Railroads and American Institutional Change*

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Abstract

For roughly 800 years, "legislation" largely meant special legislation: narrow bills tailored to the demands of particular persons, firms, or property. General laws were greeted with suspicion. Today, the reverse is true: It is believed that laws, to be good, must be broad, and states have overwhelmingly banned special legislation. This article reconceives of this history, understanding special legislation and the modern administrative state as substitutes. It argues that, contrary to the stated aim of countering corruption, the refashioning of legislation as it had always existed was born of politicians' desire to create and extract the rents that were made possible by the 19^{th}-century transportation boom. The emergence of general legislation, the administrative state, and administrative law are thus understood as the fruits of industrialization.

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The fact is that the railroad has revolutionized everything.

Commercial and Financial Chronicle, March 18, 1882

1 Introduction

Generality is perhaps the most widely praised virtue in legislation. Commentators of nearly every pedigree hold, at least in the abstract, that good law is broad law—a rule that applies to all persons equally, without caveat or exemption. Friedrich Hayek wrote that "[l]aw in its ideal form might be described as a 'once-and-for-all' command that is directed to unknown people and that is abstracted from all particular circumstances of time and place and refers only to such conditions as may occur anywhere and at any time" (2011 [1960], p.234). Wherever Hayek and other prominent legal theorists may differ, on this they agree. Noted legal theorists such as John Austin, H.L.A. Hart, and Lon Fuller all heaped praise upon generality (Austin 1832, p.6, Fuller 1969, p.46, Hart 2012, p.12).

But little more than a century ago, special legislation — legislation specifically crafted to only apply to a particular individual, class of persons, piece of property, business, or geographic area — made up the lion's share of English and American legislation, as it had for most of the preceding millennium (McIlwain 1910, Allen 1956, p. 23-24, Ireland 2004). At its inception, the core value sought from legislation was narrowness, and broadly applicable acts were often greeted with suspicion. Where "law" came from judges who painted with a broad brush, legislation was there to fill in the gaps. Changing one's name, divorcing one's spouse, incorporating a firm, and a host of other actions now within the domain of bureaucracy once required a special bill passed by the legislature.

In the mid-19th century, particularly in the United States, the nature of legislation changed. Between 1850 and 1912, almost every state in the Union ratified constitutional restrictions banning or severely restricting special legislation. As a result, special legislation declined in both practice and reputation while general legislation flourished. In the case of Indiana, after its 1851 constitutional convention restricted special legislation, general bills increased from only 8% of the total bills passed in Indiana in 1850 to 65% in 1855, remaining there for the rest of the century (Lamoreaux and Wallis, 2021). These general laws propounded broad rules, regulating wider swaths of economic activity and human behavior while delegating their particular application and enforcement to state agencies and commissions, which flourished in both number and power. With that emerged the modern system of committee control, in which legislators presided over smaller bodies tasked with overseeing the agencies' enactment of general laws (Shepsle and Weingast, 1987, Weingast and Marshall, 1988, McCubbins and Weingast, 1989).

The traditional explanation for the decline of special legislation deems it the product of a moral crusade against supposed corruption (Ireland, 2004, Luce, 2006). By that account, experts and the public suddenly realized what generations before them had not: that the normal business of legislation as it had always been practiced was corrupt, deeply immoral, and required immediate reform. This paper challenges that account.

When the economy was predominantly agrarian and lacked large capital-intensive firms, there was little personal benefit for legislators to pass general legislation because it would have yielded only small rent flows. One preferable strategy, however, was to offer constituents particularized legal services at a price. We contend that special legislation was abolished because of legislative entrepreneurship in the face of industrialization, the transportation boom, and the birth of the large firm. In an industrialized world, politicians could more profitably specialize in general legislation that regulated major industries and the overseeing of bureaucratic apparatuses which carried out such legislation.

The temporal variation in state- and territorial-level constitutional change across the United States provides a testing ground for our hypothesis. In the second half of the 19th century the United States experienced rapid industrialization and the birth of the first large-scale corporations engaged in mass production and distribution. The hallmark of industrialization and the "nation's first big business" was the railroad and the companies that operated it (Chandler Jr., 1965, 1977, Langlois, 2023). Using annual data on the extent of the American railroad system, we find a positive relationship between the extent of the transportation network in a jurisdiction and the timing of its restriction of special legislation. We find that a doubling of the length of the railroad within a jurisdiction is associated with a 2.4 percentage point increase in the likelihood of a state restricting special legislation. For some perspective, the U.S. railroad network expanded from 60 miles in 1830 to 230,000 miles in 1920. Taking that into account, the maximum percentage point increase in the probability of adopting a constitutional restriction for a given state is anywhere from 20 and 40 percentage points.

Furthermore, we argue that, due to an excessive focus on the last few decades before special legislation was restricted and a neglect of the preceding centuries, modern scholars have largely failed to recognize that the administrative state and special legislation are, in a way, substitutes. In making this point, we are making explicit the implicit understanding of the famous 15th and 16th century English statesmen Francis Bacon, Thomas Wentworth, Edward Coke, and John Eliot (Dicey 1982 [1885], 242). We document the expansion of the administrative state at the state level in the late 19th century, the subsequent allocation of legal issues once handled by special legislation, as well as the changes in the conception of separations-of-powers in American constitutional law that come with such changes. The once-sacred insistence that legislative, executive, and judicial powers not be exercised by the same body bowed to political demands to regulate rail and other major utilities. The advent of "administrative law" accommodated state legislatures' demands for the power to regulate rail, even to the exclusion of federal attempts by the Interstate Commerce Commission (ICC) to enforce similar regulations.

North, Wallis, and Weingast (2009) argue that the late 19th century was more important than the Founding Era for solidifying "democracy, political competition, secure property rights, and open entry economic activity" in the United States. This is a bold claim that runs counter to our national mythos and requires further investigation. Following their lead, we emphasize state-level constitutional changes which bring about these political goods.[1] Hennessy and Wallis (2017) and Lamoreaux and Wallis (2021, 2024) discuss the history and importance of the decline of special legislation, with a particular focus on the restrictions on special bills chartering corporations. Hennessey (2014) does the same for restrictions explicitly mentioning municipalities, and Hennessey (2016) covers the later, and more circumscribed, allowance of home rule for municipalities. This paper builds on this literature by explaining why all forms of special legislation, not just those laws relevant to corporations and municipalities, came to be restricted in the mid-to-late 19th century. In doing so, we also contribute to the literature on the legal and institutional effects of American industrialization and the railroad boom (Glaeser and Shleifer, 2003, Fleck and Hanssen, 2024).

More broadly, legal institutions have long been understood as a fundamental determinant of economic growth (North, 1991, Porta et al., 2008). Recent work in both economics and political science has established a seemingly robust correlation between economic growth and the state's fiscal and legal capacity (Johnson and Koyama, 2017, Koyama, 2022). Less understood is what drives increases in state capacity, and institutional change more broadly. The organizational form of the state, as well as its policies, can be seen as an outcome of rulers' attempts to maximize revenue subject to its political and technological constraints (Levi, 1988, North, 1981). That means changes in the economy, and the consequent changes in the distribution and appropriability of rents, cause institutional change.[2] In focusing

[1]Thus, we contribute to the long literature going back to Buchanan and Tullock (1999) on constitutional choice. For a recent similar empirical application, see Piano and Rouanet (2024) on 20th century Native American reservations.

[2]By focusing on rent creation and extraction, we also bring public choice theory into conversation with the state capacity literature. This fruitful mixing was explored and encouraged by Piano (2019).

on the appropriability of economic rents, we follow Mayshar et al. (2017), Mayshar et al. (2022), and Garfias and Sellars (2021), who all highlight how geographic and technological conditions shape not only the state's ability to appropriate revenue but also the scale of the state and the distribution of power within its hierarchy. Thinking about the state in this way brings constitutional-structure and division-of-powers questions into the conversation surrounding state capacity and highlights the entangled relationship between the state and the private economy (Wagner, 2007, Salter and Wagner, 2018).

The role of the "administrative state" looms large in America's national politics. Given the history we recount, any reform that strives to roll back the administrative state will require grappling with the tradeoff between general legislation and administrative action. One such proposal, the REINS Act,[3] contemplates an invigorated role for Congress in approving new regulations. The era of special legislation prior to the 20$^{\text{th}}$ century, in which legislatures categorically "vote up" large slates of special bills, offers evidence of what such an approach might look like.

The paper proceeds as follows. Section (2) provides a brief history of special legislation from its birth in 12$^{\text{th}}$ century England to its rapid demise in the 19$^{\text{th}}$ century United States. Section (3) presents our theory of the decline of special legislation and the important connection between general laws and the administrative state. Sections (4) and (5) provide evidence for our proposed theory: first for the importance of the transportation boom and second for the rise of the administrative state. Section (6) concludes.

[3]H.R.277 - Regulations from the Executive in Need of Scrutiny Act of 2023.

2 A History of Special Legislation

2.1 Legislation: Special from the Start

In the Anglo-Saxon tradition, special legislation goes to the historical roots of legislation itself (Allen 1956, p. 23-24, McIlwain 1910). Since the birth of the common law in Norman England, judge-made law was the primary source of general rules (Plucknett 2010 [1956]). Legislation came from the king in the form of a charter or an assize which always involved a particular person or group of people by name. When one peruses the medieval royal charters, one finds the king allowing barons to host markets and fairs, granting a license to engage in particular activities, granting land, firming up property rights over particular locations, or granting a town the right to charge a market toll. For example, on July 16, 1252, King Henry III issued a charter which read:

> Grant to Robert de Lethun and Thomas de Chaworthe, and their heirs, of a weekly market at Aluneton, co. Derby, on Monday, and of a yearly fair there on the vigil, the feast, and the morrow of St. Margaret. (Great Britain. Public Record Office, 1903)

In issuing charters, the king "was not trying to create a new system of law," but was interjecting into the judge-made common law to solve problems narrower than those addressed by it (Elliott, 1989, p.3-6).

As the English Parliament gained power and authority, the act of legislating slowly moved into their hands. Legislation remained largely special. The earliest Acts of Parliament were generally based on petitions made by individuals for the redress of grievances (Elliott, 1989, p.6). Legislation retained "a decidedly 'judicial' character," often requiring a petitioner to personally appear—as in a court of law—to have his petition heard (McIlwain, 1910, p.207-209). But even as "petitions" and "acts" became "bills," their predominantly special nature did not change (*Ibid*).[4] Edward Coke, in his *Fourth Institute*, written in 1644, offers examples of special legislation dealing mostly with estates, family law, and citizenship (Coke 1797 [1644], p.36). Two centuries later, Dicey added managing railways, harbors, and docks (Dicey 1982 [1885], p.10). One of the most famous examples of widespread land reform, the Enclosure Movement in 18th and 19th century Britain, was accomplished entirely by special legislation (Heldring et al., 2022). The list of services traditionally offered through special legislation is extensive. If you can imagine it, it was offered as special legislation: property and family record-keeping, divorces, occupational licensing, chartering of businesses, oversight of regulated industries, naturalization of immigrants, etc.

Following in the English tradition, American legislation was overwhelmingly special legislation, and Americans outstripped the English in their demand for it. Luce reports that in Massachusetts, "[b]y the early part of the 18th century, the volume of private legislation had become so considerable as to seem to the home government [England] a matter calling for strict regulation." In the beginning of the 19th century, special bills constituted most of the legislation passed in a given session, and was extensive in scope. To give but one example among literally hundreds of thousands, the state of Indiana passed a special law on December 29, 1830 entitled "An Act to Incorporate the Wabash Insurance Company" — the 19th century equivalent of being granted the right to host a weekly market (Ind. Acts 1830, chap. 22, §33). Ireland (2004) writes that "[i]n 1851 the delegates to the Indiana Constitutional Convention of 1850-1851 proclaimed that more than two-thirds of the laws enacted since statehood (1816) were special, not general." In 1873, New Jersey enacted a mere 100 pages of general legislation but 1,250 pages of special legislation. Between 1866 and 1872, Pennsylvania enacted 475 general laws and 8,755 special laws. Around the same period, in New York, 90% of legislative output consisted of special statutes, with similar practices

[4] McIlwain (1910, p.211, 216-220) reports that the terms were used interchangeably in Parliament and common usage through the Tudor period, carrying into the Seventeenth Century.

reportedly being common across the country. No one thought such legislative offerings were signs of corruption. It was simply business as usual.

2.2 The End of Special Legislation in the United States

By the mid-19th century, attitudes toward special legislation had soured, especially in the United States. In 1850, Michigan became the first state to prohibit its legislature from passing particular types of special legislation. A year later, Indiana followed suit but included a considerable list of additional restrictions, ending with the admonition that "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" (Ind. Const. 1851, art. 4, § 23). By 1875, 60% of US states had an equivalent restriction in their constitutions. In 1886, Congress banned special legislation in all federal territories at the request of the territories themselves. North Carolina was the last state to restrict special legislation in 1916. There were few abstentions: Massachusetts, Vermont, New Hampshire, Connecticut, Rhode Island, and Ohio never altered their constitutions to place broad restrictions on special bills. Figure (1) maps the year a state ratified such restrictions.

A substantial majority of the constitutional restrictions came about via state-level constitutional conventions. Of the 41 states that restricted special legislation, 35 of them did so via a new constitution established at a convention. Of those 35, 14 were the state's initial constitution (10 of which, as former western territories, were already subject to the 1886 Act of Congress restricting special legislation). Only six states left it to the people to vote on via constitutional amendment.

Ireland (2004) argues that restrictions on special legislation were often the primary reason behind calling the convention. He quotes a delegate from the Indiana Constitutional Convention of 1850-1851 declaring "...the whole error-the whole incongruity-the whole oppression of our law, and almost the whole necessity of calling this convention, was to do away with this

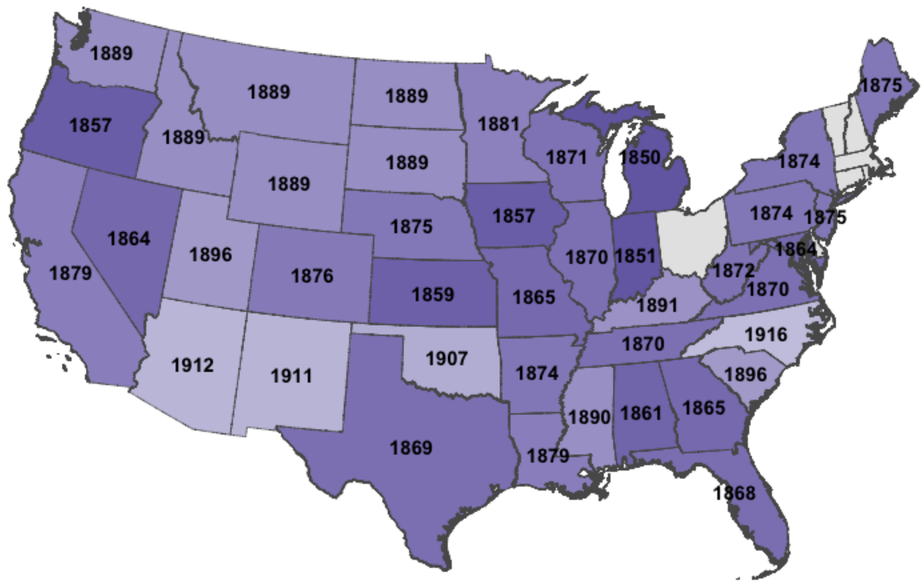

Figure 1: Adoption of Broad Restrictions on Special Legislation
Source: See text.

local legislation" (qt. in Ibid., 295). A delegate at the Illinois Constitutional Convention of 1869-1870 said: "[I]f there was one reason, above all others, for the calling of this convention, for the formation of a new constitution, it was this curse of special legislation" (qt. in Ibid., 295). Ireland provides similar quotations from delegates to the constitutional conventions of Pennsylvania, Nebraska, Missouri, California, and Kentucky.

It is noteworthy that, where records exist, there seems to have been little conflict or debate among convention delegates about the merits or necessity of the proposed restrictions. In Indiana, the provision passed by a vote of 116 to 13 (Lamoreaux and Wallis, 2021, p.423). In Pennsylvania, Russ (1944) says "opposition was totally absent" and "every member was anxious to add his bit to strengthen the wording [of the prohibition]" (268). In Maryland, the only known debate is between a Republican delegate and a Democratic delegate over whether the proposed section should enumerate restricted cases or whether it should simply be a prohibition on all special laws (Friedman, 2012, p.439-441).

Previous scholarship on these constitutional changes has largely focused on the restrictions on the chartering of corporations and municipal governments (Hennessey, 2014, Hennessy and Wallis, 2017, Lamoreaux and Wallis, 2021). But the constitutional changes often touched on a wide variety of issues. Binney (1984) categorizes these restrictions into 13 broad categories revolving around the subjects affected by them: (1) persons; (2) corporations; (3) rights, privileges, duties, property, etc.; (4) interest, liens, trade, etc.; (5) eminent domain, railroads, bridges, ferries, etc.; (6) legal proceedings; (7) municipal corporations and local government; (8) public officers; (9) highways, public grounds, etc.; (10) schools; (11) taxation; (12) elections; and (13) general restrictions. A majority of states had restrictions that touched on most, if not all, of Binney's categories.

As Friedman (2012) notes, most of the restrictions speak to a concern for separation of powers rather than fiscal issues. The individual restrictions are too numerous to list in full, but a quick overview is illustrative of what types of special laws they may have found most odious. Twenty-eight governments banned the use of the use of special legislation for changing an individual's name, 19 banned bills related to adoption or legitimation of children, and 29 banned bills granting divorces. Ten states and the territories banned special legislation that punished any crimes or misdemeanors, 21 states banned the legislator from changing the venue in any criminal or civil, and 15 prohibited bills summoning or empaneling jurors.

Criticisms of special legislation ran the gamut. It was an engine of corruption, a driver of legislative bloat, and was so voluminous that no legislator could reasonably read every bill, let alone understand its implications. It "clogged the machinery of lawmaking," "encumbered statute books," and was often rushed and sloppily drafted. It made it difficult for private parties to acquire meaningful knowledge of the law. Logrolling, facilitated by special legislation, was condemned as perverse and "undemocratic." Moreover, the pressure on politicians to "do something" for constituents was immense, diverting their attention from general legislation and “bogging” them down in parochial concerns (Ireland 2004, Luce 2006 [1935]).

Legal historians’ accounts of this opposition are dominated by the complaints of legislators, not of the general public. Luce 2006 [1935], a popular source of critiques against special legislation, was himself a state politician, and he relies upon other politicians’ statements for the bulk of his evidence of its perversity. Ireland (2004) cites dozens of contemporary statements deploring the corruption and costliness of special legislation. His sources also prove to be overwhelmingly—if not entirely—politicians, particularly governors. In the case of Pennsylvania in 1870, Hellerich (1956) goes as far as saying that it is “wrong to speak of a movement for constitutional reform” as there were no private organizations calling for reform or any newspaper campaigns trying to drum up popular enthusiasm (86). Friedman (2012) tells a similar story about Maryland in 1864 — “There is no recorded evidence that anybody outside of the constitutional convention considered or even cared about the special laws provision” (438).

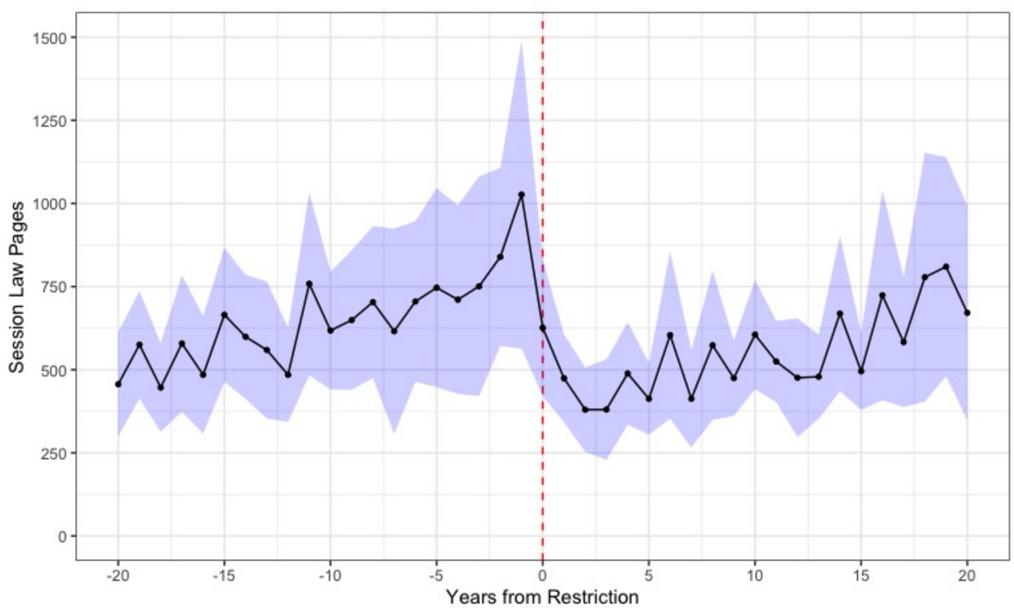

Figure 2: Average Number of Session Law Pages and time from Constitutional Restriction
Source: See Text.

By and large, these restrictions proved effective in their aim. Lamoreaux and Wallis (2021) collect data on the type of laws passed by the Indiana state legislature from 1830 to 1885. In 1850, the percentage of "general" laws relative to the total number of laws passed was a mere 8%. In 1855, the first legislative session after the 1851 amendment, the percentage of "general" laws leaped to 65%, remaining at that level for the remainder of the 19th century. Lacking equivalent data on the breakdown of legislation for the other states, we can look to the page length of collected session laws.[5] As Figure (2) shows, constitutional change is followed by a notable reduction in the page-count of total legislation, which likely reflects the decline in special laws.

3 A Theory of the Decline of Special Legislation

3.1 Legislation as Rent-extraction

It is a well-established fact that regulation facilitates rent-flows to legislators. Firms, even whole industries, petition and pay legislators in various ways to pass legislation that endow them with monopoly power or help them establish a cartel (Stigler, 1971, Krueger, 1964, Tullock, 1967, Posner, 1974). The same is true for firms, or again, entire industries, simply seeking to gain a competitive advantage over their competitors through laws that would benefit themselves disproportionally (Marvel, 1977, Coase, 1979, Maloney and McCormick, 1982, Pashigian, 1984, Bartel and Thomas, 1985). Legislators, on their own initiative, also extract rents from profitable firms by threatening to lower prices or raise costs via so-called "milker bills" (McChesney, 1987). Such legislation is, almost by definition, general legislation because in order to achieve its aims it must apply to all even if it benefits only a few.

But in an agrarian economy — such as early modern England or 18th century America

[5] The number of pages in the session laws come from the Session Laws Library hosted by HeinOnline at https://libguides.heinonline.org/session-laws-library, and cover all of the states and most of the territorial legislatures over our entire period.

— the conditions for large-scale rent extraction via general legislation are mostly absent. An agrarian economy lacks large, capital-intensive firms that make industry-wide regulation a lucrative strategy for both legislators and businesses. Without highly profitable firms, there are fewer entities willing or able to pay for regulatory favoritism or to extract rents from via veiled regulatory threats. Also, the sectoral homogeneity of the economy dampens the potential of creating and extracting rents by using the classic strategy of concentrating benefits and dispersing the costs. One alternative rent-extraction strategy of a legislature is to offer services that only it provides via legislation at a price.

We argue that industrialization and the birth of large-scale firms, particularly the railroads, drove the transition from special to general legislation. Not only did the railroad companies produce considerable private rents susceptible to extraction, the necessary specific investments in land and access to waterways would allow states to behave as monopolists. When firms are tied to a geographic region and less capable of shifting investment to "more mobile or salvageable... forms of capital as insurance against expropriation," politicians are better able to extract private rents (McChesney, 1987, Diamond, 2017).[6] To the legislator suddenly faced with more profitable industries to regulate, general legislation would be a more productive way to create rents for or extract rents from all similarly situated firms in one act of legislation rather doing so one-by-one.

Before coming around to the idea that wholesale institutional transformation was more profitable, we might expect legislators to first pull on their traditional levers of rent extraction in an effort to extract the newfound rents before them. Thus, our theory, in addition to

[6]Historical accounts support this. Between 1850 and 1871, just nine state governments granted 48,883,372 acres of land to railroads for construction (Ellis, 1945). The history of the Northern Pacific Railway in the upper Midwest was exemplary: state legislators allocated land grants to favored interests who sat on their rights, "milked it of its resources, and left very little accomplished" (Malone, 1996). Bowers (1983), drawing from Pennsylvania's experience, illustrates the sorts of exchanges made with legislators to obtain such favors: "In 1859, for example, a lobbyist for the Franklin Railroad wrote financier Jay Cooke that Senator Brewer, who had worked hard for the railroad's bill, 'wishes to be one of our directors and as a compliment as well as a debt it is due to him.' By the 1850s, nearly all members received free railroad passes at the beginning of each session[.]"

explaining the timing of the switch, also explains the increase in special bills in the years before switch shown in Figure (2) above.[7]

Switching to general legislation permits the delegation of services offered by special legislation to another branch of government. Thus, the movement away from special legislation will be accompanied by an expansion of the administrative state. Less profitable subjects of special legislation and those without stable interest groups will have little demand as subjects of congressional oversight, and thus will be devolved to either the courts or to lesser authorities to manage. Conversely, high-rent areas of law, such as the regulation of major industries, will become prominent subjects of congressional committee oversight, regulation, and administrative law. Through committee oversight and control of bureaucracy, individual legislators can further differentiate their product offering from those of other legislators, marketing access to whatever agency his committee oversees with less direct competition from legislators outside of that committee (Holcombe and Parker, 1991, Weingast and Marshall, 1988). Thus, the number of potential suppliers of a particular bill are reduced, products are differentiated, transaction costs for constituents are raised, information is more concentrated, and the potential for monopoly rents accruing to the politician is increased.

Before proceeding, it is worth briefly dispelling some of the criticisms of special legislation that underlay the traditional story supposedly explaining its decline. Complaints about the quality of legislative drafting are subjective and unfalsifiable, and the costs of ever-growing statute books and of popular ignorance of the law are difficult to ascertain. Either way, such costs would be overwhelmingly internalized by the demanders of special legislation: Where a property owner seeks a bill to define his property line or grant him a business license, the cost of poor drafting or the difficulty in finding the enacted statute would fall overwhelmingly

[7]If word of prohibition were circulating for some years before an amendment was passed, it is also possible that some portion of the increase in special bills prior to prohibition is the result of constituents rushing to get their bills in while they still could. However, contemporary evidence of whether such rumors circulated is not forthcoming.

on him. It would not likely rise to the level of a great social problem demanding immediate attention in the name of the public, much less a transformation of the nature of legislation as it had always been. That considerable ignorance of law and politics is rational has become a bedrock of public choice theory (Downs, 1957). A voter's ignorance of legislation imposes even less social cost where, as in the aforementioned examples, the vast majority of legislative output consisted of private bills that were unlikely to affect his interests.

Also, that special legislation was rife with logrolling is presumptively true, as is the claim that it frequently led to corrupt dealing. Taking those as given, though, the problem reduces to a comparative one: If special legislation was mostly replaced by bureaucracy and committee control, do general legislation and administration lead to marginally less social cost from these activities? Prima facie, there seems no reason to believe so. Differences in the intensities of legislators' preferences as to particular policies is the fact giving rise to that exchange, not the existence or non-existence of committees (Buchanan and Tullock 1999 [1962], p.100). Logrolling existed in the world of special legislation without committees (Ireland, 2004). It exists in the world of general legislation and committees (Stratmann, 1992). In fact, committee oversight, far from being anathema to logrolling, enables it. Benson (1981, 1983) reasons that the high-demand committee system is not only a mechanism to facilitate logrolling but is, itself, an example of logrolling. The bidding process among legislators to obtain seats on particular committees reflects differences in value placed on different areas of law and policy. Once those seats are obtained, committee review and agenda control are institutional arrangements that facilitate vote-trading among legislators, giving a narrower subset of the legislature the first and last pass at legislation within their purview. Thus, the argument that special legislation was uniquely susceptible to logrolling fails upon consideration of its alternative.

3.2 Constitutions as Commitment Devices

The 19th century state legislature can be seen as a market where constituents purchase legal services from legislators. From the constituent's perspective, whether a business license, divorce, naturalization, or declaration of property boundaries, is introduced by one legislator or another is of no consequence as the legal result is the same. The legislator thus operates in a highly competitive environment: multitudinous suppliers, homogeneous goods, low transaction costs (crossing the hall to another legislator), and low information costs. (Koford, 1993, Becker, 1983). A constituent walks into the legislator's office knowing what he wants, knowing whether he got it, and knowing that he can get it from nearly any other politician in exchange for his support.

Framing the provision of legislative products and services as a market simplifies the switch in legislative strategy to a story of producers finding a way to transition from a less profitable market to a more profitable one. What makes the story unique are the constraints of being competitive individual suppliers of a good within a monopoly institution. Among private actors on private markets, if a more profitable use of capital and labor are identified in an adjacent market and transaction costs are sufficiently low, those inputs will flow to their more highly valued use. In a legislative market, the state within which politicians operate has already assumed a monopoly on the provision of legislation. There is no substitute institution for the provision of legislation and no prospect of entry by another state. Legislators within that state, however, face competition from one another and from electoral challengers. Therefore, as producers, they collectively have a monopoly but individually must compete with each other.

The result is a transitional gains trap (Tullock, 1975). By the establishment of the state's monopoly on lawmaking, rents are created among lawmakers in the provision of private bills with the force of law, and supernormal returns accrue to them from providing such bills. Initial incumbents enjoy a windfall, but in the long-run, subsequent individual officeholders earn only competitive rates of return. Where this trap differs from most is that legislators have no fear of the state losing its monopoly nor of their seats being abolished.[8] As the economy industrializes, legislators would prefer to transition to more profitable forms of legislation but, under competitive pressure, are not free to simply shift his attentions to general legislation at will without incurring lost electoral support from forgone special bills. Thus, they find themselves at a suboptimal point on the Paretian frontier, catering to individual demands for special bills rather than engaging in rent creation and extraction via general legislation.

The novel solution for legislators in such a trap is to coordinate and ban their own low-profit service offering. Such an outcome is unique both for its desirability and for the parties' ability to make it happen. Constitutional prohibitions of special legislation can thus be understood as collusive agreements among producers of special legislation to restrict output, with the transaction costs of amendment and the independence of judicial enforcement serving to stabilize it (Buchanan and Tullock 1999 [1962], Landes and Posner 1976). Alternative institutional changes, such as creating a standing rule against special laws or lengthening the legislative session in an attempt to allocate more time to general laws, do not speak to legislatures' dilemma outlined here, and thus will prove to be ineffectual and are not adopted.

3.3 Why the states, but not the federal government?

An explanation based on the transportation boom also accounts for the disparity between state and federal governments in their treatment of special legislation. States retained considerable police power over commerce and the use of land within their borders throughout the 19^{th} century, and the reach of Congress' Commerce Clause powers to intrastate com-

[8] Seats, of course, can be abolished or added, but they rarely are in significant numbers, and legislators' aversion to doing so is straightforward: abolishing seats costs them their jobs, and adding seats dilutes their vote shares and reduces the sizes of their constituencies.

merce were not as great as they would later become. "[P]revailing commerce clause doctrine until the 1910's permitted Congress to address only the long-haul problem in any comprehensive way," leaving short-haul intrastate rail lines to state regulation. "It took nearly a century for federal policymakers to decide that national markets require federal regulation and suppression of inconsistent regulation from the states" (Hovenkamp, 1988). This was likely due to Congress's inability to resolve inter-regional disagreements about how to apply federal resources, with any potential federal investment in infrastructure sure to benefit some regions more than others (Wallis, 2000).

Through the development of the Interstate Commerce Commission, Congress came to play a considerable role in the growth of transportation infrastructure at the national level, but until then, the special and local bills sought by rail developers would constitutionally have only been providable by states. Federal legislators' upstart efforts at regulating rail prior to the ICC usually failed. In the decade prior to the ICC's creation, over 150 bills were introduced providing for some form of railroad regulation, and only four made it through even one House of Congress (Fiorina, 1982). When Congress finally set out to regulate rail at the national level, it did so on a largely blank slate and in a much less competitive legislative environment than state legislators had.

In an era when U.S. senators were still elected by state legislatures, they would naturally be less eager to offend the electors who placed them in office by intruding in state legislators' rent-extracting enterprises. In the heart of the "cooperative federalism" era, when states were generally held to wield far more power over federal policy than they do today, federal legislators could be expected to show greater reluctance to offend the will and policies of state governments, leaving state governments considerable dominion to pursue rents of their own (Bulman-Pozen, 2016, Hills, 1998). Baker (2023), without pointing to rail as a driving force, ties the growth of federal administrative bureaucracy to the Seventeenth Amendment, as it diminished the power of states relative to the federal government, disrupted the horizontal balance of power between the states, and opened the door to an expansion of federal police power. With the passage of the Seventeenth Amendment and the introduction of direct election of U.S. senators, the federal government made its ultimate intrusions into intrastate rail regulation with the Federal Transportation Act of 1920. Consistent with Zywicki (1997), the proven role of corporate and special interests in the passage of the Seventeenth Amendment can thus be interpreted as an extension of this story rather than as an unintended consequence.

The nationwide campaign to abolish special legislation would not have been as meaningful at the federal level, as states retained their preeminence in regulating commerce and the higher profitability of regulation-by-committee driven by the railroad boom remained largely particularized to state legislation. Whether by constitutional limitation or a disinclination to offend state electors, members of Congress did not intrude on that political market. They would, however, have continued to place the same value on special legislative offerings to their constituents and would have been loath to ban special bills without sufficient cause. As federal bureaucracy emerged and grew, the different purviews of state and federal law, the higher costs to unorganized constituents of petitioning members of Congress, and the divergence of regional economic interests would all have lent themselves to a less competitive environment for federal special legislation, absolving the need for collusion to ban it outright.

4 Railroads and Constitutional Change

4.1 America's First Big Business

In the early decades of the 19th century, more than two-thirds of all free American laborers worked in the agricultural sector (Margo, 1992, 51). Commercial enterprises were small, ownership was synonymous with management, and the family was the basic unit of business.

Chandler Jr. (1977) goes as far to say that, prior to 1840, "the practices, instruments, and institutions of commercial capitalism which had evolved to meet the growth of trade and the coming of market economies in the Mediterranean basin in the twelfth and thirteenth centuries were not fundamentally altered" (16). By 1900, however, agriculture's share of the labor force had been cut in half to 36%. The nation had experienced a revolution in transportation technology and the growth of industrialization and manufacturing. The dominant business institution was now the large, multi-unit firm engaged in mass production and distribution.

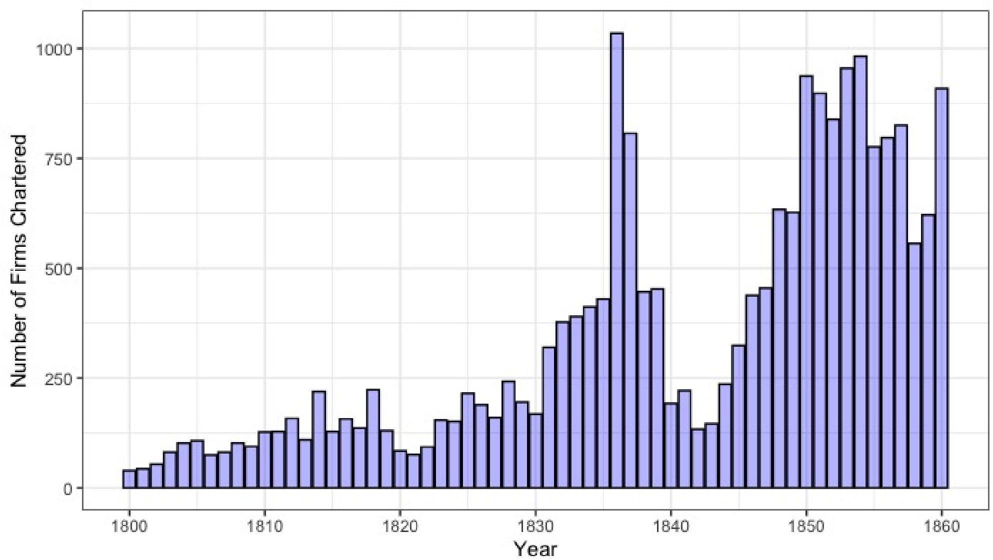

Figure 3: Total Number of Firms Chartered

Source: Wright (2013).

Chandler Jr. (1977) dates this transformation in the economy to the 1840s. Figure (3) plots data from Wright (2013) on the number of corporations chartered each year from 1800 to 1860.[9] The chartering of corporations clearly follows the business cycle, but the secular increase in the mid-1840s is evident. With the exception of the boom years immediately

[9]We thank Robert Wright for bringing this data to our attention. Unfortunately, comprehensive data on the number of corporations in the United States does not exist after 1860 until the passing of the Revenue Act of 1916 which established the modern corporate income tax (Hilt, 2018). This paucity of data is likely due to the state bans on special legislation.

prior to the Panic of 1837, it was not until 1846 that the number of corporations chartered in a year was greater than 500.

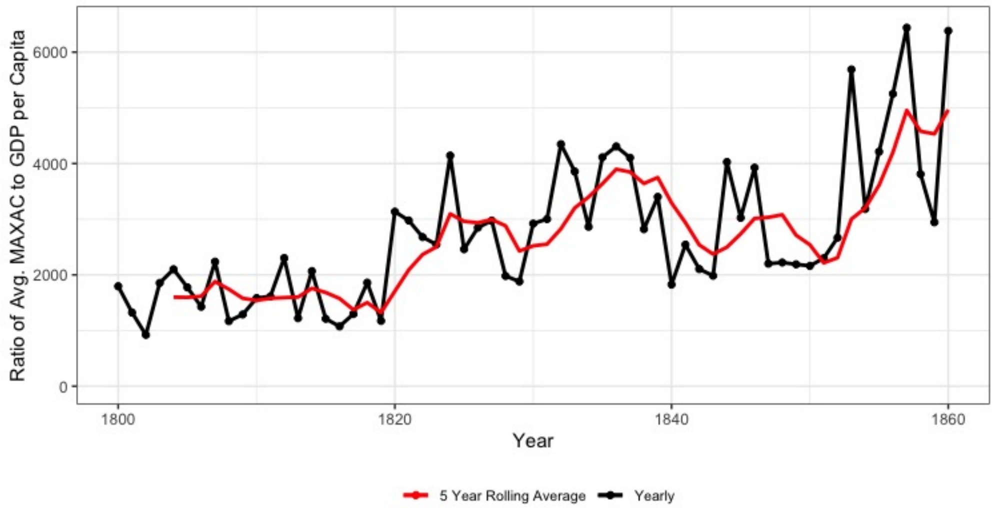

Figure 4: Ratio of Average Corporate Capitalization to GDP per Capita
Source: Wright (2013).

Not only were there more corporations leading up to the 1860s; they were getting larger. One estimate of size is the ratio of the average corporation's capitalization (as stated in its charter) to GDP per capita.[10] For example, if a corporation was capitalized at $200,000 in 1840, given that GDP per capita in 1840 was around $100, the corporation's capitalization would 2000 times that of the average American's income. Put another way, the corporation's capitalization is equivalent to the income of 2,000 average Americans. Figure (4) plots the ratio from 1800 to 1860. From 1800 to 1820, the average corporation's capitalization was equal to the income of just under 2,000 average Americans. From 1820 onward, corporation size increased in phases, reaching its maximum in 1860 at a capitalization equivalent to 5,000 average Americans.

The largest and most important of these new large corporations were the railroad companies. The railroads were the "nation's first big business" (Chandler Jr., 1965). As a matter

[10]Data on the authorized capitalization of corporations is from Wright (2013), and GDP per capita is from Carter et al. (2006).

of fact, at the turn of the century, they were "the largest business enterprises in the world" (Chandler Jr., 1977, 88). The capital required to build and maintain the railroads was greater than other traditional enterprise that came before it, and according to (Chandler Jr., 1977), they were the first private businesses in the United States to acquire said capital from regions outside of their base of operations (90). Figure (4) highlights the five largest corporations chartered in each decade. Starting in the 1840s, all "Top 5" corporations are railroad companies. The largest corporation chartered in the 1830s was the Mississippi Union Bank with a maximum authorized capital of $15.5 million (equivalent to the income of 180,233 average Americans). In the 1840s, the largest corporation was the Pennsylvania Canal and Railroad Company at $20 million (or 198,020 Americans), and by 1860 the Leavenworth City and San Francisco Railroad Company was the largest corporation at $300 million (a whopping 2,752,294 Americans).

Figure (5) plots the total miles of railroad tracks in the contiguous United States from 1820 to 1920 on a logarithmic scale. Around 1840, the railroad network was still in its infancy with a mere 3,000 miles of track in service, half of which were concentrated in New England and New York. By 1860, the U.S. was home to half of the world's railroad tracks with approximately 30,000 miles. After the Civil War, railroad growth resumed in waves. In 1869, the first transcontinental railroad connected California with the dense rail network of the East, and by 1880 there were nearly 100,000 miles of track in operation. Figure (8) maps this expansion over geographic space.

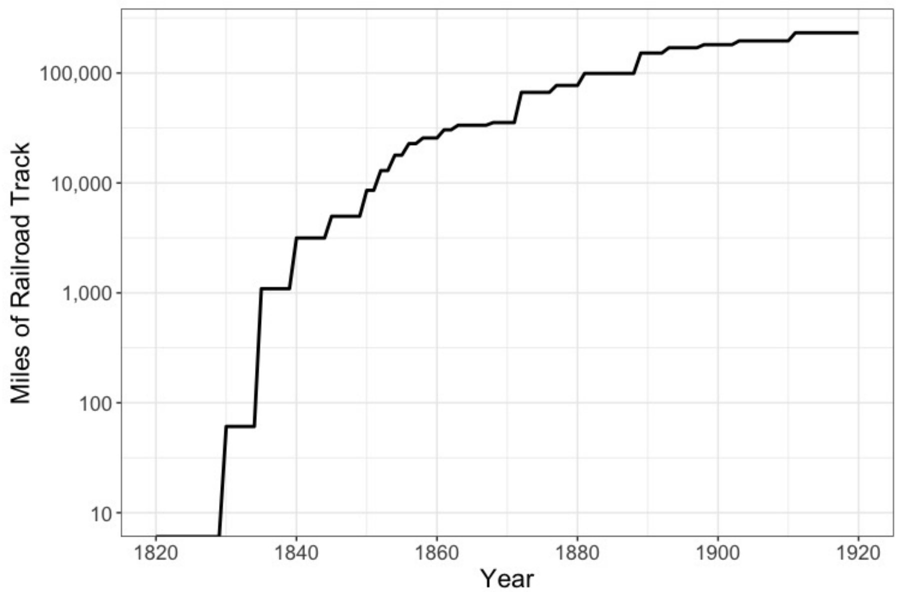

Figure 5: Total Railroad Mileage in the United States, 1820-1920
Source: Atack (2013).

Beyond the fact that the expansion of the railroad was itself a marker of economic growth, it has been shown to have had a positive effect on a number of other measures of economic activity and a real potential driver of the economic changes discussed above. Atack et al. (2008) find that the railroad increased the size of manufacturing firms at the county level and had a large positive effect on urbanization. Donaldson and Hornbeck (2016), updating the work of Fogel (1964), find that, if all railroads were to have been removed in 1890, the total value of U.S. agriculture would have declined by about 64%, translating into an annual economic loss equal to 3.22% of GNP. Hornbeck and Rotemberg (2024) find that, absent the railroads in 1890, national aggregate productivity would have been 27% lower.

4.2 Data

4.2.1 Constitutional Restrictions on Special Legislation

Our main dependent variable, shown in Figure (1) above, is the year in which a state ratified broad restrictions on special legislation. By "broad restrictions" we mean those that went beyond restrictions on the incorporation of firms and municipal governments. The timing of these restrictions are from Hennessey (2009, 142).[11] Given the small sample size, we returned to the text of each state constitution to confirm Hennessey's coding on the years of ratification. We concur with her data for every state except Virginia.[12] We provide the relevant citation to the restriction for each state and territory in Table (2).

4.2.2 The Railroad Network

Our main explanatory variable is the total length of railroads within a state or territory in a given year. Atack (2013) provides annual data on the (near) exact location of American railroads from 1826 to 1911. Using the geographic extent of U.S. states and territories from the *Atlas of Historical County Boundaries*, we calculate the total miles of railroad in a given year in each state or territory.[13] We also use the *Atlas* to control for the changing geographic extent of each state and territory over time.

4.2.3 Additional Control Variables

General incorporation acts — One potential concern may be that some states and territories have laws that are more friendly to business than others and that their more liberal

[11] The data can also be found in Hennessy and Wallis (2017, 102-103).

[12] Hennessey encodes Virginia as never ratifying such prohibitions, but we follow Binney (1984) in identifying Article 5, § 17, 20 of the 1870 Virginia Constitution as restricting special legislation.

[13] The Atlas provides all historic political boundaries for all U.S. states and territories allowing us to make due account for shifting state borders. The *Atlas of Historical County Boundaries* is available online: http://publications.newberry.org/ahcbp/.

ethos also results in earlier constitutional restrictions on special legislation. To control for state level "ease of doing business" during our time period, we collect data on when states enact general incorporation statutes from Hamill (1999) and Hilt (2017). General incorporation statutes created a more streamlined procedure by which new firms could incorporate. Rather than petition the government for a charter, an entrepreneur could fill out a form and submit it to a government office for filing and incorporation (Hilt, 2017, p.147). The first state to pass such a statute was New York in 1811, and most states and organized territories had one by 1860.

State population levels — To control for the potential importance of total population, we collect data on the population of states and territories from the U.S. census. Because the census is decennial, we interpolate values between census years. We do so only within historical boundaries to ensure the estimated values reflect underlying geographic changes.

Telegraph stations — Another major technology that was rapidly expanding in 19$^{\text{th}}$ century America was the electric telegraph. The telegraph dramatically reduced the time it took to send information from point to point, and has been shown to have had political effects (Wang, 2025). To account for potential confounding effects caused by the telegraph, we use data from Russell and Winkler (2024) on the number of telegraph stations in a state from 1844 to 1862.[14]

4.3 Empirical Strategy and Results

Relying on the data discussed above, we create an unbalanced panel where states and territories "enter" the panel in the year they join the Union.[15] The panel data span from

[14]We thank Edmund Russell and Lauren Winkler for sharing the telegraph data with us and discussing its potential uses. Visualizations of the data produced by Russell and Winkler can be viewed at https://telegraph.library.cmu.edu/. We received the data on 01/31/2024.

[15]States do not "exit" the panel as they leave the Union during the American Civil War.

1830 to 1920 and includes 48 states and 20 territories. To study the relationship between the expansion of the railroad network and the decline of special legislation in the United States, we estimate the following specification:

$$\text{Restriction}_{it} = \theta_i + \gamma_t + \beta_1 \text{ihs}(\text{Miles of Railroads})_{it} + \lambda X_{it} + \varepsilon_{it} \tag{1}$$

$Restriction_{it}$ is equal to one if and when a state alters its constitution to broadly restrict special legislation. The primary independent variable of interest, *Miles of Railroads*, is the total length of railroads within a political jurisdiction (state or territory) in a given year.[16] X_{it} is a vector of time-varying state-level controls, including territorial area, whether a general incorporation act is in effect, and population. In all specifications, we also include jurisdiction fixed effects, θ_i, to account for time-invariant unobservables unique to each jurisdiction as well as year fixed effects, γ_t to account for time-varying shocks common to all jurisdictions. Standard errors are clustered at the jurisdiction level.

Table (1) reports the estimated relationship between a state's railroad mileage and the likelihood that it has a constitutional amendment banning special legislation. As predicted, the relationship is positive and robust to relevant control variables. Column (1) is our most parsimonious specification, including only a control for territorial area and jurisdiction and year fixed effects. In column (2), to ensure the estimated effects are not driven by temporary fiscal dynamics, we add a year fixed effect interacted with whether the jurisdiction defaulted or had high debts in the 1840s.[17] Columns (3) and (4) add controls for whether the jurisdiction had a general incorporation act in effect and the jurisdiction's population. Adding the population of the state or territory as a covariate decreases the number of observations

[16] Rather than transforming our variable using natural logs, we take the inverse hyperbolic sine (ihs), which acts similar to logarithms but is preferable to $log(x+1)$ in the case of zeros. $ihs(x) = \ln\big(x + \sqrt{x^2+1}\big)$

[17] Arkansas, Illinois, Indiana, Louisiana, Maryland, Michigan, Mississippi, Pennsylvania, and the territory of Florida defaulted on their debt in the 1840s. According to Lamoreaux and Wallis (2021), Alabama, Massachusetts, New York, Ohio, South Carolina, and Wisconsin had high debts (obligations exceeding $5 per capita). It is worth noting that of this group, only Indiana places generalized restrictions on special legislation by 1860.

because, despite interpolating and extrapolating, gaps in the population data exist. All estimates are statistically significant at the 5% level.

Table 1: The Expansion of the Railroads and Special Legislation Amendments

Dependent Variable:	Constitutional Restrictions on Special Legislation			
Model:	(1)	(2)	(3)	(4)
Miles of Railroad (ihs)	0.0299**	0.0345***	0.0343***	0.0347**
	(0.0117)	(0.0124)	(0.0124)	(0.0159)
Territorial Area (log)	0.0454	0.0180	0.0261	0.0324
	(0.1020)	(0.1210)	(0.1241)	(0.4804)
General Incorporation Act			-0.0689	-0.0595
			(0.0691)	(0.0731)
Population (log)				0.1063
				(0.0975)
Outcome Mean	0.4833	0.4833	0.4833	0.4833
Jurisdiction FE	Yes	Yes	Yes	Yes
Year FE	Yes	Yes	Yes	Yes
High Debt/Default in 1840s × Year		Yes	Yes	Yes
Observations	3,863	3,863	3,863	3,322
R^2	0.74425	0.75247	0.75315	0.75632
Within R^2	0.03312	0.04249	0.04511	0.06778

Notes: Estimates of the effect of the total miles of railroad (inverse hyperbolic sine) in a jurisdiction on the likelihood a jurisdiction adopts a broad constitutional restriction on special legislation. The sample period is 1830 to 1920. Control variables include the jurisdiction's total area (log), whether it has a general incorporation act on the legislative books, and its total population (log). Each column includes jurisdiction and year fixed effects. Robust standard errors clustered at the jurisdictional (state and territory) are reported in parentheses. *Signif. Codes: ***: 0.01, **: 0.05, *: 0.1*

In our most restrictive specification, column (4), a doubling of a territory's railroad mileage is associated with a 2.36 percentage point (pp) increase in the probability of a state adopting constitutional restrictions on special legislation. The effect estimated here may seem small, but recall that railroad mileage grew extraordinarily rapidly during this period. In terms of the greatest difference between 1830 and 1920, the state of Virginia had the largest increase with 110,340 miles (16.7 doublings) and Delaware the smallest with 310 (8.3 doublings). The average difference was 12,426 (10.2 doublings, closest to that of North Carolina), and the median was 7,300 (9.4 doublings, closest to Indiana and Tennessee). Thus, the maximum percentage point increase in the probability of adopting a constitutional restriction for a given state is anywhere between 20 and 40 pp.[18]

One plausible alternative interpretation of our results is that railroads decreased the cost of traveling around the state, thus lowering the cost of monitoring and enforcing general legislation or simply lowering the overhead cost of bureaucracy. This would comport with the idea that technology and communication are driving forces behind the growth of government, as "[l]arge institutional structures require a certain degree of communications, organization, and coordination" (Cowen, 2021, McCrone and Cnuude, 1967). But if transport or communication cost is the true relevant factor, we should expect the expansion of the telegraph to have an equally large, or perhaps larger, effect on whether a state ratifies a special legislation amendment. The telegraph was capable of communicating a message across vast distances in a matter of minutes, and did not have the same industrial character as the railroads. Furthermore, the telegraph spread much quicker across the country then did the railroad. Table (A.1) reports statistically insignificant effects for the relationship between the number of telegraph stations in a state in a given year and its likelihood of ratifying an amendment. The estimated effect sizes are only a third of those estimated for railroads. This suggests, without definitively proving, that it is the industrial character of the railroads that is important for the observed constitutional change rather than its communication cost savings.

[18]To calculate this, take the number of doublings and multiply by 2.36 (our estimated coefficient).

5 The Rise of Government by Administration

5.1 Bureaucracy and Regulation via General Legislation

In the first half of the 19th century, American government was small, decentralized, and had minimal regulation. Economic activity was largely governed by local authorities and local courts. The second half of the 19th century, however, saw the locus of regulatory activity shift from local governments to the states and, later, to the federal government (Skowronek, 1982). From 1870 to 1913, thus ignoring the immediate ratchet effect of the Civil War, average state-government expenditures per capita increased by 90% from \$2.13 to \$4.04 (in constant 1914 dollars) (Holcombe and Lacombe, 2001a,b). Mirroring that growth, the average number of state government employees per 10,000 citizens more than doubled from 36 in 1850 to 78 in 1910.[19] During the same period, local governments, the inevitable recipient of the legal issues once done through special legislation, also experienced a dramatic growth in per capita expenditure. The average local-government expenditures per capita increased from \$6.65 to \$20.24 for a near 210% increase. Federal expenditures, however, only increased by 10%.

Following the bans on special legislation, government services with low rent extraction potential — such as marriage, divorce, child custody and legitimation, land recordation, estate law, etc. — became the domain of the court system, local government, or low-level bureaucracy. Divorce, for instance, which had always been a largely legislative offering, became an exclusively judicial one. Initial moves in that direction began, along with the general trend against special legislation, in the mid-19th century but, as in other categories, were not complete until around the turn of the century (Baldwin, 1914). True to our theory, divorce would have been an almost inevitably competitive offering, and thus had low rent extraction

[19] Author's calculations based on occupational status recorded in the full-count census and state populations.

potential. Constituents could obtain divorces not only from their own state legislature but from neighboring states as well, and divorce tourism was common where significant disparities existed in the laws of neighboring states.[20] High-priced divorces such as those in England discussed by Boettke, Leeson, and Lemke (2014) would have been infeasible in the presence of such jurisdictional competition. Legislators, despite having long been suppliers of divorce and even, in some cases, establishing legislative committees around it, seem to have put up no fight in letting it pass to the courts (Baldwin, 1914).

Other areas that landed under judicial or ministerial control lacked stable interest groups and offered similarly low profit opportunities for legislators. Marriage, though in principle subject to monopoly, offered little rent potential in a society with multiple religious and state suppliers (Davidson and Robert B. Ekelund, 1997, Robert B. Ekelund et al., 2002). The ability of churches to afford its religious value, of courts to offer common law marriage benefits, and of neighboring states to recognize matrimonial rights generally enforceable in a couple's home state under the Full Faith and Credit Clause left little room for politicians to form extractive institutions around it (U.S. Const., art. IV, § 1). Along with other issues that devolved to courts and ministers such as child custody and legitimation, land recordation, estate law, etc., it is an infrequent occurrence in most constituents' lives, lacking the repeat players generally necessary to form a stable interest group.

High rent areas of government business, however, were picked up by the burgeoning bureaucracy and subject to regulation via general legislation. Where railroad rates and routes were once set by special legislation, the 1860s and 1870s saw a shift to regulation via established state commissions with the mission of "look[ing] after the affairs of the railroad and supervis[ing] its management" (Clark, 1891, 22). Figure (6) illustrates that, according to

[20]New Yorkers, for instance, notoriously took advantage of Rhode Island's more liberal divorce law as their own state government restricted divorce to cases of infidelity and cruelty, and wealthy Americans later became notorious in Paris for venturing overseas to take advantage of French divorce law (New England Historical Society 2021, Green 2021).

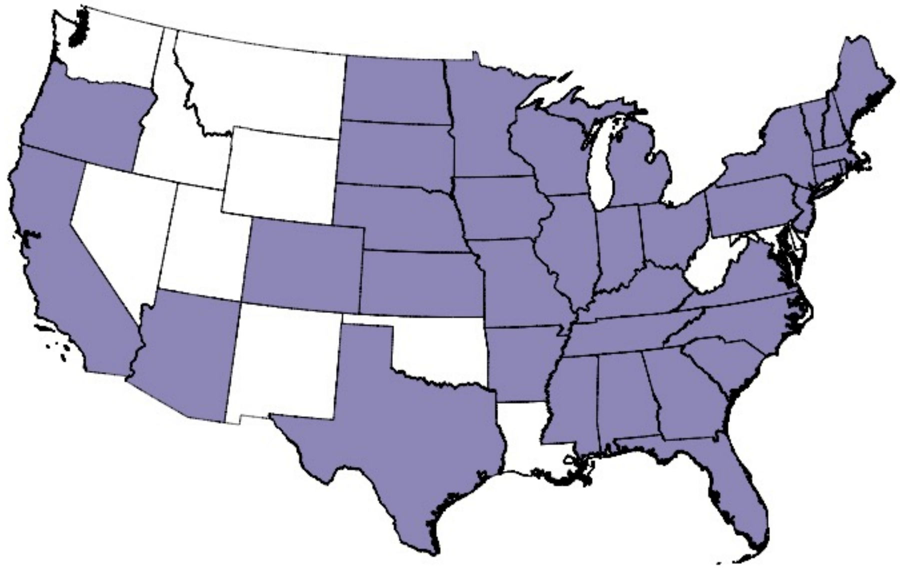

Figure 6: State Railroad Commissions Established Prior to 1891
Source: See text.

Clark (1891), the majority of states had created a railroad commission at some point before he was writing in 1891. Speaking on Pennsylvania, Davies (1992) recounts that functions like "health, education, banking, insurance, manufacturing, and transportation" had shifted from direct legislative control to the administrative bureaucracy (288). Around the same time, New York was taking further steps to transfer "complex and controversial economic questions...from the legislature to administrative agencies, of which the most important were the new Public Service Commissions created to regulate transportation and utility companies" (McCormick, 1978).

With general legislation comes an increased role for interest groups in the political process. Writing about New York, McCormick (1978) recounts that "[o]rganized economic interests increasingly asked for government assistance [in the 1890s], while unorganized citizens became more aroused than ever against uncontrolled transportation and utility companies," "economic groups that had never before significantly pressured state government began competing for influence with the habitually organized mercantile and industrial interests," and "divisive economic policies substantially reshaped the traditional patterns of New York State politics" (261). Upon election in 1906, Governor Charles Evans Hughes became known for recognizing the importance of interest group conflicts and the suitability of bureaucracy to address them in a spirit of "friendly cooperation" between corporations and government (McCormick, 1978). After the 1873 ban on special legislation in Pennsylvania, newly organized professional groups and occupational associations, from public health experts to brewers, increasingly initiated government-related bills and pressed demands upon the state legislature (Davies, 1992). The experience was hardly unique to New York and Pennsylvania. Johnson and Libecap (2007) write that in the latter decades of the 19th century, interest groups were on the rise everywhere, increasing in number and power, and political parties became increasingly reliant upon them.

As interest groups flourished, voters, faced with less locally involved and attentive legislators, responded predictably. After a century of high voter turnout throughout the United States, turnout in the late 19th and early 20th century declined dramatically and showed reduced loyalty to particular parties (McCormick, 1978, Burnham, 1965). Voter turnout in New York fell from around 85% in 1892 to the high 60s by 1910, and ticket-splitting by voters rose from below 60% of ballots to well over 90%, an experience "quite similar to the one experienced by the nation at large," with "partisanship eroding and electoral participation declining" (McCormick, 1978, 254). With long-established patronage relationships disrupted, politicians' methods of appealing to voters were destroyed, and constituents' loyalties were diminished. Voters, living under a new model of legislation, would have been understandably unsure of what service their elected officials were providing them.

5.2 The Birth of American Administrative Law

With a transforming state came transformed conceptions of law. By the 1890s, scholars in the new field of "administrative law" observed that "[o]f the public statutes which are passed every year . . . the largest number regulate, in some respect, the administration of the government, creating official powers or duties" (Freund, 1894). Alongside this emerged the now-commonplace process of regulatory rulemaking, which authors viewed as a novel development (Goodnow 1904, Wyman 1903, p. 285-86). Many observed this as a shift from the Anglo-Saxon common law tradition to the Continental system—a victory of Bacon and Wentworth over Coke and Edwards (Freund, 1894, Berle, 1917).

All the while, by contemporary accounts, legislatures dominated state bureaucracies, serving as "the central administrative authority of the state" despite agencies' official placement in the executive branches of state governments. Freund (1894) describes a pervasive absence of gubernatorial control over state administration, which he concludes "must be regarded as a deliberate principle of legislation, and as a vital part of the general scheme of keeping the executive power as weak as possible." The powers of governors were "from the beginning more qualified, and were subsequently narrowed by constitutional changes," limited to "the privilege of issuing proclamations or writing letters warning officials to do their duty" but withholding "from the chief executive all the functions of control, direction and review" and "still less" the ability to delegate the exercise of powers to subordinate officers without legislative approval. Legislatures did so until "[t]he clause which provides that he is to see that the laws are executed, is little more than a phrase" (See also Goodnow (1893)). Writing ten years later, Goodnow describes federal administrative authority as having become "highly centralized" but with "a very decentralized administrative system" still prevailing in the states, where it "has been held quite commonly that the principle of the separation of powers does not govern the relations of the local administrative authorities."

By the early decades of the 20th century, the status and authority of state governors had risen. Teaford (2002) quotes James Bryce, British ambassador to the United States, writing in 1910 that the "tendency [in the last years] seems to have been for the power and influence and authority of the State Governor to increase and be revivified ..." (17).[21] The growing power of the governor seems an unintended consequence of the legislature's choice to delegate its rulemaking powers. Realistically, as special legislation was replaced by administration, it was only a matter of time before the chief executive would assert the full weight of his constitutional authority over offices within his purview. State governments' increased capacity to regulate large industries, however, more than compensated legislators for the surrender of some portion of the legislative power.

Whether the power exercised was legislative or executive, nearly every contemporary writing on the subject includes a recognition of an innate connection between bureaucracy, the new concept of "administrative law," and railroads. "The advent of the new administrative power" became "in the public mind associated chiefly with public utility and industrial commissions first created for the control of railroads" and "vested with powers of a type hitherto withheld from administrative authorities under our system, powers which are not intended to serve as instruments of a fully expressed legislative will, but which are to aid the legislature in defining requirements that on the statute book appear merely as general principles" (Freund, 1894). Freund credited railroad regulation, along with liquor legislation, as directly precipitating this "delegation of quasi-legislative powers," in which the foremost virtue was "flexibility" and "variability," as administrative action could be undertaken more easily than legislation (*Ibid.*; *see* Harriman (1916)). Berle (1917) called the rail industry a "striking example" of the need for regulation by administrative body.

Predictably, early legal challenges to administrative power arose from the railroad industry. In *Stone v. Farmers' Loan & Trust Co.*,[22] the Supreme Court of the United States held that "[a] grant in general terms of authority to fix rates is not a renunciation of the right of legislative control so as to secure reasonable rates." In *Reagan v. Farmers' Loan and Trust*

[21] Teaford (2002) provides an abundance of historical evidence in line with the Bryce quote.
[22] 116 U.S. 307 (1886)

Co.,[23] the Court held that Texas' railroad commission's rate-setting was constitutional:

> "there can be no doubt of the general power of a state to regulate the fares and freights which may be charged and received by railroad or other carriers, and that this regulation can be carried on by means of a commission. Such a commission is merely an administrative board created by the state for carrying into effect the will of the state, as expressed by its legislation."

In *Prentis v. Atlantic Coast Line Co.*,[24] a case involving Virginia's railroad commission, the Supreme Court held that "when . . . a state constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder, so far as the Constitution of the United States is concerned." Just a few years later, in *Detroit & Mackinac Ry. Co. v. Michigan R. Comm'n*,[25] the Court clarified that the propriety of a state merging the legislative and judicial functions was a matter of the state's own constitution. Where the state's constitution "separates legislative, executive and judicial powers," the Supreme Court would not intrude upon that division. "In this and other cases, where it was argued that administrative bodies were objectionable as having both judicial and legislative as well as executive powers, they were upheld, although it was conceded that such an absorption of power actually had taken place" (Berle, 1917).

In short, the separation of powers in state governments was determined to be a state concern with no federal Due Process implications. The Supreme Court did not intrude no matter how entangled states' legislative, executive, and judicial powers had become. Even the Interstate Commerce Commission, though federal, evolved in the eyes of the law within a few short years from having no judicial power to having quasi-judicial power to having full authority to inquire into judicial matters.[26]

[23] 154 U.S. 362 (1894)

[24] 211 U.S. 210 (1908)

[25] 235 U.S. 402 (1914)

[26] *Kentucky & I. Bridge Co. v. Louisville & Nashville R. Co.*, 37 F. 567 (1889), affirmed without opinion, 149 U.S. 777 (1892); *Interstate Commerce Commission v. Cincinnati, New Orleans, etc. Ry. Co.*, 64 F. 981, 982 (1894) ("It has been held that the Interstate Commerce Commission is not a court. It is an administrative body . . . lawfully created, and lawfully exercising powers which are quasi-judicial."); *Missouri, K. & T.*

The traditional notion of separation of powers, along with the guarantee of a republican form of government, were implicated by the growth of state governments and the nearly universal acceptance of governmental bodies that simultaneously exercised executive, legislative, and judicial functions. Central to this process was the indisputable power of railroad and utility commissions, empowered by the new "administrative law," to work their will without interference from the judiciary. As state and federal bureaucracy grew in tandem with the railroad industry it was tasked to regulate, a new body of law emerged to explain and justify it. Administrative law accepted the convergence of executive, legislative, and judicial powers whose separation was once sacrosanct (The Federalist Nos. 9, 47, 48, 51). The indomitable constant was the need for regulation and the structure of government to be malleable so that legislatures could increase regulation of railroads and, soon, other public utilities.

6 Conclusion

Ours is a story of the endogenous transformation of the legislative process as it had been practiced for centuries. Both the cause and effect are profound. The cause, in our reading, is the emergence of industry in the form of railroads. For the first time, sufficient wealth existed to merit a transformation of legislative institutions as politicians faced rising opportunity costs of serving constituents one at a time through special bills. The effect is what they crafted as a solution: an administrative state to which they could delegate day-to-day rulemaking and adjudication while retaining for themselves an oversight role on committees, reducing their workload and facilitating the practice of rent extraction. Historical evidence indicates predictable effects: a proliferation of interest groups to avail themselves of the new

R. Co. v. Interstate Commerce Commission, 164 F. 645 (1908) (conceding that the Commission could inquire into judicial questions, though not to the exclusion of courts); *Interstate Commerce Commission v. Cincinnati, New Orleans, etc. Ry. Co.*, 167 U.S. 479, 501 (1897) (still reserving to state commissions the power to set rail rates; "The power given is partly judicial, partly executive and administrative, but not legislative."); *but see* Federalist No. 47, 48, 51; U.S. Const. art. IV, sec. 4, cl. 1 ("The United States shall guarantee to every State in this Union a Republican Form of Government.).

system and a disaffected electorate with reduced loyalties to incumbents and to parties.

Our theory and findings contribute to multiple avenues of inquiry. In addition to their more obvious implications for American Political Development and the history of capitalism, they turn much of the conversation around state capacity and its growth-enhancing effects on its head by treating both the size and composition of the state as endogenously determined by the productivity and income distribution of the underlying economy rather than as primarily influenced or determined by external threats.

Finally, they contribute to the study of anti-corruption and reform movements and to the philosophy of law. For more than a century, legal scholarship has almost categorically accepted politicians' version of events, in which special legislation was abolished in a spirit of reform and public backlash against legislators' corruption. Rather, we find that it was legislators who led the charge against special legislation, while the public was mostly unaware. To the extent that their efforts were self-serving, this should add some nuance to the common view that generality in the law is categorically good. Our findings give credit to the apprehensions of Coke and Edwards that general laws may be used for narrow ends as well as to Hayek's observation that neither breadth nor narrowness in the law are intrinsically desirable so long as distinctions comport with underlying differences in the population and are agreeable to majorities of in- and out-group members.

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Additional Figures

Figure 7: Examples of Special Legislation

CHAPTER XXXIV.

An Act to change the name of Melissa Jane Gillespie to that of Melissa Jane Blair.

[APPROVED JANUARY 10, 1851.]

SECTION 1. *Be it enacted by the General Assembly to the State of Indiana*, That the name of Melissa Jane Gillespie, of Noble county, be and the same is hereby changed to that of Melissa Jane Blair.

SEC. 2. This act to take effect and be in force from and after its passage.

(a) Indiana, 1850, Name change

CHAPTER V.

An Act to give the Monroe Circuit Court jurisdiction of a cause therein named.

[APPROVED DECEMBER 11, 1849.]

Section 1. *Be it enacted by the General Assembly of the State of Indiana*, That Peter Bollenbacher, of the county of Monroe, be and he is hereby permitted to file his bill for divorce against Amelia Bollenbacher, his wife, in the Monroe circuit court, and that the said court be empowered to entertain the same and adjudicate thereon without regard to the length of time that said Bollenbacher has been a resident citizen of this State, any law of this State to the contrary notwithstanding.

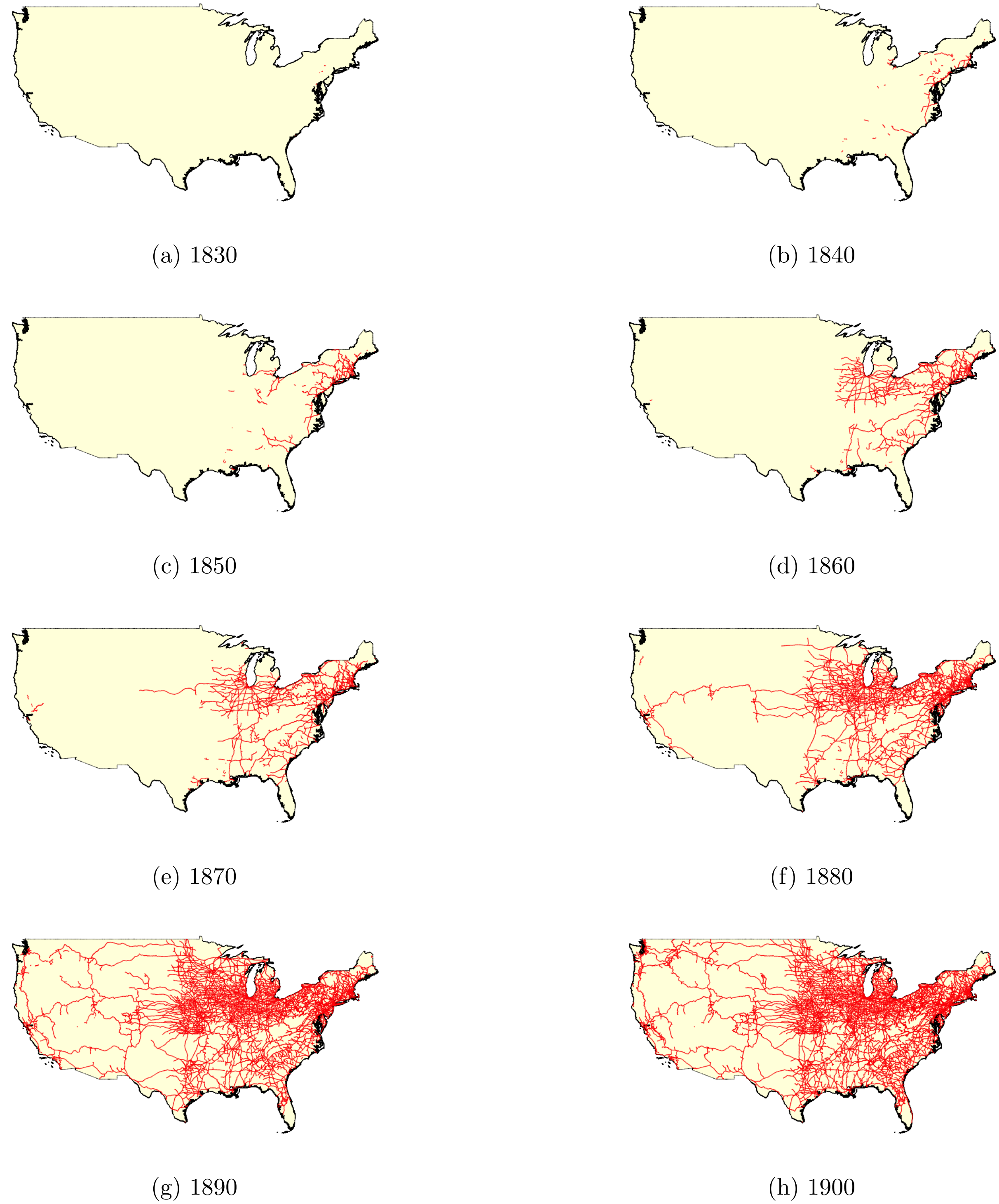
Sec. 2. The said court shall in all other matters touching said cause observe and conform to the established law and practice of the State.

Sec. 3. It is hereby made the duty of the Secretary of State to forward a certified copy of this act to the clerk of the Monroe circuit court.

Sec. 4. This act to be in force from and after its passage.

(b) Indiana, 1849, Filing for divorce

Figure 8: The Expansion of the U.S. Railroad Network



(a) 1830

(b) 1840

(c) 1850

(d) 1860

(e) 1870

(f) 1880

(g) 1890

(h) 1900

Note: The figure plots the expansion of the railroad network in the United States from 1830-1900. Source: Atack (2013)

Table 2: State-level Constitutional Broad Restrictions on Special Legislation

State	Statehood	First Ratified	Source	Method
Michigan	1837	1850	Mich. Const. 1850, art 4, § 23, 26	Convention
Indiana	1816	1851	Ind. Const. 1851, art. 4, § 22, 23	Convention
Iowa	1846	1857	Iowa Const. 1857, art. 3, § 30; art. 8, § 1	Convention
Oregon	1859	1857	Ore. Const. 1857, art. 4, § 23	Initial
Kansas	1861	1859	Kans. Const. 1859, art. 2, § 17; art. 12, § 1, 5	Initial
Alabama	1819	1861	Ala. Const. 1861, art. 3, § 29	Convention
Maryland	1788	1864	Md. Const. 1864, art. 3, § 32	Convention
Nevada	1864	1864	Nev. Const. 1864, art. 4, § 21	Initial
Georgia	1788	1865	Ga. Const. 1865, art. 1, § 15	Convention
Missouri	1821	1865	Miss. 1865, art. 4, § 27	Convention
Florida	1845	1868	Fla. Const. 1868, art. 4, § 17, 18	Convention
Texas	1845	1869	Tex. Const. 1869, art. 3, § 27; art. 12, § 37	Convention
Illinois	1818	1870	Ill. Const. 1870, art. 3, § 22	Convention
Tennessee	1796	1870	Tenn. Const. 1870, art. 11, § 4-8	Convention
Virginia	1788	1870	Va. Const. 1870, art. 5, § 17, 20	Convention
Wisconsin	1848	1871	Wis. Const. 1846, art. 4, § 31, 32	Amendment
West Virginia	1863	1872	W. Va. Const. 1872, art. 6, § 39	Convention
Arkansas	1836	1874	Ark. Const. 1874, art. 5, § 25	Convention
New York	1788	1874	N.Y. Const. 1874, art. 18, § 18	Amendment
Pennsylvania	1787	1874	Pa. Const. 1874, art. 3, § 7	Convention
Maine	1820	1875	Maine Const. 1819, art. 4, § 13, 14	Amendment
Nebraska	1867	1875	Neb. Const. 1875, art. 3, § 15	Convention
New Jersey	1787	1875	N.J. Const. 1844, art. 4, § 7, ¶ 11	Amendment
Colorado	1876	1876	Col. Const. 1876, art. 5, § 25	Initial
California	1850	1879	Cal. Const. 1879, art. 4, § 25	Convention
Louisiana	1812	1879	La. Const. 1879, art. 46, 47, 48	Convention
Minnesota	1858	1881	Minn. Const. 1857, art. 4, § 33	Amendment
U.S. Territories	-	1886	24 U.S. Stats. at Large, chap. 818, p. 170	Congressional Act
Idaho*	1890	1889	Idaho Const. 1890, art. 3, § 19	Initial
Montana*	1889	1889	Mont. Const. 1889, art. 5, § 26; art. 12, § 11	Initial
North Dakota*	1889	1889	N.D. Const. 1889, art. 2, § 69, 70; art. 7, § 31	Initial
South Dakota*	1889	1889	S.D. Const. 1889, art. 3, § 23, 24, 26; art. 17, §1	Initial
Washington*	1889	1889	Wash. Const. 1889, art. 2, §28; art. 12, §1	Initial
Wyoming*	1890	1889	Wyo. Const. 1889, art. 3, § 27	Initial
Mississippi	1817	1890	Miss. Const. 1890, art. 4, § 90	Convention
Kentucky	1792	1891	Ky. Const. 1891, art. 5, § 59	Convention
South Carolina	1788	1896	S.C. Const. 1896, art. 3, § 34	Convention
Utah*	1896	1896	Utah Const. 1895, art 6, § 26	Initial
Oklahoma	1907	1907	Okla. Const. 1907, art. 5, § 46, 59	Initial
New Mexico*	1912	1911	N.M. Const. 1911, art. 4, § 24	Initial
Arizona*	1912	1912	Ariz. Const. 1912, art. 4, § 19	Initial
North Carolina	1789	1916	N.C. Const. 1868, art. 2, § 29, amend. 67	Amendment
Connecticut	1788	-		-
Delaware	1787	-		-
New Hampshire	1788	-		-
Ohio	1803	-		-
Rhode Island	1790	-		-
Massachusetts	1788	-		-
Vermont	1791	-		-

Note: Asterisk (*) indicates states that were former territories subject to the 1886 Act of Congress restricting special legislation in the territories.

Table 3: Summary Statistics

Statistic	N	Mean	St. Dev.	Min	Max
Territorial Area	3,863	63,257.0	55,968.0	1,083	388,011
Constitutional Restriction on Special Leg.	3,863	0.5	0.5	0	1
Miles of Railroads	3,863	5,875.4	11,492.2	0.0	108,272.5
Miles of Railroads (ihs)	3,863	7.2	3.4	0.0	12.3
Population	3,322	1,300,554.0	1,397,170.0	6,077.0	10,385,228.0
General Incorporation Act	3,863	0.7	0.5	0	1
High Debt/Default	3,863	0.3	0.5	0	1

Table 4: Top 5 Largest Corporations Chartered Each Decade

Year/Corporation Name	**Max. Authorized Capital** (in millions)	**Ratio of MAC to GDP per capita**
1800		
Planters' Bank of the State of Georgia	3	30,612
Philadelphia Bank	2	20,408
American Fur Company	2	20,408
Bank of Virginia	1.5	15,306
Merchants' Bank, in the city of New York	1.25	12,755
1810		
Bank of America	6	52,632
State Bank	4.5	39,474
Louisiana State Bank	4	35,088
Farmers Bank of Virginia	2	17,544
City Bank of New York	2	17,544
1820		
Chesapeake and Ohio Canal Company	6	69,767
Bank of Louisiana	4	46,512
State Bank	3	34,884
Baltimore and Ohio Rail Road Company	3	34,884
Susquehannah and Patapsco Canal Company	2.5	29,070
1830		
Mississippi Union Bank	15.5	180,233
North American Steam Navigation Company	15	174,419
Citizens' Bank of Louisiana	12	139,535
South Western Rail Road Bank	12	139,535
New York and Erie Rail Road Company	10	116,279
1840		
Pennsylvania Canal and Railroad Company	20	198,020
Richmond and Ohio Railroad Company	12	118,812
Pennsylvania Railroad Company	10	99,010
Mobile and Ohio Rail Road Company	10	99,010
Pacific Railroad	10	99,010
1850		
Leavenworth City and San Francisco Railroad Company	300	2,752,294
Northern Pacific Railroad Company	150	1,376,147
Lake Superior, Puget's Sound and Pacific Railroad Company	100	917,431
Atlantic and Pacific Railroad Company	100	917,431
Southern Pacific Railroad Company	100	917,431

A Robustness

A.1 Considering the Telegraph

Table A.1: The Expansion of the Telegraph and Special Legislation Amendments, 1830-1866

Dependent Variable:	Constitutional Restrictions on Special Legislation			
Model:	(1)	(2)	(3)	(4)
Number of Telegraph Stations (ihs)	0.0115	0.0118	0.0120	0.0116
	(0.0125)	(0.0129)	(0.0136)	(0.0185)
Territorial Area (log)	0.0771**	0.0616*	0.0623*	0.3509*
	(0.0341)	(0.0347)	(0.0372)	(0.1998)
General Incorporation Act			-0.0072	0.0029
			(0.0644)	(0.0665)
Population (log)				0.1348
				(0.1033)
Outcome Mean	0.0573	0.0573	0.0573	0.0573
State FE	Yes	Yes	Yes	Yes
Year FE	Yes	Yes	Yes	Yes
High Debt/Default × Year FE		Yes	Yes	Yes
Observations	1,291	1,291	1,291	995
R^2	0.58047	0.60463	0.60469	0.59106
Within R^2	0.00683	0.00582	0.00596	0.03020

Notes: Estimates of the effect of the total number of telegraph stations (inverse hyperbolic sine) in a jurisdiction on the likelihood a jurisdiction adopts a broad constitutional restriction on special legislation. The sample period is 1830 to 1866. Control variables include the jurisdiction's total area (log), whether it has a general incorporation act on the legislative books, and its total population (log). Each column includes jurisdiction and year fixed effects. Robust standard errors clustered at the jurisdictional (state and territory) are reported in parentheses. *Signif. Codes: ***: 0.01, **: 0.05, *: 0.1*