modern corporation is the relative status of shareholder and management. According to legal historian Gregory Mark, shareholders played a dominant role in the classic corporation, but in the modern corporation a clear trend developed toward managerial supremacy. With managers winning the role of “governing brain,” decision making became far more streamlined and definitive, and managers could undertake strategic maneuvers such as mergers and acquisitions without fear of being blocked by a small minority of balking shareholders.

The elevation of the power of management occurred as a result of a variety of legal changes. In 1890, New York became the first state (followed by New Jersey in 1896 and Delaware in 1899) to rescind the common law doctrine known as “the rule of unanimous consent.” According to that doctrine, any fundamental change of corporate purposes, especially the sale of corporate assets, required unanimous approval by the shareholders. In practice, the rule of unanimous consent significantly hampered the creation of large corporate conglomerates, at least in cases where ownership of a corporation whose assets were being acquired were widely dispersed. Combined with the removal of restrictions that had been built into the charters of the classic corporation, the elimination of unanimous consent allowed the modern corporation a new degree of nimbleness, even though the size of the largest corporations at the end of the nineteenth century was far beyond that of earlier firms.

Court decisions also served to make shareholders subordinate to managers. A key case was the 1884 decision by the federal district court in St. Louis involving Jay Gould’s Wabash, St. Louis, and Pacific Railway. Setting a new precedent that dramatically increased the powers of management over shareholders, the court agreed to Gould’s request that his representatives be appointed receivers for the railroad company. Prior to that time, prevailing doctrine gave control over bankruptcy proceedings to impartial receivers, who were to balance the interests of stockholders, workers, and creditors. The St. Louis court’s decision, however, affirmed and legally reinforced the control of management over a corporation’s fate.

Change #8: Removing Restrictions on Size

In many cases the charters of the classic corporation placed explicit limits on size. For example, the 1818 charter of a Massachusetts company, the Main Flour Mills, limited the total property the corporation might hold to \$50,000, of which the land could not exceed \$30,000 in value. Most state constitutions also featured limits on the amount of investment capital that a single corporation could control, as shown in Table 7.3.

As we’ve already seen, many common charter provisions also indirectly limited the size of corporations. Such provisions included restrictions on the activities that a particular corporation could pursue; prohibitions against owning land not directly connected to a company’s activities; prohibitions against owning stock in other corporations; geographic restrictions; requirements in some states that excess profits be used to buy back stock, so that eventually stockholders would be eliminated and a corporation in effect would return to public ownership. In addition, the doctrine of unanimous shareholder consent for major decisions such as acquisitions or asset sales provided a brake on rapid conglomeration, because it allowed a small minority of dissident shareholders to block such action. With

the modern corporation, all those constraints were lifted, opening the door to the wave of mergers around 1900 described earlier.

New York until 1881	\$2,000,000	Maine 1867-1876	\$200,000
New York 1881-1890	\$5,000,000	Maine 1876-1883	\$500,000
Pennsylvania until 1863	\$500,000	Maine 1883-1891	\$2,000,000
Pennsylvania after 1863	\$5,000,000	Maine after 1891	\$10,000,000
Alabama until 1876	\$200,000	Vermont	\$1,000,000
Alabama 1876-1896	\$1,000,000	New Hampshire	\$1,000,000
Arizona after 1864	\$5,000,000	Massachusetts 1851-1855	\$200,000
Illinois 1852-1857	\$300,000	Massachusetts after 1855	\$500,000
Illinois after 1857	\$1,000,000	Michigan 1846-1885	\$100,000
Maine 1862-1867	\$50,000	Michigan after 1885	\$5,000,000

It might be argued that the framework of antitrust laws—beginning with the Sherman Antitrust Act in 1890 and followed by the Clayton Antitrust Act in 1914 and the Celler-Kefauver Act in 1950—functions to place a ceiling on size. And antitrust legislation has indeed produced occasional results, most notably the breakup of Standard Oil in 1911, American Tobacco, also in 1911, and AT&T in 1982. Of course, to deal with the complexity of business, such legislation must be written in broad terms, which means that enforcement and judicial interpretation are both highly subject to political ideology. Under Chief Justice Earl Warren in the 1960s, the Supreme Court viewed the intent of antitrust legislation as incorporating broad goals. These included the traditional goal of curbing monopoly pricing power, but also two key social goals: concern for the viability of locally controlled industries and small businesses, and other social effects, such as undue political influence. Thus, the Warren Court in the 1962 Brown Shoe case blocked the merger of two shoe companies, Brown and Kinney, even though the merger would have given Brown only 5.5 percent of total U.S. shoe production and allowed Brown to move from fourth to third among U.S. shoe companies.

With the arrival of the Burger Court in 1974, followed by the Reagan administration in 1981, judicial and executive antitrust philosophy shifted dramatically. In 1982, the Justice Department relaxed the standards for mergers, citing the need to allow American corporations to compete internationally, especially against large Japanese companies. The head of the Anti-Trust Division, William F. Baxter, rejected the idea that large corporations “by virtue of their size have something called economic power?”

The result of this more lenient policy on mergers has been a rapidly accelerating trend to concentration. In 1980, there were only three acquisitions larger than \$1 billion in value. In 1986, there were thirty-four such mergers. As late as 1992, total U.S. merger activity remained under \$100 billion.

But in the late 1990s, acquisitions exploded, topping \$1 trillion in 1998. In 2000, a single merger—the \$166 billion acquisition of Time-Warner by America Online—was larger than the *combined value* of all mergers and acquisitions in the United States from 1970 through 1977.

By any measure, corporations dominate the world economy, and among the largest corporations, an overwhelming majority are based in Japan and the United States. According to Martin Wolf, chief economics commentator at the *Financial Times*, thirty-seven of the top one hundred economies in the world, measured on a value-added basis, are corporations. That analysis, however, may understate their economic clout. A different comparison—of the revenues of corporations and the budgets of governments—finds that sixty-six of the one hundred largest economic entities in the world are corporations; only thirty-four are governments. In 1999, among the top two hundred companies, ranked by sales, fifty-eight Japanese firms accounted for 39 percent of total sales, while fifty-nine U.S. firms accounted for 28 percent of sales. Ranked by market value, however, nineteen of the top twenty-five firms worldwide in 2002 were U.S.-based. (See Table 7.4.)

1	General Electric	U.S.	372
2	Microsoft	U.S.	327
3	ExxonMobil	U.S.	300
4	Wal-Mart	U.S.	273
5	Citigroup	U.S.	255
6	Pfizer	U.S.	249
7	Intel	U.S.	204
8	British Petroleum	United Kingdom	201
9	Johnson & Johnson	U.S.	198
10	Royal Dutch/Shell	Netherlands/United Kingdom	190
11	AIG	U.S.	188
12	IBM	U.S.	179
13	GlaxoSmithKline	United Kingdom	145
14	NTT DoCoMo	Japan	138
15	Merck	U.S.	131
16	Coca-Cola	U.S.	130
17	Vodafone Group	U.S.	127
18	SBC	U.S.	125
19	Verizon	U.S.	125
20	Cisco Systems	U.S.	124
21	Procter & Gamble	U.S.	117
22	Novartis	Switzerland	114
23	Home Depot	U.S.	114
24	Philip Morris	U.S.	113
25	Total Fina Elf	France	109

Source: Global 2002 list, *Financial Times*, May 13, 2002.

Change #9: Corporations Win Constitutional Rights

There can be no doubt that the changes from classic corporation to modern corporation allowed greater business flexibility. For example, as described by historians John Mickelthwait and Adrian Wooldridge, “Nowadays, nobody finds it odd that, a century after its foundation, the Minnesota Mining and Manufacturing Company makes Post-it notes, or that the world’s biggest mobile-phone company, Nokia, used to be in the paper business.”

But the same changes that made corporations more flexible in their business operations also made them a far more potent force in the political realm. To make sure that this growing corporate power did not overwhelm the ability of state legislatures to control corporations, it would have made sense in the late nineteenth century for courts to affirm the constitutional authority of those legislatures to regulate corporations as they saw fit. Instead, the opposite took place, as courts systematically developed doctrines that allowed corporations to block unwelcome state laws and taxes.

In England, corporations had never been protected from state action, even when that action was of a highly arbitrary nature. Centuries of English legal tradition had established firmly the principle that corporate charters were revocable and alterable at any time. As described by Ron Harris, a historian of English constitutional law:

The larger the corporation and the more consequential the effects of its activities, the more likely was the State to interfere in its business at one point or another. Incorporation itself was not considered a protectable property right. The State could, at will, withhold an incorporation franchise which, in many cases, was of limited duration. Such withdrawal was not common, but it conformed to the Stuart conception of the constitution, which held that granting and revoking incorporation charters lay within the King’s prerogative and discretion. It also conformed to the post-1689 constitutional settlement which made the Parliament supreme and, as such, free to enact and repeal incorporation acts, according to changing circumstances or majorities.

Although 1886 is universally considered the year in which corporations won their first constitutional right—in the *Santa Clara* decision, already mentioned in chapter 1—as early as 1819 the Supreme Court had begun to establish a legal status for corporations in America that exceeded the traditional legal status enjoyed by corporations in England. The case that marked the first departure from the principle of corporate subordination to the will of the state was the 1819 case *Dartmouth College v. New Hampshire*. Encouraged by Thomas Jefferson, among others, New Hampshire had enacted legislation converting Dartmouth College from a private college into a public one. Jefferson had written to the governor, “The idea that institutions, established for the use of the nation, cannot be touched or modified . . . may perhaps be a salutary provision against the abuses of a monarch, but it is most absurd against the nation itself.” To make a corporate charter sacrosanct, said Jefferson, would amount to a belief that “the earth belongs to the dead, and not to the living.”

Seeking to block New Hampshire from making the college public, Dartmouth’s trustees went to court, arguing that the 1769 charter between the college and King George qualified as a contract entitled to protection under the contract clause of the Constitution (Article 1, Section 10), which prohibits states from “impairing the obligations of contracts.” The New Hampshire Superior Court agreed with the state. “These trustees are the servants of the public,” declared the court, “and the servant is not to resist the will of his master, in a matter that concerns that master alone.”

The trustees then appealed to the U.S. Supreme Court, where they had better luck. They were represented by the most renowned attorney of the day, Daniel Webster, a moving speaker. Though it was not recorded, Webster's oratory—"It is ... a small college, and yet there are those who love it"—aroused such emotion that some members of the audience were said to have fainted, and Chief Justice John Marshall openly wept.

In its decision, the Court agreed with the trustees of Dartmouth that the charter they had received from King George in 1769 should be considered a contract protected by the Constitution. This decision, Justice Story later wrote, was intended to protect the rights of property owners against "the passions of the popular doctrines of the day."

Dartmouth cut two ways. In practical terms, legislatures quickly figured out how to get around the problem. They added a new clause to charters stating that the state reserved the right of revocation. Moreover, the ruling included a clear statement by Justice Marshall that corporations remained subordinate to state power. Marshall wrote that the corporation is an "artificial being, invisible, intangible and existing only in contemplation of law." On the other hand, the case marked the beginning of a long process by which the Supreme Court steadily elevated the legal status of corporations above anything that had previously existed in Anglo-American law. Thus, it opened the door for a steady erosion of state sovereignty over corporations, allowing them to begin to carve out a legal zone of immunity from state legislatures.

By 1860, that process was still in its infancy. Most notably, corporations failed to win protection as "citizens" under the Comity Clause (Article IV, Section 2), which states: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States?" That strategy was turned down by the Supreme Court in the 1839 *Bank of Augusta* decision. The 1844 *Louisville, Cincinnati* decision did give corporations the right to seek review of state laws in federal courts. But until the late 1870s, the attitudes of judges toward corporations remained consistent with revolutionary era wariness of corporate power.

By 1900, the prevailing judicial philosophy had shifted dramatically. A new generation of judges had embraced the corporation as the engine of American economic progress, and a series of cases had been decided giving corporations the right to challenge state legislation under the Fourteenth Amendment and federal legislation under the Fifth Amendment. The following chapters examine this shift, including the role played by Supreme Court Justice Stephen Field, and they look more closely at the twists and turns of the *Santa Clara* decision, the strange case that gave corporations their first constitutional right.