GETTING THE AMERICAN MODEL RIGHT:

State Constitutional Revision and the Achievement of General Laws in the Mid-Nineteenth Century United States

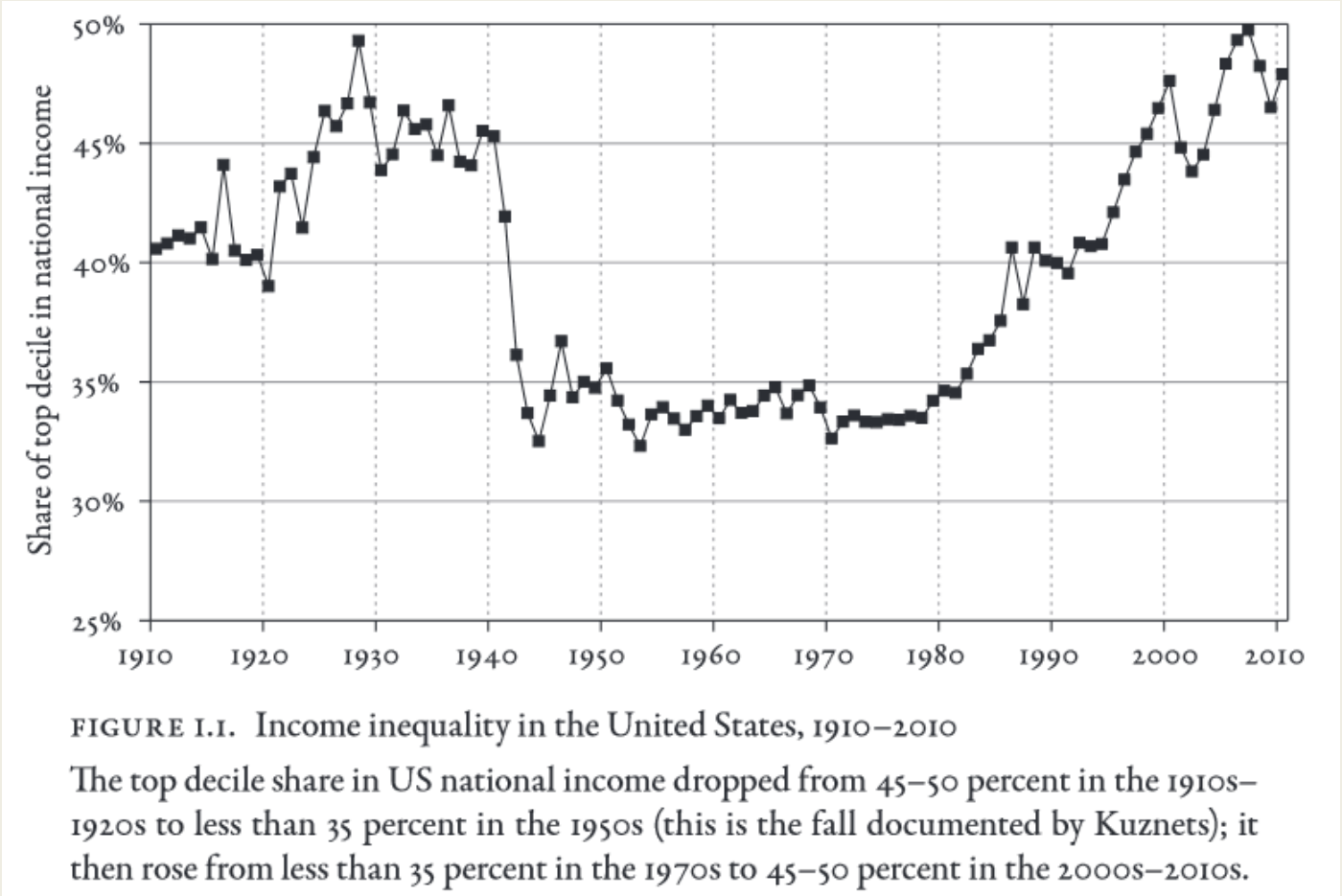


FIGURE I.1. Income inequality in the United States, 1910–2010

The top decile share in US national income dropped from 45–50 percent in the 1910s–1920s to less than 35 percent in the 1950s (this is the fall documented by Kuznets); it then rose from less than 35 percent in the 1970s to 45–50 percent in the 2000s–2010s.

Source: Thomas Piketty, *Capital in the Twenty-First Century* (Cambridge, MA: Harvard University Press, 2014), 24.

U.S. institutions are often held up as an example to the rest of the world, so it is important to get the model right.

The key development was the achievement of general laws.

The literature on the U.S. model focuses on the national government and on the era of the Revolution/Constitution. BUT:

- The idea that laws should be general was an achievement of the mid-nineteenth century, not the revolutionary era.
- It was an achievement of the states, not the federal government.
- At the state level, the new concept of equality was almost always imbedded in fundamental law (state constitutions).
- There was no similar revision at the federal level. Unlike most state constitutions, the federal constitution has never been amended to require laws to be general.
- Nonetheless, the revisions at the state level changed the norms for how governments should operate—affected federal government as well.

The General Assembly shall not pass local or special laws, in any of the following numerated cases, that is to say: Regulating the jurisdiction and duties of justices of the peace and of constables; For the punishment of crimes and misdemeanors; Regulating the practice in courts of justice; Providing for changing the venue in civil and criminal cases; Granting divorces; Changing the names of persons; … Regulating county and township business; Regulating the election of county and township officers, and their compensation; For the assessment and collection of taxes for State, county, township or road purposes; … Providing for opening and conducting elections of State, county or township officers, and designating the places of voting; providing for the sale of real estate belonging to minors, or other persons laboring under legal disabilities, by executors, administrators, guardians or trustees.

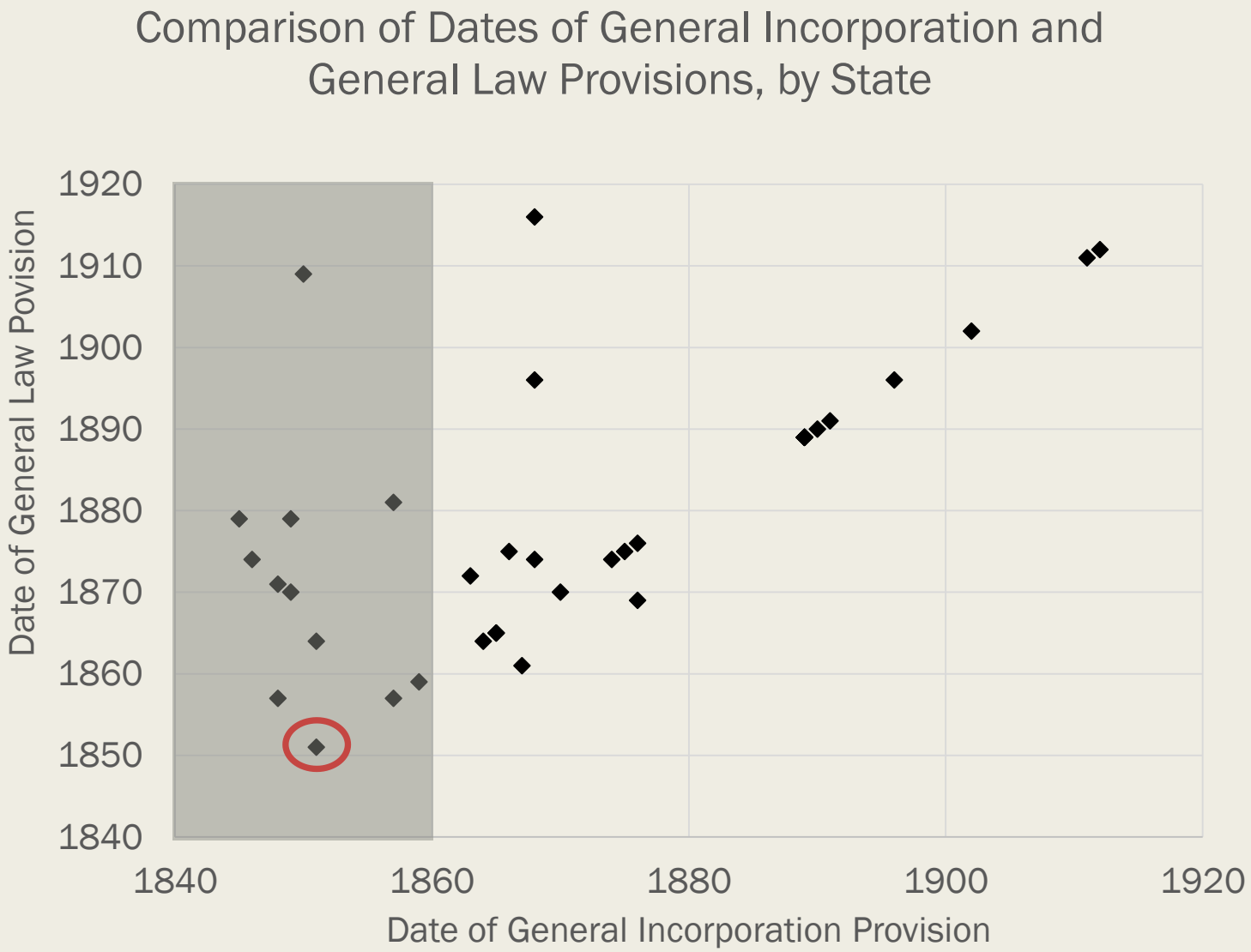
—Indiana Constitution of 1851, Article IV, Section 22

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

—Indiana Constitution of 1851, Article IV, Section 23

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

—Indiana Constitution of 1851, Article XI, Section 13


Comparison of Dates of General Incorporation and General Law Provisions, by State
Date of General Law Povision
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1910
1900
1890
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CHAPTER XLVII.

An Act for the relief of David Baker, of Cass County.

[APPROVED JANUARY 19, 1850.]

Section 1. *Be it enacted by the General Assembly of the State of Indiana*, That David Baker, of the county of Cass, be, and he is hereby authorized to file a bill for a divorce in the Cass Circuit Court, against his wife, Mary Baker, without reference to the time of the abandonment of the said Mary of her said husband, and on the trial, it shall not be necessary for the said David Baker to prove particular time of said abandonment; and the said Cass Circuit Court is hereby authorized to grant a divorce without reference to the time of the abandonment, if, in their discretion, the facts proven will justify it.

Sec. 2. This act to be in force and take effect from and after its passage and publication in the Indiana State Journal and State Sentinel.

CHAPTER XLIV.

An Act to change the name of Abraham Moore, to that of Cyrus Moore Dunham.

[APPROVED, JANUARY, 19, 1850.]

Section 1. *Be it enacted by the General Assembly of the State of Indiana*, That the name of Abraham Moore of Salem, in Washington county, Indiana, be and the same is hereby changed to that of Cyrus Moore Dunham.

Sec. 2. This act to be in force from and after its passage.

CHAPTER CC.

An Act entitled an act to incorporate the Washington Manufacturing Company.

[APPROVED JANUARY 21, 1850.]

Section 1. *Be it enacted by the General Assembly of the State of Indiana*, That William C. Richardson, Andrew Johnson, James Chappelrew, Ashbel Tutle, Francis Murphy, Chas Lyon, and A. B. Knowlton, and their associates be and they are hereby constituted, and are a body corporate, and shall have full power and authority in the name and style of "the Washington Manufacturing Company," to conduct business, sue and be sued, plead and be impleaded, borrow money, and hold real estate to the value of fifty thousand dollars.

Sec. 2. That the capital stock of said company shall be ten thousand dollars with the privilege of afterwards increasing the same to any amount not exceeding fifty thousand dollars of shares of twenty dollars each.

CHAPTER CLXXII.

An act to incorporate the Alamo Sons of Reform of the State of Indiana.

[APPROVED JANUARY 14, 1850.]

Section 1. *Be it enacted by the General Assembly of the State of Indiana*, That Noah W. Grimes, Meredith Roundtree, J. M. Stubbins, Joab Elliott, Allen McKensey, George Balser, sen., Thomas W. Florer, and S. C. Menick, and their associates, members of the Alamo Sons of Reform, of the county of Montgomery, in the State of Indiana, and their regular successors, be and they are hereby created a body corporate and politic, with perpetual succession, by the name and style of the "Alamo Sons of Reform" of the State of Indiana, for the purpose of advancing and promoting the cause of order and morality, and affording mutual aid in the time of sickness and adversity, and by that name may contract and be contracted with, sue and be sued, plead and be impleaded, in all courts of competent jurisdistion; and may have a common seal, and the same to alter, break, and renew at pleasure.

Sec. 2. That said Alamo Sons of Reform shall be capable of acquiring and holding lands not exceeding one hundred and sixty acres, by purchase, grant, gift, or demise, and the same to sell, convey, or improve, rent or lease, at pleasure, and to hold and acquire personal property, not exceeding one thousand dollars, and to sell or dispose of the same at pleasure.

CHAPTER XXXI.

AN ACT *to authorize the county commissioners of Pulaski county to borrow money.*

[APPROVED JANUARY 15, 1850.]

SECTION
1. Board of Commissioners may borrow $10,000 at any rate of interest not exceeding 10 per cent.
2. To secure the same may issue bonds payable in not exceeding ten years.
3. Bonds to be issued by order of the board, signed by auditor and countersigned by the treasurer, and transferable.
4. Commissioners to provide for payment of such bonds according to the terms thereof.
5. Secretary of State to forward a copy to the auditor of said county.

Section 1. *Be it enacted by the General Assembly of the State of Indiana*, That the board of commissioners of Pulaski county are hereby authorized to borrow money, from time to time, for the construction of public buildings and other county purposes only, to any amount not exceeding in all ten thousand dollars, at any rate of interest not exceeding ten per centum per annum.

Sec. 2. For the purpose of securing the payment of the money so borrowed, it shall be lawful for said county commissioners to issue the bonds of the county, the principal and interest of which may be payable at such times as the parties may agree on, so that the time shall not exceed ten years from the date of such bond.

CHAPTER XCIII.

AN ACT *to increase the pay of the probate judge of Harrison county.*

[APPROVED JANUARY 21, 1850.]

SECTION 1. Compensation of Probate Judge, and how allowed, in Harrison county.

Section 1. *Be it enacted by the General Assembly of the State of Indiana*, That the Board of Commissioners of Harrison county are hereby authorized and directed to allow and order to be paid to the probate judge of said county, a compensation in addition to that now allowed him by law, not exceeding one dollar per day for every day employed in his official capacity, to be paid out of the treasury of said county.

Sec. 2. This act to be in force from and after its passage.

CHAPTER 4.

AN ACT regulating the granting of Divorces, nullification of Marriages, and decrees and orders of Court incident thereto.

[APPROVED MAY 13, 1852.]

Divorces.

SEC. 6. Divorces may be decreed by the circuit courts of this State on petition filed by any person at the time a *bona fide* resident of the county in which the same is filed; of which *bona fide* residence the affidavit of such petitioner shall be *prima facie* evidence.†

Causes of divorce:

SEC. 7. Divorces shall be decreed upon the application of the injured party for the following causes:

Adultery.

First. Adultery, except as hereinafter provided.

Impotency.

Second. Impotency.

Abandonment.

Third. Abandonment for one year—or for a less period if the court shall be satisfied that reconciliation is improbable.

CHAPTER 5.

AN ACT authorizing Circuit Courts to change the names of persons and corporations.

[APPROVED JANUARY 21, 1852.]

Circuit courts may change names,

Be it enacted by the General Assembly of the State of Indiana: SECTION 1. The circuit courts in the several counties of this State, may change the names of persons and corporations on application by petition.

Where this application is to be made.

SEC. 2. The application of a person may be made to the circuit court of the county in which such person resides, and of a corporation to the circuit court of the county in which such corporation is situate, or in which its principal office is located.

Notice.

SEC. 3. Upon a petition being filed for such change, the applicant shall give notice thereof by three weekly publications in some newspaper of general circulation printed and published in the proper county, or if no newspaper be printed therein, in a newspaper printed and published nearest thereto in some adjoining county, thirty days prior to the first day of the term at which such petition shall be heard.

Proof of publication.

SEC. 4. Proof of the publication required in this act shall be made by filing a copy of such published notice, verified by the affidavit of a disinterested person, and when such proof of such publication is made, the court shall proceed to hear and determine said petition and make such order and decree therein as to such court shall seem just and reasonable.

CHAPTER 66.

AN ACT for the incorporation of Manufacturing and Mining Companies, and companies for Mechanical, Chemical, and Building purposes.

[APPROVED MAY 20, 1852.]

Proceedings to incorporate.

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That whenever three or more persons may desire to form a company to carry on any kind of manufacturing, mining, mechanical, or chemical business, they shall make, sign, and acknowledge, before some officer capable to take the acknowledgment of deeds, a certificate in writing, which shall state the corporate name adopted by the company, the objects of its formation, the amount of the capital stock, the term of its existence, not, however, to exceed fifty years, the number of directors, and their names, who shall manage the affairs of such company for the first year, and the name of the town and county in which its operations are to be carried on, and file the same in the office of the recorder of such county, which shall be placed upon record, and a duplicate thereof, in the office of the Secretary of State.

Corporate powers.

SEC. 2. When the certificate shall have been filed as aforesaid, the persons who shall have signed and acknowleded the same, and their successors, shall be a body politic and corporate, and by their corporate name, may take, hold and convey real estate necessary to carry on the operations named in such certificate.

CHAPTER 116.

AN ACT to authorize the formation of Voluntary Associations.

[APPROVED MAY 13, 1852.]

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That any persons may voluntarily associate themselves together for either of the following purposes: For what objects persons may associate.

First. To establish and maintain horticultural, literary and scientific associations.

Second. To organize military and fire companies.

Third. To provide suitable grounds for the burial of the dead, for the public walks or commons, and to ornament the same with shade trees and shrubbery.

Fourth. To plant, cultivate and preserve shade trees in the public squares and along the streets of towns.

Fifth. To organize Masonic and Odd Fellows' lodges, subordinate to their several grand lodges, and also divisions of the Sons and Daughters of Temperance, and other charitable associations and orders.

Sixth. To erect and maintain suitable buildings for public meetings.

SEC. 2. Every such association shall be formed by written articles, specifying the objects of the same, the conditions of membership, and shall be subscribed by each member thereof. Association, how formed.

SEC. 3. Any such association may adopt a corporate name, either in the original articles or at the first meeting thereof, and may have a corporate seal. May have corporate name and seal.

SEC. 4. Every such association shall file their articles aforesaid, in the office of the clerk of the circuit court of the proper county and pay the expenses therefor, and such association shall be deemed and held as a corporation. Articles to be filed.

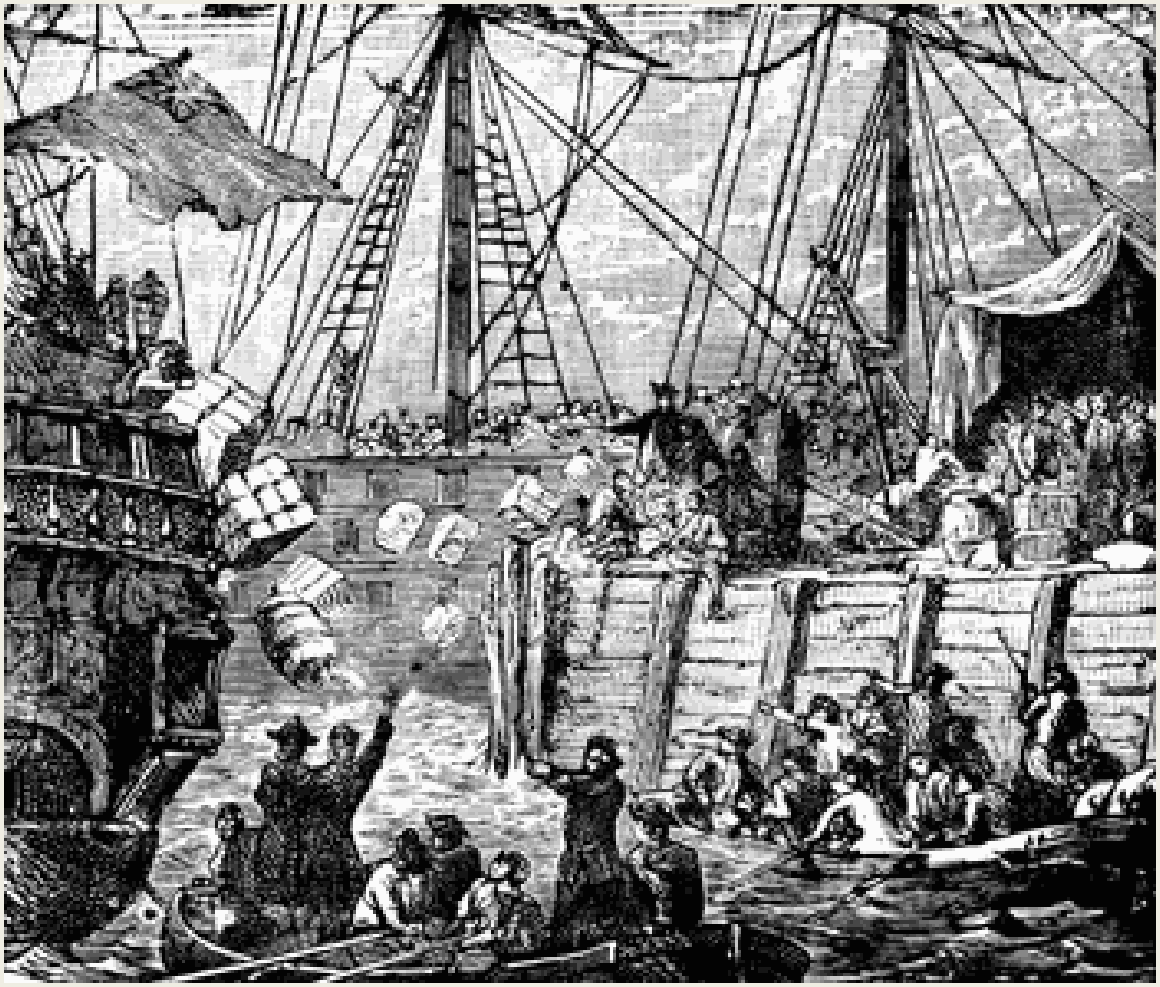
Comparison of Bills Enacted by the Indiana Legislature in 1845 and 1855

Year	Total Number of Bills	Number of private bills	Number of special bills for governments	Number of general bills	Percent of bills that were general
1845	496	172	275	49	9.9
1855	114	6	35	73	64.0

The shift to general laws was important because the practice of enacting special and local laws was fundamentally inegalitarian.

- It was inegalitarian because individuals and localities differed in their ability to secure favorable action from the legislature.
- But that was precisely why it persisted. The system allowed legislators to use their control of favors strategically to build political support.

Boston Tea Party of 1773



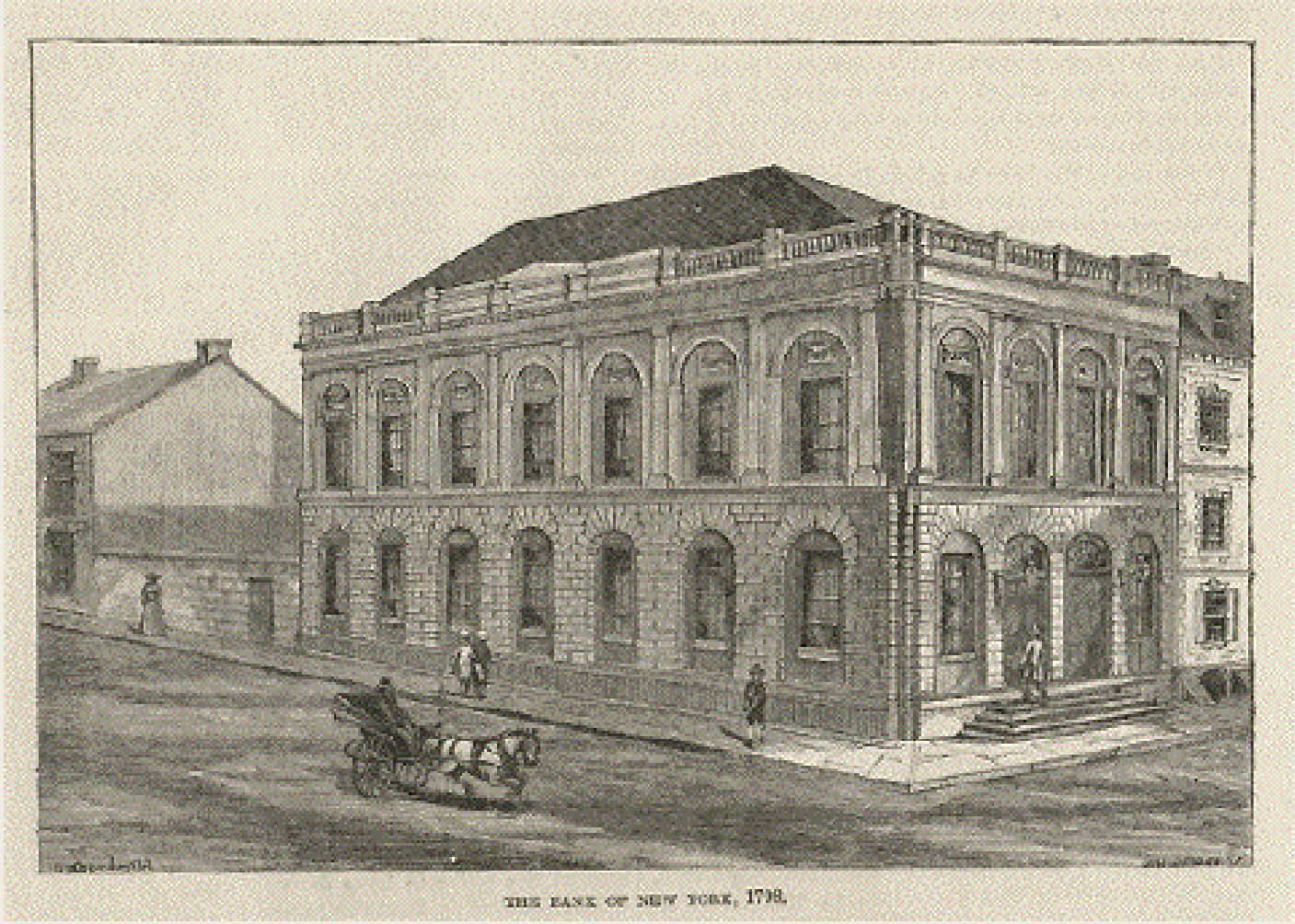
New York Constitution of 1777, Article 2:

This convention doth further, in the name and by the authority of the good people of this State, ordain, determine, and declare that the supreme legislative power within this State shall be vested in **two separate and distinct bodies** of men; the one to be called the **assembly** of the State of New York, the other to be called the **senate** of the State of New York; who together shall form the legislature, and meet once at least in every year for the despatch of business.

New York Constitution of 1777, Article 3:

And whereas laws inconsistent with the spirit of this constitution, or with the public good, may be hastily and unadvisedly passed: Be it ordained, that **the governor for the time being, the chancellor, and the judges of the supreme court, or any two of them, together with the governor, shall be, and hereby are, constituted a council to revise all bills about to be passed into laws by the legislature**; and for that purpose shall assemble themselves from time to time, when the legislature shall be convened .... And that all bills which have passed the senate and assembly shall, before they become laws, be presented to the said council for their revisal and consideration; and **if, upon such revision and consideration, it should appear improper to the said council, or a majority of them, that the said bill should become a law of this State, that they return the same, together with their objections thereto in writing, to the senate or house of assembly** (in which soever the same shall have originated) who shall enter the objection sent down by the council at large in their minutes, and proceed to reconsider the said bill. **But if, after such reconsideration, two-thirds of the said senate or house of assembly shall, notwithstanding the said objections, agree to pass the same, it shall, together with the objections, be sent to the other branch of the legislature, where it shall also be reconsidered, and, if approved by two-thirds of the members present, shall be a law.**

Bank of New York, created 1784, chartered 1791



A very important change has been effected by the *instrumentality* as Mr. Hamilton would call it of the New Bank. … [Voters] all know and understand the principles of their deliverers—Burr is … zealous and will be active in his Exertions—on the whole I think every thing promises a favorable issue to our labors.

--Edward Livingston to Thomas Jefferson, April 11, 1800

Quoted in Brian Phillips Murphy, "'A Very Convenient Instrument': The Manhattan Company, Aaron Burr, and the Election of 1800," *William and Mary Quarterly* 65 (April 2008), 233.

Table 7.2 Petitions received, bills reported, and chartering acts passed by New York Assembly and Senate, 1830–37

	Assembly			Senate			House and Senate
Year	Petitions received	Bills reported	Bills passed	Petitions received	Bills reported	Bills passed	Chartering acts
1830	23	22	12	37	34	13	9
1831	54	36	26	27	26	20	9
1832	91	49	19	23	19	16	7
1833	83	38	22	39	26	12	8
1834	92	31	21	33	24	13	8
1835	20	4	2	1	1	1	0
1836	118	54	32	36	28	19	12
1837	54	2	0	3	0	0	0
Totals	535	236	134	199	158	94	53

Source: Albany Evening Journal, various issues, 1830–37.

Source: Howard Bodenhorn, "Bank Chartering and Political Corruption in Antebellum New York: Free Banking as Reform," in *Corruption and Reform: Lessons from America's Economic History*, eds. Edward L. Glaeser and Claudia Goldin (Chicago: University of Chicago Press, 2006), 241.

Some conclusions from the NY banking example:

- Separation of powers did not prevent the corrupt manipulation of economic institutions for political ends.
- Democratic political competition increased the incentive to engage in such manipulation.
- However, it also created the possibility that a group of political leaders might find it in their interest to take such manipulation off the table by enacting a general law.
- Such a step was more likely in the aftermath of a financial crisis when the opposition came to power and there were popular pressures for reform.


Lake Superior
SOO CANALS
Lake Michigan
Lake Huron
Lake Ontario
Lake Erie
CUMBERLAND AND OXFORD
Portland
BLACK RIVER
CHAMPLAIN
Lowell
MIDDLESEX
Worcester
Boston
Northampton
Rome
OSWEGO
Albany
BLACKSTONE
Providence
Lockport
ERIE
CHENANGO
WELLAND CANAL
Buffalo
CHEMUNG
GENESEE VALLEY
NEW HAVEN AND NORTHAMPTON
DELAWARE AND HUDSON
Erie
MORRIS
New York
Detroit
PENNSYLVANIA STATE CANAL SYSTEM
OHIO AND PENNSYLVANIA
Toledo
Cleveland
DELAWARE AND RARITAN
OHIO AND ERIE
SCHUYLKILL
Chicago
Pittsburgh
Philadelphia
ILLINOIS AND MICHIGAN
WALHONDING AND MOHICAN
Alleghany Portage R.R.
SUSQUEHANNA AND TIDEWATER
La Salle
Ft. Wayne
SANDY AND BEAVER
CHESAPEAKE AND DELAWARE
MIAMI
CHESAPEAKE AND OHIO
WABASH AND ERIE
Columbus
Cumberland
Washington
MUSKINGUM
HOCKING
WHITE-WATER
Terre Haute
OHIO AND ERIE
Cincinnati
Portsmouth
JAMES RIVER AND KANAWHA
Richmond
Ohio
Buchanan
Norfolk
Louisville
OHIO FALLS
ALBEMARLE AND CHESAPEAKE
DISMAL SWAMP
Evansville
CANAL ERA, 1825-1860
km 0 100 200
mi 0 100 200

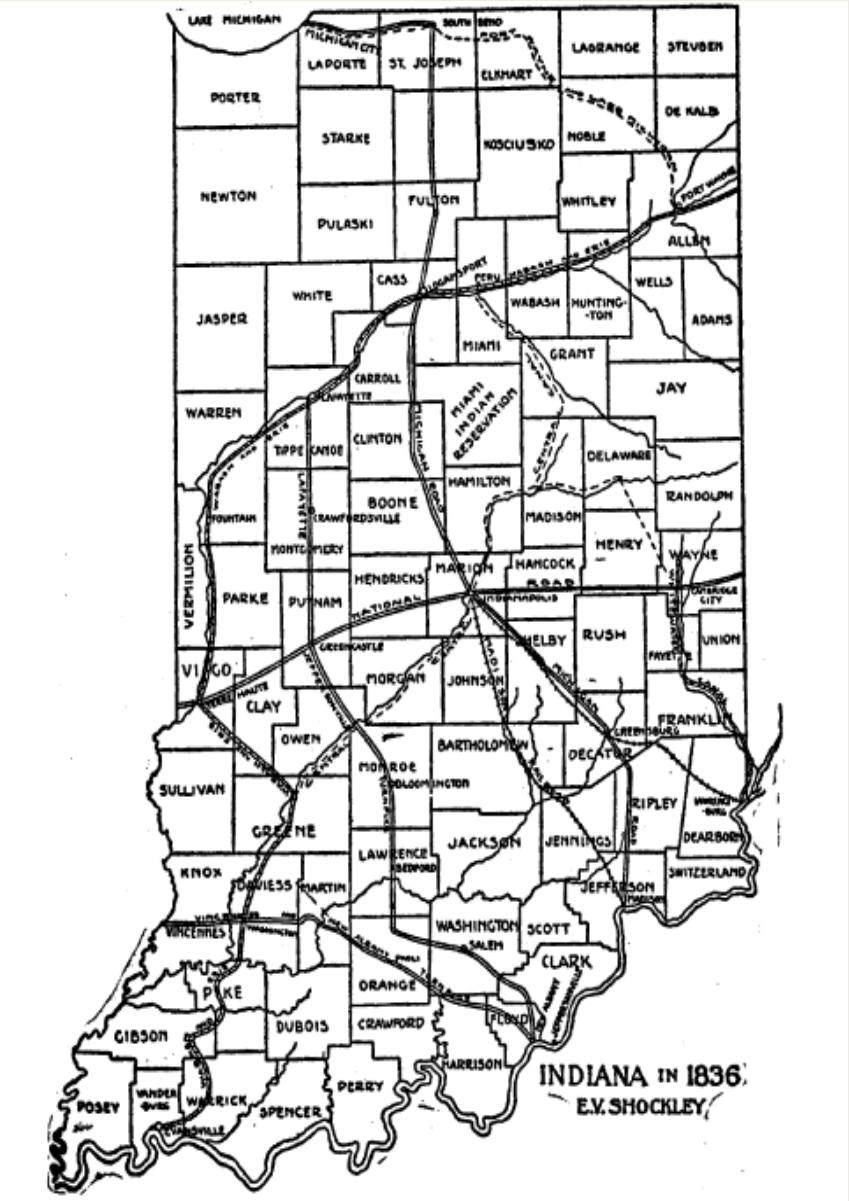
TABLE 1

TOTAL STATE DEBT AND DEBT PER CAPITA IN 1841, WHETHER A STATE DEFAULTED OR RESTRICTED DEBT, AND TOTAL STATE DEBT 1880

State	Total State Debt 1841	Debt Per Capita 1841	Did the State Default?	Did the State Adopt Debt Procedures?	Total State Debt 1880
Florida	$4,000,000	$74.07	Y	N	$1,280,500
Louisiana	$23,985,000	$68.14	Y	Y	$22,430,800
Maryland	$15,214,761	$32.37	Y	Y	$11,277,111
Illinois	$13,527,292	$28.42	Y	Y	$281,059
Arkansas	$2,676,000	$27.31	Y	N	$2,813,500
Michigan	$5,611,000	$26.47	Y	Y	$905,150
Alabama	$15,400,000	$26.06	N	N	$9,008,000
Pennsylvania	$33,301,013	$19.32	Y	Y	$21,561,990
Mississippi	$7,000,000	$18.62	Y	N	$379,485
Indiana	$12,751,000	$18.59	Y	Y	$4,998,178
New York	$21,797,267	$8.97	N	Y	$8,988,360
Massachusetts	$5,424,137	$7.35	N	N	$33,020,464
Ohio	$10,924,123	$7.19	N	Y	$6,476,805
Wisconsin	$200,000	$6.45	N	Y	$11,000
South Carolina	$3,691,234	$6.21	N	N	$6,639,171
Tennessee	$3,398,000	$4.10	N	N	$20,991,700
Kentucky	$3,085,500	$3.96	N	Y	$1,858,008
Maine	$1,734,861	$3.46	N	N	$5,848,900
Virginia	$4,037,200	$3.23	N	N	$29,345,226
Missouri	$842,261	$2.19	N	N	$16,259,000
Georgia	$1,309,750	$1.90	N	N	$9,951,500
New Hampshire	$0	$0.00	N	N	$3,501,100
Connecticut	$0	$0.00	N	N	$4,967,600
Vermont	$0	$0.00	N	N	$4,000
Rhode Island	$0	$0.00	N	Y	$3,534,500
North Carolina	$0	$0.00	N	N	$5,006,616
New Jersey	$0	$0.00	N	Y	$1,896,300
Delaware	$0	$0.00	N	N	$880,750

Source: John Joseph Wallis, "Constitutions, Corporations, and Corruption: American States and Constitutional Change, 1842 to 1852," *Journal of Economic History* 65 (March 2005), 217.

Indiana's "Mammoth" System of Internal Improvements



Source: Logan Esarey, *History of Indiana: From its Exploration to 1850* (Indianapolis, IN: W. K. Stewart, 1915), 355

Example from a speech at the Indiana constitutional convention:

"No one doubts that under the present system, the State has suffered from hasty and inconsiderate legislation. By a method of log-rolling, to use a cant term, bills have often been passed through the General Assembly without being once read, without their true character being understood, ... without men being placed in a position to be held responsible for their acts. In such a way, power may sometimes have been given to corporations which ought not to be intrusted to any man or set of men. I take it for granted that the new Constitution will prevent such evils, by providing that corporation shall exist only under general laws ...."

Source: Indiana, *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution* (Indianapolis: A. H. Brown), Vol. 1, 369.

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Mr. HALL offered the following resolutions:

1st. That Judges and all other officers, shall be elected by the people.

2. That corporations shall be created under a general law, individual liability, to the extent of stock, shall be imposed. The issue of bills of credit for general circulation shall be prohibited. No banking privileges shall be granted except to a State Bauk, and a limited number of Branches, properly restricted.

3. That special legislation shall be prohibited. No act shall embrace more than one subject—and that shall be expressed in the title. Upon the final passage of every bill in either House, the "yeas" and "nays" shall be entered upon the journals, and no act of the General Assembly shall be in force until after its publication in print and distribution among the people.

4. That the Legislature shall be prohibited from granting divorces, and from establishing lotteries.

5. That the Legislature shall be prohibited from borrowing money upon the faith of the State, without the consent of the people expressed through the ballot-box.

6. That the Legislature shall meet biennially, but may be convened by the governor in cases of emergency.

7. That all fines aforesaid, for any breach of the penal law, shall be applied to the support of common schools.

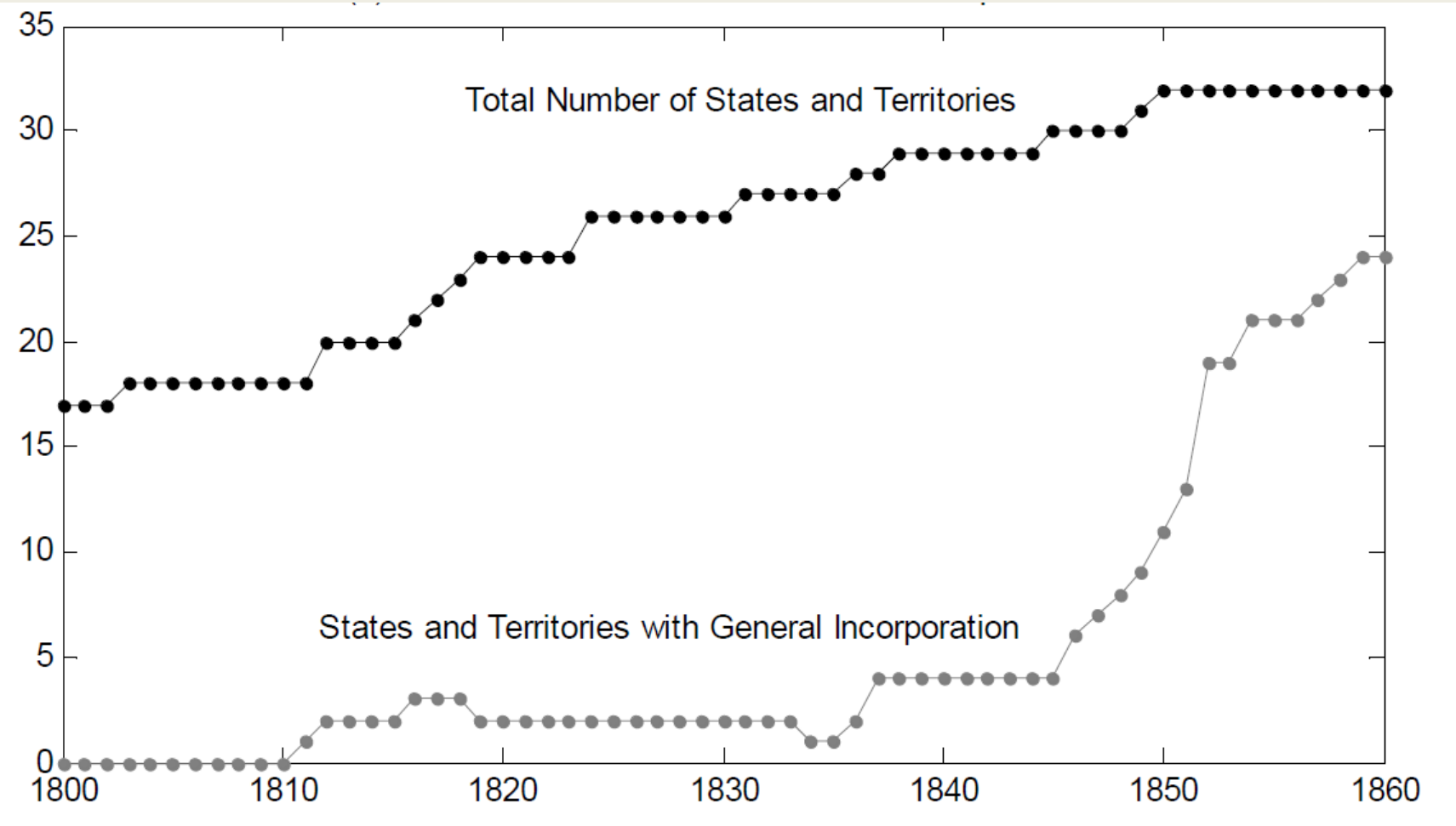
8. That all distinction between proceedings in courts of law and equity, shall be abolished; as also all distinction between different kinds of action.

9. That the House of Representatives shall consist of one hundred members, and the Senate shall be composed of fifty members: *Provided*, the members in either House may be diminished by Legislative enactment.

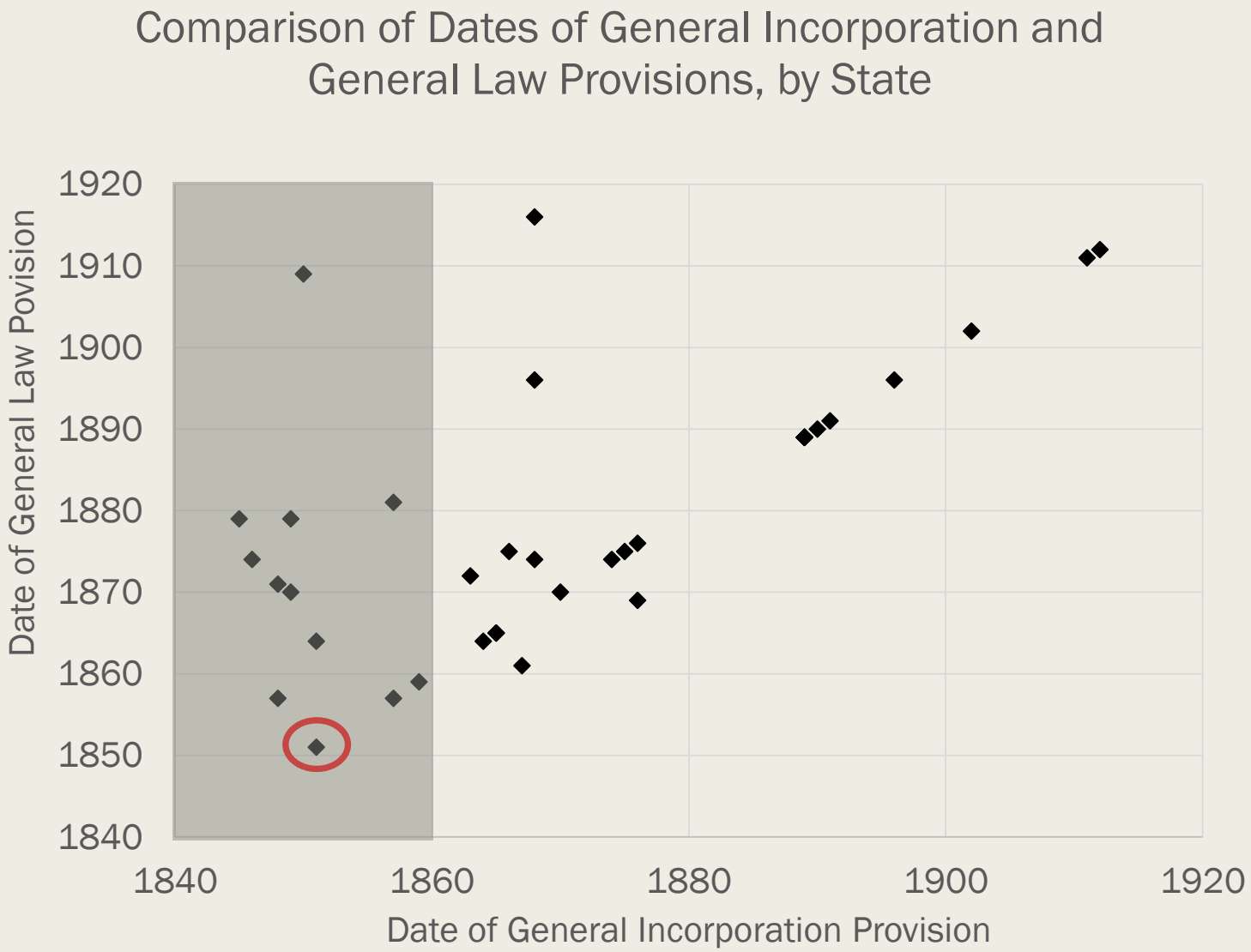
10. That all elections by the General Assembly or either branch thereof, shall be determined by a plurality of the votes given; which resolution was laid on the table by consent.

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

States and Territories with General Incorporation Laws for Manufacturing



Source: Eric Hilt, "Corporation Law and the Shift toward Open Access in the Antebellum United States," in *Organizations, Civil Society and the Roots of Development*, eds. Lamoreaux and Wallis (Chicago: University of Chicago Press, 2017), 157.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Comparison of Kansas constitutions on question of general laws

	Lecompton Constitution	First State Constitution
General incorporation	Corporations may be formed under a general law, but the Legislature may by special act create bodies politic for municipal purposes…	The Legislature shall pass no special act conferring corporate powers. Corporations may be created under general laws.
General laws	The legislature shall have no power to grant divorces, to change the names of individuals, or direct the sales of estates belong to infants or other persons laboring under legal disabilities, by special legislation, but by general laws shall confer such powers on the courts of justice.	All laws of a general nature shall have a uniform operation throughout the State; and in all cases where a general law can be made applicable no special law shall be enacted. All power to grant divorces is vested in the district courts, subject to regulation by law.

Bank Capital per Capita in New York and Pennsylvania, Selected years 1800-1860

Year	New York ($)	Pennsylvania ($)
1800	5.81[b]	8.06[a]
1805	7.27[b]	10.04
1810	7.75[b]	7.41[c,d]
1815	15.93[b]	16.38[d]
1820	15.38[b,e]	14.02[d,f]
1825	16.04[b]	n.a.[f]
1830	12.44[b,e]	10.84[d,f]
1835	14.72[b,g]	11.65[f]
1837[h]	16.43[i]	14.86
1840	15.15	14.04
1845	15.94	7.32
1850	15.29	7.43
1855	24.19	7.67
1860	28.72	8.80

Source: Howard Bodenhorn, "Bank Chartering and Political Corruption in Antebellum New York: Free Banking as Reform," in *Corruption and Reform: Lessons from America's Economic History*, eds. Edward L. Glaeser and Claudia Goldin (Chicago: University of Chicago Press, 2006), 239.

Average annual number of incorporations in Ohio and New Jersey, 1856-1889

Years	Ohio incorporations under general laws	New Jersey incorporations total	New Jersey incorporations under special laws	New Jersey incorporations under general laws
1856-59	64.3	51.0	40.0	11.0
1860-64	45.8	46.2	38.4	7.8
1865-69	306.6	138.6	121.6	17.0
1870-74	339.8	146.8	118.4	28.4
1875-79	269.8	73.4	8.8	64.6
1880-84	517.2	299.0	na	299.0
1885-89	671.8	472.8	na	472.8

Note: Ohio banned special incorporation in 1851 and New Jersey in 1875.
Source: George Heberton Evans, Jr., *Business Incorporations in the United States, 1800-1943* (New York: NBER, 1948), 15, 126, 134.

General laws transformed the way government and politics worked:

- **Legislatures had much less to do—often went to biennial sessions, as much of business taken over by administrative agencies and the courts.**
- The switch to general laws marked the birth of the modern regulatory state and also modern interest-group politics.
- General incorporation laws facilitated the organization of interest groups to influence the laws, but they also facilitated groups to counter organize—provided an important check against slippage back into old system of privileges.

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What did it mean that laws had to be general?

- Could general laws apply only to particular categories of people or organizations?
- If so, what types of categorizations were permissible?

Example of business categories built into the 1851 Indiana Constitution:

Article XI. Corporations:

Sec. 6: The stockholders in every bank, or banking company, shall be individually reponsibile to an amount of and above their stock, for all debts or liabilities or said bank or banking company. (not repealed until 1940)

Sec. 14: Dues from corporations, other than banking, shall be secured by such individual liability of the corporators, or other means, as may be prescribed by law.

U.S. Constitution, Amendment XIV, Section 1:

… No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Justice Stephen J. Field in *Charlotte, Columbia and Augusta RR Co. v. Gibbes*, 142 U.S. 386 (1891) at 393-394.

Though railroad corporations are private … their uses are public. They are formed for the convenience of the public … and are invested for that purpose with special privileges…. Being the **recipients of special privileges** from the State, to be exercised in the interest of the public,… their business is deemed affected with a public use, and to the extent of that use is subject to legislative regulation…. The mode or manner of regulation is a matter of legislative discretion…. **[T]here is no encroachment upon the Fourteenth Amendment…. All railroad corporations in the State are treated alike ….**

In all elections not otherwise provided for by this Constitution, **every white male citizen** of the United States, of the age of twenty-one years and upwards, who shall have resided in the State during the six months immediately preceding such election; and **every white male, of foreign birth**, of the age of twenty-one years and upwards, who shall have resided in the United Sates one year, and shall have resided in this State during the six months immediately preceding such election, and shall have declared his intention to become a citizen of the United States, conformably to the laws of the United States on the subject of naturalization; **shall be entitled to vote** in the township or precinct where he may reside.

—Indiana Constitution of 1851, Article II, Section 2

No Negro or Mulatto shall have the right of suffrage.

—Indiana Constitution of 1851, Article II, Section 5

No Negro or Mulatto shall come into, or settle in the State, after the adoption of this Constitution.

—Indiana Constitution of 1851, Article XIII, Section 1

Plessy v. Ferguson, 163 U.S. 537 (1896) at 544:

The object of the [14th] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.

Challenges to racial (and other forms of) discrimination required the shift to general laws:

- So long as legislatures had the ability to award special privileges to particular individuals or organizations there could be no check on discrimination.
- Without the mandate for generality, it would not have been possible to ask the question what distinctions among people or organizations could be made in the application of the laws.

Getting the American Model Right

- Scholars and policy makers need to get the model right. Otherwise, their recommendations to developing nations will be incomplete or even wrong.

- They need to understand that the story of American history is the struggle to get the model right.

  - *19th-century Americans realized that the checks and balances and the separation of powers in their constitutions were not enough to make democracy work.*

  - *The solution they arrived at was that laws should be general—that they should treat "everyone" the same.*

  - *General laws did not in themselves bring equality because they allowed for categorization. But they set in motion a process that encouraged challenges to discrimination.*

- Americans are still working on getting the model right.