11/22/24

Dear Legal History Colloquium:

Thank you for reading the attached work. I'm very much looking forward to our discussion next Wednesday! A few words to help guide you through what is attached. I've enclosed two pieces for our conversation: (i) a long law review article ("The Unenumerated Power") – a work of legal scholarship which relies on history for evidence, and (ii) a very short (4 page) work-in-progress outline ("Constitutional law in Crisis,") which situates problems in constitutional interpretation as themselves a problem of our historical moment.

Both projects stand on their own. But one might read "The Unenumerated Power" as an illustration of what "next interpretive steps" would answer some of the bigger questions about how to think about constitutional law that "Constitutional law in Crisis" raises, which is why I have included both. (Also, one is very nearly done, and the other is just beginning – I was loathe to pass up the opportunity to get your thoughts on this new bit of work.)

In terms of reading, I would encourage you to do the following: read "The Unenumerated Power" **first** (although it comes second in the enclosed pdf). I'd say you should focus on the Introduction and the Conclusion (which will give you the argument in most of its parts); skim Part I for an overview of federal corporations (this is dense and you don't need to follow every little bit, but it will be helpful if you are unfamiliar with their use/contemporary history and doctrine); skim Part II (the discussion of the power during constitutional convention and related debates, though you can mostly also get this from the Introduction). Part III is a reading of three Marshall Court cases; if you have time, of course, dive in, but please know that I know that it is a lot of material, so if you only quickly get the gist of how they fit together, that is very reasonable. (Of course, if you want to read the whole thing, that is great too!)

I'd then encourage you to read the "Constitutional law in Crisis" outline. Please note that it was written prior to the recent election and I have not changed it subsequently. I'd love to know your thoughts about this as a stand-alone, and early stage, piece of thought. I'd also be interested in hearing if it helps you understand the article better, or not. As a note – I should add that while "The Unenumerated Power" is in many ways orthogonal to conventionally organized political priors (and was written in an agnostic spirit), "Constitutional law in Crisis" might appear, in certain lights, to have them. I hope it will be clear, nevertheless, that it, too, stems fundamentally from and is engaged with problems of interpretation. I assume it goes without saying, but in case there is any doubt, in that spirit, I hope (and invite) you to question it from whatever position you find yourself thinking from today.

Best wishes,

Cat

Constitutional Law in Crisis:
Proceduralism, Anti-constitutionalism, and Constitutionalism-in-opposition

In recent months, scholars and politicians of both parties, many once reticent to use such words, have denounced former president Trump's outlook as fascist, criticized Supreme Court jurisprudence as a sham, and expressed fears for democracy's survival. One might conclude from these developments that America's constitutional order is in crisis. Yet legal scholars have tended to avoid doing so. While many describe constitutional corrosion and worry about political polarization, legal authorities have generally been reluctant, if not resistant, to suggesting that we are in a constitutional crisis – let alone that one might view Trump's 2016 election as its starting point.

In one sense, the reason for this reluctance is clear: rule of law, in some form, *has*, of course, continued, even as belief in constitutionalism has crumbled and long-standing constitutional rights have been eliminated or deeply compromised. Courts continue to function, elections occur, and no great clash between branches has called into question legal authority. Yet by assuming that the last eight years are *not* a constitutional crisis, and instead insisting that constitutional law has essentially remained continuous, legal scholars have fostered two increasingly incommensurable understandings of constitutional law: in a "political" register, scholars note a drift towards oligarchy, subordination, and corruption. In a "legal" register, however, scholars increasingly define constitutional law in ever-thinner ways: as the continuation of legal process alone.

By therefore implicitly categorizing Trumpist commitments and widely disavowed features of the current Court's jurisprudence as a political, but not legal, problem, scholars have sidelined the possibility that the emergent fusion between Trumpist politics and the current Court's doctrine reflects a developed paradigm that is itself – not just on a case-by-case basis – a problem for constitutional law *as law*. This framework might even be best understood not as a new form of (presumptively legitimate) politics, but as "anti-constitutional." Importantly, contrary to well-intended fears that such an inquiry is off the table because it would wrongly disparage democratic politics, one can suggest the presence of an "anti-constitutional" legal framework without suggesting that American voters are somehow "anti-constitutional" themselves. Without addressing such possibilities, confusion will continue: both Trump and the current Court may easily claim constitutional meaning as their own, regardless of what other labels ("fascist," "corrupt," "anti-democratic") scholars, politicians, or American voters apply to them.

As a purely practical matter, moreover, this thin, proceduralist vision of constitutional law poses difficulties for resolving our current constitutional impasse. The premise that the rule of law remains continuous helps to legitimate elections and reduce violence. But it also appears to be the case that process, stripped of all substantive commitments, leaves surprisingly little of constitutional law itself that might renew or inspire allegiance, which is at least one part of the problem that must be solved for constitutional law to "continue" with legitimacy. Liberals have long preferred to resolve conflict over substance by recourse to legal process as a "higher value." Yet our current constitutional impasse may not be resolvable without addressing what substantive commitments define constitutional law itself today.

This project attempts to understand how we might think about those substantive commitments, in light of a revisionist understanding of recent history. It is in three parts. The first part retells the history of the last eight years as a constitutional crisis. Scholars have described the last eight years as a history of threats to democracy that were ultimately rebuffed, a period of intense political polarization and fragility that is ongoing, or as the inevitable demonstration of structural flaws in the Constitution itself. To the contrary, Trump's 2016 election, I argue, created an ongoing constitutional crisis – despite the

fact that no formal "crisis," such as one branch openly defying another, occurred. The "anti-constitutional" (a fusion of Trump's politics, growing economic inequality, and Roberts Court jurisprudence), became the "constitutional." Political power and constitutional meaning were visibly at odds; law was shorn of both the meaning and logic necessary to legitimate force. Together, these changes left constitutional law incoherent – something that was reflected in the widespread public fears about the meaning of constitutional order that emerged throughout the period.

The legal regime that gained power in this period is best understood as "anti-constitutional" – rather than simply a different kind of politics – for two reasons: First, prior to 2016, growing economic inequality and emerging Roberts Court doctrine were, in combination, functionally transforming constitutional rights into property. By locking into place economic distribution as a prerequisite to the exercise of constitutional rights, while conflating understandings of rights with the scope of common law property (across privacy law, takings law, and the First Amendment, in particular), this development meant that, for the many Americans caught in a downward economic trend, rights could no longer be "felt" to function. Specifically, these interdependent changes prevented the exercise of rights, the use of which is often essential to the public ability to directly influence constitutional meaning, while also diminishing the credibility of constitutional law.

Second, the moral nihilism espoused by Trump, once elected, meant that this increasingly entrenched legal reality no longer had to be defended through constitutional argument. Power, hierarchy and corruption – simulacra of freedom – were promised to those willing to ignore the gutting of a thicker understanding of rights. The incoherence of the Court's jurisprudence that many scholars have observed was not, primarily, a reflection of problems with originalism or history and tradition, nor, as some conservatives argued, including several Justices themselves, was it a return to doctrinal "integrity." Rather, it fundamentally demonstrated the lack of a need for sound argument at all. In combination, these developments – the one making constitutional "voice" from official channels meaningless, the other making constitutional "voice" from other channels weak and harder to authentically produce – meant that while the "Constitution" was still there, constitutional meaning in any credible sense no longer existed.

An inchoate constitutionalism existed in Americans' public rejection of Trump – their repudiation of his politics suggesting, in relief, what constitutionalism *did* mean, as I discuss further below. Yet within elite understandings of the law, there was only the liberal past which had been disrupted, and the anti-constitutional present, which was becoming more clearly defined. Lacking coordination between elite legal understanding and public constitutional claim, there was no developed legal framework within which emerging public constitutional claims were voiced. Public protest that in hindsight had clear constitutional valance was dismissed as "hysterical" and "deplorable." There was, as a result, no coherent constitutional "present."

Part II explains why the liberal response to these developments failed to overcome them. Avoiding the specter of constitutional conflict, for several years after 2016, lawyers and legal academics leaned heavily on institutional stability as they responded to Trump's election. On a case-by-case basis, there were reasons for these views – at least until the composition of the Court changed in 2018. Crucial litigation victories (in particular, with respect to the travel ban and election fraud cases) and individual instances in which administrative or legal rules trumped partisan affiliation, foiling attempts to subvert legal process, bolstered this perspective.

Because they were piecemeal and reactive, however, these efforts have been unable to revive constitutional credibility. By reaching for institutional continuity instead of engaging the possibility of anti-constitutionalism head-on, liberal legal elites drove a wedge between an emergent public constitutionalism and law. Ironically, this occurred even as liberal scholars increasingly invoked "public" constitutionalism to legitimate their policy proposals. These reflexes reflected blinders put in

place by a constitutional paradigm – one that many internalized as the only legitimate way to "do" constitutional interpretation – that was itself a product of a compromised moment: the 1980s.

In the 1980s, liberals embraced the idea of legal process as both itself "liberal" and as an approach to producing constitutional consensus with conservatives. The politics of 2016, however, were in many ways – on both sides of the aisle – a rejection of that settlement. As a substantive matter, the settlement of the '80s rested on combining comparatively modest gains in Equal Protection law with a credit-fueled economy, which imploded after 2008. On a technical, legal level, this position was built on a newly stark division that saw the line between constitutional rights and economic distribution as defining "constitutional law" and private law. Scholars and lawyers came to take at face value the claim (which had itself only fully emerged in the 1970s, primarily out of a backlash to *Roe v. Wade* and the possibility of economic due process rights) that unenumerated rights – including the possibility of economic distribution within constitutional law – were vulnerable to the problem of "substantive due process." As a result, they limited their engagement with constitutional text: the First Amendment, Criminal Procedure, and Equal Protection became fully discrete siloes of law rather than what had a decade earlier looked poised to be understood as an interdependent structure – one in which process and substance could be distinguished, but could more readily be understood to interact as part of a constitutional system.

Many proceduralists understood themselves as defending the gains of the Civil Rights movement. They also saw themselves as committed to a progressive future – one of "more" rights – and viewed these goals as part of long-standing constitutional tradition. Methodologically, however, when it came to future "progress," they shifted gears. Gone was the immediacy, practicality, and empiricism employed by much winning argument in the '60s and early '70s. Instead, proceduralists now interpreted progress through what would become known as "aspirational constitutionalism": defending themselves against critics who pushed for both greater recognition of economic rights and more robust, applied understandings of other rights, they argued that these claims had legitimacy, but that claimants must nevertheless wait until a future date to see them fully realized – just how far in the future was often unclear. The similarities with the way in which legal authorities have, for the past eight years, seen crisis as always beyond the horizon but never here are not coincidental.

In the years leading up to 2016, the asymptotic and un-economic understanding of rights embraced by liberals across this period dovetailed with legal conservatives' conflation of existing property rights with constitutional ones, making constitutional aspirations as well as rights themselves seem hollower than ever. It was these forms of constitutional understanding, among other things, that Americans rejected in the 2016 election. Thus, when liberal elites reached for proceduralism – for many, the only kind of constitutionalism they had ever known – in response to ascendant anti-constitutionalism, they misunderstood the state of constitutional meaning.

In fact, proceduralism was not the only option. Far from it: there was a third "constitutionalism" that might have come into view – one different from both liberalism past and anti-constitutionalism present. We might understand this emergent possibility as "constitutionalism-in-opposition": in the counterreaction to Trump, but also as in the complaints which gave way to his rise, there lay clear public indication about what constitutionalism meant to many Americans which might have been (and still might be) rearticulated into more sophisticated legal argument. Americans clearly understood their constitutionalism as requiring different forms of economic distribution and much greater protections for bodily freedom (including but not limited to reproductive rights and the dangers of racial discrimination) than either liberal or conservative understandings of constitutionalism sanctioned. They understood the Constitution as protecting these substantive rights "now." That this understanding was embraced in reaction to ascendant "anti-constitutionalism" suggests that it was not merely a "new politics," or simple preferences, but that it in fact reflected fundamental understandings of what constitutional law had to mean to "be constitutional law."

Part III discusses what this emergent constitutionalism might look like – and why we should embrace it. Prior moments of constitutional change have occurred not through incremental improvement of constitutional argument, nor by attempting to restore previously dominant constitutional paradigms. They have occurred through opposition resulting in transformation, working both through public understanding and the more technical legal reasoning and method of constitutional interpretation.

As Democrats began to invoke "freedom" in the summer of 2024, an alternative present constitutionalism which tied together legal power with public understanding finally seemed plausible. The test for whether it can succeed will depend, however, on how legal actors define this oppositional "freedom" within an interpretive legal framework. It will be tempting for many to revert to "aspirational" constitutionalism, particularly when legislative successes are not forthcoming. It will similarly be tempting to avoid interpretive considerations by relying on the possibility of legislation and public works alone. Regardless of who is president, these approaches will not be successful without a deeper constitutional framework; one that builds on the "constitution-in-opposition" that emerged as early as 2016, while answering – not individually – but as part of a coherent understanding the interpretive hurdles to this constitutionalism.

Chief among these problems is taking seriously distributive rights as part of constitutional law. This is not incommensurable with constitutional law, as many argue. (Among other things, during the Civil War, the largest capital redistribution in historical memory occurred without "destroying" constitutional law, through uncompensated emancipation.) A constitutional paradigm which embraces distributive rights as essential to the function of existing rights is possible within the Constitution. Doing so requires moving beyond a liberalism which, when push comes to shove, primarily defines its relationship to law as one of incremental interpretation and procedural commitments. It requires responding to specific interpretive problems – namely questions about substantive due process, questions about how constitutional law can mean something different in the present than in the past while remaining legitimate, and questions about whether positive rights can in fact (or already do, implicitly) exist within a Constitution that many have understood (in particular, since the Cold War) as about "negative" liberties. It may require recognizing positive, distributive rights as foundational to other constitutional rights.

There are few silver linings to the current moment. If what Trump and the current Court have wrought is, in fact, "anti-constitutional," however, in Americans' repudiation of that framework – as well as their rejection of prior versions of liberal constitutionalism – our moment may have also clarified previously hidden commitments within the Constitution which go beyond what prior generations understood it to mean.

111 Va. L. Rev._(forthcoming 2025)

THE UNENUMERATED POWER

Caitlin B. Tully †

Scholars and courts have long viewed unenumerated powers and rights as constitutionally dubious. This skepticism has produced far-ranging effects: most recently, it has undergirded the Court's invalidation of privacy rights. Many others have contested the presumption against unenumerated law, including a recent wave of scholarship which criticizes "enumerationism." These efforts have been hampered, however, by the fact that they are unable to point to a concrete example of a tacit power or right that is entirely independent from an enumerated power or right.

This Article demonstrates – for the first time – that at least one such power exists: the power to charter corporations. Trillions of dollars circulate through the federal corporate form. Yet scholars often assume that the Constitution has nothing to say about corporations. The doctrine of federal incorporation, meanwhile, is confused: courts analogize federal corporations to state corporations or federal agencies, despite obvious inconsistencies, or avoid them altogether. As this Article demonstrates, however, the Framers understood the power to charter as an independent power with its own prerogatives and limits, and there was little doubt about the power's constitutionality following ratification. In fact, as this Article shows, the Marshall Court constructed doctrine defining this pre-existing power across three cases: Dartmouth College v. Woodward*,* McCulloch v. Maryland*, and* Osborn v. Bank of the United States*, establishing an independent threshold for the*

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creation of federal corporations: "constitutional" purpose. Congress has effectively relied on this tacit, but independent, legal power for over two centuries.

This Article provides the first comprehensive account of the doctrine of federal incorporation and its current use, as well as an index of all federal corporations from the Founding to the present. In addition, this Article makes two important interventions. First, by clarifying the legal basis of federal incorporation, the existence of the charter power may offer alternative rationales for the constitutionality of federal legislation; alternatives to existing constructions of administrative law; and a coherent way to analyze large transactions which currently defy categorization. Second, as the current Court considers whether to invalidate existing jurisprudence which endorses "implied" rights, the existence of the charter power cuts against the theoretical case for doing so. Challenging the presumption against the legitimacy of unenumerated powers and rights, the charter power demonstrates that, in at least one case, a "silent" power was concrete, constrained, and original.

TABLE OF CONTENTS

INTRODUCTION

This Article shows that Congress has an independent constitutional power to charter corporations. Because the word "corporation" is not in the Constitution, scholars have generally overlooked this power.[1] The few that have noted the possibility of the corporate power's existence have done so only in passing, without developing why it is constitutional, what its legal parameters are, or what it means today.[2] Some go so far as to erroneously claim that "[a]s best we can tell, the people who wrote and ratified the Constitution

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[1] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW (6th ed. 2020); GEOFFREY R. STONE, LOUIS MICHAEL SEIDMAN, CASS R. SUNSTEIN, MARK V. TUSHNET & PAMELA S. KARLAN, CONSTITUTIONAL LAW (8th ed. 2018); RANDY E. BARNETT, CONSTITUTIONAL LAW: CASES IN CONTEXT (3rd ed. 2018) (None mention the word "corporation.") *See also* PAUL BREST, SANFORD LEVINSON, JACK M. BALKIN, AKHIL REED AMAR & REVA B. SIEGEL, PROCESSES OF CONSTITUTIONAL DECISIONMAKING (7th ed. 2018) (discussed *infra*, noting that the Second Bank of the United States was a corporation, but refraining from offering an opinion as to whether or not the power to incorporate was drafted into the Constitution, or from offering a legal definition of a constitutional corporation).

[2] Charles Black Jr. noted in 1969 that, in McCulloch v. Maryland, Justice Marshall "decided…that Congress possesses the power…[of] *chartering corporations*" on bases *other* than the Necessary and Proper Clause. CHARLES BLACK JR., STRUCTURE AND INTERPRETATION IN CONSTITUTIONAL LAW, 7, 14 (1969). For *McCulloch*, *see infra*, Part III. Recently, scholars have stated that the corporate power exists and is constitutional, but have not developed the point further. *See* Nikolas Bowie, *Corporate Personhood v. Corporate Statehood,* 132 HARV. L. REV. 2009 (2019) (noting that "[e]ven though the U.S. Constitution didn't mention corporations, members of all three of the federal government's branches considered the power of incorporation such an inherent feature of sovereignty that they authorized Congress to charter corporations as the Constitution's first implied power"). *See also*, Jonathan Gienapp, *The Lost Constitution: The Rise and Fall of James Wilson's and Gouverneur Morris's Constitutionalism at the Founding*, 46 n. 146 (Fordham University School of Law, Faculty Legal Theory Workshop, Mar. 4, 2020) (noting that "[t]he real question…was whether it was politically useful to reinforce the already vested [incorporation] power through enumeration or not"). As I discuss in Part II, a broad "sovereignty" argument is insufficient to clear the hurdle of proving federal incorporation's status as an autonomous constitutional power, not least because sovereignty itself was transformed by the change from the British to the American constitution. Along similar lines, as I explain in Part III, the power was not "vested," in the sense that it simply continued unabated, but had to be constructed by the Marshall Court. *See also* Richard Primus, *"The Essential Characteristic": Enumerated Powers and the Bank of the United States,* 117 MICH. L. REV. 415 (2018).

simply never considered whether the Constitution applied to corporations."[3] This oversight has left fundamentally unstable a field of law that sits at the center of American economic life. Even more importantly, it has meant that both the practical and theoretical implications of an entire constitutional power have remained unexplored.

For over two hundred years, Congress has chartered corporate entities: from the Bank of the United States to the Union Pacific Railroad, from the Reconstruction Finance Company to Amtrak, and from Fannie Mae and Freddie Mac to the recent Covid-19 bailout – trillions of dollars circulate through the federal corporate form.[4] Courts and scholars do not question whether or not federal incorporation is, as a general concern, legal, but there is broad and long-standing consensus that the existing law of federal corporations is dysfunctional.[5] Contemporary doctrine is either inconsistent, unstable, or avoidant; the doctrine of constitutional avoidance itself emerged out of a confrontation with a federal corporation, the Tennessee Valley Authority, in *Ashwander v. TVA*.[6]

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[3] ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS, 3 (2019). *See also* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION, 355 (1996). *See infra* Part II.

[4] Appendix A; *infra* Part I.

[5] *Infra*, Part I. *See generally*, WARREN M. PERSONS, GOVERNMENT EXPERIMENTATION IN BUSINESS (1934); JOHN MCDIARMID, GOVERNMENT CORPORATIONS AND FEDERAL FUNDS (1938); ANNMARIE HAUK WALSH, THE PUBLIC'S BUSINESS: THE POLITICS AND PRACTICES OF GOVERNMENT CORPORATIONS, 353 (1978); HAROLD SEIDMAN & ROBERT GILMOUR, POLITICS, POSITION, AND POWER: FROM THE POSITIVE TO THE REGULATORY STATE (1986); FRANCES J. LEAZES, JR., ACCOUNTABILITY AND THE BUSINESS STATE (1987); DONALD AXELROD, SHADOW GOVERNMENT: THE HIDDEN WORLD OF PUBLIC AUTHORITIES – AND HOW THEY CONTROL OVER $ 1 TRILLION OF *YOUR* MONEY (1992); Michael A. Froomkin, *Reinventing the Government Corporation*, 1995 U. ILL. L. REV. 543 (1995); JERRY MITCHELL, THE AMERICAN EXPERIMENT WITH GOVERNMENT CORPORATIONS (1999); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUMB. L. REV. 1367 (2003); MARTHA MINOW & JODY FREEMAN, eds., GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY (2009).

[6] Lebron v. National Railroad Passenger Corporation, 513 U.S. 374 (1995) (O'Connor, J., dissenting) ("[d]espite the prevalence of publicly owned corporations…whether they are Government agencies is a question seldom answered, and then only for limited purposes"). *See also*, Froomkin, *supra* note 5, 564 ("the Supreme Court's decisions [relating to federal corporations]…do not follow a consistent pattern except that most of the decisions have been brief and, when taken as a group, contradictory"). Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936).

The legal costs of leaving the law of federal incorporation incoherent are wide-ranging and systemically significant. Among other problems, this incoherence contributed to the 2008 financial crisis – federal incorporation implied federal backing which, in turn, encouraged financial institutions to incorrectly price mortgage-backed securities – and, consequently, the failure of public confidence in government that followed.[7]

As a matter of constitutional theory, the costs are arguably even greater. In overturning *Roe v. Wade*, the Court's recent caselaw has raised the stakes of the perennial contest over whether or not constitutional law should recognize unenumerated rights and powers, and on what basis.[8] No one formally disputes the possibility of unenumerated rights or powers, of course – even Robert Bork's famous "inkblot" statement about the 9th Amendment conceded, hypothetically, that unenumerated rights might exist.[9] And, for much

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[7] Additional problems are discussed later in the introduction, and *infra*, Part IB. See *infra*, Part IB, for further discussion of the financial crisis. On mortgages *see* Jacobs v. Federal Hous. Fin. Agency, 908 F.3d 884, 887 (3d Cir. 2018). Note that federal incorporation was on both sides of the financial crisis: the federal takeover of General Motors transformed GM into a federal corporation as well, because over 50% of the stock was held by the federal government. Judiciary Act of 1925, ch. 229, § 43, Stat. 936, 941 (1925) (incorporated at U.S.C. 28 § 1349 (2006), as amended). On problems with the legality of the bailout, *see e.g.*, Dennis K. Berman, *Debating the Legality of the Bailout*, WALL ST. J., Dec. 7, 2010 (reporting on a bipartisan conference at Stanford Law School in 2010 on the Constitution and the 2008/9 bailout); David Zaring, *Litigating the Financial Crisis,* 100 VA. L. REV. 1405 (2014).

[8] Dobbs v. Jackson Women's Health Organization, 597 U.S._ (2022). *See* Jeannie Suk Gersen, *If Roe v. Wade is Overturned, What's Next?*, THE NEW YORKER, Apr. 17, 2022.

[9] *The Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States, Hearing before the Committee on the Judiciary*, 100th Cong., 249 (1987) (statement of Robert H. Bork) (hereafter, "Bork Nomination Statement").

See, generally, U.S. CONST. amends. IX, X. The 9th Amendment, of course, expressly contemplates unenumerated rights. Importantly, powers are less limited by constitutional text than scholars often assume: Congress overwhelmingly voted against attaching "expressly" to "delegated" in the 10th Amendment, clearly rejecting the Articles of Confederation's prior restriction, by 32 to 17. 1 ANNALS OF CONGRESS, 768 (Joseph Gales ed., 1834). *See also*, Primus, *supra* note 2, on unenumerated constitutional prerogatives.

Scholars have long considered the possibility of unenumerated constitutionalism as a matter of general inquiry. *See* BLACK JR., *supra note* 2; Thomas Grey, *Do We Have an Unwritten Constitution*, 27 STAN. L. REV. 703 (1975); LAURENCE TRIBE, THE INVISIBLE CONSTITUTION (2008);

of the twentieth century, the expansion of Commerce Clause doctrine has hardly made the search for more congressional power, enumerated or otherwise, seem urgent.[10] Yet the relative absence of examples of unenumerated rights or powers that are not so heavily politicized has long cast a shadow over even those unenumerated rights and legislative or executive prerogatives that have, for long stretches of time, been doctrinally stable.[11] While this disfavor has most visibly affected rights, moreover, there are signs that it has affected congressional power as well.[12]

In recent years, scholars have discussed and debated unenumerated constitutional law in two ways.[13] There is a growing school of thought that argues that it is a mistake to understand the Constitution as one of "enumerated powers."[14] Scholars have also identified or otherwise theorized the existence of silent or unnamed "backdrops" or "conventions" in the law.[15] Neither group has,

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AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY (2012); Farah Peterson, *Constitutionalism in Unexpected Places*, 106 VA. L. REV 559 (2020).

[10] *See* Part IVAiii, *infra*.

[11] *See* especially, John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe* v. Wade, 82 YALE L. J. 920 (1973). *See also* Roe v. Wade, 410 U.S. 113,174–76 (1973) (Rehnquist, J., dissenting) (comparing *Roe* to *Lochner v. New York*). *See e.g.*, Brief for Petitioner at 1, Dobbs v. Jackson, No. 19-1392 (S. Ct., filed Jul. 21, 2021), arguing that "nothing in constitutional text, structure, history or tradition supports a right to abortion." For further evidence of the shadow which hangs over the idea of unenumerated constitutionalism, *see infra* Part IVB.

[12] *See, e.g.*, National Federal of Independent Business v. Sebelius, 567 U.S. 519 (2012) discussed *infra* Part IVAiii. In other words, while the distinction between rights and powers matters in many contexts, to the extent that such a presumption encompasses both, it is immaterial.

[13] On rights, *see infra* Part IVB.

[14] *See* Andrew Coan and David S. Schwartz, *The Original Meaning of Enumerated Powers* (January 17, 2023). Arizona Legal Studies Discussion Paper No. 23-02, Univ. of Wisconsin Legal Studies Research Paper #1763, Available at SSRN: https://ssrn.com/abstract=4327619 or http://dx.doi.org/10.2139/ssrn.4327619; Robert Reinstein, *The Aggregate and Implied Powers of the United States*, 69 AM. U. L. REV. 3 (2019); Primus, *supra* note 2*;* John Mikhail, *Fixing the Constitution's Implied Powers*, Balkinization Blog, Oct. 25, 2018, https://balkin.blogspot.com/2018/10/fixing-constitutions-implied-powers.html; Andrew Coan, *Implementing Enumeration*, 57 WM. & MARY L. REV. 1985, 1988 (2016); John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L. J. 1045 (2014); Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576 (2014).

[15] *E.g.*, Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813 (2011-2012); Ashraf Ahmed, *A Theory of Constitutional*

however, articulated what a concrete, entirely "silent" constitutional power might be.[16]

This Article shows that although the word "corporation" is not in the Constitution, Congress has an independent constitutional power to charter corporations – and has since the drafting of the Constitution. Offering the first comprehensive excavation of the corporate power, I argue that, like the powers to Coin and Tax, the corporate power is a distinct constitutional power, not a subset of the legislative power nor an administrative prerogative alone.[17] In other words, the corporate power exists independently of the "Necessary and Proper" and Commerce Clauses and the Spending Power.[18] Modern doctrinal indeterminacy and scholarly confusion about both federal corporate law and unenumerated constitutional powers and rights can be clarified by canonizing – or rather re-canonizing – the corporate power.

Norms, 120 MICH. L. REV. 1361 (2022); *But see*, Roderick M. Hills, Jr., *Strategic Ambiguity and Article VII: Why the Framers Decided Not to Decide* (forthcoming, J. CONS. HIST).

[16] "Constructions" or "conventions" refer to authoritative ideas and lenses which solve for constitutional confusion and may have become law-like over time. They are not the same thing as silent or unenumerated powers and rights, which are understood as existing in the Constitution itself. Note that, as a result, scholars of conventions are under no burden to find silent rights or powers. Because they exist in the same family of authoritative silent concepts, however, I nevertheless include them here. On the distinction between "constructions" and the interpretation of rights or powers, *see* Jack Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641 (2013).

Critics of "enumerationism" have argued that their work has substantive contemporary implications. But they have generally relied on existing dormant clauses which broadly gesture toward federal legislative power for that content: for instance, the General Welfare Clause, the Necessary and Proper Clause, and the Preamble. *Compare* Coan and Schwartz, *supra* note 14, with Reinstein, *supra* note 14, arguing that the General Welfare Clause is overbroad and that there is a four-point grouping of power clustered in categories (but not creating a stand-alone right or power). *See also* Jonathan Gienapp, *The Myth of the Constitutional Given: Enumeration and National Power at the Founding* 69 AM. U. L. REV. F. 183 (2020) available at: https://aulawreview.org/blog/the-myth-of-the-constitutional-given-enumeration-and-national-power-at-the-founding (arguing that the General Welfare Clause and the Preamble were meant to be active clauses as part of a "Wilsonian" understanding of the Constitution).

[17] *Infra*, Part III.

[18] *Id.*

To demonstrate the existence of the corporate power, this Article relies on several interpretive modes of argument.[19] Part I, which is discussed further in the Introduction, describes the twentieth century caselaw of federal incorporation. Proceeding chronologically: Part II builds on recent advances in historical research, showing how the corporate power was drafted into the Constitution, and illuminating the early legal parameters of the corporate power. As Part II shows, contemporaneous legal sources and the transcripts of the Constitutional Convention make clear that the Framers understood federal incorporation as a distinct legal power. There was no confusion that the power to incorporate was part of another field of law.[20] Further, the fact that the word "corporation" was left out of the Constitution did not mean that the power was legally absent. Scholars have sometimes taken this omission to signal that the possibility of a corporate power was rejected.[21] But as they discussed themselves, the Framers had specific reasons to omit the word for this power.[22] At the time the Constitution was drafted, anti-monopoly sentiment was high.[23] The political climate meant that placing the word "corporation" in the Constitution posed nothing less than a threat to ratification.[24] The Framers discussed drafting strategies which explicitly took this fact into consideration: namely, that the corporate power could be drafted into the Constitution – and predictably relied upon as such – even if it was not expressly labeled by name.[25] The early Congress passed federal incorporation laws by an overwhelming majority.[26] And for decades after ratification, the legal matter was uncontested: until the Second Bank of the United States became the object of political debate several decades later, architects of government action relying on the corporate power – in particular, the First Bank of the United States – do not appear to have thought it

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[19] This approach is indebted to PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982), though the arguments here do not follow his "modalities" exactly.

[20] *See infra,* Parts II and III.

[21] *E.g.*, WINKLER, 3 (2019); RAKOVE, 355 (1996) *supra* note 3 (arguing that the power was rejected); BREST LEVINSON, 2018, *supra* note 1 (leaving open the possibility that it was).

[22] 2 MAX FARRAND, THE RECORDS OF THE CONSTITUTIONAL CONVENTION OF 1787, 335 (1937), discussed *infra* Part II.

[23] *See infra* Part II.

[24] 2 FARRAND, 335 (1937), *supra* note 22; discussed *infra* Part II.

[25] *Id.*, *infra* Part II.

[26] The House voted 39 to 20 to adopt the bill chartering the First Bank of the United State. R.K. MOULTON, LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANKS OF THE UNITED STATES, 13 (1984) in BREST LEVINSON, *supra* note 1.

was necessary to engage in any sustained legal defense of their project.[27] As Part II explains, together, these facts indicate that, as a legal matter, the corporate power was in the Constitution from the beginning.[28]

Once the charter power was drafted into the Constitution in this manner, the Marshall Court built out the corporate power – again, as an independent power. Constitutional powers and rights generally have "paradigmatic" caselaw: doctrinal foundations on which subsequent law is moored.[29] Part III excavates this foundation for federal incorporation law.[30] Scholars often read *McCulloch* for its holding that the Bank of the United States was constitutional. In doing so, they treat *McCulloch* as a singular case; the constitutionality of the Bank of the United States as a stand-alone issue – not about the legal form of federal incorporation which created the Bank, but about the Bank as a *sui generis* creation – and the

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[27] *Infra* Part II. *See*, for omission, RON CHERNOW, ALEXANDER HAMILTON, (2004).

[28] *Infra* Part II. Richard Primus has suggested that the corporate power was left silent thanks to a coalition of those who rejected it outright and those who were worried about the naming of the power having adverse political – but not legal – effects. *See* Primus, *supra* note 2, 427-28. This Article argues, in Parts II and III, that, whether or not this was the case, the legally predictable outcome of this approach – one which would have been clear to most lawyers at the time – was that the corporate power was enforceable. For the classic statement of predictability as legal knowledge *see* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

[29] On the "paradigm-case method," *see* JED RUBENFELD, REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW chs. 1-3 (2005).

[30] Note that, in this mode, this Article uses sources like the Marshall Court and Blackstone as the legal authorities they have been and continue to be. *See infra*, note 210 for further discussion of Blackstone. Marshall has recently been subject to increasing historical scrutiny for his Federalist politics. John Fabian Witt, *The Operative: How John Marshall Built the Supreme Court Around his Political Agenda*, THE NEW REPUBLIC, Jan. 7, 2019, available at: https://newrepublic.com/article/152667/john-marshall-political-supreme-court-justice. This Article does not highlight recent criticism of Marshall to the same extent as it does with Madison, however, because a chorus of historians agree not only that Madison was inconsistent on the law, but that this affected how he publicly argued about the corporate power in particular. By contrast, while there is no question Marshall was a Federalist, there is also no clear evidence that he was judging in bad faith when he wrote the opinion in *McCulloch. See also* Part IVB, *infra.*

constitutionality of the question as turning on the Necessary and Proper Clause alone.[31]

But as Part III shows, *McCulloch* was only one pillar on which the early "canonical" case law of federal incorporation rested. More importantly, in constructing the corporate power, the Court was not inventing the law of federal incorporation or simply resolving the question of the Bank's constitutionality. To the contrary, the Court was solving for secondary problems related to the pre-existing constitutional power of incorporation. Offering new readings of *McCulloch v. Maryland*, *Dartmouth College v. Woodward*, and *Osborn v. the Bank of the United States*, this Article shows how these cases operated as a trinity, in which the Marshall Court organized how the national government's power to create corporations – generally, not just the Bank, specifically – would operate in the new federal system.[32] In addition to other relevant rules governing federal incorporation, the Marshall Court articulated an independent threshold for when federal corporations were proper: "constitutional" purpose.[33]

Parts II and III challenge long-standing assumptions common in the constitutional law literature that attribute unwarranted authority to James Madison's famous denunciation of the Bank of the United States as unconstitutional on the grounds that it was not named in the Constitution.[34] Thanks largely to Madison's statement, it has become commonplace to assert that the Constitution is only one of "enumerated powers."[35] Building on advances in historical scholarship, however, this Article shows that Madison's arguments were an early use of constitutional argument as political sally:

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[31] *See, e.g.*, CHEMERINSKY, (6th ed. 2020); STONE, SEIDMAN, SUNSTEIN, TUSHNET & KARLAN, (8th ed. 2018); BARNETT, (3rd ed. 2018), *supra* note 1.

[32] *Infra*, Part III. *Dartmouth* has, of course, long been read for the origins of the "private," presumptively state-chartered, corporation. Part III shows how *Dartmouth* offers insight into federal, not state incorporation.

[33] McCulloch v. Maryland, 17 U.S. 316, 419 (1819), discussed *infra*, Part III.

[34] ANNALS OF CONGRESS, 1st Cong., 3rd sess. 1896, 1898, discussed *infra*, Part III.

[35] The 10th Amendment's statement that the Constitution is one of "delegated" powers is frequently conflated with "enumerated" powers. *See*, *The Founders and Federalism*, American Government Online Textbook (Monday, April 4, 2022), https://www.ushistory.org/gov/3a.asp ("delegated (sometimes called enumerated or expressed) powers").

articulated for a political audience, they did not unsettle the underlying legal consensus that the power enjoyed.[36]

History and early doctrine are not the only modes of argument which demonstrate the existence of the corporate power. As this Article shows, the text of the Constitution, contemporary reliance, and doctrinal coherence all underscore that the corporate power is clearly present – though still unnamed – today. In other words, independent of one's methodological commitments regarding the importance history has for law, the corporate power's existence is clear. As Part II explains, Article IV Section III's "equal footing doctrine" and the Territories Clause, Article I Section VIII's Patent Clause, and the First Amendment, all bear the marks of the corporate power.

To show the contemporary existence of the corporate power – and thus, both reliance and coherence arguments for the power – this Article offers the first survey of the twentieth century doctrine of federal incorporation.[37] This survey appears in Part I, thereby setting the stage for Parts II and III. As Part I demonstrates, the use of federal incorporation by both Congress and the executive has been both important and continuous: in relying on the corporate power to this extent, Congress and the executive have demonstrated its constitutional existence.

Simultaneously, however, in the absence of a clear understanding of the corporate power, courts' efforts to address federal incorporation have been incoherent. Part I shows why – despite the continuous reliance on the federal corporate form by Congress and the executive – existing legal understandings of that activity are inadequate. As Part I explains, the legal uncertainty that has defined federal incorporation in its modern form has, at times, made this device more, not less valuable. This Part shows how, as administrative and private law regimes grew increasingly organized and regulated in the twentieth century, the existence of a legal device

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[36] *See* NOAH FELDMAN, THE THREE LIVES OF JAMES MADISON: GENIUS, PARTISAN, PRESIDENT (2017); GORDON S. WOOD, *Is there a James Madison Problem? in* REVOLUTIONARY CHARACTERS: WHAT MADE THE FOUNDERS DIFFERENT, 141-172 (2007); MARY SARAH BILDER, MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION (2015); Primus, *supra* note 2.

[37] There is no casebook for federal incorporation. Among the most helpful pre-existing sources are a survey which specifically covers the federal jurisdiction features of federal incorporation, and white papers from the Congressional Research Service. Paul E. Lund, *Federally Chartered Corporations and Federal Jurisdiction*, 36 FLA. ST. U. L. REV. 317 (2009); Kevin R. Kosar, The Quasi Government: Hybrid Organizations with Both Government and Private Sector Legal Characteristics (January 31, 2008) CRS Report for Congress.

which remained comparatively murky offered Congress and the executive branch valuable legal and financial flexibility. Not inconsequentially, this meant that a range of actors had little incentive to clarify this field of law.[38]

The costs of leaving the corporate power inchoate counsel against leaving the corporate power as it stands. As Part I argues, in the aggregate, the legal ambiguity around federal incorporation has come at a cost to constitutional coherence and legitimacy – outweighing the legal and financial flexibility that the uncertainty of the corporate power has sometimes enabled. Part I outlines those costs: First, the corporate power's indeterminacy encourages large actors to use privatization or public backing to escape the constraints of either public or private law – encouraging financial boom-bust cycles and corroding public trust.[39] Second, confusion about the status of federal incorporation may lead the current Court to mistake legitimate federal corporate activity for "illegitimate" administrative action, as it continues to redefine various aspects of administrative law.[40] Third, in the twenty-first century, Congress has increasingly engaged in large transactions which are difficult to reconcile with and may disrupt existing fields of law – ranging from the 2008 financial bailout to the Puerto Rican debt crisis to the recent Oxycontin settlement.[41] The lack of a legal category for understanding this activity arguably stems from – and might be alleviated by addressing – our failure to recognize the corporate power in the first instance:

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[38] *Infra* Part I. For instance, federal incorporation can allow Congress to engage in off-budget accounting – a question that will come before the Court this coming year, in Community Financial Services Association of America Ltd. v. CFPB. As the Court explained in 1927, "an important if not the chief reason for employing these incorporated agencies was to enable them to employ commercial methods and to conduct their operations with a freedom supposed to be inconsistent with accountability to the Treasury under its established procedure of audit and control over the financial transactions of the United States." Skinner and Eddy Corporation v. McCarl, 275 U.S. 1, 85 (1927).

[39] *See* notes 5 and 7, *supra*, and Part IB, *infra*.

[40] *Infra*, Part IBi(c).

[41] Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), 48 U.S.C. § 2101; Press Release, U.S. Dep't of Just., Justice Department Announces Global Resolution of Criminal and Civil Investigations with Opioid Manufacturer Purdue Pharma and Civil Settlements with Members of the Sackler Family, Oct. 21, 2020 (Monday, April 4, 2022), https://www.ju stice.gov/opa/pr/justice-department-announces-global-resolution-criminal-and-civil-investigations-opioid; Housing and Economic Recovery Act of 2008, 12 U.S.C. § 4501.

Discussed *infra* Part IBi(d).

Part I argues that these transactions are the latest "generation" in federal corporate activity.

With the charter power thus established across Parts I, II and III, Part IV makes two interventions:

Part IV A shows how we might develop an understanding of federal incorporation as positive law, independent from the administrative, legislative, and private law categories scholars have previously struggled to reconcile it to out of necessity. Once we recognize that the corporate power is a stand-alone constitutional power, we can begin to describe its legal particulars, just like any other independent power or right. Federal corporations differ from state corporations and federal agencies in important ways. Among other things, they allow the federal government to craft a corporate form that includes the kind of substantive, not economic, rules that regulatory agencies are currently prohibited from imposing on state-chartered corporations.[42] Federal corporations remain bespoke and are not governed by general incorporation laws, and they support the production of goods and services – they are not just devices for federal spending.[43] Along with Part I, Part IV A helps to outline these activities and differences.[44]

Drawing on Parts II and III, Part IV A also offers three new tools for courts and scholars focused on contemporary doctrine: (i) clarity with respect to threshold questions such as when a federal corporation has "private" status; (ii) an alternative justification for federal legislation that engages in financial activity, broadly defined: for example, rather than relying on the Commerce Clause, Spending Power, or the Tax Power, courts might find legislation like the Affordable Care Act constitutional because this legislation creates a federal corporation; (iii) a category of analysis which remains bounded by constitutional restrictions but rests outside of usual administrative law rules. As Part I details, the Court has signaled that it may revisit

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[42] Nat'l Ass'n of Mfrs., et al. v. SEC, No. 13-CF-000635 (D.D.C. Apr. 3, 2017).

[43] Appendix A.

[44] Note that there are also important questions about when and whether federal corporations (or the federal government) can take over existing corporations as well, and what occurs when they do. *See especially,* Regional Rail Reorganization Cases, 419 U.S. 102 (1974) (Douglass, J. dissenting); Marcel Kahan & Edward B. Rock, *When Government is the Controlling Shareholder*, 89 TEX. L. REV. 1293 (2011); M. Davidoff & David Zaring, *Regulation by Deal: The Government's Response to the Financial Crisis*, 61 ADMIN. L. REV. 463 (2009). Note also that forced consolidation resulted in the Railway Express Agency. (Appendix A.) This Article leaves these questions for future work to discuss in full.

federal corporation law as part of its general reconsideration of administrative law.[45] A clear understanding of federal incorporation may prove important if it does so, not least because of federal corporate activity may intersect with the rapidly changing landscape of Appointments Clause jurisprudence.

Part IV B discusses the theoretical implications of the corporate power, or where we might go "beyond" enumerationism. It is beyond the scope of this article to answer whether or not there are more silent powers or rights in the Constitution. This Article also does not contend that the mere presence of one unenumerated power means that all other unenumerated rights or powers are suddenly doctrinally unimpeachable. Nevertheless, the fact of the corporate power has several important methodological implications for how we think about constitutional interpretation generally – and for how we address "silent" rights and powers in particular.

First, the corporate power's existence challenges the current supremacy of certain styles of textualism and originalism, not least because the fact of the corporate power demonstrates how ineffective these approaches have been at ensuring either legal stability or democratic transparency. Even as Congress has become so reliant on this "silent" power that our economy is entirely interwoven with it, our law has been unable to effectively cognize it.

This oversight is, in part, due to a long textualist tradition of equating constitutional rights and powers with single-clause labels. This tradition has venerable roots: among other sources, it sprang from the transformative mid-century First Amendment fundamentalism of Hugo Black.[46] But the corporate power demonstrates that textualism – and indeed, interpretation that, like Black's, takes rights and powers seriously – must be distinguished from mere taxonomy to remain coherent. Specifically, this Article shows that the tradition of unenumerated interpretation which the corporate power demonstrates cuts against the presumption against unenumerated rights that the Court relied on, most recently, in *Dobbs*.[47] The corporate power also suggests that there is firmer

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[45] Department of Transportation v. Association of American Railroads, 135 S. Ct. 1225, 57 (2015); Lebron v. National Railroad Passenger Corporation, 513 U.S. 374 (1995), discussed *infra* Part IB.

[46] *See especially*, Griswold v. Connecticut, 381 U.S. 479 (1965) (Black, J. dissenting). Note that Black's dissent was based on his opposition to the resurrection of the "ordered liberty" test *Dobbs* relies on – he feared that *Griswold*'s embrace of unenumerated rights would require legal logic that would, in turn, call into question the incorporation of First Amendment rights he had made his life's work.

[47] *See infra*, notes 295, 303, 304.

existing interpretive ground for unenumerated law than we have previously considered possible. The drafting approaches of the Framers detailed here, what is usually referred to as the "structuralism" of the Marshall Court, and what we might term the "inter-provision interpretation" of the Warren Court, indicate as much.[48] This interpretive unity transcends disagreements about Federalist politics and the particular legal climate of the 1960s, and deserves further attention of its own.

This Article also contributes to debate over how we should think about the relationship between history and law today. In part because of the increasingly long shadow originalism casts, legal scholars have recently tended in either originalist or realist directions when engaging with the history of the Constitution.[49] This has had the side effect of causing legal scholarship to address the distinction between law and politics in one of two ways. Both approaches elide the law-politics distinction: original meaning attempts to "democratize" originalism by assuming that there is no distinction between the two, in a positive manner.[50] Conversely, those favoring a realist approach – rightly refusing to ignore evidence of political disagreement in the past – often conclude from this disagreement that no clear legal meaning can be found.[51] What is lost is the reality of historical friction between law and politics. This, in turn, endangers the possibility that accurate historical work might co-exist with positive legal argument.[52] The corporate power is evidence of the kind of collateral

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[48] For the canonical statement of "structural interpretation" *see* BLACK JR., *supra* note 2.

[49] For a helpful survey of originalism, *see* Gregory Ablavsky, *Akhil Amar's Unusable Past* (April 4, 2022). 121 MICH. L. REV. 1119 (2023). For an example of realism *see, e.g.,* Ryan D. Doerfler & Samuel Moyn, *The Constitution is Broken and Should Not Be Reclaimed*, N.Y. TIMES (Aug. 19, 2022), available at https://www.nytimes.com/2022/08/19/opinion/liberals-constitution.html; Sanford Levinson, *What Is This Project, Anyway?*, DEMOCRACY JOURNAL, https://democracyjournal.org/magazine/61/what-is-this-project-anyway/.

[50] *See infra* Part IVBi, for further discussion. This effort is not limited to Founding: renewed interest in "popular constitutionalism" has encouraged scholars to search for public-legal fusion across American history. For a recent example *see* JOSEPH FISHKIN AND WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY (2022).

[51] *See, e.g.*, Richard H. Fallon, *The Chimerical Concept of Original Meaning*, 107 VA. L. REV. 1421 (2021); JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA (2019).

[52] *See infra* Part IVBi for further implications.

damage that can occur when we are limited to realist or originalist perspectives: if we fully committed to either at the expense of contradictory evidence, we would be unable to explain its presence.

Beyond the remit of these methodological considerations, contemporary doctrine and legal theory alike have important interpretive conventions which presume against the possibility that legal meaning might be in some sense hidden.[53] These conventions spring from a deep-rooted understanding, shared by both the public and experts, that the legitimacy of American law depends upon it remaining democratically accountable.[54] For this reason, more than any other, it may be tempting to assume that there cannot be a "silent" constitutional power. Part IV addresses possible criticisms of the interpretation this Article lays out, explaining how the fact that the corporate power exists does not legitimate "secret deals" or find "elephants in mouseholes."[55] To the contrary: it is not by recognizing but by continuing to overlook the corporate power that legal analysis has failed to constrain it.

In sum, this Article offers important evidence that an interpretive approach focused on discrete, individual, yet unnamed powers (or rights) might lead to more robust and actionable insights than we have previously thought. It calls into question the ongoing presumption that unenumerated rights and powers are inherently

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[53] These fall into roughly two groups: interpretive conventions about legibility (those of statutory canons and constitutional interpretation), and statutory disclosure rules.

[54] The Constitution's brevity, textual nature, and pre-ratification discussion in the press, usually framed in contrast to British constitutional law, have long been taken to mean that we should understand the Constitution as animated by values of legibility. In *McCulloch*, Marshall himself argues that the Constitution does not exhibit the "prolixity of a legal code" because if it were "it would, probably, never be understood by the public." McCulloch v. Maryland, 17 U.S. 316, 62 (1819). Importantly, however, Marshall relies on this lack of prolixity as one of several reasons that the corporate power *is* clearly in the Constitution.

[55] Among other things, statutory conventions which require clarity in specific ways do not automatically apply to constitutional law. Scholars have, for other reasons, suggested we see the ways in which constitutional law is similar to legislation. *See, e.g.*, Farah Peterson, *Expounding the Constitution*, 130 YALE L.J. 2 (2020). But in important ways, constitutional law is also a distinct topic – with its own rules of interpretation as a result. For one example of constitutional law's singularity, *see* David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 3885 (2016).

suspect or political.[56] And, most importantly, it shows that such rights and powers are not merely "aspirational" – nor do they live only as lost historical alternatives. They are present in the law right now.

This Article proceeds in four parts. Part I lays out the existing law of federal incorporation, explains how transactions may also be understood as corporations, and shows how the indeterminacy created by the current law's contradictions undermines the legitimacy of federal corporate activity, resulting in significant legal, not just political and financial, costs. Part II describes the original drafting of the charter power, addressing the debate over whether or not the corporate power was originally in the Constitution, and on what basis. Part III describes the Marshall Court doctrine that constructed the power: *McCulloch*, *Dartmouth*, and *Osborn*. Part IV first details what implications a revived corporate power has for both considering and constructing federal corporations today; second, it explains how understanding the corporate power affects wider constitutional debates about implied powers and rights.

This Article also provides a list of existing chartered corporations, something that has not been attempted in several decades. Due to the nature of existing records and legal ambiguity, this list cannot be definitive; it errs on the side of inclusivity. This list is a "living" one, designed to be updated periodically, attached as Appendix A.

I. A POWER WITHOUT A PARADIGM

Part I describes federal corporate activity and its contemporary law in two forms: chartered corporations and "corporations-by-transaction": large transactions which have presented difficulties to other areas of law, and which may trigger thresholds of federal corporate law, creating *de facto* corporations. First, this Part introduces both forms of federal incorporation and the uncertainty the legal analysis around them currently produces. Then, it describes why this uncertainty has adverse effects and why, therefore, it is worth engaging with earlier understandings of federal incorporation, as described in Parts II and III.

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[56] As discussed in Part IV, there are, of course, important doctrinal distinctions that may be made between different unenumerated rights and powers. In this sense, the corporate power stands on its own.

A. Chartered Corporations

Federal corporations have been chartered across nearly two and a half centuries of law.[57] Primarily used for federal economic activity, these entities are usually created by Congress through an independent statute which generally serves as their charter.[58] Unlike state corporations, which are chartered through general incorporation statutes, the charter for federal corporations is a bespoke piece of drafting with no boilerplate or default rules, outside of what various interpretive conventions might bring to bear. Board appointments may be at the discretion of the President (with the advice and consent of the Senate), though not always. Charters often contain typical corporate provisions, articulating the number of board seats and describing a capital structure, for instance. Federal corporate charters may include extensive descriptions of purpose and guidelines for action that more closely resemble conventional legislative bills.[59]

The most well-known examples of federal corporations are New Deal institutions like the Tennessee Valley Authority ("TVA") (1933), the Reconstruction Finance Corporation ("RFC") (1932), or the Federal Deposit Insurance Corporation ("FDIC") (1933). Contemporary federal corporations range from Amtrak (1971) to Fannie and Freddie to the (until recently ignored) Small Business Administration ("SBA") (1953). Federal corporations include now-niche entities like the Communications Satellite Corporation ("COMSAT") (1963), or the Overseas Private Investment Corporation (1969). Hidden-in-plain-sight goliaths like the First Bank of the United States and the Union Pacific Railroad are also federal corporations.

The stated purposes of and substantive areas of federal corporate involvement have varied widely across their history. Federal corporations exist or have existed domestically, in foreign jurisdictions,[60] and as part of Indian law.[61] Domestic federal corporate

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[57] Appendix A.

[58] Occasionally, the executive branch or an agency will charter a corporation through a state charter, either under congressional direction or without express congressional authorization. *See* Appendix A.

[59] In other words, federal corporate charters resemble the early corporate charters from which they descend.

[60] The Virgin Islands Corporation (1949), the Panama Canal Railroad, the Overseas Private Investment Corporation (1969), the African Development Corporation (1980).

[61] Section 17 of the Indian Reorganization Act, passed in 1934, prompted a wave of tribal incorporation, the law and practice of which

concerns have included: energy and technology,[62] prisons and judicial administration,[63] transportation,[64] export and import management,[65] education,[66] housing,[67] farming,[68] commodity price regulation,[69] land

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remains vexed – but which is also used prolifically. Indian Reorganization Act, 25 U.S.C. ch. 14 § 461 et seq. 25. Specifically, 25 U.S.C. § 477 stipulates that, although tribes and tribal members may not use state corporate law to incorporate without losing sovereign immunity, tribes may form corporations by applying for federal charters instead.

[62] The Tennessee Valley Authority (1933), the Rural Telephone Bank (1971), the Synthetic Fuels Corporation ("Synfuels") (1980), the United States Enrichment Corporation (1992).

[63] The Federal Prison Industries, Inc. (1934), the Legal Services Corporation (1974), the State Justice Institute (1984).

[64] The Union Pacific Railroad (1862), the Railway Express Agency (1918), the Inland Waterways Corporation (1924), the St. Lawrence Seaway Development Corporation (1954), Amtrak (National Railroad Passenger Corporation) (1971), Conrail (1976).

[65] The Export and Import Bank (1934), the Overseas Private Investment Corporation (1969).

[66] The General Education Board (1903) (backed by John D. Rockefeller), the Carnegie Foundation for the Advancement of Teaching (1906), the Student Loan Marketing Association ("Sallie Mae") (1973).

[67] The United States Housing Corporation (1917), the Home Owners' Loan Corporation (1933), the Subsistence Homestead Corporation (1933), the Federal Housing Administration (1934), the Defense Homes Corporation (1940), the Government National Mortgage Association ("Ginnie Mae") (1968), the Federal National Mortgage Association ("Fannie Mae") (1968), the National Corporation for Housing Partnerships (1968), the Federal Home Loan Mortgage Corporation ("Freddie Mac") (1970).

[68] The Federal Farm Loan Board (1917) (prior to the commencement of WWI), the Production Credit Corporation (1917), the Federal Crop Insurance Corporation (1938), the Farm Credit System Insurance Corporation (1987).

[69] The Sugar Equalization Board (1918), the Commodity Credit Corporation (1948), the Federal Surplus Commodities Corporation (1933), the Food Administration (1917) and the Grain Corporation (1917) were created by the federal government, but had state, not federal charters.

preservation,[70] general financial liquidity (the banking sector),[71] and, last but not least, war.[72]

Despite the breadth of their substantive uses, federal corporations generally share broad financial characteristics.[73] Congress uses federal corporations to engage in financial activity via a discrete institutional organization, often using them to promote liquidity as well. Unlike administrative agencies, they do not generally engage in rulemaking or "regulatory" activities, but rather, financial ones. Federal corporations can organize the production of goods and services. Profitability is less important than liquidity.[74]

Federal corporations' features reflect their unique legal status: they usually possess a federal charter, have the ability to circulate both private and public funds, and may be less susceptible to profitability constraints than classical private corporations. In contrast to state corporations, federal corporations can have substantive regulatory requirements baked into their charter that federal agencies are currently barred from imposing on state-chartered private corporations.[75]

But in many respects, the organizational structures they may take hew closely to developments in private law structuring, even when they are wholly held by the federal government. Federal corporations can often issue both debt and equity and engage in various forms of corporate restructuring. They include but are not

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[70] The National Park Foundation (1967), the Valles Caldera Trust (2000).

[71] The National Bank of the United States, (1864), the Federal Deposit Insurance Corporation (1933), the Reconstruction Finance Corporation (1932), Federal Savings and Loan Insurance Corporation (1934), the Federal Financing Bank (1973), the National Credit Union Administration Central Liquidity Facility (1978), Pension Benefit Guaranty Corporation (1974), the Resolution Trust Corporation (1989), the Resolution Funding Corporation (1989), the Securities Investor Protection Corporation (1970), the Financing Corporation (1987).

[72] The Panama Canal was a matter of both military and financial concern; Emergency Fleet Corporation (1917), the United States Spruce Corporation (1917), the Defense Homes Corporation (1940), the Rubber Reserve Corporation (1940), the Rubber Development Corporation (1942); the War Assets Administration (1946).

[73] Federal charters are sometimes used to grant honorific status to some pre-existing non-profit organizations, such as the Boy Scouts of America. These entities are not discussed here because they do not constitute the primary use for federal incorporation. *See*, Kosar, *supra* note 37, 31-32.

[74] MCDIARMID, *supra* note 5.

[75] *Nat'l Ass'n of Mfrs., et al. v. SEC*, No. 13-CF-000635 (D.D.C. Apr. 3, 2017).

limited to banks. For instance: they are organized as closely held corporations underneath an agency (which may hold all their stock); as intermediate financial institutions, backed by the Treasury but run as independent entities; and as independent entities (without express Treasury backing).[76]

i. Indeterminacy

The facts of federal incorporation are clear enough, but what to make of them as a legal matter is not. Despite often being (mistakenly) understood as a product of the age of "Super Statutes" – the New Deal and Progressive eras – there is no uniform statutory definition of federal corporations.[77] U.S.C. §1349 provides federal jurisdiction where over 50% of the capital stock of an entity is held by the federal government, creating a default presumption of federal corporate status above this threshold.[78] But courts have found that federal corporations are governmental even where there is a minority

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[76] MCDIARMID, *supra* note 5. *See also*, Appendix A.

[77] 5 U.S.C. § 103(1) defines "government corporation" as owned or controlled by the United States. But the definition of government "control" on which this turns is unclear: 5 U.S.C. § 103(2) refers to "government-controlled entities" – while leaving the definition of "control" open. 5 U.S.C. § 103. "Government controlled corporations" are also included in the definition of "agency" under the Freedom of Information Act, 5 U.S.C. § 552(2). However, "control" is not defined. As discussed in Part III, *infra*, in *Osborn v. United States*, the Court held that the Bank of the United States was not private, despite being only *minority* held by the federal government. Osborn v. Bank of the United States, 22 U.S. 738, 861 (1824).

The Government Corporations Control Act, discussed *infra* applies to covered corporations, but it does not apply to all federal corporations. Pub. L. No. 79-248, 59 Stat. 597 (1945) (codified as amended at 31 U.S.C. §§ 1105, 9101-09 (1988 & Supp. V 1993)) (hereinafter "GCCA"). "Wholly-owned" federal corporations, for example, are not determined by criteria but via a statutory list. GCCA, 31 U.S.C. 9101(3). In 1995, the Congressional Research Service attempted to compile a list of federal corporations, but had to rely on self-reporting, noting that "no comprehensive definition of or criteria for creating government corporations exist."). U.S. General Accounting Office, *Profiles of Existing Government Corporations*, GGD-96-14, Dec. 1995, 2 (hereinafter "1995 GAO Report"). *See also*, WALSH, *supra* note 5, 353 (1978) ("None of the available sources of nationwide data precisely defines public authorities or government corporations or provides counts of them.").

[78] Act of Feb. 13, 1925, ch. 229, 43, Stat. 936, 941, incorporated at U.S.C. §1349 (2006), as amended.

government stake.[79] Scholarly attempts to comprehend federal corporations are contradictory and confused.[80] And statutory analysis – which courts have only sometimes deployed – has not provided clarity or consistency.[81]

In 1945, Congress passed the GCCA, a statute designed to impose uniformity on federal corporations.[82] Reflecting federal corporations' unique status, the GCCA was designed to be a "Super Statute" of its own: a sister (but not subordinate) statute to the Administrative Procedure Act (the "APA").[83] Yet as drafted, the GCCA left federal corporations in disarray, and the relationship between federal corporations and administrative agencies unclear: by bucketing federal corporations as distinct from administration, the statute appeared to capture them. Yet because the statute relied on a list – not legal criteria – to specify which corporations it covered, it did not elaborate on how to analyze federal corporations, in general. The result was a statute which was and remains easy to circumvent: by creating new entities, Congress could avoid any regulations attached to the enumerated list the GCCA provided. Meanwhile, federal corporations' relationship to other areas of law remained uncertain. For example: many federal corporations are not bound by the Freedom of Information Act ("FOIA"); Civil Service laws may apply, but do not always; and the fiduciary duties of federal corporate board members are unclear.[84]

Scholars' responses reflect the challenges inherent in addressing a form of law which does not sit well within any existing field of study. Public finance scholarship is imprecise when it comes to matters of legal form.[85] Legal scholarship generally remains focused on how

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[79] Osborn v. Bank of the United States, 22 U.S. 738, 861 (1824), discussed *infra*, Part IIIC and IVA.

[80] *See supra* note 5.

[81] *See* note 77, *supra*.

[82] 31 U.S.C. §§ 1105, 9101-09.

[83] LEAZES, JR., *supra* note 5, 48. (Note that although the APA does not govern corporations, it may apply to rulemaking endeavors by wholly owned federal corporations).

[84] 1995 GAO Report, 10; Leazes, Jr., *supra* note 5, 48; Froomkin, *supra* note 5. *See also*, Kahan & Rock, *supra* note 45; Davidoff & Zaring, *supra* note 45. *But see,* Union Pac. Ry. Co. v. Chicago, R.I. & Pac. Ry, 163 U.S. 564, 599–600 (1896) (presidentially appointed directors of the Union Pacific "had the same powers as other directors and no more)."

[85] Public finance scholars and political scientists frequently describe federal corporations in terms of their ownership characteristics: as "GSE's" (Government Sponsored Entities), "government corporations" (wholly owned federal corporations), or by other public finance terminology ("quasi-corporations"). *E.g.*, 1995 GAO Report. But these

federal incorporation disturbs preexisting fields of study.[86] Administrative law scholars cite federal corporations for state action and delegation problems.[87] Public law scholars sometimes include federal corporations in their accounts of "privatization."[88] Private law scholars cite "moral hazard" or reframe banking law as federal corporate law.[89] Scholars agree that federal corporate activity is anomalous, even problematic – yet because they observe the corporate power through these discrete and often unrelated lenses, they have left many of the dilemmas federal incorporation presents unsolved. Like the parable of the blind men and the elephant, scholars viewing federal corporations through fully developed legal categories necessarily address only a part, and not the whole, of federal corporate existence. Thus, the corporate power remains in the "twilight zone" in which was encountered.[90]

ii. The Court's Three Approaches

The Court itself has long been aware of the poor fit between existing frameworks and the federal corporate activity it must, from time to time, comprehend. Judicial analysis of federal incorporation can be categorized into three approaches: (i) jurisprudence which attempts to "solve" for federal incorporation by definitively reconciling it to administrative or private law, what I refer to as a "fundamental" approach; (ii) state action doctrine; and (iii) via a variety of mechanisms, avoidance.[91] The cumulative result is doctrine which

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characteristics have little independent legal weight. For that reason, they are not reproduced here.

[86] *See* WALSH, SEIDMAN & GILMOUR, MITCHELL, PERSONS, AXELROD, LEAZES, JR., *supra* note 5.

[87] Metzger, *supra* note 5.

[88] MINOW & FREEMAN, *supra* note 5.

[89] *E.g.*, Neil Bhutta & Benjamin J. Keys, *Moral Hazard during the Housing Boom: Evidence from Private Mortgage Insurance*, Wharton Faculty Working Paper (2020); Lev Menand & Morgan Ricks, *Federal Corporate Law and the Business of Banking*, 88 U. CHI. L. REV. 1361, (2021).

[90] SEIDMAN & GILMOUR, *supra* note 5, 53.

[91] Because federal corporations are often created via statutes – that is, their charters are pieces of legislation – it is tempting to understand their incoherence as a problem of statutory interpretation. *But see infra*, Part III, on how the Marshall Court departed from treating federal corporations like statutes.

"does not follow a consistent pattern except that most of the decisions have been brief and, when taken as a group, contradictory."[92]

These approaches developed in concert with each other: over the twentieth century, doctrine swung from attempts to develop a "fundamental" approach, to the application of state action analysis as a threshold concern and – in the 1990s and later – back again. As courts confronted the confusion their own approaches continued to produce, they also adopted various strategies of avoidance – relying on the doctrine of constitutional avoidance and narrowing jurisdictional rules, among other factors – to sidestep the confusion their own prior analysis had wrought.

a. The Fundamental Approach

Courts developed the fundamental approach in the face of two problems: federal corporate indeterminacy, and federal corporate charters which claim "agency" or "corporate" status for themselves. In theory, at least, a fundamental approach promises satisfying clarity in response to both sets of problems: unlike threshold questions, which only ask whether the action at issue is governmental or not, a fundamental inquiry attempts to understand what the entity at issue *is*.[93] Such an approach also allows courts to prevent Congress from self-selecting out of private or public law constraints, by looking past these labels as it performs independent analysis.[94]

In practice, however, the inherent problems with the fundamental approach – that it is ultimately legally difficult, even impossible, to fully merge one autonomous field of law with another – have meant that the graft does not take. Early twentieth-century attempts apply the fundamental approach backfired, for instance, when the Emergency Fleet Corporation was characterized as both as

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[92] Froomkin, *supra* note 5, 564.

[93] Late nineteenth-century doctrine had left courts with only the word "instrumentality" to apply to federal corporate activity. See, Farmers & Mechanics' National Bank v. Dearing, 91 U.S. 29 (1875). *See, e.g.*, Sloan Shipyards Corp. v. U.S. Shipping Bd. Emergency Fleet Corp, 258 U.S. 549 (1922); U.S. v. Strang, 254 U.S. 491 (1921) (McReynolds, J.) (holding that the Emergency Fleet Corporation was a "corporation" and thus not entitled to sovereign immunity).

[94] *See, especially*, Cherry Cotton Mills Inc. v. United States, 327 U.S. 536, 4 (1946), discussed *infra*.

corporation and a government in separate instances.[95] At one point, Justice Brandeis characterized it as both in the same opinion.[96]

The contradictions that appeared at the highwater mark of its application further demonstrate the problem with this approach: In the 1946 case *Cherry Cotton Mills*, Justice Black asserted that the RFC – the largest, most visible, most controversial, and most independent of New Deal federal corporations – was an agency.[97] "That the Congress chose to call it [RFC] a corporation," he wrote, "does not alter its characteristics so as to make it something other than what it actually is, an agency selected by Government to accomplish purely Governmental purposes."[98] Years of congressional hearings, however, had shown that the RFC was not bound by regular agency reporting rules.[99] And, paradoxically, *Cherry Cotton Mills* was about whether or not the Comptroller General – the agent in charge of most federal budgeting – could decline a suit against the RFC, on the grounds that he had no authority over it. The Court found that he could. The result of the *Cherry Cotton Mills* holding maintained the status quo: the RFC retained its autonomous characteristics.[100] Black's clear tone, in other words, could only offer superficial order.

b. State Action

After *Cherry Cotton Mills*, courts increasingly turned to both avoidance and state action doctrine as a way to manage federal incorporation's dual nature. Until 1995, avoidance, discussed below, would reign supreme; state action became the dominant strategy when questions could not be denied.

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[95] Compare *Sloan Shipyards* and *US. V. Strang*, *supra* note 93 with U.S. v. Walter, 263 U.S. 15 (1923). (EFC the "government" when considering whether an individual had conspired to commit fraud against it).

[96] Skinner and Eddy Corporation v. McCarl, 275 U.S. 1 (1927)) ("the Fleet Corporation…is thus an instrumentality of the government," but also "[b]eing a private corporation, the Fleet Corporation may be sued in the state or federal courts like other private corporations.").

[97] Decided the same year as the GCCA was passed, *Cherry Cotton Mills* appeared to offer a moment of interbranch coordination. Just as GCCA failed to be comprehensive, however, *Cherry Cotton Mill*'s application of the "agency" label to the RFC did not ultimately succeed at organizing federal corporate law. On the RFC, *see*, MCDIARMID, *supra* note 5.

[98] *Cherry Cotton Mills*, 327 U.S. 536, 4 (1946).

[99] *See*, for discussion, MCDIARMID, *supra* note 5.

[100] Cherry Cotton Mills, 327 U.S. 536 (1946).

State action doctrine reduces categorical questions to the threshold determination of whether or not various characteristics render action "public" or "private" for a specific constitutional concern at hand.[101] Because of federal corporations' hybrid status, this flexibility is better equipped to deal with their atypical features than a fundamental approach. Yet in the aggregate, decisions on the basis of state action doctrine have created confusion. As scholars have long observed, state action doctrine encourages Congress to opt in and out of private and public legal regimes in order to avoid the costs of each on a case by case basis.[102] Congress becomes under-constrained – undermining public confidence in public law and institutions as a result.

A series of cases involving Amtrak is illustrative. Amtrak has been considered a government actor for the purposes of the First Amendment,[103] a "private" actor not subject to the Fourth Amendment,[104] a "public" actor subject to the Fourth Amendment,[105] a "private" employer not subject to Fifth Amendment Due Process requirements when firing employees,[106] and a "private" actor unable to enjoy Supremacy Clause immunity from state liquor laws, to name only a selection.[107]

State action doctrine is often decried as a "conceptual disaster zone"; even the Court concedes that "our cases deciding when private action might be deemed that of the state have not been a model of consistency."[108] The application of state action doctrine to federal corporations has collectively produced so much law on both sides of the public/private line that it has made the status of the federal corporate form more indeterminate, not less.

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[101] Jackson v. Metro Edison Co., 419 U.S. 345, 351 (1974).

[102] Metzger, *supra* note 5.

[103] Lebron v. National Railroad Passenger Corporation, 513 U.S. 374 (1995).

[104] Railway Labor Executives Ass'n v National R.R. Passenger Corp., 691 F.Supp, 1516, 1524 n. 11 (D.D.C. 1988).

[105] Merola v. National R.R. Passenger Corp., 683 F.Supp. 935, 940-41 (S.D.N.Y.1988); Sisak v. National Railroad Passenger Corp., 1992 WL 42245 (S.D.N.Y. February 24, 1992).

[106] Anderson v. National R.R. Passenger Corp., 754 F.2d 202, 204 (7th Cir. 1984) Kimbrough v. Amtrak 549 F. Supp. 169 N.D. Alabama (1982). An analogous line of cases find that Conrail is also not a "public" employer. *E.g.*, Morin v. Consolidated Rail Corp., 810 F.2d 720 (7th Cir. 1987); Myron v. Consolidated Rail Corp., 752 F.2d 50 (2d Cir. 1985).

[107] NRPC v. Miller, 358 F. Supp. 1321 D. Kan. (1973).

[108] Charles L. Black, Jr. *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 632 (1991).

c. Avoidance

Between the 1940s and the 1990s, the primary strategy for dealing with federal corporations was not addressing them at all – an approach both the Court and Congress endorsed. [109]

The primary way courts avoid federal corporations is by limiting their presence in court altogether. Doctrine is currently confused as to whether or not federal corporations automatically receive federal jurisdiction.[110] As discussed in Part III, the early law of federal incorporation signaled that all federal corporations should have federal jurisdiction as a matter "arising under" the Constitution.[111] While courts today have not eliminated this possible course, as a practical matter contemporary courts generally require a "sue and be sued" clause in the authorizing charter, or other express grant of federal jurisdiction, to allow federal corporations into federal court.[112] Overall, doctrine is characterized by narrowing access.[113]

Congress has similarly preferred avoidance. Across the twentieth century, Congress issued a series of carveouts precluding federal jurisdiction from several significant categories of federal corporations wholesale.[114] In the twenty-first century, Congress

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[109] Lebron v. National Railroad Passenger Corporation, 513 U.S. 374 (1995) (O'Connor, J. dissenting).

[110] *See* Part III C *infra* for discussion. *Compare* Keifer & Keifer v. Reconstruction Fin. Corp., 306 U.S. 381, 394 (1939) ("the legal position of Regional (a subsidiary of the RFC) is, therefore, the same as though Congress had expressly empowered it 'to sue and be sued'") *with* Ass'n of Westinghouse Salaried Employees v. Westinghouse Elec. Co., 348 U.S. 437, 451 (1955) ("Federal jurisdiction based solely on the fact of federal incorporation has, however, been severely restricted"). *See also*, Pacific R. Removal Cases, 115 U.S. 1, (1885).

[111] Osborn v. Bank of the United States, 22 U.S. 738, 861 (1824), discussed *infra* Part IIIC, along with Bank of the United States v. Deveaux, 9 U.S. 61 (1809) (the root of the "sue and be sued" language, with which *Osborn* is in tension).

[112] Am. Nat'l Red Cross v. S.G., 112 S. Ct. 2465, 2476 (1992). (holding that "[a] congressional charter's 'sue and be sued' provision may be read to confer federal court jurisdiction if, but only if, it specifically mentions the federal courts. The charter must contain an express authorization, such as 'in all state courts…and in any circuit court of the United States.'"). *But see* Osborn, 861, discussed *infra* Part IIIC. Courts have declined to eliminate the possibility that the underlying federal charter itself is sufficient for federal jurisdiction. *See generally*, Lund, *supra* note 37; *Red Cross*, 112 S. Ct. 2465, 2476 (1992), n. 3.

[113] Lund, *supra* note 37.

[114] Until the twentieth century, Congress preferred federal corporations to have clear federal jurisdiction, because it enabled them

appears to have doubled down on this approach: as discussed below, large federal transactions may now be replacing federal corporations. Where, previously, jurisdiction was eliminated through a sweeping statute, it is now denied through a provision: these transactions often contain anti-review clauses (of questionable enforceability).[115] Rather than wait for the Court to decline to discuss federal incorporation, Congress has attempted to ensure that result itself.[116]

B. Liquidity vs. Legitimacy

i. The Benefits of Indeterminacy

As Part I A has shown, Congress and the executive branch have consistently relied on federal corporations – despite their legal uncertainty. Part I B argues that legal confusion about federal corporations persists in part – and in addition to the constitutional issues addressed in the rest of this Article – because it has proven useful to Congress and the executive branch.

Scholars have often theorized that uncertainty, not clarity, is beneficial, and can be financially valuable, to the party that has the primary power to resolve this uncertainty on their own terms.[117] Congress' use of federal incorporation in the twentieth and twenty-first centuries – and the corporate power's concomitant ambiguity – suggest that this theory is correct.

Since Congress created the first federal incorporation, the federal government has used federal corporations to create liquidity. The Bank of the United States was created at least in part to solve a liquidity crisis.[118] The Union Pacific Railroad used its federal charter

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to engage in strike-breaking. RICHARD WHITE, RAILROADED, 292 (2011). Act of July 12, 1882, ch. 290 § 4, 22, Stat. 162, 153 (removing federal jurisdiction for banks on the basis of their federal charter alone); Act of Jan. 28, 1915, ch. 22, § 5. (removing federal jurisdiction for railroads on the basis of their charter alone).

[115] Collins. v. Yellen, 594 U.S. _ (2021).

[116] While Congress has the power to grant jurisdiction under Article III, whether or not it is using this power properly – and if a question "arises under" is up to the Court.

[117] FRANK KNIGHT, RISK, UNCERTAINTY, AND PROFIT (1921); *see also*, Carole M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988).

[118] *See e.g.*, BRAY HAMMOND, BANKS AND POLITICS IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR (1957).

to prop up its stock – and with that, stock markets.[119] The United States Fleet Corporation demonstrated that, by the early twentieth century, the federal government was making as much use of complex corporate structure – and the accounting mechanisms they enabled – as those in private markets.[120]

Two features of federal incorporation have enabled this activity: the implied financial value of federal law, and the bespoke legal form federal incorporation offers.[121] As scholars have long demonstrated, federal charters can create cheap credit because financial markets presume that a federal charter equals federal financial backing – whether or not this backing is contractually guaranteed or not.[122] In this way, a federal charter *itself* has value.[123]

The twentieth century saw legal ambiguity become an increasingly important additional factor. Specifically, federal corporations have enjoyed a comparative lack of scrutiny – both judicial and scholarly – throughout this period. As both administrative and private law regimes grew increasingly organized and regulated in the twentieth century, the existence of a legal device which remained comparatively murky has offered Congress and the

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[119] WHITE, RAILROADED, *supra* note 114, xxv. *See also*, Edward F. McQuarrie, *The US Bond Market before 1926: Investor Total Return from 1973, Comparing Federal, Municipal and Corporate Bonds Part II: 1857-1926* (2019), 6, Available at:
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3269683

[120] *See* MCDIARMID, *supra* note 5.

[121] A standard corporate form can enable liquidity. But in addition, the flexibility of the federal corporate form – prior to any additional legal ambiguity – has further encouraged government actors to use these entities because they retain significant control over legal provisions.

[122] *See, e.g.*, Don Layton, *The Role of the Implied Guarantee Subsidy in FHLB Membership*, (July, 2020) Joint Center for Housing Studies, Harvard University. (Wednesday, March 8, 2023) https://www.jchs.harvard.edu/sites/default/files/media/imp/harvard_jchs_COVID_nhlb_politics_and_policy_layton_2020.pdf; Federal Reserve Bank of New York Staff Report No. 719, *The Rescue of Fannie Mae and Freddie Mac* (2015) (Wednesday, March 8, 2023) https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr719.pdf.

[123] The benefits of federal backing extend beyond implied insurance. Historically, federal bonds that had "circulation" privileges have long traded at a premium, serving as both currency and collateral for secondary financial institutions. *E.g.*, Jeremy J. Siegel, *The Real Rate of Interest From 1800-1900, a Study of the U.S. and U.K.* (1991), Rodney L. White Center for Financial Research Working Paper, The Wharton School (Wednesday, March 8, 2023), https://rodneywhitecenter.wharton.upenn.edu/wp-content/uploads/2014/04/9109.pdf 3.

executive branch valuable legal and financial flexibility in several ways.

First, legal ambiguity and avoidance, together, mean that, as a practical matter, Congress more probably than not retains the power to privately and autonomously determine federal corporate status, away from both judicial and public scrutiny.[124] Second, regulatory confusion has allowed for off-budget accounting. In the twentieth century, Congress developed federal corporations hand in hand with accounting mechanisms that allow federal corporations to finance activity without going through normal Appropriations oversight.[125] As the Court explained in 1927, "an important if not the chief reason for employing these incorporated agencies was to enable them to employ commercial methods and to conduct their operations with a freedom supposed to be inconsistent with accountability to the Treasury under its established procedure of audit and control over the financial transactions of the United States."[126] By escaping the constraints of the normal budgetary process, the ambiguity around federal corporate design allowed Congress and the executive to fund activities that would otherwise demand more rigorous oversight.[127]

The benefits of ambiguity are political, not just financial. Federal corporations allow the federal government to create below-the-radar entities that they can either disown, dissolve, or even sell off on the private market when it becomes financially or politically beneficial to do so. [128] Even more significantly, federal incorporation offers the political branches a way to divorce distributive questions from political cycles. This diffuses distributive pressures that would otherwise impact politics more acutely and immediately.[129] The importance of these features should not be undervalued.

ii. The Costs of Indeterminacy

By relying on legal ambiguity in these ways, the contemporary law of federal incorporation fundamentally borrows from the

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[124] *See* Part IA, *supra*.

[125] *See* MCDIARMID, *supra* note 5.

[126] Skinner and Eddy Corporation v. McCarl, 275 U.S. 1, 85 (1927).

[127] *See* MCDIARMID, *supra* note 5.

[128] *See*, *e.g.*, James Sterngold, *85% U.S. Stake in Conrail Sold for 1.6 Billion*, N.Y. TIMES, Mar. 27, 1987.

[129] *See*, for a foundational discussion of the comparative advantages of debt, credit, and taxation as political concerns, JOHN BREWER, THE SINEWS OF CAPITAL: WAR, MONEY, AND THE ENGLISH STATE, 1688-1783 (1990).

legitimacy of constitutional law to manage credit: much like *fiat* currency, the federal charter has value thanks to the implied promise not just of payment but of the stability of the constitutional law on which it depends.[130] The legitimacy of constitutional law, in turn, is frequently equated with general legal coherence, consistency, and constraint. As long as assumptions continue that the law is generally these things, areas of ambiguity can essentially borrow from that legitimacy without long-term legal damage. But when such confusion – and its uses – begin to show, they harm the legitimacy of the underlying constitutional system.

In recent decades, several particular problems have arisen which show that federal incorporations' legal ambiguity comes at a significant cost to public law legitimacy, chipping away at public trust by suggesting both a lack of legal coherence and clear restraints on self-dealing and federal power. Together, these issues strongly suggest that the utility of leaving federal corporations unclear is outweighed by the public law costs of doing so.

a. The 2008 Financial Crisis, Steel Seizure*, and "Bill of Rights Flipping"*

The most recent example of the costs of federal corporate ambiguity is well-known: the 2008 financial crisis. Scholars have demonstrated how federal incorporations' indeterminacy encourages large actors to use privatization or public backing to escape the constraints of either public or private law – encouraging financial boom-bust cycles, and corroding public trust.[131]

The response to the 2008 crisis also highlights problems with confusion around federal corporate law: namely, how the lack of clarity about federal corporations' constitutional status can lead to ultimately unconstitutional activity. Scholars widely criticized the bailout for being an unconstitutional use of executive power.[132] Less discussed was how this feature of the bailout avoided review. The financial crisis saw activity that had been questioned in the *Steel Seizure Cases* (an executive intervention in private holding), prove out

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[130] *See* Douglass C. North and Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth Century England*, JOURN. ECON. HIST. Vol. 49 No. 4 1989). *See further*, CHRISTINE DESAN, MAKING MONEY: COIN, CURRENCY, AND THE COMING OF CAPITALISM (2014); KATHARINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY (2019).

[131] *See* notes 5, 7, 89, and 122 *supra*.

[132] *See* Berman and Zaring, *supra* note 7.

of bounds when the federal government took over General Motors.[133] In short, confusion about federal corporate status transformed a public delegation question into one about private damages – avoiding review as a result.

This threshold problem has implications beyond delegation and emergency powers questions. As the Court extends constitutional rights to corporate entities, federal incorporation could potentially allow government to "flip" which side of the Bill of Rights governs.[134] Clarifying the constitutional status of federal corporations would help prevent such confusion in the future.

b. The Return of the "Fundamental Approach"

Perhaps the most urgent reason to clarify federal incorporations' constitutional basis is to avoid legitimate government activity being deemed unconstitutional by the Court. In the 2015 case *Department of Transportation v. Association of American Railroads*, several concurrences suggested that federal incorporation presented "a host of new constitutional questions."[135] The Court has indicated that clarifying these constitutional questions means embracing a "fundamental" approach to federal incorporation – which it revived in 1995 after a long, avoidant, lull.[136]

This development has significant implications: a swath of entities – now deemed "agencies" – could become subject to the Court's

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[133] *Compare* Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*) 343 U.S. 579 (1952), *with In re* Chrysler LLC, 576 F.3d 108, 111 (2d Cir.) (2009), *and* Starr Int'l Co. v. United States, 121 Fed. Cl. 428, 436 (2015).

But see, Collins v. Yellen, 594 U.S. _ (2021) (standing available for constitutional harms, where the harm might be a transfer of a right to a dividend).

[134] *See* Part IIIA and Part IVA for further discussion. Under reverse incorporation, *Citizens United* could apply to federal corporations. *See*, Citizens United v. FEC, 558 U.S. 310 (2010); Bolling v. Sharpe, 347 U.S. 497 (1954).

[135] Department of Transportation v. Association of American Railroads, 135 S. Ct. 1225, 57 (2015) Department of Transportation, 135 S. Ct. at 1235 (Alito, J.). Justice Thomas invited rehearing to "resolve" some of these "fundamental" concerns though the Court ultimately remanded them. *Dep't of Transp.*, 821 F.3d 19 (2016); *Dep't of Transp.*, 2017 WL 6209642 (2017); *Dep't of Transp.*, 896 F.3d 539 (2018). *But see infra* Part IIIC, on the Marshall Court eschewing the category of "independent agency" for federal corporations.

[136] Lebron v. National Railroad Passenger Corporation, 513 U.S. 374 (1995) (holding that Amtrak – a federal corporation that self-identifies as "private," was categorically an "agency").

new Appointments Clause and non-delegation doctrine jurisprudence. *Lebron* did not just find that Amtrak was public, it saw Amtrak as a prime example of a larger *group* of federal corporations chartered during and after the 1970s. The *Lebron* opinion cast a wide net: it set up an analogy by which future federal corporations might be deemed "agencies" – despite their private characteristics. With no alternative view of the original corporate power in sight, the Court risks mistaking a vigorous application of revived Appointments Clause and non-delegation doctrine for a fundamental understanding of federal incorporation.

c. Corporations-by-Transaction

Federal corporations have historically been chartered entities. However, there are several reasons to believe that today, they may include entities and transactions that do not possess a charter, but which in other respects resemble federal corporations, and which facilitate similar activity to that which federal incorporation has historically encompassed.

Three recent examples illustrate the point: PROMESA, the bankruptcy statute that governs ongoing debt resolution of municipal and other debt in Puerto Rico (drafted in 2016); the attempts at settlement coordinated between the Department of Justice, the Bankruptcy Court for the Southern District of New York, and Purdue Pharma over the ongoing Oxycontin litigation (commenced in 2020); and the recently litigated FHFA conservatorship of Fannie Mae and Freddie Mac (conservatorship ongoing since 2008; litigation resolved in 2021).[137] This Article refers to these entities as "corporations-by-transaction."

These transactions trigger both statutory thresholds and factual ones often associated with federal corporations:

> (1) they are the product of unique legislation;
>
> (2) they are ongoing for a significant, even indeterminate duration (that is, they require administration or corporate governance);
>
> (3) they are entities that are in many ways designed to continue liquidity – not necessarily profitability – but use a combination of private market mechanisms and public law to do this; and

[137] *See* note 41, *supra*.

(4) they place officers or other administrative staff in the position of running an organization in quasi-governmental interest.

Significant legal and policy issues have arisen around each of these transactions. These issues might be resolved – or, in some cases be more effectively challenged – by understanding them as *de facto* federal corporations – which would then require that they meet certain constraints which do not currently apply. In brief: the failure of PROMESA to conform to regular bankruptcy rules by fiscally preempting Puerto Rican sovereignty might be understood as Congress reverse-engineering itself into federal corporate governance via the Territories Clause.[138] The trust structure created by the Purdue Oxycontin settlement – which provides for a coalition of states to continuously oversee the manufacture of opioids in order to pay claimants, rather than liquidating assets – resembles Progressive and New Deal federal corporations in the business of commodity production more than conventional legal settlements, but lacks even the modest public accountability mechanisms attached to these entities.[139] The FHFA receivership replicated doctrinal uncertainty around federal corporate status at the statutory level, by (i) including an "anti-injunction" clause; and (ii) by granting the director the choice between two worlds of fiduciary duties: one that was private, and one that was public.[140]

The legal result in two of these cases has provoked enormous public disaffection; the third generated significant litigation.[141]

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[138] Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC, 140 S. Ct. 1649, 17 (2020) (relying on the Territories Clause but not expressing its decision in terms of federal incorporation).

[139] *See*, Press Release, U.S. Dep't of Just., Justice Department Announces Global Resolution of Criminal and Civil Investigations with Opioid Manufacturer Purdue Pharma and Civil Settlements with Members of the Sackler Family, Oct. 21, 2020 (Monday, April 4, 2022), https://www.justice.gov/opa/pr/justice-department-announces-global-resolution-criminal-and-civil-investigations-opioid; and Purdue Pharma, Confirmed Plan of Reorganization Facilitates Creation of New Company – "Knoa Pharma," Sep. 3, 2021 (Tuesday, March 7, 2022) https://www.purduepharma.com/news/2021/09/03/confirmed-plan-of-reorganization-facilitates-creation-of-new-company-knoa-pharma/.

[140] 12 U. S. C. §4617(f), and 12 U. S. C. §4617(b)(2)(J)(ii).

[141] Many Puerto Ricans refer to PROMESA as "La Junta." *See e.g.*, Marisa Gerber, *Puerto Ricans Press for Gov. Rossello's Resignation Ahead of Major Protest Monday,* L.A. TIMES, Jul. 20, 2019. On the Oxycontin case *see* Laura Poitras and Nan Goldin, *All the Beauty and the Bloodshed* (2022) *See also*, Collins. v. Yellen, 594 U.S. _ (2021).

Among other things, these transactions suggest that Congress is using a lack of legal clarity to avoid review, and using bankruptcy as a backdoor into regulation it cannot achieve through other means.

It may be that, in the face of judicial activity around the Appointments Clause, new, non-chartered forms may offer a kind of safe harbor: Congress may be preserving its capacity to create now-threatened entities by importing drafting practices more often seen as best practices in corporate finance, so that they resemble "agencies" less, and other units of activity more.[142] There is reason to suspect that this is the case: Congress has continued to use existing federal corporations, including funneling new funds with new parameters through several federal corporations during the Covid-19 bailout. But no new federal corporations have been chartered since the 1990s.[143]

The factors described above support the possibility that these transactions are best understood as a use of the federal corporate power. There are also practical benefits that would follow from recognizing this formal category: categorizing these transactions in that way would offer a helpful framework for scholars to analyze this activity as a class – rather than being forced to treat each event as a lone exception. This could impose greater limitations on this activity than is currently in place, helping to restore clarity and legitimacy to this area of federal lawmaking.

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As Part I has demonstrated, federal incorporation has been systemically important for over 200 years. The legal ambiguity which characterizes its contemporary form, however, has come at significant costs: to legitimacy, to legal clarity, and to possible innovation. As doctrinal and scholarly confusion indicates, clarifying the corporate power cannot be fully achieved through relying on existing administrative or private law categories, for the basic reason that these categories were themselves developed independent of the corporate power. Federal incorporation is not a flawed variant of them. In its modern form, in fact, the corporate power has operated – and been welcomed, by Congress and the executive – as an exception to these regimes. The continuity of federal corporate activity shown in Part I demonstrates the practical importance of federal

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[142] Both PROMESA and the FHFA have overcome Appointments Clause litigation. Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC, 140 S. Ct. 1649, 17 (2020). Collins v. Yellen, 594 U.S. _ (2021).

[143] Appendix A.

incorporation. The continuous doctrinal confusion described shows, in relief, the absence of a canonical – and constitutional – understanding of federal incorporation. In order to understand federal incorporation today as an independent constitutional power, Parts II and III reconstruct its constitutional roots.

II. THE UNENUMERATED POWER

Part II outlines the constitutional foundations for an alternative view of the corporate power, arguing that the power to charter was drafted into the Constitution. This challenges existing readings that locate the roots of federal incorporation in the controversies around both the First Bank of the United States and the so-called Bank War over the Second, a reading that interprets subsequent legal doctrine as part of a general legislative question, with unclear scope or other parameters.

Scholars have often treated the question around the first federal corporation, the First Bank of the United States, as a question of interpretation resolved during *McCulloch v. Maryland*, rather than as an obvious part of our constitutional framework.[144] Many ignore the existence of the corporate power altogether, seeing only the Bank, not its legal form.[145] Some suggest the power to charter was rejected at the Framing.[146]

These perspectives begin with reading James Madison's 1790 critique of the First Bank of the United States as "unconstitutional" because it was "unenumerated" as evidence that the legal matter was unsettled throughout ratification, at least until Washington signed legislation chartering the Bank, and more often, up until *McCulloch v. Maryland* itself. Scholars then treat *McCulloch*'s resolution of the constitutionality of the Second Bank as the paradigm case for a general debate over the scope of enumerated rights and implied or unenumerated powers, of which the First and Second Banks, together, serves as examples.[147]

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[144] *McCulloch* deals with the Second, not the First Bank. Scholars focused on the enumerated/unenumerated debate, however, rarely distinguish between the two. *E.g.*, BREST LEVINSON, 2018, *supra* note 1; See also, Josh Chafetz, *Multiplicity in Federalism and the Separation of Powers*, 120 Yale L.J. 1084, 1103, n. 121 (2011).

[145] *See, e.g.*, CHEMERINSKY, (6th ed. 2020); STONE, SEIDMAN, SUNSTEIN, TUSHNET & KARLAN, (8th ed. 2018); BARNETT, (3rd ed. 2018), *supra* note 1.

[146] *See, e.g.*, WINKLER, 3 (2019); RAKOVE, 355 (1996), *supra* note 3.

[147] For further discussion *see infra* Part IVB. For an example of this narrative see, e.g., BREST LEVINSON, 2018, *supra* note 1.

This Part offers a different interpretation: The silence of the power resulted from drafting problems at the Founding. Far from general concerns about enumerated and unenumerated powers (matters on which Madison was famously inconsistent in any event), the Framers confronted a political climate that made it impossible to both ratify the Constitution and mention the corporate power, in particular, by name.[148] Constitutional text, usage, background conventions, and the records of the Constitutional Convention together suggest they drafted the power into several provisions – ones which would make no sense if there was no corporate power. These efforts reflect a basic legal consensus, not confusion – even as some debated the matter. In any case, these features, and the eventual path of the law, indicate that, irrespective of what happened in closed session, the corporate power was legally "in" the Constitution as a stand-alone power from ratification.[149]

A. Federal Corporations in the Constitution

During the Constitutional Convention, the Framers discussed including an express power to charter in the Constitution. On a Saturday in late August 1787, they entertained language providing that the federal government have the power "[t]o grant charters of incorporation in cases where the public good may require them, and the authority of a single State may be incompetent."[150] By September, the men in attendance were not just tinkering with the text – they were expanding it: James Madison "suggested an enlargement of the [August] motion into a power '[t]o grant charters of incorporation where the interest of the U.S. might require & the legislative provisions of the individual States may be incompetent.'"[151]

When the Constitution was ratified, however, the word "corporation" was nowhere to be found. This absence was not a rejection.[152] Instead, it reflected circumstances particular to the

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[148] On Madison's inconsistency, *see* FELDMAN, WOOD, BILDER, and Primus, *supra* note 36.

[149] *See* Holmes, *supra* note 28 on legal predictability.

[150] 1 MAX FARRAND, THE RECORDS OF THE CONSTITUTIONAL CONVENTION OF 1787, 321 (1911).

[151] *Id.*, 2, 615. The distinction would matter later, in *McCulloch*, in which the Court embraced Madison's September "interest" proposal rather than this prior "public good" requirement. *See infra*, Part III.

[152] *E.g.*, RAKOVE, *supra* note 3, 355. The records of the ratification debates state that the specific power of general incorporation was

corporate power, ones which required that this power be left legally present, but only implied.

The Framers debated the corporate power in closed session.[153] And they found themselves with a problem on their hands. Many reasonably assumed the new Congress would have the power to charter: Among other things, this power was, in many respects, synonymous with sovereignty, even as federalism complicated that fact.[154] At the same time, a decade of financial instability and post-revolutionary tensions since Independence meant that formerly charter-espousing colonists now found cause to despise the concept and its many varieties. Many associated charters not with rights, but with banks and monopolies, and they were not favorably disposed to either.[155]

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rejected as an enumerated power. ("Among the enumerated powers given to Congress was one to erect corporations. It was, on debate, struck out.") Immediately after that, the Framers included instances of the power in its wake. (Yet "[s]everal particular powers were then proposed.") 2 FARRAND, *supra* note 22 app. A, at 376.

Because Abraham Baldwin, who authored one of the documentary histories of ratification, wrote, after the fact, that this enumeration was the charter power being "whittled down to a shred" *Id.* 376 – specifically, that all that existed of the corporate power was the patent power – some scholars have taken Baldwin's statement to mean that there was too little left of federal incorporation to be constructed as a power. *E.g.*, RAKOVE, *supra* note 3, 355; and, by omission, CHEMERINSKY; STONE, SEIDMAN, SUNSTEIN, TUSHNET & KARLAN; BARNETT, *supra* note 1. Most scholars do not draw such an extreme negative. *See, e.g.*, Pauline Maier, *The Revolutionary Origins of the American Corporation*, WILL. AND MAR. QUARTERLY, Vol. 50, No. 1, 51, 52 (1993) (noting that the power was not express, but refusing to draw the inference that it therefore did not exist); *see also* Bowie and Gienapp, *supra* note 2.

[153] Congress did not authorize publication of records from the constitutional convention until 1818. *See* Ch. VIII, 3 Stat. 475 (March 27, 1818) https://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=003/llsl003.db&recNum=516.

[154] WILLIAM BLACKSTONE, COMMENTARIES book 1, ch. 18 (1765). ("the king's consent is absolutely necessary to the erection of any corporation, either implied or expressly given.") On Blackstone as legal authority, *see* note 210, *infra*. *See also* Part IIIA, *infra*.

[155] WOODY HOLTON, UNRULY AMERICANS AND THE ORIGINS OF THE CONSTITUTION, 145-52 (2007).

The ratifying committees of six states (New Hampshire, Massachusetts, New York, North Carolina, Virginia, and, belatedly, in 1790, Rhode Island) all returned the Constitution with notes requesting "anti-monopoly" clauses. THE DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 1786–1870, 95, 142, 198, 274 (State Dept. 1894).

The notes of the Constitutional Convention suggest that including the power by name risked ratification itself. Rufus King worried that "the States will be prejudiced and divided into parties by [the mention of the corporate power]." Specifically, he pointed out that, "In Philada. And New York, [the charter power] will be referred to the establishment of a Bank, which has been a subject of contention in those Cities." These discouraging connotations were widespread: "in other places," he continued, "[federal incorporation] will be referred to mercantile monopolies."[156] Gouverneur Morris summarized: it was "extremely doubtful whether the constitution they were framing could ever be passed at all by the people of America."[157]

This situation presented a problem: how to include a specific power, without specific mention? Morris suggested that "to give [the Constitution] its best chance, however, *they should make it as palatable as possible and put nothing into it not very essential, which might raise up enemies*."[158] One way to do this was through implication. In the end, conventions of legal drafting offered a workaround to the problem express mention posed. For example, James Wilson explained that "[a]s to mercantile monopolies they are already included in the power to regulate trade."[159]

As it happened, federal incorporation is clearly visible not just in the clause concerning Trade, but in several other items as well. The

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But, as Richard Primus has noted, no anti-monopoly or anti-corporation amendment was added, and Madison himself refrained from including one when he presented other amendments to Congress in 1789. See, Primus, *supra* note 2, 427-28.

[156] 1 FARRAND, *supra* note 150, 321. Some thought this interpretive problem was overstated. James Wilson even thought an express mention of a bank might escape unscathed: he offered that "[a]s to Banks he did not think with Mr. King that the power in that point of view would excite the prejudices & parties apprehended." He was quickly rebutted. *Id.*

[157] *Id.* David Schwartz, John Mikhail, and Jonathan Gienapp have all recently argued that that it is Morris and James Wilson – *not* Madison – who should be seen as the primary "pens" of the Constitution. *See*, David S. Schwartz and John Mikhail, *The Other Madison Problem*, 89 FORDHAM L. REV. 2033 (2021). *See further*, Bill Treanor, *The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution*, 120 MICH. L. REV. 1 (2021).

[158] 1 FARRAND, *supra* note 150, 321. Italics added.

[159] 2 FARRAND, *supra* note 22, 616. Not all agreed, but few vocally disagreed, and the totality of evidence suggests that these views were superseded. George Mason was "for limiting the [charter] power to the single case of Canals," but "was afraid of monopolies of every sort, which he did not think were by any means already implied by the Constitution as supposed by Mr. Wilson."

federal corporate power is implicit in the so-called "equal footing" doctrine, Article IV Section III's prohibition on states engaging in their own territorial expansion.[160] Article IV provides that no new state may be "formed or erected within the Jurisdiction of any other State."[161] Among other things, this forbids states from repeating the chartering process through which they themselves had come into existence, while allowing the federal government to continue the same process.[162] It also prohibits states from using the corporate form to expand their own geographical – and subsequently, jurisdictional – boundaries. Giving up full sovereignty on entering the new constitutional compact, states were ceding one part of the power to incorporate to Congress. In other words, without discussing "Necessary and Proper," Article IV presumes that as a default rule, there would be a federal charter power.

The federal government's power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States" likewise employs a background assumption that federal chartering would continue.[163] One way to acquire Territory or other Property, and then to "govern" it, was through a corporate form: The Crown had used this capability to send colonists to what would become the American States.[164] Federal incorporation offered this same device for expansion – and foreign conquest, as an exclusive power to the U.S. Congress, one it readily turned westward, and, a generation after ratification, to the Panama Canal.[165] Today, this legal framework remains an integral part of federal incorporation as it is currently wielded. It undergirds, for instance, legal decedents of the charter power's role in territorial expansion, such as PROMESA.[166]

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[160] U.S. CONST. art. IV, § 3.

[161] *Id.*

[162] The colonies originated as corporations chartered by the British Crown. *See, e.g.*, Herbert L. Osgood, *The Corporation as a Form of Colonial Government*, POL. SCI. QUARTERLY Vol. 11, No. 2, 259 (1896).

[163] U.S. CONST. art. 4, §3.

[164] *See, e.g.*, Osgood, *supra* note 162.

[165] Alexander Hamilton repeatedly referred to the territorial governments as federal corporations. Alexander Hamilton, Opinion as to the Constitutionality of the Bank of the United States (1791). http://avalon.law.yale.edu/18th_century/bank-ah.asp.

On Panama, *see*, John M. Belohlavek, *A Philadelphian and the Canal: The Charles Biddle Mission to Panama, 1835*-1836, The Pennsylvania Magazine of History and Biography, Vol. 104, No. 4, 450 (1980).

[166] *Supra*, Part IBic.

The so-called "Patent" Clause implies the charter power in a different manner. It eschews what has come to be its colloquial namesake, opting instead for the more elliptical command that "[t]he Congress shall have the power…to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[167] Like the silence of the corporate power, this clause bears the imprint of how political context could shape word choice, *without* changing underlying legal meaning.[168] The same anti-monopoly context that affected how the Framers drafted the corporate power offers at least a plausible explanation for why the clause we think of as about "patents" refers to "rights" instead of the synonym for government "grants." The word "Patent" was often used to refer to corporate charters at the time.[169]

Finally, the Tenth Amendment's "Reservation" Clause did not apply to the corporate power – despite its silence. The Tenth Amendment provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People."[170] Given the prominence of state corporate law today, it is easy to assume – as much history does – that incorporation emerged from the states, not federal power.[171] Conversely, recent scholarship has suggested that the corporate power was a "vested" power that needs no further explanation other than that it inhered to Congress as part of their sovereignty – and therefore, that we need not consider federalism at all.[172]

Yet neither argument suffices. First, the argument that the corporate power was "vested" hardly settles the matter: for all the ways in which the British common law tradition shaped ideas of

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[167] U.S. CONST. art. I, § 8.

[168] Compare with the 1623 English Parliamentary "Statute on Monopolies" which expressly preserved the right to grant "letters patent" for inventions for up to 14 years. Statute of Monopolies, 1623 c. 3 (Regnal. 21_Ja_1) Section IV. (Thursday, March 9, 2023) https://www.legislation.gov.uk/aep/Ja1/21/3/section/VI.

[169] *See, e.g.*, Johnson & Graham's Lessee v. McIntosh, 21 U.S. 543, 545 (1823) ("immediately after the granting of the letters patent, the corporation proceeded … to take possession of parts of the territory … the Colony of Virginia.").

[170] U.S. CONST. amend. X.

[171] LAWRENCE F. FRIEDMAN, A HISTORY OF AMERICAN LAW, 138 (1973); MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 49 (1977). *See also, infra* notes 205-7 for how this background assumption affects how scholars have read *Dartmouth College*.

[172] Gienapp; Bowie, *supra* note 2.

rights in the new republic, British sovereignty was by definition something the Constitution was in certain ways shaped *against*. Commitments to both dual and popular sovereignty would have to be balanced with received ideas of what made governments "governments," in the new, American formulation. As a result, no British "sovereign" prerogative could be assumed to inhere to the new federal government without question. The early legal controversy over sovereign immunity, in which American law was framed in contradistinction to power held by the British Crown, demonstrates the problem.[173] In the case of the corporate power, assumptions around how incorporation was implicit in sovereignty influenced background legal conventions that shaped the discussion of the corporate power. Nevertheless, as the Framers' discussion shows, it was not so implicit that there was a corporate power as to leave it entirely undiscussed.

Second, incorporation was also not reserved to the states, either on the "clearly reserved" (that is "prohibited to it"), or non-express (default reservation) bases. First, as to a clear reservation: there was none. By 1787, state constitutions conflicted over whether or not they acknowledged their own corporate power, and how. Pennsylvania reserved the power to incorporate in its post-revolution Constitutions.[174] North Carolina expressly eschewed the corporate prerogative.[175] There were no clear rules as to whether or not the power to charter was reserved, implied, or expressly disavowed at the state level based on state constitutions or held-over royal charters.[176] As a result of this mixed endorsement of corporate power on the state level, there was no clear default rule as to how to interpret state constitutional law on the corporate power: To assume that a state constitution which allowed or disallowed incorporation itself governed the federal power would be to effectively allow one or another state to have greater interpretive weight than the others. This would be a clear violation of the states' equal rights vis-à-vis each other, and

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[173] *E.g.*, Burr v. United States, 25 F. Cas. 30, 34-35 (C.C.D. Va. 1807).

[174] Twelve new state constitutions were drafted after the Revolution. Only Pennsylvania and Vermont claimed an express right on the part of their legislatures to grant charters of incorporation.

[175] N.C. CONST. art. 23.

[176] HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870 (1989). After the American revolution, colonial legislatures passed special bills which created corporate entities: municipal governments, ecclesiastical organizations, turnpikes, and dams. These existing rights would help shape limits to federal incorporation. *See infra*, Part IIIA. But they did not preclude the existence of the federal power.

could not stand.[177] As a result, little meaning could be drawn either way from these provisions. Thus, state constitutional law provisions on incorporation muddied more than they clarified.

Second, as to power about which there was *no* clear reservation, the Establishment Clause demonstrates the presence of the corporate power in two ways. The First Amendment expresses a positive bar to federal incorporation of religious entities.[178] This suggests that *other* corporate entities might be made by the federal government. Furthermore, the Establishment Clause's proscription of particular federal action suggests that where there is confusion about power between federal and state jurisdiction and *no* prohibition, powers not mentioned *and* not restricted may be held concurrently.[179]

All told, then, while federal incorporation posed drafting problems, the textual omission of its name is not evidence of its absence. Constitutional structure is one route to inferring the power was there. Norms of legal interpretation offer another route to the same conclusion. The presence of the corporate power in provisions of the Constitution suggests that the charter power was "silently" drafted into the Constitution at the time it was penned, not "interpreted" into it later.

B. Madison's "Unconstitutionality"

For several years after the Constitutional Convention, the constitutionality of the charter power appears to have been settled. The records of ratification mostly do not discuss incorporation. In other words, "silent" drafting worked: the text of the Constitution, combined with present legal assumptions about how this text would interact with surrounding law, created a reliable legal understanding that there was a corporate charter.[180] It worked so well, in fact, that, as Alexander Hamilton prepared to introduce his bank bill to

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[177] U.S. CONST. art. 4, § 1.

[178] U.S. CONST. amend. I. While the First Amendment is frequently read for its proscription against federal interference in existing state religious establishment, a federal corporate statute creating a church would, by definition, be a "law respecting an establishment of religion."

[179] *Id.*

[180] *See* Holmes, *supra* note 28, on legal predictability. Prospective drafting in this sense is about likelihood of enforcement, not just exposition: a legal drafter hopes to accurately assess this, through a mixture of commission and omission when they draft a legal document. The analogy to corporate documents – which are necessarily drafted in this manner, both because they are prospective and because they are intended to achieve a certain legal result – is illustrative.

Congress, he appears not to have spent any time developing arguments for the "constitutionality" of the bank.[181] Two years after ratification, he could assume he would not need to. With constitutionality thus presumed, Hamilton presented his bill to charter the First Bank of the United States to the Congress on December 13, 1790. In the words of one biographer, it "sailed" through the Senate, on January 20th, 1791.[182]

When the bill reached the House floor, however, things became more complicated. Almost a year earlier, Congress had debated how to handle the revolutionary war debt.[183] Of the many issues this presented, a central one was how to address old continental bonds that had been paid as military wages during the Revolutionary War. This federal debt was now mostly held by speculators, having been sold for a pittance during the ten years of inflation that wracked the new union between Independence and ratification.[184]

Confronting the problem, Madison had presented a plan to handle repayment through bond "discrimination" to Congress: The Treasury should discriminate between original and secondary holders, he suggested. The original holders would have to be found. They could then be paid in full for the right they no longer held in paper, minus the purchase price. The secondary holders would be bought out for their purchase of the debt – but not receive any upside now that the bonds had value. In this manner, Madison believed, revolutionary war veterans would not be penalized for the circumstances which had led them to sell off their bonds before they could be realized. At the same time, the government would not be

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[181] *See*, for omission, CHERNOW, (2004), *supra* note 27.

[182] *Id.* There were no references to the Constitutional Convention on the Senate floor; nor was there any extensive debate over "Necessary and Proper." A letter from Pierce Butler, a Senator from South Carolina, to James Jackson, a member of the House from Georgia, mentions one constitutional concern raised in the Senate: that Article 1, Section 9, forbids favoring one state over another "by any regulation of Commerce or Revenue to the Ports of one State over those of another," and thus to the extent the Bank was an "exclusive privilege…[it might be considered] as a violation of the Constitution." (He then wrote dismissively, that "the arguments adduced on this head need not be mentioned to professional Gentlemen of your abilities.") Pierce Butler to General James Jackson, Jan. 24, 1791, Butler Letterbook, in Benjamin B. Klubes, *The First Federal Congress and the First National Bank: A Case Study in Constitutional Interpretation*, 10 J. EARLY REPUB. 1, 25 (1990). As Klubes further notes, monopoly concerns were also raised in the house floor, however they were not precise constitutional arguments, in the way that Madison's arguments were.

[183] FELDMAN, *supra* note 36, 298.

[184] *Id.*, 294.

forced to pay out more than the face value that other proposals were now willing to pay to the secondary holders.[185]

Hamilton – Madison's sometime friend with whom he had co-authored the Federalist Papers – was uninterested in Madison's concerns. After debate failed to be resolved in Congress, the House directed Hamilton to produce a report on "Public Credit" and offer his recommendation, as Secretary of the Treasury. In that report, Hamilton recommended paying secondary holders in full, and alone.[186] The policy was adopted. While the bond program was not itself to be managed by the proposed Bank of the United States, the policy was part of the larger – and interdependent – system Hamilton laid out across the following year, which would be anchored by the Bank.[187]

When Madison saw the Bank bill, he was irate.[188] With Hamilton, Madison had supported the need for economic union in the years leading up to the Constitutional Convention. Faced with increasing disarray among the states, thanks to post-Revolution debts and conflicting state interests, Madison saw the need for a framework larger than the sum of its parts. He had worked tirelessly to bring about the Convention in the first place.[189] Yet now the architecture of union was, to his eyes, being distorted, even – by encouraging financial centralization in New York – being put to perverse use. Earlier disagreements, for instance, Madison's dispute with Hamilton about bond policy, had forced Madison to argue on policy grounds – grounds that put him at a disadvantage, since he was discussing Hamilton's area of known expertise. In the case of the Bank, however, Hamilton was leaning on a constitutional provision about which Madison had a secret weapon: the power to charter a bank was not literally stated in the Constitution; the records of the convention were not public; and, among his peers, it was well-known that Madison had

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[185] Speech of February 11, 1790, Papers of James Madison, ed. William T. Hutchinson and William M. E. Rachal (Chicago, University of Chicago Press, 1962-) (taken over by Charlottesville: University of Virginia Press). 13:36-37, in FELDMAN, *supra* note 36, 295.

[186] Alexander Hamilton, Report on Public Credit (1789).

[187] For an overview of the bank's structure, see, e.g., Andrew T. Hill, *The First Bank of the United States*, Federal Reserve History, December 4, 2015 (Sunday, March 12, 2023) https://www.federalreservehistory.org/essays/first-bank-of-the-us.

[188] FELDMAN, *supra* note 36, 295.

[189] *Id.*

taken one of the only full sets of notes from the debates from the Constitutional Convention.[190]

Madison was thus famously able to argue, on the floor of Congress, that because the word "corporation" is not in the Constitution, the Bank of the United States was unconstitutional. Specifically drawing on the debates at the convention, Madison argued that because the corporate power "was a distinct, an independent and substantive prerogative," it would have been enumerated in the Constitution if it had been included. He then stated that "he well recollected that a power to grant charters of incorporation had been proposed in the General Convention and rejected."[191]

Scholars have often treated this statement as the entry point into a general (and teachable) discussion about the enumerated/unenumerated line, both during the Founding, and today.[192] The usual schematic then proceeds to chart "sides" to the debate – with every viewpoint being equally weighted – between Madison's position, on the one hand, and Chief Justice Marshall's later development of "structural" reasoning in *McCulloch* as its riposte, on the other.[193]

Assuming Madison was raising a constitutional point that was still live as a legal concern makes it unclear whether or not there already was a corporate power.[194] In addition, reading Marshall as

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[190] William Jackson, the secretary of the convention, failed to take clear notes. While several attendees, including Hamilton, took extensive notes that they published after Congress lifted the ban on publicizing the conversation at the convention in 1818, many of them did not attend the entire convention. According to his own papers, by contrast, Madison physically made his presence as note-keeper known ("I chose a seat in front of the presiding member.") *See*, for the quotation and a helpful overview, Margaret Wood, *Constitution Day: Records of the Constitutional Convention*, Library of Congress Blog, Law Librarians of Congress Sept. 17, 2018 (March 12, 2023) https://blogs.loc.gov/law/2018/09/constitution-day-records-of-the-constitutional-convention/.

[191] ANNALS OF CONGRESS, 1st Cong., 3rd sess. 1896, 1898.

[192] *E.g.*, BREST LEVINSON, *supra* note 1 (discussed *infra*, Part IVB). Note that, separate of the corporate power, there *was* a broader debate about unenumerated powers and the Necessary and Proper Clause that was ongoing. *See, e.g.*, GIENAPP, *supra* note 51.

[193] *E.g.*, BREST LEVINSON, *supra* note 1.

[194] Because the famous advisory letters Alexander Hamilton, Edmund Randolph, and Thomas Jefferson sent to President Washington on the constitutionality of the Bank have been widely covered elsewhere,

constructing the corporate power in response to Madison, rather than recapitulating settled law in face of Madison's attempt to unsettle it, makes Marshall's opinion seem more innovative than it was. These considerations about the power's framing have contemporary implications: the conventional view forces discussion around federal incorporation to rely on general legislative powers, producing doctrinal confusion and leaving us empty-handed when it comes to understanding the scope and nature of federal corporations. Recently, it has forced lawyers – and judges – to rely on some parts of the Constitution over others to legitimate federal financial activity, as for instance, occurred with the Affordable Care Act.[195] Arguably, it forces all discussions to take place in the shadow of a broad unenumerated/enumerated debate, which can prejudice more focused discussions about the specific details of powers (and rights) themselves.[196]

In fact, Madison's response was political improvisation, not a principled reminder of a constitutional problem all were acquainted with. As one scholar observes, in the case of the Bank question, Madison "initiat[ed]…[his] repeated practice of claiming that political enemies [were]…bent on subverting the basic principles of the

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and because the points they make mostly recapitulate points made here, this Article does not address those letters.

It is worth noting, however, that Thomas Jefferson was not at the constitutional convention because he was in France at the time. His letters on the Bank, which are loosely reasoned, reflect his distance from both regular legal practice and the debate about federal incorporation that had transpired in Philadelphia. For instance, despite noting that in order to create a Bank, Congress must "form subscribers into a corporation," Jefferson actually never argues that federal incorporation is unconstitutional, just that the Bank is. His argument against the Bank is also loosely worded (that it would "communicate to them [the bank subscribers] a power to make laws paramount to the laws of the States.") Thomas Jefferson, *Opinion on the Constitutionality of a National Bank* (1791), http://avalon.law.yale.edu/18th_century/bank-tj.asp.

And, notably, Washington requested Jefferson and Randolph's opinions on the bank first and then presented them to Hamilton four days later requesting a rebuttal – possibly indicating that Washington was already inclined towards the constitutionality of his actions. *To Alexander Hamilton from George Washington*, 16 February 1791, *in* THE PAPERS OF ALEXANDER HAMILTON vol. 8, at 50-51 (Harold C. Syrett, ed., 1965).

[195] National Federal of Independent Business v. Sebelius, 567 U.S. 519 (2012). *See also* Primus, *supra* note 2.

[196] *Infra*, Part IVB.

Constitution."[197] This tactic saw Madison publicly announcing views that were directly opposed to positions he uncontrovertibly held going into the convention itself – and using interpretation in haphazard ways.[198] The inconsistencies included the enumerated/unenumerated question itself. When debate about the Presidential removal power arose in 1789, for example, Madison had *rejected* an enumerated powers approach (which would have cut against his position) and instead used the *lack* of enumeration to his advantage.[199] Further, Madison's floor statement relied on what would become his favored rhetorical tool: He had been at the convention, he had the notes – and everyone, including the public, knew that. Madison, along with others, had prevailed in efforts to keep the records to the Convention under lock and key after ratification. Once the convention was over, however, Madison continuously relied on public knowledge that he had attended the conventions as a source for his own argumentative authority.[200]

Scholars have recently shown that Madison was consistent neither in his interpretive approaches nor his political recollections.[201] No doubt, he used constitutional argument to try to correct the new nation's course in ways he thought were consistent with its better lights. One imagines that, as a point of principle, he agreed about the corporate power in Philadelphia. Confronted in early 1791 with Hamilton's particular instantiation of it, embedded in an entire financial system designed in large part as an imitation of both British and Dutch finance, Madison may have felt himself faced with a foreign object. Perhaps he assumed there must be some way to distinguish his objections from mere politics: that he could use the Constitution for political argumentation, and that was nevertheless

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[197] FELDMAN, *supra* note 36, 286, (noting that with Madison's floor statements on the bank, he made a "fateful" turn to arguing "that the bank is not merely wrong but unconstitutional").

[198] *Id.*, 345. Feldman argues that, following the "enumerated/implied" lines he developed in arguing against the Bank, Madison painted himself into a constitutional corner. For example, Madison argued that there was no enumerated power with respect to trade subsidies, but "first conceived of the need for the new, national, unified Constitution precisely in order to create a unified national trade policy."

[199] Madison argued that the President clearly had the removal power because of the "construction and implication" of the power in the Constitution. Floor Statement of James Madison to Congress, Feb. 3, 1791 in CLARK AND HALL, EDS., LEGISLATIVE HISTORY OF THE UNITED STATES, 46. Cited in RAKOVE, *supra* note 3, 354.

[200] *See generally*, FELDMAN, *supra* note 36.

[201] *See* FELDMAN, WOOD, BILDER, and Primus, *supra* note 36. *See also* Schwartz and Mikhail, *supra* note 157.

different from the Constitution itself.[202] Whatever the case, tellingly, Madison's after the fact arguments about federal incorporation failed to persuade his colleagues. Ultimately, the 'Father of the Constitution's' condemnation of the Bank as unconstitutional incited repudiation from several colleagues in the house who had been at the convention.[203] The Bank bill was passed by a large majority, which included those who had attended the Constitutional Convention.[204]

III. MARSHALL CONSTRUCTS THE CHARTER POWER

Part III shows how the Marshall Court treated federal incorporation as an independent constitutional power. Three cases constructed federal incorporation: *Dartmouth College v. Woodward, McCulloch v. Maryland*, and *Osborn v. the Bank of the United States*. These cases have long been held up independently as lodestar cases in different domains: *Dartmouth* about the invention of the private corporation; *McCulloch* on federal power; *Osborn* on "arising under" federal jurisdiction. Yet these cases also show the Court working to define the corporate power as something distinct from either federal legislation or what would become administrative law, on the one hand, and from the burgeoning idea of state corporate law, on the other. Beyond merely suggesting an independent subject, the Marshall trinity reveals that the early Court developed a doctrinal construction for federal incorporation which was unique as well.

As with all constitutional powers and rights, silent or express, the passage of the Constitution did not answer every question of application. That there was a federal corporate power was clear. How to define the scope of that power required interpretation.

Federal corporations created three main problems of interpretation which the early court confronted: how to distinguish federal corporations from state corporations; how to limit the creation

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[202] Although Madison cited policy for his reasons for changing position a third time in 1816, he agreed to sign a bill chartering the Second Bank of the United States as President himself.

[203] 1 ANNALS OF CONGRESS, 1896, 1952, 1955. As Jonathan Gienapp has pointed out, Fisher Ames claimed that the representatives "laughed" at Madison after he raised his "Eleventh hour" protest to Hamilton's bill. Ames to George Richards Minot (Feb. 17, 1791), 1 W.B. ALLEN, WORKS OF FISHER AMES, 95 (1983). *See also* Primus, *supra* note 2, 442-454, showing that Madison, to quote Gienapp, "prompted this debate out of desperation." Gienapp, *supra* note 2.

[204] The House voted 39 to 20 to adopt the bill, MOULTON, LEGISLATIVE, 13 (1984), *supra* note 26.

of federal corporations given the nature of limited federal powers; and how to characterize financial activity in the federal corporate form.

In answering these concerns, the Court articulated positive rules for defining what federal corporations were: *Dartmouth* cognized federal corporations as a distinct category from state (private) corporations. *McCulloch* created a purposive standard for federal corporations: "constitutional" interest. *Osborn* suggested that federal corporations could not be persons, despite the beginnings of corporate autonomy *Dartmouth* previously carved out for state-chartered private entities. And, *Osborn* rejected two thresholds courts use today to treat federal corporations as either analogous to agencies or state corporations. Under *Osborn*, private ownership could not transform the status of a federal corporation to something outside the remit of constitutional law. The Court expressly rejected the idea that financial holdings dictated the constitutional status of power dealing with the bank, which had only a 20% government stake at the time. By the same token, *Osborn* noted that federal corporations did not necessarily have "officers" within the meaning of the Constitution – but neither were such agents "contractors."

These rules did not mirror existing or emerging legal categories. To the extent the new law of federal incorporation carried over the law of sovereign corporations from prior British law, it was entirely reformulated within the new constitutional – and federal – context. In analyzing federal corporations, the Marshall Court chose not to solely rely on concepts like preemption or the public/private divide. The Court distinguished federal corporations from the emerging categories of private state corporations and federal legislation.

In doing so, the Court created a specific field of federal financial intervention which was neither administrative nor "private" law, nor was it simply "statutory." The construction of the power evident in this trinity of cases reinforces the fact that federal incorporation is a distinct power, and suggests that there is a construction of the federal corporate power that remains valid – though dormant – law today.

A. Dartmouth *as Federalism: Federal vs. State Corporations*

Dartmouth College v. Woodward has long been treated as synonymous with the advent of the contemporary corporate form: a presumptively state-chartered, private entity; and one [now] afforded

the status of legal "person."[205] Holding that the Contracts Clause barred the State of New Hampshire from retroactively altering the charter of Dartmouth, the Court carved the category of "private corporation" into American law.[206]

With its presumptive equation of "corporate law" with state-chartered corporations, however, this focus has obfuscated why *Dartmouth* had to articulate the categories that defined the "private" corporation – the categories of "private" and "public," and of "purpose" and type – in the first place: *Dartmouth* carved out the idea of state chartered private corporations against a backdrop of existing federal power. The result was an idea of the state corporation that – far from being the only vision of corporate power – was helpful in large part because it could be distinguished from the already extant federal incorporation.[207]

Importantly, the corporation at issue in *Dartmouth* was not a state-chartered entity – it was a pre-existing *British* corporation. To solve the case, the Court needed only to clarify how new American constitutional law applied to this category of pre-existing corporate

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[205] Dartmouth College v. Woodward, 17 U.S. 518, 663-64 (1819). *See, e.g.*, GORDON WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 466-7 (2009); WILLARD J. HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970, 9 (1970). *See also*, HORWITZ, 72 (1977), *supra* note 176. *But see*, WINKLER, *supra* note 3.

[206] Spurred in part by *Citizens United v. FEC*, scholars have recently reopened debate into the scope and history of corporate "personhood." *See, e.g.*, WINKLER, *supra* note 3; Bowie, *supra* note 2. Nevertheless, this debate has not upset the long-standing agreement about the basic novelty of *Dartmouth*'s characterization of the corporation as "private." *See infra*, note 207.

[207] Scholars have complicated personhood and questions of how "private" the corporate form is, by attending to shifting definitions of both corporate "personhood" and private status that correlate with periods in the rise of "modern" corporate law. *See, e.g.*, Naomi Lamoreaux and John Joseph Wallis, *Economic Crisis, General Laws, and the Mid-Nineteenth Century Transformation of American Political Economy*, JOURN. EAR. REP. Vol. 41 No. 3, 403 (2021); But none has displaced an underlying assumption that capitalism emerged hand in hand with private property and local, state-centric democracy. *See, especially*, HURST, and WOOD, *supra* note 209; and HORWITZ (1977), *supra* note 176.

As a result, literature discussing both the origins of corporate law and American history more broadly usually presumes that the only corporate development of *any* significance occurred at the state level. *See e.g.*, Maier, 52, *supra* note 157. *See also* WOOD, *supra* note 209; WINKLER, *supra* note 3. *But see*, for an important recent critique of this literature, Stefan Link and Noam Maggor, *The United States As A Developing Nation*, 246 PAST & PRESENT 269 (2020).

entities.[208] On its facts, in other words, *Dartmouth* could have been decided without constructing new legal categories.

As *dicta* suggests, however, the *Dartmouth* Court contemplated another problem when deciding to resolve the case in the way that it did: how to divide a formerly unified sovereign power – the power to charter – between the new federal government and the states. Federal incorporation was clearly on the Court's mind when deciding *Dartmouth*: the *Dartmouth* Court openly discussed whether or not "banks" could be constitutional – *before McCulloch* had raised the question. As Justice Story explained, "[i]n respect to franchises, whether corporate or not, which include a pernancy of profits, such as right of fishery, or to hold a ferry, a market or fair, or to erect a turnpike, *bank*, or bridge, there is no pretence to say that grants of them are not within the Constitution."[209]

This question – how the corporate power could coexist between federal and state governments – could *not* be resolved by reliance on British law. Under British law, the power to charter was held by the Crown alone.[210] This unitary chartering power created the framework within which a panoply of corporate "types" then operated by their own common law rules. Instead of being organized into public or private (or state or federal) categories, corporations were organized by other characteristics. These were characteristics we might today think of most clearly as their purpose. For example: corporations were "eleemosynary," civil, or ecclesiastical.[211]

What unified these myriad types was the power the sovereign had to alter or revoke the granted charters entirely: the power of "*quo*

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[208] In other words, the Court could have maintained that the corporation was "eleemosynary" or another of Blackstone's categories. *See e.g.*, Jesse F. Orton, *Confusion of Property with Privilege: The Dartmouth College Case*, 15 VA. L. REGISTER 417 (1909).

[209] *Dartmouth College*, 17 U.S. 518, 699 (1819) (Story, J., concurring), italics added.

[210] BLACKSTONE, *supra* note 154. Like any legal authority, Blackstone was debated. *See* JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS, (2017), 80-89; Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551 (2006). But, as with the Marshall Court – and in the absence of any evidence indicating that this debate would have affected how the corporate power operated legally – this Article treats Blackstone as the legal authority it was at the time and continues to be.

[211] *See* STEWART A. KYD, A TREATISE ON THE LAW OF CORPORATIONS (1973).

warranto."[212] *Quo warranto* meant that the power of creation was never severed fully from a subsequent power of destruction. This power made the idea of a "private" corporation in the contemporary understanding non-sensical: corporations' charters could be revoked even without the clear presence of *ultra vires* activity.[213]

The question at the heart of *Dartmouth* – when and where *quo warranto* powers applied – thus went to the heart of the problem constructing the corporate power in a federal system *also* presented: because *quo warranto* essentially designated sovereignty over the corporate form, in addressing it, the Court had to decide which governments were sovereign over which forms of corporate entities, a problem unique to the new constitutional system.

Once seen, the problem was unavoidable. The problem in *Dartmouth*, in other words, was a problem of federalism. It was in this context that the Court developed the new corporate categories it articulated in *Dartmouth*. Put simply, as the Court considered both state and federal incorporation, the fact that there *was* a federal corporate power, as discussed in Part II, did not solve all problems of legal construction.

How the Court arrived at its chosen solution – new constructions of corporate "purpose" divided into public and private at the state level, and "federal" or "constitutional" at the federal level – had more to do with the absence of helpful interpretive guidance than the presence of it. Creating unique interpretive burdens on the Marshall Court, neither existing British precedents nor sister constitutional powers were particularly helpful in constructing a dual corporate power. British law, with its emphasis on unitary sovereignty, was relatively useless when transported into a federal system in which the

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[212] *See* J.H.BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY (2007); Catherine Patterson, *Quo Warranto and Borough Corporations in Early Stuart England: Royal Prerogative and Local Privileges in the Central Courts*, THE ENG. HIST. REV. Vol. 120, No. 488, 879, (2005) (describing *quo warranto* as "a writ by which the King questioned the basis of a franchise, privilege, or liberty.").

[213] *Quo warranto* was rarely exercised in full; its power (and for this Article, importance) lay in the conceptual linkage between sovereignty and corporate creation that it both reflected and embedded. Famously, Charles II exercised his *quo warranto* powers against the city of London. This particular act of *quo warranto* was reversed by Parliament after the Glorious Revolution. *See* CHAFETZ, *supra* note 210, 80-89. But such controversy never eliminated *quo warranto* from legal understanding. The London example should also be understood in light of the fact it was itself an extraordinary and unprecedented use of the corporate power to punish political dissent.

division of corporate power was unclear. But so were analogies to existing federal powers.[214] Unlike some powers where "exclusivity" to the federal government was comparatively clear (for instance the power to Coin), the fact of the corporate power did not self-define its limitations.[215]

These were just the formal problems. As a matter of practice, in the interregnum between the American Revolution and the ratification of the Constitution, the states had exercised *de facto* powers which had been previously held by the Crown. Even as several state constitutions expressly disavowed their own "monopoly" power, legislatures granted local charters both before and after the ratification of the Constitution: special bills which created corporate entities – from municipal governments to ecclesiastical organizations to granting rights to build roads, turnpikes, and dams.[216] The existence of such state corporations made clear that, from its beginnings, the federal corporate power would have to differ from the totalizing British prerogative: federal incorporation had to coexist with state incorporation as well.

Treating incorporation as a "concurrent" power – that is, a power that was the same, but parallel – the way legislation worked, however, would have created even more confusion and concern about encroachment, precisely because the corporate power in the British system had been so totalizing. Incorporation created entities which varied in their size, purpose, and reach. A workable interpretive framework needed to make sense of this variation, lest the legality of every entity be thrown into doubt. In the end, *Dartmouth* relied on a qualitative distinction between federal and state corporations – one based in the new ideas of corporate "purpose," and of public, and private, to resolve the problem of whether Dartmouth's charter could be revoked.

The Court's chosen framework relied heavily on an idea Alexander Hamilton had sketched out in 1789.[217] In early debates

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[214] *See, e.g.*, United States v. Burr 25 F. Cas. 30, 34–35 (C.C.D. Va. 1807) (sovereign immunity an example of how transplanted concepts from English law are not replicated automatically in constitutional law).

[215] U.S. CONST. art. I, §8.

[216] For anti-monopoly clauses in state constitutions, *see supra*, note 157. Individuals worked around formal sovereign power developed during the colonial period, even as legal officials often respected it; state practices did not always reflect formal law. *See* JOSEPH STANCLIFFE DAVIS, ESSAYS IN THE EARLIER HISTORY OF THE AMERICAN CORPORATION, 22, 94 (1917).

[217] Alexander Hamilton, Opinion as to the Constitutionality of the Bank of the United States (1791), http://avalon.law.yale.edu/18th_century/bank-ah.asp.

about the Bank of the United States, Hamilton had argued that it was possible to see the federal corporate power neither as exclusive nor concurrent, but as *qualitatively* different from the state corporate power.[218] Addressing the problem of whether corporate power was "unlimited" in his long letter to Washington during the bank debates, Hamilton had drawn a line which echoed the old British idea of "types" of corporations – this time dividing them between "federal" and "state" types.[219] Federal incorporation, Hamilton explained, would not duplicate forms of state incorporation that were clearly within the physical limits of the state for that purpose alone: "A [federal] corporation may not be erected by Congress for superintending the police of the city of Philadelphia, because they are not authorized to regulate the police of that city."[220] And federal corporations might also be limited by kind to endeavors that grew out of reasons there was a Congress in the first place: interstate co-ordination problems, ("the collection of taxes," "to trade with foreign countries, or to the trade between the States, or with the Indian tribes"), territorial expansion, federal property (Hamilton cited Congress' capacity to have police for the protection of the Capital), and international dealings.[221]

Dartmouth's construction of "private" status for state corporations took up this idea of a "qualitative" distinction between state and federal corporations. Effectively, *Dartmouth* used the idea of "purpose" to draw a line between state and federal corporations. *Dartmouth* held that "private" state corporations could be independent; state "public" corporations were not.[222] Federal corporations, as *McCulloch* and *Osborn* would soon clarify, could not include either state "public" corporations *or* "private" ones, by contrast.[223]

Since *Dartmouth* changed the default rules for state corporations *only*, in other words, federal corporations retained the old, holistic relationship to sovereignty, which included *quo warranto* powers. This meant not only that the federal corporate prerogative continued to include *quo warranto* powers, but that federal corporate

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[218] *Id.* ("The circumstance that the powers of sovereignty are in this country divided between the National and State governments, does not afford the distinction required. It does not follow from this, that each of the portion of powers delegated to the one or the other, is not sovereign with regard to its proper objects. It will only follow from it, that each has sovereign power as to certain things, and not as to other things.").

[219] *Id.*

[220] *Id.*

[221] *Id.*

[222] Dartmouth College v. Woodward, 17 U.S. 518, (1819).

[223] *See infra* Parts IIIB and C.

drafting would continue to be bespoke.[224] It also laid the groundwork for later caselaw which clarified that, unlike state corporations, federal corporations could never be fully "private."[225]

By relying on this distinction between "form" and "purpose" at the state level, *Dartmouth* previewed *McCulloch*'s idea of purpose as limiting the valid construction of federal entities. *Dartmouth* also laid the groundwork for subsequent treatment of *federal* corporations by constructively saying that Dartmouth College was chartered by New Hampshire (not the Crown). As a result, the *Dartmouth* Court preemptively voided the idea that the Contracts Clause could preclude federal interference with federally chartered but financially private corporations, or, as came up in *McCulloch*, that it would grant states power over federal corporations as well.[226]

Finally, in developing a clear idea of retained state power over municipal and other entities – "public" corporations – *Dartmouth* marked out the field in which federal power was not sovereign. This would matter when, in *McCulloch*, the Court was forced to articulate how the silent corporate power was not indefinite.

B. McCulloch *Revisited, or "Constitutional Interest": Federal Corporations as Constitutional Law*

Dartmouth created a framework that began to solve for how to understand the corporate power in a federal system. But it was the *McCulloch* and *Osborn* Courts that would define what, exactly, a federal corporation *was*. *McCulloch* articulated a way to think of federal corporations that was deceptively simple: Federal corporations were not "public" purpose entities. This was a category that *Dartmouth* had created to refer primarily to municipal and local corporations not enfranchised with the new "private" status. Rather,

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[224] *See* Part IA, *supra*, and Appendix A. *See* note 41, *supra*.

[225] Because *Dartmouth* was constructively a state corporation, it foreclosed the important question of whether the Contracts clause would preclude federal revocation of a federal corporation. As *Osborn* made clear later, the idea of a fully "private" – that is, immune and independent – federal corporation was nonsensical. *See infra*, Part IIICiii. Note however Southern Pacific R. Co v. United States, 168 U.S. 1(1897) (holding that Congress could retake land grants from a federal corporation if conditions in the charter were unfulfilled, thereby suggesting that property, once transferred, could "vest" in a federal corporation and could not be revoked unilaterally.).

[226] With the exception of a land tax on the property held by a federal bank, *McCulloch* held that states could not interfere with federal corporations. McCulloch v. Maryland, 17 U.S. 316, 412 (1819).

federal corporations were *constitutional* corporations.

The idea of a "constitutional corporation" derived from a phrase James Madison used to delimit federal corporations in an early draft of the Constitution, before the Framers agreed the power would not be mentioned by name. Madison had experimented with a provision naming the corporate power – one that stipulated that federal corporations should exist where there was a constitutional "interest."[227]

The Marshall Court revived this concept of a "constitutional" corporation in *McCulloch*. The "constitutional" label enabled the Court to differentiate federal corporations from the newly emergent categories of "public" and "private" in *Dartmouth*, and to define federal incorporation autonomously as a result: First, a "constitutional" purpose limited corporations chartered by the federal government. It suggested that federal corporations could not be chartered if they would duplicate state entities. And, federal corporations required a purpose which could be justified either through the text or structure of the Constitution. Because *Dartmouth* coded the idea of "public purpose" as a state, not federal category, Madison's "interest" proposal lived on, in other words, in *McCulloch*'s broader category of a constitutional purpose – one which could presumably include financial dealings that might be disallowed to the "public good" standard.

Second, as *Osborn* would later confirm, the idea of a "constitutional" corporation implied that federal power over federal corporations would remain intact – even while the corporate form might also enable financial endeavors that would be beyond the scope of the newly articulated idea of public power at the state level.

Third, as *McCulloch* made clear, while being compatible with other limitations and prerogatives of federal power – federalism and the Supremacy Clause among them – federal corporations remained discrete subjects of law. Their bespoke status meant they were not governed by a general incorporation statute – something that even at the state level would only become common practice generations into the future. Rather, it meant that federal corporations were generally products of the legislature. Nevertheless, federal corporations were bound by different rules than general federal legislation, in particular with respect to when chartering could be undertaken and for what purpose, and how courts should interpret federal charters and corporate activity.

McCulloch arose when the State of Maryland implemented a tax on a branch of the Bank of the United States. The penultimate case

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[227] *Supra* Part II; 1 FARRAND, 615, *supra* note 150; 2 FARRAND, *supra* note 22, 615.

in a series of controversies that had all arisen as different states attempted to tax various iterations of the Bank, after Maryland courts upheld the tax, the Bank appealed to the Supreme Court, suing in the name of a Baltimore branch employee, James McCulloch.[228] The Court offered two holdings in the case. First, the Court found that the Bank was constitutional. Second, the Court held that Maryland did not have the power to tax the bank.

In order to answer each question, the Court had to address the corporate power in two seemingly opposing ways: the first question required the Court to describe the charter power in terms of its limitations; the second involved the Court expounding on the corporate power's prerogatives. By addressing these questions side by side, the questions in *McCulloch* did not divide the corporate power, however, but rather described it as a whole. Demonstrating the indivisibility of federal corporate form, the limitations on federal corporations as federal creatures were inextricably tied to their powers and immunities.

The Court achieved the bulk of the work of describing federal incorporation in the first question: whether or not the corporate power was constitutional.[229] This question, which required the Court to describe how federal corporations were both constitutional *and* limited, has been at the root of significant subsequent confusion. Because Marshall discusses the Necessary and Proper Clause at length in this portion of the opinion, *McCulloch* is often treated as synonymous with that clause.[230] In addition, scholars often focus on

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[228] McCulloch v. Maryland, 17 U.S. 316 (1819). *Deveaux* and *Osborn,* which had similar facts, are addressed below.

[229] In the second question, the Court held, on the basis of the Supremacy Clause, that Maryland could not tax the bank. In doing so, the Court restated that federal corporations, once properly created, were entitled to the privileges (and restrictions) that went with federal law.

This question was important because clarified that there were limitations to the federal power to charter. Specifically: the property on which federal corporations sit may be subject to local taxes. Nevertheless, in contrast to the first question, which required the Court to define the scope of a federal corporation, the second question is not particularly illuminating, which is why I do not discuss it in full here.

[230] *See, e.g.*, CHEMERINSKY; STONE, SEIDMAN, SUNSTEIN, TUSHNET & KARLAN; BARNETT, *supra* note 1. While some scholars maintain that the question of the constitutionality of the bank remained an open question at this time, they do not generally equate Marshall's mention in *McCulloch* that "[t]his Government is acknowledged by all to be one of enumerated powers" with a declaration about the Constitution. Since of course, the result of the case depends on an entirely opposite proposition, one may take it instead as a typical judicial wind-up:

the stated problem of the constitutionality of a bank – but not on the legal form which created it: the federal corporation.[231] Further, because the case does not expressly describe the charter power as an independent power – instead often referring to it as a tool for certain ends – the fact that federal incorporation is analyzed independently in the case has receded from view.

Yet as Charles Black correctly observed some time ago, it is the corporate status of the bank – not the "Necessary and Proper" Clause, nor the question of a "bank" as an independent topic – that *McCulloch* turns on.[232] Counsel for the State of Maryland had moved discussion to the Necessary and Proper Clause – not the Court.[233] Arguing that the clause was a limitation on powers, including the creation of a bank, counsel claimed that Necessary and Proper "was inserted for the purpose of conferring on Congress the power of making laws." The Court, however, dismissed not just this argument but the entire line of reasoning outright, stating that the fact "that a legislature, endowed with legislative powers, can legislate is a proposition too self-evident to have been questioned."[234]

With the question of "Necessary" thus entangled with the problem of legislative power, the Court needed an alternative line of discussion to address the specific limits of incorporation. The "ends," or purposes, of federal incorporation offered that alternative. What mattered when contemplating allowable forms of federal incorporation *was* their end or purpose: federal corporations remained

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conceding in vague terms to Madison's politics, before striking the death blow to their underlying constitutional claim. McCulloch v. Maryland, 17 U.S. 316, 405 (1819). For more on Madison, *see* Part II, *supra*.

[231] *Id.*

[232] BLACK JR., *supra* note 2. Although the Court subsequently used the clause to describe its prior holding on occasion, even subsequent decisions involving federal incorporation did not turn on that interpretation. *See* Osborn v. Bank of the United States, 22 U.S. 738 (1824), discussed *infra*. Others have also noted that the case was not a "Necessary and Proper Clause" case, though they have arrived at other conclusions about what this means. *See, e.g.*, Chafetz, *supra note* 144, 1100-07.

[233] As Marshall explained for the Court: "[t]he counsel for the State of Maryland…have urged various arguments to prove that this clause [Necessary and Proper], though in terms a grant of power, is not so in effect, but is really restrictive of the general right which might otherwise be implied of selecting means for executing the enumerated powers." McCulloch v. Maryland, 17 U.S. 316, 412 (1819).

[234] *Id.* at 413. Marshall was, of course, ignoring the fact that many of the state ratification committees had been persuaded to accept the (limited) formulation of Necessary and Proper as an accommodation to their concerns about the breadth of federal power. For discussion, *see* GIENAPP, *supra* note 51.

bespoke, and unlike post-*Dartmouth* state corporations, there was no distinction between private and public federal corporation. Thus, even though this discussion seemed focused not on the entity of the federal corporation, but only its goals, the entity itself – much like old British corporations had been organized by their "type" – would be limited and structured based on that purpose.[235]

Marshall described that purpose as a realm of federal incorporation in which Congress was entitled to create federal corporations "which tended directly to the execution of the constitutional powers of the government," that are "in themselves constitutional."[236] Thus, federal corporations were corporations with a "constitutional" purpose. Requiring both that federal corporations be "essential to the beneficial exercise of" the relevant power, and, that the relevant benefit must be "direct," the language offered a sort of test for understanding when a federal corporation should be chartered – one that abstracted the question far past the particulars of a national bank.[237]

While open-textured, by using language like "essential," and "made in pursuance of the Constitution" to describe the power, the power was limited by constitutional ends.[238] These ends include unenumerated and enumerated powers, Marshall writes. "Beneficial" created important room away from the existentially imperative (the "nugatory" Necessary, as Jefferson had put it previously).[239] But unenumerated was not a free-for-all (nor for that matter, was the charter power's relationship to enumerated powers). The relevant benefit – though not specified – must also be articulable; that is, it must be "direct."[240]

This notion of a "constitutional" purpose had two effects. In one respect, it was a limitation on federal power. A constitutional corporation could only be chartered where purposes could be inferred from constitutional text or structure. Further, a "constitutional" corporation did not overlap with "public" state corporations or "private" state entities.

In another respect, however, it offered a broad prerogative: by avoiding the *Dartmouth* divisions between public and private, a "constitutional" corporation offered a label that was inclusive of federal financial activity – so long as that financial activity had a clearly constitutional rationale. Finally, the idea of a constitutional

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[235] *See* KYD (1973) *supra* note 211.

[236] *McCulloch*, 17 U.S. 316, 419 (1819).

[237] *Id.*

[238] *Id.*

[239] Jefferson's Opinion on the Constitutionality of a National Bank (1791), http://avalon.law.yale.edu/18th_century/bank-tj.asp.

[240] *McCulloch*, 17 U.S. 316, 419 (1819).

corporation presumed that any such creation would remain tethered to federal power: unlike state private entities post-*Dartmouth*, federal corporations were not autonomous.

C. Osborn*: Federal Corporations and Adjacent Law*

McCulloch articulated an idea of a freestanding federal corporate law. Yet for all its work articulating what a "constitutional" corporation meant, *McCulloch* stayed within the interpretive bounds of constitutional law itself. *McCulloch* therefore offered little guidance as to how to understand federal incorporation when it came into contact with or was in court due to questions arising out of *other* forms of law – the questions that today encourage the Court to analyze federal corporations through those alternative lenses, rather than as an autonomous field of law.

In *Osborn*, by contrast, the Court explained how the law of federal incorporation dovetailed with adjacent areas of legal analysis. On its face, *Osborn* was focused on federal jurisdiction: whether or not the Second Bank of the United States had jurisdiction "arising" under the Constitution.[241] The Court's opinion on this question underscored the constitutional status of federal corporations: it went out of its way to safeguard the possibility that federal corporations had federal jurisdiction: their federal charter made them automatically a subject of constitutional law.[242]

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[241] Osborn v. Bank of the United States, 22 U.S. 738 (1824).

[242] Because the Second Bank charter had a sue-and-be-sue clause among its provisions, and because the Court partly relied on this clause for its holding, in order to accommodate a tension with *United States v. Deveaux*, uncertainty exists about the basis of federal jurisdiction for federal corporations today. While *Deveaux* also granted federal jurisdiction, it did so on the basis of diversity jurisdiction, muddying whether a federal charter alone clearly provided access to federal courts. And, because the bank in *Deveaux* did not have a sue-and-be-sued clause, there is a colorable lack of clarity about whether one is required for federal corporations to have federal jurisdiction.

But *Osborn* expressly included language indicating that the charter of the Second Bank was likely sufficient for federal jurisdiction "arising under" under the Constitution even if it had no "sue and be sue" clause. *Osborn*, 22 U.S. 738, 861, 823 (1824) (noting the hypothetical of a blank charter, and also asking rhetorically "can a being, thus constituted, have a case which does not arise literally, as well as substantially, under the law?"). This broader inference has never been overturned. In fact, the Court has repeatedly preserved it. Am. Nat'l Red Cross v. S.G., 112 S. Ct. 2465, 2476 (1992). n. 3 (expressly declining to address federal

Several substantive issues were intertwined with the jurisdictional questions as well. (i) *Osborn* indicated that, as ideas of corporate autonomy emerged, federal corporations could not be citizens based on new theories of corporate personhood, reinforcing that federal corporations were entirely different subjects than state-chartered private corporations. (ii) *Osborn* held that, despite having a majority ownership which was private, a federal corporation would not automatically become a "private" creature. (iii) Finally, while insisting on this federal status, *Osborn* held that, in this case at least, agents of the corporation were not "officers" within the meaning of the Constitution – but neither were they "contractors." In other words, federal corporations could be outside the bounds of agency law, without becoming "private" entities.

Osborn reaffirmed that the Marshall Court understood federal incorporation as an independent body of law. The Court's treatment of each of the topics *Osborn* touched on is also significant for how it stands either in tension or in conflict with current law, as discussed further in Part IV.

i. Personhood

Because federal corporations never attained either corporate autonomy in the sense of a "private" corporation under *Dartmouth*, nor did the Court confer the status of citizenship on them (through jurisdiction or otherwise) based on their place of incorporation alone, they cannot be considered "persons" today. This forecloses the possibility, that, as discussed in Part I, the existence of corporate personhood means that, if federal corporations are considered "private" by the Court, they may effectively be granted a form of

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jurisdiction based on the federal nature of the corporate charter, and deciding the case on other grounds).

Moreover, there is significant reason to think that *Osborn* was a step toward overturning *Deveaux* on the jurisdiction question – just as *Dartmouth* superseded *Deveaux* on state corporate personhood. Justice Story attested that Marshall regretted his holding in *Deveaux*. DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888), 88, n. 178 (1985). The understanding of federal incorporation this Article articulates would support finding federal jurisdiction for all federal corporations, on the basis of their charter alone.

corporate citizenship which "flips" which side of the Constitution they are bound by.[243]

When *Osborn* arose, contemporary ideas of corporate personhood did not yet exist.[244] However, *Dartmouth*'s creation of autonomous, private status had foreshadowed its eventual development.[245] The one case which stood between *Dartmouth* and this new vision of corporate citizenship was *Bank of the United States v. Deveaux,* which insisted that corporate citizenship is the product of its members, not its site of incorporation.[246] *Osborn*, however, had partially displaced *Deveaux*.[247] In a post-*Dartmouth* environment, this displacement opened up a colorable claim: by moving away from *Deveaux*, was *Osborn* on a course toward viewing federal corporations as autonomous "citizens" too? *Osborn* guards against this inference. In addressing federal jurisdiction, *Osborn* reiterated how entangled federal corporations were with the federal government: As *Osborn* states: "[t]his being [the federal corporation] can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States." Further, "[i]t is not only itself the mere creature of a law, but all its actions and all its rights are dependent on the same law."[248] Nowhere did *Osborn* entertain corporate citizenship.[249] The Marshall Court's clear refusal to engage with even antecedent ideas of corporate personhood when considering federal corporations suggests that any attempt to enable them to occupy this status today is a misreading of the constitutional status of federal corporations.

ii. Private Holdings

In contrast to today, the *Osborn* Court found that a federal corporation did not become a "private" entity as a legal matter even

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[243] Under reverse incorporation, the rights that have now attached to private state-chartered corporations would attach to federal corporate "citizens" as well. Bolling v. Sharpe, 347 U.S. 497 (1954).

[244] See also Louisville Cincinnati, & C. R.R. v. Letson, 2 How. 497 U.S. (1844) (citizenship determined by the place of incorporation, not the members of the corporation).

[245] *See* notes 205-7, *supra*.

[246] Bank of the United States v. Deveaux, 9 U.S. 61 (1809). The Court was divided on the personhood matter as a general problem of how to understand incorporation in the context of private, state-chartered corporations. Justice Story favored personhood; Justice Marshall opposed it. *See*, Dartmouth College v. Woodward, 17 U.S. 518, (1819).

[247] *See supra,* notes 111 and 242.

[248] *Osborn,* 22 U.S. 738, 823 (1824).

[249] *Id.*

when it was majority held by private shareholders.[250] This result flowed from its sister cases, as well as from Osborn's jurisdictional holding. It relied on logic that may seem counterintuitive today: the status of a federal corporation flowed from its charter – not its ownership.

McCulloch had announced that the charter power created constitutional entities.[251] But it had also expressed that the bank branches were not fully immune from state law. The real property on which federal corporations sat might be taxed like any other.[252] Once *Dartmouth* articulated an idea of "private" corporations that could, in theory, transcend state jurisdiction to apply to federal entities as well, the problem of whether or not there could be sufficient "private" or "state" characteristics to fully change the nature of a federal corporation from a "constitutional corporation" into a "private" one was a live concern.

The State of Ohio seized on this opportunity, arguing that the Bank was a private entity, and thus that there was no "arising under" jurisdiction.[253] Finding that there *was* "arising under" jurisdiction, the Court also indicated that a majority private share in a federal corporation was insufficient to render that entity "private."[254]

Today, a majority private share might constitute a transformative event, meaning that a federal corporation was "private."[255] To the *Osborn* Court, this was nonsensical. Despite the fact that the Bank of the United had only a 20% government stake, the *Osborn* Court insisted this threshold did not transform a federal corporation into a "private" entity.[256]

iii. Officers

The Court addressed one last relevant concern in conjunction with its discussion of shareholding: whether or not agents of the Bank were "Officers" under the Constitution. The Court maintained that agents of the bank did not rise to "Officer" status – as they might have been had the bank been a federal agency. In doing so, the Court made clear that federal corporations existed outside the remit of what would

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[250] *Id.*

[251] *Supra*, Part IIIB.

[252] McCulloch v. Maryland, 17 U.S. 316 (1819).

[253] *Osborn*, 22 U.S. 738, 867 (1824).

[254] *Id.*

[255] Judiciary Act of 1925, ch. 229, § 43, Stat. 936, 941 (1925) (incorporated at U.S.C. 28 § 1349 (2006), as amended).

[256] *Osborn*, 22 U.S. 738 (1824).

later form the basis for administrative law.[257] Concurrently, the Court also maintained that the fact that they were not officers had no bearing on whether or not the federal corporation was "private."

The issue arose as part of *Osborn*'s counsel's attempt to void "arising under" jurisdiction by showing that the Bank was a private corporation. Several of the bank officers held elected office. The Constitution bars those who "hold[s] any office under the United States" from serving as a member of Congress. By arguing that bank officers could not therefore constitutionally be "Officers," counsel for *Osborn* hoped to show that the Bank was private – and therefore, subject to state, not federal power.[258]

Counsel's argument, however, contained an errant assumption that the Court was quick to point out: that in order for the Bank to be subject to constitutional and federal law (and not private, state law), it had to resemble law governing administrative posts.[259] In this way, arguments made by *Osborn*'s counsel prefigure the "fundamental" approach to contemporary analysis described in Part I, on which federal corporations can only be cognized as either agencies or private corporations.[260]

The Court reiterated that agents of the bank did not rise to "Officer" status.[261] Importantly, the Court also emphasized that there was no converse implication: *not* being an "officer" did not mean one was then a "contractor."[262] In reply, Marshall pointedly rejected the language of "public" and "private." He noted that counsel "contended…[that the directors'] resemblance to contractors [was]

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[257] *Id.* Federal corporations are sometimes referred to as "independent agencies" (usually by Congress, who benefits in certain cases from defining these entities in that way.) *See, e.g*, USA.gov "Index of U.S. Agencies and Departments" (Wednesday, March, 15, 2023) https://www.usa.gov/federal-agencies/a

Importantly, however, this was not the language the Marshall Court used. It has also been contested when litigated. *See, e.g.*, Cherry Cotton Mills Inc. v. United States, 327 U.S. 536, 4 (1946).

[258] U.S. CONST. art. I, § 6.

[259] Osborn v. Bank of the United States, 22 U.S. 738, 867 (1824) ("[t]he appellants rely greatly on the distinction between the Bank and the public institutions, such as the mint or the post office." Individuals in those offices, Marshall acknowledged, are "officers of government, and are excluded from a seat in Congress.").

[260] *Supra*, Part IAii(a).

[261] *Osborn*, 22 U.S. 738, 867 (1824). ("It will not be contended, that the directors, or other officers of the Bank, are officers of government.).

[262] ("[t]he connexion [sic] of the government with the Bank, is likened to that with contractors.") *Id.*, 867.

more perfect than it is." This could not be, he opined, because the bank "was not created for its own sake, or for private purposes."[263]

Osborn stood firm on the existence of federal corporations as an autonomous object of legal analysis. Referring to the bank as a "a machine employed by the government" rather than saying that the contrary purposes were "public" ones, the Court refused any categorization other than that of the constitutional power it had outlined in *McCulloch*: Marshall simply reiterated that "it has never been supposed that Congress could create such a [private] corporation."[264]

IV. FEDERAL CORPORATIONS IN THE SUN

Part IV A shows how excavating the power described in Parts II and III has implications for the doctrine and use of federal corporations today. Part IV B considers the implications of an "unenumerated power" for constitutional interpretation.

A. Federal Corporations Today

The corporate power, as described in Parts II and III, suggests an alternative vision of federal incorporation than the one that courts employ today. Adopting this vision would mean displacing existing doctrine. But it would be a stretch to say that it would be displacing settled law: as Part I demonstrated, courts have frequently changed approaches to federal corporations – when they have not tried to avoid them. Scholars generally agree that there is little settled about the doctrine of federal corporation today except its confusion.[265]

In fact, "re-canonizing" the corporate power as an independent power would answer questions that courts and scholars have been troubled by for decades. With the current Court poised to revisit the law of federal incorporation – a turn figuring into its general re-working of administrative law – the interventions this Article makes come at a critical juncture: placing the law of federal incorporation on clearer footing could also help avoid future doctrinal incoherence.[266] In particular, it may aid the Court in not invalidating constitutional

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[263] *Id.*
[264] *Id.,* 859–60.
[265] *See* note 5, *supra.*
[266] *See* Part IBi(c), *supra.*

federal corporate activity based on the mistaken understanding that federal corporations are "agencies."

The understanding of the corporate power this Article lays out also offers Congress and the executive branch a clearer outline of the possibilities within their policy-making capacities. Existing doctrine does not, of course, bar Congress from creating federal corporations right now. Nevertheless, as Part I explains, confusion about the scope and nature of this capacity has often stood in the way of Congress' deploying federal incorporation without incurring outsized costs to legitimacy and public confidence.

Many legislators are not aware that they can create federal corporations.[267] Understanding that the roots of this activity lie not in the political projects of the New Deal or Progressive eras, but in the Constitution might go a long way to making possible important economic activity today.[268] Reviving the concept of federal incorporation detailed here would, of course, potentially limit the

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[267] The Congressional Research Service has issued reports in response to queries specifically asking what the corporate power allows Congress to do. *See, e.g.*, Kosar, *supra* note 37.

[268] Since the late nineteenth century, scholars and politicians have episodically suggested that Congress use federal incorporation to regulate existing state-chartered corporations. Proposals vary, but most imagine a general incorporation statute that would require entities above a certain size (or other thresholds) to be federally chartered. William Jennings Bryan, 1899, CHICAGO CONFERENCE ON TRUSTS: SPEECHES, DEBATES, RESOLUTIONS, LISTS OF THE DELEGATES, COMMITTEES, ETC. 383 (Civ. Fed'n of Chi. Ed., 1900), 506-08; RALPH NADER ET AL., CONSTITUTIONALIZING THE CORPORATION: THE CASE FOR THE FEDERAL CHARTERING OF GIANT CORPORATIONS (1976); Accountable Capitalism Act, S.3348, 115th Cong. (sponsored and drafted by Sen. Elizabeth Warren, 2017-2018).

Despite arousing perennial interest from academics and legislators alike, these proposals have all been summarily rejected. On rejection, *see* Melvin I. Urofsky, *Proposed Federal Incorporation in the Progressive* Era, 26 AM. J. LEGAL HIST., 176 (1982) (noting that between 1901 and 1914, proposals for federal licensing or chartering were put before the House at least 24 times; all failed).

There is no legal bar to creating a general federal incorporation statute of this sort, although the question of how to incent or force existing corporations to change their charter raises legal issues around vesting, the Contracts Clause, and the Takings Clause, among other reasons to question to its benefits. However, in attempting to create a uniform regulatory power, such proposals risk accidentally binding Congress more than the state entities they are trying to regulate: such an interpretation of federal incorporation could replace Congress' bespoke capacity (both with respect to taking over state corporations and creating them) with unintended uniformity requirements for federal corporations as well.

flexibility Congress has previously enjoyed – constraining the credit bump federal corporations benefit from, and limiting accounting and other benefits a lack of attention currently enables.[269] But raising legislative awareness would bolster legitimate congressional action that today often struggles to pass through Congress. That activity ranges from the production – not just subsidizing – of goods, to nimble but institutionalized federal spending, authorized around, not through, often unwieldy omnibus bills. Federal corporations are an important device that could help the federal government bring its economic activity into the twenty-first century, but using them effectively requires understanding them clearly.

Further, although Congress' expansive legislative powers have long been recognized as part of modern Commerce Clause jurisprudence, the possibility that these powers will come into question – as they did in *Sebelius* – suggests that alternative constitutional understandings of federal legislation may become increasingly important in coming years.[270] The understanding of the corporate power this Article lays out offers Congress the ability to independently articulate the rational for its activities based on constitutional law – independent of increasingly unstable twentieth century precedent.

This Part briefly lays out the positive legal scope of the corporate power, based on the Marshall Court rules described in Part III. It then explains how reviving the corporate power might affect existing doctrine and congressional activity in more detail.

i. The Positive Law of the Charter Power

Recognizing that there is a corporate power means resolving existing doctrinal confusion about federal corporations in several ways. First, it means that federal corporations cannot disown their "public" status. Early jurisprudence underscores that "government control" – which remains undefined today – is a meaningless threshold under the early understanding of federal incorporation.[271] As the Marshall Court explained in *Osborn*, *all* federal corporations are, in a general sense, "government controlled": the constitutional nature of the charter makes it unthinkable that the entity is anything other than a product of the federal government.[272]

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[269] *See* Part IB for discussion.
[270] On *Sebelius*, *see* note 195, *supra*.
[271] *See supra*, note 77, and *supra*, Part I.
[272] *Osborn*, 22 U.S. 738, 861 (1824).

Specifically, early doctrine is crystal clear that we should understand federal corporations as locked into a governmental relationship with the Bill of Rights.[273] Federal corporations should also automatically have federal jurisdiction.[274] Consequently, (i) the choose-your-own-adventure state action doctrine currently offers; (ii) the potential implications corporate personhood holds for federal corporations based on reverse incorporation; and (iii) the use of jurisdictional confusion to keep federal corporations out of court, are, on a close reading of the early case law of federal corporations, unconstitutional.

As such, the observations this Article offers are in tension with the Court's application of state action doctrine to federal corporations in the twentieth century; to its caselaw on jurisdiction, and to its current trajectory with respect to corporate personhood.[275] But on closer inspection, these commitments actually make sense of doctrinal confusion. The rules in Part III complement, albeit indirectly, the Court's recent search for a renewed "fundamental" test to replace state action doctrine and avoidance.[276] They offer a principled reason for limiting implications that the Court likely failed to foresee when it extended constitutional rights to state-chartered corporations. And with respect to jurisdiction, the early law of federal corporations helps solve an ongoing split in doctrine.[277]

None of this means, however, that federal corporations are suddenly part of administrative law. As Part III lays out, this was not how the Marshall Court conceived of federal corporate law.[278] Federal corporations have always been primarily financial – not administrative – devices. When the Court articulated it, the idea of a "constitutional" purpose was intertwined with federal financial stability, not modern ideals concerning public benefits. In this way, federal corporations sit outside of ongoing historical debates about the "advent" or "originality" of administrative law – and beyond the reach of the APA and related doctrine.[279]

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[273] *See* Part IIICii for discussion.

[274] *See* Part IIICi.

[275] *See* note 134, *supra*.

[276] *See* Parts IAi(a) and IBi(b), *supra*.

[277] *See* Parts IAii(c) and IIICi, *supra*.

[278] *See* Part IIIC *supra*.

[279] Contesting claims that the New Deal administrative state is "unconstitutional," legal historians have produced a wealth of literature describing 19th century forms of administration. *Compare* PHILIP HAMBURGER, "IS ADMINISTRATIVE LAW UNLAWFUL" (2014) with WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996).

Notably, this also means that federal corporations' purposive and corporate constraints are at odds with ideals of the "public good" as it is often understood. Board members, directors or other associates of federal corporations are bound by any oath they take to the Constitution. But there is no other federal "fiduciary" law that applies.[280]

In addition, federal corporations remain quintessentially bespoke entities. This quality has long led to confusion, because it makes it difficult to establish default interpretive rules about federal corporations. In practice, what this means is that federal corporations can engage in substantive activity that might be prohibited based on existing private law rules.[281] They also have more financial flexibility than private state-chartered corporations. Where private law corporations must choose a corporate form which then dictates fiduciary duties and budgeting requirements, federal corporations have no similar restrictions.

Finally, unlike state corporate law – where the charter itself became, after *Dartmouth*, a "contract" – no such development ever took place with the federal corporation. Whoever contracts with a federal corporation assumes the risk that the federal government may change the underlying charter.[282]

ii. Beyond Administrative Law

Today, the Court is poised to revive – and perhaps reinvent – the "fundamental" approach to federal corporations described in Part I, an approach that the Court previously appeared to have left behind in 1946. As Part I explains, this may have consequences for the constitutionality of a range of federal corporate and administrative activity. In short, the Court has indicated that it will reconsider federal corporate status in certain instances – and that it views a wide swath of federal corporate activity, much of which exists on the "private" end of the spectrum, as part of administrative law. Because understanding these entities as "agencies" has implications beyond merely seeing them as "public" – it has consequences for appointments and independence, among other things – it is crucial that this area of the law not be further confused.

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[280] *See* note 84, *supra*.

[281] *See* note 42, *supra*.

[282] Today, this is simply legislative prerogative, but it derives from *quo warranto*, *see supra* notes 212, and Part IIIA.

As Part III demonstrates, the Marshall Court did not conceive of federal corporations as agencies – despite insisting on their "public" status in many other respects.[283] The early law of federal incorporation suggests that the current Court should decline to extend this definition further.[284] The Marshall Court's logic might also help us better understand existing uses of the term "agency" to comprehend federal corporations.

To square existing caselaw with the law described in Part III, we might understand prior cases which used "agency" to describe federal corporations not as lumping federal corporations with administrative law, but as searching for a way to designate them as "public" for constitutional law purposes. Instead of casting a wide net for new "agencies," the current Court might then make an important distinction between the use of "agency" as a term for "public constitutional constraints" described above, and "agency" as a term for "rules about disclosure, the APA, and appointments." Better still, the Court should recognize that federal corporations are distinct entities which are fully "public" in the sense of the former, and not at all in the sense of the latter.

iii. Alternative Rationales for Federal Legislation

Recognizing the corporate power opens up new terrain for both how Congress drafts and courts respond to federal financial legislation. The proper scope of federal spending and regulation has long been analyzed under the Commerce Clause, the Necessary and Proper Clause, the Spending Clause and the Tax Power.[285] The scope of activity these clauses authorize has expanded in the past century.[286] Yet some constraints remain: federal endeavors flowing from these clauses are generally thought of as regulatory, not

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[283] Parts IIIB and C, *supra*. Note that these cases cannot be distinguished for the purposes of this section because of their focus on a "bank" both because they were not only addressing banking law, but also because the federal corporations the Court is poised to reconsider have many private law features. As a result, they are more analogous to the Bank of the United States than they are to typical administrative agencies.

[284] Part IIIC, *supra*.

[285] Gibbens v. Ogden. 22 U.S. 1 (1824).

[286] United States v. Darby, 312 U.S. 100 (1941) *But see*, U.S. v. Lopez 514 U.S. 549 (1995), and U.S. v. Morrison, 529 U.S. 598 (2000); *compare with* Gonzales v. Raich 541 U.S. 1 (2005).

creative.[287] As a result, federal activity is often required to be tethered, however tenuously, to activity across all or between several states, whether through the "general" in the Spending Clause's "general welfare" discussion, or through the regulation of interstate commerce.

The law of federal corporations offers a different vantage point from which to consider what federal activity is constitutional in several ways. Specifically, it provides that there could be a federal corporation which has a "constitutional" purpose even if that purpose is not clearly about either "regulation" *or* "interstate commerce."[288] Such purpose would not necessarily require general spending (or specifically attach to an individual provision of the Constitution), although, as a general matter, it might follow the usual contours of federalism and federal power.

This has several consequences. First, it emphasizes federal corporations' unique capacity to produce goods and services. As Part I outlines, federal corporations have historically manufactured items directly, in addition to backing credit and facilitating existing markets. For instance, the 2022 infant formula crisis might have been addressed by federal incorporation; the current housing crisis might still be. Significantly, the corporate power allows federal corporations to do this without relying on an executive order or emergency powers.[289] It also allows Congress to achieve specific ends without large spending bills. Importantly, there is no legal requirement that this production of goods be attached to a "natural monopoly."

Finally, it means that when Congress engages in legislative activity that might otherwise come under attack under Commerce Clause jurisprudence, there are independent grounds for the constitutionality of such activity. As described in Part I, the idea that there are "corporations-by-transaction" may have use for litigation of existing federal activity – as much as for understanding it.[290] The Affordable Care Act, for example, might be understood as a constructive federal corporation.[291] As the current Court revisits formerly stable areas of twentieth century jurisprudence, it may be

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[287] Even the Spending Clause is "regulatory" in that federal funds are often granted to states conditionally.

[288] *See* Part IIIB, *supra*.

[289] *See*, Whitehouse.gov, 'President Biden Announces First Two Infant Formula Defense Production Act Authorizations', May 22, 2022 (Wednesday, March 15, 2023) https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/22/president-biden-announces-first-two-infant-formula-defense-production-act-authorizations/.

[290] *See* Part IBi(c), *supra.*

[291] *See also* Primus, *supra* note 2.

important for Congress to expound on its own action in independent, but constitutionally grounded ways.

B. Silent Powers; Silent Rights

Beyond the doctrinal and policy considerations described above, the corporate power has important implications for how we think about constitutional interpretation, generally. Unenumerated powers and rights have long been disfavored in practice, even though the Constitution protects them as a general concept.[292]

Today, this general disfavor is expanding in at least two directions. With respect to powers, the Roberts Court – despite fashioning itself in Marshall's image – disfavored Marshall's "structural" interpretation in *Sebelius*, the 2012 case upholding the Affordable Care Act on the basis of the Tax power rather than under *McCulloch*.[293] Meanwhile, although the 9th Amendment clearly protects unenumerated rights, skepticism about unenumerated rights is currently affecting previously established rights, not just as yet unrecognized ones.[294] The Court's recent repeal of constitutional privacy rights is indicative of an extension of a general formula: one that associates rights and powers with one-word labels, above all else.[295]

As this Article shows, however, this prejudice against silent rights or powers is antithetical to how the Constitution operated as a legal document, both at its inception and in subsequent years. Those who have written off unenumerated rights or powers based on fears

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[292] *See supra*, note 9.

[293] National Federal of Independent Business v. Sebelius, 567 U.S. 519 (2012). On "structural interpretation" see BLACK JR., *supra* note 26; *see also* BOBBITT, *supra* note 19, 155–56; Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 790–91 (1999).

[294] U.S. CONST. amend. IX. *Dobbs*, 597 U.S._ (2022). *See also* Suk Gersen, *supra* note 8.

[295] *Dobbs*, 597 U.S._ (2022); *see* Caitlin B. Tully, *The Liberal Giant Who Doomed Roe*, SLATE MAGAZINE, June 25, 2023, https://slate.com/news-and-politics/2023/06/john-hart-ely-dobbs-roe-legacy.html; (observing that Alito's opinion as well as John Hart Ely's theory undergirding it depends on single-provision rights); see also Jeannie Suk Gersen, *Why the Privacy Wars Rage On*, THE NEW YORKER, June 20, 2022, https://www.newyorker.com/magazine/2022/06/27/why-the-privacy-wars-rage-on-amy-gajda-seek-and-hide-brian-hochman-the-listeners (noting the logical flaws behind the current Court's silo-ing of First and Fourth Amendment privacy).

of wild misinterpretation have essentially confused a textual Constitution with a taxonomic one.

This Part addresses two important criticisms that might be made of the corporate power: First, that it requires overlooking significant political controversy during the founding – and therefore that it is illegitimate. Second, that justifying it now justifies legal opacity, as a normative principle. Then, this Part discusses the interpretive implications the existence that the corporate power has for the future of constitutional interpretation: First, how we should approach existing but embattled unenumerated rights and powers in court. Second, what methodological implications this unenumerated power holds for how we think about unenumerated powers and rights in the future.

i. Political Argument and Legal Meaning

In recent years, thanks in part to the increasingly long shadow cast by originalism, scholars have tended in originalist or realist directions when engaging with the history of the Constitution. The corporate power fits uneasily into either perspective, because recognizing it requires acknowledging historical friction between law and politics, which these perspectives can elide.[296] Acknowledging the historical friction between politics and law does not, however, mean giving up on the importance of democracy to law. If anything, the corporate power shows the empirical difficulties and legal costs that come with adhering too rigidly to either one of these approaches.

Conventional accounts of *McCulloch* and the Bank Wars, which implicitly reason via modes of law-politics fusion, demonstrate the point.[297] Scholars sometimes suggest that there was no original corporate power – either because the Framers failed to make the corporate power publicly explicit (original public meaning), or because it was debated after ratification (equating political arguments with legal ones). Yet the arguments they rely on to explain what courts, Congress, and the executive branch have been doing for the last two hundred years do not provide us with either a more democratic understanding of the law or of its history.

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[296] *See* the Introduction *supra*, and for discussion of originalism and realism; Ablavsky, *supra* note 50; on fusion as aspirational legal history, *see* FISHKIN AND FORBATH, *supra* note 51; for realism *see, e.g.*, Doerfler, Moyn, Levinson, *supra* note 50; Fallon, GIENAPP, *supra* note 52.

[297] *See, e.g.*, WINKLER; RAKOVE, *supra* note 3; BREST LEVINSON, 2018, *supra* note 1.

Accounts which view the Bank – and thus the corporate power – as either fully ambiguous or unconstitutional prior to *McCulloch* simultaneously reify the Marshall Court's hallowed doctrinal status while implicitly politicizing it: if everything before *McCulloch* is politics, then *McCulloch* is *de facto* treated as a case which could only be the product of a political agenda – even as scholars continue to hold up Marshall's opinion as a masterwork of independent legal reasoning. This allows scholars to cast Anti-Federalist and Federalist debate (via private letters, legislative sources, or the press) as a proxy for actually popular understandings of constitutional law. But, far from solving the problem of how law and politics, let alone democracy, relate, this framing leaves us with a theory of courts and law which – far from being democratically accountable – ultimately depends on a dubiously grounded doctrinal fiat. In the case of the corporate power, it has left us with confusion, not clarity or accountability.

Conflating political, legal, and public understanding in this way also ultimately engages in a risky game of "both-sides-ism": assuming that if a subject is debated, both sides must have equal credibility, and that the law was more "up for grabs" than it might well have been. In other words, it risks denying that one set of ideas can have been more "on the wall" than others, or judging how "on the wall" ideas were by reference to the fact that (i) one of two parties subscribed to those ideas and (ii) they were litigated.[298] Law-politics fusionism may thus encourage legal reasoning that struggles to draw hold up in the face of unpredictable majority/minority dynamics.[299]

Just as the corporate power does not condone anti-democratic lawmaking simply by recognizing the historical existence of a tension between law and politics, recognizing the corporate power – including the history of its drafting at the constitutional convention – does not mean blessing legal secrecy in general. Nor is recognizing the corporate power prohibited by existing legal commitments to transparency: there is no constitutional – or legal – rule that the corporate power must be "clear" in this way for it to be constitutional.[300] When scholars problematize lawyerly opacity, they

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[298] For the formulation of "on the wall" *see* Jack M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 FORDHAM L. REV. 1703, 1733 (1997).

[299] For recent consequences of fusionism in the constitutional context, *see* Farah Peterson, *Our Constitutionalism of Force,* 122 COLUMB. L. REV. 1539 (2022).

[300] On the difference between statutory canons which do have rules against hidden meaning and constitutional law, *see supra* note 55.

often do so without going so far as to call it illegitimate.[301] But more importantly, identifying the corporate power hardly undermines the ideal of transparency. Rather, it advances it.

ii. Unenumerated Constitutionalism in Court

As the current Court considers whether to undo a series of constitutional decisions that uphold unenumerated rights, the fact of an original and specific unenumerated power calls into question whether a taxonomic textualist posture reflects judicial restraint or interpretive integrity. To be clear, this Article is not claiming that because the corporate power exists, all unenumerated right or powers are now doctrinally unimpeachable. Just like rights and powers that rely on individual constitutional clauses, unenumerated rights and powers each have distinct legal foundations.

This Article does, however, have implications that extend beyond the corporate power itself: namely, that it is incorrect for courts or scholars to apply a presumption that unenumerated constitutional law is inherently suspect. Scholars have focused a great deal of attention on the originalist features of the Court's recent *Dobbs* decision.[302] Yet the holding of *Dobbs* largely turned on the Court's baseline presumption against unenumerated rights.[303] Justice Alito concluded that constitutional rights cannot exist if, as *Roe* did, they rely on several constitutional provisions at once to explain the

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Note that the Constitution itself grants Congress discretionary power to keep its own proceedings a secret. While the "Journal Clause" requires Congress to keep records of its proceedings that it will publish, it also expressly allows Congress to withhold "such Parts as may in their Judgement require Secrecy." U.S. CONST. art. I, § 5.

[301] As scholars have observed, transparency itself is often ill-defined, and is not an inherent good (or evil). *See*, David E. Pozen, *Seeing Transparency More Clearly*, 80 PUB. ADMIN. REV. 326 (2020). *See also*, Mark Fenster, *The Opacity of Transparency*, 91. IOWA L. REV. 885 (2006).

[302] *See e.g.*, Reva Siegel, *The History of History and Tradition: The Roots of* Dobb's Method (and Originalism) *in Defense of Segregation* 133 YALE L.J.F. (forthcoming, 2024); David H. Gans, *This Court Has Revealed Conservative Originalism to Be A Hollow Shell*, THE ATLANTIC, July 20, 2022. Note that within this discussion, there has been a great deal of nuance about what "originalism" means.

[303] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2247 (2022) ("[*Roe*] held that the abortion right, which is not mentioned in the Constitution, is part of a right to privacy, which is also not mentioned.")

presence of a new constitutional concept.[304] The *Dobbs* Court relied on originalism, and, in particular, the "history and tradition" test it deployed, as carveouts from this baseline presumption against un-enumerationism.[305]

The corporate power, however, makes both the presumption against unenumeration and the carveouts the Court has attached to it difficult to sustain without doing harm to constitutional coherence.

First, the presumption against unenumeration is, implicitly, backstopped by suspicions that the Warren Court was engaged in judicial activism.[306] But the existence of the corporate power suggests, at the level of general constitutional interpretation, that when the Warren (or Burger) Courts engaged in their "inter-provision" interpretation, they were following in the footsteps of the Marshall Court – and the Framers – as well.[307]

Scholars have tended not to develop whether or how the Marshall Court's "structural" interpretation relates to the Warren Court's "interprovision" approach.[308] This is largely because "structural interpretation" is often equated with implications alone – with "ends" – rather than with stand-alone rights or powers.[309] Yet the corporate power shows that, at the very least, both courts' shared attention to interpreting constitutional "silence" was united in an important way. Both articulated the limits of what are best recognized as fully discrete and unenumerated legal concepts. As distinct from an "end" or a "construction" of the law, "the corporate power" and "the right to privacy" *could* be enumerated – and neither is.

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[304] *Id.* (Alito, J.) (stating that *Roe* is bad law because it finds abortion rights to "spring from no fewer than five different constitutional provisions.") *But see*, Suk Gersen; Tully, *supra* note 295.

[305] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2247, 2278-80 (2022).

[306] The anti-legitimacy arguments grew largely from arguments first made by John Hart Ely. See Ely, *supra* note 11. For discussion, *see* Tully, *supra* note 295; on the campaign to delegitimate *Roe*, *see further* Melissa Murray and Katherine Shaw, *Dobbs and Democracy* 137 HARV. L. REV. 728 (2024).

[307] In addition, *Roe* was decided by the Burger, not Warren Court.

[308] *See* BOBBITT, *supra* note 19, 155–56; Amar, *supra* note 293, 790–91. *But see*, Charles L. Black, Jr. *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3 (1970) (connecting the Warren and Marshall Courts as sister courts, though not fully building out how they addressed silence as ahistorical or exportable constitutional law; according to Black, the one defined "citizenship"; the other "nationhood").

[309] *See* Amar and BOBBITT, *Id.*

Second, and on a more granular level, the corporate power also poses difficulties for both the anti-unenumeration presumption and the related carveout. *Dobbs* indicated something approaching a sliding scale test for un-enumeration: (i) the more like a taxonomical right an unenumerated rights appears (the more "nameable" the un-named right), and (ii) the more independent it is from enumerated rights, the less credible it is.[310] Once a right passes this threshold, the anti-enumeration presumption applies. Then, "history and tradition" provides a carveout which protects some unenumerated rights, but not others.[311]

The corporate power triggers this presumption, but does not fit within this carveout. It is not an object of "history and tradition."[312] Some originalists might dispute its existence, as discussed above.[313] If deployed, in other words, the criteria *Dobbs*' wielded against privacy rights would fell a creation of the Marshall Court, too. This result suggests that the Court's current presumption against un-enumeration is overbroad. Both presumption and carveout are even less workable if we extend the two courts' shared legacy to the Framer's "silent" drafting of the corporate power described in Part II.

On a fundamental level, the taxonomic approach to textualism which undergirds the anti-unenumeration presumption might be enough to cast suspicion against one unenumerated right – namely, *Roe*'s privacy right. But it is harder to argue that this approach is correct when it has to account for multiple unenumerated and discrete constitutional concepts, produced by different courts at different moments.

The interpretive unity of both the Marshall and Warren courts on the question of un-enumeration transcends disagreements about about Federalist politics and the particular legal climate of the 1960s. Both courts articulated fully unenumerated rights or powers which exist independent of single enumerated clauses in the Constitution. Rather than offering a way to prevent endorsing "bad" or "judge-made" law, the presumption against un-enumeration itself produces perverse results. As a result, we should reconsider relying on it at all.

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[310] *Dobbs*, *supra* note 316, 2247, 2278-80 (2022).

[311] *Id.*

[312] The legal arguments this Article makes are bolstered by reliance interests, just as reliance bolsters any legal argument. But the corporate power is not constitutional merely because it has been used in the past. Further, there can hardly be a "tradition" surrounding federal incorporation, not least because of the twentieth century confusion surrounding the power, and its lack of cultural resonance. On "history and tradition" *see* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2247, 2278-80 (2022).

[313] *See* Part IVBi, *supra*.

By extension, general scholarly presumptions against unenumerated rights, addressed below, deserve reconsideration as well.

iii. Beyond Enumerationism

It is beyond the scope of this Article to develop any doctrinal "test" for unenumerated powers or rights – except if to point out that the existence of the corporate power suggests that there might be other "silent" rights and powers, with singular bases of their own. Nevertheless, as scholars consider what lies beyond an "enumerationist" reading of the Constitution, the corporate power may offer insight into possible next steps.

Most immediately, it suggests that a search for unenumerated rights or powers that have lain dormant for several decades might be more productive than scholars often assume. Beginning in the 1990s, if not earlier, scholars have mostly taken for granted that such possibilities are a dead end.[314] Notably, the idea that rights might be "found" in the Constitution – building on a classic style of legal scholarship with roots in Brandeis' and Warren's common law "Right to Privacy" – has, in recent decades, become increasingly limited.[315] Scholars tend to make historical arguments which claim that "lost alternatives" in the past might have contemporary salience, instead of arguing that rights we have overlooked exist in the Constitution in the present.[316] When making non-historical arguments, it is commonplace to argue for judicial "principles" instead of rights or powers – even when, in essence, one is advocating for substantive rights.[317]

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[314] Following on a wave of articles articulating criminal procedure rights in the 1980s, a recent search for "Harvard" and law review articles starting with "Is there a right?" showed the latest result as Lori B. Andrews, *Is There a Right to Clone? Constitutional Challenges to Bans on Human Cloning*, 31 HARV. J. LAW & TECH. 647 (1998).

[315] Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

[316] *See*, *e.g.*, Risa Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L.J. 1609 (2000); Amy Dru Stanley, Instead of *Waiting for the Thirteenth Amendment: The War Power, Slave Marriage, and Inviolate Human* Rights, 115 AM. HIST. REV. 732 (2010); Rebecca J. Scott, *Public Rights, Social Rights, and the Conceptual Roots of the Plessy Challenge*, 106 MICH. L. REV. 777 (2008).

[317] *Compare* Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973); and Michelman, *The Supreme Court and Litigation Access*

Legal scholars can hardly be faulted for making arguments based at least in part on what they think may succeed in court. But the result has not just been success in the courtroom, or incisive legal analysis. It has also been a narrowing down of constitutional method.[318] Today, we operate in an interpretive universe that is increasingly defined by four coordinates: originalism, taxonomic textualism, precedent, and process.[319] These approaches may or may not indicate the limits of a good brief. But they should not be taken to self-evidently indicate the limits of constitutional interpretation. The law we continue to rely on, including longstanding rights no one has suggested we should find unconstitutional, such as desegregation, were themselves defended through and built on modes of argument which sit firmly outside of such circumscribed methodological norms.[320]

There is something of renaissance afoot that aims to reengage with a variety of features of constitutional law.[321] The corporate power

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Fees: The Right to Protect One's Rights, 1973 DUKE L.J. 1153 (1973), *with* Martha T. McCluskey, *Constitutional Economic Justice: Structural Power for "We the People,"* Yale Law & Policy Review Essay (2015) https://yalelawandpolicy.org/sites/default/files/YLPR/mccluskey.final_.2_0.pdf (casting what is essentially an argument for economic rights as a jurisprudential "principle"); Richard Re, *Equal Right to the Poor*, 84 U. CHI. L. REV. 1149 (2017) (similarly defining an "equal right principle" for judges), Liza Batkin, Note, *Wealth-Based Equal Process and Cash Bail*, N.Y.U. L. REV. (2021) (proposing a "general principle" to shore up what Batkin terms "wealth-based equal process doctrine" doctrine).

[318] For a rare example of such methodological innovation after the late 1980s, *see* Amar, *supra* note 293. *See also*, Siegel, *supra* note 302 (historicizing originalism to counteract current legal understandings which erase, methodologically, the idea that any other form of legal method has ever had authority). On current difficulties with constitutional theory, *see* Caitlin B. Tully, *Does Constitutional Law Have a Future?*, 2022 MICH. ST. L. REV. 427 (2022).

[319] One might add "purposivism" to this list, though it applies more in the statutory context. *See, e.g.*, Note, *The Rise of Purposivism and the Fall of* Chevron*: Major Statutory Cases in the Supreme Court* 130 HARV. L. REV 1227 (2017). The *Dobbs*' dissent's reliance on precedent – as well as that in the political branches suggests some of the costs of this methodological trajectory.

[320] *See, e.g.*, Charles Black Jr., *The Lawfulness of the Segregation Decisions* 69 YALE L. J. 421 (1960); Laurence H. Tribe, *Forward: Toward A Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973).

[321] *See, e.g.*, Presidential Commission on the Supreme Court of the United States, *Final Report* (2021); Daniel Hemel, *Can Structural Change Fix the Supreme Court?*, 35 J. ECON. PERSP. 119 (2021); David E. Pozen

suggests that we should not limit such investigations to questions of process or the respective interpretive power of branches of government. Revisiting the method and substance of constitutional interpretation might bear fruit, too. We should not write off the possibility that there might be unnamed, but discrete, individual, and substantive rights or powers in the Constitution that we have overlooked. Meanwhile, we should stop casting aspersions on unenumerated rights we already know exist. The work of explaining fully how these rights and powers fit together exactly has yet to be done; the existence of the corporate power marks one place to start.

CONCLUSION

As this Article has shown, it was clear during the Framing of the Constitution that the corporate power was a discrete legal power, independent from both the legislative power and other individual constitutional clauses. It was also clear, as a legal matter, that a stand-alone power to charter existed in the Constitution. And, as this Article has demonstrated, the Marshall Court concurred. Rereading three key Marshall Court cases – *Dartmouth*, *McCulloch*, and *Osborn* – this Article has shown that, rather than relying on the Necessary and Proper Clause, the Court established an independent threshold for when federal corporations were proper: "constitutional" purpose. The Court also laid out further default rules of construction in these cases, which clearly indicate that the corporate power was understood as distinct from general legislative, administrative, or private law rules. Finally, this Article has shown that the corporate power exists today – regardless of one's interpretive commitments regarding history – as a matter of constitutional text, contemporary reliance, and doctrinal coherence.

Leaving federal incorporation unexamined has meant that American liquidity has often come at a cost to constitutional legitimacy. The corporate power is central to American federal finance – and as a result, the lives of most Americans. And yet, its legal

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& Thomas P. Schmidt, *The Puzzles and Possibilities of Article V*, 121 COLUMB. L. REV 2317 (2021); Pamela S. Karlan, *The New Countermajoritarian Difficulty*, 109 CALIF. L. REV. (2021) 2323. Increased public attention has also been paid to departmentalism. *See e.g.*, Ezra Klein, *Liberals Need a Clearer Vision of the Constitution. Here's What It Could Look Like*, N.Y. TIMES, July 5th, 2022 (interview with Larry Kramer about popular constitutionalism). https://www.nytimes.com/2022/07/05/opinion/ezra-klein-podcast-larry-kramer.html

parameters have remained unclear. This oversight reflects, among other things, that the nexus between constitutional law and the American economy remains under-examined. It also reflects the current power of certain styles of constitutional interpretation, most immediately, the Courts' turn toward treating constitutional text as "taxonomy": an interpretive mode in which only rights or powers which are expressly labeled in the Constitution count.

This oversight has consequences for the constitutionality of legislative and administrative action today. As the current Court considers revisiting twentieth-century jurisprudence governing both, a clear understanding of the corporate power offers constitutional grounding independent from these increasingly embattled doctrinal foundations. And, as scholars and policymakers look for new ways to meet twenty-first-century challenges, federal corporations, properly understood, might enable us to address some of these concerns.

Finally, the fact of the corporate power illuminates fault lines in existing approaches to constitutional interpretation. Some implications are immediate: As the current Court considers overturning precedent which protects unenumerated rights, especially privacy rights, the corporate power's existence counsels against doing so. The Court's taxonomic turn is the product of a long line of constitutional thought that equates unenumerated rights and powers with irresponsible constitutional interpretation. The corporate power's existence runs counter to this presumption.

APPENDIX A[322]

Federal Corporations in the United States of America 1788-2008

Name	Date Created	Date Abolished	Authority
African Development Corporation	1980	Permanent	22 U.S.C. § 290h
Amtrak (National Railroad Passenger Corporation)	1971	Permanent	49 U.S.C. § 24101
Atlantic and Pacific Railroad	1866	1880[323]	14 Stat. 292. c. 278
Bank of the United States (first)	1791[324]	1811	1 Stat. 192, Chap. 3

[322] With limited exceptions, this list generally excludes: town or municipal incorporation (including civil, religious, and small financial or utility entities in Washington D.C. and surrounding areas); the banking sector; tribal corporations under the Federal Indian Reorganization Act (*see supra*, note 46); and honorific federal charters (such as that held by the Boy Scouts or the Gold Star Wives). For discussion of federal charters in the banking industry, *see* Menand & Ricks, *supra* note 89. For a comprehensive list that is inclusive of these additional entities until 1944, *see Establishing and Effectuating a Policy with Respect to the Creation or Chartering of Certain Corporations by Act of Congress*, S. REP. NO. 80-30, at 4–13 (1947).

This list only includes federal corporations which have been noted in at least one additional and authoritative secondary source. For that reason, it does not include "corporations-by-transaction" as defined in Part I, despite the fact that they meet federal corporate thresholds and are *de facto* federal corporations. Sources include: *Establishing and Effectuating a Policy with Respect to the Creation or Chartering of Certain Corporations by Act of Congress*, S. REP. NO. 80-30, at 4–13 (1947); the 1995 GAO Report on federal corporations, *supra* note 77, MCDIARMID, *supra* note 5, Harry S. Truman, "Message to the Congress Transmitting Corporation Supplement to the Budget for 1947) available at www.trumanlibrary.gov/library/public-papers/94/message-congress-transmitting-corporation-supplemen-budget-1947. *See also*, House Document 541, 79th Cong. 2nd sess.

[323] Jointly controlled by Saint Louis and San Francisco Railway, and Atchison, Topeka, and Santa Fe Railroad.

[324] According to Alexander Hamilton, several federal corporations were chartered prior to the chartering of the Bank: "namely, in the erection of two governments northwest of the River Ohio, and the other

Bank of the United States (second)	1816	1836	3 Stat. 266, 77
Carnegie Foundation for the Advancement of Teaching	1906	Permanent	H.R. 13538, Pub L. 42 (59th Cong. Sess. 1 Chap. 636)
Central Bank for Cooperatives	1933	1989[325]	48 Stat. 261 §30
Central Pacific Railroad Co.	1862	Permanent[326]	Pub. L. 37-120, 12 Stat. 489
Choctaw, Oklahoma and Gulf Railroad Company	1894[327]	1904[328]	Act of Jan. 22, 1894, c. 14, 28 Stat. 27

southwest the last independent of any antecedent compact." Hamilton, *supra* note 185. *See e.g.*, Act of Aug. 7, 1789, ch. 9, 1 Stat. 50 (the First Congress making rules and regulations for the Northwest Territories).

[325] Became "Cobank," which still exists.

[326] Leased to Southern Pacific Railroad in 1885 after a series of mergers; by 1888 is "non-operating" subsidiary. 1959 formally merges with Southern Pacific Railroad. (Note that although the Southern Pacific Railroad is sometimes included in discussions of federal incorporation, it had a California charter and was not formally chartered by the federal government, although it was aided by a federal land grant, similar to that granted to the Atlantic and Pacific Railroad (which *was* incorporated by Congress). (See for similar land-grant railroads: the "Katy" railroad (Missouri-Kansas-Texas) and the Frisco (St. Louis-San Francisco). For terms of the Southern Pacific Grant *see*, Act of July 27, 1866 (14 Stat. 299 §18). *See also*, United States v. Southern Pacific R. Co., 146 U.S. 570 (1892). For discussion, see Annual Reports of the War Department, Beginning of the First Session of the Forty-Eight Congress, Vol. 1 (of 4), 312. (1883) (Monday, March 20, 2023) https://books.google.nl/books?id=Str1DuRcnVwC&pg=PA311&lpg=PA311&dq=Act+of+2+May+1872,+17+Stat.+59+(1872)+(Texas+Pacific+and+Southern+Pacific+railroads+consolidated).&source=bl&ots=x0pAp1DDGD&sig=ACfU3U2BbkqRmIf6jo31xZyF8XojfYq44w&hl=en&sa=X&ved=2ahUKEwjVp4S76ur9AhWBh_0HHeezBKAQ6AF6BAghEAM#v=onepage&q=Act%20of%202%20May%201872%2C%2017%20Stat.%2059%20(1872)%20(Texas%20Pacific%20and%20Southern%20Pacific%20railroads%20consolidated).&f=false.

[327] The Company was created to take over the pre-existing and distressed Choctaw Coal and Railway Company. The latter entity had a Minnesota charter and, in 1888, had been granted access to Choctaw territory (and coal mining rights) by federal statute. *See*, Act of February 18, 1888, ch. 13, 25 Stat. 35. *See also*, Choctaw, O. & G. R. Co. v. Mackey, 256 U.S. 531 (1921).

[328] Leased to Chicago, Rock Island and Pacific Railway Company (state charter, Illinois) for a term of 100 years. See, Preston George and

Commodity Credit Corporation	1935[329]	Permanent	EO No. 6340, Oct. 16, 1933; amended and extended: 50 Stat. 5 § 2; 53 Stat. 510, ch. 5
Communications Satellite Corporation ("COMSAT")	1963	2000[330]	Pub. L. 87-624, 76 Stat. 423
Community Financial Institutions Fund	1994	Permanent	Pub. L. 103-325, H.R. 3474
Corporation for National and Community Service	1993	Permanent	Pub. L. 91-378, 89 Stat. 727
Conrail	1976	1987[331]	45 U.S.C. § 741
Corporation for Public Broadcasting	1967	Permanent	47 U.S.C. § 396
Corporation of Foreign Security Holders	1933	N/A[332]	48 Stat. 92-95
Defense Homes Corporation	1940	1942	Act of Oct. 14, 1940, Ch. 862, 54 Stat. 1125
Disaster Loan Corporation	1937	1945	50 Stat. 19, ch. 10
Electric Home and Farm Authority	1936	1942	49 Stat. 1186, ch. 163
Export-Import[333] Bank	1934	Permanent	12 U.S.C. § 635
Farm Credit System Insurance Corporation	1987	Permanent	Pub. L. 100-233, 101 Stat. 1568

Sylvan Wood, *The Railroads of Oklahoma*, No. 60, The Railway and Locomotive Historical Society Bulletin, (1943), pp. 40-42.

[329] Chartered by federal government, but with state charter.

[330] Merged with Lockheed Martin Corp.

[331] IPO.

[332] Dissolution not found.

[333] A second Export-Import Bank was briefly chartered under the laws of the District of Columbia, between 1935 and 1936, when it was dissolved by executive order (EO No. 365 of May 7, 1936).

Farmers' Home Corporation	1937	1946	50 Stat. 527-528
Federal Agricultural Mortgage Corporation ("Farmer Mac")	1988	Permanent	Pub. L. 100-233, 101 Stat. 1568
Federal Crop Insurance Corporation	1938	Permanent	7 U.S.C. Ch. 36, § 1503
Federal Deposit Insurance Corporation	1933	Permanent	Pub. L. 73-65, 48 Stat. 162
Federal Farm Credit Banks	1916	Permanent	Pub. L. 64-158, 39 Stat. 360
Federal Farm Credit System Insurance Corporation	1987	Permanent	Pub. L. No. 100-233, 101 Stat. 1568
Federal Farm Loan Board	1917	Permanent	Pub. L. 64-158, 39 Stat. 360
Federal Farm Mortgage Corporation	1934	1961	48 Stat. 344-349
Federal Financing Bank	1973	Permanent	12 U.S.C. § 2281
Federal Home Loan Mortgage Corporation ("Freddie Mac")	1970	2008[334]	Pub. L. 91-351, 84 Stat. 457
Federal Housing Administration	1934	Permanent	Pub. L. 73-479, 48 Stat. 1246
Federal National Mortgage Association ("Fannie Mae")	1938	Permanent[335]	Pub. L. 73-479, 48 Stat. 1246
Federal Prison Industries, Inc.	1934	Permanent[336]	EO 6917

[334] Under conservatorship.
[335] Publicly traded since 1968
[336] Became "UNICOR" in 1977

Federal Savings and Loan Insurance Corporation	1934	1989	Pub. L. 73-479, 48 Stat. 1246
Federal Surplus Commodities Corporation	1933[337]	1942[338]	Delaware Charter
Food Administration	1917[339]	1920	EO 2679-A
Freedman's Savings & Trust Co.	1865	1874	13 Stat. 510-13
General Education Board[340]	1903	1960	Act of January 12, 1903
Government National Mortgage Association ("Ginnie Mae")	1968	Permanent	Pub. L. 90-448, 82 Stat. 476
Grain Corporation	1917[341]	1927	EO 2681; 3087
Group Hospitalization, Inc.	1939	Permanent	53 Stat. 1412-1414
Home Owners' Loan Association	1933	1951	Pub. L. 73-43, 48 Stat. 128
Inland Waterways Corporation	1924	1963	43 Stat. 360, 49 U.S.C.A §§ 151-156
Institute of Inter-American Affairs	1940	1946	EO 8840
Lake Erie & Ohio River Ship Canal Co.	1906	N/A[342]	34 Stat. 8099-814
Legal Services Corporation	1974	Permanent	Pub. L. 93-355, 88 Stat. 378
Loomis Aerial Telegraph Co.	1873	N/A[343]	17 Stat. 412, ch. 45

[337] Chartered by federal government, but with state charter.

[338] Consolidated into the Agricultural Marketing Administration by Executive Order 9069 (7 Fed. Reg. 1409, Feb. 23, 1942), without affecting corporate powers.

[339] Chartered by federal government, but with state charter.

[340] Backed by John D. Rockefeller. See also the Carnegie Foundation for the Advancement of Teaching.

[341] Chartered by federal government, but with state charter.

[342] Dissolution not found.

[343] Exact dissolution date unknown but dissolution confirmed.

National Bank	1863	1913[344]	Ch. 58, 12 Stat. 665
National Bolivian Navigation Co.	1870	N/A[345]	16 Stat. 192-193
National Corporation for Housing Partnerships	`1968	Permanent	42 U.S.C. § 3937
National Credit Union Administration Central Liquidity Facility	1979	Permanent	12 U.S.C. § 1795
National Park Foundation	1967	Permanent	Pub. L. 90-209, 81 Stat. 814
Neighborhood Reinvestment Corporation	1978	Permanent	Pub. L. 95-557, 92 Stat. 2115
Northern Pacific Railway Co.	1864	1970[346]	Act of 2 July, 1864, 13 Stat. 365 (1864)
Overseas Private Investment Corporation	1969	2019[347]	Pub. L. 91-175, 83 Stat. 805
Pacific Development Company	1940	1943	Delaware Charter
Panama Railroad Company	1846; 1904[348]	1979	N/A
Pennsylvania Avenue Development Corporation	1972	1996	40 U.S.C. § 871

[344] The creation of the federal reserve transformed federal banking.

[345] Exact dissolution date unknown. (Still existing in 1880, *see*, U.S. Freehold Land & Emigration Co. v. Gallegos, 89 F. 769 (8th Cir.).

[346] Having survived multiple reorganizations, the Northern Pacific merged with and became the Burlington Northern Railroad (a private entity) in 1970.

[347] Now International Development Finance Corporation.

[348] Initially held by treaty with Columbia; subsequently purchased from France by President Theodor Roosevelt (at which point stock was entirely held by the Secretary of War).

Pension Benefit Guarantee Corporation	1974	Permanent	Pub. L. 93-406, 88 Stat. 829
Railway Express Agency	1918	1975	Pub. L. 66-152, 41 Stat. 456[349]
Reconstruction Finance Agency	1932	1957	15 U.S.C. Ch. 14
Resolution Trust Corporation	1989	1995	Pub. L. 101-73, 103 Stat. 183
Resolution Funding Corporation	1989	Permanent	Pub. L. 101-73, 103 Stat. 183
Rubber Development Corporation	1942[350]	1947	Delaware Charter[351]
Rubber Reserve Company	1940	1945	N/A[352]
Rural Telephone Bank	1971	Permanent	7 U.S.C. Ch. 31, Ch. 4
Securities Investor Protection Corporation	1970	Permanent	15 U.S.C. § 78aaa
Small Business Association	1953	Permanent	Pub. L. 83-163, Ch. 282, 67
Smaller War Plants Corporation	1942		56 Stat. § 353, sec. 4
State Justice Institute	1984	Permanent	42 U.S.C. § 10701
Student Loan Marketing Association (subsequently "Sallie Mae")	1972	2004[353]	20 U.S.C. § 1087-2
St. Lawrence Seaway Development Corporation	1954	Permanent	Pub. L. 358-83, 68 Stat. 92

[349] Created by forced merger of four existing private companies under ICC authority in 1918; 1920 statute returned parts of the entity to prior private control and spun off and retained Railway Express.

[350] Operated in Brazil.

[351] Held by RFC.

[352] Organized under the RFC.

[353] Privatized.

Subsistence Homestead Corporation	1933	1936	48 Stat. 195, 15 U.S.C.A. § 701
Sugar Equalization Board	1918[354]	1926	Delaware Charter
Synthetic Fuels Corporation	1980	1986	Pub. L. 96-294, 94 Stat. 611
Texas Pacific Railroad	1871	1928[355]	Act of 3 March, 1871, 16 Stat. 573
Tennessee Valley Authority	1933	Permanent	16 U.S.C. 12A
The Emergency Fleet Corporation	1917	1936	39 Stat. 729
The Financing Corporation (FICO)	1987	2019	Pub. L. 100-86, 101 Stat. 552
The Maritime Canal Co. of Nicaragua	1889	1899	25 Stat. 673-675
The National Life Assurance & Trust Association	1870	N/A[356]	16 Stat. 165, ch. 152
Utah & Northern Ry. Co. (Territories of Utah, Idaho, and Montana)	1878	1889	20 Stat. 242, ch. 362
Union Pacific Railroad[357]	1862	Still active[358]	Pub. L. 37-120, 12 Stat. 489
United States Freehold Land & Emigration Co.	1870		16 Stat. 192-93

[354] Chartered by federal government, but with state charter.

[355] Majority acquired by Missouri Pacific Railroad (not a federal corporation); in turn acquired by the Union Pacific Railroad in 1980; merger completed in in 1992.

[356] Dissolution not found.

[357] The related "Sinking Fund," chartered in 1878, was also an early federal corporation. The Sink Fund was a stand-alone legal entity into which returns (a 5% fee) on federal backing of the railroad was to be placed. The success and the finances of this fund remained in controversy for most of its existence, until the railroad itself was sold off in bankruptcy in in 1893, and the sink fund was retired. Act of May 7, 1878, 20 Stat. 56. *See also* John P. Davis, *The Union Pacific Railway*, The Annals of the American Academy of Political and Social Science, Vol. 8, (Sep. 1896), pp 47-91.

[358] *But see*, reorganization in 1893.

		N/A[359]	
United States Housing Authority	1937	1947[360]	50 Sat. 798-800
United States Housing Corporation	1917[361]	1920	EO 2889, New York charter
United States Enrichment Corporation	1992	1998[362]	Pub. L. 102-486, 106 Stat. 2776
United States Spruce Corporation	1917[363]	1919	Washington State Charter
United States Railway Corporation	1974	1986	45 U.S.C. § 741
Valles Caldera Trust	2000	Permanent	Pub. L. 106-248, 35 Stat. 260
Virgin Islands Company	1934	1965	48 U.S.C. § 1407
War Assets Administration	1946	1949	EO 9689
War Finance Corporation	1918	1939	Pub. L. No. 65-120, 40 Stat. 506
The Washington and Alexandria Turnpike Co.	1808	N/A[364]	2 Stat. 486 § 2
Washington & Boston Steamship Co.	1870	N/A[365]	16 Stat. 97, ch. 75
Washington Bridge Col.	1808	1868	2 Stat. 457, § 2
Washington Canal Co.	1802 (extended 1809)	1807	2 Stat. 177 § 9; 2 Stat. 518, §3.

[359] Dissolution not found (still existing in 1880, *see*, U.S. Freehold Land & Emigration Co. v. Gallegos, 89 F. 769 (8th Cir.).
[360] Consolidated with the Housing and Home Finance Agency.
[361] Chartered by federal government, but with state charter.
[362] IPO, now "Centrus."
[363] Chartered by federal government, but with state charter.
[364] Dissolution not found.
[365] Dissolution not found.